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Room for Law: Realism, Evolutionary Biology, and the Promise(s) of International Law

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Room for Law: Realism, Evolutionary Biology, and the Promise(s) of International Law

By
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The advocates of various paradigms in international relations ("IR") theory contend for relative status with all the inordinate determination of the great houses of high-fashion design or the rowing crews of classic rivals in intercollegiate athletics. For decades, the dominant paradigm in that contest has been "realism,"[1] a theoretical perspective on international politics that emphasizes military competition[2] among self-interested states[3] embedded in an "anarchic"

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1. The seminal "neo-Realist" theorizing is unquestionably the work of Kenneth Waltz. *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) [hereinafter WALTZ]; *see also* Kenneth Waltz, *Reflections on* Theory of International Politics: *A Response to My Critics*, *in* NEOREALISM AND ITS CRITICS 322 (Robert O. Keohane ed., 1986) [hereinafter Waltz, *Reflections*]; *cf.* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001) (reformulating and updating neo-Realist theory). Neo-Realism dominates contemporary theorizing among Realists, and this Article uses "Realism" to mean neo-Realism.

"Classical" Realism, which emphasizes human nature and history, reaches essentially the same conclusions as neo-Realism, which emphasizes rational state behavior and microeconomic logic. For some classic works of classical Realism, see E.H. CARR, THE TWENTY YEARS' CRISIS 1919-1939 (1961); GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1951); HANS J. MORGENTHAU, POLITICS AMONG NATIONS (1948). *See also* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940) (discussing international law); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207-08 (1993) (describing classical Realism and its triumph over law-oriented, Wilsonian idealism).

2. *See* WALTZ, *supra* note 1, at 102 ("Among states, the state of nature is a state of war. This is meant not in the sense that war constantly occurs but in the sense that . . . war may at any time break out.").

3. Realism is associated with state self-interest and the related concept of *realpolitik*, the characteristics of which, exhaustively listed, are these:

> The ruler's, and later the state's, interest provides the spring of action; the necessities of policy arise from the unregulated competition of states; calculation based on these necessities can discover the policies that will best serve a state's interest; success is the ultimate test of policy, and success is defined as preserving and strengthening the state. Ever since Machiavelli, interest and necessity—and *raison d'état*, the phrase that comprehends them—have remained the key concepts of *Realpolitik*.

Id. at 117.

international order.[4] IR Realists assume that states—the crucial unit of analysis[5]—are rational, unitary[6] actors[7] whose interactions in their struggle for power determine the important features of, and outcomes in, the international system.[8]

IR Realists are hostile to the possibility of widespread or longstanding international cooperation in peacetime. Realists believe that nations measure gains in relative terms,[9] and that such a metric makes cooperation fragile because an increase in the welfare of one state can come only at the expense of lessened (relative) welfare for other states.[10] In the military realm—the area of

4. "Anarchy" to the Realist is not pure chaos, but rather the lack of a centralized authority with coercive power over states. *See id.*at 102 ("Among men as among states, anarchy, or the absence of government, is associated with the occurrence of violence."); *id.* at 104 ("Citizens need not prepare to defend themselves. Public agencies do that. A national system is not one of self-help. The international system is.").

5. *See id.* at 95 ("States are the units whose interactions form the structure of international-political systems. They will long remain so."). Realists thus differ from those who would assign a crucial role to domestic interest groups, international institutions, multinational corporations, or anything else.

6. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1836 (2002) ("NeoRealist theory, an outgrowth of classical Realism, treats states as unitary actors and as the relevant unit in international relations.") (citation omitted). To treat a state as "unitary" is to assume that it acts as an individual with a unified decision-making apparatus rather than as, for example, a set of competing interest groups whose pulling and tugging results in state behavior. As Alexander Thompson summarizes:

> Those who treat states as unitary assume either that the state aggregates all domestic preferences—of individuals, interest groups, and various intragovernmental actors—and acts as if it were a single actor or that state decision making is in fact channeled through a single or small group of crucial individuals who make important decisions.

Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUDS. S285, S291 (2002); *see also* Brett Frischman, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 701 (2003) ("Game theoretic (and institutionalist) analyses often focus on States as 'players' and assume that States are unitary rational actors acting to maximize their 'individual' welfare."); *cf.* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 508 (2004) ("By describing state behavior as unitary and emphasizing the political bargaining only at the international level, however, this [institutionalist] approach has underemphasized the diverse domestic sources of government action.").

7. A balance-of-power theory, properly stated, begins with assumptions about states: They are unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination. States, or those who act for them, try in more or less sensible ways to use the means available in order to achieve the ends in view. *See* WALTZ, *supra* note 1, at 118; *see also* Waltz, *Reflections, supra* note 1, at 339 ("The state in fact is not a unitary and purposive actor. I assumed it to be such only for the purpose of constructing a theory.").

8. *See* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 9 (Winter 1994/95) ("Daily life is essentially a struggle for power.").

9. *Id.* at 11 ("[S]tates in the international system aim to maximize their relative power positions over other states"); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 487 (1988) ("[S]tates are *positional*, not atomistic, in character").

10. Waltz notes:

> When faced with the possibility of cooperating for mutual gain, states that feel insecure must ask how the gain will be divided. They are compelled to ask not "Will both of us gain?" but "Who will gain more?" . . . Even the prospect of large absolute gains for both parties does not elicit their cooperation so long as each fears how the other will use its increased capabilities.

WALTZ, *supra* note 1, at 105. *But cf.* Duncan Snidal, *Relative Gains and the Pattern of International Cooperation*, 85 AM. POL. SCI. REV. 701 (1991) (discussing conditions under which cooperation can occur even between self-interested parties measuring gains in relative terms); Duncan Snidal, *Inter-*

international relations given pride of place by Realists[11]—the relative-gains metric exacerbates a "security dilemma"[12] already rife with the potential for spiraling mistrust fed by systematic misperceptions.[13] To the Realist, only the "balance of power" can keep leashed the dogs of war,[14] and even the alliances that result from restoring the balance of power are ephemeral.[15] For a state to rely upon anything but its own power and, occasionally, upon alliances formed to preserve that power, is at best pointless and at worst dangerously naïve.[16] With respect to that means of international cooperation most familiar to lawyers, in fact, the Realists have "left no room whatsoever for international law."[17]

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national Cooperation Among Relative-Gains Maximizers, 35 INT'L STUDS. Q. 387 (1991) (same); John C. Matthew III, *Current Gains and Future Outcomes: When Cumulative Relative Gains Matter*, INT'L SEC., Summer 1996 (same).

11. *See* Mearsheimer, *supra* note 8, at 9 ("International relations is not a constant state of war, but it is a state of relentless security competition, with the possibility of war always in the background.").

12. *See* Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 169 (1978) (defining security dilemma as when "many of the means by which a state tries to increase its security decreases the security of others"); Charles L. Glaser, *The Security Dilemma Revisited*, 50 WORLD POL. 171 (1997).

13. *See* ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (1976); *see also* John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 72, 94-95 n.135 (1997) (describing misperception-spiral theory, discussing related literature, and applying theory to "proportionality" requirement for lawful responses to breach of international agreements).

14. Waltz argues that the balance of power is definitive not only of Realism but also of IR theory as a whole. *See* WALTZ, *supra* note 1, at 117 ("If there is any distinctively political theory of international politics, balance-of-power theory is it."). *But cf.* Jack Levy, *Domestic Politics and War*, *in* THE ORIGIN AND PREVENTION OF MAJOR WARS 79, 88 (Robert Rothberg & Theodore Rabb eds., 1989) (asserting that the so-called "democratic peace hypothesis"—that one democracy will not find itself at war with another democracy—is "as close as anything we have to an empirical law in international relations").

The reader with an eye for the absence of conventions will note the lack of any prefatory article in the title of Waltz's seminal book. Legend has it that, as the quotation from Waltz just above would predict, the author of *Theory of International Politics* maintained that his work was inarguably *the* theory of international politics, while his publisher, perhaps wishing to avoid offending potential future author-customers, wished to style the book as *a* theory of international politics. The resulting compromise, while not exactly Solomonic, nonetheless seems admirably inventive. (An author formulating an alternative paradigm, known as Constructivism and emphasizing the social construction of "reality" in the international realm, paid titular homage to Waltz right down to the absent article. *See* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999)).

15. *See* Mearsheimer, *supra* note 8, at 11 (stating that "alliances are only temporary marriages of convenience, where today's alliance partner might be tomorrow's enemy, and today's enemy might be tomorrow's alliance partner.").

16. Realists describe as "epiphenomenal" the apparent impact of cooperative endeavors upon international politics, by which they mean that the cooperation is nothing more than a manifestation of underlying power relationships. *See* Mearsheimer, *supra* note 8, at 14 (using NATO as an example of an epiphenomenal institution). Mearsheimer not only upbraids theoreticians for confusing epiphenomenona with reality but also concludes his article with a warning to policy-makers:

> There is a downside for policymakers who rely on institution[s] . . . . [T]he false belief that institutions matter . . . has had pernicious effects. Unfortunately, misplaced reliance on institutional solutions is likely to lead to more failures in the future.

Id. at 49. Mearsheimer also undertakes a lively, but more academically oriented, critique of those IR theorists who support a role for institutions in international politics. *See id.* at 15-37.

17. Burley, *supra* note 1, at 217.

I argue in this Article that the international system in fact has ample room for law. I first elaborate upon a crucial, though sometimes implicit, assertion of the Realists that I call the "Selection Axiom": strong selection pressure in world politics forces states either to practice a law-free *realpolitik* or to perish. I then draw upon the selection-oriented theory of evolutionary biology[18] to argue, in the main portion of the Article, that the Realists' Selection Axiom is supported neither by logic nor facts. I conclude by arguing that the invalidity of the Selection Axiom leaves substantial room for international law in world politics.

My argument against the Selection Axiom has five parts. First, the Realists' inference that low state extinction rates in the present are the result of *high* selection pressure on states in the past is fallacious. Low state extinction rates are at least as consistent with an international environment reflecting little or no selection pressure as they are with the Realist view. In fact, high state extinction rates would more conclusively demonstrate the existence of high selection pressure in the international system.

Second, an examination of relevant empirical evidence concerning state survival rates suggests that, contrary to the assertion of the Selection Axiom, selection pressure on states is in fact low. Births of states in the modern era far outnumber deaths—the antithesis of the Malthusian situation that one would expect in an environment of high selection pressure. Indeed, since 1945, state death has virtually ceased while state births have skyrocketed, and thus whatever selection pressures might once have existed would appear to have vanished.

Third, evolutionary biology teaches us that evolution towards higher adaptive fitness reliably occurs only in a population with a *large* number of individuals. The international environment, in contrast, involves an almost vanishingly *small* number of individuals (i.e., states) compared to natural populations. In small natural populations, random "genetic drift" is likely to be a powerful factor; analogously, the tiny population of states is one in which any number of factors besides a ruthless concern for state survival may be important.

18. The discussion of evolutionary biology throughout this Article draws heavily upon Mark Ridley's *Evolution*. *See* MARK RIDLEY, EVOLUTION 69-150 (2nd ed. 1996). Ridley's collegiate-level textbook requires careful attention but relatively few mathematical skills. I also draw extensively upon Douglas Futuyma's survey of the same general sort. *See* DOUGLAS J. FUTUYMA, EVOLUTIONARY BIOLOGY (1998). Those more comfortable with quantitative exegeses may consult works on "population biology" or "population ecology."

Entirely equation-free accounts of evolution are available as well. The extraordinary *opus* of biologist Ernst Mayr allows one to choose a cogent account of evolutionary theory of nearly any length that one might desire. *See* ERNST MAYR, ONE LONG ARGUMENT 35-47 (1991) (dividing Darwin's thought into, and providing intellectual-historical context of, five sub-theories); ERNST MAYR, THIS IS BIOLOGY 175-206 (1998); ERNST MAYR, WHAT EVOLUTION IS 83-156 (2001) (discussing inheritance, natural selection, adaptation, and other aspects of evolutionary theory applicable at the level of individual organisms). One commendably concise summary of evolutionary theory is actually by an IR specialist. *See* Miles Kahler, *Evolution, Choice, and International Change*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 165, 168-70 (David A. Lake & Robert Powell eds., 1999).

For a graphically appealing account of evolutionary theory that discusses the intellectual history of evolutionary theory with a minimum of explicit discussion of its underlying ideas, see CARL ZIMMER, EVOLUTION 73-97 (2001). For a similarly informal account that concentrates on Darwin's own ideas, see JONATHAN MILLER, DARWIN FOR BEGINNERS (1982).

Fourth, the vast majority of state deaths in the modern era occurred during one of two waves of "mass extinctions" in Europe, with a very low rate of state extinction at other times and in other places. Such a pattern—long periods of stasis interrupted by temporally and geographically intense flux—suggests what evolutionary biologists call a "punctuated equilibrium."[19] Natural extinctions that occur within the context of a punctuated equilibrium are typically more a matter of chance than of classical fitness. Similarly, the existence of a punctuated equilibrium in international politics implies that the demise of a particular state stems more from bad luck than from a state's unwillingness or inability to conduct a foreign policy of law-free *realpolitik*.[20]

Fifth, evolutionary biologists have concluded that sexual reproduction is a more adaptive mechanism than asexual reproduction when—but only when—environmental change is rapid and complex. If the relevant analogies between biology and international relations hold true—analogies that are admittedly somewhat difficult to draw with respect to reproduction—then high selective pressure in an international environment where change is rapid and complex should result in a method of state reproduction closer to sexual than to asexual reproduction. While state "reproduction" almost certainly occurs in an international environment of rapid and complex change, the most common method of state "reproduction" in fact appears much more closely akin to *asexual* reproduction. Evidence from the international environment is thus inconsistent with the expectation under the Selection Axiom that selection pressures would have pushed the relevant population (in other words, the set of nation-states) towards the fitter mode of reproduction (in other words, "sexual" reproduction).

From these multiple analyses of Realism as illuminated by evolutionary biology, I conclude that the Realists' Selection Axiom rests on ground so unstable as to risk intellectual liquefaction. The Realist contention that low state extinction rates indicate high selection pressures is fallacious. Many more states have been born than have died. Analogies in the international system to the phenomena of genetic drift and punctuated equilibrium imply that fate—not fitness—is the most prominent determinant of survival in the state system. The *less* fit mode of reproduction actually dominates the international system. In light of all these arguments taken together, the Selection Axiom is untenable.

If the international system places minimal selective pressure upon modern states, then states may conduct their foreign policy free from the Realist shackles of a narrowly conceived national self-interest focused exclusively on power and survival. Of particular importance for those interested in international law, the irrelevance of the Selection Axiom makes room for a foreign policy that treats international law as a useful and significant constraint upon state behavior in international politics. Cooperation offers the promise of signif-

19. Many associate this concept with the late Stephen Jay Gould. For a discussion of the concept, see *infra* Section V.

20. Both genetic drift and punctuated equilibrium imply a greater role for chance than for adaptive fitness. They are independent phenomena, however. Both appear to be present in international relations.

icant rewards, especially if measured in absolute terms, rather than the ultimate punishment of state extinction. States may make choices in foreign policy resulting from domestic politics, including the creation by rule-of-law democracies of "zones of law" in which international legal cooperation is a familiar, well-followed approach to international relations. Cooperation through international law, even if practiced only among relatively small groups of states, can lead to prosperity for its practitioners. The refutation of the Selection Axiom leaves a great deal of freedom for these ideas, all of which imply that states may employ and respect international law without hazard to their health.

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Part I sets out the Selection Axiom. Parts II through VI criticize the Selection Axiom from a variety of viewpoints, all informed by analogies to evolutionary biology. Part VII examines the variety of avenues for conducting and defending international legal cooperation that are available if international relations need not obey the strictures of the Selection Axiom. A concluding section briefly discusses the methodological implications of the Article.

I.
THE "SELECTION AXIOM" IN REALIST INTERNATIONAL RELATIONS THEORY

The "security dilemma" and the "balance of power," both fundamental concepts in Realist theories of international relations, are dynamic theories: they predict the reaction of states, after a time lag of unspecified duration, to actions by one or more other states. The security dilemma exists because, after one state initially acts to increase its perceived security, other states react with fear or suspicion—and then *respond* with concrete measures of their own that rebound to the detriment of the perceived security of the initial actor. The balance of power, similarly, exists because, after one or more states threaten hegemony, other states respond by banding together in temporary alliances to restore the balance of power.

If states act in the international realm as if their policymakers have accepted the Realist world-view, then the security dilemma and the balance of power are at least plausible descriptions of how international relations might unfold. However, theorists of international relations who espouse the Realist cause do not simply *assume* that states behave as if national decision-makers are Realists. Rather, Realists *argue* that states must behave as if they were Realists *or face extinction.* Under the Realist view, the international system will gradually come to reflect the dynamics predicted by Realist theories of international relations as selection pressure forces states without a Realist foreign policy out of the system, and into oblivion.[21]

21. Peter D. Feaver, *To the Editors, in Correspondence, Brother Can You Spare a Paradigm (Or Was Anybody Ever a Realist?)*, 25 INT'L SEC. 165, 166 (2000) (stating that "Realist theories are as much about the *consequences* of behavior as about the *determinants* of behavior.") (emphasis in original).

This selection-oriented argument is crucial to the Realist position. As Waltz himself puts it: "We should keep the notion of 'selection' in a position of central importance."[22] One scholar summarizes this aspect of the theory:

> Waltz argues that states that fail to behave according to neoRealist prescripts will be selected out of the system . . . . The anarchy that defines the neoRealist world means that states must be ever vigilant, because attacks can happen without warning, and because states seek survival at the least and world conquest at the most. In this very dangerous world, failure to follow this dogma is severely punishable, even by death.[23]

Waltz's Realist view that the international system imposes high selection pressure on states in turn greatly favors the adoption of Realist policies by states if they are to survive:

> A self-help system is one in which those who do not help themselves, or who do so less effectively than others, will fail to prosper, will lay themselves open to danger, will suffer. Fear of such unwanted consequences stimulates states to behave in ways that tend toward the creation of balances of power. Notice that the theory requires no assumptions of rationality or of constancy of will on the part of all of the actors. The theory says simply that if some do relatively well, others will emulate them or fall by the wayside.[24]

Indeed, less successful states may not simply "fall by the wayside" but wind up as road kill: "What if a state does not conform to systemic pressures? Waltz's answer points to the causal mechanism that drives his balance-of-power theory. The system will punish the state, and the state may even disappear."[25]

High selection pressures will lead to the convergence of state behavior at the domestic level, as less successful states copy the instruments of national pdwer employed by states successful at conquest (or self-defense):

> The possibility that conflict will be conducted by force leads to competition in the arts and the instruments of force. Competition produces a tendency towards sameness of the competitors. Thus Bismarck's startling victories over Austria in 1866 and over France in 1870 quickly led the major continental powers (and Japan) to imitate the Prussian military staff system, and the failure of Britain and the United States to follow the pattern simply indicated that they were outside the immediate arena of competition.[26]

In the view of Realists, the high stakes and constant competition of world politics force even states with very different domestic systems to behave in essentially similar ways in the international realm:

> The effects of competition are not confined narrowly to the military realm. Socialization to the system should also occur. Does it? . . . One should look for instances of states conforming to common international practices even though for internal reasons they would prefer not to. The behavior of the Soviet Union in its early years is one such instance. The Bolsheviks in the early years of their power

22. Waltz, *Reflections*, *supra* note 1, at 331.

23. Tanisha M. Fazal, *State Exit from the International System*, 58 INT'L ORG. 311, 315 (2004) (citation omitted).

24. WALTZ, *supra* note 1, at 118; *cf.* Waltz, *Reflections*, *supra* note 1, at 331 ("That some states imitate the successful practices of others indicates that the international arena is a competitive one in which the less skillful must expect to pay the price of their ineptitude.").

25. Feaver, *supra* note 21, at 166.

26. WALTZ, *supra* note 1, at 127.

> preached international revolution and flouted the conventions of diplomacy . . . . In a competitive arena, however, one party may need the assistance of others. Refusal to play the political game may risk one's own destruction. The pressures of competition were rapidly felt and reflected in the Soviet Union's diplomacy.[27]

The convergence of state goals, concerns, and means does not, however, lead to self-restraint, centralized authority, or the primacy of law:

> *National* politics is the realm of authority, of administration, and of law. *International* politics is the realm of power, of struggle, and of accommodation. The international realm is preeminently a political one.[28]

I call the selection-oriented Realist argument the "Selection Axiom" and formulate it as follows: strong selection pressures in the international system force states into a stark choice between, on the one hand, the conduct of a rational, self-interested foreign policy in which international legal constraints are irrelevant, and, on the other hand, the extinction of the state.

The survivors among states in a world that matches the assumptions and conclusions of the Realists, then, will be those states that have succeeded in conducting, whether by design, emulation or chance, a wise and well-focused foreign policy. Even if the pool of states initially contains many irrational, inept or inattentive states, the set of states will eventually come to consist only of rational, capable, self-interested states. The rational geopolitical egoists will conquer all others. Only the fittest will survive, although some of the survivors may be fit by virtue of emulating those others who were for a brief moment the very fittest of all.[29]

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The relationship between the Selection Axiom, as propounded by Waltz and adopted implicitly or explicitly by other Realists, and subsequent scholarship in IR theory is complex. Direct criticism of the Selection Axiom, on its own terms, has been rare. Although criticism of Realism as a whole is hardly in short supply, the opponents of Realism have almost entirely ignored the Selection Axiom in favor of concentrating their fire on Realism's emphasis on the rational and unitary state, on relative gains, and on security issues.[30]

Others have noted that the Selection Axiom leaves unspecified a significant number of assumptions crucial to any scholar attempting to operationalize the theory and perform empirical tests.[31] Ann Florini not only undertakes a trench-

27. *Id.* at 127-28.

28. *Id.* at 113 (emphasis added).

29. Note that this version of the Realist argument is *not* grounded in sociobiology or its clone, "evolutionary psychology." The pressure of selection operates on states, not on individual humans; the relevant adaptations occur at the level of states, not individuals. For an abridged and helpfully illustrated edition of the seminal sociobiological work, however, see EDWARD O. WILSON, SOCIOBIOLOGY: THE ABRIDGED EDITION (1980). For an application of sociobiology to Realism by way of the behavior of individuals, see Bradley A. Thayer, *Bringing in Darwin: Evolutionary Theory, Realism, and International Politics*, 25 INT'L SEC. 124 (2000).

30. *See* Setear, *supra* note 13, at 2 nn. 2 & 3, 6 n. 8, 9 n. 9 (gathering criticisms).

31. *See* Kahler, *supra* note 18, at 181 (stating that Waltz "never elaborates a clear intervening indicator of differential 'success' (apart from simple survival), a clear portrait of the competitive environment, or an assessment of how the selection environment varies over time"). Kahler has

ant criticism of the dynamic aspects of Realism but also offers a theory of change in international politics that she bases quite self-consciously upon a comprehensive analogy to evolutionary biology.[32] For reasons that she ably defends, however, Florini eschews any use of the state itself as the unit of selection.[33]

In contrast, several IR theorists have followed the Selection Axiom by not only taking an evolutionary perspective but also by treating the state as the relevant unit of selection.[34] Nonetheless, such scholars focus upon the scale or scope of the state rather than, as the Selection Axiom does, upon its foreign policy. One scholar, in discussing whether Waltz relies upon an assumption of state rationality, devotes a single sentence to criticizing Waltz's use of the Selection Axiom: "This evolutionary principle, however, can hold only for systems with many actors, experiencing such severe pressure on resources that many will disappear over time."[35]

Perhaps the general lack of direct criticism of the Selection Axiom is a result of the Realists' failure to specify precisely the assumptions and implications of their own theory. As one can see from the descriptions above, the seminal work in modern Realist thought does not discuss the Selection Axiom at a very high level of specificity. My formulation of the Selection Axiom must therefore be an inference from, and a paraphrase of, a diffuse and often anecdotal set of statements about a logically crucial portion of Realist theory.

This Article is much more specific than existing efforts in political science have been in examining the underpinnings of the Selection Axiom. Focusing on the principles of biology, I examine such topics in natural selection as superfecundity, sexual reproduction, and mass extinctions. Realists do not directly base their theories on such detailed biological phenomena; indeed, they do not even mention such aspects of evolutionary biology. They do not generally choose between the framework of natural selection and that of market-based selection. They do not sketch out the methods of transmission or recombination from generation to generation; indeed, they do not define what the generation is. To Realists, the story is one of "pressure" and thus of "selection" with little more. In that sense, this Article can only be an indirect criticism of Realist theory. Direct engagement with the aptness of particular biological metaphors would require that the Realists had addressed such issues. The approach of this Article is rather to draw from evolutionary biology a variety of logical and empirical implications that must or can bear upon the conceptualization of the Se-

similar concerns of definitional rigor about the application to international relations of organizational ecology, evolutionary economics, and evolutionary game theory. *See id.* at 174-80.

32. Ann Florini, *The Evolution of International Norms*, 40 INT'L STUD. Q. 363 (1996). Florini argues that the relevant unit of selection is not the state, but the norms adopted by states (and by other international actors).

33. *Id.* at 370.

34. Richard Bean, *War and the Birth of the Nation-State*, 33 J. ECON. HIST. 203 (1973); HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS (1994).

35. Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* NEOREALISM AND ITS CRITICS *supra* note 1, at 173.

lection Axiom in international relations, for evolutionary biology fortunately is not as radically undertheorized as is the Realists' Selection Axiom.

In contrast to all of the discussions of Realist theory described above, therefore, I undertake a sustained analysis of the Selection Axiom *and* continuously indulge its assumption that the state is the crucial focus of selective pressures *and* draw extensively upon principles of evolutionary biology to illuminate its multiple shortcomings. Rather than attacking fundamental Realist assumptions about relative gains or state-centrism or the primacy of security issues, as so many others have done before, I grant Realists *all* of these assumptions and demonstrate that the flaws in the Selection Axiom are *still* sufficiently profound to leave ample room for international law in the international relations of rational, unitary states.

II.
LOGICAL FALLACIES IN THE SELECTION AXIOM

In this Part of the Article, I examine the faulty logic underlying the Realist contention that low rates of state extinction indicate high selection pressures. In Part III, I argue that an empirical examination of state survival rates implies that selection pressure upon states in the international system is low. I then argue, in Parts IV and V, that conditions in the international system are closely analogous to two biological phenomena—genetic drift and punctuated equilibria—that imply low selection pressures and a large role for chance. In Part VI, I argue that the mode of biological reproduction more closely parallel to state "reproduction" is *not* the fitter mode of reproduction given the nature of the international environment. If one takes seriously all these arguments derived from an examination of evolutionary biology, then one can hardly take seriously the Selection Axiom. In Part VII, I then discuss how a foreign policy based upon taking international law seriously can occupy the room left open in international relations after setting the Selection Axiom aside.

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As described in Part I, the Realists maintain that the strong selection pressures inherent in an anarchical international system will lead to geopolitical egoism and emulation, rather than extensive cooperation, among those states hardy enough to survive. Traditionally, the Realists have also faced a fact that one might imagine undercuts this perspective: state extinction is rare. Waltz, for example, readily acknowledges that state death is less frequent than the demise of multi-national corporations:

> The death rate among states is remarkably low. Few states die; many firms do. Who is likely to be around 100 years from now—the United States, the Soviet Union, France, Egypt, Thailand, and Uganda? Or Ford, IBM, Shell, Unilever, and Massey-Ferguson? I would bet on the states, perhaps even on Uganda.[36]

36. WALTZ, *supra* note 1, at 95. One can hardly fault Waltz for thinking that, from the vantage point of the late 1970s, the Soviet Union was less likely to perish than Uganda.

Undeterred by the low death rate among states, the Realists argue that the rarity of state extinction in fact supports their argument. In a world in which selection pressures have existed for hundreds of years, the Realists argue, one should in fact expect to see low current rates of state extinction. Under this view, the unfit nations have *already* been selected out. Extant nations have survived centuries of earlier struggle and, gimlet-eyed and geopolitically savvy, should have continued to survive throughout the more recent past. Analogously, post-Cretaceous reptilian predators like the alligator have survived through the millennia, subject to strong selection pressures all along; one would predict that the modern alligator would be hardy. One cannot gainsay the logic of this argument, taken on its own: in an environment characterized by long periods of strong selection pressure from a constant and ongoing source, the current inhabitants of that environment are likely to be well suited to their environs and thus are unlikely to go extinct.

There are, however, two problems with the Realists' attempt to harmonize low state death rates with high selection pressures. Perhaps the most glaring difficulty is what Realists do *not* note: in an environment characterized by long periods of *no* selection pressure from any source, the current inhabitants of that environment are *also* unlikely to go extinct. With no selection pressure, entities of all stripes will survive. The absence of pervasive state deaths is, therefore, consistent with both the Selection Axiom *and* its precise opposite. The *presence* of pervasive state death would be inconsistent with the Realist argument that states are well suited for their environment as a result of a long period of high selection pressure, but the *absence* of pervasive state death is consistent with *either* the presence of highly fit organisms *or* the absence of selection pressures. The Realist argument that low rates of state deaths affirm the adaptive fitness of modern states is therefore logically indeterminate: low extinction rates are consistent not only with the Realist assertion of high adaptive fitness among contemporary states (owing to high selection pressure in the past), but also with a directly opposed assertion of *low* selection pressures.

However, indeterminacy is not the only logical difficulty with the Selection Axiom. If the Realists wish to argue that low recent extinction rates are consistent with the prior existence of strong selection pressures, they must also argue that *the same* selection pressures that existed in the past still exist in the present. If selection pressures are both strong *and* consistent through time, then those entities present after the passage of significant amounts of time will be highly fit for their environment and so will be unlikely to suffer extinction. However, if selection pressure is strong but from *variegated* sources, then the previously fit inhabitants of the environment will be *poorly* adapted to the new environment and will perish in large numbers.

A well-known example from recent natural history may be illustrative.[37] The peppered moth, *Beston betularia*, is native to northern Europe, including

37. The discussion of this paragraph draws heavily upon the account in RIDLEY, *supra* note 18, at 103-09. Futuyma discusses the example of the peppered moth in much less detail, FUTUYMA, *supra* note 18, at 158-59, but he nonetheless describes it as "[t]he best known and most carefully

northern England. The peppered moth spends a great deal of time in the presence of both birch trees and predatory birds. The bark of the birch tree is white in a state of nature, especially when covered with a commonly present variety of lichen. At the onset of the Industrial Revolution, the peppered-moth population consisted almost entirely of lightly colored moths. Inferentially, the prevalence of this coloration was a result of strong selection pressure against highly visible, dark moths—easy prey for watchful, hungry avians. A small number of darkly colored members of the species survived, however. Soot from the smokestacks of the factories of the Industrial Revolution in northern England blackened the bark of birch trees near Manchester and killed the associated lichen. In much less than a century—the geological blink of an eye—the population of peppered moths near Manchester consisted almost entirely of darkly colored individuals. Those moths born with dark coloration were more difficult for predators to find on sooty trees and therefore much more likely to survive to pass on their genes, including those controlling their coloration. Over only a brief period of time, selection pressures operated to swing the balance of coloration in the moth population from light to dark—even though the *initial* predominance of light moths had presumably been due to the operation over long periods of time of strong selection pressures.

Indeed, the story of the peppered moth has another turn—one that also emphasizes the transience of fitness in at least some circumstances. The genes of light-colored peppered moths have in the recent past been the unintended beneficiaries of successful human efforts to reduce industrial air pollution. The skies of northern England are no longer as sooty as they once were, and light peppered moths are seen with increasing frequency in the population. What once was a losing trait (dark coloration) became a winning trait during the 1800s and well into the 1900s, and then that winning trait in turn lost ground later in the 20th century to a newly viable alternative. Changes in the observed frequency of moth coloration were frequent during *both* the increase and the decrease in the Industrial Revolution's air-borne offal.

The various turns of the peppered moth's story illustrate that even an organism that has evolved over a long period of time to a state of dominant fitness may suffer a rapid reversal of fortune. Realists argue that a low rate of state death is consistent with high selection pressures in the past, but such an argument will hold true only if, in contrast to the environment of the peppered moth, the environment of international relations has been highly stable.

Is the international system so much more constant than the soot output of Manchester's factories? The question is far from merely rhetorical. Unless the international environment is constant, the absence of state extinction is evidence only for a *lack* of selection pressures, rather than for a system in which the unfit have fallen victim to strong selection pressures. In an international environment that is not constant, high selection pressure over time would not result in low

studied case of directional [fitness-related] selection at a single locus in natural populations." *Id.* at 158.

state extinctions because states would not have sufficient time to adapt to their environment. The asserted fitness of extant states, in other words, depends upon the criteria for their fitness having been constant over time.

On one level, the Realist might well answer "yes" to this question of international constancy: the balancing of power and the need for states ceaselessly to struggle for relative security advantages are phenomena with a timeless quality about them, at least to the Realist. As Waltz puts it:

> Thinking only of the modern state system, conventionally dated from 1648, today's states are hardly recognizable when compared with their originals even where their names survive from a distant time. Through all of the changes of boundaries, of social, economic, and political form, of economic and military activity, the substance and style of international politics remains strikingly constant. We can look farther afield, for example, to the China of the warring states era or to the India of Kautilya, and see that where political entities of whatever sort compete freely, substantive and stylistic characteristics are similar . . . Balance-of-power politics in much the form that we know it has been practiced over the millennia by many different types of political units, from ancient China and India, to the Greek and Italian city states, and unto our own day.[38]

Perhaps Waltz is correct, and Machiavelli could take Mubarak's place in formulating foreign policy without difficulty. At any level of analysis below the most abstract, however, the characteristics allowing states successfully to navigate the Thirty Years War would not seem to be the same characteristics allowing states to prosper in the era following the Cold War. Certainly a robust line of kingly successors and a warm relationship with mercenary troops has not, at least since Napoleon, been the ticket to national success. Indeed, Waltz himself believes, as stated just above, "states are hardly recognizable when compared with their originals."[39] If states are shaped by their environment, and no state is a recognizable version of the initial set of states, then it seems only reasonable to conclude that the criteria for state success have changed dramatically since the origin of the state system. To the degree that the fitness criteria in international relations *have* changed over time, the lack of state extinctions in the recent past is evidence only of a general lack of selection pressure—*not* a demonstration of the Selection Axiom's assertion that environmental pressures have fine-tuned state fitness over a long period of time and have left behind only well-adapted states.

III.
THE EMPIRICAL CASE AGAINST THE SELECTION AXIOM

The previous section examined logical flaws in the Selection Axiom stemming from its assertion that low current rates of state extinction reflect an environment of high selection pressure. This asserted correspondence depends upon both a logical indeterminacy and upon an eminently contestable assumption of constancy in the environment of international relations surrounding states. This section criticizes the Selection Axiom from an empirical rather than a logical

38. Waltz, *Reflections*, *supra* note 1, at 329-30, 341.
39. *Id.* at 329.

perspective. Realists (and other IR theorists) have assumed that the rate at which states exit the international system is extremely low. Recently, however, Tanisha Fazal has actually gathered and analyzed the relevant data and concluded that, relative to the assumptions of political scientists, state deaths are in fact fairly high.[40] Some of Professor Fazal's assumptions are contestable, but the death rate in the international system *compared to the death rate in natural environments* remains extremely small even under those assumptions leading to a relatively high rate of state deaths. The relative selection pressure facing states, as opposed to organisms, therefore remains much smaller. Additionally, investigation of state *births* raises a serious challenge to the empirical underpinnings of the Selection Axiom.

A. *Evidence on State Deaths*

As mentioned above, Realists are commendably clear in stating their empirical position on state death: "The death rate among states is remarkably low. Few states die; many firms do."[41] After a careful analysis of the relevant data generated by the international system, however, Fazal has concluded that roughly one in four states perished during the post-Napoleonic era.[42] A 25% extinction rate is, presumably, significantly higher than the "remarkably low" extinction rate previously assumed by Realists. This section analyzes the effect on the validity of the Selection Axiom of this new, higher extinction rate. This section also considers measures of state extinction besides those employed by Fazal, who focuses on the loss of formal control over foreign policy as the measure of state extinction. Finally, this section compares the death rate in natural populations to the state death rate in international relations. I conclude that Fazal's estimate of the rate of state extinction should prompt the conscientious Realist to re-assess, although not necessarily abandon, the Selection Axiom: Fazal's estimate of the rate of state extinction is higher than "remarkably low." While the use of some plausible alternative definitions of state death might reduce Fazal's estimates somewhat, the central Realist contention that current rates of state extinction are very low would remain far from certain. Nonetheless, selection pressures in *natural* populations lead to death rates for organisms that are many orders of magnitude higher than the death rates observed in the population of states in the international environment, regardless of the estimate of state death rates that one adopts.

Defining a state's death as "the formal loss of control over foreign policy to another state," and using data from the oft-studied Correlates of War Project (CoWP), Fazal concludes that fifty of the 202 states belonging to the international system at one time or another between 1816 and 1992 have perished, as shown here in Table One.[43] Thirty-five of those fifty met a violent end.[44] As

40. Fazal, *supra* note 23, at 312.
41. WALTZ, *supra* note 1, at 95.
42. Fazal, *supra* note 23, at 312.
43. *Id.*
44. *Id.* at 319.

Table Two shows, only nine of the twenty-three states extant in 1816 survived continuously to 1996.[45] Compared to the Realists' assertion that state death rates are "remarkably low," Fazal's evidence would seem more readily to support assertions of a significant ongoing lack of fitness in the international system, or at least of a relatively high rate of state exit (25%) with a significant portion of all states (thirty-five out of 202, or more than 15%) ever extant during the post-Napoleonic era having exited as a result of foreign conquest.

At the same time, however, Fazal notes that state extinction has been virtually absent from the international system since 1945.[46] Only eight states exited after 1945, and only two exited violently. She notes also that "buffer" states—nations with the misfortune to occupy territory on an overland route between two rival powers—are much more likely to suffer state death (roughly 1.5 times more likely) than non-buffer states.[47] Furthermore, as I discuss at more length in section V below, European states are much more likely to die than non-European states. Selection pressure, as measured by death rates, therefore remains quite low for non-European states, for non-buffer states, and for all states created after, or existing in, 1945.

Taken as a whole, Fazal's analysis is not necessarily inconsistent with the essentials of the Realist position. However, Fazal's analysis does require a more elaborate defense of the Selection Axiom than that reflected in the essentially data-free discussion undertaken by Waltz. The interpretation of Fazal's data that requires the least revision of the Realist arguments surrounding the Selection Axiom, however, would be the relatively simple argument that her data do *not* in fact reflect a high extinction rate. Even under Fazal's interpretation of the data, after all, fewer than one in six states has left the international system as a result of conquest, and less than 2% of states have suffered such a fate since 1945. This post-1945 rate might fairly count as "remarkably low." One might additionally argue that the overall rate of roughly 17% is low enough, even if it is not remarkably low. If one considers state extinction rates to be low even in light of Fazal's data, then a Realist may preserve the Selection Axiom without change.

The dramatic drop-off in state extinction rates since 1945 is also consistent with the Realist assertion that strong selection pressures have weeded out the weak, at least as of the end of World War II. A Realist who simply moved back the date when selection pressures had already done their work from 1815 to 1945 could otherwise preserve the arguments of the Selection Axiom. Finally, as we shall see in more detail in the next sub-section, even a death rate for states of 25% is dramatically smaller than death rates for a single generation in many natural populations.

45. UNIVERSITY OF MICHIGAN, CORRELATES OF WAR PROJECT, *at http://pss.la.psu.edu/int-sys.html* (last modified Feb. 10, 2003).

46. Fazal, *supra* note 23, at 330.

47. *Id.* at 329, 331.

TABLE ONE: EXITING STATES AND YEAR OF EXIT

Papal States	1860
Tuscany	1860
Modena	1860
Parma	1860
Two Sicilies	1861
Hesse Electoral	1866
Hanover	1866
Saxony	1867
Hesse Grand Ducal	1867
Mecklenburg Schwerin	1867
Baden	1870
Wuerttemburg	1870
Paraguay	1870
Bavaria	1871
Peru	1880
Tunisia	1881
Egypt	1882
Korea	1905
Cuba	1906
Morocco	1911
Haiti	1915
Dominican Republic	1916
Austria-Hungary	1918
Ethiopia	1936
Austria	1938
Albania	1939
Czechoslovakia	1939
Poland	1939
Netherlands	1940
Denmark	1940
Belgium	1940
Norway	1940
Estonia	1940
Latvia	1940
Lithuania	1940
Luxemburg	1940
Greece	1941
Yugoslavia	1941
France	1942
Germany	1945
Japan	1945
Syria	1958
Zanzibar	1964
Vietnam, Republic of	1975
Yemen Arab Republic	1990
German Democratic Republic	1990
German Federal Republic	1990
Yemen People's Republic	1990
Soviet Union	1991
Czechoslovakia	1992

TABLE TWO: STATES IN EXISTENCE IN 1816 AND THEIR FATE

States Continuously in Existence Between 1816 and 1996	States in Existence in 1816 That Left the State System Once (or More) Between 1816 and 1996
Italy	Austria-Hungary
Portugal	Baden
Russia-Soviet Union-Russia	Bavaria
Spain	Denmark
Sweden	France
Switzerland	Germany
Turkey	Hesse Electoral
United Kingdom	Hesse Grand Ducal
United States of America	Netherlands
	Papal States
	Saxony
	Tuscany
	Two Sicilies
	Wuerttemburg

Furthermore, as Fazal herself notes, there are many possible definitions of state death.[48] Some alternative definitions would lead to a much lower state extinction rate. In terms of the status of its ability to conduct its foreign policy, for example, France perished during both the Franco-Prussian War and—twice—during World War II. Many, however, would consider the France of 2003 to be the "same" France extant in 1803. Such perceptions of continuity are not merely an acknowledgment of a nation or a culture regardless of whether the nation or culture has a state. In contrast to, say, Laplanders, the French throughout this period plainly had a state in addition to a culture, a language, and a people.

If one adopts persistence in nomenclature rather than continuous independence in foreign policy as the defining criterion of state existence, then the results change significantly from those under the CoWP definition. As Table Three shows, only twenty-one states perished permanently in name between 1816 and 1992, an extinction rate of roughly 10% rather than roughly 25%. The mergers in 1990 of what were informally called West Germany and East Germany into Germany, and of North Yemen and South Yemen into Yemen, account for roughly 20% of those disappearances. Roughly 60% of the disappearances in state names result from absorptions occurring between 1860 and 1871 in the course of German or Italian unification. The remaining disappearances are Austria-Hungary, the Republic of Vietnam, the Soviet Union, and Zanzibar.

48. *Id.* at 318-19.

If we increase from three to seven the number of years that a state may be occupied and still survive, then state deaths also diminish significantly. A dozen states perishing during World War II under the CoWP/Fazal definition, for example, had been replaced by a state of essentially the same name by the end of 1945. Four other states returned to the international scene as independent actors of the same name within seven years of an initial extinction occurring outside the deadly confines of World War II. In fact, as Table Four demonstrates, only nine contemporary states besides Germany and Japan bear the name of a state that perished under the CoWP definition and then remained occupied, or absent from the international scene, for more than seven years.

TABLE THREE: STATES WITH NAMES NO LONGER PRESENT IN THE STATE SYSTEM (AND YEAR OF EXTINCTION)

Austria-Hungary	1918
Baden	1870
Bavaria	1871
Germany, Democratic Republic of	1990
Germany, Federal Republic of	1990
Hanover	1866
Hesse Electoral	1866
Hesse Grand Ducal	1867
Mecklenburg Schwerin	1867
Modena	1860
Papal States	1860
Parma	1860
Saxony	1867
Soviet Union	1991
Tuscany	1860
Two Sicilies	1861
Vietnam, Republic of	1975
Wuerttemburg	1870
Yemen Arab Republic	1990
Yemen People's Republc	1990
Zanzibar	1964

To the extent that, by judgment or redefinition, one interprets Fazal's analysis as reflecting relatively few state exits, and thereby as demonstrating relatively little selection pressure in the international environment, the Realist argument remains unthreatened. A judgment as to what constitutes strong selection pressure, however, is a subjective one, just as is the judgment about precisely which measure of state exit is best. A reasonable person could take Fazal's carefully constructed definition of state death—the formal loss of control over foreign policy, judged in the case of conquest by annexation or by a

TABLE FOUR: EXITS OF STATES WITH A NAME LATER PRESENT AGAIN IN INTERNATIONAL SYSTEM

State Name	Initial Exit	Re-Entrance
Albania	1939	1944
Belgium	1940	1945
Cuba	1906	1909
Czechoslovakia	1939	1945
Denmark	1940	1945
Dominican Republic	1916	1924
Egypt	1882	1937
Estonia	1940	1991
Ethiopia	1936	1941
France	1942	1944
Germany	1945	1990
Greece	1941	1944
Haiti	1915	1934
Japan	1945	1952
Latvia	1940	1991
Lithuania	1940	1991
Luxemburg	1940	1944
Morocco	1911	1956
Netherlands	1940	1945
Norway	1940	1945
Paraguay	1870	1876
Poland	1939	1945
Syria	1958	1961
Tunisia	1881	1956
Yugoslavia	1941	1944

military occupation intended to last for three or more years—and then judge the resulting extinction rates of 15% (by conquest) or 25% (from all causes) to constitute a relatively high rate of state exit. Such a result would be inconsistent with the Realists' assertion that selection pressure over long periods of time has resulted in well-adapted states by the time of the Congress of Vienna: high *current* death rates are inconsistent with a pool of highly fit organisms (at least when assuming, as the Realists implicitly do, that the environment facing states has been relatively constant).[49]

Realists could of course simply shift the relevant demarcation from the Congress of Vienna to the end of World War II, when the rate of state extinction dropped precipitously under almost any externally oriented measure of state

49. *See supra* Part II (discussing implicit Realist assumption of constancy in environment facing states in international relations).

death. Such a shift in the demarcation date allows the retention, *mutatis mutandis*, of the Selection Axiom in its entirety.

If one judges state extinctions between 1816 and 1992 as reflecting a high rate of state deaths, however, then the next question—and that question must remain a hypothetical one until the Realists respond to Fazal's recent research—is whether Realists will themselves abandon the Selection Axiom. Given the centrality of the Selection Axiom to Realism, and given the inventiveness of social scientists in recasting their theories in light of apparently contrary data, one might hazard that Realists will be drawn to amend, rather than to abandon, the Selection Axiom.

The path of least resistance for Realists who accept that the rate of state deaths is high would presumably be an argument that a high rate of state deaths reflects high selection pressure in the international system. The world, under this view, simply continues to be more Realist than the Realists themselves had previously assumed. This modified approach requires abandonment of the argument that the current system is highly adapted, but it does allow preservation of the argument that selection pressure is high. Furthermore, if one observes *high* rates of state death and then infers high selection pressures, the logical-indeterminacy argument advanced above in opposition to the Selection Axiom[50] falls by the wayside. If state death rates are newly considered by Realists to be high, then *only* an inference of *high* selection pressure will be consistent with the evidence. Realists who subscribe to a revised inference of high selection pressure, drawn from a new assumption that rates of state deaths are high, will thereby gird their intellectual loins more effectively from attack than can Realists retaining their earlier arguments; an ongoing assertion that the rate of state deaths is low, and that such a rate shows a high degree of current fitness, allows the Realists' opponents to argue, with equal plausibility, that low rates of state death simply indicate low selection pressure.

B. Evidence on State Births

As we have seen in the previous section, an empirical examination of state deaths requires some elaboration, and may require some revision, of the traditional Realist view of the Selection Axiom. While high rates of state death would be inconsistent with the Selection Axiom as currently formulated, there are several ways in which Realists could argue that state death rates are not especially high or could rework their formulation of the Selection Axiom to accommodate relatively high rates of state death. Thus, empirical data suggesting high rates of state deaths may, but need not, render the Selection Axiom an unpersuasive description of international relations.

If one broadens the empirical analysis to include state births, and especially the relationship between state births and state deaths, then one finds significant evidence of a *lack* of selection pressure in the international system throughout the period since 1815. Since 1816, many more states have been created, and

50. *See supra* Part I.

have survived, than have perished. Such a pattern of overall expansion in the population of states is clearly inconsistent with the Selection Axiom.

Under the CoWP's definitions, there were 211 state births between 1817 and 1997, with only forty-eight state deaths during the same period (see Appendix). Measured in terms of the number of states in the system, there were twenty-three states in 1816; as of 1997, there were 187. More than eight times as many states existed in 1997, therefore, as existed less than two centuries before. During that period, the ratio of births to deaths among states is greater than 5:1. Such statistics are hardly evidence for a ruthless winnowing of irrational or altruistic states. The decolonization-driven growth in states after World War II is particularly dramatic, as shown by the growth in membership of the United Nations. The UN had fifty-nine members at the end of 1950, with ninety-eight members at the end of 1960, 125 members at the end of 1970, and 151 by the end of 1980. Nor did a ruthless culling of states follow these lavish increases in their numbers. As Kahler puts it:

> [T]he post-1945 international system does not appear to lend great support to a dynamic of variation and selection. Despite the birth of dozens of new and weak states, those weak states have, by and large, survived in much larger numbers than a crude evolutionary model might suggest.[51]

Although the post-1945 growth in states is the most dramatic, the increase in extant states in fact shows a nearly monotonic trend over the entire period covered by CoWP. From 1820 until 2000, only the decades of the 1860s and the 1930s saw more state deaths than state births.

In summary, then, many more nations were born and survive to this day than have perished. One might contrast this manifold net growth in the number of states since the Congress of Vienna with some common biological examples of theoretical fecundity. In nature, one finds mortality rates almost equal to birth rates, with huge numbers of offspring initially present that are soon winnowed dramatically by natural selection pressures to result in a steady-state population. The international environment, in contrast, exhibits birth rates far in excess of state mortality, with the result that the population of states has grown dramatically. The contrast between nature and the international environment implies that states face selection pressures almost laughably low by natural standards.

Some examples of birth rates and death rates in natural populations illustrate the dramatic differences between the natural and the international environments. *Wolffia microscopia*, which is both the smallest and the fastest-growing flowering plant on Earth, has a generation time under optimal conditions of 30 hours.[52] In four months of unrestrained growth, a single plant of the species could spawn enough organisms to fill a volume equivalent to that of the entire Earth.[53] The cabbage aphid has an average of forty-one offspring per female,

51. Kahler, *supra* note 18, at 165.

52. W.P. Armstrong, *Principles of Population Growth*, WAYNE'S WORD, *at* http://waynesword.palomar.edu/lmexer9.htm (last visited Mar. 17, 2004).

53. *Id.*

with roughly sixteen generations per summer. One such insect, if all of its progeny were insulated from death, could produce about 1.5×10^{24} aphids in a summer.[54] The originating aphid's offspring would then outnumber the stars in the universe by several orders of magnitude. Even the ponderous reproductive processes of the elephant would, if an initial population of 10,000 animals grew at a mere 1% per year since the end of the last Ice Age, have resulted in a population of 2×10^{47} organisms by the present day. Such a population of pachyderms would outweigh the Earth by more than two dozen orders of magnitude.[55] These are only examples, but almost every plant or animal besides the higher mammals produces dozens or hundreds of times more offspring than can survive to adulthood. Indeed, the "potential exponential increase of populations (superfecundity)" is literally "Fact 1" in a prominent evolutionary biologist's schematic summary of Darwinian evolution.[56]

Superfecundity and a remotely steady population size together imply that death rates for offspring approach 100%: if a given pair of organisms gives rise to a huge number of offspring but only two of them are to survive (and thus replace their parents in a steady-state population), then almost all of those offspring must die. If aphids in a steady-state population produced just *one* generation a summer (instead of the sixteen that they actually do), then the death rate among aphid offspring would be roughly 95%. (Two of the forty-one offspring would survive to maintain a constant population, and 2/41 is approximately 5%.) Asexually reproducing organisms producing 1,000 potential offspring (in the form of eggs or seeds, for example) in a steady-state population have a death rate of 99.9%—and this assumes that such organisms have only one reproductive cycle, whereas many organisms (such as trees and fish) have both recurring reproductive cycles and significant lifespans.

In this light, even the death rate of 25% attributable to the international system if one adopts Fazal's definitions wholesale seems capable of producing only a relatively mild degree of selection pressure. Taking into account both births and deaths, after all, the net population of states has grown far more rapidly than would a steady-state population. A state born since, or extant in, 1945 is nearly certain to have survived to the present. Indeed, it is the *survival* rate, not the death rate, that we find approaching 95% in international relations after

54. MISSISSIPPI STATE UNIVERSITY, O. ORKIN INSECT ZOO, BASIC FACTS: INSECT NUMBERS *at* http://insectzoo.msstate.edu/Students/basic.numbers.html (citing Glenn Herrick) (last visited Mar. 17, 2004).

55. The mass of the elephant varies by type (African or Asian) and gender, but the largest combination (male African) weighs roughly 6000 (6×10^3) kilograms. *See* THE PHYSICS FACTBOOK, (Glenn Elert ed.) *at* http://hypertextbook.com/facts/2003/EugeneShnayder.shtml (last visited Nov. 15, 2004). The number of organisms (2×10^{47}) multiplied by the hypothesized weight per organism (6×10^3) yields a product of 1.2×10^{51} kilograms. *Id.* The mass of the earth is roughly 6×10^{24} kilograms. *How is the Mass of the Earth Determined*, ENCHANTED LEARNING, *at* http://www.enchantedlearning.com/subjects/astronomy/planets/earth/Mass.shtml. The difference in orders of magnitude (51 – 24) is twenty-seven. If we instead use the mass of the smallest combination of type and gender—the male Asian, about one third as massive as the male African elephant, at a mere 2×10^3 kilograms—then the final product will be 4×10^{51}. The difference in orders of magnitude (50 – 24) is twenty-six.

56. MAYR, THIS IS BIOLOGY, *supra* note 18, at 190.

World War II. In comparison to nature, the international environment seems so comparatively benign as to be essentially devoid of any selection pressures at all. Realists demonstrate an excessive faith in assuming, as the Selection Axiom does, that some analog to natural selection in the international environment will serve to ensure that states either conduct rational, egoistic foreign policies or perish.

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Evidence on state deaths has complex and at least partially ambiguous implications for the accuracy and logical coherence of the Selection Axiom. Evidence on state births, in contrast, has simple and plainly negative implications for the Selection Axiom's viability. On balance, the evidence concerning state births and deaths would seem to strike a significant, though not by itself decisive, blow against the Selection Axiom. To the degree that the Selection Axiom fails to occupy the conceptual center in theories of international relations, non-Realist theories allowing a significant role for international law can fill the resulting space. Before examining that potential role for international law in more detail, however, I evaluate the implications for the Selection Axiom of the small number of states that exist compared to the number of organisms present in the vast majority of natural populations.

IV.
THE PAUCITY OF STATES AS A THREAT TO THE SELECTION AXIOM

Examinations of state births and deaths emphasize changes in the overall population of states. The order of magnitude of the number of existing states—the rough size of the general stock, as opposed to the direction or ratios of the flows into or out of that stock—is also relevant to a systematic analysis of the Selection Axiom. In this section, I examine the evolutionary concept of "genetic drift." Genetic drift is a probability-driven phenomenon that results in a significantly diminished role for selection pressures in small natural populations.[57] I argue that the application of these concepts to the international system results in a further undercutting of the Selection Axiom.

Natural populations commonly consist of tens of thousands of organisms or more. The state system, in contrast, has never had more than two hundred members, an almost trivial size compared to natural populations. Additionally, the modern era's founding population—the states extant after the Napoleonic Wars had consolidated central Europe and long before the post-colonial era led to a dramatic proliferation of states—consisted of fewer than two dozen states. Such a bottleneck is especially small even within the frame of reference of the international system, and is thus likely to be particularly influential in shaping the future of any evolutionary state system. In small natural populations, the non-selective phenomenon of "genetic drift" is likely to dominate classical selection

57. The discussion of evolutionary biology in this section relies upon RIDLEY, *supra* note 18, at 135-45, and FUTUYMA, *supra* note 18, at 297-307.

mechanisms and thus result in the demise of large numbers of characteristics that possess adaptive advantage. This is especially true of bottleneck populations. Classical selection pressures, and the adaptive characteristics that follow in their wake, are therefore much *less* likely to be the dominant force in international relations than proponents of the Selection Axiom would have us believe.

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Natural populations of larger animals almost always number in the tens of thousands, while reproductively isolated groupings of hundreds of thousands or greater would not be uncommon for insects or plants. One needs look no further than one's own gut for bacterial populations consisting of millions for a single species. The population of states, currently at a peak of roughly 200, is a far cry from the numbers present in a typical natural population. (Indeed, if a population in nature consisted of 200 individuals, then one would consider the species ultra-rare and its prospects for survival dim at best, at least absent sustained and expensive human efforts to preserve the species).[58]

This difference of several orders of magnitude between the size of the population of states in the international system and the size of most populations of organisms in nature is of considerable significance. The analysis that follows in this Part of the Article hinges on the fact that *natural* selection is a *large*-numbers phenomenon—often, to a first approximation, an infinite-numbers phenomenon in light of the underlying mathematics of the situation—while *international*, in other words, inter-state, relations is a *small*-numbers phenomenon. A reliable selection for genotypes of differentially fitter phenotypes can easily occur when large populations are at issue. Under these circumstances, extant organisms may well reflect the gradual evolution of fitter organisms, just as sufficiently large populations ensure the predictability, in the aggregate, of a variety of other probabilistic phenomena.[59] An expectation that the same phenomena will occur reliably in the highly particularized, small-numbers world of international relations, however, is more akin to an article of faith.

In evolutionary biology, "genetic drift" is a factor of special importance in small populations. Genetic drift occurs because the genetic complement of a successor generation depends not only upon the fitness of the phenotypes expressed in the predecessor generation but also, given the limitations upon the perpetuation of all alleles (variations of a gene) when parental organisms are

58. *See generally* DOUGLAS ADAMS & MARK CARWARDINE, LAST CHANCE TO SEE (1990) (reporting on authors' mixed success in finding members of ultra-rare species in nature, and generally assessing prospects for survival of such species as poor).

59. For two formulations of the "law of large numbers," for example, see GENE R. SELLERS ET AL., A FIRST COURSE IN STATISTICS 162 (3rd ed. 1992) ("As the number of times that an experiment is repeated increases, the relative frequency with which an event occurs will tend to approach the theoretical probability for the event"); P.B. Stark, *The Law of Large Numbers*, *at* http://stat-www.berkeley.edu/~stark/Java/lln.htm ("in repeated, independent trials with the same probability p of success in each trial, the chance that the percentage of successes differs from the probability p by more than a fixed positive amount, $e > 0$, converges to zero as the number of trials n goes to infinity, for every positive e").

few, upon purely random factors. An example is perhaps the simplest way to tell a somewhat complex story.

Imagine the smallest possible sexually reproducing population: one male and one female. Assume that four alleles are possible with respect to a particular gene, and that two alleles at a time together determine the phenotypical expression of that gene in the organism. Assume further that, as between the two individuals, all four alleles exist. Call the alleles *a*, *b*, *c*, and *d*, and assume for the sake of convenience that the male organism possesses an *a/b* genotype and the female possesses a *c/d* genotype. Four combinations of these alleles can occur: *a/c*, *a/d*, *b/c*, and *b/d*. Assume, as is typical, that the division of diploid (two-allele) somatic cells into haploid (one-allele) gametes occurs randomly and independently. In other words, the father will pass on the *a* allele to half of his children and the *b* allele to the other half; the mother will pass on her *c* allele to half of her offspring; and which allele of the father passes to a particular child will not affect which allele of the mother passes to that same child. Taken together, these circumstances may seem elaborate and thus far-fetched, but they in fact describe a typical situation for four variations on a gene dependent for its expression on a pair of variations.

The probability that the steady-state population of two offspring from these parents will continue to have all four of the alleles originally present is only one in four.[60] The probability that only two alleles will be passed on to the next generation is also one in four,[61] with the balance of offspring pairs possessing three of the four alleles present in the parental generation. As a matter of simple statistical fluctuation, therefore, *at least* one allele will drop out of the population in *75%* of generations spawned under these circumstances.

Importantly, the fitness of the eliminated allele is *irrelevant* to this process: the "selection," if one may even call it that occurs *before any* phenotypical expression of the genotype and thus before differential fitness can play a role. Note also that the loss of the allele is effectively permanent. Only a spontaneous recurrence of whatever mutation is necessary to convert the existing allele to the vanished allele will (re-)introduce that allele into the population. Mutation rates leading to *any* change at all in an allele are typically very low,[62] let alone mutation rates leading to a particular change in the allele so that it reverts to a former

60. The first offspring will have some pairing, such as a/c. The second offspring will have the "missing" allele from the male, that is, *b*, half of the time, and the "missing" allele from the female, that is, *d*, half of the time. The joint probability of having both the missing alleles is ½ x ½, or ¼. (The choice of the first offspring's pairing is arbitrary.)

61. The calculation is the same as for the chance that all four alleles will be present in the next generation, but one must substitute the already-present alleles (that is, *a* and *c*) for the missing alleles used in the previous example. The answer is still ¼.

62. The "classical genetical ball-park figure" for the per-gene mutation rate is one in a million. RIDLEY, *supra* note 18, at 29. Ridley provides a range of more precise estimates for particular genes, while noting that there may be some selection bias in that sufficiently rare mutations are unlikely to be observed. *Id.*; *see also* FUTUYMA, *supra* note 18, at 271-76 (stating that mutation rates per genetic locus appear to be between 1 in 100,000 and 1 in 1,000,000, and also observing that the likelihood of *some* mutation existing in each *gamete* is relatively high given the very large number of genes in each gamete).

incarnation. An allele that is "fixed" out of the population as a result of genetic drift therefore effectively vanishes forever from the population. (One may also view this phenomenon as an irreversible "sampling error" or as the result of a "random walk" that eventually comes to rest when only one allele remains in the population at the relevant locus).[63] If a population is small, then genetic drift ensures that the composition of the offspring's genotype is a result of something other than natural selection.[64] Such a population may grow in size in intervening years, but all subsequent generations will possess a genetic complement that depends in significant measure upon genetic drift in the past.

Obviously there are more than two states in the international system (and, as I argue below, their mode of "reproduction" bears more similarity to asexual than to sexual reproduction).[65] Nonetheless, the international state system is much closer in numbers to two than it is to the tens of thousands or the millions typically found in natural systems. Most phenomena associated with genetic drift are roughly linear with respect to population—that is, the average increase in genetic variation over the same number of generations will be twice as great with a population twice as large. In comparison to natural populations, the population of states is quite small. An application of evolutionary principles would therefore predict that the population of states is much more susceptible to non-fitness-related, random changes in the characteristics of states.

The effects of random, non-adaptive changes in characteristics are likely to be especially prominent in the international system because of the extremely small size of the bottleneck "founder population" extant as of the Congress of Vienna. The number of states extant prior to 1816 is not part of the CoWP data, and thus is a quantity not readily available under a definition comparable to the data from 1816 until the present. The prevalence of states with small geographical territories at the time of the Treaty of Westphalia in 1648, however, implies a relatively large number of states. Regardless, there were fewer than two dozen at the end of the Napoleonic Wars. If the analogy between natural populations and international states holds, then all variation present in modern states stems from that small number of "founder states." The effects of random factors on a population of just two dozen or so entities can be quite profound. In natural populations of twenty, for example, the average population possessing initially maximum genetic variation will have *no* genetic variation after 200 genera-

63. For an explanation of genetic drift employing these analogies, see FUTUYMA, *supra* note 18, at 298-300.

64. A complementary, but more empirically oriented, demonstration of the prominent role of genetic drift occurs when biologists artificially create separate populations out of a genetically identical stock and then, after raising all populations in separate but identical environments, examine the genetic composition of successor generations. Such experiments show a marked tendency for the *distribution* of genotypes across the populations to be random. A given population displays only one frequency distribution of alleles, but the *spectrum* of populations displays all possible frequency distributions. As with the examination of a small offspring generation, one can infer that the composition of a *particular* population's genotype is a matter of chance, not the product of natural selection as a result of differential fitness. Otherwise, some particular frequency of genotypes would presumably prevail across all populations raised in identical conditions.

65. *See infra* section VI.

tions—not as a result of any adaptive differences among phenotypes, but simply as a result of the long-ago random propagation of certain alleles and the demise of others.[66]

The mechanics of genetic drift offer a cautionary lesson to those who would argue in favor of the Selection Axiom. The randomness of genotypes in small natural populations implies that small populations will possess characteristics determined by chance, and not by the death of those entities unfortunate enough to possess genotypes that lead them to comparatively maladaptive behavior. The small number of states in the international system, especially at the time of the (re-)"founding" of the modern state system early in the 19th century, strongly implies that the current determinants of foreign policy do *not* result from the death of states failing to conduct the rational, egoistic foreign policy touted by Realists as a state's only reliable survival strategy.

V.
PUNCTUATED EQUILIBRIUM AS A THREAT TO THE SELECTION AXIOM

Two main perspectives exist on the rate of evolutionary change in nature. The "gradualist" perspective, which is of longer (or at least broader) standing in evolutionary biology, holds that the predominant force in determining whether species thrive or perish operates gradually over long periods of time.[67] The competing theory of "punctuated equilibrium," associated with Niles Eldredge and Stephen Jay Gould,[68] holds that very intense forces of selection operate for very brief periods of time (geologically speaking), with the intervening periods characterized by mild selection pressures and few extinctions.[69] The theory of punctuated equilibrium provides that dramatic evolutionary changes occur around mass extinctions, with relatively little evolutionary change occurring in between.[70] The gradualists thus assume that, at the level of an individual species, evolution proceeds incrementally over long periods of time, while those favoring a theory of punctuated equilibrium assume that most change within a

66. FUTUYMA, *supra* note 18, at 302.

67. The question of whether Darwin himself might have advocated a theory of punctuated equilibrium is controversial. See RIDLEY, *supra* note 18, at 569. The orthodoxy in 20th-century evolutionary biology favored gradualism at least until Gould's and Eldredge's work in the 1970s prompted "the most lively modern controversy about evolutionary rates—the theory of punctuated equilibrium." *Id.* at 560.

68. *See* Stephen Jay Gould & Niles Eldredge, *Punctuated equilibria: an alternative to phyletic gradualism*, *in* MODELS IN PALEOBIOLOGY 82 (T.J.M. Schopf ed., 1972); Stephen Jay Gould & Niles Eldredge, *Punctuated equilibria: the tempo and mode of evolution reconsidered*, 3 PALEOBIOLOGY 115 (1977); Stephen Jay Gould & Niles Eldredge, *Punctuated equilibrium comes of age*, 366 NATURE 223 (1993); Niles Eldredge & Stephen Jay Gould, *Punctuated equilibrium prevails*, 332 NATURE 211 (1988).

69. For a survey of scholarship consistent with the theory of punctuated equilibrium and drawn from a wide variety of fields, see Connie J.G. Gersick, *Revolutionary Change Theories: A Multi-Level Exploration of the Punctuated Equilibrium Paradigm*, 16 ACAD. MGT. REV. 10 (1991).

70. *See generally* STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY (1989) (discussing dramatic winnowing in general body plans of animals occurring some time after "Cambrian explosion").

species occurs in a concentrated (initial) phase preceding a long period of stasis.[71]

The difference between the two perspectives is in the end a matter of degree.[72] Theories of both gradualism and of punctuated equilibrium acknowledge that there have been mass extinctions during relatively short periods of time, and both theories acknowledge that selective fitness of one sort or another accounts for the survival of those species that persist through a mass extinction.

Nonetheless, the matters of degree that distinguish gradualism from punctuated equilibrium are not simply quibbles about the shape of a second-derivative function. To the gradualist, natural selection of a slow but discriminating type is the predominant mode of natural selection. Species that survive do so as a result of the gradual accumulation of adaptive traits providing small comparative advantages compared to their competitors.

To the backers of punctuated equilibrium, in contrast, the world as we see it is the result of a much more arbitrary process. Periodically, a catastrophe befalls the world, or an adaptation bursts into prominence. Huge numbers of species perish more or less at once, in geological terms. Since so many species perish, some of them may well be highly fit, while others may be poorly adapted to their pre-catastrophe environment. The post-catastrophe environment is so different from the pre-catastrophe environment that the results of long periods of pre-catastrophe evolution are nearly irrelevant. If *all* of the dinosaurs perished despite the huge variations among them, after all, then how subtle were the forces of natural selection that operated upon the finely tuned, painstakingly accumulated variety of characteristics and degrees of fitness that existed within the dinosaur family? If a huge growth in the number of mammalian species occurred in a relatively short time, with little change thereafter, then what impact does natural selection have during the millennia between catastrophes, and what impact will adaptive pressures have upon the ability of existing species to survive the next catastrophe? Once having survived a catastrophe (or having passed through the initial post-speciation phase), a macro-evolutionary group (or individual species) does not exhibit much subsequent change. Selection pressures are gigantic and arbitrary at the punctuating mass extinction; selection pressures are minimal, if still present, during the equilibria.

The debate between those favoring gradualism and those endorsing punctuated equilibrium persists in evolutionary biology largely because of the paucity of data necessary to resolve the issue. The fossil record, of course, is the pre-eminent source for data in debates involving geological time scales. That record has huge gaps in both space and time. Fossils vary immensely in completeness and quality. Many important traits—coloration, locomotion, embryological characteristics—are almost impossible to determine even with the most modern methods and the most favorable fossil record. Those who study biology

71. The discussion of evolutionary biology in this section draws upon RIDLEY, *supra* note 18, at 557-69.

72. *See id.* at 562 ("The two theories represent extreme points in [their] continuous dimensions . . . .").

must, in this area of investigation, content themselves with fragmentary evidence resistant to investigation through controlled experimentation.

Those who study international relations, in contrast, are fortunate to have before them a much less opaque and more complete record. At least if one confines one's analysis to the past few centuries, then the births and deaths of states are known almost exactly and comprehensively in both time and space. Controversies stem from differences in definition or interpretation, not from a daunting absence of data.

The pattern of state extinction reflected in the international political record of the past few centuries is much more consistent with a theory of punctuated equilibrium than of gradualism. There have been two clusters of state extinctions since the Congress of Vienna, with virtually no state extinction at other times. State extinctions cluster not only in time but also in space: outside of Europe, state death is minimal.

The extinction of the dinosaurs closely followed the impact of a huge asteroid near what is now the Yucatan Peninsula.[73] In international relations, the asteroids originated in Berlin. The unification of non-Austrian Germany initiated by Prussia (and the roughly contemporaneous unification of Italy) marks one period of mass state extinctions; the attempted conquest of Europe initiated by Nazi Germany led to the other.[74] Figure One shows the distribution of state extinctions by year during the period 1816-1996. The clustering of extinctions around 1870 and 1940 is apparent. The only years in which more than one state death occurred demonstrate, with one exception, a clustering around the 1860s and the 1940s: 1860, 1866, 1867, 1870, 1939, 1940, 1941, 1945, and 1990. No state died between 1816 and 1860; only three states died between 1872 and 1905; and only three states perished between 1946 and 1989.

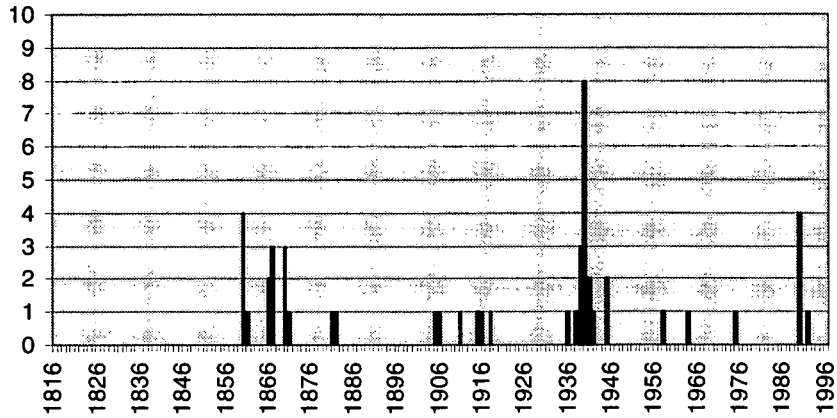
Alternatively, one may examine the fates of the twenty-three states extant in 1816. Nine such states remained in (continuous) existence over the nine score years until 1997. Of those states that perished, nine died between 1860 and 1871, and four during World War II. The only outlier, Austria-Hungary, left the international system in 1918 (after a mere 480 years of life under the Hapsburgs).

What is the implication of a punctuated equilibrium in state survivals for the Selection Axiom? In the biological case, evolution by punctuated equilibrium emphasizes the role of chance and downplays the prominence of fine-tuned natural selection operating over extended periods of time. The analogy to inter-

73. *See generally* WALTER ALVAREZ, T. REX AND THE CRATER OF DOOM (1997) (describing decades-long scientific hunt for explanation of sudden extinction of dinosaurs). Some recent research implies that the impact of a single asteroid may be only a partial explanation of the dinosaurs' demise. *See also* Marsha Walton, *What Really Happened to the Dinosaurs?*, CNN, *at* http://www.cnn.com/2004/TECH/science/03/02/coolsc.dinosaurs.extinction/index.html (last visited Mar. 15, 2004).

74. *Cf.* Fazal, *supra* note 23, at 328 ("Three waves of state death—German unification, Italian unification, and World War II—stand out . . . ."). If one were to include as "states" the ruling structures of aboriginal peoples in Africa, Australia, and the Western Hemisphere, then European colonization would be another such period of mass extinctions. The CoWP data do not cover this period, however.

FIGURE ONE: STATE DEATHS BY YEAR, 1816-1996



national relations, given the data, seems a close one. In the case of states, evolution by punctuated equilibrium emphasizes the role of geography and downplays the prominence of fine-tuned foreign policies. A buffer state is much likelier to perish than states blessed with a more favorable geographical position. The difficulty of developing sufficient fitness to survive in the international system extends beyond those whose geopolitical bad luck places them between the political equivalents of Scylla and Charybdis, however. France is a great power, but it fell to Germany in World War II—as did virtually every nation in continental Europe, whether by conquest or alliance. Did Switzerland and Sweden, for example, conduct their foreign policies with so much more aplomb than Belgium and Norway that the latter deservedly fell prey to German aggression while the former did not? When the Western Allies and the Soviet Union drove towards Berlin, the states created in the immediate wake of German conquest died *en masse*. It was not as if Vichy France conducted sufficiently canny diplomacy to allow itself to persist after the fall of Germany while the General Government of Poland did not. Buffer states and states near Germany were likely to meet their end regardless of the shrewdness of their foreign policy.

State deaths are concentrated not only in time but also in space: state deaths cluster tightly in Europe.[75] In Fazal's table of state extinctions, thirty of the forty-three extinguished states (70%) are European. To some degree, this reflects the initially disproportionate number of states that were European; out of the twenty-three states present in the international system in 1816, only the United States (and, depending on one's definition of "European," Turkey) were not European states. The initial predominance of European states fades relatively rapidly, however. As early as 1875, non-European states outnumbered

75. As discussed briefly above, *supra* note 74, a data set that included the initial wave of colonizations and counted the pre-existing governmental structures in the Americas as "states" would show another wave of mass extinctions—and this set of such extinctions, in contrast to those occurring during the CoWPs' coverage, *would* involve large numbers of deaths among non-European states.

European states. Of the thirty-five states that joined the international system between 1816 and 1900, only eight were European states. Of the state deaths during that period, thirteen were European states and only four were not. Thirty-two additional states entered the international system before the wave of intra-war liberations in 1944; only thirteen were European. Even before the number of non-European states mushroomed after World War II, therefore, the international system had witnessed the birth (or existence in 1816) of forty-three European states and thirty-seven non-European states. European states represented roughly 20% of the states in existence at the end of the twentieth century but account for about 40% of state extinctions since the end of World War II.[76]

The fact that state deaths cluster in Europe leads to an argument with the same logic that applied with respect to the clustering in time of state deaths around the 1860s and the 1940s. If state death visits a large number of European states and only a small number of non-European states, then selection pressure is high (and broad) in Europe and low elsewhere. The crucial variable is not a matter of choice made in foreign policy, but of geographical chance. After all, a European state cannot readily move to another continent, no matter how keen its attention to foreign policy.

Even in a punctuated equilibrium, of course, there is selection on *some* criterion—ability to survive in a suddenly darkened environment with huge disruptions in the pre-existing food web, or distance from Germany—that correlates with fitness in some very rough sense. Nonetheless, selection on such a criterion is *not* based upon a small comparative advantage, whether in natural adaptive fitness or in foreign policy, stemming from an accumulation over long years of advantageous factors. The existence of a dynamic of punctuated equilibrium in the international system therefore weakens the Selection Axiom.

As we saw in earlier Parts of this Article, the validity of the Selection Axiom is undermined by an indeterminate logic, by the implications of the low mortality rate in the state system, and by the implications of the tiny size of the population of states compared to natural populations. In this Part of the Article, we have seen that the veracity of the Selection Axiom is also undercut by the implications of the concentrations of state death in space and in time. Geography, not the degree to which a nation conducts a Realist foreign policy, appears to be destiny.

VI.
THE MODE OF STATE REPRODUCTION AS A CONTRADICTION OF THE SELECTION AXIOM

In the final Part of the Article devoted to dismantling the Selection Axiom, I begin with a question asked by evolutionary biologists: why do some organisms reproduce sexually and some reproduce asexually? I then analogize the answers to that question of evolutionary biology to the field of international relations. I conclude that, although the relevant analogies are more difficult to

76. This calculation counts the Soviet Union as a European nation.

draw than is the case with the earlier portions of this Article, one may at least tentatively conclude that the results of the analogous inquiry in international relations are inconsistent with the implications of the Selection Axiom.

In a formulation that may strike some as appropriate even outside the realm of evolutionary biology, one author states: "The problem of sex is still more or less unsolved."[77] Evolutionary biologists have nonetheless both formulated the various conceptual quandaries involved with some rigor and advanced a number of testable hypotheses to account for the variation in the modes of reproduction observed in the natural world. In natural environments that change rapidly and involve complex co-evolutions of various organisms, sexual reproduction is more effective than asexual reproduction in fitting organisms to their environment.

The state system appears to be an environment of rapid change and complex interdependencies among states. Such an environment should produce states reproducing in a manner analogous to sexual reproduction. Nonetheless, state reproduction appears to bear a much closer resemblance to asexual reproduction than to sexual reproduction. The dissonance between the observed method of reproduction (analogous to *a*sexual reproduction) and the characteristics of the international environment (which favor an analogy to sexual reproduction) is yet another reason to believe that the Selection Axiom's assertion that selective pressures significantly shape international relations is misplaced.

A. The Evolutionary Biology of Modes of Reproduction

Victory in the evolutionary struggle goes to those individuals whose genes rise in frequency in the gene pool as their progeny reproduce. An organism that requires a mate places itself at a severe disadvantage from this point of view. An animal reproducing asexually contributes roughly 100% of its genes to an offspring, while a sexual animal contributes only about 50% of its genes to the ongoing gene pool. The cost to an individual animal from sexual reproduction in evolutionary terms therefore appears, in a world where a favorable mutation typically contributes only 1% or less to increased reproductive fitness, to be almost insuperable.[78]

Sexual reproduction does carry one clear advantage: because sexual reproduction combines genes from two parents, it greatly accelerates the rate at which new combinations of genes can occur together. Imagine two individuals that reproduce asexually and share no alleles at a given, two-allele gene locus. Absent a mutation—an extreme rarity at an individual locus, at least measured on a generational scale[79]—each of the two offspring of those individuals will have gene combinations that are exactly the same as each of its respective parent organisms. Imagine instead two individuals that reproduce sexually (and with one another) and that share no alleles at a given, two-allele gene locus. *None* of

77. RIDLEY, *supra* note 18, at 312.

78. The discussion in this and subsequent paragraphs concerning sexual and asexual reproduction draws upon RIDLEY, *supra* note 18, at 284-96, and FUTUYMA, *supra* note 18, at 606-13.

79. *See* RIDLEY, *supra* note 18, at 29.

the offspring will have a combination of alleles identical to its parent. A given parent can contribute only one of its alleles to its offspring, so all offspring will reflect an innovative combination of alleles at the gene locus in question. If we look a bit further down the generational road, then 25% of those in all subsequent generations will on average contain a combination present in the founding pair, while the other 75% contain one of multiple combinations not present in either founding parent.

A complementary perspective on the utility of sexual reproduction emphasizes its large comparative advantage in transmitting a favorable, dominant[80] mutation through a population initially in equilibrium. Among asexually reproducing organisms, the offspring of only one organism in subsequent generations will ever possess the new phenotype (unless the same mutation spontaneously arises in another organism). With sexual reproduction, in contrast, half of all the offspring in the lineage of the mutated individual will display the new phenotype, and those offspring will either yield descendants that also display the new phenotype half the time (if they outbreed with a mate) or even three-quarters of the time (if two organisms in the lineage, each possessing one dominant allele, mate with one another). A new mutation that confers a selective advantage upon its bearer can thus spread much more rapidly through a population composed of organisms reproducing sexually instead of asexually.

Under what environmental conditions, then, are organisms that pay the steep price of sexual reproduction still likely to reap a profit after one allows for the gains from more varied genetic recombination and more rapid spread of mutations through the population? The exact answer depends upon a variety of mathematical calculations and particularized assumptions, but the general answer is fairly clear: sexual reproduction is a better mode of reproduction in environments undergoing rapid change. Such change may occur as a result of factors common to all organisms living in a particular location—changes in average temperature, the availability of moisture, and so on. Rapid change may also occur—is in fact particularly likely to occur—for organisms with survival prospects intimately dependent on particular organisms of another species (as with predators and their prey). In these situations of "co-evolution," each species improves its survival prospect at the expense of the other species, and selection pressures are strong indeed. Hell may be other people,[81] but the environment, hellish or at least unforgiving and rapidly changing, certainly can be other species. In such an environment, the gains to a sexually reproducing individual's genes from the rapid genetic recombination and transmission of mutations can outweigh the high cost imposed by sexual reproduction upon passage of one's own genes along to one's offspring. Indeed, many evolutionary biolo-

80. A "dominant" allele will manifest itself even in the presence of other alleles at the same gene locus. If human eye color were determined at one gene locus, and if the allele for dark eye coloring were dominant, then an individual would have dark eyes if the individual possessed at least one allele for dark eye coloring. (The individual would have light eyes only if both alleles present were the allele for light eye coloring.)

81. *See* JEAN PAUL SARTRE, *No Exit*, *in* NO EXIT AND THREE OTHER PLAYS 3, 45 (1989) ("Hell is—other people!").

gists have posited the host-parasite relationship as the driving force behind sexual reproduction in hosts (who tend to be the more complex, more slowly reproducing member in host-parasite pairs).

B. The Environment and "Reproduction" of States

In attempting to apply these insights from evolutionary biology to international relations, one must answer two questions. First, do states face an environment in which change is rapid, and especially one in which complex interdependencies mimic the co-evolutionary environment present in predator-prey or host-parasite relationships? Such an environment is one in which paying the high price for sexual reproduction is likely to be profitable. Second, does the "reproductive process" of states more closely resemble sexual reproduction than it does asexual reproduction? If the answer to both questions is "yes," then states display features consistent with the extrapolated prediction of evolutionary biology: states would possess the (sexual) reproductive mode most likely to be effective in their (high-pressure) environment. The same consistency between the predictions of evolutionary biology and the practice of international relations would exist if the answer to both questions is "no," for states would then possess the (asexual) reproductive mode most likely to be effective in their (low-pressure) environment. Uniformly positive or uniformly negative answers to the questions of stress and of resemblance to sexual reproduction would therefore support the Selection Axiom as a demonstration of the proper fit between reproductive mechanism and environmental conditions.

If, in contrast, states have adopted a sexual reproductive mode in a low-pressure environment, or have adopted an asexual reproductive mode in a high-pressure environment, then there is a mismatch between the reproductive mode of states and their environment. Such a mismatch would undercut the validity of the Selection Axiom to the extent that it assumes that the international environment operates according to the principles of natural selection.

Precise answers to this pair of dichotomous questions—"do states propagate themselves in a manner analogous to sexual or asexual reproduction?" and "is the international environment simple or complex?"—are difficult to generate. The analogies are arguably strained. The conclusions of this Part of the Article are, therefore, necessarily more speculative than those of other Parts.

The character of the international environment is perhaps the easier question. Rapid change in the international environment during and after the Cold War is taken as a starting point, not a point of contention, for many analysts of international relations.[82] The neat bipolarity of the Cold War dissolved in just a few years, and the decade or so since has been heralded as a transition to a new, multipolar world; or to a new, information-oriented world; or to a new, economically driven world; or to a new, non-state-centric world, and so on. As one

82. As discussed above, however, see *supra* Section II, the Realists themselves claim that international relations occurs against an essentially unchanging backdrop of competition.

might expect in a period of rapid change, there is agreement as to the magnitude of change, but disagreement as to its eventual direction.

A longer-term view of international relations—say, over the past two centuries, which is roughly the period covered by the most commonly employed database describing the inter-state environment—reveals a great deal of change as well. As the 18th century drew to a close, hereditary monarchs legitimated by divine right took to the field in wartime at the head of a small, professional army that marched to battle. They ruled European-based empires possessing far-flung colonies. They sent their orders via messengers who rode upon horses or boarded a sailing ship. The population of those European countries lived overwhelmingly in a rural environment. Traffic in horse-drawn carts connected a few urban areas inhabited by artisans and guild members. As the 20th century drew to a close, wartime presidents or prime ministers legitimated by elections remained in national capitals to command large, citizen-based armies. Empires were no more. The instructions of governments flowed to their diplomats with the speed of light in telecons, faxes, and e-mails. A nation could project military force with aircraft flying faster than the speed of sound or, in many cases, with intercontinental missiles that can span continents in minutes. Populations in European nations (and many others) live in an overwhelmingly urban environment. Traffic between huge cities flows along roads, railways, air traffic routes, and the information superhighway. The guilds are no more; labor unions waxed and then waned; communism has come and gone; socialism thrived and then sputtered; liberal capitalism, albeit liberal capitalism with labor laws and social security and central banking and an intricate system of taxation, seems to have conquered all the world.

Objective measures, as opposed to impressions, of so broad a concept as "change in the environment facing states" are of course difficult to come by. Nonetheless, the past two centuries seem likely to reflect an environment of rapid, rather than gradual, change. Furthermore, the kinds of complex interdependencies that favor sexual reproduction in a predator-prey or host-parasite relationship also appear to have (increasingly) figured in state-to-state relationships. Once, perhaps, international relations was a struggle of autarkic states pitted against one another, but now states are interdependent in a host of ways—economically most prominently, perhaps, but also culturally, environmentally and informationally. To the degree that this state-to-state interdependence mimics the selection pressures of co-evolutionary relationships across species, the international system would also favor sexual reproduction over asexual reproduction as the mechanism best suited to maintaining a population of highly fit individuals in an environment of rapid and complex change. Owing to both change and interdependence, therefore, the international environment appears to echo natural environments that favor sexual reproduction.

The next question, then, is whether states have a mode of "reproduction" that is closer to sexual reproduction or to asexual reproduction. The inquiry might be easier to conduct if the Realists had filled in their analogy to natural selection with a discussion of which (if any) aspects of international relations

and state behavior are analogous to alleles, genes, genotypes, gene pools, phenotypes, gametes, offspring, organisms, species, or generations. If one makes the assumption that individual states are analogous to the individual organisms in a population, however, then states appear to reproduce in a fashion closer to asexual than to sexual reproduction. To assume otherwise would require that one state mate with another to perpetuate itself (themselves). Of course, two states do sometimes combine, as did the Federal Republic of Germany (West Germany, in more common parlance) and the German Democratic Republic (East Germany, in more common parlance) at the end of the Cold War. This cannot be the common pattern, however, not only because we so seldom observe such mergers, but also because a population of states that reproduced only with such mergers would soon dwindle to zero. We do not observe two newly united Germanys, but one, and there is no sign—and certainly no requirement—that we are about to have two Germanys. Unidirectional change in the direction of fewer states has a predictable outcome.

If states occasionally fragmented into a large number of new states, however, then one could have a constant or rising population of states. Such fragmentations plainly occur, as with the Soviet Union and also with Yugoslavia near the end of Cold War. Perhaps this situation is akin to reproduction in organisms. Such fragmentations do not involve more than one parent state, however, and are therefore more closely analogous to asexual reproduction than to sexual propagation. The Soviet Union dissolved without the clear participation of some particular other, already-extant state, for example. Decolonization likewise increased the number of states but, also likewise, seems to have involved no necessary pairing of pre-existing states. Perhaps, in some general way, France and Great Britain are the "parent" states of the "offspring" United States (and Canada). But who sired Australia besides Great Britain, or parented Algeria besides France, or gave birth to the states of Central America besides Spain? Furthermore, those states continuously in existence since 1815, or indeed for any significant length of time, must surely have passed through the equivalent of several generations, or selection could hardly have operated at all. Yet what nation or nations regularly shared in imparting its characteristics in equal measure with, say, Great Britain?

Given that the international environment appears to be an environment of complex change and competitively interdependent interactions, the Selection Axiom would predict that states in an environment characterized by strong selection pressures would reproduce in some fashion analogous to sexual reproduction. States appear, however, to reproduce in a manner more closely analogous to *a*sexual reproduction. The Selection Axiom's emphasis on selective pressures in the international system therefore seems misplaced for this reason as well as for the many other reasons detailed in previous Parts of this Article.[83]

83. Note, however, that if the Realists are correct in claiming that the international environment is essentially unchanging, then the correspondence of the international environment and an

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In this Part of the Article, I have presented ideas from evolutionary biology implying that sexual reproduction is the best mode of reproduction in environments with high selection pressures, while asexual reproduction is the preferred reproductive mode in low-pressure environments. I have argued that international politics displays the rapid and interdependent changes characteristic of a high-pressure environment. I have also argued that state "reproduction" occurs in a mode more closely analogous to asexual reproduction than to sexual reproduction. The mismatch between environment and mode of reproduction implies that states are *not* highly fit for their environment. This implication undercuts the explanatory force that one can reasonably attribute to the Realist's Selection Axiom.

VII.
ROOM FOR LAW

This Article thus far has focused on criticizing the Selection Axiom—especially when the pre-conditions for the reliable operation of natural selection, as developed by theorists of evolutionary biology, suggest shortcomings in the assumptions and analysis of Realists promoting the Selection Axiom. In this Part, I describe briefly how international legal cooperation might fill the space opened up in international relations by a realization that the Selection Axiom does not meaningfully constrain international relations along the lines of Realist foreign policy.

At the outset, I note that vitiating the Selection Axiom leaves room in international relations not only for international legal cooperation but also for a wide variety of other phenomena and causal explanations. If states need not conduct their foreign policy with a ruthless rationality, then states could conduct their foreign policy simply as an extension of their domestic politics without the need to check their activities against the supposed realities of international politics. If survival is not a primary concern of most states, then they might use international relations as an arena in which to fight out long-standing cultural or ethnic rivalries. A state might habituate itself to a role as a moral watchdog for the world, or as a gadfly buzzing about the great powers. A state could even treat its foreign relations as a canvas on which to paint policies to be judged exclusively on the grounds of their aesthetic appeal.

I focus in this Part, however, on the potential for states to consider international legal cooperation, both as a goal of intrinsic merit and as an instrumentally useful endeavor. A wide variety of scholars and politicians have already explored or justified such a possibility,[84] so here I will simply sketch a variety

asexual mode of reproduction *is* consistent with an environment reflecting high selection pressures. The Realist position is therefore internally consistent on this score.

84. *See* Setear, *supra* note 13, at 2-6 (describing scholarship in international law and international relations favorably disposed towards prospects for international cooperation); Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000);

of plausible arguments that one might make on behalf of foreign policies that treat international legal obligations as important, useful, or both.

States may use international law to solve a variety of collective-action problems, including the Prisoner's Dilemma that many scholars of international relations believe generally characterizes the structural difficulty facing states desiring to cooperate with one another. As with domestic contracts, parties that can reliably agree in advance upon their future behavior can optimally structure their current decisions and take best advantage of comparative competencies. International law, especially treaties, can provide clear rules and thereby a clear means of determining whether those states that promise to cooperate are living up to their promise. The treaty process also provides a variety of other rules that sharpen the payoffs and temporal boundaries of cooperation. Without these rules, an international environment filled with cross-cultural noise and the possibility of misinterpretation might blur beyond saving the potential for joint gains. International law provides a wide variety of modalities—treaties, customary law, "soft" law—from which a state may choose to signal and construct the optimal degree of commitment and cooperation.

Among nations already familiar with the rule of law as a result of its usage in their domestic polities, international law is an especially attractive tool for international cooperation. The rhetoric and obligations of law will be well known to all participants. Domestic courts, with their sophisticated apparatus of law and enforcement, will be fertile field for the implementation of international cooperative measures. Domestic bureaucracies, with their persistence in implementing the rules laid down for them and with their deference to legal standards, will also be part of the arsenal open to those seeking to effectuate international cooperation through international law. Trans-national alliances among actors at the core (or even the periphery) of the legal system can add their distinctive strength to the cooperative effort. Domestic actors can use international legal obligations to advance cooperative agendas that their domestic polities might not tolerate if the obligations at issue were not embodied in international legal promises.

One should also note that a sub-group of cooperators may prosper even in a system generally populated by hostile entities.[85] Conditions in the international system need not, therefore, be such that all nations adopt foreign policies respectful of international law. International law can be relevant in the study of the international system so long as even a few states find it useful to employ international law as a method of international cooperation.

Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

85. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 64-67 (1985) (arguing that small groups of cooperative entities can prosper despite predominance of competitive behavior in system as a whole).

VIII.
CONCLUSION

An author who draws upon ideas outside a discipline to criticize conventional wisdom inside that discipline runs the risk that insiders will judge the critic to have paid insufficient attention to the rich context of the criticized discipline. Legal academics sometimes bristle at efforts to enlist the rational, materialist approach of IR theory in the service of explanations and criticisms of international law. Sociologists bridle at the idea that complex social interactions are explicable with simple models put forth by economists. Professors of literature object to the notion that mere mimicry of their deconstructions by professors of physics shows the vacuity of post-modern literary analyses (even when the mimicry is skillful enough to garner acceptance in a journal peer-reviewed by professors of literature).

This Article, however, inverts this common critique of interdisciplinary arbitrage. I do not argue that those in the outside discipline have been insufficiently sensitive to the unique richness of the inside discipline. Rather, I argue that those in the *inside* discipline have paid insufficient attention to the well-developed ideas of the *outside* discipline. If IR insiders were to pay proper attention to the logic and theory of evolutionary biology, then they would see the absurdity of arguing that a system of a few dozen states characterized by just two periods of significant selection in two hundred years could possibly bear the weight of analogy to strong and continuous Darwinian selection occurring over millennia in natural populations numbering in the millions.

Abandoning the Selection Axiom in the light of the arguments against it presented in this Article would give IR theorists free rein to postulate a wide variety of explanations for the dynamics of the international system. One such explanation is domestic politics; another, and one implicitly supported by a good deal of the analysis of this Article, is pure randomness. To scholars of international law, however, a field of explanatory constraints freed from the Selection Axiom is fertile field for explanations or justifications of international law. If states may survive while conducting a foreign policy that is not rational and egoistic, then states may survive—perhaps even thrive—while cooperating with other states through any of a variety of means, most definitely including international law. As a method of cooperation, international law has a number of advantages. International law carries with it some measure of the moral authority possessed by domestic law. International law sharpens the notion of just what behavior constitutes cooperation, as well as when plausibly to make such judgments. International law provides a well-defined set of procedures and rhetorical styles within which sovereign states can comfortably work out limitations on their sovereignty in the name of common benefits. Freed from the shackles of the Selection Axiom, states may gain a crucial means of prosperity in international law.

APPENDICES: EXITS, ENTRANCES, AND PRIOR EXISTENCES IN THE INTERNATIONAL SYSTEM, 1816-1992

APPENDIX A: STATES THAT HAVE NEVER SUFFERED STATE DEATH

State	Year of Birth (or, if 1816, then year of birth was earlier than 1816)
United States of America	1816
United Kingdom	1816
Switzerland	1816
Spain	1816
Portugal	1816
Italy	1816
Russia	1816
Sweden	1816
Turkey	1816
Brazil	1826
Mexico	1831
Colombia	1831
Peru	1839
Chile	1839
Venezuela	1841
Argentina	1841
Bolivia	1848
Ecuador	1854
Iran	1855
China	1860
Guatemala	1868
El Salvador	1875
Paraguay	1876
Rumania	1878
Uruguay	1882
Thailand	1887
Honduras	1899
Nicaragua	1900
Bulgaria	1908
Cuba	1909
Finland	1917
Hungary	1919
Canada	1920
Costa Rica	1920
Panama	1920
Liberia	1920

State	Year of Birth (or, if 1816, then year of birth was earlier than 1816)
South Africa	1920
Afghanistan	1920
Nepal	1920
Australia	1920
New Zealand	1920
Mongolia	1921
Ireland	1922
Dominican Republic	1924
Saudi Arabia	1927
Iraq	1932
Haiti	1934
Egypt	1937
Ethiopia	1941
Luxemburg	1944
France	1944
Albania	1944
Yugoslavia	1944
Greece	1944
Iceland	1944
Netherlands	1945
Belgium	1945
Poland	1945
Norway	1945
Denmark	1945
Lebanon	1946
Jordan	1946
Philippines	1946
India	1947
Pakistan	1947
Israel	1948
Korea, North	1948
Burma	1948
Sri Lanka	1948
Republic of China	1949
Korea,South	1949
Indonesia	1949
Libya	1951
Japan	1952
Cambodia	1953
Laos	1953

State	Year of Birth (or, if 1816, then year of birth was earlier than 1816)
Vietnam, Dem. Rep. of	1954
Austria	1955
Morocco	1956
Tunisia	1956
Sudan	1956
Ghana	1957
Malaysia	1957
Guinea	1958
Cyprus	1960
Mali	1960
Senegal	1960
Benin	1960
Mauritania	1960
Niger	1960
Ivory Coast	1960
Burkina Faso	1960
Togo	1960
Cameroun	1960
Nigeria	1960
Gabon	1960
Central African Republic	1960
Chad	1960
Congo	1960
Zaire	1960
Somalia	1960
Malagasy Republic	1960
Sierra Leone	1961
Tanzania	1961
Syria	1961
Kuwait	1961
Jamaica	1962
Trinidad and Tobago	1962
Uganda	1962
Burundi	1962
Rwanda	1962
Algeria	1962
Kenya	1963
Malta	1964
Zambia	1964
Malawi	1964

State	Year of Birth (or, if 1816, then year of birth was earlier than 1816)
Gambia	1965
Zimbabwe	1965
Maldive Islands	1965
Singapore	1965
Barbados	1966
Guyana	1966
Lesotho	1966
Botswana	1966
Equatorial Guinea	1968
Swaziland	1968
Mauritius	1968
Fiji	1970
Bahrain	1971
Qatar	1971
United Arab Emirates	1971
Oman	1971
Bhutan	1971
Bangladesh	1972
Bahamas	1973
Grenada	1974
Guinea-Bissau	1974
Surinam	1975
Cape Verde	1975
Sao Tome-Principe	1975
Angola	1975
Mozambique	1975
Comoros	1975
Papua New Guinea	1975
Seychelles	1976
Western Samoa	1976
Djibouti	1977
Dominica	1978
Solomon Islands	1978
St. Lucia	1979
St. Vincent and the Grenadines	1979
Antigua & Barbuda	1981
Belize	1981
Vanuatu	1981
St. Kitts-Nevis	1983

State	Year of Birth (or, if 1816, then year of birth was earlier than 1816)
Brunei	1984
Liechtenstein	1990
Germany	1990
Namibia	1990
Yemen	1990
Moldova	1991
Estonia	1991
Latvia	1991
Lithuania	1991
Ukraine	1991
Belarus	1991
Armenia	1991
Georgia	1991
Azerbaijan	1991
Turkmenistan	1991
Tajikistan	1991
Kyrgyz Republic	1991
Uzbekistan	1991
Kazakhstan	1991
Marshall Islands	1991
Federated States of Micronesia	1991
San Marino	1992
Croatia	1992
Bosnia-Herzegovina	1992
Slovenia	1992

APPENDIX B: STATES THAT DIED (AND YEAR OF REBIRTH)

State	Date of Birth	Date of Death	Date of Rebirth
Papal States	Extant in 1816	1860	None
Modena	1842	1860	None
Parma	1851	1860	None
Tuscany	Extant in 1816	1860	None
Two Sicilies	Extant in 1816	1861	None
Hanover	1838	1866	None
Hesse Electoral	Extant in 1816	1866	None
Saxony	Extant in 1816	1867	None
Hesse Grand Ducal	Extant in 1816	1867	None
Mecklenburg Schwerin	1843	1867	None
Paraguay	1846	1870	1876
Baden	Extant in 1816	1870	None
Wuerttemburg	Extant in 1816	1870	None
Bavaria	Extant in 1816	1871	None
Tunisia	1825	1881	1956
Egypt	1855	1882	1937
Korea	1887	1905	None
Cuba	1902	1906	1909
Morocco	1847	1911	1956
Haiti	1859	1915	1934
Dominican Republic	1894	1916	1924
Austria-Hungary	Extant in 1816	1918	None
Ethiopia	1898	1936	1941
Austria	1919	1938	1955
Poland	1919	1939	1945
Czechoslovakia	1918	1939	1945
Albania	1914	1939	1944
Netherlands	Extant in 1816	1940	1945
Belgium	1830	1940	1945
Luxemburg	1920	1940	1944
Estonia	1918	1940	1991
Latvia	1918	1940	1991
Lithuania	1918	1940	1991
Norway	1905	1940	1945
Denmark	Extant in 1816	1940	1945
Yugoslavia	1878	1941	1944
Greece	1828	1941	1944
France	Extant in 1816	1942	1944
Germany	Extant in 1816	1945	1990

State	Date of Birth	Date of Death	Date of Rebirth
Japan	1860	1945	1952
Syria	1946	1958	1961
Zanzibar	1963	1964	None
Vietnam, Republic of	1954	1975	None
German Federal Republic	1955	1990	None
German Democratic Republic	1954	1990	None
Yemen Arab Republic	1926	1990	None
Yemen People's Republic	1967	1990	None

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Hidden Slaves: Forced Labor in the United States

Hidden Slaves
Forced Labor in the United States

By
Free the Slaves, Washington, D.C., and the Human Rights Center of the University of California, Berkeley*

I.
Executive Summary

Forced labor is a serious and pervasive problem in the United States. At any given time, ten thousand or more people work as forced laborers in scores of cities and towns across the country. And it is likely that the actual number is much higher, possibly reaching into the tens of thousands. Because forced labor is *hidden*, *inhumane*, *widespread*, and *criminal*, sustained and coordinated efforts by U.S. law enforcement, social service providers, and the general public are needed to expose and eradicate this illicit trade.

The International Labor Organization (ILO) Convention Concerning Forced Labor 29 defines forced labor, with exceptions, as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[1]

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Research for this report was conducted under the direction of Kevin Bales, Laurel Fletcher, and Eric Stover by Kevin Bales, Camilla Brown, Terry Coonan, Laurel Fletcher, Natalie Hill, Steve Lize, Kristin Madigan, Jacob Patton, Natasha Pinto, Rachel Shigekane, and Eric Stover. Harvey Weinstein consulted on the research design of the case studies. The Center for the Advancement of Human Rights at Florida State University conducted a survey of forty-nine social service providers in the United States.

Further research assistance was provided by Alexander Freeman, Abigail Lloyd, Angele Motlagh, L. Kathleen Roberts, Rebecca Tanner, Kaja Tretjak, and Charlotte J. Wiener of the International Human Rights Law Clinic at U.C. Berkeley. Jolene Smith of Free the Slaves and Mark Gertz and Pippin Whitaker of the Center for the Advancement of Human Rights, Florida State University, provided valuable assistance to this project. The researchers gratefully acknowledge the courage of survivors to speak with us in the hope that telling their stories will help eliminate forced labor.

1. Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, art. 2(1), 39 U.N.T.S. 55, 58 (entered into force May 1, 1932) [hereinafter Forced Labour Convention]. The ILO Convention on the Elimination of the Worst Forms of Child Labour 182 adds that these types of child labor comprise (a) "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced

This report documents the nature and scope of forced labor in the United States from January 1998 to December 2003. It is the first study to examine the numbers, demographic characteristics, and origins of victims and perpetrators of forced labor in the United States and the adequacy of the U.S. response to this growing problem since the enactment of the Victims of Trafficking and Violence Protection Act of 2000 (Trafficking Act). The report is based on data obtained from a telephone survey of forty-nine service providers that have worked with or are experts in forced labor cases, a press survey of 131 incidents of forced labor, and eight case studies of forced labor in different regions of the United States. The study was conducted by a team of researchers from Free the Slaves[2] and the Human Rights Center of the University of California, Berkeley.[3]

Victims of forced labor come from numerous ethnic and racial groups. Most are "trafficked" from thirty-five or more countries and, through force, fraud, or coercion, find themselves laboring against their will in the United States. In the study, Chinese comprised the largest number of victims, followed by Mexicans and Vietnamese. Some victims were born and raised in the United States and found themselves pressed into servitude by fraudulent or deceptive means. Over the past five years, forced labor operations have been reported in at least ninety U.S. cities. These operations tend to thrive in states with large populations and sizable immigrant communities, such as California, Florida, New York, and Texas—all of which are transit routes for international travelers.

Forced labor is prevalent in five sectors of the U.S. economy: prostitution and sex services (46%), domestic service (27%), agriculture (10%), sweatshop/factory (5%), and restaurant and hotel work (4%). Forced labor persists in these sectors because of low wages, lack of regulation and monitoring of working

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or compulsory recruitment of children for use in armed conflict"; (b) "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances"; (c) "the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties"; and (d) "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, art 3(a)-(d), S. Treaty Doc. No. 106-5, 1, 4, 38 I.L.M. 1207, 1208 (entered into force Nov. 19, 2000).

2. Free the Slaves is a non-profit, non-partisan organization dedicated to ending slavery worldwide. Founded in 2000, Free the Slaves works to empower grassroots anti-slavery organizations, educate the public about the existence of slavery, eliminate slave-made goods from product supply chains, encourage governments to enact and enforce anti-slavery laws, and conduct social science-based research on slavery and human trafficking. Free the Slaves seeks to create an inclusive and diverse movement, respecting the dignity and views of all people involved in eradicating slavery; base all strategies on accurate research; support sustainable solutions, preventing adverse repercussions for those we aim to assist; and seek guidance and ideas from agencies around the world that are carrying our local and regional anti-slavery programs.

3. Founded in 1994 with the assistance of The Sandler Family Supporting Foundation, the Human Rights Center (HRC) is a unique interdisciplinary research and teaching enterprise that reaches across academic disciplines and professions to conduct research in emerging issues in international human rights and humanitarian law. The HRC complements and supports the work of nongovernmental human rights organizations by drawing upon the creativity and expertise of researchers from several diverse university programs and departments including anthropology, demography, ethnic studies, geography, journalism, law, political science, and public health. The HRC collaborates closely with the International Human Rights Law Clinic and the Berkeley War Crimes Study Center at the University of California, Berkeley.

conditions, and a high demand for cheap labor. These conditions enable unscrupulous employers and criminal networks to gain virtually complete control over workers' lives.

The U.S. government has been a leader in recognizing and combating forced labor worldwide. The Trafficking Act embodies an aggressive, proactive approach to the problem of human trafficking and forced labor that:

- *criminalizes* procuring and subjecting another human being to peonage, involuntary sex trafficking, slavery, involuntary servitude, or forced labor;
- provides social services and legal *benefits* to survivors of these crimes, including authorization to remain in the country;
- provides funding to support *protection programs* for survivors in the United States as well as abroad; and
- includes provisions to *monitor and eliminate* trafficking in countries outside the United States.

Despite these considerable advancements, the Trafficking Act has some notable shortcomings. The act conditions immigration relief and social services on prosecutorial cooperation and thus creates the perception that survivors are primarily instruments of law enforcement rather than individuals who are, in and of themselves, deserving of protection and restoration of their human rights.

Furthermore, more proactive measures need to be taken to train law enforcement officers, particularly at the local level, to identify victims and forced labor operations; improve cooperation and information sharing on forced labor between federal and state agencies; revise procedures for the handling of survivors; and provide survivors with protection, benefits, and compensation.

By and large, victims of forced labor are reluctant to report abuse to law enforcement personnel because they fear retribution from their traffickers. Many victims also have an inherent fear of police based on their past experiences with corrupt authorities in their home countries and communities. To overcome these obstacles, there is an urgent need to train law enforcement personnel at all levels to recognize and assist trafficking victims.

Trafficking is defined almost exclusively as a federal crime to be handled by federal authorities. This limited mandate has hindered coordination between federal and state law enforcement agencies and, in turn, has allowed perpetrators of forced labor to go undetected. Moreover, federal law enforcement personnel are often unable to protect survivors and their families from traffickers because authorities lack the necessary legal tools, assistance, and funds to provide them with secure and safe refuge. Taken together, these obstacles can impede a survivor's willingness to cooperate in criminal investigations.

Forced labor survivors are at significant risk of developing health-related problems. Most survivors come from impoverished areas of the world where access to adequate health care is limited or nonexistent. Because forced labor victims often circumvent formal medical screenings for migrants, many arrive in the United States without proper immunizations and bearing communicable diseases. Once trafficked migrants reach their destination in the United States, they continue to face a variety of health risks as they begin working in dangerous and unregulated work environments. Those who work in the sex trade are especially

at risk of contracting HIV or other sexually transmitted diseases. Perpetrators of forced labor frequently use violence or the withholding of food as a means of "breaking," controlling, and punishing their workers.

Victims of forced labor often suffer psychological assaults designed to keep them submissive. Cut off from contact with the outside world, they can lose their sense of personal efficacy and control, attributes that mental health professionals have long considered essential to good mental and physical health. In such situations, many forced labor victims become increasingly dependent on their captors, if merely to survive. While little is known about the specific psychological sequelae of forced labor, survivors often report feelings of depression, recurring nightmares, and panic attacks.

While the Trafficking Act has greatly amplified the federal government's role in investigating and prosecuting forced labor cases in the United States, the job of providing basic social and legal services to survivors has fallen squarely on the shoulders of nongovernmental organizations (NGOs) and social service agencies. Yet fewer than half of these agencies are able to meet these needs. Social service agencies report that finding appropriate housing for survivors has been one of their greatest challenges. Housing that is safe and secure can protect survivors from their former captors. Yet housing of any kind can be costly for social service agencies. Much would be gained if these agencies were provided with greater financial support so that they could provide survivors of forced labor with safe and adequate housing and other basic legal and social services.

We recommend that the U.S. government undertake the following measures to combat forced labor in the United States:

1. *Start a broad-based awareness-raising campaign about human trafficking and forced labor in the United States with special attention to reaching immigrant communities.* Private citizens should be informed about the characteristics of forced labor operations and how to identify potential victims. Further, increased public awareness about the demand for goods and services provided by forced labor can foster public pressure on employers and manufacturers to eradicate conditions that generate market vulnerabilities to the use of forced labor.

2. *Improve the institutional capacity of law enforcement personnel at the local, state, and federal level to respond to forced labor and trafficking.* The U.S. government should increase training and coordination of officials involved in the identification, investigation, and prosecution of perpetrators. In addition, more resources should be devoted to enable service agencies to aid existing clients and to conduct outreach that might result in identifying more victims.

3. *Ensure better legal protections and monitoring of workers in sectors such as agriculture, domestic labor, garment manufacturing, and food service that are particularly vulnerable to forced labor and trafficking.* The U.S. government should promote accountability in sectors, especially agriculture and garment manufacturing, which use subcontracting systems that violate labor laws and practices.

4. *Correct aspects of migration policy that provide incentives for unscrupulous employers to use forced labor.* The U.S. government should eliminate the visa requirement that requires each worker to remain with one particular employer. This would help reduce the vulnerability of low-wage workers to exploitation.

5. *Strengthen protection and rehabilitation programs for survivors.* To address short-term needs of survivors, the U.S. government should create incentives for survivors to come forward and cooperate with law enforcement personnel. This includes developing mechanisms to protect victims and family members vulnerable to retaliation and threats by traffickers in home countries. U.S. authorities should also review eligibility requirements for immigration relief, as well as their administration, to ensure that they are consistent with the goal of supporting and protecting survivors. Increased public and private support to social service agencies is necessary to provide adequate, safe housing to survivors upon liberation from captivity. Once survivors feel safe and secure, they are more likely to aid law enforcement personnel in the prosecution of suspected traffickers.

II.
INTRODUCTION

MIGRANT-CAMP OPERATORS FACE FORCED LABOR CHARGES
The New York Times, June 21, 2002
TAKOMA PARK COUPLE ENSLAVED WOMAN
The Washington Post, June 10, 2003
SLAVERY IN FLORIDA'S CITRUS GROVES
The Miami Herald, Nov. 21, 2002
"COYOTES" OFFER EVIL DEAL: HONDURANS FORCED INTO PROSTITUTION
The Washington Times, July 23, 2002

For most Americans, the occasional newspaper headline is the only indication that forced labor exists in the United States. Each year, forced labor generates millions of dollars for criminals who prey on the most vulnerable—the poor, the uneducated, and the impoverished immigrant seeking a better life. Held as captives, victims of forced labor toil in slave-like conditions for months and even years with little or no contact with the outside world. Those who survive enslavement face enormous challenges as they struggle to regain control over their shattered lives. Forced labor is a serious and pervasive problem in the United States for four reasons: it is *hidden*, it is *inhumane*, it is *widespread*, and it is *criminal*.

Forced Labor Is Hidden

Each year thousands of men, women, and children are trafficked into the United States and forced to work without pay in deplorable conditions. Most of them are rarely seen in public places. Hidden from view, they toil in sweatshops, brothels, farms, and private homes. To prevent them from escaping, their

captors confiscate their identification documents, forbid them from leaving their workplaces or contacting their families, threaten them with arrest and deportation, and restrict their access to the surrounding community.

Forced Labor Is Inhumane

Victims of forced labor have been tortured, raped, assaulted, and murdered. They have been held in absolute control by their captors and stripped of their dignity. Some have been subjected to forced abortion, dangerous working conditions, poor nutrition, and humiliation. Some have died during their enslavement. Others have been physically or psychologically scarred for life. Once freed, many will suffer from a host of health-related problems, including repetitive stress injury, chronic back pain, visual and respiratory illnesses, sexually transmitted diseases, and depression.

Forced Labor Is Widespread

Forced labor exists in ninety cities across the United States. It is practiced in a wide range of industrial sectors, including domestic service, the sex industry, food service, factory production, and agriculture. In the last five years alone, the press has reported 131 cases of forced labor in the United States involving 19,254 men, women, and children from a wide range of ethnic and racial groups.[4] Although many victims are immigrants, some are U.S. residents or citizens.

Forced Labor Is Criminal

Forced labor is universally condemned and outlawed. Its practice in the United States violates a host of laws, including prohibitions on indentured servitude, money laundering, and tax evasion. Yet criminals find it a highly profitable and lucrative enterprise. Their workers are forced to be docile, and when problems arise, "employers" know they can rein workers in with threats and physical violence. Criminals also have learned that the odds are good that they will never be held accountable in a court of law.

The Study

The United States is at a critical juncture in its struggle to end forced labor. In 2000, the U.S. government enacted new laws to hold perpetrators of forced labor accountable and to assist survivors freed from captivity. Since then, both prosecutions of suspected wrongdoers and the number of social and legal service providers assisting survivors have increased exponentially. As efforts to stamp out forced labor gather speed, there is a need to evaluate the record to date and to propose new measures that will further strengthen the eradication of this egregious practice. To this end, Free the Slaves and the Human Rights Center at the University of California, Berkeley, with the assistance of the Center for the Ad-

4. Of these 131 cases, 105 listed the number, or the estimated number of persons who had been found in a situation of forced labor.

vancement of Human Rights at Florida State University, conducted a study of the nature and scope of forced labor in the United States to assess efforts of the government and NGOs to address the problem and recommend measures to improve the U.S. response to forced labor.

The research team employed a combination of quantitative and qualitative research methodologies. To gain an understanding of the numbers, demographic characteristics, and origins of those in forced labor in the United States, we conducted:

- a survey of newspaper articles reporting incidents of forced labor between January 1998 and December 2003;[5]
- a telephone survey of forty-nine service providers that have worked with or are knowledgeable about forced labor cases;[6]
- a review of reports published by the U.S. government regarding the number of forced labor cases it has investigated and prosecuted.

To gain knowledge regarding the experience of survivors of forced labor and the adequacy of the United States response, we also conducted:

- a review of the U.S. and international laws regarding forced labor;
- interviews with key informants, including government officials, service providers, and advocates, who have extensive experience with forced labor;
- eight case studies of forced labor in different regions of the United States that illustrate how the problem has affected a wide range of economic and demographic sectors.[7]

Of the eight case studies selected for study, one involved forced prostitution, two involved servitude of domestic workers, two involved agricultural workers, two involved factory workers, and one involved children who had been sexually abused and forced to work in the restaurant and service industries. In conducting the case studies, researchers often encountered difficulty gaining access to survivors. Some service providers and advocates were unwilling to convey our request for participation in this study to their clients, citing the need to

5. More than 300 published news reports for the period of January 1998 through December 2003 were reviewed for the survey. Cases that seemed to meet the criteria set out in ILO Convention 29 on forced labor were then coded into an SPSS format for analysis. When a case of forced labor was covered in more than one news report, the information from the multiple reports was combined into a single computer record. A total of 131 individual cases of forced labor were identified, each case having from one to thousands of victims. The following variables were recorded for each case: location of violation; city of violation; country of origin (victim); number in forced labor; whether a minor was involved; economic sector of exploitation; type of visa held by victim, if any; country of origin of perpetrator; story title and author; report citation; and contact name for story, if any.

6. A telephone research unit at Florida State University contacted forty-nine service provision agencies across the United States. Respondents in the agencies were asked a series of questions aimed at discovering if that agency had helped individuals who were caught in situations of forced labor. If such cases were reported, then questions were asked concerning the age and gender of the victims; the economic sector of exploitation; if the victims were minors, whether they had been sexually abused; the country of origin of the victim; the country of origin of the perpetrator; whether there had been arrests or prosecutions in relation to the case; the current situation of the victims; and further contact information for the agency. These data were then coded into an SPSS format for analysis.

7. Information for the case studies was gathered from a wide range of sources, including news reports, legal records, and interviews. The cases were selected to be illustrative of forced labor in different sectors and regions.

protect them from contact with individuals who were not directly involved in their cases. This access barrier to survivors may impede success of further research regarding the effects of forced labor on survivors and may influence how well clients are served by the current U.S. response. Despite this challenge, researchers interviewed six survivors.

The Case against Kil-Soo Lee: Sweatshop Workers in American Samoa

Kil-Soo Lee, a Korean businessman, recruited women primarily from China and Vietnam to work in his garment factory on the island of American Samoa from 1998 until the factory closed in late 2000. Kil-Soo Lee used employment contract fees and penalties to trap the workers into remaining with the company. He kept workers locked in the factory compound, withheld food as punishment, and authorized violent retaliation for resistance on the part of the workers. In February 2003, Kil-Soo Lee was convicted of criminal charges of involuntary servitude, extortion, and money laundering.

The Case against Lakireddy Bali Reddy: Sexual Exploitation in California

Lakireddy Bali Reddy, a local businessman, sexually exploited several young girls from his native village in India. Uncovered in January 2000, his sex and labor exploitation ring spanned fifteen years and operated in India and California. He repeatedly raped and sexually abused his victims and forced them to work in his businesses in Berkeley, California, including a well-established Indian restaurant. Reddy pleaded guilty to criminal charges related to immigration fraud and illegal sexual activity and agreed to pay $2 million in restitution to several of his victims.

The Case against Victoria Island Farms/JB Farm Labor Contractor: Exploitative Farm Labor in California

California asparagus harvesters, numbering in the hundreds, were forced to harvest the high-priced vegetable in substandard conditions for virtually no pay on the property of Victoria Islands, an internationally known asparagus grower, during the 2000 growing season. Hired by JB Farm Labor Contractor, the workers, recruited mostly from Mexico, were powerless to stop the huge deductions for transportation and other "debts" the employer deducted from their weekly paychecks. Some escaped during the season. Some of the workers filed a civil case against JB Farm Labor Contractor and Victoria Island Farms that resulted in the defendants' paying the workers the wages owed them.

The Case against R&A Harvesting: Forced Farm Labor in Florida

Florida citrus pickers endured abuse by R&A Harvesting, a farm labor contractor, between January 2000 and June 2001. The company used threats of violence to force as many as 700 Mexican and Guatemalan workers to labor for little or no pay. After R&A Harvesting employees attacked a van driver sus-

pected of assisting the workers, the Coalition of Immokalee Workers, a local community organization, pressured prosecutors to investigate the allegations of forced labor. The owners of R&A Harvesting, the three Ramos brothers and a cousin, were tried and convicted of forced labor charges in 2002.

The Case against the Cadena Family: Forced Prostitution in Florida and South Carolina

Based in Mexico, Cadena family members lured young girls and women to come to the United States ostensibly to work as waitresses and domestic workers. Between August 1996 and February 1998, the Cadena family brought between twenty-five and forty unsuspecting victims to Florida and South Carolina and forced them to work as prostitutes to service primarily Mexican migrant farm workers. In March 1998, several Cadena family members and their associates were brought to justice, receiving criminal sentences ranging from two to fifteen years imprisonment.

The Case against Supawan Veerapool: Enslavement of a Domestic Service Worker in California

In 1989, a Thai woman by the name of Supawan Veerapool, the common law wife of Thailand's ambassador to Sweden, brought a domestic worker to Los Angeles to provide household support in her home. On arrival in the United States, Veerapool confiscated the domestic worker's passport and then forced her to work twenty-hour days, six days a week until she escaped in 1998. Convicted on criminal charges in 1999, Veerapool was sentenced to eight years in prison.

The Case against the John Pickle Company: Forced Labor in a Factory in Oklahoma

In 2001, the Al-Samit International agency recruited qualified skilled workers in India by promising them good jobs in a factory that manufactured pressure valves in the state of Oklahoma. On arrival, the John Pickle Company forced the workers to surrender their travel documents, live in the factory, and work twelve to sixteen hours a day, six days a week, for well below the legal minimum wage. By February 2002, all of the approximately fifty workers had managed to escape. They later filed a civil suit against their former employer. Subsequently, the U.S. Equal Employment Opportunity Commission, the federal agency charged with investigating and filing cases of employment discrimination, filed a separate civil action against the John Pickle Company.

The Case against the Satia Family: Forced Domestic Servitude in Washington, D.C.

The Satias, two Cameroonian sisters and their husbands, recruited young Cameroonian girls, aged fourteen and seventeen, to work as domestics in their Washington, D.C. homes. They recruited the girls with the promise of studying

in the United States in exchange for providing childcare and domestic help. Once in the United States, the Satias confined the domestic servants to their homes and forced them to work in excess of fourteen hours a day without remuneration and under threat of violence and deportation. The younger survivor escaped in 1999 after two years of captivity. A year later, the older survivor fled, after having endured five years of exploitation. In 2001, the Satia sisters and their husbands were charged with forced labor. Found guilty, they received criminal sentences ranging from five to nine years and were ordered to pay their victims over $100,000 in restitution.

The rest of this report consists of six sections. Section 3 provides background and analysis of the causes and extent of forced labor in the United States. It reviews the literature and research on the structure of labor markets and their relationship to maintaining forced labor. It also examines data collected on forced labor to determine geographic and demographic patterns, as well as the occurrence of forced labor in particular economic sectors. Section 4 reviews the legal history of prohibitions against forced labor in the United States and at the international level. Section 5 examines the way in which U.S. laws are enforced against traffickers and used to assist survivors of forced labor. Section 6 discusses the impacts of trafficking and forced labor on the health of survivors. Section 7 sets out the numerous challenges that social and legal service providers face in their efforts to meet the needs of survivors. Finally, Section 8 presents our conclusions and recommendations to strengthen the U.S. response to forced labor.

III.
ENDING FORCED LABOR IN THE UNITED STATES

Forced labor exists in the United States because factors in the U.S. economy, the legal system, and immigration policy support it. Forced labor is a problem that is driven by a growing "informal economy" in the United States. The International Labor Organization (ILO) defines an informal economy as "all remunerative work—both self-employment and wage employment—that is not recognised, regulated, or protected by existing legal or regulatory frameworks and non-remunerative work undertaken in an income-producing enterprise."[8] Forced labor exists in both legal and illegal industries that are poorly regulated and fail to comply with U.S. labor laws. "Employers" in such industries are often criminal entrepreneurs for whom forced labor may be one of a number of illegal activities. Over time, such employers have found that forced labor can support a lucrative business through the ready availability of free labor, better and more varied transport, new methods of secure communications, and the increased permeability of borders.

8. EMPLOYMENT SECTOR, INT'L LABOUR ORG., WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE 12 (2002).

Exposing Forced Labor

U.S. NGOs deserve the lion's share of credit for exposing the existence of forced labor in the United States. The first major bust of a forced labor operation in recent years took place in 1995, when labor rights groups uncovered a sweatshop operated by a Chinese-Thai family in El Monte, California, a small community near Los Angeles. The seventy-two workers, most of them Thai women, had been held in a compound behind fences tipped with razor wire and forced to sew garments in slave-like conditions. Outrage over the case fueled efforts of a relatively small group of advocates and government officials to end such practices. The U.S. Congress responded by adopting the Victims of Trafficking and Violence Protection Act of 2000 (Trafficking Act).[9] One effect of this process is that policymakers and advocates have taken the lead in the struggle to end forced labor. The challenge now is to raise the public's awareness of the problem and to educate and equip state and local law enforcement to recognize and destroy forced labor operations.

Public awareness of forced labor is practically nonexistent in the United States. Occasionally, the police or a group of rights advocates will expose a forced labor operation, and invariably the media will depict it as a single and shocking event. But rarely do such exposés educate the public about forced labor's place and function within the U.S. economy.

Like the public, U.S. law enforcement is largely unaware of or poorly informed about the nature of forced labor and the plight of its victims. Because most victims of forced labor are undocumented workers or illegal aliens, law enforcement often regards them as criminals rather than victims ensnared in an illicit trade. This is largely because trafficking into forced labor is considered a federal crime. As a result, state and local law enforcement personnel lack basic training on identifying the crime, protecting victims, and bringing perpetrators to justice. Ironically, treating forced labor victims as criminals only makes it easier for an "employer" to get away with the crime because prosecutions rarely succeed without cooperative eyewitnesses.

The Number of Victims

Our data suggest that at any given time 10,000 or more people are working as forced laborers in the United States.[10] It is likely that the actual number reaches into the tens of thousands. Determining the exact number of victims, however, has proven difficult given the hidden nature of forced labor and the

9. *See* Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 101-113 (2000).

10. We arrived at this estimation based on our survey of newspaper articles on 131 incidents of forced labor from January 1998 to December 2003. Of the 131 incidents, the number of people held in a situation of forced labor was reported in 105 cases. Totaling the reported numbers from these 105 cases, the survey revealed that 19,254 individuals had been subject to forced labor during this period. Our telephone survey of forty-nine social service providers revealed that the average period an individual is kept in forced labor is two to five years. This would suggest that at any given time 10,000 or more individuals are in conditions of forced labor in the United States. Though this figure is likely to be much higher, we have chosen a more conservative estimate given the absence of reliable data on the numbers of individuals in conditions of forced labor.

manner in which these figures are collected and analyzed. Data on victims of forced labor is further complicated by the U.S. government's practice of not counting the *actual* number of persons trafficked or caught in a situation of forced labor in a given year. Instead, it counts only survivors, defined by the Trafficking Act as victims of a "severe form of trafficking," who have been *assisted* in accessing immigration benefits. By this definition, the U.S. government reports that it has assisted approximately 450 survivors over the past three years.[11] Moreover, while the U.S. Department of Justice (DOJ) estimates 14,500 to 17,500 people are trafficked into the United States each year, it is unclear how these figures were calculated.[12]

Geographical Distribution of Victims

Our data suggest that forced labor operations have existed in at least ninety U.S. cities over the past five years. This figure was derived from a press survey of 131 cases of forced labor and a telephone survey of forty-nine service providers across the United States. The press survey located cases of forced labor in sixty-four cities within the United States and its territories of Saipan and Guam, while service providers reported forced labor in thirty-eight cities in seventeen states, with twelve cities appearing in both surveys. The survey of service providers also revealed that the length of time victims were held in forced labor ranged from a few weeks to more than twenty years, with the majority of cases lasting between two and five years.

Our data also suggest that forced labor operations are concentrated in the states of California, Florida, New York, and Texas—all of which are transit routes for international travelers. Cities where reported forced labor occurred also tended to be in states with large populations and sizable immigrant communities. Our data is consistent with findings of the U.S. government. The U.S. Department of Justice reports that in 2003, the largest concentrations of survivors of trafficking who received federal assistance resided in California,

11. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003 16 (2004) [hereinafter REPORT FROM ATTORNEY GENERAL], *available at* http://www.usdoj.gov/ag/speeches/2004/050104agreporttocongresstvprav10.pdf.

12. *Id.* at 3. Government estimates of the numbers of victims trafficked into the United States annually has varied and, over time, the government has revised this figure downward. A report prepared at the request of the Central Intelligence Agency states that "an estimated 45,000 to 50,000 women and children are trafficked annually to the United States, primarily by small crime rings and loosely connected criminal networks." AMY RICHARD O'NEILL, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (2000), *available at* http://www.cia.gov/csi/monograph/women/trafficking.pdf. However, in August 2003, the U.S. government released the *Assessment of U.S. Activities to Combat Trafficking in Persons*, in which it states: "The U.S. Government estimates that 18,000 to 20,000 people are trafficked annually into the United States." U.S. DEP'T OF JUSTICE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 3 (2003) [hereinafter ASSESSMENT], *available at* http://www.usdoj.gov/crt/crim/wetf/us_assessment.pdf. The reports issued in 2003 and 2004 do not explain why the government estimate has dropped by over half since 2000.

Oklahoma, Texas, and New York.[13] In 2002, the DOJ reports that survivors of trafficking who received federal assistance resided in Texas (31%), Florida (19%), and California (14%).[14]

Origins of Victims and Perpetrators

The press and service provider surveys show that, as of December 2003, victims of forced labor came from thirty-nine countries, including the United States. The range of nationalities represents most regions of the developing world, as well as more developed countries like South Korea and those of Eastern Europe. The largest number of persons discovered to be in forced labor in the United States were Chinese, followed by Mexican and Vietnamese. Because no statistical sample has been drawn, it is important to note that these counts do not represent the actual distribution of nationalities of forced laborers in the United States, but the recorded nationalities may be thought of as indicative of the general pattern.

Human trafficking and forced labor are normally considered crimes that primarily involve foreign nationals, but our research recorded twenty cases involving approximately seventy-one victims who are U.S. citizens. It is possible that cases involving U.S. citizens are more likely to be detected and also more likely to gain press coverage, but until more comprehensive surveys are carried out, better estimations of the nationalities of forced labor victims will not be possible. The two combined surveys documented Chinese nationals as the largest group of victims (eleven cases with approximately 10,000 individuals). Mexican victims were the second-most numerous (twenty-five cases involving approximately 1500 individuals), followed by Vietnamese (six cases involving approximately 250 individuals).[15]

In contrast, the DOJ estimates that the countries of origin for the greatest number of survivors who received federal assistance in 2003 were India (38%), Vietnam (11%), Mexico (9%), Indonesia (5%), Tonga (5%), Zambia (5%), and Thailand (4%).[16] In 2002, the most common countries of origin were Honduras (36%) and Mexico (35%).[17]

Our data indicate the nationality or ethnicity of perpetrators closely matched that of victims. A common pattern is that those caught in situations of forced labor are brought into the United States and then exploited by perpetrators of the same nationality or ethnicity. Often the perpetrators are recently naturalized U.S. citizens with close ties to their country of origin. Russian-Americans, Chinese-Americans, and Mexican-Americans were all noted as perpetrators in cases in the surveys, primarily in the areas of prostitution, agricul-

13. REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 9. These concentrations reflect where survivors resided at the time they received federal assistance, not necessarily where the forced labor operations occurred. *Id.*

14. *Id.* at 9 n.1.

15. *See* Appendix for chart listing survey results.

16. REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 10.

17. *Id.* at 10 n.1.

ture, and restaurant work. The economic sectors where longer-term U.S. citizens were found to be exploiting forced labor follow the same pattern. These sectors include prostitution and child sex exploitation (fourteen cases); agriculture (five cases); services, restaurants, and commercial (three cases); sexual abuse of children (three cases); domestic service (two cases); and mail-order brides (one case).

When the perpetrator was a U.S. citizen not of recent origin, the cases tended to concentrate in certain areas of exploitation, especially the sexual exploitation of children and the trafficking of very young children for adoption.

Economic and Demographic Sectors

In our survey of press reports, forced labor was found predominantly in prostitution, domestic work, agriculture, sweatshop factories, restaurant and hotel work, and entertainment.[18] The DOJ data indicate similar findings; the highest concentrations of trafficking survivors who received federal assistance had been held as prostitutes, domestic servants, agricultural laborers and sweatshop factory workers.[19] By economic sector, the distribution of the recorded cases was fifty-eight prostitution cases (46.4%); thirty-four domestic service cases (27.2%); thirteen agricultural cases (10.4%); six sweatshop or factory cases (4.8%); five service, food, or care cases (3.8%); four sexual exploitation of children cases (3.1%); four entertainment cases (3.1%); and one mail-order bride case (0.8%).[20]

Prostitution and Sex Services

The data from our press and service provider surveys suggest that prostitution is the sector in which the largest amount of forced labor occurs in the United States. It appears that the trafficking of women for prostitution and children for sexual exploitation are:

- highly profitable activities that are often tied to organized crime;
- driven by a demand for cheap sex services and child sex; and
- crimes that can be linked to existing migration patterns and immigrant community infrastructures that have emerged from the lack of safe and legal means of migration to the United States

Although little research exists addressing the connections between forced prostitution and existing "sex markets" in the United States, it stands to reason that these markets may encourage forced prostitution and the commercial sexual exploitation of children. These markets comprise a variety of activities, includ-

18. In our eight case studies, the numbers of victims in each instance ranged from one to 700. Across the studies, there were 800 to 1100 individuals forced into agricultural work, 321 forced into sweatshop factory work, twenty-five to forty forced into prostitution, and three forced into domestic service. At least three, and possibly twenty-five, children were sexually exploited in addition to being forced into service sector work.

19. REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 10.

20. In six cases, the press did not report the economic sector in which the forced labor occurred. Of the 131 cases of forced labor found in the survey of press reports, forty-five (36.3%) involved children. Approximately 1200 child victims (those under the age of eighteen) were exploited in these cases.

ing prostitution, pornography, striptease and erotic dancing, and peep shows, and they are sometimes under the control of organized crime networks.[21] While prostitution is illegal in most states of the United States, striptease is legal in many states, as is the sale of pornography, which is pervasive and constitutionally protected. For organized crime networks, the combination of legal and illegal sexual services is normally part of a larger portfolio of products and services that includes drugs and drug trafficking as well.

The connection between the demand for sex services and the sexual exploitation of women and children in the United States has not been researched in a comprehensive and conclusive way. We lack quantitative data on the magnitude of the demand for sex services, the organization of the sex service economy, and its regulation. Despite this paucity of information, there appears to be little question that traffickers would not be engaged in this lucrative trade if a considerable demand for it did not exist.

Our data suggest that sex traffickers usually recruit victims of their own nationality or ethnic background. Sex trafficking appears to be closely linked to migrant smuggling enterprises run by Asian, Mexican, and Eastern European organized crime networks, among others. Some of these operations feed victims into situations of forced labor. For example, for eighteen months, beginning in August 1996, the Cadena family trafficked twenty-five to forty women and girls from their hometown in Veracruz and forced them to work as prostitutes servicing migrant workers in the United States. It appears that the Cadenas targeted the migrant worker community by design. First, they recognized and promoted a demand for cheap sex services in communities of migrant workers and then supplied it. Second, they chose remote farms where the migrant workers were isolated, hidden from law enforcement, and unlikely to be visited by inspection teams from the Department of Labor. Finally, they were confident that neither the women nor the men, most of whom were undocumented immigrants, would report the operators to the authorities for fear of arrest and deportation.

Domestic Service

According to our survey data, the second highest incidence of forced labor takes place in domestic service in U.S. homes. Two case studies of forced domestic servitude were made for this study, one involving two young women from Cameroon who were brought to a suburb of Washington, D.C., and the other involving a Thai woman who was brought to Los Angeles, California. Our study indicates that forced labor in domestic work is fueled by the following:

- the demand for cheap, exploitable household help;
- the lack of legal protections in the domestic service sector; and
- the absence of monitoring of work conditions

21. JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 8-9 (2001).

U.S. citizens and foreign nationals living in the United States bring thousands of domestic workers into the country, and many of them suffer abuse.[22] The captive servants have included women from Brazil, Ivory Coast, Ethiopia, Nepal, Ghana, and India. Such cases are driven by a burgeoning demand for cheap, docile, exploitable household labor.[23] Like agricultural workers, domestic workers have few legal protections.

U.S. labor law does not define household workers as "employees" under the National Labor Relations Act (NLRA), thus denying them certain protections and restricting their ability to organize for better wages and working conditions.[24] Another factor increasing their vulnerability is an immigration policy that allows domestic workers to be brought to the United States by their employers.[25] Visas normally require that domestic service workers remain with their original employer or face deportation. This requirement tends to discourage workers from reporting abuses. Additionally, some perpetrators are foreign nationals who rely on diplomatic immunity to shield themselves from punishment if their use of forced labor is uncovered.

Monitoring the working conditions of domestic service workers is also difficult because work takes place in private homes. In each of our case studies of domestic workers, the "employer" effectively isolated the worker through threats and intimidation. For example, in the case of forced domestic servitude in the Washington, D.C. area, the victims' employers repeatedly lectured them about exaggerated dangers of life in the United States. The older survivor recalled her "boss," Vivian Satia, telling her, "It's not everybody can make it in America. It's dangerous out there. . . . You can go out there and get killed."[26] Satia and her sister told their captives that U.S. immigration authorities would be looking for them to arrest and deport them if they ventured outside alone.

Agriculture

The agricultural sector experiences a high occurrence of forced labor in the United States. Farm workers in general are particularly vulnerable. A number of factors allow this:

- agricultural wages are stagnant and working conditions are poor;
- legal protections for agricultural workers are weak; and
- monitoring of work conditions is scant.

22. Phuong Ly, *Pair Convicted of Enslaving Housekeeper*, WASH. POST, Dec. 21, 2001, at B1.

23. *See* BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? 29-32 (Int'l Org. for Migration Research Series, No. 15, 2003).

24. National Labor Relations Act, 29 U.S.C. § 152(3) (2003) ("The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home.").

25. The U.S. government issues close to 4000 A-3 and G-5 visas for household employees of diplomats and employees of international agencies every year. Joy Mutanu Zarembka, *Maid to Order*, COLORLINES, Fall 2001, at 27. In addition, B-1 visas provide another option for foreign nationals and U.S. citizens with permanent residency abroad wanting to bring domestic help into the United States. *Id.*

26. David France, *Slavery's New Face*, NEWSWEEK, Dec. 18, 2000, at 60.

Agriculture is one of the most profitable sectors of the formal economy.[27] The growing international demand for U.S. agricultural produce is increasing the demand for farm labor across the country. Each year more than 1.5 million seasonal farm workers cultivate and harvest produce in the United States.[28] Some 700,000 of these workers are migratory, following the harvest from place to place.[29] In spite of the expansion in agricultural production, farm worker wages and housing conditions are stagnant or declining.[30] Like domestic workers, agricultural workers are not "employees" under the NRLA[31] and are not guaranteed certain protections, making it difficult to organize and negotiate collectively with employers. When depressed wages, poor working conditions, and a lack of legal protections are combined with an increasing demand for cheap farm labor, the result is a continuum of abuses of which forced labor is the most extreme.[32]

Labor inspectors work to stem forced labor by enforcing labor laws, primarily the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)[33] and the Fair Labor Standards Act (FLSA).[34] These laws mandate the payment of minimum wage and the regulation of deductions from workers' pay to ensure that workers are not paid below the federal minimum wage, regardless of their immigration status. The MSPA also mandates that migrant labor contractors—companies that supply farm labor to growers—must be registered with the Department of Labor. Both immigration and labor laws hold the labor contractor rather than the grower responsible for the legal rights of workers.[35] It is common for growers to hire workers through farm labor contractors.[36] The Department of Labor can revoke the permit of a contractor who has a history of violations. Legal advocates and government labor inspectors also can pursue

27. The U.S. Department of Agriculture forecasts record growth of U.S. agricultural exports of $59.5 billion for the 2004 fiscal year—a six percent increase in exports for 2003. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ELEC. OUTLOOK REPORT AES-40, OUTLOOK FOR U.S. AGRIC. TRADE, 1 (2003), *available at* http://usda.mannlib.cornell.edu/reports/erssor/trade/aes-bb/2003/aes40.pdf. In addition, U.S. agricultural exports have grown steadily from $49.1 billion in 1999 to $56.2 billion in 2003. Id.

28. DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARM WORKERS TODAY xiii (1998).

29. *Id.*

30. *See generally* DAVID GRIFFITH & ED KISSAM, WORKING POOR: FARMWORKERS IN THE UNITED STATES 30-31 (1995); U.S. DEP'T OF LABOR, RESEARCH REPORT NO. 8, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998, at 33 (2000).

31. 29 U.S.C. § 152(3).

32. In this context, we are referring to abuses other than those detrimental to workers' health, including death and debilitating injuries or sickness that can be caused by the dangerous working conditions.

33. *See* 29 U.S.C. § 1801 *et seq* (2003).

34. *See* 29 U.S.C. § 201 *et seq* (2003).

35. Griffith and Kissam observe: "Because growers can hold farm labor contractors responsible for laws governing the treatment of farm labor, enforcement agencies have shifted their attention from growers to farm labor contractors. Under these conditions, enforcement becomes a greater problem . . . ." GRIFFITH & KISSAM, *supra* note 30, at 291.

36. ROTHENBERG, *supra* note 28, at 91; Andy Furillo, *Toiling under Abuse: Farm Workers' Struggle Goes On*, SACRAMENTO BEE, May 20, 2001, at A1 ("Instead of growers directly hiring their workers, they are now employing middlemen—farm labor contractors—to round up their pickers and pruners.").

civil suits against employers who use forced labor and violate the MSPA and FLSA.

While the legal mechanisms exist, the Wage and Hour Division of the U.S. Department of Labor does not have the resources to effectively investigate sectors such as private households (in the case of domestic services) or the vast U.S. agriculture market.[37] There are insufficient resources to prosecute the volume of forced labor cases. A Department of Labor spokesperson reflected, "These cases take a lot of resources to get the evidence needed to try perpetrators. And when we do have a criminal case, we lose an investigator for a long period of time."[38]

We can examine the prevalence of forced labor in agriculture by looking at the example of the citrus industry in southwest Florida. Florida's economy benefits from the nearly $1 billion generated by agricultural sales per year in this region.[39] During the 1995/1996 season, citrus sales alone totaled $243.6 million, despite below-average citrus prices.[40] Furthermore, citrus production is rising in southwest Florida, and experts anticipate that it will increase by thirty percent from 1998 to 2008.[41] The increased production will rely on a growing supply of farm labor. Today, work crews composed largely of immigrants from Mexico and Central America provide this labor.[42] Farm workers in Florida are predominantly immigrants, almost half of whom are undocumented, reflecting a trend seen throughout the United States.[43]

Since the late 1990s, farm labor contractors Ramiro, Jose, and Juan Ramos have supplied labor to harvest oranges and other citrus products for some of the largest citrus growers in the United States. Between January 2000 and June 2001, the Ramos family forced approximately 700 Mexican and Guatemalan

37. Interview by Steven Lize with anonymous official, Wage and Hour Division, U.S. Dep't of Labor, location confidential (Sept. 4, 2003). The Wage and Hour Division, Department of Labor, which is responsible for administering the Fair Labor Standards Act, has found that relying on complaints alone to investigate labor law violations is not effective in ensuring compliance. In response, the Wage and Hour Division has moved to directed investigations of employers in targeted industries. To date, about seventy percent of their investigations have been complaint-based and thirty percent have been targeted. *Id.*

38. *Id.* A Department of Labor spokesperson commented that the agency has improved its investigations by hiring more multilingual and multicultural investigators: "[B]ecause of the way investigators look, even if they speak the workers' language, the workers do not open up. So we are also trying to diversify culturally and ethnically." Interview by Laurel Fletcher and Jolene Smith with anonymous official, U.S. Dep't of Labor, location confidential (July 1, 2003). Workers also fear that if the employer is investigated, they will not be paid, will be "blacklisted," or will be deported. *Id.* The Department of Labor spokesperson recognized other threats, commenting, "It has been alleged that in rural areas, nobody will blow the whistle because they think bad things can happen to them." *Id.*

39. FRITZ ROKA & DOROTHY COOK, FARMWORKERS IN SOUTHWEST FLORIDA 3 (1998).

40. *Id.* at 3-4.

41. *Id.* at 6.

42. *See* GRIFFITH AND KISSAM, *supra* note 30, at 29-30; *see generally* U.S. DEP'T OF LABOR, *supra* note 30, at 5.

43. In a census conducted in 1997 and 1998, the U.S. Department of Labor found that eighty-one percent of all farmworkers employed in U.S. crop production were foreign-born and that seventy-seven percent were born in Mexico. Furthermore, over half (fifty-two percent) of the farmworkers were working without authorization. U.S. DEP'T OF LABOR, *supra* note 30, at 5, 22.

workers, predominantly men, to work without pay, or for far less than minimum wage, under threat of violence. They instituted this coercive control under the pretense of collecting debt owed for transport from Arizona to Florida and for work equipment, housing, utilities, and other necessities.

The extent of the problem stretches beyond Florida's citrus industry. In June 2002, the U.S. Justice Department indicted six New York agricultural labor employers on forced labor charges.[44] In June 2003, a federal grand jury indicted a Hawaiian man on charges of smuggling four Tongan nationals into Hawaii and forcing them to work for his pig farm and rock-wall business.[45] The Hawaiian man beat the Tongans with his fists, rocks, and tools and threatened them with deportation if they tried to leave.[46] In September 2003, a federal grand jury convicted two New Hampshire employers of forcing four Jamaican nationals to labor in their tree service business by confiscating their passports and threatening them with physical violence.[47] The U.S. DOJ reported that one of the employers "physically assaulted one of the men and [the other employer] ordered his dog to attack the man as he was fleeing."[48]

Sweatshops

Sweatshop manufacturing, where employers run factories that violate labor laws, is another economic sector that utilizes forced labor in the United States. This report looks at the largest single case of forced labor—in which over 200 workers were enslaved—that arose in a sweatshop garment factory in the U.S. territory of American Samoa. It appears that this sector is vulnerable to forced labor because:

- competitive pressures on manufacturers who locate within the United States force wages down;
- manufacturers operate within the informal economy and evade monitoring or enforcement of labor laws; and
- merchandise produced in U.S. island territories carries a "Made in the U.S.A." label, yet workers enjoy fewer rights and labor protections than their counterparts on the mainland.

Most individuals associate sweatshops with less developed countries, but industry pressures on, for example, U.S. textile and clothing manufacturers, encourage employers to locate factories in close proximity to retailers.[49] If producers stay in the United States, they must compete with lower-wage manufacturers in other countries. Most of the U.S. garment and textile industry is concentrated around New York City and Los Angeles, California, close to the

44. Press Release, U.S. Department of Justice, Six Indicted in Conspiracy for Trafficking and Holding Migrant Workers in Conditions of Forced Labor in Western New York (June 19, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/June/02_crt_360.htm.

45. Vicki Viotti, *Waipahu Man Accused of Human Trafficking*, HONOLULU ADVERTISER, June 14, 2003.

46. *Id.*

47. Press release, U.S. Department of Justice, Jury Convicts New Hampshire Couple of Forced Labor (Sept. 2, 2003), *available at* http://www.usdoj.gov/opa/pr/2003September/03_crt_481.htm.

48. *Id.*

49. PETER STALKER, WORKERS WITHOUT FRONTIERS 46 (2000).

creative centers of fashion design.[50] According to the Union of Needle Trades and Industrial Textile Employees, seventy-five percent of all New York apparel manufacturing firms are sweatshops.[51] That competition is pressing manufacturers who choose to remain in the United States to reduce their labor costs to a minimum. In some cases, this can mean resorting to forced labor.

Sweatshops are susceptible to forced labor because they frequently operate within the informal economy, frustrating attempts to monitor or enforce labor law regulation. Like agriculture and domestic service, sweatshop manufacturing is a sector in which there are few protections for workers and little monitoring of labor law compliance.[52] Forced labor in U.S. garment factories came to light in 1995, when the group of Thai captive workers in El Monte, California, was freed.[53] Our forced labor case study of Kil-Soo Lee, the American Samoan garment manufacturer whose workers produced garments for major U.S. clothing retailers, is an example of how weak labor protections facilitate forced-labor schemes.

Minimum wage standards in American Samoa are lower than in mainland United States. Lack of workplace inspections or labor law enforcement, combined with the workers' fear of making complaints, create a context in which forced labor may occur. The workers' fears come, in part, from the extensive control exercised by employers. The Samoan immigration board has the power to deport an immigrant worker in response to a request from an employer who wishes to terminate the worker's employment.[54] According to an official from the Samoan governor's office, once the immigration board has processed the worker on arrival in American Samoa and issued him or her an identification card, the board has no proactive role and becomes substantially involved in a worker's affairs only if the worker lodges an objection to a request for deportation.[55] Workers fear complaining and have few legal tools to help them fight back.

In addition to the international agreements it has ratified, the United States has broad and stringent laws against all forms of forced labor. The next section of this report explains this legal structure in more detail and highlights the way in which the law has continually sought to respond to the challenges of eliminating forced labor.

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50. ELLEN ISRAEL ROSEN, MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY 3, 137 (2002).

51. *Id.* at 227.

52. Ellen Israel Rosen observes, "Sweatshops in the United States are not simply firms that offer undesirable jobs for long hours and poor pay. They are firms paying wages that violate federally mandated minimum wage standards as well as other employment standards set forth in the Fair Labor Standards Act. Sweatshops may employ women without sufficient education for better jobs, or women immigrants, both legal and illegal, who lack language skills. Frequently, official employment and wage data fail to reflect these firms." *Id.* at 226-27.

53. *Id.* at 2.

54. Nguyen Thi Nga v. Daewoosa Samoa, Nos. 133-99, 68-99, 93-00 (Am. Samoa decided Apr. 16, 2002).

55. Interview by Natalie Hill with anonymous official, Am. Sam. Governor's Office, location confidential (July 25, 2003).

IV.
THE U.S. LEGAL RESPONSE TO FORCED LABOR

Throughout U.S. history, perpetrators of forced labor have been one step ahead of the law. In 1865, the Thirteenth Amendment of the U.S. Constitution outlawed chattel slavery and involuntary servitude.[56] Yet in the years following the American Civil War, Southern white landowners lured thousands of newly freed slaves and immigrants into peonage as sharecroppers on their plantations and farms. In response, the U.S. Supreme Court issued a series of opinions stating that the Constitution's prohibition against slavery was intended to go beyond situations of ownership to stamp out "any other kind of slavery, now or hereafter."[57] In 1874, in response to a new form of human trafficking, Congress adopted the "Padrone statute"[58] to combat the practice of kidnapping boys in Italy to be used as shoeblacks, street musicians, and beggars on the streets of American cities.[59] In 1910, in an effort to curb prostitution, Congress passed the Mann Act, which imposed stiff penalties on traffickers of women within U.S. borders.[60]

Still, unscrupulous employers continued to find new ways of compelling workers—many of whom were newly arrived immigrants—to work under slave-like conditions. In the early 1940s, the Supreme Court ruled that employers could not force workers to remain in their jobs,[61] nor could they penalize them for leaving their employment.[62] Congress went on to enact a federal law in 1948 specifically criminalizing "peonage,"[63] or the practice of holding someone captive to work off a debt, and involuntary servitude,[64] whereby an individual is *forced* to work against his or her will. Despite this landmark legislation, U.S. courts generally interpreted the law to mean that criminal sanctions could only be imposed against perpetrators who used physical force or threats and *not* psychological coercion or trickery to hold victims in bondage.[65] This limitation in the application of the law was eliminated with the passage of the Trafficking Act of 2000.

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56. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

57. *Slaughter-House Cases*, 83 U.S. 36, 72 (1872).

58. Act of June 23, 1874, ch. 464, 18 Stat. 251.

59. United States v. Kozminski, 487 U.S. 931, 947 (1988) (quoting 2 Cong. Rec. 4443 (1874) (Rep. Cessna)).

60. *See* 18 U.S.C. §§ 2421-2424 (2003).

61. Pollock v. Williams, 322 U.S. 4, 17-18, 24 (1944).

62. *Id.*

63. 18 U.S.C. § 1581 (2003).

64. 18 U.S.C. §§ 1583-1584 (2003) (outlawing enticement and sale into involuntary servitude).

65. *See, e.g.*, Kozminski, 487 U.S. 931 (1988); United States v. Shackney, 333 F.2d 475 (2d Cir. 1964).

International Prohibitions against Forced Labor

The first international agreement abolishing slavery dates to the League of Nations Slavery Convention of 1926. The convention defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[66] It declared slavery a "crime against humanity," and the slave trader *hostis humani generis* and an enemy of all humankind over whom any state could hold criminal jurisdiction. Thirty years later, the U.N. Supplementary Convention on Slavery proscribed slavery-like practices, including bondage, serfdom, the forcing or sale of a woman into marriage, and the sale of children into labor.[67]

By the early twentieth century, as chattel or legal slavery was fading as a practice, colonial powers had begun imposing mass forced labor on indigenous populations under their control. In response, the International Labor Organization (ILO) adopted Forced Labor Convention 29, which outlawed forced labor, defined, with some exceptions, as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[68] During the Second World War, forced labor persisted and took on unprecedented forms. At the height of the Nazi regime, one quarter of Germany's workforce, comprised mostly of foreign civilians, worked as forced laborers.[69] During the final months of the regime, large numbers of Jewish and other prisoners held in German concentration camps were compelled to work in a range of economic sectors, including munitions and massive construction projects. The Japanese military also forced as many as 700,000 Koreans, 40,000 Chinese, hundreds of thousands of other Asians, and up to half of the 140,000 Allied prisoners to work under brutal conditions in mines, steel plants, and construction.[70] After the war, in 1949, the international community adopted the Geneva Conventions, imposing minimum conditions under which prisoners of war and civilians may be forced to work during times of armed conflict.

66. Convention to Suppress the Slave Trade and Slavery, *adopted* Sept. 25, 1926, art. 1(1), 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263.

67. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *adopted* Sept. 7, 1956, art. 1(a)-(d), 7(b), 18 U.S.T. 3201, 3204-5, 3206, 266 U.N.T.S. 40, 41, 43.

68. Forced Labour Convention, *supra* note 1, at 58. The ILO Forced Labour Convention is the most widely ratified ILO convention with 139 state parties. It should be noted, however, that not all forms of forced labor are prohibited under the ILO forced labor conventions. Exemptions that would have otherwise fallen under the definition of forced labor include prison labor with restrictions, work as part of "the normal civic obligations of the citizens of a fully self-governing country," and labor "exacted in virtue of compulsory military service laws for work of a purely military character." *Id.* The right of a government to exact forced labor in a time of emergency is also exempted from the forced labor conventions. *Id.*

69. MICHAEL THAD ALLEN, THE BUSINESS OF GENOCIDE: THE SS, SLAVE LABOR, AND CONCENTRATION CAMPS 1 (2002).

70. Adam Jones, Gendercide Watch, *Case Study Corvée (Forced) Labor* (2002), *available at* http://www.gendercide.org/case_corvee.html.

International Human Trafficking and Forced Labor

The first international agreement to prohibit human trafficking was the U.N. 1949 Convention for the Suppression of Trafficking in Persons and the Exploitation of the Prostitution of Others.[71] An amalgamation of late nineteenth and early twentieth-century treaties drafted to address the phenomenon of "white slavery," the Convention defined trafficking solely in terms of prostitution, which limited its ability to combat other forms of human trafficking not linked to sexual exploitation. The 1979 International Convention on the Elimination of Discrimination Against Women went on to call on states "to suppress all forms of traffic in women and exploitation of prostitution of women."[72] But it was not until 2000, when the international community adopted the Convention Against Transnational Organized Crime and the accompanying Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), that international law would really begin targeting modern forms of human trafficking.[73]

The Trafficking Protocol adopts a broad definition of trafficking that enshrines three concepts: (1) the movement of individuals (2) through deception or threats (3) *for the purpose of exploitation.*[74] Exploitation covers a wide range of practices, including sexual exploitation, forced labor, slavery or practices akin to slavery, and the removal of organs. The Trafficking Protocol calls on states to criminalize human trafficking, create measures to prevent it, and address the needs of victims. Preventative measures required by the protocol include dissemination of information, partnerships with civil society to address the issue, and poverty reduction programming.

Domestic Legislation: The Trafficking Act

The Victims of Trafficking and Violence Protection Act of 2000[75] is a bold departure from prior approaches to trafficking and forced labor in the United States. Recognizing that these crimes are global problems, the law established

71. Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, *adopted* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951).

72. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, art. 6, 1249 U.N.T.S. 13, 17. The United States signed the agreement in 1986 but has not yet ratified it.

73. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 43, 60, U.N. Doc. A/55/49 (2000).

74. The protocol in article 3(a) defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, or deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual slavery, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs." *Id.* at 61.

75. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, § 101, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000)) [hereinafter The Trafficking Act].

the Office to Monitor and Combat Trafficking in Persons in the U.S. State Department to oversee a wide range of efforts to end human trafficking abroad. The Trafficking Act:

- criminalizes procuring and subjecting another human being to peonage, involuntary sex trafficking, slavery, involuntary servitude, or forced labor;
- provides social services and legal benefits to survivors of these crimes, including authorization to remain in the country;
- provides funding to support protection programs for survivors in the United States as well as abroad; and
- includes provisions to monitor and eliminate trafficking in countries outside the United States.

Most important, the law distinguishes smuggling—a victimless crime by which migrants cross borders without authorization—from trafficking—a practice by which individuals are induced by force, fraud, trickery, or coercion to enter the United States and then forced to work against their will. The law clearly specifies that those caught up in trafficking and forced labor should be recognized as *victims* of a crime rather than treated as unauthorized migrants who must be returned to their countries of origin.

Labor and human rights activists welcomed the passage of the Trafficking Act in 2000 for many reasons. The new law sharpened the legal teeth of existing sanctions against involuntary servitude, peonage, and slavery by adding new crimes of human trafficking, sex trafficking, forced labor, and document servitude (withholding or destroying documents as part of a trafficking scheme).[76] Trafficking is defined as the prohibition against any individual who provides or obtains the labor or services of another through peonage, slavery, involuntary servitude, or forced labor. The act defines illegal trafficking as providing or obtaining the labor or services of another through peonage, slavery, involuntary servitude, or forced labor.[77] The law also contains a provision that sanctions trafficking adults into the sex industry through force, fraud, or coercion.[78]

The Trafficking Act thereby strengthened the tools for both law enforcement investigation and the prosecution of criminals trafficking people into forced labor. Thus far, the U.S. government has prosecuted 110 traffickers under the new forced labor and trafficking statutes.[79] As of April 2004, there were

76. 22 U.S.C. §§ 7101(b)(2)-(3), 7102(8). The Trafficking Act definition of forced labor is narrower than that in ILO Convention 29, as it sanctions compelled labor secured through specific types of threats, rather than labor secured through the more general "menace of penalty." ILO Convention 29 stipulates that the work of convicted prisoners should be carried out "under the supervision and control of a public authority and that the [prisoner] is not hired to or placed at the disposal of private individuals, companies or associations." Forced Labour Convention, *supra* note 1. Like ILO Convention 29, the Thirteenth Amendment to the U.S. Constitution also recognizes punishment for a crime as an exception to slavery and involuntary servitude. The United States permits prison labor in a variety of contexts and this practice has been the subject of prior ILO studies. *See, e.g.*, INT'L LABOUR CONFERENCE, 89TH SESSION, INT'L LABOUR OFFICE, REPORT I(B), STOPPING FORCED LABOUR: A REPORT OF THE DIRECTOR GENERAL 69 (2001).

77. *See* 22 U.S.C. § 7102(8)(B).

78. 22 U.S.C. § 7102(8)(A). In the case of victims under eighteen years old, there is no requirement of force, fraud, or coercion. *Id.*

79. REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 18-21.

153 open investigations of trafficking cases, double the number of cases the DOJ had open in January 2001.[80] The investigation and prosecution of trafficking cases takes from eight months to three years from the initial law enforcement response to sentencing. Since January 2001, the DOJ has charged 110 defendants and convicted or secured sentences for seventy-seven perpetrators of forced labor or human trafficking in thirty-two cases.[81] The DOJ identifies twenty of these trafficking cases as involving sex trafficking or sex abuse.[82] It should be noted, however, that it is very difficult to classify trafficking cases as purely forced labor or sex trafficking because in many instances when the victim is a woman or child, she is both sexually abused and forced to work. The DOJ does not make statistics available on details of exploitation in each case.

The act not only strengthened laws so that traffickers could be held accountable for their crimes, but it also provided specific measures to address the unique needs of trafficking victims. To begin with, it offered temporary immigration status to victims of a "severe form of trafficking" (minors trafficked for commercial sex and trafficking of adults through deception to work against their will).[83] Through the T visa, nonresidents who are willing to cooperate with law enforcement to prosecute their traffickers are eligible to remain in the United States and to receive the same social service assistance offered to refugees, even where victims have entered the United States without proper immigration documents. Victims who are able to provide information to law enforcement, but who are unable to cooperate fully, are also eligible for temporary immigration relief.[84] Family members of victims are also eligible for protection and are given the opportunity to reunite with the survivor in the United States. The act also enabled survivors to receive housing, psychological counseling, and other social service needs.

Finally, the act enlarged the repertoire of law enforcement tools to combat trafficking. It broadened the definition of "coercion" for the new crimes of forced labor and sex trafficking to include psychological manipulation.[85] This means alleged perpetrators can be held accountable if they caused a victim to believe that his or her failure to comply with their orders would result in serious harm to the victim or to others. As noted above, psychological coercion was previously insufficient to prove involuntary servitude. The law also criminalized the confiscation or destruction of identity or travel documents, a practice

80. *Id.*

81. *Id.*

82. *Id.*

83. 22 U.S.C. § 7105(b)(1)(B)-(C).

84. *See* 22 U.S.C. § 7105(b)(1). Victims of trafficking are eligible for a U visa, which provides witnesses of crimes with temporary status and permission to work. Regulations for the U visa, however, have not yet been adopted and so are not readily available. U visas, though providing less protection than the T visas available to severe victims of trafficking who cooperate with law enforcement, may be a more appropriate option for those victims who are too traumatized to provide testimony and so cannot be certified as cooperating with a prosecution. In other circumstances, a victim might not have the opportunity to cooperate if, for example, the trafficker has already been convicted (perhaps by the state) and federal prosecutors decide not to pursue federal charges.

85. *See* 22 U.S.C. § 7102(2).

traffickers often use to control their victims,[86] and enabled prosecutors to pursue not just the ringleaders, but all those involved in a trafficking operation, including recruiters, drivers, and other intermediaries.

Such progress notwithstanding, the Trafficking Act does have some notable shortcomings, the effects of which will be explored more fully in the following sections. Advocates and service providers criticize the framework of the Trafficking Act, which conditions benefits on the cooperation of survivors with federal law enforcement. Qualified trafficking survivors are eligible for two types of immigration relief—"continued presence" and a T visa—both of which grant authorization to work and entitle survivors to receive social service benefits, but are impossible to obtain without assistance from law enforcement personnel. Only federal law enforcement personnel may request continued presence.[87] Survivors may apply on their own for a T visa, but applicants over fifteen years old must document that they are cooperating with law enforcement.

Although not strictly required, an endorsement from federal law enforcement is the preferred evidence of cooperation. State and local law enforcement agencies that encounter trafficking victims are encouraged to refer these cases to the federal government.[88]

U.S. Legal Response to Forced Labor Abroad

The United States has used its laws and courts in an effort to eradicate forced labor beyond its borders. Under the Trafficking Act of 2000, the State Department, through its Office to Monitor and Combat Trafficking in Persons, reports annually on the efforts of countries to combat human trafficking based on compliance with a set of minimum standards, including the existence of domestic legislation outlawing trafficking and punishing traffickers.[89] Countries are classified into one of three categories: full compliance (Tier 1), making significant efforts to comply (Tier 2), or not in compliance and not making significant efforts to do so (Tier 3).[90] Tier 3 countries may be sanctioned in the form of loss of nonhumanitarian, non-trade-related assistance.[91]

In addition to the Trafficking Act, the Smoot-Hawley Tariff Act of 1930 and the Alien Tort Claims Act of 1789 provide additional avenues to combat forced labor outside the United States. The Smoot-Hawley Act, which defines forced labor similarly to ILO Convention No. 29, prohibits importation of goods

86. 18 U.S.C. § 1592.

87. *See* 22 U.S.C. § 7105(c)(3).

88. On December 19, 2003, President George W. Bush signed a new law that makes it easier for survivors cooperating with state and local law enforcement to qualify for immigration relief and benefits. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-93, 117 Stat. 2875 (2003). Even with the new law, however, advocates question the wisdom of making access to benefits subject to cooperation with law enforcement because of the additional burdens it puts on survivors who are extremely vulnerable.

89. 22 U.S.C. § 7107(b)(1).

90. *See* 22 U.S.C. § 7107(b)(1)(A)-(C).

91. 22 U.S.C. § 7107(c)-(f).

manufactured with forced labor.[92] Although not widely invoked, the Smoot-Hawley Act includes a ban, adopted in 1998, on the import of all goods made with child labor. It also expresses U.S. support for the international prohibition on child labor.[93] The Alien Tort Claims Act enables foreign victims of slavery, forced labor, or other serious human rights violations to sue their abusers in U.S. courts for conduct that occurred outside the United States. Traditionally, this law has been used against foreign government officials. Burmese citizens, however, have recently sought to apply the statute against the U.S.-based Unocal Corporation for its use of forced labor during the construction of a natural gas pipeline across the rural Tenasserim region of Burma.[94]

Relation of the United States to International Trends

In many ways, the United States has been at the forefront of the fight against modern slavery and forced labor. Unlike international law, U.S. domestic legislation recognizes that slavery is defined primarily by the power of an individual to control another for economic gain.[95] Historically, the federal government has expanded this principle by adopting laws to respond specifically to the evolving nature of forced labor and enslavement. Moreover, while the definitions and philosophy of trafficking in the U.N. Trafficking Protocol and the U.S. Trafficking Act are similar, the United States has adopted a more aggressive, proactive approach to the problem than the one outlined in the international agreement. For example, unlike the Trafficking Protocol, the Trafficking Act contains international monitoring and sanctions provisions. Similarly, while the protocol does not allow victims to seek relief from perpetrators, the Trafficking Act establishes mandatory restitution from convicted traffickers.[96] A recent

92. The law prohibits the importation of "goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions." Smoot-Hawley Tariff Act of 1930, 19 U.S.C § 1307 (2003).

93. Unfortunately, application of international standards is hampered because Customs regulations do not define the age of a child. Donna L. Bade, *Corporate Responsibility and U.S. Import Regulations against Forced Labor*, 8 TULSA J. COMP. & INT'L L. 11 (2000). U.S. companies tend to define "child labor" according to varying standards, such as by the legal age in the manufacturing country, the legal age in the United States, or a combination of the two. *Id.*

94. *See* Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-55628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. filed Sept. 18, 2002). Burmese villagers brought suit under the Alien Tort Claims Act and other federal laws against U.S.-headquartered Unocal Corporation for aiding and abetting the Burmese military in subjecting the villagers to forced labor, murder, rape, and torture during the building of a natural gas pipeline across the rural Tenasserim region of Burma. The federal appellate court ruled in favor of the plaintiffs to allow the case to proceed to trial in 2002. *Id.* In July 2003, however, the case was reheard *en banc* by an expanded panel of appellate judges that, at the time of writing, has not yet issued a ruling.

95. Nevertheless, there is a growing tendency in international law to expand the definition of slavery. For example, the U.N. Working Group on Contemporary Forms of Slavery provided in 1997 that "slavery" encompasses a range of contemporary human rights violations, including the exploitation of child labor, debt bondage, and traffic in persons. *See* UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 14, CONTEMPORARY FORMS OF SLAVERY (1991), *available at* www.unhchr.ch/html/menu6/2/fs14.htm.

96. *See* 18 U.S.C. § 1593.

amendment to the Trafficking Act allows survivors to sue their former captors for civil damages for violations of the statute.[97]

Despite their strengths, both international and U.S. anti-trafficking laws suffer similar weaknesses when it comes to protections for victims. Although the U.N. Protocol and the U.S. Trafficking Act are explicit in recognizing that trafficked individuals are *victims of a crime* rather than illegal migrants, they are by no means consistent in this victim-centered approach. The Trafficking Protocol makes state provision of immigration relief, social services, and compensation to victims discretionary as opposed to mandatory. While the U.S. law goes further and establishes regulations to provide immigration status and social services to victims, it provides these benefits only to victims of a "severe form of trafficking" who are involved with the prosecution of their traffickers. Furthermore, conditioning immigration relief and social services on cooperation with prosecution creates the perception that victims are primarily instruments of law enforcement rather than individuals who are, in and of themselves, deserving of protection and restoration of their human rights.

The Trafficking Act also contains "definitional inconsistencies" that may weaken intended protections for trafficking survivors. For example, survivors must show they are a "victim of a severe form of trafficking"—a victim of sex or human trafficking—to be eligible for immigration relief and benefits. According to some advocates, federal authorities have failed to issue certifications to some trafficking survivors because they felt the allegations of abuse were not "severe enough."[98]

V.
Implementation and Enforcement of U.S. Laws

Three years after the passage of the Trafficking Act, U.S. law enforcement personnel, policymakers, and labor rights advocates are still wrestling with the legal mandates established under the new law. Our research suggests that effective implementation and enforcement of the Trafficking Act will depend on several factors, including training law enforcement officers, particularly at the local level, to identify victims and forced labor operations; improving cooperation and information sharing between federal and state agencies charged with combating forced labor; revising procedures for the handling of survivors; and finding more effective measures for providing survivors with protection, benefits, and compensation.

Identifying Victims

One of the greatest challenges U.S. law enforcement faces is developing the skills to identify victims of trafficking and forced labor. Finding victims, a federal prosecutor in the U.S. Department of Labor said, is "devilishly difficult

97. Trafficking Victims Protection Reauthorization Act, *supra* note 88, § 4(a).

98. Interview by Laurel Fletcher with anonymous trafficking expert, nongovernmental organization, location confidential (June 4, 2003).

to do."[99] There are many reasons why victim identification is complicated. Victims are usually reluctant to approach local police because they fear retribution from their traffickers or "employers." This fear often stems from their experiences with corrupt law enforcement personnel in their countries of origin. Invariably, exploiters play on this fear by warning their captives that U.S. law enforcement is no different. Luis Rivera, an organizer for California Rural Legal Assistance, Inc.—a group that has assisted the California asparagus workers—observed that abused workers are reluctant to call the police because "they don't trust them."[100]

In some cases, "employers" have given their workers false identities as a means of passing through U.S. immigration. In one case that eventually exposed such a trafficking scheme, Lakireddy Bali Reddy, the California-based sex trafficker, arranged for a man and his sister from his hometown to fraudulently pose as the parents of two teenage sisters so that the sisters would be allowed to pass through U.S. immigration. Reddy sexually exploited the teenagers until the older sister died of asphyxiation, a result of a blocked exhaust vent in one of his apartments.

Law Enforcement

Law enforcement, particularly at the local level, must develop the capacity to identify not only victims of trafficking and forced labor but also the very operations themselves. "Police don't know trafficking when they see it," said Martina Vandenberg, formerly of Human Rights Watch.[101] Indeed, the problem is so pervasive that the DOJ has launched a federal training program to help investigators working for the Federal Bureau of Investigation (FBI), the Department of Homeland Security's Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service, or INS),[102] and the Department of Labor detect forced labor operations.

An example from the Reddy case study demonstrates why the DOJ training program is necessary. In 1997, the INS investigated Reddy for potential immigration fraud. The INS investigation team found the real-estate tycoon had committed no crimes. Reddy, said the INS district director, was "a professionally educated gentleman, with widespread corporate interests. . . . There was nothing to indicate any criminal conduct."[103]

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99. Interview with anonymous official, *supra* note 37.

100. Telephone interview by Natalie Hill with Luis Rivera, Organizer, California Rural Legal Assistance, Inc. (July 11, 2003).

101. Interview by Laurel Fletcher with Martina Vandenberg, Attorney, Jenner and Block, formerly Researcher, Women's Rights Division, Human Rights Watch, in Washington, D.C. (July 5, 2003).

102. The U.S. government recently restructured its immigration agency. Beginning March 1, 2003, the functions of the Immigration and Naturalization Service were transferred to the new Department of Homeland Security (within the Directorate of Border and Transportation Security and U.S. Citizenship and Immigration Services). REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 15 n.1.

103. Debra Levi Holtz, *INS Investigated Landlord in '97*, S.F. CHRON., Jan. 21, 2000, at A19.

Similarly, in the Oklahoma factory worker case, survivors claim that the John Pickle Company (JPC) shielded its forced labor operation from the local police by using its reputation as a longstanding, profitable, and successful local employer as a screen for JPC's illicit activities. There are reports that the police even escorted "troublesome workers" to the airport, where they were sent back to India.[104] Apparently, at no time did the local sheriffs question Pickle's employment of the Indian men or investigate for possible criminal activity.

To date, the DOJ has no plans to provide similar training to state and local law enforcement officers.[105] Clearly, the sheer number of police departments in the United States—over 17,000—would make such a task daunting. Yet a more targeted approach, aimed at training local law enforcement in areas of the country where forced labor is pervasive, could go a long way toward improving detection of these operations. Witness, for example, the forced prostitution case in Florida where local police missed an opportunity to break up the prostitution ring simply because they did not know what they were looking for. According to social service providers, police responded to a phone call from one of the female victims by dispatching deputies to an address given to them by the woman caller. When the deputies arrived at the brothel, however, guards managed to dissuade them from carrying through their investigation, and they left without entering the premises. The prostitution ring was only uncovered several months later when a group of women escaped and made their way to the Mexican consulate.[106]

Fragmentation of Law Enforcement

The approach now taken by federal and state agencies to combat forced labor in the United States is fragmentary and inconsistent. This is largely because trafficking is considered a federal crime that must be handled by federal agents. Indeed, until passage of the recent amendments to the Trafficking Act, federal agents had primary authority to certify that a survivor met the definitional threshold to be eligible to receive benefits and protections under the act. This process can be cumbersome, time-consuming, and frustrating for the survivor. Likewise, the process of seeking federal certification can involve a great risk to the survivor.

If agents are unwilling to issue such a certification, then the survivor is left exposed. Her trafficker may be aware that she has approached the authorities and seek retribution against her. Without certification, she cannot stay in the United States legally and she faces a grim choice. She must live in the United States as a permanent undocumented individual, flee to a third country, or risk returning to her home country where the trafficker continues to wield great influence and power.

104. *See* Affidavit of forced labor survivor [Marshal Joseph Suares] at 15, Chellen v. John Pickle Co., 344 F. Supp. 2d 1278 (N.D. Okla. 2002) (No. 02-CV-85-EA (M)).

105. ASSESSMENT, *supra* note 12, at 17-18.

106. Sean Gardiner & Geoffrey Mohan, *Smuggled for Sex*, NEWSDAY, Mar. 12, 2001, at A05.

Not only is the certification process coordinated through the DOJ, but the department is also responsible for keeping track of statistics under the act. Federal statistics regarding trafficking cases will not include federal cases that are not appropriately charged, for example, by a federal agency other than DOJ, nor do they include trafficking or forced labor incidents that come to the attention of the state prosecutors. Thus, there is concern among service providers that lack of coordination between federal government agencies makes it difficult to establish accurate numbers of prosecutions and may prevent survivors from accessing benefits and protection.

A related problem is that local police and state officials unable to identify a forced labor operation necessarily fail to refer such cases to federal agents. This was apparent in the California asparagus case that was never referred to federal law enforcement. JB Farm Labor, the labor contractor who hired the workers and kept them in substandard housing, withheld most of their paychecks to satisfy their transportation "debt" and threatened them with harm if they left .[107] Yet while these facts are strikingly similar to those of the R&A Harvesting case in Florida, a federal investigation took place only after the workers had filed a civil suit against JB Farms Labor Contractor and Victoria Island Farms. Attorneys for the workers contacted the Department of Labor about the case but did not pursue enforcement when the department could not secure assurances from the immigration authorities that they would not take action against the workers.[108] Drawn to the case through a newspaper article, the Department of Labor conducted an investigation, but they did so only after the 2000 season was over and the workers were no longer at the site.[109]

Today, there are greater protections for survivors of forced labor, largely because of the T visa program and an agreement reached between the Department of Labor and the Department of Homeland Security that protects undocumented workers from action by immigration officials in connection with labor department investigations. In 1999, the DOJ and Department of Labor created the Worker Exploitation Task Force to improve coordination and increase the prosecution of forced labor cases. In 2001, as required by the Trafficking Act, President George W. Bush created the Inter-Agency Task Force to Monitor and Combat Trafficking. The Inter-Agency Task Force includes the Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Homeland Security, the Director of Central Intelligence, the Director of the Office of Management and Budget, and the administrator of the U.S. Agency for International Development. The mandate of

107. The complaint alleged that the workers were "essentially held hostage in the camps . . . with promises of future payments of owed wages . . . with direct and implied threats against the workers and their families in Mexico." Fourth Amended Complaint at 2, Manuel A. v. JB Farm Contractor, (E.D. Cal. received Nov. 17, 2000) (No. CIV S-00-1162-GEB PAN).

108. Interview by Natalie Hill with Cynthia Rice, Director of Litigation, Advocacy and Training, California Rural Legal Assistance, Inc., in San Francisco, Cal. (May 14, 2003).

109. WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, CASE NO. 2001-302-00223, VICTORIA ISLAND FARMS, REDACTED FINAL INVESTIGATIVE REPORT 1-2; WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, CASE NO. 2000-302-00282, JOSE BAUTISTA, FARM LABOR CONTRACTOR, REDACTED FINAL INVESTIGATIVE REPORT 1-2.

this task force is to coordinate and implement executive policy in order to combat trafficking. In March 2003, the task force created a Senior Policy Advisory Group to advise the task force on important policy issues.[110]

There is hope that this interagency approach will make the process of investigating and adjudicating trafficking and forced labor cases more efficient and less burdensome for survivors. One encouraging sign is the creation of regional task forces under the umbrella of the Worker Exploitation Task Force throughout the United States. These task forces serve as forums for agencies to share information and coordinate approaches to specific trafficking and forced labor cases. A member of the Department of Labor explained why this interagency approach is so important:

> If INS is looking at [a forced labor case], they would be looking to deport people. If we are looking at it, we are looking to pay people. If Justice is looking at it, they are looking to put people in jail. Obviously, that's a very unsatisfactory way of attacking the problem. The way you must attack the problem is to do it in an interdisciplinary way . . . (s)o that we can deal with specific cases of slavery or peonage as a whole rather than as separate agencies, so that less slips through the cracks.[111]

Despite this progress, government officials familiar with the work of such task forces believe coordination among members of the task force could be improved. They point to interagency rivalries, different approaches to cases based on agency priorities, and the challenges of coordinating a large number of agencies and participants. Despite these criticisms, most agree that such task forces serve an important function and emphasize that there has been more interagency cooperation around trafficking than most other issues. As one member of the Worker Exploitation Task Force noted: "I frankly think that [the task force] works reasonably well at this point. It could always work better. . . . What I've given you is the model. The closer we come to that, the better off we are."[112]

NGO advocates support the idea of greater federal interagency cooperation and information exchange in addressing trafficking and forced labor cases. Advocates believe that greater cooperation will lead to the development of alternative ways of providing victim relief for those cases that are not taken up by federal prosecutors. As Jennifer Stanger, Media and Advocacy Director at the Coalition to Abolish Slavery and Trafficking (CAST), has noted, only three or four of the agency's twenty or thirty trafficking cases have been chosen for federal prosecution. In an interagency scheme, Stanger would like to see the Department of Labor, as a federal enforcement agency, take a greater role in addressing trafficking cases by being able to request benefits and issue certificates of endorsement. "Trafficking," she says, "is as much a labor issue as it is a criminal one." She would like to see other federal agencies, such as the Depart-

110. For an account of the activities of the Senior Policy Advisory Group, *see* ASSESSMENT, *supra* note 12, at 4.

111. Interview with anonymous official, *supra* note 37.

112. *Id.*

ment of Labor, "have the ability to confer victim status, especially when a case is rejected for criminal prosecution by the DOJ."[113]

Ironically, as awareness about trafficking and forced labor has increased at the level of local law enforcement, new tensions have arisen between state and federal agencies. Victims who cooperate with local authorities are technically eligible for a T visa but run into problems because the Trafficking Act favors documentation of cooperation from federal law enforcement over an endorsement from state officials. The new amendments to the Trafficking Act attempt to make state endorsements equivalent to federal ones, but the new law has not yet been implemented.[114] Advocates are watching the certification process carefully. Without access to federal immigration and welfare benefits, victims in state prosecutions are unable to regularize their status and must fall back on state benefits—if available—or private support. The NGO advocate recounted that victims "are surviving on the good will of local citizens to take care of them, and they have no legal status."[115]

NGO advocates also report that federal officials often refuse to issue endorsements of T visa applications. One service provider attributed this reluctance to the mistaken belief among law enforcement that the benefits are too generous and that "they are giving away a green card" by providing certification.[116] Moreover, agents may wait until the Department of Homeland Security has determined that a victim is a legitimate victim of severe trafficking, or until a prosecution has begun, to issue an endorsement, causing victims to wait months before receiving much-needed benefits. Advocates report that for some victims the dependency on federal authorities for immigration relief, compounded by the pain and discomfort of testifying about their experience, does not serve their needs and dissuades them from cooperating with law enforcement.

NGO advocates also note that middle management in federal investigatory agencies often hinders the enforcement of the Trafficking Act by downplaying the severity of crimes involving forced labor. On several occasions, such officials have reassigned experienced and knowledgeable investigators to other

113. Interview by Rachel Shigekane with Jennifer Stanger, Media/Advocacy Director, Coalition to Abolish Slavery and Trafficking, in Los Angeles, Cal. (July 7, 2003).

114. The Trafficking Victims Protection Reauthorization Act of 2003 directs immigration officials to consider statements from state and local law enforcement officials when certifying a survivor's compliance with a request for assistance in the investigation or prosecution of crimes attributed to the trafficker. However, immigration officials await further guidance to implement this directive. Memorandum from William R. Yates, Associate Director of Operations, to Paul Novak, Director, Vermont Service Center (Apr. 15, 2004).

115. Interview with Jennifer Stanger, *supra* note 113.

116. *Id.* In fact, the benefits to which victims are actually entitled are fairly modest. In California, for example, victims receive refugee assistance for a period of eight months. This aid consists of $300 per month in refugee cash assistance, $120 per month in food stamps, as well as access to medical care during this period. By way of comparison, this totals just over half of the official poverty threshold for an individual, $748 per month. OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2003 HEATH AND HUMAN SERVICES POVERTY GUIDELINES (2003) (citing 68 Fed. Reg. 26, 6456-58 (Feb. 7, 2003)), *available at* http://aspe.hhs.gov/poverty/03poverty.htm.

higher priority crimes. "Think of it like a sandwich," says Jennifer Stanger of CAST. "One slice of the bread is the NGO that has been given funding to do outreach and training and to provide services. The prosecution is the other piece of bread. But the problem is, there is no sandwich meat, which is the investigative part, in the middle. These cases are only as good as the evidence that's been compiled by the investigators."[117] Advocates note that investigative resources are beginning to be provided but are not yet sufficient.

New Approaches to Law Enforcement

Bringing the needs of victims of trafficking and forced labor into sharp focus and prosecuting their abusers requires a reorientation of all levels of law enforcement as well as an unprecedented degree of coordination between state and federal justice departments. By any standard, it is an enormous undertaking but fortunately one that has enjoyed significant support from both the Clinton and Bush administrations.

The Trafficking Act has also helped law enforcement personnel recognize that those ensnared in trafficking and forced labor are *victims* and not criminals. "One of the important changes in these cases and one of the things that was recognized by the Trafficking Act," says an official from the DOJ section that prosecutes forced labor cases, "was that we need to treat victims as victims. In the past, too often we had to view them as criminals or people who were being quickly deported or prosecuted for prostitution. . . . The big change and the thing that has made our work much more successful is that we do treat them as victims."[118] This approach has paid dividends in a rapid increase, noted earlier, in the number of forced labor cases prosecuted in the past five years.

Key to this increase has been the change in the relationship between law enforcement and victims. Prosecutors understand that winning forced labor cases and appropriately punishing offenders requires the trust and cooperation of victims and witnesses. "Obviously, without the cooperation of the victims we can't win cases," said the DOJ spokesman. He added:

> So it's of benefit both to the victims but also to law enforcement. I think that's an enormous change. In the past, we used to do a raid, lock up the victims and treat them as if they were as guilty as the defendants. Now, I think we try to deal with them much more humanely. We try to give them services, find them shelter and all of that so it's a much different approach that leads to happier, more cooperative victims. That makes us much more successful.[119]

Our case study of the Thai domestic worker trafficked into the western United States illustrates the DOJ official's point. Khai cooperated with law enforcement and testified against her former employer. She said the behavior of the federal prosecutor in her case made all the difference: "The U.S. Attorney gave me a new life. He delivered me, like a doctor delivering a baby, to a new

117. Interview by Rachel Shigekane with Jennifer Stanger, Media/Advocacy Director, Coalition to Abolish Slavery and Trafficking, in Los Angeles, Cal. (June 9, 2003).

118. Interview by Laurel Fletcher with anonymous official, U.S. Dep't of Justice, location confidential (June 3, 2003).

119. *Id.*

life."[120] For Khai, prosecution served to reveal the truth about her perpetrator. She hoped that coming forward to testify would help others. "I had to fight," she said. "I had to tell the truth, to tell what happened."[121] Because of her experience, Khai believes "justice does exist. I have a different view now on law enforcement, the courts, immigration, and prosecutors."[122] As a result of her cooperation with federal prosecutors, Khai received a T visa in June 2003, which enabled her to stay and work in the United States. She is now looking forward to being reunited with her son, whom she has not seen in over ten years.

Treatment of Survivors

Much of the criticism of the United States' approach to forced labor stems from the link between prosecution of perpetrators and serving victims. According to one top-level federal prosecutor, attitudes among prosecutors toward forced labor victims vary from "humanitarian"—where the focus is to alleviate the suffering of the victim—to "instrumental"—where victims are seen as necessary to win criminal cases. Under the Trafficking Act, prosecutors are pivotal to meeting the needs of victims for social services and fulfilling the criminal enforcement aims of the statute. Yet these aims can at times clash, leaving victims unacknowledged or underserved, perpetrators unindicted, and service providers and law enforcement agents feeling frustrated.

An illustration of this problem is apparent in the case of the Florida citrus workers. In May 2000, a Florida-based NGO, the Coalition of Immokalee Workers (CIW), began investigating the plight of migrant workers employed by R&A Harvesting. CIW got involved after R&A Harvesting employees accused the driver of a van transporting migrant workers of "stealing" workers and severely beat the driver. Shortly thereafter, CIW urged the DOJ to investigate what seemed to be a clear case of forced labor in Florida's citrus groves. Federal investigators, however, initially declined to pursue the case because, without adequate resources to investigate, they felt they could not prove involuntary servitude without victims who would be willing to testify. In response, CIW sent one of its own members to the camp undercover to document abuses. Even with this evidence, prosecutors wanted other witnesses, all of whom were trapped in the camp and terrified to leave for fear of what their boss might do to them. A year after the assault on the van driver, in April 2001, several CIW members went to the labor camp and handed out cards with the group's telephone number. The next day four workers called the organization asking for help to escape. Within hours, two cars driven by members of the group met the workers just outside the camp. The workers quickly jumped in and ducked down under the seats, too afraid to sit up until they were twenty miles away from their captors. The escaped captives agreed to be witnesses. With their help, prosecutors convicted Ramos, his two brothers, and a cousin of a host of

120. Interview by Rachel Shigekane with Khai, pseudonymous Thai domestic worker/restaurant worker/trafficking victim, location confidential (June 10, 2003).

121. *Id.*

122. *Id.*

charges, including conspiracy to hold workers in indentured servitude, extortion, and firearms charges.[123] Despite a successful resolution, almost a year had elapsed between the time when CIW first brought the case to the attention of prosecutors and the time when prosecutors had the evidence they wanted to charge the Ramos family. Meanwhile, the workers had continued to toil under slave-like conditions.

What makes for a good prosecution does not always serve the immediate safety needs of victims. On average, the investigation and prosecution of trafficking and forced labor cases takes between eight months and three years to complete, during which time victims may remain in situations of forced labor or in fear of their captors and associates.

When victims are liberated from situations of forced labor, their treatment by law enforcement varies greatly. For example, in the forced prostitution ring case—a case that was discovered before passage of the Trafficking Act—the victims found themselves imprisoned in a detention center while their perpetrators ran free. Federal agents began raiding the Cadena brothels in November 1997, arresting both victims and perpetrators. Agents then held the victims in a detention center, while many of the criminal ringleaders evaded arrest. An FBI agent involved in the case explained: "We couldn't let the witnesses loose because they want to go home—we'd lose them all. It just happened that way."[124] To ensure that the victims were not deported, the investigating border patrol agent had to call immigration authorities every day to ensure the witnesses would not be deported. "Had we missed a day," the FBI agent said, "we would've lost them."[125]

This detention was bad for both the victims and law enforcement. The prosecution team needed to earn the trust of the women freed from forced labor so they would testify against their captors. Yet their detention confirmed to them what the perpetrators had always told the women: if they were caught by the authorities, they would be "in prison for the rest of [their] lives."[126]

BENEFITS, PROTECTION, AND COMPENSATION

Because of the passage of the Trafficking Act, law enforcement can now offer immigration protection to victims and thus assuage their fear of deportation. For example, federal officials used the "continued presence" provision of the Trafficking Act to bring approximately 200 Vietnamese workers to the United States from American Samoa in connection with the Kil-Soo Lee case. Lee, a Korean businessman who owned a garment factory on the island, with-

123. According to federal government sources, violations of the Trafficking Act could not be charged in this case because of the time frame of the events.

124. Interview by Steven Lize with anonymous Special Agent, Federal Bureau of Investigations, location confidential (May 2, 2003).

125. *Id.*

126. *International Trafficking of Women and Children: Hearings Before the Near E. & S. Asian Affairs Subcomm., U.S. Senate Foreign Relations Comm.*, 106th Cong. (2000) [hereinafter *Hearings*] (statement of Maria, pseudonymous trafficking survivor), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=F:63986.wais.

held food, locked the gates of the plant, and forced the victims to work there ostensibly to pay off their transportation "debt" to him. In a massive effort, law enforcement coordinated with social service providers to arrange transportation and housing for the victims to resettle in Hawaii and in the mainland United States. With the assistance of legal and social service providers, these victims are currently in the process of applying for T visas and making plans to be reunited with family members. Alternatives to detention of victims are clearly vital to achieving the humanitarian and law enforcement goals of the Trafficking Act.

Yet for every victim who is willing to come forward and testify for prosecutors, there are many who are unable or unwilling to do so. As a result, the victims will not receive immigration relief or other benefits under the Trafficking Act. Jennifer Stanger estimates that only fifty percent of their clients wish to cooperate in the prosecution of their perpetrators. "Even though somebody has been beaten and abused," she says, "it may not be a priority for them to see . . . [the perpetrator] go to jail."[127] Some survivors simply desire to return home and never see their traffickers again. Many advocates believe that immigration relief and permission to work should be granted to survivors automatically and not linked to cooperation with a prosecution.

Survivors of forced labor often fear pressing charges against their former captors because it could result in harm to themselves and their families. For example, after U.S. authorities arrested Lakireddy Bali Reddy in January 2000, journalists reported that many of the parents of Reddy's victims living in Velvadam, India, were fearful of reprisals.[128] In May 2000, a group of assailants attacked a long-time critic of Reddy and his family while they were asleep at their home in Velvadam and doused the residents with acid. Days later, the critic died from his injuries. A five-year-old victim was badly burned and the legs of the third victim, a woman, were also disfigured. Shortly after the Indian authorities launched an investigation into the attack, a key witness was killed. The motivation for the attack still remains unclear.

In July 2000, U.S. immigration authorities took the unusual step of bringing some of the families of Reddy's victims to the United States for their protection. Yet the Reddy victims were threatened in California, too. Soon after two of Reddy's victims were liberated from their former captor, two men dressed as police officers—at least one of them carrying a gun—attempted to gain entry to the domestic violence shelter where the victims were housed. One of the women collapsed. Both women were then rushed to a local hospital for treatment. Authorities later moved them to a local Air Force base while service providers looked for suitable housing.

Even after perpetrators have been convicted, survivors and their families may remain in danger, whether they return to their home countries or remain in the United States. Several of the perpetrators charged in the forced prostitution

127. Interview with Jennifer Stanger, *supra* note 113.

128. *See Chanipoyina Seetha na kuturae kadu*, ANDHRA JYOTHI, Jan. 22, 2000.

case escaped to Mexico, where they lived in the same town as the victims and their families and continued to threaten and harass the former captives. One witness testified: "They have even threatened to bring our younger sisters to the United States and force them to work in brothels, as well."[129] Similarly, in the case against R&A Harvesting, a witness still feels that his life could be in danger. He believes there were more perpetrators involved than the three men arrested for the attack and that these men may harm him one day. "I still don't like to go out, like at night to the dances in town," he said. "I keep thinking that someone could be one of the Ramos guys looking for revenge. I live with that fear."[130] Similarly, Khai, the Thai domestic worker, is desperate to have her son and daughter leave Thailand before her captor completes her sentence. "[My captor] is in prison now," she said. "After she is released, I believe something will happen because law enforcement is different in Thailand." Her former "employer" had once told Khai, perhaps as a warning, that a "hit man" could be hired in Thailand for $200 to $300.

Vulnerability of family members abroad causes much anxiety and grief for forced labor victims in the United States. For victims, pursuing justice raises the stakes, because the threats of perpetrators—often powerful members of the communities in which they live and recruit—are quite credible. Several Indian workers who were trafficked for forced labor at John Pickle Company (JPC) reported that "Gulam" Pesh Imam, an executive with Al-Samit International, the company that had recruited them, threatened their families. After the Indian workers began escaping the JPC factory, an Al-Samit agent reportedly phoned JPC to ask one of the Indian lead workers about the whereabouts of one of the escaped workers.[131] The Al-Samit agent allegedly said that the police in India were looking for the escaped worker and that "[the worker's] brother had been taken by the police and beaten up."[132] "If Gulam [Pesh Imam] knows I am coming [home], he will arrange to have someone meet me at the airport," one of the workers told the American court.[133] "Gulam has shown that he is a violent man. . . . Many families in India have been threatened or contacted by Gulam or his agents. I have no doubt that if I were to return my family and me would be in danger."[134]

Despite these real dangers and the Trafficking Act's mandate to protect trafficking survivors, federal authorities have been unable to protect family members of survivors from retribution in their countries of origin. U.S. law enforcement has no authority to intervene directly when acts of retribution take place beyond U.S. borders. While family members have the option of relocating to the United States through the T visa process, that process can take years and

129. *Hearings*, *supra* note 126.

130. Interview by Steven Lize with anonymous van driver/witness, location confidential (April 10, 2003).

131. *See* Affidavit of forced labor survivor [Marshal Josheph Suares] at 11, *Chellen* (No. 02-CV-85-EA (M)).

132. *Id.* at 11-12.

133. *Id.* at 17.

134. *Id.*

is not suited to addressing crisis situations. Emergency relocation is available but not routinely used. Unfortunately, help at the local level in the country of origin, where it could be most effective, is seldom an option. Corruption or indifference of local police and government authorities in the country of origin frequently leave family members and repatriated survivors with nowhere to turn for help. The influence of the perpetrator may hold sway over a survivor across international boundaries and across the span of years. Khai, the Thai woman forced to do domestic work, is painfully aware that her perpetrator's release date of 2006 is quickly approaching and that she only has one year to arrange for family members to flee Thailand and seek safety in other countries. Thus, the inability to meet a global problem with a global response may leave victims of forced labor reluctant to step forward and thus jeopardize future arrests and prosecutions of perpetrators.

Police indifference and victims' fear of retribution are compounded by the stature of traffickers in source countries. In at least five of the eight case studies researched for this report, the perpetrators held positions of great wealth and influence in their home countries. The Reddy family in Velvadam, India; the Satia family in Cameroon; and the Cadena family in Veracruz, Mexico, are all very wealthy families who are well-respected by economically and politically powerful groups in their respective communities. Survivors reported that "Gulam" Pesh Imann, an executive of Al-Samit International, the recruitment company responsible for bringing the Indian men to work at John Pickle Company, was said to have connections to organized crime in India.[135] Supawan Veerapool, who enslaved Khai, the Thai domestic worker, was the common law wife of Thailand's ambassador to Sweden and has connections at the highest levels of Thai government.

A consequence of forced labor is that, when freed, survivors are usually left with little or no resources to rebuild their lives. While no comprehensive figures are available, some survivors have sued their former captors to collect the money they are owed. The record so far has been mixed. The American Samoan garment workers, for example, thought they had secured a victory after Lee reached an agreement in 1999 with the Department of Labor to pay the workers back wages. Lee went so far as to deposit the wages in the workers' bank accounts. Then he sent employees to accompany workers to the bank and they forced the workers to return the money, threatening to fire those who refused and to return those who sought legal help to Vietnam. In a subsequent class action suit, workers won judgments in the range of $3000 to $7683, in addition to $2500 each for damages.[136] In the criminal case against Reddy, he was required to pay $2 million in restitution to four victims.[137]

135. Affidavit of forced labor survivor [Uday Dattatray Ludbe] at 19, *Chellen* (No. 02-CV-85-EA (M)).

136. Nguyen Thi Nga v. Daewoosa Samoa, Nos. 133-99, 68-99, 93-00 (Am. Samoa decided Apr. 16, 2002).

137. Matthew Yi, *Guilty Plea in Smuggling of Girls*, S.F. CHRON., Mar. 8, 2001, at A21.

Others have not been so fortunate. A judge ordered the Ramos family to pay the U.S. government $3 million, but the former captives received nothing. In the forced prostitution case, a federal judge ordered the perpetrators to pay $1 million to the women they had forced to work as prostitutes. The ringleader pled poverty and paid nothing, but subsequently attorneys for the women have managed to recover small sums.

The Trafficking Act currently directs violators to pay restitution to their former captives. Under the act, survivors may recover funds for "'any costs incurred' for physical, psychiatric, or psychological care, and . . . 'any other losses suffered.'"[138] Recent changes to the Trafficking Act allow survivors of forced labor to sue their perpetrators and collect damages. In cases in which prosecutors win convictions, survivors are able to use a criminal judgment to establish their claims once the criminal proceeding is concluded. Even if federal criminal charges were never filed, survivors now may file suit in a federal court and thus avoid relying on state laws that may not be tailored to address forced labor and trafficking violations.

Survivors of Reddy's trafficking and forced labor scheme filed a civil suit to gain compensation from him for their losses. The goal of the suit was to strip Reddy of his wealth and thus diminish his standing in both California and India. The parties settled the case shortly after trial began in April 2004. The sister of the victim who died in Reddy's apartment and her family received $8.9 million. They also received a portion of the $2 million in restitution money awarded in the earlier criminal case. Two other survivors who were not sex victims received $60,000 each.

VI.
HEALTH AND MEDICAL CONSEQUENCES OF FORCED LABOR

Those subjected to forced labor are at significant risk of developing health related problems, ranging from minor to life threatening. Because forced labor is largely hidden from public view, its health and medical consequences have never been systematically studied in the United States. Yet our case studies, as well as morbidity and mortality studies of refugee populations and workers in industry and agriculture, provide a general picture of the health needs of victims of forced labor. The health status of forced labor victims can be considered in four discrete but interdependent phases: pre-departure, journey, forced labor, and post release.

Pre-departure

Our study found that most victims of forced labor who were trafficked into the United States came from impoverished areas of the world. Poverty is an important indicator of health, and many diseases, such as tuberculosis (TB), hepatitis B and C, and sexually transmitted diseases, are more prevalent in impover-

138. United States v. Julian, 242 F.3d 1245, 1247 (10th Cir. 2001) (quoting § 2259(b) of the Trafficking Act) (emphasis omitted).

ished populations where access to adequate health care is limited or nonexistent. Because many forced labor victims circumvent formal medical screenings for migrants, many will arrive in the United States without proper immunizations and bearing communicable diseases. Studies have found that even legal migrants to the United States have caused TB caseloads to increase, largely because those infected had not received proper care in their home countries. In one study, thirty-one to forty-seven percent of migrant farm workers tested on the East and West Coasts of the United States were TB positive, and those groups were six times more likely to develop TB than the general population.

Journey

Smuggling and some forms of trafficking of migrants constitute the most dangerous forms of migration.[139] These illegal processes can take place within a country, across a single border, or through multiple borders. During the journey, which may last only a day or a matter of months, trafficked and smuggled migrants are exposed to grave risks of injury or death. In addition, in long and complicated journeys, these migrants may be exposed to illnesses and diseases, including malaria, or find preexisting illnesses become aggravated along the route.

Trafficked and smuggled migrants enter the United States by several different modes of transportation, including aircraft, boat, and overland vehicles, all of which can pose potential health risks. People who are hidden among cargo shipments during transport risk injury or death by drowning, freezing, or suffocating, or by being crushed or exposed to toxic materials.[140] The potential for health complications is further exacerbated by overcrowding, lack of food, poor sanitation, severe dehydration, and environmental extremes.[141] In May 2003, for example, seventeen undocumented migrants from Mexico and Central America perished from asphyxiation and heat stroke inside an abandoned tractor-trailer located in southern Texas.[142] As many as one hundred people had been packed inside the trailer.[143]

In transit, power is displaced between traffickers and migrants to create an ongoing relationship of dependency that can complicate a survivor's recovery in the post-release phase. This is particularly true for young trafficking victims who have been kidnapped or entrusted to the care of traffickers by their parents or other family members. Traffickers often confiscate personal identification

139. INTER-AM. COMM'N OF WOMEN, ORG. OF AM. STATES & WOMEN, HEALTH & DEV. PROGRAM, PAN-AM. HEALTH ORG., JOINT FACT SHEET, TRAFFICKING OF WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION IN THE AMERICAS (2001) [hereinafter JOINT FACT SHEET].

140. Brian D. Gushulak & Douglas W. MacPherson, *Health Issues Associated with the Smuggling and Trafficking of Migrants*, 2 J. IMMIGRANT HEALTH 67, 71-72 (2000).

141. *Id.*

142. Nick Madigan, *2nd Group of Trapped People Is Found in a Truck in Texas*, N.Y. TIMES, May 17, 2003, at A13; Simon Romero, *Scene of Horror and Despair in Trailer*, N.Y. TIMES, May 16, 2003, at A20.

143. Romero, *supra* note 142.

and travel documents to prevent victims from trying to escape.[144] Traffickers confiscated the documents of victims in four of our eight cases studies.[145] In the remaining four, the victims did not have any identification documents to begin with. During the journey, traffickers may use threats and beatings to maintain control over their victims. Should victims require medical treatment because of an illness or physical abuse, it is almost always the trafficker or smuggler who decides if it will be provided or not.

Forced Labor

Once trafficked migrants reach their destination in the United States, they continue to face a variety of health risks. Because many have entered the country illegally or their captors keep them isolated through violence or intimidation, victims remain hidden and continue to depend on their trafficker or "employer" for shelter, food, and safety. Forced labor victims are likely to enter and be held in high-risk, poorly regulated work environments. Those who work in the sex trade are at risk of contracting AIDS or other sexually transmitted diseases. While published evidence is limited, some media reports indicate children of forced labor victims are taken from their parents and returned to their parents' place of origin.[146]

Victims of forced labor increase their susceptibility to ill health because they often are forced to live in overcrowded housing with poor sanitation. In the case against Kil-Soo Lee, one survivor, Tuyen, described thirty-six workers sharing one to two showers and two to five toilets. There was no hot water or toilet paper. The bathroom facilities were not maintained and some remained permanently broken. Some mornings, the lines to use the facilities were so long that not everyone had an opportunity to do so before having to be present for work. Those who missed out had to wait for a meal break to use the toilet or to wash their face. Drinking water was only available in the bathroom.[147]

A similar situation prevailed in the Florida citrus harvesting case, where forty or more workers slept in a large trailer. Worse yet were the living conditions of the Florida forced prostitution victims. The women and girls were made to live and work in filthy, rubbish-strewn trailers, duplexes, and houses that were located in isolated agricultural areas accessible only by dirt roads running through citrus groves.[148] The windows of the women's living quarters were broken or boarded up.[149] Inside, there were soiled mattresses on the floor.[150]

144. Donna M. Hughes, *The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women*, 53 J. INT'L AFF. 625, 636 (2000).

145. In the Los Angeles domestic service case, the victim's trafficker confiscated her passport soon after her plane landed in Los Angeles. Similarly, the assistant manager in the American Samoa garment factory confiscated the travel documents of his Vietnamese workers.

146. *Trafficking of Migrants: Hidden Health Concerns*, MIGRATION & HEALTH NEWSL. (Int'l Org. for Migration, Geneva, Switz.) Feb. 2000.

147. Interview by Natalie Hill with Tuyen, pseudonymous forced labor victim, location confidential (June 10, 2003); Nguyen Thi Nga v. Daewoosa Samoa, Nos. 133-99, 68-99, 93-00 (Am. Samoa decided Apr. 16, 2002).

148. Gardiner, *supra* note 106.

149. *Id.*

The women were forced to service strangers and sleep on those same mattresses each night.[151] The mattresses were separated from each other, if at all, only by hanging sheets.[152] Garbage and used condoms littered the brothels.[153]

Mental Health

The psychological consequences of forced labor remain largely unexplored. Despite the paucity of research data, we do know that when people enter exploitative work situations against their will, they risk losing their sense of personal efficacy and control, attributes that mental health professionals have long considered essential to good mental and physical health.[154] Under the control of their traffickers or "employers," victims may experience feelings of isolation, shame, and betrayal. They may fear being sent home without any money, especially if deceived by a promise of bona fide employment.[155] They may experience or witness repeated threats and verbal abuse, involuntary confinement, torture, and sexual assault. A manager at the Daewoosa garment factory in American Samoa, for example, frequently sexually abused female Vietnamese workers by slipping into their sleeping quarters at night. Removed from their family and friends, forced labor victims lack a social support network to help cope with these traumatic assaults. Some, like the victims in the Florida forced prostitution ring, turn to drugs and alcohol, where available, as a coping mechanism. "I would go to bed drunk because it was the only way I could fall asleep," one victim said.[156]

All of these conditions can cause forced labor victims to lose their sense of control and become increasingly dependent on those who hold them captive, if merely to survive. Captivity brings the victim into prolonged contact with the perpetrator and creates a special type of relationship, one of coercive control. "In situations of captivity," writes psychiatrist Judith Herman, "the perpetrator becomes the most powerful person in the life of the victim, and the psychology of the victim is shaped by the actions and beliefs of the perpetrator."[157] "The methods of establishing control over another person," she adds, are "the organ-

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Psychologists dealing with trauma survivors have long postulated that personal efficacy and control is a major determinant of recovery. *See generally*, JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 74-95 (1992). Another way of examining this phenomenon is through the "control of destiny" hypothesis, developed by Leonard Syme, which holds that control over one's destiny refers to the ability "to influence the events that impinge upon their lives." S. Leonard Syme, *Social and Economic Disparities in Health: Thoughts about Intervention*, 76 MILLBANK Q. 493, 495 (1998). According to the research of Syme and others, a greater sense of control in one's life often leads to better health outcomes. *See id.* at 493-505.
155. Melanie Orhant, *Article 1: Trafficking in Persons*, *in* REPRODUCTIVE HEALTH AND RIGHTS–REACHING THE HARDLY REACHED 3 (Elaine Murphy & Anne Hendrix-Jones eds., 2002), *available at* http://www.path.org/files/RHR-Article-1.pdf.
156. Quoted in Gardiner, *supra* note 106.
157. HERMAN, *supra* note 154, at 74-75.

ized techniques of disempowerment and disconnection . . . [so as] to instill terror and helplessness and to destroy the victim's sense of self in relation to others."[158] As victims become more isolated, they grow "increasingly dependent on the perpetrator, not only for survival and basic bodily needs but also for information and even for emotional sustenance."[159]

Lakireddy Bali Reddy used techniques of disempowerment and disconnection to create dependency among the teenage girls he trafficked into the United States. Because of their age and low-caste status, the girls were already susceptible to the power and dominance of a higher caste male who was older than most of their fathers. Reddy frequently rewarded the younger girls with gifts and favorable treatment. If girls exhibited maturity, they would cease to receive such favorable treatment. Since Reddy was constantly bringing younger girls into his estate, it was to a survivor's distinct advantage not to "grow up." For this reason, according to one of the attorneys in the case, the psychological and emotional development of one of the survivor's has been grossly stunted.[160]

Over a period of time, Reddy brought his favorite girls to Berkeley, California to provide him with sex and to work in his restaurants and apartment buildings. Once in the United States, Reddy's control over the girls intensified—they were now in a foreign land under fraudulent circumstances where they did not speak the language or understand the customs. Housed in Reddy's apartments and fed at his restaurants, the girls were prevented from going to school and having contact with people outside of the Reddy network. To reinforce his control, Reddy frequently beat the girls or threatened to turn them in to the authorities. One of Reddy's victims, a girl who had been brought to Berkeley at a very young age, exhibited a great loyalty to him. She, in fact, helped to hold down other girls while Reddy raped them. This ultimately caused some confusion for police investigators who apparently mistook her for a possible perpetrator and held her in jail for over a month.[161] Court records show that some of Reddy's victims still bear psychological scars, including depression, recurring nightmares, and panic attacks, as a result of their captivity, sexual abuse, and dependency.[162]

In the case of Khai, the Thai domestic worker, the trafficker used similar methods of intimidation and separation, including reminding Khai of her employer's higher socio-economic status. Khai's employer, Veerapool, would often jab a finger at her and say, "Do you know who you are? Do you know who I am?"—the implication being that Khai was from a lower class and that the perpetrator was an important and respected person.[163] Veerapool also

158. *Id.* at 77.

159. *Id.* at 81.

160. Interview by Rachel Shigekane with Nancy Hormachae, in Berkeley, Cal. (June 25, 2003).

161. *Id.*

162. United States v. Lakireddy Bali Reddy, No. CR 00-40028-01 SBA (filed June 21, 2001) (citing Pre-sentencing Report, at paras. 79-80).

163. Interview with Khai, *supra* note 120. *See generally*, KATHRYN MCMAHON & JENNIFER STANGER, COALITION TO ABOLISH SLAVERY & TRAFFICKING, SPEAKING OUT: THREE NARRATIVES OF WOMEN TRAFFICKED TO THE UNITED STATES 14 (2002).

trained her to be physically "lower" than she was. If her employer sat in a chair, the domestic servant had to sit on the floor. The servant served her employer's party guests as she served her employer, on her knees, to reinforce her lowly status. In an effort to isolate her, the employer forbade Khai to talk to neighbors or shopkeepers. Khai was allowed to answer the telephone but not to make outgoing calls.

Louisa Satia and her husband used the same kind of tactics to denigrate and isolate sixteen-year-old Maryse[164] in their Washington, D.C., apartment. Maryse's employers forbade her to leave the apartment complex, warning that they would deport her if she did. One morning, as Maryse was sending the children off to school, she stopped to talk to a man at a bus stop near the apartment complex. Louisa happened to see the encounter and later beat Maryse.[165] On other occasions, Louisa would forcibly cut Maryse's hair, put glue and soft drink in her hair, and spray cleaning liquid in her eyes.[166] Louisa's husband also sexually assaulted Maryse by exposing his genitals to her, attempting to take off her clothes, and trying to touch her breasts.[167] In an effort to keep her from communicating with her parents, her employers confiscated Maryse's letters and tried to convince her that her parents were indifferent to her situation.[168]

Physical Health

The physical consequences of forced labor are many and varied. Because forced labor is largely a clandestine practice, it is also likely that many of these health problems go untreated for long periods of time. Perpetrators of forced labor frequently use violence as a means of "breaking" and controlling their workers. Vietnamese workers at the garment factory in American Samoa reported that Samoan guards and workers frequently beat them if they complained about their working conditions. The factory managers, the workers said, encouraged the beatings as a form of punishment or as a way to maintain order. In one incident, a Samoan worker, in the process of beating several workers, thrust a PVC pipe into the left eye of a female employee, causing her to lose the eye. Violence-related injuries associated with forced labor include bruises, broken bones, head wounds, stab wounds, and oral and dental injuries.[169]

The Mexican women forced to work as prostitutes in Florida suffered serious physical injuries as a result of the violence they endured at the hands of their traffickers and "clients." The traffickers repeatedly raped girls in order to "initiate" them to sexual servitude.[170] Customers also threatened and beat the wo-

164. Pseudonym used to protect the survivor's identity.

165. Summary of the Investigation, Dep't of Justice, at 6(A)(14), United States v. Satia, 2003 WL 21436987 (4th Cir. 2003) (No. AW-00-0590).

166. *Id.* at 6(A)(12).

167. *Id.* at 6(A)(13).

168. Interview by Steven Lize with anonymous Assistant U.S. Attorney, location confidential (July 10, 2002).

169. JOINT FACT SHEET, *supra* note 139.

170. Sean Gardiner & Geoffrey Mohan, *Smuggled for Sex*, NEWSDAY (Mar. 12, 2001), at A05.

men. "Most of the clients had weapons," a victim recalled, "and if I did not do what they wanted me to do sexually, they beat me."[171] Several of the victims became pregnant and were forced to have abortions.[172]

Because they are at the mercy of their captors, victims of forced labor are rarely in control of their own health-care decisions. Women and men who are forced into prostitution face the risk of contracting HIV because they may lack the power to insist on the use of condoms.[173] Women who become pregnant while in captivity lack access to appropriate prenatal care or are forced to abort. Some resort to unsafe abortions.[174] Women can suffer severe consequences as a result of undiagnosed and untreated gynecological infections and complications, including pelvic inflammatory disease, chronic pelvic pain, ectopic pregnancy, and sterility.[175]

Forced labor victims who become malnourished in captivity are at risk of developing long-term illnesses. Our study found that perpetrators of forced labor failed to provide their workers with adequate nutrition and at times withheld food as a form of punishment. In February 2002, *The New York Times*, quoting an unpublished report from the Department of Labor, wrote that the Vietnamese workers at the American Samoa garment factory looked like "walking skeletons" and that their "diet, consisting primarily of watery broth of rice and cabbage, is of a type and quantity that may lead to malnutrition."[176] The newspaper revealed that the factory management "admits that they withhold meals from employees as a form of punishment when workers complain about food."[177] A nutritional expert who testified on behalf of the workers in the civil case before the High Court of American Samoa argued that because of the absence of fresh vegetables and fruit, the meals failed to meet U.S. Department of Agriculture nutritional guidelines.[178]

According to one of the garment workers, the first in the serving line might get some solid ingredients in the soup but the last in line would get only broth. She described sending word to new workers to bring seeds with them so that they could plant vegetables. They grew cabbages but it was not enough to feed them. Another garment worker described meals of rice, cabbage, and potatoes that did not provide him with enough nutrition to do the work that was expected of him and left him hungry.[179] Likewise, the asparagus harvesters testified that although they were provided between two to three meals per day, they were at

171. *Id.*
172. *Id.*
173. JOINT FACT SHEET, *supra* note 139.
174. *Id.*
175. *Id.*
176. Steven Greenhouse, *Beatings and Other Abuses Cited at Samoan Apparel Plat that Supplied U.S. Retailers*, N.Y. TIMES, Feb. 6, 2001, at A14 (citing Department of Labor report dated December 14, 2000).
177. *Id.*
178. Nguyen Thi Nga v. Daewoosa Samoa, Nos. 133-99, 68-99, 93-00 (Am. Samoa decided Apr. 16, 2002).
179. Interview by Natalie Hill with Anh Dung, pseudonymous forced labor victim, location confidential (June 10, 2003).

times fed spoiled eggs and meat, the food was often over or undercooked, and they often went hungry.[180]

The Oklahoma factory workers also reported suffering from malnourishment. At the Pickle plant, the owner John Pickle allegedly maintained complete control over the food purchases and rationed the daily food allowance. The cooks lacked the appropriate utensils to cook meals for fifty-two workers.[181] Workers testified that the cooks were made to cut whole apples into fourths and serve half-glasses of milk as a way to ration food.[182] When the workers complained, Pickle and his agents allegedly told the workers to be quiet and accept it or they would be sent back to India.

Forced labor victims working in agriculture, construction, and manufacturing are at risk of developing repetitive strain injuries, chronic back pain, and visual and respiratory problems if they fail to receive proper medical care.[183] If these conditions remain untreated, they can become debilitating and require long-term treatment and rehabilitation.

Access to Health Care

Perpetrators of forced labor maintain near total control over their victims, including access to health care. Perpetrators expressly cultivate a fear of law enforcement and other "outsiders" among laborers.[184] Even if movement is less restricted, victims often decide not to seek health care or risk the consequences of "breaking the rules" because they fear reprisals from their captors. Three survivors of the California asparagus worker case and the Florida citrus worker case had no access to medical care in the labor camp where they were housed. In each case, armed guards patrolled the camp at night to ensure that no one tried to leave. No health professionals visited the camp, and workers used their own painkillers and other medications to ease their ailments. In the case of the Oklahoma factory workers, victims reported suffering from work-related injuries but were denied access to proper medical care. In one instance, a worker stated he became ill and received no medical help. Even when a fellow American worker tried to take him to the doctor, the company owner allegedly stopped them and forced the worker to stay and work. Some workers claim they suffered injuries, such as eye infections or vision impairment, for which they were denied treatment.[185]

180. Plaintiffs' and Workers' Declarations in Support of Motion for Temporary Restraining Order and Leave to File Using Fictious Names, Manuel A. v. JB Farm Labor Contractor, (E.D. Cal.) (filed May 25, 2000) (No. CIV S-00-160-GEB PAN); Interview by Natalie Hill with Juan, pseudonymous forced labor victim, location confidential (Apr. 27, 2003).

181. *See* Affidavit of forced labor survivor at 12 [Bharathakumaran Nair], *Chellen* (No. 02-CV-85-EA (M)).

182. *Id.*

183. Orhant, *supra* note 155, at 1.

184. JOINT FACT SHEET, *supra* note 139.

185. *See* Affidavit of forced labor survivor [Uday Dattatray Ludbe] at 17, *Chellen* (No. 02-CV-85-EA (M)); Affidavit of forced labor survivor [Bharathakumaran Nair], *supra* note 181.

Even if victims have a means of leaving their premises, they may be reluctant to seek professional care because they are unfamiliar with U.S. currency, unsure of how to use local transport, unable to speak English, or fear health providers may report them to immigration or labor officials.[186] While Khai, the Thai domestic worker, traveled almost daily from her employer's house to the restaurant, she was forbidden to speak to any neighbors or shopkeepers she might encounter en route or near the restaurant.[187] Because of the clandestine nature of forced labor, victims may receive regular but unsanitary and inadequate care under the strict supervision of their employer.[188] Finally, without access to proper health care, victims can potentially pass on communicable diseases to members of the community where they are held captive.

Post-release

The most immediate needs of those who survive forced labor are safety and housing. Some survivors may require immediate hospitalization or specialized medical care, but most will be able to forgo medical screening and medical care until after they have settled into their new surroundings. It is important, however, that survivors undergo screenings to identify any preexisting or acquired health problems. Health professionals who are familiar with migrant health issues usually are best suited to conduct screenings, as diseases common in a survivor's country of origin may not be commonly recognized in the United States. Screening should include questions about the patient's labor conditions, housing, past and current medical history, and nutrition.[189] Social and cultural factors will significantly influence how survivors present health problems to service providers. If a survivor is from a country where similar health services are not available, she may find it difficult to trust care providers.[190] Alternatively, services may not correspond to the kind of help survivors think they need.[191]

While forced labor victims may suffer mental health effects including post-traumatic stress disorder (PTSD) as a result of their enslavement,[192] the nature, severity, and prevalence of these effects after release from captivity require further research. Studies of groups of undocumented migrants indicate that the

186. Karen Aroian, *Mental Health Risks and Problems Encountered by Illegal Immigrants*, 14 ISSUES OF MENTAL HEALTH NURSING 379-97 (1993).

187. Interview with Khai, *supra* note 120.

188. Orhant, *supra* note 155, at 3-4.

189. *Id.* at 6.

190. Federico Allodi & Glenn R. Randall, *Physical and Psychiatric Effects of Torture*, *in* THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS 72-75 (Eric Stover & Elena O. Nightingale eds., 1985).

191. Harvey M. Weinstein et al., *Rethinking Displacement: Bosnians Uprooted in Bosnia and California*, *in* 7 NEGOTIATING POWER AND PLACE AT THE MARGINS: SELECTED PAPERS ON REFUGEES 62 (Juliene G. Lipson & Lucia Ann McSpadden, eds., 1999) ("While some refugees seek psychological assistance and family disruption does occur, the majority of the Bosnians focus on rebuilding their lives and suppressing troubling thoughts.").

192. The National Institute of Mental Health defines PTSD as an "anxiety disorder that can develop after exposure to a terrifying event or ordeal in which grave physical harm occurred or was threatened." NAT'L INST. OF MENTAL HEALTH, FACTS ABOUT POST-TRAUMATIC STRESS DISORDER (2002), *available at* http://www.nimh.nih.gov/publicat/ptsdfacts.cfm.

prevalence of psychiatric disease, including depression and suicide, is higher in these populations.[193] In the case of children, the Organization of American States and the Pan-American Health Organization reports that "traumatic sexualization, betrayal, powerlessness, and stigmatization involved in sexual exploitation are particularly damaging to child and adolescent development and can lead to various types of psychiatric morbidity . . . ."[194]

Children who witness acts of violence or repeated sexual abuse are at significant risk of developing PTSD, among other disorders.[195] Psychologists have noted, for example, that one of Reddy's victims may be plagued with psychological problems for the remainder of her life because of the sexual abuse she suffered and because Reddy forced her to watch as he sexually abused her older sister.[196] People diagnosed with PTSD tend to relive the ordeal repeatedly through nightmares, flashback episodes, and memories. They may also avoid reminders of the event and experience excessive alertness. Other common symptoms include emotional numbness, depression, irritability, inability to sleep, difficulty concentrating or completing tasks, and outbursts of anger. These symptoms can be severe and last long enough to have a significant adverse effect on the individual's daily life.[197]

Despite the suffering from trafficking, Florrie Burke, a mental health expert with Safe Horizon, notes that traditional psychotherapy may not be appropriate for survivors: "Many times they're not ready for it right away. That comes later, when they're ready to deal with it. Sometimes all someone wants is a paying job, and processing [the experience] comes later."[198] Forced labor survivors who seek mental health services need to perceive the physician or therapist as part of a secure environment. Finding culturally appropriate mental health services presents another challenge, as Nancy Hormachea, an attorney in the Reddy case, noted: "All the survivors [in the Reddy case] had psychological issues, yet it has been nearly impossible to provide them with good therapy. Western-style therapy is foreign to them and not culturally appropriate . . . . Most refused to go because they didn't like it and they couldn't keep their scheduled appointments. I'm not sure that they derived any benefit from it. There has to be another model for psychotherapeutic help."[199] According to Hormachae, many of Reddy's victims felt stigmatized by the very fact that they were experiencing emotional difficulties and in need of therapeutic assistance. "You have to understand that . . [there] are derogatory sayings about people who seek [psycho-

193. For a discussion of depressive syndromes and affective disorders among refugees, see U.S. DEP'T OF HEALTH & HUMAN SERVS., PROMOTING MENTAL HEALTH SERVICES FOR REFUGEES: A HANDBOOK ON MODEL PRACTICES (1991), *available at* http://aspe.hhs.gov/pic/pdf/3928.pdf.

194. JOINT FACT SHEET, *supra* note 139.

195. POST-TRAUMATIC STRESS DISORDER IN CHILDREN 19 (Spencer Eth & Robert S. Pynoos eds., 1985).

196. United States v. Lakireddy Bali Reddy, No. CR 00-40028-01 SBA (filed June 21, 2001).

197. NAT'L INST. OF MENTAL HEALTH, *supra* note 192.

198. Interview by Jolene Smith with Florrie Burke, Senior Director, Safe Horizon, in New York, N.Y. (Aug. 11, 2003).

199. Interview with Nancy Hormachea, *supra* note 160.

logical] help [in the village] where these girls come from," Hormachae said.[200] "They are seen as being 'crazy' and described as being like 'a chained, rabid dog.'"[201]

People who survive forced labor and participate in the T visa program must agree to participate actively in the prosecution of their trafficker or employer. But a decision to participate in potentially contentious legal proceedings should not be taken lightly. Studies of torture survivors indicate that to achieve a favorable therapeutic outcome, survivors must have "an acceptable self-concept and see the world as a fairly secure and predictable place."[202] Courtrooms are hardly safe and secure environments for the recounting of traumatic events. Judges can—and often do—admonish witnesses who stray from the facts, which in turn can frustrate victims intent on telling their story publicly. The adversarial nature of trials also can result in unanticipated and unexpected events in the courtroom. The sight of the defendant, a long-repressed memory, or the sight of a loved one or co-worker can devastate even the most confident witness. So can the hardscrabble of cross-examination as defense attorneys set out to poke holes in a witness's testimony or impugn his or her credibility. Witnesses may also feel that the court does not "respect" them, especially if they have to endure an intense cross-examination. Based on research on victims and witnesses who have appeared before the International Criminal Tribunal for the Former Yugoslavia, the level of fear or concern experienced by witnesses throughout the pretrial process depends on the stability and safety of the witness' living conditions; the amount of time that had passed between the end of the war and their participation in the trial; fear of reprisals that might affect a witness's children; and whether the witness lived in the same town as the accused and his family.[203] To avoid further trauma, all of these factors need to be considered when attorneys approach forced labor survivors to testify against their former traffickers and/or employers.

VII.
SOCIAL AND LEGAL SERVICES

While the Trafficking Act has greatly amplified the federal government's role in investigating and prosecuting forced labor cases in the United States, the job of providing basic social and legal services to survivors has fallen squarely on the shoulders of NGOs and social service agencies. With limited resources, these groups must identify forced labor survivors, attend to their immediate needs for physical safety and housing, refer them for health care, facilitate their access to protection and rehabilitative services, and help them return to their countries of origin or begin new lives in the United States. Yet according to our

200. *Id.*

201. *Id.*

202. Allodi , *supra* note 190, at 75.

203. ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE 62 (2003).

survey of forty-nine social service providers, fewer than half of these agencies are able to meet these needs.

Identifying Survivors

Social service providers and legal advocates must be able to assess whether a person seeking their assistance is a survivor of forced labor. Yet most of these professionals, through no fault of their own, lack the skills to do so. Until recently, service providers and legal advocates encountered relatively few, if any, forced labor survivors in their daily work. With the passage of the Trafficking Act in 2000, however, that situation has changed rapidly; so much so that a growing number of service agencies and advocacy groups are developing criteria to help their staff distinguish forced labor survivors from other types of clients.

Survivors gain their freedom and come to service providers and legal advocates in a variety of ways. In six of our case studies, victims received initial assistance from either a "Good Samaritan" or a local social service agency. In the case of Khai, the enslaved Thai domestic worker, it was a Good Samaritan who first brought Khai to the Thai Community Development Center (CDC), a nonprofit organization in Los Angeles serving Thai immigrants. The CDC helped Khai find shelter and later a permanent home and a job. The organization also referred Khai's case to federal prosecutors and throughout the trial served as her liaison with the office of the prosecutor.[204] In some cases, forced labor survivors are discovered by chance. Over time, however, one NGO has learned how to investigate forced labor operations in agriculture. Laura Germino with the Coalition of Immokalee Workers (CIW) explains how her organization uncovered a recent forced labor operation: "The guy first called in to say his employer owed him money. The crew-leader hadn't paid him. So we invited [the laborer] to come to the meetings. We began trying to get the money back for him, and during the course of the *cobro* [recovery of unpaid wages], we learned that there was a slavery operation."[205]

Some forced labor victims have even been liberated by local law enforcement personnel, as happened in the Reddy case. Local law enforcement agents could play a more active role in identifying and ending forced labor operations, but most lack training in the identification of forced labor operations and continue to view people in such situations as illegal immigrants and undocumented workers. In more isolated areas of the United States, local law enforcement complaisance has benefited employers who use forced labor. In recent years, there has been a growing recognition among government agencies and private organizations that finance anti-trafficking efforts of the role nongovernmental organizations, such as members of the Freedom Network, can play in educating

204. Interview by Rachel Shigekane with Erica Tumbaga, Case Manager, Coalition to Abolish Slavery and Trafficking, in Los Angeles, Cal. (June 9, 2003).

205. Interview by Steven Lize with Laura Germino, Anti-Slavery Campaign Coordinator, Coalition of Immokalee Workers, in Immokalee, Fla. (June 7, 2003).

and training local police to identify and refer victims of forced labor to appropriate service providers and federal authorities.

Safety, Housing, and Protection

The first priority in assisting survivors of forced labor is to ensure their safety. Not all survivors are at the same risk of harm, so their security needs vary. In most parts of the United States, service providers, community groups, and advocates have taken the lead in protecting forced labor survivors, including managing survivors' privacy and housing to shield them from retribution or unwanted contact with an alleged perpetrator's defense attorneys.

"The important thing," says Laura Germino of the CIW, "is to place survivors in a community [group] that will 'ground' them, . . . make them feel safe and comfortable, . . . and help them understand the process of the federal investigation and prosecution."[206] In the case of the Florida citrus pickers, Germino's organization provided peer counseling for the liberated workers, while the local Catholic Church gave them clothes and toiletries. Another local religious organization provided housing and paid for their phone calls to their families in Mexico. This coordinated effort created a safe environment that enabled the workers to speak freely about their experience to federal investigators.

Not all efforts to coordinate security arrangements for survivors have gone smoothly. In the case against JB Farm Labor Contractor/Victoria Island Farms, the asparagus harvesters' attorney had initially contacted the U.S. Department of Labor (DOL) for assistance in investigating violations of federal labor law. Before revealing the identity of any of the parties, the attorney asked the local DOL representative for assurances that the workers would not be detained and deported by the Immigration and Naturalization Service (now U.S. Immigration and Custom Enforcement). In the end, the DOL acknowledged it could not provide such assurances and the attorney, wishing to protect her clients, declined to involve the DOL.[207]

Social service agencies report that finding appropriate housing for survivors has been one of their greatest challenges. In 2004, for example, the Coalition to Abolish Slavery and Trafficking (CAST) was finally able to open its first shelter for forced labor survivors—indeed, it was the first of its kind to be inaugurated in the United States.[208] Before that time, the organization had housed clients in two apartment units and, when those units were filled, in hotels and shelters operated by other groups.

Housing for survivors of forced labor must serve two purposes. First, it should provide a safe and comfortable environment. Second, the facility should serve as a protective barrier that screens survivors from unwanted intrusions. The facility's staff should function as "survivor advocates" by assisting their clients' access to needed services and helping them to make decisions about

206. *Id.*
207. Interview with Cynthia Rice, *supra* note 108.
208. *See* CAST NEWS 6 (Coaltion Against Slavery and Trafficking, L.A., Cal.) Fall 2003, at 3.

their future. If the survivor wishes to cooperate with law enforcement, the staff should be able to help facilitate such interviews.

As a rule, forced labor survivors should not be placed in shelters for the homeless or with victims of domestic violence. Survivors have reported feeling extremely uncomfortable in homeless shelters, especially if fellow lodgers have substance abuse or mental health problems. Similarly, women liberated from forced prostitution have reported feeling shunned or discriminated against in shelters for domestic violence victims.[209] Such facilities are often poorly equipped to meet the needs of forced labor survivors.

Nalini Shekar, the director of a shelter in northern California which has housed both victims of domestic violence and trafficking, said that programs designed for domestic violence victims, such as support groups, may not be appropriate for trafficking survivors who have been socially isolated and under the control of a trafficker for a significant amount of time. Such shelters, she added, often lack adequate security measures to protect trafficking survivors from perpetrators, particularly if they are part of a highly organized, extensive, and well-financed trafficking network.[210] Many of Shekar's concerns were borne out in the Reddy case by the attempt of an intruder to break into the shelter and find two of the survivors.

Forced labor survivors are not the only ones in need of protection. Persons who witness violent incidents involving forced labor or human trafficking as well as private citizens and organizations that help survivors escape risk retaliation from perpetrators. In the Florida citrus pickers case, the perpetrators or their associates reportedly menaced the homes of several staff members of CIW who had help liberate the workers. Despite repeated requests, the local police failed to answer the organization's calls for protection. Only after the NGO reported the threats to the justice department prosecutor who headed the investigation did local law enforcement, in conjunction with federal agents, monitor the situation more closely.

Prosecution and Benefits

Forced labor survivors (and their service providers) are often caught in a bind when they try to balance their desire for justice and benefits with their needs for privacy and security. The Trafficking Act requires that forced labor survivors share information about themselves (and possibly others in a similar situation) with federal law enforcement agents in order to receive federal benefits. But in doing so, survivors may be increasing their vulnerability in at least two ways. First, by alerting law enforcement to their presence, survivors with-

209. Interview by Natalie Hill and Rachel Shigekane with Kathleen Kim, Skadden Fellow, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and Mie Lewis, AED, New Voices Fellow, Asian Pacific Islander Legal Outreach, Co-chairs of the Bay Area Anti-Trafficking Task Force, in San Francisco, Cal. (June 16, 2003).

210. Interview by Rachel Shigekane with Nalini Shekar, in Oakland, Cal. (July 17, 2003). Shekar noted that forced labor survivors tend to stay in a shelter for a year or more, while victims of domestic violence stay an average of three to nine months. *Id.*

out legal immigration status risk deportation if their account is found to lack credibility. Second, alleged perpetrators who are defendants in criminal proceedings have a right to review information provided by survivors to federal investigation. As a result, survivors and their families may be at a greater risk for retaliation. According to CAST's Jennifer Stanger, these dilemmas have had "a chilling effect" on survivors who wish to apply for T visas but are reluctant to place themselves at greater risk. "Rather than cooperating with government authorities," says Stanger, "victims of trafficking may be reluctant to come forward if they believe that this information may be turned over to their traffickers or be used to have them removed."[211]

Both our governmental and nongovernmental informants agreed that all forced labor survivors should have a legal advocate. As an attorney in the Reddy case put it: "I think it's in the victim's best interest to have a consistent figure in her life who's going to be advocating for her and helping her navigate through this really confusing minefield."[212]

In the best of worlds, the survivor should be assisted by one agency that offers both legal and social services. In this way, the survivor will receive both social services, such as housing, clothing and transportation, and legal counseling on immigration status and work authorization. There are a small number of service providers linked through the Freedom Network, a national coalition of anti-trafficking organizations, which have adopted an empowerment model of working with survivors. The empowerment model encourages self-sufficiency and increased self-esteem so that survivors may make informed decisions of their own choosing. For example, network member CAST has developed a management system that addresses a wide range of survivor needs, including access to mental and physical health, housing, legal counseling, education, and employment. CAST case managers work with survivors in one of two modes: "intensive" cases receive the most comprehensive, personalized, and individualized attention. For example, a CAST case manager will routinely accompany a survivor who is receiving "intensive" case management to medical appointments. Other cases are handled on an "information and assistance" basis and receive less frequent and individualized attention.[213]

CAST will provide assistance to survivors for as long as they desire such help. For example, Khai, the former indentured domestic worker, continues to receive "intensive case management" at CAST two years after her liberation. Khai's case manager has helped her put together a successful T visa application; stabilize her employment; make arrangements to bring her son over from Thailand; apply for federal benefits, including food stamps, health care and Refugee Cash Assistance; and ensure that she keeps her medical appointments and understands her physician's instructions.[214]

211. Interview with Jennifer Stanger, *supra* note 117.

212. Interview by Laurel Fletcher with anonymous Assistant U.S. Attorney, location confidential (June 3, 2003).

213. Interview with Erica Tumbaga, *supra* note 204.

214. *Id.*

T visas

By the end of the Fiscal Year 2003, the U.S. Department of Justice reports that a total of approximately 450 survivors have accessed immigration benefits under the TVPA by receiving a continued presence visa and/or by receiving a T visa.[215] In 2003 alone, 297 of these T visas were issued.[216] Such progress notwithstanding, legal and social service providers point to several flaws in the special immigration program. To begin with, the application process is slow and cumbersome. Law enforcement may wait several months before issuing the endorsement survivors need to prove eligibility for immigration relief. On average, it takes the federal agency administering the program four to twelve months to process and approve a T visa application. Access to agency personnel also is restricted. The agency maintains only a general telephone number, which, according to users and advocates, requires callers to navigate complicated electronic voice instructions and wait on hold for long periods of time. Service providers say that rectifying these problems would help make the agency more "user-friendly" for all concerned.

Language and Culture

Service providers and legal advocates are learning to be sensitive to the varied backgrounds of survivors and the ways in which they interpret their experiences. Many survivors have minimal formal education, so it can be difficult for them to understand the roles of law enforcement and service providers or to fathom the complexities of the U.S. legal and welfare systems. The survivors of Reddy's abuse, for example, had never used public transportation or managed their personal finances, let alone navigated a complex criminal justice system, before they were freed. Not only do service providers need to translate these systems for their clients, they also may need to educate clients' families and communities in their home countries and in the United States.

Service providers and legal advocates must be aware of the difficulties their clients might face from the local migrant community once they denounce their captors. When it was discovered that Khai and the Thai Community Development Center had contacted federal authorities to report Supawan Veerapool's abuse, many members of the local Thai community accused Khai of being disloyal and ungrateful to a generous patron who had arranged for her to come to the United States. "I felt that eighty percent of the community was against me," Khai recalled in an interview for this study. "They regarded Supawan as a 'high soul'. . . and couldn't believe how bad Supawan really is. . . I felt like I did the right thing. But in Thai culture, I am seen as ungrateful."[217]

215. REPORT FROM ATTORNEY GENERAL, *supra* note 11, at 16. As of September 30, 2003, approximately 374 continued presence requests had been granted and as of November 30, 2003, approximately 757 T visa applications had been received, 328 of which were granted, thirty-eight of which were denied and the remaining of which were pending. *Id.* Note that some survivors applied for and received both continued presence and T visas. *See* Appendix for chart.

216. *Id.* at 15.

217. Interview with Khai, *supra* note 120.

Finally, service providers and law enforcement alike find it difficult to communicate with survivors because of language differences. Some social and legal service providers have in-house interpreters or are themselves proficient in the language of the survivor. But, as our study found, the need for interpreters is a pressing problem for many service agencies and federal and local investigators. CAST case manager Erica Tumbaga said language capacity was one of the greatest challenges faced by her organization. Even though federal agents have access to official language specialists, they are not easily mobilized in a timely manner, which can delay investigations. In the case against R&A Harvesting, the lead federal investigator assigned to the case did not speak Spanish, which restricted his ability to gather criminal intelligence and corroborating evidence. He thus had to rely on another, Spanish-speaking agent, which meant the investigation took longer as the two men had to double up for interviews.[218]

Reintegration

Reintegration is hard to achieve for many of those freed from forced labor. Service providers point to several barriers, including language and cultural differences, the effects of trauma, poor job skills, and a lack of education. Reintegration, for some, may mean repatriation to their country of origin where they may face stigmatization because of their experience.

Yet despite these challenges, many victims of forced labor have successfully reintegrated into society. Khai, the domestic servitude survivor, has done well in adjusting to a life of freedom in Los Angeles. "Khai is really one of our success stories," her case manager said. "She is a pretty stable person. Her English is good. She has housing and a job and a good relationship with her family. And the experience had not wholly traumatized her emotionally."[219] Khai agrees: "I have freedom now. I eat what I want. I am not afraid. I don't worry that people are watching over me. I feel like an ordinary person. I think that this is good."[220]

VIII.
CONCLUSIONS / RECOMMENDATIONS

Lessons Learned and Future Challenges

The U.S. government has recognized the problems of forced labor and human trafficking, and its actions to combat these abuses, both in the United States and overseas, constitute a significant platform on which to build. Already there have been important successes in enforcing laws that bring perpetrators of human trafficking and forced labor to justice. There has also been a marked change in approach and practice. Those caught in forced labor are now more likely to be recognized as victims of crime, with rights and needs that are specific to the nature of the abuse and exploitation they have endured. NGOs, ser-

218. *Id.*
219. Interview with Erica Tumbaga, *supra* note 204.
220. Interview with Khai, *supra* note 120.

vice agencies, legal advocacy groups, worker organizations, and other community-based groups are now accumulating invaluable experience in supporting victims of forced labor and trafficking and in participating in multisector efforts to combat these crimes. Yet these actions will not be fully effective until the United States raises public awareness about human trafficking and creates transnational law enforcement networks to tackle the problem head on. While much remains to be done, this study provides lessons to be learned, which can be built upon to strengthen U.S. efforts to eradicate forced labor.

Domestic Laws Can Create Strong Legal Platforms

Passage of the Trafficking Act in 2000 was a watershed event, providing a comprehensive legal framework to tackle human trafficking in the United States. The legislation established a comprehensive set of regulations to ensure that criminal traffickers are prosecuted and that their victims are treated as such. The record to date shows that the new law enforcement tools have paid off: the number of investigations and prosecutions of traffickers has increased dramatically. Key to this success is providing immigration benefits and social services to survivors of trafficking and forced labor. Greater cooperation would occur if the government issued regulations for the U visa established by the TVPA to allow survivors who provide limited assistance to law enforcement personnel to receive temporary legal status and benefits. There remains a need to refine U.S. laws to close gaps in enforcement and care for survivors of forced labor. For example, increased opportunities for regularized migration would help decrease vulnerability of workers to forced labor, and gender-sensitive migration policies would protect women in potentially exploitative situations.

Training Is Critical

Law enforcement, NGOs, worker organizations, government monitoring agencies, and service providers are learning more and more about the signs of trafficking and forced labor. This study finds that identification of victims increases as those likely to encounter survivors gain expertise in the various signals of forced labor conditions. Furthermore, expertise in identifying and supporting survivors strengthens eradication efforts by increasing law enforcement knowledge about forced labor and trafficking operations as well as by empowering survivors to seek justice and rebuild their lives.

The numbers of professionals with trafficking and forced labor expertise is still relatively small, but growing. Their experiences serve as a vital resource for the creation of training materials as well as their dissemination. Building up the numbers of trained and seasoned professionals is crucial to minimizing inadvertent risk of harm to victims or rescuers through inappropriate interventions, such as confronting a trafficker while the victim is still under her or his control. With time, training should be extended both in breadth and depth to more agencies and professionals in order to identify, liberate, and support survivors. In particular, worker and employer organizations are important audiences to target

for training on the signs of forced labor. Because victims are often isolated, these sectors may have access to victims and could function as monitors.

Witness and Survivor Protection

The safety of survivors is critical to creating conditions under which they will be able to rebuild their lives and, if they choose, to cooperate fully with law enforcement. This study links the effective response of U.S. law enforcement and service providers to the promotion of witness cooperation. Research found that housing that required forced labor survivors to live in homeless shelters or with victims of domestic violence was inappropriate. Creation of temporary housing specifically for survivors of trafficking and forced labor has just begun and promises to address many of the special needs of survivors emerging from servitude.

While law enforcement has been able to protect survivors in the United States, it has proved difficult to provide effective protection to family members of survivors abroad. NGOs and worker organizations, working transnationally, may prove to be an effective tool for protecting forced labor survivors and their families. NGOs and worker organizations in origin countries could form part of an early warning system by monitoring the status of families of witnesses as well as survivors who return home. These groups could alert government authorities at home and in the United States about reported threats or abuse. Calling attention to problems early would send an important message to traffickers and their associates not to harm victims and families. It would also inform survivors and their families that the United States values their safety and in this way could help garner victim trust and cooperation.

Social Services Provision to Survivors

A wide range of social services are needed to assist trafficking survivors. This study found that most experienced and successful service providers cover a host of needs, often working with clients for a long period. In particular, seasoned service providers have learned to screen survivors of forced labor and trafficking for specific needs resulting from their forced labor situation. It is important that survivors receive a health screening soon after their liberation and access to safe and secure shelter. Those forced into prostitution, for example, run a high risk of having contracted sexually transmitted diseases and having endured physical assault. Psychologically, victims may lose their sense of personal efficacy and control and experience feelings of shame, betrayal, and isolation. Providers work with survivors to provide emotional support and, when appropriate, counseling.

Another proven practice of service providers is to identify a lead agency and point of contact that will remain responsible for coordinating between service providers and, when a survivor is cooperating with law enforcement, between prosecutors and investigators. The multiple and varied needs of survivors favor a multisector, holistic approach to service so that the survivor's needs for housing, health care (mental and physical), legal services, language and job

skills may be addressed in a coordinated manner. In the best of worlds, the survivor should be assisted by one agency offering both legal and social services. In this way, the survivor would receive both social services, such as housing, clothing, and transportation, and legal counseling on immigration status, work authorization, and, possibly, their role in prosecution. There are a small number of service providers that have adopted an empowerment model when working with survivors. The empowerment model encourages self-sufficiency and increased self-esteem so that survivors take greater control over their lives and may make informed decisions concerning their futures.

This study found agreement among law enforcement, legal advocates, and social service providers that all forced labor survivors should have legal representation. Survivors face numerous and daunting legal issues. If cooperating with law enforcement, survivors are helped by having legal counsel who advise and support them in recounting their experiences. Similarly, legal advocates take responsibility for ensuring that survivors receive the immigration and other benefits to which they are entitled. Securing benefits helps to stabilize survivors' lives and promotes rehabilitation.

Research

Knowledge of the criminal aspects of forced labor and human trafficking in the United States is still very limited. This study shows that law enforcement, social service providers, and legal advocates have gained most of their understanding about trafficking and forced labor on a case-by-case basis. Organized research will inform and strengthen the response by sectors already involved in combating forced labor as well as promote inclusion of other groups, such as medical professionals and worker and employer organizations. The recent amendment to the Trafficking Act directs numerous agencies including the National Research Council of the National Academies, the Secretary of Health and Human Services, and the Attorney General to undertake and support research on trafficking. We suggest attention be directed to the economic dimensions and health aspects as established by the new law, and that research in these areas be tailored appropriately.

To target activities and resources where they are most needed, research is needed in states or geographical regions where forced labor trafficking cases are emerging, on companies that profit from the flow of the products of forced labor into their product supply chains, and on those economic sectors in which there is a tendency for trafficking and forced labor to occur. These sectors include prostitution and pornography, domestic services, agriculture, factory production, and restaurant and hotel services. At present there is little understanding of the elasticity of demand for forced labor in different sectors.

Further research on the needs and experiences of survivors is also important. This is clear in the lack of reliable data on the health status of forced labor survivors in the United States. Future research should identify the precise health and medical consequences of forced labor: the nature of the maladies and their durations, the best practices to identify and administer services to survivors, and

the level of recovery to be expected following treatment. This information should be used to develop screening protocols to help health care professionals identify preexisting or potential health problems. Research should be conducted to determine what kinds of follow-up health care would be needed for survivors who choose to return to their countries of origin. Researchers should solicit the active participation of survivors, so that future programs will meet the needs of survivors from diverse cultural backgrounds.

Recommendations

Forced labor remains a widespread problem in the United States because there is public ignorance of the crime, a lack of sensitivity to victims, insufficient legal action, and a public demand for cheap goods and services. Yet for all its severity and breadth, forced labor can be stopped. The record of accomplishments is striking, particularly considering that the Trafficking Act has been in effect for less than five years. It is clear, however, that much remains to be done. In particular, the U.S. government should:

1. *Start a broad-based awareness-raising campaign, with special attention to reaching immigrant communities in the United States.* Private citizens have reported cases of forced labor, suggesting that raising awareness among the general public can increase identification of victims. Furthermore, public awareness about the link between the demand for cheap products and services and the crime of forced labor can foster public pressure on companies and industry to take responsibility for the treatment of workers in the production of components or ingredients in the products they sell in the United States. The U.S. government should also encourage worker and employer organizations to promote awareness about forced labor and trafficking within their constituencies. More research needs to be conducted on the demand for commercial sex services so as to design a public awareness campaign to combat forced labor in this sector.

2. *Improve institutional capacity to respond to forced labor and trafficking.* This means training government officials involved in identification, investigation, and prosecution of perpetrators of trafficking and forced labor. Better coordination of law enforcement activities and policies also should be promoted between federal, state, and local level authorities. In addition, more resources should be devoted to enable service agencies to serve existing clients and to conduct outreach that might result in identifying more forced labor survivors.

3. *Ensure better protection for workers in sectors vulnerable to forced labor and trafficking.* Increased legal protections and monitoring of working conditions in agriculture, domestic labor, sweatshops, and food service would promote safer work environments. The government should promote accountability in those sectors, especially agriculture and garment manufacturing, which use subcontracting systems that violate labor laws and practices. In particular, there is a need for the Department of Labor to deepen its monitoring and enforcement activities in low-wage sectors. This is another key area in which worker and employer organizations may become involved by disseminating information and promoting compliance with fair labor standards.

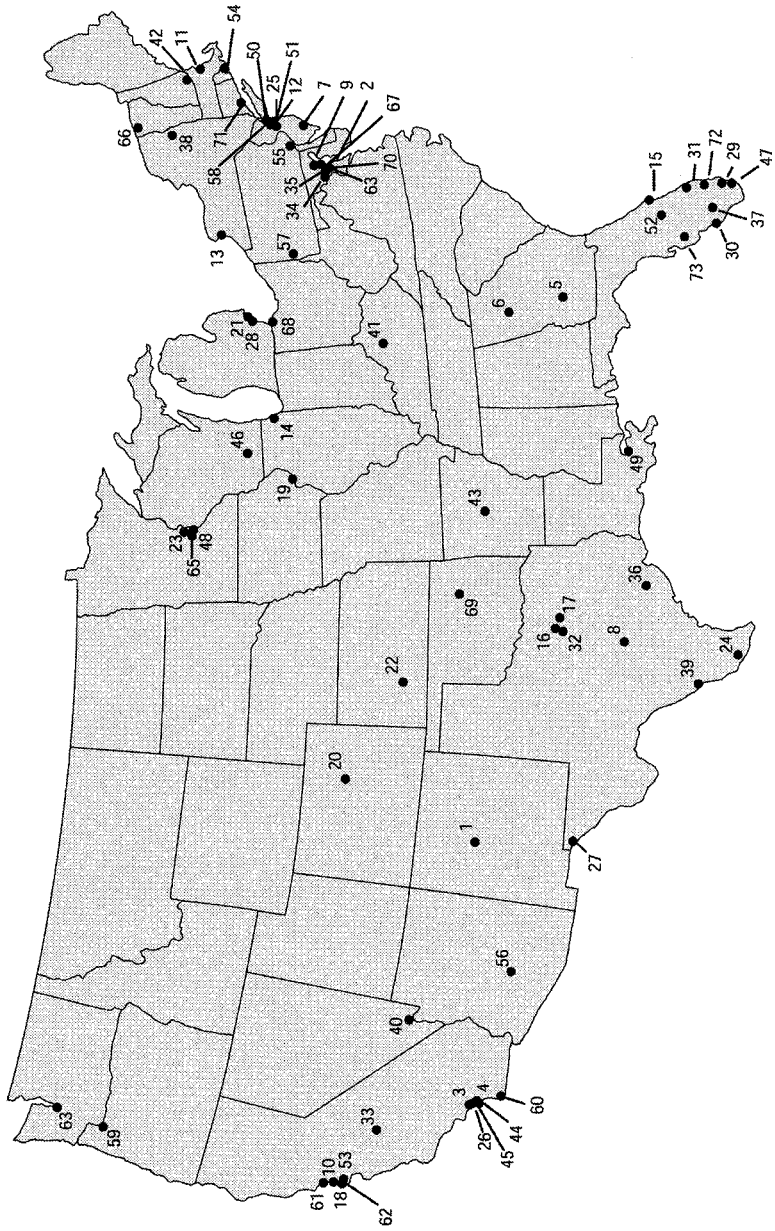
4. *Correct aspects of immigration policy that encourage the practice of forced labor.* The U.S. government should eliminate the visa requirement that mandates a worker to remain with one particular employer. This would go a long way toward reducing the vulnerability of low-wage workers, such as domestic laborers, to exploitation.

5. *Strengthen protection and rehabilitation programs for survivors.* To address short-term needs of survivors, the U.S. government should create incentives for survivors to come forward and cooperate with law enforcement personnel. This includes developing mechanisms to protect victims and family members vulnerable to retaliation and threats by traffickers in home countries. U.S. authorities should also review eligibility requirements for immigration relief as well as their administration to ensure these are consistent with the goal of supporting and protecting survivors. Increased public and private support to social service agencies is required in order to provide adequate, safe housing to survivors upon liberation from captivity. Once survivors feel safe and secure, they are more likely to aid law enforcement personnel in the prosecution of suspected traffickers.

APPENDIX

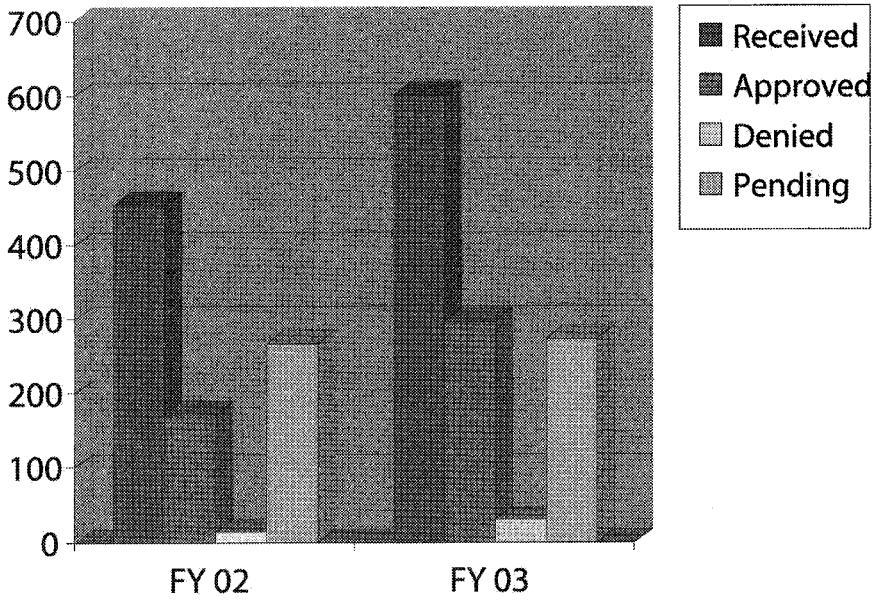
Reported Country of Origin of Victims of Forced Labor	Number of Cases	Estimated Number of Individuals
Mexico	25	ca 1,500
United States	20	ca 71
China	11	ca 10,000
Thailand	9	ca 150
India	9	ca 70
Bangladesh	8	ca 200
Russia	8	ca 100
Vietnam	6	ca 250
Honduras	5	ca 70
Philippines	5	ca 200
Korea	4	ca 6
Guatemala	3	ca 5
Indonesia	3	4
Cambodia	2	30
Cameroon	2	3
Estonia	2	15
Ghana	2	2
Kenya	2	2
Malaysia	2	5
Zambia	2	2
Albania	1	1
Brazil	1	1
Czech Republic	1	10
Ecuador	1	1
Ethiopia	1	3
Guyana	1	1
Haiti	1	1
Hungary	1	13
Jamaica	1	2
Kryghistan	1	1
Latvia	1	5
Micronesia	1	2
Nigeria	1	2
Peru	1	8
Romania	1	10
Tonga	1	4
Ukraine	1	29
Uzbekistan	1	1
Yugoslavia	1	1

Specific Nationality Not Reported		
Asia	6	ca 10,000
Southeast Asia	4	ca 30
"Hispanic"	2	ca 70
Eastern European	1	1



U.S. CITIES IN WHICH FORCED LABOR INCIDENCES WERE REPORTED.

RATES OF T VISA APPLICATION APPROVAL.



Number of Applications	FY 2002	FY 2003
Received	453	601
Approved	172	297
Denied	13	30
Pending	268	274

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Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools

Haider Ala Hamoudi

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By
Haider Ala Hamoudi*

INTRODUCTION

The current condition of Iraqi law schools is extremely poor.[1] Once among the most prestigious in the Middle East,[2] law schools in Iraq have deteriorated substantially during the past two decades for several reasons. First, the totalitarian regime of Saddam Hussein, hostile to the rule of law and to the establishment of consistent legal order, viewed the legal system and its educational component with suspicion.[3] Thus, the former regime underfunded,[4] understaf-

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1. Given the near total absence of scholarly research on the subject of Iraqi universities prior to the fall of Saddam Hussein, there is very little written information available respecting the current condition of the law schools. As a result, much of the information contained in this article has been gathered through personal observations and numerous interviews with the deans, faculty, staff, and students of various Iraqi law schools, as well as Iraqi lawyers and judges. In all, my colleagues and I have spoken with hundreds of people since December 2003. For reasons of both clarity and security, I do not refer to each of the persons with whom I spoke or the exact dates on which I spoke with them, but rather refer to all such discussions collectively as "Conversations."

2. Eric Davis, *Baghdad's Buried Treasure*, N.Y. TIMES, Apr. 16, 2003, at A19; *Coalition Provisional Authority Briefing Before the United States Dept. of Defense*, Mar. 9, 2004 (statement of Coalition Provisional Authority Senior Advisor Dan Senor and Brigadier General Mark Kimmitt, Deputy Director for Coalition Operations).

3. The former Iraqi regime's disregard for the rule of law is well documented and largely beyond the scope of this article. The most thorough information on this subject can be found in the annual U.S. State Department human rights reports, *available at* http://www.state.gov/g/drl/rls/hrrpt, as well as the annual Amnesty International Reports, *available at* http://www.amnesty.org/ailib/aireport/index.html. The past two decades of these reports provide chilling reading, not only with respect to the absence of any consistent legal order, but also with respect to the regime's abysmal human rights record and reliance on torture, extrajudicial execution, and arbitrary detention in order to silence all forms of real and perceived dissent.

4. I have not been able to obtain reliable figures from any responsible authority regarding the law schools' respective budgets over the past several years; this is invariably attributed to the poor accounting system employed by the previous regime. However, the dean of Baghdad University College of Law estimated that approximately 90% of the law school budget was spent on faculty salaries, which in the year before the 2003 invasion averaged the equivalent of US $90 per faculty member per month. Conversations, *supra* note 1. This would mean that the school had no more than $300 a month to commit elsewhere. *Id.*

fed,[5] and badly maintained the schools.[6] Members of the Ba'ath party infiltrated the schools both at the student level and through faculty appointments to monitor libraries and classroom discussions to ensure that everything taught or read was in strict accordance with the principles of the ruling Ba'ath party.[7] Students, professors, and the public believed that the deans appointed during Saddam's regime were government agents who would report any suspicious activity to the Iraqi security services.[8]

The sanctions the United Nations imposed on Iraq in 1990 also caused the deterioration of Iraqi law schools. Indirectly, the sanctions caused a massive decline in Iraq's economic condition that affected every person and institution in the country.[9] Directly, the sanctions prevented the schools from accessing and obtaining educational resources from outside Iraq.[10] Finally, the spate of loot-

5. *See infra* Part III.B (discussing the inadequate staffing at Iraqi law schools today). Baghdad University College of Law and the University of the Two Rivers College of Law in Baghdad, Iraq's two most prestigious law schools, *see infra* note 19, have suffered substantially from the emigration of many of their faculty members over the past two decades. A professor at the University of the Two Rivers told me that over two dozen of the schools' brightest faculty members have left Iraq since 1980. Conversations, *supra* note 1. The Dean of Baghdad University College of Law estimated the figure to be closer to 35 faculty members. *Id.* No official reports on this trend are available.

6. *See generally The United States and the Iraqi Marshlands: An Environmental Response: Hearing Before the Subcomm. on the Middle East and Central Asia of the House Comm. on International Relations*, 108th Cong. 20-21 (2004) (statement of Fernando R. Miralles-Wilhelm, Assistant Professor, University of Miami) (describing the weak condition of Basra University); Jared Stearns, *Librarians Aim to End Bad Chapter in Iraqi History*, BOSTON GLOBE, Mar. 21, 2004, at G20.

7. Conversations, *supra* note 1. The repression to which the law schools were subjected during the reign of the previous regime was a frequent theme of the law school faculties at each university. Numerous professors on countless occasions told us that they had at the time heavily censored their lecture materials to exclude anything that might be considered even mildly critical of the regime. Many also reported being questioned by government agents on occasion. Moreover, according to the faculties at several schools, libraries were frequently combed to remove any materials that might be deemed seditious, such that one Suleymania professor told me he was forced to write an entire master's thesis on a subject concerning Islamic law in the modern era without being able to quote a source from the nation with the most scholarship in that field, Iran. *Id.*

8. *Id.*

9. Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions and War in Iraq, in* POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS 91, 105-29 (Thomas G. Weiss et al. eds., 1997); RICHARD E. HULL, IMPOSING INTERNATIONAL SANCTIONS: LEGAL ASPECTS AND ENFORCEMENT BY THE MILITARY, *at* http://www.ndu.edu/inss/books/book_titles.html (Mar. 1997); Cassandra LaRae-Perez, Note, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions From an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 166-68 (2002).

10. *See* S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., at 19, U.N. Doc. S/INF/46 (1990) (indicating that the comprehensive U.N. sanctions were to encompass all goods, except food and medicine under certain humanitarian circumstances). A tour of the Iraqi law school libraries in non-Kurdistan Iraq provides a fascinating, if tragic, glimpse into the long decline of the schools under Ba'ath party rule. Baghdad University's law library, for example, contains a respectable collection of United States law journals published between 1950 and 1980. The library carries fewer journals published after 1980, the year in which the Iraq-Iran war began and Saddam Hussein became president, and the number decreases as the decade-long war continued. By 1991, the year of the first Gulf War and the UN-imposed sanctions, new acquisitions virtually ceased altogether. Baghdad and Basra library officials each estimated that their respective collections expanded by approximately 10 books per year in the 1990's, all brought by professors who had received rare permission to travel and returned with as many books as they could carry. Conversations, *supra* note 1. For more information regarding the extent to which Iraqi universities were isolated from the trends and develop-

ing that took place immediately after the fall of Saddam's regime in April 2003 damaged the schools considerably.[11] The schools were stripped of virtually all possessions that could be carried off, including desks, air conditioners, computers, carpets, metal support rods, linoleum tiling, and shelves; many books were burned.[12] The damage to schools, already desperately low on resources, cannot be underestimated.

As a result, law schools are in desperately poor shape in today's Iraq, and the legal profession is held in very low regard. Iraqi law school graduates tend to be dismissed by the general population as low level scriveners and facilitators of corruption, carrying bribes from a client to a judge or government official in order to achieve a particular result; talented students generally avoid law school as a result.[13]

I learned much of this firsthand when I moved to Iraq in December 2003. DePaul University's International Human Rights Law Institute ("IHRLI") sent me and several other educators to Iraq to reform and improve legal education. More broadly, we hoped that by raising the standard of Iraqi legal education we could help improve the entire legal profession, both in terms of its respectability and its dedication to the honest, efficient, and transparent administration of justice. This would, we hoped, help to create of a rule of law society in Iraq. The effect of our efforts would be gradual, we expected, but nonetheless real if all went well.[14]

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ments of parallel institutions elsewhere, see Kathryn McConnell, *Rebuilding Education Sector Key to Iraq's Rejoining World*, WASHINGTON FILE (Dec. 1, 2003) *at* http://usinfo.org/wf-archive/2003/031201/epf106.htm.

11. *See United States Post-War Policies in Iraq: Hearing Before the Senate Foreign Relations Comm.*, 108th Cong. (2003) (statement of Peter W. Galbraith, Ambassador, United States) [hereinafter Galbraith]. *See also* Stearns, *supra* note 6 (discussing looting during the 1991 Gulf War). Fortunately for the schools in the northern, Kurdish controlled region of the country, which has been free of Baghdad rule since 1991, looting did not take place, and these schools were therefore spared this additional source of devastation. Conversations, *supra* note 1.

12. Galbraith, *supra* note 11; Conversations, *supra* note 1. While immeasurable damage was done to the libraries of the universities in the non-Kurdistan region of Iraq, credit must be given to the laudable efforts of the faculties of several law schools to preserve some of their material at considerable risk to themselves. At Baghdad University, for example, the dean and certain faculty members built a brick wall in front of the door to the library. They then painted it to camouflage its existence, so that looters were not aware of the location of the library. Books in the law school's main library were thereby preserved. Conversations, *supra* note 1. In Basra, the faculty rented a pickup truck in the midst of the chaos that enveloped their city after the fall of the regime and carried most of their collection to their private homes, where it could be better protected. *Id.*

13. These beliefs seem to be widely shared even within Iraq's functioning legal community. Virtually all of the practicing lawyers, judges, and professors with whom we interacted advocated this position, though of course the practicing lawyers were quick to point out that there are always exceptions. As a corollary to this principle, the entire legal system is widely viewed by the legal community to be deeply corrupt, so that effective lawyering is not as important to a practicing attorney as the extent of the attorney's (often unseemly) connections to members of the judiciary. Conversations, *supra* note 1.

14. IHRLI developed the project in the summer of 2003 in response to a Request for Proposal from the Higher Education and Development Program of the United States Agency for International Development ("USAID"). USAID granted the project approximately $3.9 million in September 2003, and the project began in earnest upon our arrival in Iraq in December 2003. The project is set to end in February 2005, though the contract may be renewed for another year. For more informa-

The project as it developed focused primarily on three law schools: the Colleges of Law at Baghdad University, Suleymania University, and Basra University.[15] At each school, we focused on four programs. First, we sought to improve and expand the infrastructure of and the materials contained in the law school libraries. Our many site visits demonstrated that this was one of the most pressing needs of the schools. Second, we tried to reform the law school curriculum, which is overly centralized, contains no electives, and has remained largely unchanged for thirty years.[16] Third, we held several academic conferences in Iraq on legal subjects of pressing concern. These conferences offered the faculties of nearly all of Iraq's law schools, as well as judges, lawyers, and other members of the legal profession, opportunities to meet and exchange ideas on important legal issues facing Iraq today. Finally, and most pertinently for the purposes of this article, we aimed to create clinical legal education programs in the three selected Iraqi law schools. I was responsible for this particular program.[17]

My conclusion is that Iraq's law schools would benefit greatly from the introduction of clinical education methodologies. At the present time, there are many practical impediments to the institution of a live clinic, by which I mean a clinic that handles actual cases and clients. These impediments would render the creation of a live clinic now ineffective at best and counterproductive at worst. Thus, I recommend that any available funding and resources be focused instead on simulated and experientially-based learning programs based on clinical pedagogy.

That said, my participation in this program has only strengthened my firm belief in the educational benefits of a live clinic. As beneficial as simulated exercises may be, I believe that one of the best ways to prepare a student to

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tion, see our website at http://www.law.depaul.edu/institutes_centers/ihrli/programs/rule_education.asp.

15. The project had neither the staff nor the funding necessary to institute programs at all of Iraq's law schools. We therefore selected these three, which are among the better known and are located in disparate parts of Iraq, in the hopes that reforms instituted there might be carried elsewhere in subsequent years. My only real regret was our inability to include Mosul University College of Law within the project; given its size and prestige, it would have been a welcome addition. Indeed, we had originally intended to include it, but the security situation in Mosul was so poor in our judgment that we did not think it was feasible to attempt a program. The prudence of this decision became clear in June 2004, when the dean of Mosul's College of Law was brutally murdered outside her home, for reasons that remain unclear. BBC News, *Academic Killed in Northern Iraq, at* http://news.bbc.co.uk/2/hi/middle_east/3829487.stm (June 22, 2004).

16. *See infra* Part III.C.

17. In terms of personnel, each of the four programs in our project was led by a manager, though each of us helped our colleagues with their programs to the extent possible. Our Baghdad-based Chief of Party, Sermid Al-Sarraf, oversaw the entire project. In addition, Dr. David E. Guinn, the executive director of IHRLI, and Professor Cherif Bassiouni, the president of IHRLI and a highly respected and eminent figure in his own right in the areas of human rights law and international criminal law, were involved in the management of the project from Chicago; each also traveled to Iraq to assess project development. Therefore, though I was responsible for management of the clinical program, I frequently consulted with all of my colleagues, and their advice and support were invaluable, as was that of the local Iraqi staff who assisted us. In deference to and in deep appreciation of the substantial efforts provided by my colleagues, I use the plural "we" throughout to describe the clinical program's efforts.

practice law is to have the student actually practice law. Moreover, in a society as devastated as Iraq's has been by the inconsistent application of law, the formation of a live clinic would go a long way toward instituting a greater respect for the rule of law among law students, faculty, the potential clients of such a clinic, and broader segments of society. While many Iraqis have spoken to me over the past year of the importance of the rule of law, few have had the opportunity to appreciate its benefits firsthand. A live clinic would provide such an opportunity. My account and recommendations, therefore, are not intended to disparage the notion of creating a live clinic, but rather to call for the careful and sustained development of experientially-based programs that can, in the course of a year or two, be developed into a live clinic.

I.
LEGAL EDUCATION IN IRAQ

A. Baghdad, Basra, and Suleymania Universities

1. Baghdad University

Founded in 1908, Baghdad University College of Law is Iraq's oldest and most prestigious institution of higher education.[18] During our visits to its library, the dean and librarian pointed out to us that the collection, though meager, far outshines the collection at the other major Iraqi law schools.[19] In spite of, or perhaps because of, its reputation, Baghdad University is the most resistant to change in its educational approach. On many occasions throughout the course of the project, the dean and several faculty members repeated to me their belief

18. Davis, *supra* note 2 (oldest). *See also* Daniel Del Castillo, *Iraq's Universities Try for a Fresh Start,* CHRON. OF HIGHER EDUC., May 30, 2003, at 42 (most prestigious). As in most of the world, the initial law degree in Iraq is obtained at the undergraduate level. *See* Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions,* 43 S. TEX. L. REV. 649, 655 (2002) (describing world practice). Advanced degrees are available, and it is expected that professors, for example, have at least a master's degree in law prior to teaching. Conversations, *supra* note 1. The only law school that might be considered slightly more prestigious than Baghdad University College of Law is the College of Law at the former Saddam University, now renamed the University of the Two Rivers. Daniel Del Castillo, *A Once-Privileged University Fears the Future,* CHRON. OF HIGHER EDUC., Sept. 12, 2003, at 38 (describing Saddam University as the best university in Iraq). In 1993, Saddam Hussein decided to create Iraq's most prestigious university and name it after himself. *Id.* To achieve this, he divided Baghdad University into two separate universities, moving some of the better professors and students and most of the more advanced facilities into the newly created Saddam University. *Id.* Saddam University's budget was also considerably more generous than that of any other university of comparable size, including Baghdad University. *Id.* The two universities are therefore in some competition with one another for the higher quality students, though Baghdad University may soon regain its competitive edge because, after Saddam's fall, the University of the Two Rivers' budget was cut so that it is commensurate to the budgets of the other universities in Iraq. *Id.* Some Baghdad University administrative officials have suggested that the universities should remerge, though I have not found any documentary evidence that this is under active consideration. Conversations, *supra* note 1.

19. Conversations, *supra* note 1. I should note, however, that while I have never asked anyone from the University of the Two Rivers about their law school library, I would not be surprised, given the nature of the rivalry between the two universities, if the faculty there believed their collection to be superior in quality if not in quantity. In contrast, no faculty member at any other law school stated to us that his or her school's collection was in any way comparable to that of Baghdad University. My own observations bore this out.

that clinical educational methodologies are untested and unorthodox and therefore not worthy of the University's high standards. Thus, the faculty accepted little more practice-based training than a lecture by a judge on the realities of practice or a student visit to a courtroom. Faculty resistance to active student participation would prove to be our greatest challenge at Baghdad University.

2. Suleymania University

The College of Law at Suleymania University is the most fortunate of the three law schools in our project by virtue of its location in the relatively peaceful Kurdistan region of Iraq, which has been free of Ba'ath Party rule since the end of the last Gulf War in 1991.[20] Founded in 1998,[21] the College of Law has well-developed facilities by Iraqi standards and is more connected to global educational developments.[22] Through our extensive discussions with the dean and faculty, it became clear that they are considerably more open to alternative pedagogical methods, such as clinical education, than their counterparts in Baghdad. The greatest difficulty that Suleymania University faces is a dearth of experienced and qualified faculty to teach the more than 400 enrolled students.[23] Only three faculty members hold doctorate degrees, and one of these members is the dean, who has very limited teaching responsibility.[24] The law school employs only five other assistant professors and lecturers, most of whom are active doctoral candidates.[25] The College of Law is therefore poorly equipped to engage in meaningful pedagogical reform without a considerable expansion of faculty resources.

3. Basra University

Despite the best efforts of its well-intentioned and diligent faculty, we found that Basra University is one of Iraq's most degraded educational institutions. It suffered acutely in Iraq's recent wars with Iran and the United States because of its geographical location near both the Iranian and Kuwaiti borders. Though it was once one of Iraq's top universities, its current desperate state was

20. David Filipov, *Coalition Readies for Attacks in Key Zone*, BOSTON GLOBE, Mar. 25, 2003, at A17. The Kurdistan region was declared a "no fly" zone by the United States and its allies shortly after the first Gulf War; in fact, it became a de facto autonomous zone over which Iraq's military forces exercised no control. *Id.* Accordingly, Kurdistan Iraq largely escaped both the economic and political deprivations of the past decade, as well as the damage done immediately following the most recent conflict. Tom Hundley, *Island of Stability in Volatile Iraq*, CHI. TRIB., Jan. 25, 2004, at C1.

21. UNIVERSITY OF SULEYMANIA, PROSPECTUS: 2001-2002 135 (2001) [hereinafter SULEYMANIA U. PROSPECTUS].

22. During our initial visit to the law school in January 2004, for example, we observed that the University hosts two computer labs containing over 100 internet connected computers for its more than 7,000 students, and the College of Law dedicates another 25 computers to student use. Although the student to computer ratio may be astonishingly poor by American standards, the mere existence of a wired computer lab that is free for student use is impressive by Iraqi standards.

23. SULEYMANIA U. PROSPECTUS, *supra* note 21, at 137.

24. *Id.* at 135; Conversations, *supra* note 1.

25. SULEYMANIA U. PROSPECTUS, *supra* note 21, at 135; Conversations, *supra* note 1. Suleymania University also employs a number of visiting lecturers, but these do not hold permanent positions. SULEYMANIA U. PROSPECTUS, *supra* note 21, at 136.

apparent to us during our first visit to the campus in December 2003. At that time, there were not enough desks for students to use, the buildings were in disrepair, and the law school library was stripped of its shelving, so that what functioned as a library was a mere collection of books stacked in a corner of a barren room.[26] Though classes were being held even during our initial December 2003 visit, education seemed almost impossible to us.

B. Traditional Teaching Methodology in Iraqi Law Schools

In each of the many classes that we attended at the law schools during our many visits, the nearly exclusive method of instruction was lecture. Student performance is evaluated entirely on the students' ability to memorize the lectures, which they indicate by regurgitating the information on a final exam at the end of the year.[27] At the classes we attended, the professors' lectures rarely included any discussion.[28] The deference students are expected to give professors at Iraqi law schools was apparent to us immediately upon entering any law school classroom. Students stand as the professor enters, sit only after he or she instructs them to do so, and remain in their seats after the lecture until the professor exits the classroom. By our observation, student-professor interaction is not welcome.

This is not unprecedented. The dominant educational paradigm in law schools in developed and developing nations outside of the United States consists primarily of instructor lectures, with students consigned to a largely passive role.[29] Attempts have been made to introduce clinical programs into jurisdictions that employ this methodology,[30] but they have sometimes met strong resistance.[31] Professors operating within such a system grow accustomed to the

26. We noticed in subsequent visits that the condition of the library had improved partly through the efforts of the Basra University faculty and partly through our own library reform program.

27. Conversations, *supra* note 1.

28. Some faculty members indicated to me that they objected to the interruption of their classes by student questions, calling it disruptive to the remainder of the class, which they presumed to be following the material without difficulty. Others indicated that they welcomed, but rarely received, questions from students during lectures. By far the most common view, however, was that student questions on lecture material were ideally welcome, but that time limitations along with the large number of students attending each lecture made them impractical. In any event, having attended over fifty classes over the course of the past year, I can say with confidence that discussions are rare, and when they do exist, they are more in the nature of clarifications on the part of the professor to a confused student than a true intellectual discourse of any kind.

29. Stuckey, *supra* note 18, at 655-60. *See also* Lisa A. Granik, *Legal Education in Post-Soviet Russia and Ukraine*, 72 OR. L. REV. 963, 966 (1993) (describing this as the traditional educational methodology in Russia); CENT. EUR. AND EURASIAN INITIATIVE, AM. BAR ASS'N, LAW SCHOOL ACCREDITATION IN THE NEW INDEPENDENT STATES OF THE FORMER SOVIET UNION: WHAT STEPS FOR THE FUTURE? 3 (2003) (same), *available at* http://www.abaceeli.org.

30. RICHARD J. WILSON, PUB. INT. L. INITIATIVE, COLUM. U., CLINICAL LEGAL EDUCATION AS A MEANS TO IMPROVE ACCESS TO JUSTICE IN DEVELOPING AND NEWLY DEMOCRATIC COUNTRIES (1996) (describing several efforts), *available at* http://www.pili.org. *See also* John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 111-16 (2002) (describing some success in Russia).

31. *See, e.g.*, Rodney J. Uphoff, *Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator*, 6 CLINICAL L. REV. 315, 318-319, 326-28 (1999) (describing a

deference they receive in a lecture-based format and often object to any educational techniques involving more independent student thinking. This type of opposition to clinical pedagogy was a challenge that the project leaders and I therefore anticipated prior to beginning work on our clinical program.

C. TraditionalPractice-Oriented Education in Iraqi Law Schools Traditionally

During our initial visits to the law schools in December 2003 and January 2004, we learned that there was very little practice-based training in Iraqi law schools.[32] At one time, the law schools had a significant practice-oriented program that required students entering their final year of law school to attend court sessions and report on them.[33] At Suleymania University, professors still attend the courtroom sessions and often supervise the proceedings to answer questions.[34] Outside of the Kurdistan region, however, these programs have largely withered since the 1980s.[35] Saddam's regime required law schools to admit increasing numbers of students while the nation's courtrooms steadily deteriorated due to inadequate funding.[36] As a result, courthouses do not presently have the capacity to hold the students that need to attend summer sessions.[37] Moreover, the universities do not have a sufficient number of faculty members to oversee students during courtroom visits.[38] Finally, Iraqi judges are hostile to the idea of unsupervised students crowding into their tiny courtrooms to witness proceedings that will, in their view, inevitably be disrupted by the students' presence.[39] Thus, though the court visitation program still exists in theory, outside of Kurdistan Iraq[40] it tends to be more honored in the breach than the observance.[41] A small subset of students will attend court sessions, take notes, and then copy and distribute them among the other students.[42] The reports are so disregarded that members of the faculty often do not even read them.[43] In

lack of enthusiasm for and failure to understand the goals of clinical education in Romania); Lawrence M. Grosberg, *Clinical Education in Russia: "Da and Nyet,"* 7 CLINICAL L. REV. 469, 479 (2001) (describing some problems facing clinical education in Russia); Joanne Fedler, *Legal Education in South Africa*, 72 OR. L. REV. 999, 1003 (1993) (same for South Africa).

32. Conversations, *supra* note 1.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Based on my own observations, most courthouses in Baghdad, Basra, and Suleymania have only one proper courtroom, which holds approximately 15-25 observers. The vast majority of the proceedings in these courthouses take place in small rooms that are no larger than judges' chambers in the United States.

38. *See infra* Part III.B.

39. Conversations, *supra* note 1.

40. As noted in the text, at Suleymania University, the program is taken considerably more seriously. In addition to faculty attendance at the sessions, student reports are carefully evaluated for content.

41. Conversations, *supra* note 1.

42. *Id.*

43. *Id.*

light of these difficulties, the deans and faculties at all of the law schools expressed on several occasions a desire to expand the program substantially.

It must be noted, however, that court visitation programs are not truly "clinical" by Western pedagogical standards. They do not fit within the American Bar Association's definition of "clinical legal studies,"[44] and they hardly provide for experiential learning—the touchstone of any clinical program.[45] Nevertheless, the law schools' desire to expand these programs manifested an interest on their part in having students gain a basic sense of the realities of legal practice during their legal educations. We found this very encouraging.

II.
OBJECTIONS AND OBSTACLES TO IMPLENTATION OF THE CLINICAL PROGRAM

The faculty-supported courtroom visitation programs provided us with the foundation for a long and intensive series of discussions on the benefits of clinical legal education, which were held between December 2003 and February 2004.[46] During these initial discussions, we learned that the creation of a clinical education program was not going to be easy. The faculty made us aware of several logistical and procedural challenges that would limit the program. Some could be overcome. Others presented more serious difficulties. Taken together, however, there were significant obstacles that would act as substantial limitations on our program.

A. Security

Due to the armed conflict that continued in Iraq throughout the duration of our project, we expected that security related concerns would be among the most daunting for us.[47] In addition to general threats, such as car bombs, theft, and

44. ASSOCIATION OF AMERICAN LAW SCHOOLS-AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION 12 (1980) (defining "clinical legal studies" as including "law student performance on live cases or problems, or in simulations of the lawyer's role").

45. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 474 (1995) (describing experiential learning as the essence of clinical education).

46. Part of the reason why these discussions proved to last so long, at least with the Baghdad and Basra University faculties, was the faculties' hostility to U.S.-based groups and organizations. Faculty members did not disassociate the U.S. military occupation from our project and suspected, as far as we could tell, that our project was part of a plan to "Americanize" Iraq. In an attempt to defuse these suspicions, we emphasized that it was not our purpose to alter the entire Iraqi legal education system, which has a long and storied tradition. We stressed that we only wanted to present our ideas on possible alternative pedagogical tools and to allow the faculty to determine in consultation with us the extent and manner in which these would be implemented in their law schools. Notwithstanding the frequency and sincerity of our reassurances, I do not believe we effectively persuaded the faculties. Rather, the compelling factor in our favor turned out to be the fact that a great number of our staff, including myself, were ethnically Iraqi. Absent this key component, I believe our program would have failed entirely.

47. Security was a significant concern everywhere, but conditions did vary among the three law schools. Suleymania was the safest of the three; there was an obvious police presence in the city and American soldiers even appeared in public without weapons at times. Of the remaining two

kidnapping, the faculties of both Baghdad and Basra Universities repeatedly warned us that Iraqi participants would fear that involvement in our program would expose them to danger because of our financial ties to a U.S. government agency. While these circumstances would render the implementation of any program difficult, they virtually prohibited the creation of a live clinic. A student with an appointment for a pending court matter or a scheduled client interview cannot afford to be absent, even if the roads are dangerous, without possibly damaging the client's legal position. In contrast, a clinical program built around simulated exercises could accommodate security concerns more flexibly. If several students missed a moot court session because they were unable to come to school for security reasons, the court could function without them, or the session could be delayed.

B. Faculty-Student Ratios

Baghdad University College of Law, the largest and most prestigious of the Iraqi law schools, has only thirty-one full-time faculty members for its 3,000 students.[48] Basra University College of Law, with its thirty-four faculty members and nearly 1,000 students,[49] provides a slightly more favorable, but still very high, student to faculty ratio. Suleymania University College of Law has only six faculty members for over 400 students.[50] In order to accommodate the large numbers of students, each university has a morning session and an afternoon session, each with a different group of students.[51] This system requires the professors to lecture for six to eight hours a day to classes of often more than 50 students. Given such strained resources, the deans were reluctant to allow faculty members to devote additional time to clinical or other programs, and the faculties were reluctant to accept additional responsibilities.

C. Inflexible Curriculum and Lack of Elective Courses[52]

Early on, we learned that in non-Kurdistan Iraq the courses that each student must complete in order to graduate are determined by a curriculum committee consisting of the deans from each law school, led by the dean of the Baghdad

schools, Basra tended to be a safer city for the most part, and the university was in a slightly quieter location. At Baghdad University's College of Law, located in the nation's turbulent capital and in an area of the city, Adhamiya, where insurgents and coalition troops frequently clashed, it became immediately clear to us that any program we sought to implement would be significantly limited due to security. For further information regarding the security situation prevailing in Adhamiya during the project period, see Evan Osnos, *Gear Slow to Arrive for Iraqis*, CHI. TRIB., Feb. 5, 2004, at C3; Stephen Grey, *Life and Art Dangerously Close in Iraqi Soap Opera,* AUSTRALIAN, Mar. 22, 2004, at 15.

48. Conversations, *supra* note 1.

49. *Id.*

50. *See supra* notes 23-25 and accompanying text.

51. Conversations, *supra* note 1. Between December 2003 and September 2004, Basra University decided not to accept any more students for afternoon sessions in order to relieve the burden on its substantially overtaxed faculty. *Id.*

52. As noted in the introduction to this article, problems regarding the curriculum are being addressed in a separate program of our project. The success of these ongoing efforts has yet to be fully gauged.

University College of Law.[53] The committee's determinations must be approved by a higher commission consisting of the Minister of Higher Education and Scientific Research and the presidents of all the Iraqi universities.[54] The current law school curriculum consists of thirty-three courses.[55] There are no electives, and the law schools are not permitted to vary the established curriculum.[56] Further, over 80% of the material to be taught in any given course is determined in advance by the curriculum committee, although the remainder may be filled as the professor wishes.[57] Any additional courses or subject matter must be in addition to, rather than in lieu of, curriculum committee requirements.[58] For example, the dean and faculty at Basra University College of Law informed us that they added an admiralty class to their curriculum, which they felt was necessary given Basra's status as Iraq's only port city.[59] As a result, Basra law students are now required to complete one additional course over the committee requirements.[60]

This rigid curriculum presented significant difficulties in terms of establishing a legal clinic. The addition of any clinical program to the established curriculum, whether a live clinic or a more traditional academic course focusing on simulations and trial advocacy, would require an enormous commitment of resources that probably drastically exceeds the Iraqi law schools' total combined budgets.[61] Adding a clinical elective at even a few schools is likewise difficult because that elective must be taken in addition to other required coursework. Participation in a clinic involves a considerable amount of effort, and asking students to undertake that effort while also completing all other curriculum obligations would be difficult.

Within Kurdistan Iraq, Suleymania University has developed its own curriculum, which can be changed more easily.[62] Nevertheless, adding elective

53. Conversations, *supra* note 1.

54. *Id.* The several law school deans with whom we spoke indicated that, in their experience, the higher commission rarely rejects the recommendations of the law school deans. However, the second level of approval does require further time and effort before any curriculum change can be effected.

55. Baghdad University College of Law's curriculum for the 2003-04 academic year, as given to us by the dean, is contained in Appendix A.

56. Conversations, *supra* note 1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. More than 10,000 law students graduate in Iraq each year from the over twenty existing law schools. *Id.* Even assuming a student-faculty ratio of 35:1 for the clinics or practice-based programs, which would be regarded as absurdly poor by most clinicians in the United States, a mandatory, universal clinical program would need to retain and train approximately 300 professors or attorneys. This is almost ten times the number of existing faculty members at Baghdad University College of Law.

62. *Id.* The 2001-02 curriculum, as contained in the SULEYMANIA U. PROSPECTUS, *supra* note 21, at 136-37, is reprinted as Appendix B. One of the most recent changes to the Suleymania curriculum related directly to the faculty's desire to insert more practice-related coursework into students' existing course load. Conversations, *supra* note 1. Noticing that the existing summer courtroom visitation program was not as beneficial as it could be, because students did not learn civil and criminal procedure until their fourth year of study, the university approved a change in the

courses such as clinical offerings still requires overcoming many obstacles, such as a lack of available faculty.

D. Faculty Resistance

It was apparent from our initial discussions that senior faculty members, in particular those dominating Baghdad University, believe strongly in the traditional model of education, in which students learn in a passive, non-interactive manner. In the faculty's collective judgment, students are ill-prepared to handle experiential education, even in simulated settings. Throughout the discussions, the faculty made clear its belief that it is absurd for a professor to guide students to learn from their own experiences rather than to tell them what to do and how to do it.

Junior faculty members at all of the universities were more flexible. Unfortunately, in our initial discussions it became clear to us that the opinions of junior faculty members are not held in the same regard as those of their senior colleagues. The Iraqi law schools seemed quite hierarchical in nature and, as a result, the more favorable opinions of junior faculty members tended to have little impact on the program.

E. Limited Resources; Other Priorities

As noted above, the general condition of most Iraqi law schools is quite poor, and their needs are multifold. These range from adding materials to the library and granting increased computer access to students to hiring more faculty and improving the basic infrastructure of classes by purchasing desks, air conditioners, blackboards, and similar items. In light of the schools' desperate state, many faculty members wondered aloud more than once during our initial discussions whether a significant expenditure of funds on a clinical program was the best way to direct our limited funding. Though we continued to press for a program, we acknowledged the validity of their concerns.

F. Faculty and Student Training

Law professors in Iraq are prohibited by statute from engaging in the practice of law.[63] While some of the professors we met did briefly work as lawyers

curriculum that moved civil and criminal procedure to the third year. *Id.* Some of the faculty at several other universities suggested on more than one occasion that they would welcome such a change in their curriculum, but that to implement it would be a difficult endeavor.

63. Qanoon Al-Muhamat No. 173, §§ 21, 34 (1965) [hereinafter Attorney Law]. There is a narrow exception to this rule that allows professors to engage in practice through a department established at each university known as a Legal Consulting Office. Revolutionary Command Council Decree No. 48, Art. 1, §§ 1-2 (1997). Under the decree (passed over the strong objection of the Iraqi Bar Association), professors can appear in court and otherwise consult on legal matters through the Office. In practice, however, the Office at almost every College of Law has rarely been used in recent years. Conversations, *supra* note 1. When the Office has been used, the work usually entails little more than providing an interpretation of a statute to an appellate court judge in connection with an existing case at the request of one party's attorney. *Id.* According to the faculties at every university, a professor will very rarely handle an entire case on his own through the Office. *Id.*

prior to their teaching careers, the overwhelming majority lacked any practical experience. Thus we concluded that any clinical program would require significant training for the faculty members leading it. Unfortunately, such a training program would be difficult to arrange because outside personnel with clinical training experience would probably not come to Iraq, given the security concerns. Out of country training would obviously be expensive and complicated as well.

Student maturity was also a significant problem. Because a law degree in Iraq is obtained at the undergraduate level,[64] most first-year Iraqi law students are seventeen years old. Though we intended to focus our program on third and fourth-year law students to ameliorate our maturity concerns, we still were unsure of students' ability to handle live client affairs in any significant capacity. In addition, Iraqi law does not permit students to participate in court proceedings or appear before government agencies; only members of the Iraqi bar are permitted to do this.[65]

III.
PROGRAM DESIGN

In light of the foregoing obstacles, we did not believe that it was possible for us to create a live clinic at any of the three law schools prior to the scheduled end of our project. Further, we believed that forcing the institution of a live clinic could prove counterproductive because if the program failed it would leave the schools with a general distaste for experientially-based education. Nevertheless, given our desire to expose law students to experiential learning, we decided to embark on a set of programs that were more modest and based on simulations. To succeed, my colleagues and I knew we would have to structure the program to take all obstacles into account and to compromise where necessary to ensure continued faculty support.

More importantly, we needed to tailor the program to fit the particular needs and capabilities of each institution. Despite the former regime's extensive efforts to impose centralized rigidity on the administration and management of all Iraqi law schools,[66] each school has remained unique.[67] Our program had to take this into account to be successful. Therefore, toward the end of the initial discussion period, we developed the following plans for each of the three law schools in close consultation with the faculty and administration of each school. As I explain in Part V below, we were not always able to implement our ideal programs as originally envisioned, but the initial plans remained our blueprints throughout the project.

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64. *See supra* note 18.

65. Attorney Law, *supra* note 63, § 21 (allowing only attorneys whose names are registered as members of the bar to represent clients before courts and government administrative bodies).

66. Centralized control was best demonstrated by the uniform curriculum and by the fact that the Minister of Higher Education and Scientific Research was responsible for the appointment of deans and faculty at each College of Law. Conversations, *supra* note 1.

67. *See supra* Part II.A.

A. Baghdad University

While the faculty at Baghdad University refused to accept the benefits of experiential learning, it did support some forms of practice-based education such as courtroom visitations and lectures by judges, prosecutors, and attorneys. These programs would only be possible with our support. Therefore, the faculty was amenable to the implementation of two linked programs focusing on the most talented third- and fourth-year students. The resulting programs included aspects of practice-based education that were of primary interest to the faculty and aspects that were more appealing to us.

The fourth-year program, larger in terms of attention and resources devoted to it, involved selecting the twenty students with the highest grades[68] and enrolling them in a three-phase clinical education program focusing on criminal law. In the first phase, the students would attend courtroom sessions and listen to lectures on the ethical and competent practice of law. These lectures would be given by judges, defense lawyers, and prosecutors, whom I refer to throughout as "exercise leaders." This first phase did not involve true experiential learning because the students were not involved in practice-based exercises. The second phase, however, involved a more active student role, including limited role playing with faculty and exercise leaders. Important to this phase were pre-role playing discussions between students and the faculty and exercise leaders. My colleagues and I knew we needed to urge the exercise leaders to assist the students in learning from their own experiences rather than merely show them the "correct" way to approach a legal problem and ask them to parrot that. We anticipated that this would be very difficult because it involved persuading them, as well as the faculty and the students, to employ an alien methodology. The third and final phase of the fourth-year program was the organization of several moot court sessions, for which the students would prepare and play important roles in connection with a simulated criminal case. The students would therefore conduct an entire trial or set of trials, time permitting. The final moot court session, insisted on by the faculty, would consist entirely of exercise leaders playing the same roles that the students had played.[69] As an additional incentive to encourage faculty support, we agreed to use project money to build a permanent moot court room on university grounds for this purpose.

68. Though we would have preferred to have had an opportunity to meet with and select students to participate in the program based on a variety of factors not limited to grades alone, this approach was staunchly opposed by the faculty for reasons that seemed reasonable in the specific context of Iraq. In a society so divided by sectarian and religious differences, as well as controversies regarding the role of women in the professional classes, the faculty did not want to give any appearance that the selection criteria were based on anything other than merit, and they felt that the use of any subjective standards would create that appearance.

69. As an indication of how distrustful some members of Baghdad's faculty were to the notion of students learning from experience, a few had initially suggested early on in the discussions that the students should play no role in the moot court but rather should be engaged only as passive bystanders or perhaps witnesses. The concept of a moot court in which not a single student played a significant role struck me as absurd, but some within the faculty continued to advocate it until the end of the program, insisting that nobody would learn anything from watching students make a mess out of a criminal proceeding.

Initially, my colleagues and I vigorously opposed the concluding moot court session because it could suggest to the students that there is only one correct method of advocacy; namely, that employed by the exercise leaders. However, under much faculty pressure, we relented because we saw no other way to proceed with the program and retain faculty support. I intended to exhort the students not to view the exercise leaders' approach as necessarily "correct" and their own techniques as necessarily "incorrect," but rather to contrast the two and decide for themselves. Unfortunately, however, given the long tradition of deference among Iraqi law students, I was skeptical that anything I said might make a difference.

The other program we intended to institute at Baghdad University was a summer externship during which the twenty best-performing third-year students (again, based on grades) would be selected to work under the supervision of practicing lawyers. The lawyers would involve the students in all aspects of practice. In comparing the third- and fourth-year programs, the third-year program was designed to be smaller and was likely to be of less benefit, given the restricted ways in which students would probably be used in the attorneys' offices. Nevertheless, in our view, the third-year program would still expose students to practice-based education if implemented properly. The key to its success would lie in close supervision of the selected attorneys. While the faculty made very clear their low regard for Iraqi attorneys generally, they were confident that a sufficient number of competent and ethical attorneys could be found with whom the students could be placed.[70] This was absolutely crucial; if the students did not have the opportunity to assist in the meaningful practice of law or, even worse, witnessed outright corruption or fraud, the program could undermine our larger goal of assisting in the development of a rule of law society in Iraq. In selecting appropriate attorneys, we were forced to rely on the faculty's judgment. Fortunately, through our repeated discussions, my colleagues and I had begun to place a great deal of trust in them.

Structuring the two programs in a way that would motivate the students was a difficult challenge. This was particularly an issue for the fourth-year students because our program added to their existing, curriculum-committee-imposed course of study. In addition, the faculty assured us more than once during our discussions that Iraqi law students, like their counterparts in the United States, would not be very motivated in their final year of study, especially as graduation neared.

Fortunately, during our initial discussions, we did discover one way to motivate the fourth-year students. Law students at Baghdad University are required to complete a research paper approved by a faculty mentor prior to graduation.[71] The faculty allowed us to waive this requirement for students who participated

70. Naturally, in addition to competence and ethics, we wished to select attorneys who would be reasonably amenable to employing the experientially-based pedagogical tools from which we wanted the students to benefit.

71. Conversations, *supra* note 1. According to the faculty at Baghdad University, the same is true of every Iraqi law student. *Id.*

satisfactorily in our program. The faculty seemed amenable to this because the research requirement was not terribly important to them. In their view, it had long ceased to be a meaningful enterprise given the severe restrictions on outside material and resources.[72] For students in the third-year program, no similar inducement could be offered.[73] Fortunately, it was not as necessary for them, because the program did not force students to take time away from their other academic requirements and because third-year students are in theory already required to spend their summer attending court sessions. The program therefore would not be such a stark deviation from the norm and would provide a better executed, more meaningful summer experience for the students.

B. Suleymania University

Due to strained faculty resources, Suleymania University was not in a position to offer any additional programs during the course of the school year. Moreover, in our initial discussions, the faculty repeated several times its strong preference for implementing a program that would focus on an entire class of students rather than a select few. Accordingly, in consultation with the faculty, we devised a summer program that was to be a practice-oriented, four week workshop to be held in August 2004.[74] It would be open to all students who had graduated the previous June and would be led by practicing judges, prosecutors, and attorneys.[75] The workshop was to consist of a series of conferences in which students were introduced to and encouraged to engage actively in the experiential learning process. One workshop would focus on civil court advocacy and procedure, another on criminal court advocacy and procedure, and yet another on ethics and practice.

Although we could not compel attendance at any of the workshops, we would, through direct discussions with the students, encourage maximum participation, particularly in the ethics workshop.[76] Our concerns regarding attend-

72. *Id. See also supra* note 10 and accompanying text.

73. In what stands out in my mind as the most tragic example of the devastated state of affairs that govern Iraqi law schools today, some faculty members proposed that we pay the students to participate in the program as an inducement. That one would need to offer money to Baghdad University's top students in order to entice them to participate in a program designed for their benefit was troubling to us. Nevertheless, financial inducements were not offered, and, fortunately, the faculty's cynicism regarding the level of student interest absent such inducements did not appear to be justified in the end. *See infra* Part V.C.

74. Originally, we had discussed with the Suleymania faculty a plan that would help strengthen their third year court visitation program. However, because their current third year program is already strong and our fourth year program seemed so promising, we decided to focus our efforts entirely on fourth year students.

75. In fact, the fourth year students were not "students" at all but rather recent graduates. Nevertheless, given that they would have graduated only two months prior to the scheduled start of the program, the faculty and we tended to think of them as students, and we designed the program as if they were still enrolled at the university. Accordingly, I refer to the graduates herein as "students," notwithstanding the technically incorrect nomenclature.

76. Our emphasis on the ethics workshop was not related to the development of clinical programs per se, though it is my belief that ethics in particular is a subject best learned experientially. Rather, my colleagues at IHRLI, in considering our broader project objectives, lamented the lack of any formal ethics training in the Iraqi law school curriculum, particularly when lawyers are so rou-

ance at the Suleymania workshops were particularly acute because recent graduates could not be compelled, or even influenced meaningfully, to attend. A professor exhorting current students to attend a seminar, for example, is very likely to have an effect on attendance, particularly given the hierarchical nature of Iraqi universities. A graduate, however, even a very recent one, is entirely free of the university, and a professor's urging is not likely to have the same effect. As a result, the faculty was quite certain that the majority of students would not attend. However, by making the program available to everyone, the faculty believed that approximately one-third of the recent graduates would attend regularly.

C. Basra University

As with Suleymania, the Basra faculty made apparent its strong desire to make any program we implemented available to an entire class of students. We therefore agreed to adjust Basra's two existing civil and criminal procedure classes to include a practice-based component that would subsume the 15-20% of the course that is discretionary.[77] This clinical component would be divided into two parts. The first part would consist of court visitations and lectures by judges, prosecutors, and other practitioners (to whom I again refer as exercise leaders) on ethics, courtroom strategy, advocacy techniques, and similar issues. The second part would consist of role playing and moot court exercises, whereby students would act as advocates, with the faculty and exercise leaders evaluating and guiding their performance. As in Baghdad, we agreed to build a moot court room for the law school for this purpose.

Our greatest concern was ensuring that students would have a meaningful opportunity to participate. In light of the large number of students (approximately one hundred in each of the morning and afternoon sessions), we knew that this would prove to be a challenge. We hoped that by dividing the classes and securing the assistance of a sufficient number of exercise leaders, we could provide the necessary resources to give students a significant opportunity to learn from the experiential training. In addition, although we did have some of the same concerns that we had with respect to the Baghdad program regarding hostility to the general concept of clinical pedagogy, the problem seemed less pronounced in Basra.

IV.
IMPLEMENTATION OF THE PROGRAM

Having spent the first three to four months of our project developing the detailed program described above, we set out to implement it. Below, I describe

tinely regarded in the broader society as irredeemably corrupt. There were many ways the project sought to address this, but one was to encourage students to attend the ethics workshops.

77. *See supra* Part III.C (describing the limited amount of discretion professors have in teaching courses).

the challenges we faced during the implementation period and gauge our relative success in achieving our project goals.

A. Challenges

1. Security

Security problems waxed and waned during implementation and affected nearly every aspect of the programs in Basra and Baghdad. On numerous occasions, I was forced to cancel courtroom visits or scheduled workshops because, in my judgment, street travel to one or both of the law schools was too dangerous. My own ability to travel to Basra was severely restricted because of the dangers of intercity road travel.[78] The program could therefore almost never keep to the schedule that we had so carefully developed, despite the best efforts of the project staff, the students, and the faculties.[79] Regrettably, during a critical period at the beginning of our program, April 2004, particularly acute security concerns arose throughout the country. The U.S.-led coalition conducted a series of military incursions into the restive city of Falluja, and violence erupted in much of Iraq's south and in some neighborhoods of Baghdad as well.[80]

Classes at this time were intermittent and sparsely attended; the attention of the students and professors was elsewhere. In addition, the faculties in Basra and Baghdad told me that because of these difficulties, the schools were moving exams forward, from late to early June 2004.[81] These developments severely affected our project, as our Baghdad program was supposed to begin full moot court sessions in April, and in Basra we had planned to have a series of practice-based exercises at that time as part of the students' existing coursework. Given the conditions, we were forced simultaneously to cut back on and accelerate our program, in an already challenging security environment, to complete it before the middle of May, when the students would begin to be preoccupied with exam preparation.

In light of these challenges, I believe the progress we made was admirable. In Baghdad, for example, we reached the second phase of our three-phase, fourth-year program. Exercise leaders came to the school and assisted the students in practice-based techniques, even though we ran out of time before we could hold a full moot court session. In Basra, most, though not all, of the

78. *See, e.g.*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, TRAVEL WARNING: IRAQ (Oct. 20, 2004), *available at* http://travel.state.gov/travel/iraq_warning.html.

79. On at least one occasion, the desire on the part of project participants to adhere to our schedule may have led us to proceed imprudently. Specifically, one day in early April 2004 we decided to attend a scheduled courtroom session in Baghdad after some discussion among the dean, several faculty members, and me about whether or not conditions were safe for travel on that particular day. When we arrived at the courthouse, we discovered that no criminal sessions would be held that day. The guard at the gate informed us that the U.S. Army and Iraqi police had decided that the roads were too dangerous for travel, so they could not bring any defendants to court. From that point on, we were considerably more cautious in deciding whether or not conditions were safe enough for us to proceed with program activities.

80. Mark Franchetti, *Apocalypse Now?*, SUNDAY TIMES (London), Apr. 11, 2004, at 15; Christopher Caldwell, *Bush Weathers a Stormy War*, FIN. TIMES (London), Apr. 10, 2004, at 11.

81. Conversations, *supra* note 1.

students in the civil and criminal procedure classes were exposed to practice-based techniques and given the opportunity to visit courtrooms. While these opportunities were more limited in scope than we had originally planned, they were still opportunities the students otherwise would not have had.

In one area, the Baghdad third-year summer externship, the increased security concerns ironically resulted in a significant improvement to our program. Both faculty and parents believed that it was unwise to allow students to travel unsupervised to an attorney's office on a daily basis. We therefore eliminated the attorney externship aspect of the program, after having already begun attorney training, and replaced it with court visitations and moot court sessions that continued to run even after classes began. I believe that the students benefited more from and were also more interested in the program than they would have been had it been limited to attorney externships.

Finally, I should note that none of the security concerns affected our Suleymania program. Throughout the entire implementation period, Suleymania remained free of significant incident from our perspective.

B. Faculty Support and Cooperation

Generally, the faculties at each school were well intentioned, diligent, and eager to work with us to improve their respective schools, as were the exercise leaders. Nevertheless, it was difficult to persuade these individuals to employ different pedagogical methods from those to which they were accustomed. My colleagues and I were unfortunately only mildly successful in overcoming this obstacle, with the degree of success varying from school to school.

We were most successful at Suleymania University. The faculty and exercise leaders on whom we relied there generally welcomed the challenge of allowing students to learn in such a dramatically different fashion, though the process of teaching them these new techniques was challenging. Most were initially confused as to what we were asking of them, such that the first two-to-three days of the workshop were effectively mere lectures by the exercise leaders. Moreover, I could not speak Kurdish, the native language in Kurdistan Iraq, and this made it more difficult for me to steer the exercise leaders in the direction of the alternative pedagogy. Fortunately, the students and practitioners were all fluent in Arabic, and the ideas I presented did seep in gradually. The progress gathered momentum as the weeks proceeded. By the end, several of the Suleymania exercise leaders echoed the comments of Western clinical commentators, with whom they were not familiar, arguing that experiential learning benefits students greatly because it teaches them to teach themselves through experience, as they will be compelled to do throughout their careers.[82] By the

82. *Id.* For the general views of Western clinical commentators, see, for example, Quigley, *supra* note 45, at 473-76 (describing experience as the key to education); Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 617 (1984) (describing critical self-reflection following experiential learning as the best kind of education); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512 (1992) (stating that a "critical goal of clinical education [is] to teach students how to be reflective practition-

end of the seminar I believe the majority of those who participated in the summer workshops had a decent understanding of clinical ideas and application.

At Baghdad University, however, the traditional notions of proper pedagogical techniques interfered with the success of the program. For example, though students played significant roles in simulation exercises, their lessons were often dictated by the faculty or the exercise leaders rather than by their own experience. They were told where they made mistakes and were instructed on specific improvements. Students responded by producing pen and paper and writing down the comments, seemingly verbatim, presumably to memorize them. We urged a different approach to the extent that we considered prudent, but we were careful not to breed resentment by insisting that the faculty had acted in error. In our view, the mere introduction of these ideas was a step in the right direction. If the faculty did not wish to move further, nothing could be gained by trying to force them to accept an unpopular idea. I am personally very confident that in the future, given sufficient time, the faculty will begin to warm to the new pedagogical techniques.

Basra University was similar to Baghdad University in this respect as well, except for the outstanding performance of a single junior faculty member whose ability to understand and employ experientially based learning techniques was extraordinary. A former attorney, he understood almost immediately the concept of experiential learning and had an uncanny ability to allow a student to perform a simulated exercise and to coach him or her in a manner that ensured that the student would learn from his or her own mistakes. Even extremely poor performances received a nod, a smile, and a series of questions that would bring the student to understand exactly why his or her approach was not likely to be effective. Though the security situation and large number of participating students limited his efficacy somewhat, his efforts alone made a significant difference and helped the program achieve modest success.

C. Student Interest

The most satisfying aspect of the program at all three schools was the level of student interest. Students at all three universities exhibited an overwhelming degree of interest that surprised even their own professors. As the most fitting example of this, at Suleymania University, where our concerns over a lack of attendance and interest were the greatest, over 150 of the 220 eligible students signed up to participate in the program on the first day of a three day registration period. In addition, in Baghdad, we received numerous queries from nonparticipating students as to how they could join the program in the future. Several members of the Basra faculty mentioned more than once that the classes with a practice-based component were considerably better attended than other classes. Furthermore, the profound student interest was a crucial factor in maintaining

ers") (quotation marks omitted); Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1, 9 (1978) (describing the process by which students at Columbia University's legal clinic developed useful skills for directing their own learning).

faculty support for the program. The faculties at all three law schools, which had indicated on many occasions that their respective students were unmotivated, were delighted to see students take such an interest in their own education.

CONCLUSION

There are a number of lessons that I learned from these experiences and that I think could be applied in other circumstances, both within Iraq and other developing nations. First and foremost, I learned that clinical legal education is not simply a pedagogical method useful to students in American law schools; students in other areas of the world such as Iraq can benefit immensely from this educational methodology. While I believed this to be true from the beginning, it became concretely evident to me as I saw Iraqi students, faculty, and practitioners apply and learn from these new techniques. Students were made aware for the first time of what would be expected of them when they graduated; their exposure to the world of practice both interested them and seemed to benefit them.

The students with whom we worked over the past year made it clear to us on numerous occasions that they learned more about the actual practice of law from our program than they had in years of lecture in law school. We only provided simulated exercises and moot courts; if students were permitted to appear in court representing live clients, their ability to learn from their own experiences, and to challenge preconceived notions in order to protect their clients' interests, would be magnified. I believe that the highly deferential, lecture-based educational format, when applied exclusively, results in a certain passivity on the part of law students, and that passivity is not an admirable quality in any advocate in any jurisdiction. A live clinic, with students arguing cases before actual judges, would help students not only to refine and improve advocacy techniques and their legal abilities generally, but it would also require them to engage in the legal process more assertively.

If the law schools open live clinics, this educational tool would also lead to a societal benefit of greater respect for the rule of law. Based on my experiences in Iraq and after numerous discussions with legal practitioners, professors, law students, judges, and even government ministers, I believe that one of Iraq's greatest needs is a strengthening of its legal institutions and a greater societal reliance on those institutions to settle disputes. One of the major problems with the legal system in Iraq, as in the United States, is that most Iraqis cannot afford to retain competent counsel.[83] Further, Iraqis view their legal system as corrupt. As a result of these problems, they often redress grievances through violence

83. The Iraqi Municipalities and Labor Minister estimated recently that the unemployment rate in Iraq is 50%, and the poverty rate 60%. *Iraqi Press Highlights*, BBC WORLDWIDE MONITORING (Oct. 22, 2004). Therefore at least three out of every five Iraqis could not even consider retaining an attorney.

and other extralegal measures.[84] Opening a live clinic at a law school that was geared toward handling day-to-day issues could help address these problems by providing competent, cost- and corruption-free legal services.[85]

The second important lesson I learned from this experience is that imposing any form of education, or any specific program, upon an institution that is not prepared for or otherwise resistant to it will not be successful. Our program achieved modest success precisely because we were very flexible and open, both in designing the program and in implementing it. We relied throughout the project on continuous dialogue with the respective faculties and made frequent adjustments to our plan when they objected or as circumstances required. This flexibility and open communication were necessary not only to ensure faculty support, but also to ensure that our program harmonized well with the needs of the law students. While we believe that our ideas certainly helped and could continue to help improve legal education in Iraq, those ideas needed to be tailored to best meet the needs of the law students, the faculty, and the society. Local professors, not outside educators such as ourselves, are best suited to assess those needs and tailor a program to address them.

Indeed, the level of success we enjoyed at each school depended on the level of faculty and administrative support we received. We were more successful in Basra than in Baghdad because of one outstanding faculty member. His success was made possible due to a relatively disinterested and otherwise preoccupied administration, a relatively younger faculty (most were younger than forty-five), and a consequently weaker deference to tradition. In such an environment, a pioneering and enthusiastic professor can thrive, but only if he or she has great personal motivation to do so.

By contrast, we were more successful in Suleymania than in Basra because the administration actively supported our endeavors and encouraged all the participants in the summer workshops to be open to new ideas. With this type of support, those participating in the program felt freer to experiment. I believe that more faculty members and exercise leaders in Basra or Baghdad would have been open to experimenting with clinical pedagogy had the administrations in their respective universities reacted as warmly as the Suleymania administration did.

Finally, I learned that achieving the sort of goals we set out for ourselves requires patience and determination. I entered Iraq in December 2003 expecting

84. By my observation, most Iraqis seem to rely almost reflexively on extralegal measures to settle their disputes. Disputes concerning automobile accidents, for example, are routinely settled through negotiations among different family or tribal groups, and familial disputes are often referred to a religious authority to be settled in accordance with the Islamic code. *See also* Ian Fisher, *Iraqi Liquor Store Owners Fear Fundamentalists' Rise*, N.Y. TIMES, July 16, 2004, at A8 (describing Iraqi vigilantism); Hassan Fattah, *Iraqi Tribal Leaders Find New Clout*, CHRISTIAN SCI. MONITOR, June 17, 2003, at 6 (describing the importance of tribal law).

85. I do not mean to suggest that a live clinic is a panacea that would immediately solve the many problems facing the Iraqi legal system. Clearly, inasmuch as there is a corruption problem in the existing judiciary, it must be addressed elsewhere. However, a drive to clean the judiciary, when combined with the administration of legal services on the part of a clinic that does not practice corruption, would together go a long way toward improving the image and practice of law in Iraq.

to open three live clinics at three law schools in the course of a single year. Now, I remain uncertain as to whether a live clinic could be opened at any one of the three schools by the 2005-06 school year, and I am certain that two of the three schools, Baghdad and Basra, are not ready for such a step. I do not think this demonstrates any failure or deficiencies on our part but rather simply reflects the reality of Iraq's current state. Years of progress are necessary for the faculty to begin to incorporate experiential learning techniques as part of their own educational methodology and for clinical education and live clinics to be an integral part of the Iraqi legal experience. I believe this can only be achieved in Iraq in the longer term.

I do not know whether the funding or necessary resolve exist to carry forth clinical education in Iraq in the near future. However, having seen firsthand the difference that clinical legal education can make for Iraqi law students and potentially for Iraqi society in general, I fervently hope that these next steps are taken, and that in one to two years' time an article similar to this one is written concerning the formation of Iraq's first live clinic.

APPENDIX A: GENERAL IRAQI LAW SCHOOL CURRICULUM[86]

FIRST YEAR	SECOND YEAR
Constitutional Law	Civil Contracts
Introduction to the Study of Law	Civil Law
Introduction to the Shari'a (Islamic Law)	Administrative Rulings
History of Law	Criminal Law
Study of Crime and Punishment	Public International Law
Principles of Economics	The Law of Labor and Social Security
Computer Instruction	Trade Law
	Computer Instruction
THIRD YEAR	FOURTH YEAR
Civil Law	The Law of Commercial Papers
Criminal Law	Civil Procedure and Evidence
Personal Law	Principles of Islamic Law
Principles of Public Law	Execution of Judgments
Public Finance	Private International Law
Administrative Law	Criminal Procedure
Political Organization	Principles of Real Property Law
Computer Instruction	Trade Law
	International Organizations
	Computer Instruction

86. As represented by the 2003-04 curriculum of Baghdad University College of Law. *See supra* note 55.

APPENDIX B: SULEYMANIA LAW SCHOOL CURRICULUM[87]

FIRST YEAR	SECOND YEAR
Constitutional Law	General Theory of Obligations
Introduction to the Study of Law	Political Systems
Introduction to the Shari'a (Islamic Law)	Administrative Law
History of Law	Public Penal Law
Introduction to the Study of Law (in English)	Principles of Administrative and Constitutional Law (in English)
Principles of Criminology	Law of Personal Status (Marriage and Divorce)
Kurdology	International Organizations
Principles of Economics	Public Finances and Financial Legislation
Computer Instruction	
Human Rights	
THIRD YEAR	FOURTH YEAR
Principles of Commercial Law and Corporations	The Law of Commercial Papers
Private Penal Law	Civil Rights Law
The Law of Personal Status (Inheritance)	Civil Procedure and Evidence
Civil Contracts	Principles of Fiqh (Islamic Legislation)
Public International Law	Execution of Judgments
Public International Law (in English)	Private International Law
Labor Law and Social Security	Criminal Procedure
	Commercial Law (in English)

87. As represented by the 2001-02 Suleymania Prospectus. *See supra* note 62. Criminal Procedure and Civil Procedure and Evidence are being moved to the third year effective Fall 2005. *Id.*

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Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law

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Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law

By
Duncan B. Hollis*

INTRODUCTION

Following the end of the Cold War and the subsequent proliferation of international rules, processes, and organizations, some international law scholars argued that there was no longer a need to debate the existence of international law.[1] It was, as Thomas Franck coined it, a "post-ontological era," where international lawyers could turn their attention away from debating "whether international law is law" and focus instead on evaluating the law's substantive content.[2] New work soon followed, exploring patterns of compliance with international law, methods for predicting its effectiveness, and standards for evaluating its fairness.[3]

Despite the important contributions of such scholarship, recent developments suggest that the pronouncement of a post-ontological age was premature. Issues as diverse as terrorism, hegemony, and globalization all demonstrate that the international lawyer cannot yet dispense with the question of what makes international law "law" and where one looks to find it.

Realpolitik, and with it the ghosts of Austin and Bentham, have returned to prominence in certain circles since September 11, 2001, and the U.S. invasion of Iraq. Many proponents of this approach question the obligatory nature of long-recognized legal regimes ranging from the U.N. Charter to the Geneva Conven-

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1. *See, e.g.*, Jose Alvarez, *Foreword: Why Nations Behave*, 19 MICH. J. INT'L L. 303, 303 (1998) ("[A]n ever increasing number of scholars are going beyond well-worn debates about whether international law is truly 'law' to undertake 'post-ontological' inquiries appropriate to the new 'maturity' of the international legal system."); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993).

2. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

3. *See, e.g., id.*; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

tions.[4] These proponents argue for the primacy of national security interests—particularly, efforts to combat terrorism and the proliferation of weapons of mass destruction—even if pursuing those interests requires discarding or dismissing existing regimes of international law.[5]

Others view the dramatic demonstration of U.S. power in Iraq differently, suggesting that it raises the specter of international hegemonic law. Such a system would replace the rule of equally sovereign states creating law through consent and practice with a system whereby a single actor, the hegemon, dictates new rules of law.[6] While advocates of realpolitik would likely dismiss international law as such, opponents and proponents of a system of international hegemonic law instead analyze whether U.S. predominance is somehow transforming the existing international legal order into something new and quite different.

A separate strain of scholarship has raised the question of globalization's impact on state sovereignty.[7] Unlike the consolidation of power which is central to the realpolitik and hegemonic law perspectives, globalization arguably functions as a decentralizing influence that diminishes the importance of sovereign states as other actors—international organizations, multinational corporations, non-governmental organizations (NGOs), and even individuals—exercise increased influence in the creation, implementation, and enforcement of international law.[8]

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4. *See, e.g.*, Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (2002) ("[I]nternational 'rules' concerning the use of force are no longer regarded as obligatory by states."). In early 2002, the White House Counsel described the Geneva Convention provisions on treatment of prisoners of war as "quaint" and "obsolete" in light of the new war on terrorism. *See* Draft Memorandum from White House Counsel Alberto Gonzales, to President George W. Bush 2 (Jan. 25, 2002), *available at* http://msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf (last visited Jan. 27, 2005).

5. Although not addressing the implications for ontological analysis specifically, Thomas Franck has recognized the more general implications of these developments. *See* Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 610 (2003) (describing certain U.S. policymakers' "plan to disable all supranational institutions and the constraints of international law on national sovereignty. If, as now seems all too possible, this campaign succeeds . . . what sort of world order will emerge from the ruins of the Charter system?").

6. *See, e.g.*, Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001); Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

7. *See, e.g.*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999). Although subject to no strict definition, globalization encompasses notions of increasing transboundary movements, whether of capital, goods, people, pollution, diseases, or ideas. *Id.* at 12.

8. *See, e.g.*, Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 235-236 (2002) (discussing the debate over globalization's impact on sovereignty in terms of the decrease in subjects excluded from international regulation and the increase in non-state actors' participation); Phillip Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty*, 95 MICH. L. REV. 1944, 1946 (1997) (citing "globalism" as a "visible challenge[ ] to national sovereignty"); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959 (2000) (acknowledging that some perceive "[n]ational sovereignty . . . to have diminished significantly in the past half century as a result of economic globalization" and other manifestations of globalization).

Responding to each of these issues may well involve post-ontological analyses, such as investigating patterns of compliance with international humanitarian law and U.N. Security Council resolutions or assessing the fairness of non-state actor participation in international fora. However, these issues cannot be addressed solely from that perspective. Scholars and practitioners alike must also engage these issues on the so-called ontological level. Asking whether international humanitarian law or U.N. Charter provisions on the use of force continue to have legal effect in an age of terrorism requires attention to the most basic question of what it means to qualify something as "international law." Similarly, asking whether international hegemonic law reflects the future of the international legal order or whether globalization means the inevitable decline of state sovereignty requires analysis of whether the very foundations of the international legal order are themselves undergoing change. These issues have traditionally been the subject of the doctrine of sources of international law. As such, whether or not one views this as an era that values post-ontological analysis, new scholarship is needed to determine whether the sources of international law are changing in fundamental ways.

Of course, the difficulty in taking up the subject of sources (and perhaps one reason some sought to declare victory and move past it) is that scholars and practitioners have never been able to agree on a definitive list of what sources contain the rules of international law, let alone what method, or methods, provide the basis of obligation for such rules.[9] It is, therefore, difficult to evaluate whether recent developments reflect changes to the sources of international law. Indeed, competing views on the operation of international law have long deadlocked sources doctrine.

The stalemate over sources doctrine does not mean, however, that all efforts to evaluate change in the international legal order are doomed to fail. By shifting the frame of reference, new opportunities may emerge to break the deadlock. This article seeks to engender such a shift by proposing that sources doctrine incorporate considerations of authority. It argues that international lawyers must go beyond the traditional lines of inquiry, such as what makes international law binding (the basis of obligation) and where one finds it (the sources of international law), to ask who is making the law. In doing so, a new perspective is presented for evaluating whether and how the international legal order is changing. Investigating whether the actors making international law have changed may, in turn, offer new insights into the longstanding inquiries regarding the basis of obligation and sources of international law themselves.

9. *See, e.g.*, PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 35 (7th ed. 1997) ("The changes in international society since 1945 have led to basic disputes on the sources of international law and it must be noted at the outset that they have become an area of considerable theoretical controversy."). The situation seems little altered from 1981 when Sir Robert Jennings wrote, "I doubt whether anybody is going to dissent from the proposition that there has never been a time when there has been so much confusion and doubt about the tests of the validity—or sources—of international law, than the present." Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?*, SCHWEITZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 37, 60 (1981), *reprinted in* SOURCES OF INTERNATIONAL LAW 28 (Martti Koskenniemi ed., 2000).

This article begins with a brief review of the longstanding debates over the sources of international law. It then explains why the issue of authority should form a key component of any study of sources and provides an overview of the ways in which the authority to make, interpret, and apply treaties has changed. Specifically, this article evaluates whether the role non-state actors play in making, applying, and interpreting treaties has changed who is truly authorized to form treaties. It finds that, although non-state actors have a proven capacity to make treaties and participate in their application and implementation, the treaty paradigm generally continues to be pre-conditioned on the presence of state consent. The article argues that evidence of state consent to non-state actor participation in treaties demonstrates a need for sources scholarship to focus as much attention on changes in who makes international law as has previously been devoted to the issue of changes in where one looks to find the law.

Finally, the article concludes that a sources doctrine that considers existing distributions of legal authority may serve as a useful tool for assessing the impact of recent developments such as globalization and hegemony on the international legal order. Such an authority-based approach ultimately provides a less dynamic picture of international law than these developments might suggest, one where state consent still matters. At the same time, it provides a baseline for future analysis; a way to compare whether and how states could give the power to create and apply international law to other entities; and a way to assess whether a single actor's influence has grown so large as to effectively usurp the role of other actors in making and applying the law. In looking at what states are consenting to, moreover, an authority-based approach offers a perspective on international law *as it is practiced*—a perspective that may serve to counterbalance the views of those who argue against the law's very existence.

I.
THE STALEMATE OVER SOURCES

The debate over the sources of international law still engages age-old arguments between positivists dedicated to law created through the consent of states and naturalists supporting international law as divined from moral dictates existing independent of state consent.[10] Other candidates have arisen over the

10. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 40-44 (4th ed. 1997); ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 6 (1997). This debate is complicated as proponents of both positivist and naturalist positions adopt widely divergent methodologies. Thus, positivism has advocates who focus on demonstrating international law as the reflection of state consent, others who focus on divorcing international law from its ethical elements, and those who defend the law's normativity and prescriptive force. *See* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 303-304, 307 (1999); S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 17) ("[T]he rules of law binding upon States . . . emanate from their own free will."); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 4 (R. Tucker ed., 2d ed. 1967) (distinguishing legal orders from moral and social orders); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 421 (1983) (arguing for uniformity of treatment of the rules of international law). Similarly, naturalist scholars derive their version of international law from sources ranging from divine dictates to more secular bases. *See, e.g.*, Alfred Verdross & Heribert F.

years, each identified as *the* source of obligation in international law.[11] At the same time, whole new methodologies have emerged such as the New Haven School, International Law and Economics, International Law and International Relations, and the New Stream movement, each of which suggests new ways to look at or argue about international law.[12]

Most international lawyers, however, rely on the articulation of sources in Article 38 of the Statute of the International Court of Justice—treaties, custom, and recognized general principles—to identify what legal rules to apply in a particular case.[13] Similarly, most international lawyers continue to explain how these rules constitute law by referring to the notion that "the general consent of states creates rules of general application."[14]

Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 31 (R. St.J. Macdonald & Douglas Johnston eds., 1983) (noting that Christian defenders of natural law, including Grotius, relied on the Bible to demonstrate legal norms); FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 2 (1998) (articulating a Kantian conception of international law based on certain "morally legitimate" principles).

11. Writing in 1971, Oscar Schachter identified eleven other possible bases of international legal obligation in addition to state consent and natural law, and one can say with some certainty that the candidate rolls have only expanded in the ensuing thirty years. Oscar Schachter, *Towards a Theory of International Obligation*, *in* THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 9-10 (Stephen Schwebel ed., 1971) (citing consent of states; customary practice; a sense of "'rightness'—the juridical conscience"; natural law or natural reason; social necessity; the will of the international community; "direct (or 'stigmatic') intuition"; common purposes of the participants; effectiveness; sanctions; "'systemic' goals"; shared expectations as to authority; and rules of recognition).

12. *See generally* Symposium, *Method in International Law*, 93 AM. J. INT'L L. 291 (1999). For more comprehensive treatments of these methods, see MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (1981) (representing the New Haven School); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999) (representing the International Law and Economics approach); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (representing the International Law and International Relations outlook); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Lakimielsliiton Kustannus ed., 1989) (representing the New Stream perspective).

13. Article 38(1) of the ICJ Statute provides that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm (last visited Jan. 27, 2005) [hereinafter ICJ Statute].

14. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 1995); Louis Henkin, *General Course on Public International Law*, *in* IV RECUEIL DES COURS 46 (1989) ("State consent is the foundation of international law. The principle that law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy.").

A. Disputing the Traditional Sources

Challenges abound to Article 38's identification of treaties, custom, and recognized general principles as an exhaustive list of the sources of international law. Sir Gerald Fitzmaurice noted the difficulty of referring to treaties as a source of law because they only bind the parties to the treaty.[15] Sir Robert Jennings considered it "an open question whether [Article 38] is now itself a sufficient guide to the content of modern international law," proposing other sources such as the results of treaty negotiating conferences as well as the decisions and recommendations of international organizations.[16] Still others question Article 38's failure to acknowledge the so-called "relative normativity" of international law, most apparent through doctrines such as *jus cogens*, obligations *erga omnes*, and the whole generation of soft-law principles.[17]

Nor has the concept that state consent serves as the exclusive source of obligation in international law escaped censure. Scholars question what gives legal force to the consent of states expressed through treaties. Do treaties bind states because they consent to the treaty's binding effect? Such a construction leads to an infinite logical regression of states consenting to consent. Or, does a treaty's legal force derive from a non-consensual basis such as natural law? If so, consent cannot be the only basis for creating international law.[18]

Notwithstanding such criticism of Article 38 and state consent, most international lawyers still rely on them as international law's operating framework. Martti Koskenniemi opines that we do so "by default" because there is "such a wide variety of theories about the point of international law, and such profound disagreement over them . . . that no such theory can plausibly be used as a reference point for reaching acceptable resolutions in normative problems."[19] Indeed, past efforts to identify alternatives to state consent, much like the efforts to establish consent itself as the only basis for international law, have attracted adherents without crowning a new normative basis for the law.[20] Nor have ef-

15. Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 153, 157 (1958).

16. Jennings, *supra* note 9, at 59, 61, 70-73, 80-83, *reprinted in* SOURCES OF INTER-NATIONAL LAW, *supra* note 9, at 27, 29, 38-41, 48-51.

17. *See* Jose E. Alvarez, *Positivism Regained, Nihilism Postponed*, 15 MICH. J. INT'L L. 747, 747-48 (1994) (reviewing G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993), and critiquing his attempt to rescue the positivist doctrine of international law, specifically Article 38, from the threats posed by relative normativity).

18. *See, e.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 187 (1990) ("'Why are treaties binding?' is a question usually answered by the superficial assertion that 'treaties are binding because states have agreed to be bound' . . . . But the binding force . . . cannot emanate solely from the agreement of the parties. It must come from some ultimate unwritten rule of recognition, the existence of which may be inferred from the conduct and belief of states."); RUBIN, *supra* note 10, at 15 ("An asserted rule that makes 'consent' to the legal order a constitutive fact is itself either a natural law rule or a rule that rests on prior consent, thus introducing an infinite regress."); Fitzmaurice, *supra* note 15, at 164 ("the rule *pacta sunt servanda* . . . does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it.").

19. Martti Koskenniemi, *Introduction*, *in* SOURCES OF INTERNATIONAL LAW, supra note 9, at xii.

20. *See, e.g.*, *id.*; Schachter, *supra* note 11, at 9.

forts to suggest sources beyond those in Article 38 had better luck. True, some states, academics, and jurists have identified new "sources" of international law such as certain General Assembly resolutions, the work of the International Law Commission, and even aspirational texts such as the American Declaration of the Rights of Man.[21] Others, however, just as definitively deny them such independent status.[22]

In some sense then, Article 38 and the principle of state consent have come to represent a "common denominator." Alfred Rubin puts it more eloquently, noting that if one envisions the path from morality to law as leading through a fairly well-defined swampy area that is dangerous to those who get lost, our major signpost is the summary of sources now found in Article 38.[23]

Assessing whether the sources of international law are changing, however, requires that we step off this path to explore for new routes to the creation of international law beyond state consent, or new places to look for the law beyond treaties, custom, general principles, and the judicial and academic opinions that accompany them. Yet, given the doctrinal confusion over both the existing sources of international law in Article 38 and the basis of their obligation, we can question the utility of such an endeavor. To continue with Professor

21. *See, e.g.*, T. Olawale Elias, *Modern Sources of International Law*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 34, 41, 50-51 (1972) (identifying the International Law Commission as a "law-making body" and concluding that votes on General Assembly resolutions are binding); Alvarez, *supra* note 17, at 774-75 (asking, "[c]an anyone today afford to ignore the General Assembly's role in norm creation?" and citing instances where international and domestic courts have relied on General Assembly resolutions as sources of law); *Report No. 75/02 Mary and Carrie Dann*, Case 11.140 (Dec. 27, 2002), at ¶ 163, *compiled in Annual Report of the Inter-American Commission of Human Rights 2002*, Organization of American States, OEA/Ser.L/V/II.117, Doc. 1, rev. 1 (Mar. 7, 2003), *available at* http://www.cidh.oas.org/annualrep/2002eng/USA.11140b.htm (last visited Jan. 27, 2005) (citing "well-established and long-standing jurisprudence and practice of the inter-American system according to which the American Declaration is recognized as constituting a source of legal obligation for OAS member states").

22. The United States, for example, has rejected any legal obligations under the American Declaration. *See* Indigenous People, 2002 DIGEST § H, at 378-82 (U.S. views on the Petition of Mary and Carrie Dann). In the context of General Assembly resolutions, many, including the United States, continue to emphasize that such resolutions are not binding on Member States by themselves, but may have weight as evidence of a rule of customary international law. *See, e.g.*, BROWNLIE, *supra* note 14, at 14; United Nations General Assembly Declarations, 1978 DIGEST § 2, at 9 (quoting Stephen Schwebel on the legal force of General Assembly resolutions, including statements he made on behalf of the United States as Deputy Legal Adviser of the Department of State in 1975). Others, meanwhile, take a middle path, emphasizing the normative influence of documents that do not fall within the Article 38 framework, but admitting they are not true "sources" of international law. *See, e.g.*, Oscar Schachter, *The Nature and Process of Legal Development in International Society*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY, *supra* note 10, at 745, 788 ("It is, of course, true that such [General Assembly] resolutions are not a formal source of law within the explicit categories of article 38(1) . . . [y]et few would deny that General Assembly resolutions have had a formative influence in the development of international law in matters of considerable importance to national states."); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L. J. 445, 477 (1981) ("[w]hile General Assembly resolutions are not *ipso facto* new sources of international law, they can contribute to the normative process of law-creation.").

23. RUBIN, *supra* note 10, at 192. The same could presumably be said if one views law as a derivation of politics separate from, or in addition to, morality.

Rubin's analogy, in venturing off the existing path, we inevitably risk getting stuck in the swamp.

B. *Integrating Questions of Authority into the Doctrine of Sources*

Given the existing, horizontal distribution of authority in international law, it is not altogether surprising that the doctrine of sources has bogged down in varied and conflicting assertions of what constitutes a source of international law, let alone what makes such law obligatory. The international legal order continues to lack universal, centralized, legislative and adjudicatory bodies that could definitively delineate the sources of law and judge their content. As Leo Gross noted a half century ago, we are left in a situation where, in the absence of such authorities, "each state has a right to interpret the law, the right of autointerpretation, as it might be called."[24] A state's view, however, remains just that—one interpretation, not a final decision on the law's content or applicability. Only if all concerned parties consent, whether by treaty, adjudication, or arbitration, does an actual determination of the legal norm, at least with respect to those parties, become possible.[25] Absent that consent, controversies over what the law is, or even what the sources of law are, may continue indefinitely.

Viewed from this perspective, debates over the sources of international law too frequently overlook one essential part of the inquiry: Who has the authority to decide where to find the law and label it as such?[26] In reality, many jurisprudential debates that on the surface involve questions of what gives international law an obligatory character and where one looks for its content may be recast as debates about authority—debates about which entities or persons have the authority to determine what constitutes international law and where to look for it.[27]

In looking at the sources of international law, therefore, we need to ask not merely "what" and "where", but also "who"—not merely what element gives law its legal force and where do we find it, but also, who is it that makes this law? First, who makes the law itself; who creates legal obligations, be it by treaty, custom, or recognized general principles? Second, who has authority? Who is it that the law-creators have consented to apply, interpret, or even modify the law for them?

By integrating such a search for authority into the doctrine of sources, we may find a framework for moving beyond the old and unresolved debate about the sources of international law. Asking "who" in addition to "what" and "where" allows us to shift the debate away from arguments about whether state consent forms the only basis or merely one of several bases of obligation in international law. Similarly, an authority-based analysis does not require the

24. Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation* (1953), *reprinted in* ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 386 (1984).

25. *Id.* at 386-88.

26. *See* RUBIN, *supra* note 10, at 24-25. Other scholars in the post-ontological context have suggested the need to address the "why" question—why do the subjects of international law comply with it? *See, e.g.*, Alvarez, *supra* note 1, at 306 (introducing a symposium on compliance scholarship dedicated to studying why states generally obey international law).

27. RUBIN, *supra* note 10, at 24-25, 165.

identification of an exclusive list of the sources of international law, be they in Article 38 or some larger listing. We can evaluate changes in who exercises authority to make and apply international law even if only within those "common denominator" sources of obligation (state consent) and law (Article 38) on which all agree. Moreover, in doing so, we may gain a fresh perspective on the traditional debate. For example, if we found state consent had operated to change who participates in the formation of the traditional sources of international law that would demonstrate an expansion of the generally accepted basis of obligation from state consent to a situation where the consent of states *and* non-state actors together creates the law. Thus, if asking whether the sources of international law have changed, we can, and should, be asking whether we have changed who it is that states have consented to make treaties, to create custom and to recognize general principles of law and who it is that is authorized to apply, interpret or even modify them.

II.
NON-STATE ACTOR TREATY-MAKING: A CASE STUDY OF AUTHORITY IN INTERNATIONAL LAW

To demonstrate how this approach might operate, consider the law of treaties. An authority-based approach examines the treaty-makers themselves. Avoiding such well trodden ground as what gives treaties their legal force and which categories of treaties constitute a source of law, it seeks to identify actors who have authority to make, implement, interpret, or modify treaties in addition to the sovereign states that have traditionally exercised such authority.[28] If such actors exist, this approach asks how does their authority inform our understanding of treaties as a source of law and state consent as a basis for obligation?[29]

Jose Alvarez has already highlighted how shifting the fora of treaty negotiations from ad hoc conferences to international institutions increased the influence of various non-state actors such as NGOs, international civil servants, and experts in the treaty-making process.[30] For purposes of sources doctrine, however, the issue is not merely one of influence; if it were, we would long-ago have had to dispense with the idea that equally sovereign states make treaties and custom to account for what Philip Jessup called the "inescapable fact of power differentials" among states.[31] Instead, sources doctrine involves a description of the distribution of formal legal authority, as distinct from the dis-

28. States, by definition, are considered to possess the capacity to make treaties. *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, art. 6, 1155 U.N.T.S. 331, 334.

29. It is important to distinguish from the outset that this line of inquiry into who makes the law is distinct from the separate issue of the "subjects" of international law—those states, international organizations, and other entities, including individuals, whose conduct may be regulated by international law. It is true that evidence of a treaty-making capacity may demonstrate that a particular entity is a subject of international law whose conduct may thus be regulated by international law. The focus of the current line of analysis, however, lies in looking at who concludes treaties as evidence of a capacity to make international law rather than simply asking who is subject to it.

30. *See generally* Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213 (2002).

31. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 30 (1948).

tribution of political or even moral authority, both of which may help explain why those with legal authority act in a certain way.[32] An authority-based approach thus focuses on who can actually create international law or authorize its definitive interpretation or application. Under this approach, three candidates emerge as potential sources of authority in addition to sovereign states: sub-state actors, supranational actors, and extra-national actors.

A. *Sub-State Actors*

Sub-state actors are semi-autonomous territorial entities that are legally dependent upon, or associated with, independent sovereign states.[33] They include sub-national components of federal states, overseas territories, and other dependent territories of existing states. In reality, although often thought of as anomalies, states have afforded these entities a role in treaties for some time. In the earliest international organizations—the Universal Postal Union and the International Telecommunications Union—states gave colonial administrations separate and full membership in the respective organizations.[34] In rare cases, a sub-state actor could join a treaty directly; for instance, Ukraine and Belarus joined the U.N. Charter while part of the Soviet Union. India and the Philippines did the same prior to their independence.[35]

It would be a mistake, however, to write these precedents off as the peculiar products of colonial and Cold War environments.[36] More than ever, sub-state entities now directly participate in both bilateral and multilateral treaties on matters in which they claim competence. Swiss Cantons, German and Austrian Länder, Hong Kong, Bermuda, Jersey, The Cook Islands, New Caledonia, Quebec, Puerto Rico, Tatarstan, and Flanders all serve as examples of sub-state actors that have concluded treaties in recent years.

On what basis do sub-state actors participate in treaties? Their ability to conclude treaties is largely a function of whether they have been authorized to

32. The difference between exercises of legal and political authority may be demonstrated through consideration of how a domestic legislative body operates. Laws are usually enacted through a process that includes a certain majority vote of the legislators. A single legislator, however, may have political authority that far exceeds his or her single vote; his or her decision-making may influence dozens of votes on any particular issue. Nevertheless, the existence of such political authority does not necessarily alter or change the distribution of legal authority where each legislator has a single vote and where a certain majority of those votes is required to pass a law. Of course, at some point, distributions of legal authority may become so divorced from the political reality of how law-making occurs that the entire legal system requires reconsideration. This is the case, for example, for those concerned with international hegemonic law.

33. Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71 (1968).

34. *Id.* at 64-65; HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 52 (3d ed. 1995).

35. Lissitzyn, *supra* note 33, at 6; SCHERMERS & BLOKKER, *supra* note 34, at 50; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 47 (2000).

36. Although he recognized his conclusion wasn't inevitable, Lissitzyn thought sub-state treaty-making was in decline. Lissitzyn, *supra* note 33, at 87 ("[T]he extent to which dependent entities appear as distinct partners in treaty relations will continue to fluctuate in the future as it has in the past, although the present over-all trend seems to be in the direction of diminishing it. But, the growing complexity of transnational relations and concerns may yet reverse this trend.").

do so.[37] In his 1968 Hague Lectures on Territorial Entities in the Law of Treaties, Oliver Lissitzyn explained this authorization requirement by suggesting that international law imposes only two prerequisites on sub-state entity treaty-making: (1) the consent of the state responsible for the sub-state actor; and (2) the willingness of the sub-state actor's treaty partners to regard it as capable of entering into treaties.[38] The contemporary treaty-making practice of sub-state actors is consistent with both of these requirements. However, questions remain about the "independent" capacity of these actors and the consequences of "unauthorized agreements."

1. Internal Authorization of Sub-State Treaty-Making

In most cases where a sovereign state does not authorize its political subdivision to make treaties, that sub-state actor will not negotiate and conclude treaties independently.[39] In India, for example, sub-state actors have no capacity to conclude international agreements and there is little practice of them doing

37. Such direct "participation" in treaties should be distinguished from the separate, and often equally important, role that sub-state actors play in determining the extent to which a sovereign state can exercise its own treaty-making authority. Depending on the constitutional distribution of authority, sub-state actors may have authority to accept or reject whether the sovereign state can assume treaty obligations in certain areas where the sub-state actor exercises competence. *See, e.g.*, J.G. Brouwer, *The Netherlands*, *in* NATIONAL TREATY LAW AND PRACTICE 133, 144 (Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., 1999) [hereinafter 1999 NATIONAL TREATY LAW AND PRACTICE] (describing Netherlands Antilles and Aruba's "absolute veto" authority on treaties involving economic and financial matters affecting their interests); Hans D. Treviranus & Hubert Beemelmans, *Federal Republic of Germany*, *in* NATIONAL TREATY LAW AND PRACTICE 43, 55 (Monroe Leigh & Merritt R. Blakeslee eds., 1995) [hereinafter 1995 NATIONAL TREATY LAW AND PRACTICE] (noting a modus vivendi—the Lindau arrangement—where the German Federal Government seeks the agreement of its Länder before concluding a treaty affecting their legislative competence). As a result, the state may not be able to ratify the treaty or may, if available, need to invoke territorial or federal clauses to exclude obligations under the treaty with respect to the non-consenting sub-state entity. Maurice Copithorne, *Canada*, *in* NATIONAL TREATY LAW AND PRACTICE 1, 6-7 (Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., 2003) [hereinafter 2003 NATIONAL TREATY LAW AND PRACTICE] (describing consequences of Canadian provinces' authority to accept or decline participation in treaty regimes implicating areas of provincial competence). In some cases, the role the sub-state component plays in how a state exercises the state's treaty-power may also explain why the sub-state actor is authorized to conclude treaties independently. *See, e.g.*, 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 183 (Myron Nordquist ed., 1989) [hereinafter UNCLOS COMMENTARY] (noting that, in the context of the 1982 Law of the Sea Convention, several metropolitan states and sub-state actors argued for separate sub-state participation in the treaty on the grounds that the metropolitan states had "renounced [certain] . . . powers and transferred them, together with the appurtenant treaty-making competences, to the representatives of the territories concerned.").

38. Lissitzyn, *supra* note 33, at 84; *Report of the International Law Commission on the Work of Its Eighteenth Session*, (draft) art. 5.2, [1966] 2 Y.B. Int'l L. Comm'n 172, 191, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (providing that "States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down."). This provision was deleted during negotiations of the 1969 Vienna Convention on the Law of Treaties. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 21 (2d ed. 1984).

39. *But see infra* notes 57-61 and accompanying text (discussing "unauthorized agreements" concluded by sub-state actors).

so.[40] A state that is unwilling to authorize a sub-state actor to pursue independent treaty-making may, however, be willing to conclude a treaty on its behalf.[41]

In other cases, sovereign states authorize their sub-state components to enter into treaties directly and in their own name. Frequently, this authorization will only apply to a single agreement. For example, in 1981, Canada concluded a social security agreement with the United States. In this agreement, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec's distinct pension system.[42] Quebec and the United States concluded that agreement in 1983.[43] For its part, the United Kingdom has used an "Instrument of Entrustment" to authorize certain overseas territories such as Bermuda, the British Virgin Islands, and Jersey to enter into specific treaties with the United States and Canada.[44] Even the United States sometimes authorizes its dependent territories to join treaties on a case-by-case basis. For example, in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.[45]

Increasingly, however, states have formalized the treaty-making authority of certain sub-state components through domestic laws. In most cases, this sub-state entity authorization remains subject to a residual level of state supervision. In 1988, for example, Austria amended its Constitution to authorize Austrian Länder to conclude international treaties with neighboring states and their constituent parts with respect to matters falling within the Länder's exclusive competence.[46] This approach mirrors that under the German Constitution ("Basic

40. K. Thakore, *India*, *in* 1995 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 79, 101.

41. Thus, the Kingdom of the Netherlands may conclude an agreement for the benefit of one of its constituent parts such as Netherlands Antilles or Aruba. Brouwer, *supra* note 37, at 144. *See also* Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, Nov. 21, 2001, U.S.-U.K., Treaties and International Agreements Online, CTIA No. 15989.000; AUST, *supra* note 35, at 53 (citing an agreement between New Zealand and the United Kingdom on behalf of the Channel Islands).

42. Agreement With Respect to Social Security, Mar. 11, 1981, U.S.-Can., art. XX, 35 U.S.T. 3403, 3417.

43. Understanding and Administrative Arrangement with the Government of Quebec, Mar. 30, 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

44. Ian Sinclair & Susan Dickson, *United Kingdom*, *in* 1995 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 244. For example, on September 12, 2002, the United Kingdom informed the United States that it had "entrusted" the Insular Authorities of Guernsey, Jersey and the Government of the Isle of Man to negotiate and conclude Tax Information Exchange Agreements with the United States on the understanding that the United Kingdom remained responsible for the international relations of these territories. *See, e.g.*, Press Release, U.S. Treasury Department, Treasury Secretary O'Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information (Nov. 4, 2002), *at* http://www.treas.gov/press/releases/po3595.htm (last visited Jan. 27, 2005).

45. Self-Governing and Non-Self-Governing Territories, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 5, at 436, 438-40 [hereinafter Kozak] (regarding testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs on July 17, 1986, regarding international activities of U.S. territories and commonwealths). Subsequently, Puerto Rico withdrew from the Caribbean Development Bank.

46. Franz Cede & Gerhard Hafner, *Federal Republic of Austria*, *in* 1999 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 1, 12.

Law"), which authorizes German Länder to make treaties. Germany's authorization has led to some 80 agreements between German Länder and neighboring European countries.[47] Similarly, Swiss Cantons have concluded some 140 international agreements, although these agreements have been mainly administrative in nature.[48] Since 1993, Belgium's law has authorized its component "regions" to enter into treaties on matters within a region's exclusive competence (for example, each region's water and environmental resources).[49] Under this authority, Belgium's three regional governments—Flanders, Wallonia, and Brussels-Capital—have entered into two multilateral agreements with France and the Netherlands, one for the protection of the Sheldt river and the other for that of the Meuse river.[50] Moreover, the development of the European Union may lead to more frequent and significant exercises of such sub-state treaty-making powers.[51]

Sub-state treaty making is not simply a European phenomenon, however. Through the Russian Constitution and internal agreements among the subjects of the Russian Federation, Russia has authorized certain of its sub-state components, such as Yaroslav and Tatarstan, to conclude treaties.[52] Tatarstan has concluded agreements concerning commerce, science and technology, and culture with Azerbaijan, Bulgaria, and apparently even a few Polish provinces.[53] In 1991, Mexico enacted a law authorizing centralized agencies of both Mexico's state and municipal public administrations to enter into international agreements.[54] Similarly, although the U.S. Constitution denies U.S. states the right to enter into "treaties" as that term is defined under U.S. law, it does authorize them to enter into "compacts" with foreign powers, provided that the U.S. state

47. Treviranus & Beemelmans, *supra* note 37, at 54. The Federation retains the authority to approve these agreements, although to date it has not denied any proposed agreements by the Länder. *Id.*

48. Luzius Wildhaber et al., *Switzerland*, *in* 1995 NATIONAL TREATY LAW AND PRACTICE, supra note 37, at 117, 125-26, 151-153. Articles 10(1) and 102(7) of the Swiss Constitution require that the Federal Council approve such cantonal agreements. *Id.* at 153.

49. AUST, *supra* note 35, at 50.

50. *Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments)-France-Netherlands: Agreements on the Protection of the Rivers Meuse and Scheldt, done at Charleville Mezieres, France, Apr. 26, 1994*, 34 I.L.M. 851 (1995). Article 9 of both agreements requires each of the regional governments to separately notify France upon the completion of their required domestic procedures for entry into force. *Id.* at 858.

51. *See* Treviranus & Beemelmans, *supra* note 37, at 54 (discussing the treaty-making authority of German Länder and noting that the "development of the European Union will . . . increase the importance of the treaty-making power of the Länder.").

52. W. E. Butler, *Russia*, *in* 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 151, 152-53 (citing Yaroslav region's agreements with Belarus, Kazakhstan, Moldova, Uzbekistan, Ukraine, and individual German Länder).

53. Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

54. Luis Miguel Díaz, *Mexico*, *in* 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 101, 104. Although not considered treaties under Mexican law, these inter-institutional agreements are defined as being governed by "public international law." *Id.* at 117 (citing article 2(II) of the Law regarding the Making of Treaties).

obtains the approval of the U.S. Congress.[55] Historically, this authority has been exercised rarely by U.S. states and even more infrequently in recent years.[56]

What U.S. states are doing, however, is concluding unauthorized agreements with foreign powers.[57] For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba on water issues without Congressional authorization.[58] Other sovereign states are experiencing similar problems; the requirement of state authorization appears to have driven some sub-state actors to make more frequent use of unauthorized arrangements with foreign states, other sub-state actors, and international organizations.[59] Quebec has concluded some 230 "ententes" with foreign governments, nearly 60% of which were with foreign states.[60] South Africa had similar problems with its provinces concluding "international agreements" despite constitutional provisions giving the national government exclusive authority over such agreements.[61]

The conclusion of such unauthorized agreements by sub-state actors might suggest that these actors have become truly independent treaty-making "authorities." There are, however, several problems with such a proposition. First, very little information exists concerning these unauthorized instruments; they are rarely published or consolidated in ways that allow for an evaluation of their legal character.[62] Second, the sovereign state will frequently step in post hoc to

55. U.S. CONST. art. 1, § 10, cl. 1 ("No State shall enter into any Treaty"); U.S. CONST. art. 1, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power.").

56. Among the most well-known examples are a 1956 New York-Canada agreement to establish a port authority for the Niagara River bridge, a 1958 Minnesota-Manitoba highway agreement, 1949 and 1952 Forest Fire Compacts between northeastern U.S. states and Canadian provinces, and various compacts authorized under the 1972 International Bridge Act. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 153 (2d ed. 1996); International Bridge Act, 33 U.S.C. § 535a (1972). Unlike Mexico's law, however, the applicable law for compacts between U.S. states and foreign powers is unclear. *See* Lissitzyn, *supra* note 33, at 29 (finding considerable evidence that compacts are legally binding, but that "the evidence for the view that compacts of States of the Union with foreign entities are governed by the law of treaties is inconclusive").

57. *See, e.g.*, AUST, *supra* note 35, at 48-49.

58. At the request of Senator Byron Dorgan of North Dakota, William H. Taft IV, Legal Adviser to the U.S. Department of State, wrote a letter to Senator Dorgan that analyzed the constitutional questions posed by the unauthorized agreement where Missouri and Manitoba undertook to cooperate in opposition to inter-basin water transfers between the Missouri River and Hudson Bay basins, despite federal policy supporting at least some such transfers. *See* Capacity to Make: Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba, 2001 DIGEST § A, at 179-98 [hereinafter Taft Letter].

59. *See, e.g.*, Treviranus & Beemelmans, *supra* note 37, at 56 (discussing use by German Länder of Joint Declarations and Protocols); Copithorne, *supra* note 37, at 2. States are likely to view such activity as problematic because it means that they are not able to exercise full control over the international activities of their sub-national units in a manner befitting their sovereign status. States may also have concerns about legal responsibility for the actions of their sub-state units, even where those actors operated without authority from the states themselves.

60. Nikravesh, *supra* note 53, at 239.

61. Neville Botha, *South Africa*, *in* 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 199, 219.

62. *See, e.g.*, Wildhaber et al., *supra* note 48, at 153 ("It is difficult to get hold of all [Swiss] cantonal agreements. More than half of them have not been officially published.").

rectify the absence of authority. Mexico, for example, enacted its law authorizing sub-state entities' "international agreements" to provide a legal foundation for what was an existing practice.[63] In 1986, the Swiss Federal Council authorized the Swiss Ambassador to sign an agreement on cultural and technical cooperation between itself "acting for the canton of Jura" and the Republic of the Seychelles. In doing so, it rebuked the canton of Jura for having independently negotiated the agreement, and insisted on the Swiss Federal Council's exclusive power to negotiate such international agreements.[64]

Finally, where unauthorized sub-state arrangements are available, their legal status is often murky.[65] This may be because the commitments in the texts of these arrangements are often political, rather than legal, in nature.[66] The ambiguity may also result from a sovereign state's refusal to recognize the validity of the agreements entered into by one of its sub-state entities. Canada, for example, refuses to recognize its provinces' international arrangements as international agreements unless it has consented to them.[67] Notwithstanding Canada's position, France views all of its "ententes" with Quebec as binding under international law.[68]

2. *External Consent to Sub-State Treaty-Making*

France's willingness to regard its agreements with Quebec as binding under international law illustrates that a sovereign state's decision to authorize its sub-state entities to make treaties is not the only criterion for such treaty-making. A second prerequisite is the potential treaty partners' willingness to accept the sub-

63. Díaz, *supra* note 54, at 104.

64. Wildhaber et al., *supra* note 48, at 154.

65. AUST, *supra* note 35, at 50 (declaring the legal status of unauthorized agreements "problematical"); Lissitzyn, *supra* note 33, at 84 (discussing how the "validity of an agreement made by a dependent entity without the consent of the dominant State is one on which little guidance is available in practice").

66. This is frequently the case with Quebec's "ententes." *See* Nikravesh, *supra* note 53, at 250-51 (noting that Quebecois ententes rarely require legally mandated performance); Copithorne, *supra* note 37, at 2; Treviranus & Beemelmans, *supra* note 37, at 56 (discussing use by German Länder of non-legal arrangements). In the United States, the practice is to permit sub-state actors to conclude arrangements that do not involve international commitments or to work out modifications that ensure that result. *See, e.g.*, Kozak, *supra* note 45, at 435; Taft Letter, *supra* note 58. For example, on April 22, 1999, the U.S. state of North Carolina signed a "Memorandum of Intent" with the Republic of Moldova that detailed cooperation between, among other entities, North Carolina's National Guard and Moldova's military. Memorandum of Intent Between the Republic of Moldova and the State of Carolina, Apr. 22, 1999, *available at* http://www.secretary.state.nc.us/Partnership/memorandum.htm (last visited Jan. 27, 2005). In doing so, however, the Memorandum was specifically crafted to indicate in Article 6 that it did not constitute an international agreement. *Id.*

67. Copithorne, *supra* note 37, at 11-12. For example, Canada consented to an education entente concluded by France and Quebec on February 27, 1965. Nikravesh, *supra* note 53, at 235. Similarly, the United States and Canada both stepped in to "consent" to and indemnify an agreement concerning the Ross Dam on the Skaggit River on behalf of the city of Seattle and British Columbia, where the two sub-state entities had originally concluded an agreement on the subject by themselves. Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088.

68. Nikravesh, *supra* note 53, at 242.

state actor as a treaty partner. This element must also be satisfied before authorized, let alone unauthorized, treaty-making can occur.

In practice, most states take a more conservative approach than France. A would-be treaty partner usually seeks confirmation that a sub-state actor has the authority to conclude treaties and the competence to undertake obligations with respect to the treaty's subject matter. Israel, for example, consults with foreign governments to confirm that the sub-state actor has the authority to conclude the envisaged treaty. If the sub-state actor does not have this authority, Israel will redraft the document to ensure that the text does not constitute a binding international agreement.[69] In 2001, the United States took the same approach with the United Kingdom, confirming first with the United Kingdom that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States.[70] When the United States determined that the Cayman Islands lacked the necessary entrustment to sign a similar tax information exchange agreement in its own name, the United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman Islands.[71]

Notwithstanding the increased frequency of their bilateral treaty-making, few sub-state actors participate in multilateral agreements because the states negotiating these agreements generally refuse to consent to the sub-state actor's participation. The reasons for these objections vary from a concern that sub-state actors might merely act as proxies for a sovereign state that is already a party to the treaty to a more general objection to opening up treaties to non-state actors. For example, attempts to expand sub-state territorial participation in negotiations for a South Pacific Regional Environmental Program (SPREP) met strong resistance. In one noted exchange between the United States and Guam, the latter demanded that the treaty grant sub-state actors the same right to form and block consensus as states for matters over which they had competence.[72] At the end of the negotiations, however, the states gave territories only limited membership rights and retained consensus powers for themselves.[73]

69. Ruth Lapidoth, *Israel*, *in* 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, 65, 78. Furthermore, before concluding a 1980 maritime boundary treaty with the Cook Islands, the United States sought and received confirmation from New Zealand of the Cook Islands' treaty-making power and competence over maritime matters. *See* Treaty on Friendship and Delimitation of the Maritime Boundary Between the United States and the Cook Islands, June 11, 1980, U.S.-Cook Islands, 35 U.S.T. 2061; Conclusion and Entry into Force, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 1, at 1207-08.

70. *See supra* note 44.

71. *See, e.g.*, Press Release, U.S. Treasury Department, Treasury Secretary O'Neill's Signing Ceremony Statement: United States and United Kingdom Sign Agreement to Exchange Tax Information With Respect to the Cayman Islands (Nov. 27, 2001), *at* http://www.treas.gov/press/releases/po823.htm (last visited Jan. 27, 2005).

72. *See* SOUTH PACIFIC REGIONAL ENVIRONMENT PROGRAMME, REPORT OF THE PLENIPOTENTIARY MEETING ON THE SPREP TREATY (June 14-16, 1993), *available at* http://www.sprep.org.ws/publication/pub_detail.asp?id=86 (last visited Jan. 27, 2005).

73. Agreement Establishing the South Pacific Regional Environmental Program, June 16, 1993, 1993 U.S.T. Lexis 105, *available at* http://sedac.ciesin.org/entri/texts/acrc/SPEnviro.txt.html (last visited Jan. 27, 2005). Article 4(3) of the Agreement provides that work "shall be conducted on the basis of consensus of all Members, taking into account the practices and procedures of the South

More recently, France argued that New Caledonia should be allowed to join the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Ocean. France took this position because its 1999 constitutional amendment afforded New Caledonia a separate treaty-making capacity, and France had promised New Caledonia greater autonomy in its foreign relations.[74] At the same time as it lobbied for New Caledonia's right to join the treaty, however, France also indicated it would join the treaty. Other states objected to separate French and New Caledonian membership where the Convention contemplated decision-making by a supermajority vote of the parties.[75] Like SPREP, the final version of the treaty was not open to direct sub-state participation and such actors were denied direct voting rights.

In a few notable cases, however, states have shown a willingness to open up treaties to direct sub-state actor participation. Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated states and territories to sign and ratify the Convention with all the attendant rights and obligations afforded to states under the Convention.[76] In all three cases, the entity must have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of those

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Pacific region," but that "[i]n the event that a decision is required in the SPREP Meeting, that decision shall be taken by a consensus of the Parties. The consensus of the Parties shall ensure that the views of all Members of the SPREP Meeting have been properly considered and taken into account." *Id.*, 1993 U.S.T. Lexis at *18, *available at* http://sedac.ciesin.org/entri/texts/acrc/SPEnviro.txt.html (last visited Jan. 27, 2005). Article 3 provides that meetings are open to parties to the agreement and, where they have "appropriate authorization of the Party having responsibility for their international affairs," the following territories—American Samoa, French Polynesia, Guam, New Caledonia, Northern Mariana Islands, Palau, Tokelau, and Wallis and Futuna. *Id.*, 1993 U.S.T. Lexis at *16-17, *available at* http://sedac.ciesin.org/entri/texts/acrc/SPEnviro.txt.html (last visited Jan. 27, 2005).

74. Article 77 of the French Constitution authorizes French law to transfer powers "definitively" to New Caledonia. LA CONSTITUTION [CONST.] tit. XIII, art. 77. Certain treaty-making powers were included among the powers transferred. *See* Law No. 99-209 of Mar. 19, 1999, arts. 21, 22, J.O., Mar. 21, 1999, p. 4197, 4198-99, *La Gazette du Palais*, May-June 1999, Legislation, 304, 305-06 (giving New Caledonia authority to conclude international conventions in specific areas such as regulation and exercise of the rights of exploration and exploitation and conservation of marine resources in the Exclusive Economic Zone).

75. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, *opened for signature* Sept. 5, 2000, INTERNET GUIDE TO INTERNATIONAL FISHERIES LAW, *available at* http://www.oceanlaw.net/texts/westpac.htm (last visited Jan. 27, 2005). These same states, including the People's Republic of China, however, were willing to give Taiwan greater voting rights. As adopted, the Convention allows Taiwan to agree to the Convention with full voting rights. *See, e.g., id.* (Arrangement for the Participation of Fishing Entities).

76. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 305(1)(c)-(e), 306, 1833 U.N.T.S. 396, 517-18, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N., *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, at 139 (last visited Jan. 27, 2005) [hereinafter UNCLOS] (authorizing ratification or acceptance of the Convention by (1) "self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations"; (2) "self-governing associated States . . . [with] instruments of association"; and (3) "territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence").

matters.[77] The same approach has been followed in the related United Nations Fish Stocks Agreement.[78]

The Agreement establishing the World Trade Organization (WTO) approaches sub-state actor participation slightly differently. Article XII authorizes any "customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements" to accede on terms agreed to between it and the WTO.[79] Prior to their reversion to the People's Republic of China from the United Kingdom and Portugal respectively, both Hong Kong and Macau joined the WTO pursuant to Article XII. Hong Kong and Macau have since continued their independent membership despite China's accession to the WTO.[80]

What does this practice generally mean for sub-state actor treaty participation? Do we need to add sub-state actors as a new category under the list of "who" is entitled to conclude treaties? Such an addition appears premature given that sub-state treaty-making remains a function of state consent; sub-state actors remain dependent on authorization to make treaties from the responsible sovereign states as well as from their would-be treaty partners. As demonstrated above, states continue to oversee and regulate the conditions, if any, under which their sub-state components can conclude treaties. These conditions may be case-specific or based in law. Moreover, states generally take the view that, where a sub-state actor concludes a treaty within the conditions laid down by the state, it is the state, not the sub-state component, that bears international legal

77. *Id.* These two criteria were considered fundamental to determining which participants would be allowed to join the Convention. UNCLOS COMMENTARY, *supra* note 37, at 184. To date no qualifying territories have joined the Convention, although a number of self-governing associated states such as the Cook Islands and Niue have done so. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N., STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, OF THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE CONVENTION AND OF THE AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE CONVENTION RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS: TABLE RECAPITULATING THE STATUS OF THE CONVENTION AND OF THE RELATED AGREEMENTS, *at* http://www.un.org/Depts/los/reference_files/status2005.pdf (last visited Jan. 27, 2005).

78. *See* Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, arts. 1(2)(b), 37-40, 2167 U.N.T.S. 88, 90, 125-26. *See also* DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N., CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS, *at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Jan. 27, 2005).

79. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII, 1867 U.N.T.S. 3, 162 [hereinafter WTO Agreement]. Thus, Macau joined the WTO before the People's Republic of China did.

80. *See* WTO, UNDERSTANDING THE WTO: THE ORGANIZATION: MEMBERS AND OBSERVERS, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 27, 2005). In addition, although it would not necessarily qualify as a sub-state actor as defined in this essay, Taiwan also relied on Article XII to join the WTO in 2002. *Id.*

responsibility under the resulting agreement.[81] Some states even take the view that they may terminate their sub-state entities' international agreements.[82]

Because sovereign states control sub-state actor participation and execution of international agreements so tightly, it is hard to consider them much more than agents or designees of the state.[83] It is unlikely that a sub-state actor would have the same right of autointerpretation as state actors in cases where the sovereign state has a different interpretation of a treaty. Even in cases where a sub-state actor negotiates outside the scope of any existing authority, states have taken steps to either affirm or reject the results of those negotiations. Moreover, as the SPREP and New Caledonia cases suggest, treaty-making by sub-state actors remains derivative of not only the consent of the states to which they are a part but also the consent of other states parties to the treaty.

Nevertheless, the trend by which some sub-state actors are concluding international agreements outside the conditions laid down by their states merits attention. Moreover, the fact that certain treaty regimes now allow sub-state actors to participate separate from and in addition to the states with which they are associated (for example, the Cook Islands and New Zealand in UNCLOS; China, Hong Kong and Macau in the WTO) suggests that an agency theory of sub-state actor treaty-making is not a sufficient explanation. Therefore, although we cannot yet categorize sub-state actors as a new class of "authorities" in the treaty context, depending on how these trends progress in the future, it is possible that states will authorize sub-state participation in treaties in ways that allow them to achieve such a status.

B. Supranational Actors

Just as states may be subdivided into various sub-state components, so too may they organize themselves into a "supranational" entity. The creation of such an actor involves more than the mere investment of powers in some organization or grouping of states, which frequently occurs in the creation of an inter-

81. *See, e.g.*, AUST, *supra* note 35, at 49 (regarding federal states such as Germany and Switzerland as legally responsible for treaties of sub-federal units); *id.* at 52 (considering the United Kingdom as ultimately responsible for the performance of treaties by its overseas territories); Kozak, *supra* note 45, at 431 ("the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the states of the Union. Thus the Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met."). When signing the Amsterdam Treaty in 1997, Belgium clarified that it would bear full responsibility for compliance with all treaty obligations, even though it characterized its signature of the treaty as one by which it *and* its regions "entered into an undertaking at the international level." AUST, *supra* note 35, at 51. *But see* Díaz, *supra* note 54, at 111 (noting Mexico does not view sub-national international agreements as binding on the Mexican federation).

82. Cede & Hafner, *supra* note 46, at 12 (noting that the Federal Government can require the Land to terminate its treaties).

83. Lissitzyn, *supra* note 33, at 15 (noting that while treaty conclusion by a dependent entity may lead to the determination that the sub-state actor is an international person possessing its own treaty-making capacity, whether or not it is a "State," a second juridical explanation is also possible where the sub-state actor may be regarded as having no distinct international personality or capacity of its own, but merely the authority to act as an agent or organ of the dominant state which retains the requisite capacity).

national organization.[84] Although there is no fixed definition for what constitutes a supranational entity, at least two criteria distinguish it from other actors.[85] First, states must transfer to the entity powers that they themselves previously exercised over their nationals.[86] Second, in exercising these previously national powers, a supranational actor must have independent authority from its member states.[87]

The European Union ("EU") is the paradigmatic example of a supranational actor.[88] In the treaty context, however, the EU has not traditionally played a direct role in making treaties. Rather, its component communities—the European Community ("EC") and the European Atomic Energy Community ("Euratom")—have traditionally performed such functions.[89] The EC now has an extensive network of international agreements; as of May 2002, it had concluded roughly 600 bilateral agreements.[90] Moreover, as of April 2003, the EC

84. Even though supranational organizations can in some ways be viewed as a category of international organizations, this essay treats them as separate and distinct actors because of the different authorities that they have been allowed to exercise internationally, particularly in the treaty context. *See infra* notes 118-119, 130-134 and accompanying text.

85. *See* Francesco Capotorti, *Supranational Organizations*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 737, 737 (2000) (indicating that the term "supranational" has not acquired a distinct legal meaning). In the absence of an agreed definition, scholars have, as here, used different criteria to give the term meaning. *See, e.g.*, *id.* at 739-40 (identifying a supranational organization according to whether the entity has independent decision-making authority, direct relations with individuals in member states, and the existence of a legal system with its own judicial body); Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287 (1997) (describing a supranational organization as a particular type of international organization empowered to exercise directly some of the functions otherwise reserved to states); SCHERMERS & BLOKKER, *supra* note 34, at 41-42 (listing six descriptive factors for supranational organizations, including the power to bind member states; the power to make rules binding on inhabitants of member states; decision-making that is not entirely dependent on cooperation of all member states; the ability to enforce its decisions; financial autonomy; and restrictions on unilateral withdrawal without the consent of the organization).

86. Thus, rather than merely investing an entity with powers to bind member states, a supranational organization will actually take over competence on certain matters previously exercised by the member states, and its exercise of such competences will bind not only member states but also their nationals. *See, e.g.*, Capotorti, *supra* note 85, at 738-39.

87. *See, e.g.*, *id.* at 739 (looking to the "actual 'independence' of the decision-making machinery"); SCHERMERS & BLOKKER, *supra* note 34, at 41 (identifying "independence" in terms of binding decisions adopted by majority decision or composing a decision-making organ of independent individuals).

88. Helfer & Slaughter, *supra* note 85, at 287.

89. Until recently, the European Union was only a political organization, organized into three pillars: (i) its communities, namely the European Community (EC), Euratom, and the European Coal and Steel Community (ECSC), the last of which expired in 2002; (ii) the Common Foreign and Security Policy (CFSP); and (iii) Justice and Home Affairs (JHA). Although its Member States had previously granted the EC and Euratom international legal personality, including the authority to enter into treaties, they did not do so with respect to the EU until more recently. *See, e.g.*, AUST, *supra* note 35, at 55-56; DOMINIC MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 13, 37 (1997); I. MACLEOD ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 25 (1996). For a discussion of the EU's new treaty-making authorities, see *infra* notes 99-101 and accompanying text.

90. *See, e.g.*, EUROPEAN COMMISSION, ANNOTATED SUMMARY OF AGREEMENTS LINKING THE COMMUNITIES WITH NON-MEMBER COUNTRIES 5 (updated through May 13, 2002) (listing "current agreements . . . which have been signed but have not yet entered into force, interim or provisional measures applying them in practice and a reference to sectoral measures which are not strictly inter-

had joined approximately 90 multilateral treaty regimes ranging from the Food and Agriculture Organization ("FAO") to the WTO.[91]

As with sub-state actors, the ability of a supranational actor to join a treaty depends on the extent to which sovereign states have consented to its participation. First, the supranational actor's member states must transfer competence to it over all or part of the treaty's subject matter and authorize it to enter into international agreements on such matters. The EC Member States have in fact done this through the treaty establishing the European Community.[92] In that treaty, the Member States transferred competence over certain matters to the EC, which entitles the EC to exercise those competences internationally.[93] This transfer can result in either "exclusive" EC treaty-making authority, where the EC but not its Member States may conclude treaties, or "mixed" authority, where Member States retain the freedom to also conclude treaties on the same subject.[94] For example, Member States have transferred to the EC all of their competence with respect to fisheries. In this context, therefore, the EC now joins fish treaties in lieu of its Member States and participates in those treaties with a single vote.[95] In other areas, where the EC only has shared competence

national agreements but which (independently) cover one or more aspects traditionally covered by agreements.").

91. *See id.*; Constitution of the United Nations Food and Agriculture Organization, as Amended, Nov. 20, 1959, art. II(3), 12 U.S.T. 980, 987-88, *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/003/X8700E/X8700E00.HTM (last visited Jan. 27, 2005) [hereinafter FAO]; WTO Agreement, *supra* note 79, art. XIV, 1867 U.N.T.S. at 163.

92. MCGOLDRICK, *supra* note 89, at 29-30, 43 (discussing articles of the EC Treaty granting the EC authority to enter into agreements on matters ranging from the environment to development cooperation to the role of the European Court of Justice's interpretation of the Treaty to grant the EC wide treaty-making powers); MACLEOD ET AL., *supra* note 89, at 38, 56-57 (reviewing areas of EC competence, including fisheries, transport, common commercial policy, education, vocational training and youth, culture, public health, and the environment).

93. The Member States' transfer of various competences in the EC Treaty can be either explicit or implicit. MCGOLDRICK, *supra* note 89, at 43-66. Under the EC Treaty, "competence" refers not simply to particular subject areas but, more accurately, to objectives spelled out under the Treaty, such that it is not a subject matter but the attainment of the objective within the powers authorized under the EC Treaty that characterizes "competence." MACLEOD ET AL., supra note 89, at 38. The notion that the EC's external competence stretches to the same extent as its internal competence is known as the "doctrine of parallelism." MCGOLDRICK, *supra* note 89, at 48. Moreover, the EC may engage in treaty-making even for those areas of its competence that are available, although not yet exercised internally. *Id.* at 58.

94. AUST, *supra* note 35, at 55-56; MCGOLDRICK, *supra* note 89, at 78. Mixed competence is also possible in cases where the EC has potentially exclusive competence, but has yet to exercise it, leaving residual competence in the Member States. This appears to be the case, for example, in the area of aviation safety, where the creation of the European Aviation and Space Agency (EASA) potentially gives the EC exclusive competence, but where, for the time being, the EC appears willing to allow its Member States' bilateral aviation safety agreements to continue, pending further development of the Agency. *EASA Implementation to Impact Certification of Europe-Bound Products*, 93 BUS. & COMMERCIAL AVIATION 53 (2003); David Kaminski-Morrow, *Transition to New Safety Agency Going Smoothly: EASA Chief*, AIR TRANSPORT INTELLIGENCE (Oct. 3, 2003), *available at* http://www.airtransportintelligence.com (last visited Jan. 27, 2005).

95. For example, the parties to the 1949 Convention establishing the Inter-American Tropical Tuna Commission recently amended the Convention to authorize EC participation and ban participation by EC Member States unless those Member States represented a territory lying outside the EC Treaty's geographic scope. *See, e.g.*, Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission, June 11, 1999, 40 I.L.M. 1494.

(for example, the environment and transportation), the EC and its Member States participate jointly, exercising votes according to the number of Member States that have joined the treaty.[96]

The EC only has the power to join treaties the subject matter of which falls within the competence accorded to it by its Member States. Member States may challenge whether the EC is acting within the scope of its authority in concluding a particular treaty.[97] For example, a number of Member States contested the EC's ability to join the European Convention on Human Rights before the European Court of Justice ("ECJ"). The ECJ concluded that the EC did not yet have competence over the enforcement of human rights and prevented it from joining the treaty.[98]

In addition to the EC, the EU Member States have amended the Treaty on European Union to authorize the EU itself to conclude agreements in the areas of foreign affairs and justice.[99] The EU recently concluded its first two agreements with the United States on extradition and mutual legal assistance.[100] There are even plans for a consolidation of all EU, EC, and Euratom treaty-making powers within the EU through the new Treaty Establishing a Constitution for Europe.[101]

The fact that Member States authorize the EC and EU to enter into treaties in certain areas does not, of course, guarantee that such agreements will be concluded.[102] Other treaty partners must also agree (that is, they must give their external consent). They have done so for the EC with increasing frequency in the multilateral context through the use of the so-called REIO clause.[103] Treaties containing this clause permit REIOs—regional economic integration organi-

96. Indeed, "[f]rom a strictly legal perspective, in relation to an agreement over which competence is shared, neither the EC nor the member states should become a party without the other. Neither of them in isolation is capable of fulfilling all of the obligations under the agreement." MCGOLDRICK, *supra* note 89, at 80-81. In practice, the situation of mixed agreements is more muddled with both the EC and its Member States frequently coordinating to delineate a common position in lieu of alternative assertions of authority. *Id.* at 81.

97. *Id.* at 94-97 (explaining that the Member States may bring a case to the European Court of Justice, which may, as a matter of Community law rather than international law, determine whether the EC can enter into an agreement).

98. *Id.* at 99-100.

99. AUST, *supra* note 35, at 56; Treaty of Nice Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, art. 1(4), Feb. 26, 2001, O.J. (C 80) 1 (2001) (amending art. 24 of the Treaty on European Union).

100. GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN UNION, EUROPEAN UNION, FACTSHEET: EXTRADITION AND MUTUAL LEGAL ASSISTANCE (June 25, 2003), *at* http://europa.eu.int/comm/external_relations/us/sum06_03/extra.pdf (last visited Jan. 27, 2005).

101. *See, e.g.*, Treaty Establishing a Constitution for Europe, Oct. 29, 2004, arts. III-323 to III-326, 47 *EUR-Lex* C 310 (Dec. 16, 2004), *available at* http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML (last visited Jan. 27, 2005); Angelo Petroni, *Your Liberty is at Risk in the EU's New Constitution*, WALL ST. J. EUR., Oct. 7, 2003 (describing push to give EU full "legal personality").

102. Member States may, however, be under an obligation as a matter of EC law to push for EC membership in treaties where the EC has mixed or exclusive competence. MCGOLDRICK, *supra* note 89, at 87.

103. *Id.*; MACLEOD ET AL., *supra* note 89, at 32. The EC has no ability to join multilateral treaties in its own right; the treaties are open only to participation by states and REIOs.

zations—that have competence in respect of matters governed by the treaty and that have been duly authorized to join the treaty to sign and consent to be bound by the treaty.[104] The REIO then has similar rights and obligations as states parties, although limitations are included to ensure that the REIO and its member states do not collectively enjoy any additional rights unavailable to states that have chosen not to organize supranationally.[105] Examples of EC participation in international treaties through a REIO clause include the Convention on Biological Diversity ("CBD"), the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the United Nations Framework Convention on Climate Change ("FCCC"), the Constitution of the United Nations Food and Agriculture Organization ("FAO"), the Vienna Convention for the Protection of the Ozone Layer, the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the Convention on Nuclear Safety.[106] Even in those cases where there is no REIO clause, treaties such as UNCLOS allow international organizations that meet certain criteria to join the treaty, and the EC has been able to satisfy such criteria.[107]

The willingness of sovereign states to authorize EC and EU participation in treaties is not, however, uniform. Particularly with respect to older treaties such as the United Nations Charter and the International Labor Organization, states are unwilling to consider treaty amendments that would allow membership by

104. An example of such a clause is found in Article 53(2) of the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. 106-45, at 24 (2000), 1999 U.S.T. Lexis 175, at 72-73 [hereinafter Montreal Convention] ("[t]his Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a 'Regional Economic Integration Organisation' means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention.").

105. A REIO's participation will generally be accompanied by provisions that allow the REIO to vote on matters for which it has competence with the number of votes of its member states, but only where its member states do not exercise their own votes (that is, there is no additional vote). *See* Convention on Biological Diversity, June 5, 1992, art. 31, 1760 U.N.T.S. 142, 161 [hereinafter CBD]. Similarly, acceptance of a treaty by a REIO is not usually counted for "entry into force" purposes. *See id.*, art. 36(5), 1760 U.N.T.S. at 163. Finally, although the EC is often reluctant to define the scope of its competence, some REIOs require it to declare its competence under the treaty in order to join the treaty. *See, e.g., id.*, art. 34(3), 1760 U.N.T.S. at 162; MCGOLDRICK, *supra* note 89, at 115.

106. CBD, *supra* note 105, arts. 2, 31, 33, 34-36, 1760 U.N.T.S. at 146-47, 161-63; Montreal Convention, *supra* note 104, art. 52, S. TREATY DOC. 106-45, at 43, 1999 U.S.T. Lexis 175, at 112; United Nations Framework Convention on Climate Change, May 9, 1992, arts. 1(6), 20, 22, 23, S. TREATY DOC. 102-38, at 5, 24, 25, 26, 31 I.L.M. 849, 853, 870-71 [hereinafter FCCC]; FAO, *supra* note 91, art. II, 12 U.S.T. 980, 987-88; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, arts. 1(6), 12-17, T.I.A.S. No. 11,097, at 5, 14-17, 1513 U.N.T.S. 323, 325, 331-33 [hereinafter Vienna Ozone Convention]; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, arts. 26-29, 28 I.L.M. 493, 523-24; Convention on Nuclear Safety, June 17, 1994, arts. 30-31, 1963 U.N.T.S. 293, 328-29.

107. UNCLOS, *supra* note 76, Annex IX, art. 1, 1833 U.N.T.S. at 578, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, at 192 (laying out detailed provisions for participation by "international organization[s]," which are defined as "intergovernmental organization[s] constituted by States to which [their] member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters").

non-state actors.[108] Recent calls by the EU to join treaty regimes such as the International Monetary Fund (IMF) and the International Civil Aviation Organization (ICAO) have met with a cool reception.[109]

Although both the internal authorization of and external consent to EC treaty-making are similar to the prerequisites for sub-state treaty-making, the EC appears to operate with much greater independence than its sub-state counterparts. An individual Member State is unable to revoke its transfer of competence to the EC.[110] Unlike sub-state actors, the EC itself takes on legal responsibility for its treaty obligations.[111] Given this legal responsibility, the EC has a corresponding right of autointerpretation with respect to its treaties that sub-state actors do not likely enjoy. Moreover, mechanisms to access legal fora such as the ECJ exist within the EU to resolve disputes between Member States and the EC over the scope of their respective treaty-making competences. Although sub-state actors' unauthorized treaties may be ignored or rejected by sovereign states, even an unauthorized EC treaty will create international legal obligations for the EC, a point confirmed by the ECJ in *France v. Commission.*[112] As the recent debate over EC Member States' "Open Skies" treaty commitments demonstrates, the EC may also challenge whether its Member States improperly exercised treaty-making authority that they had previously transferred to the EC.[113]

A strong case can be made for adding supranational actors such as the European Community—and soon perhaps the European Union itself—to the list of entities that are capable of entering into international treaties independently. What remains to be seen, however, is whether the EC represents a truly new class of actors with treaty-making authority or simply a case *sui generis*. The

108. *See, e.g.*, AUST, *supra* note 35, at 56; MCGOLDRICK, *supra* note 89, at 82.

109. *See, e.g.*, Paul Hofheinz, *EU Urged to Revamp Voting at IMF to Counterbalance U.S.*, WALL ST. J. EUR., Apr. 19, 2002 (discussing the EU Commissioner's call for the EU Member States to be represented at the IMF by a single representative); Press Release, European Commission, Strength through Unity: The Commission Asks for the European Community's Accession to the ICAO and the IMO, Reference IP/02/525 (Apr. 9, 2002), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/525&format=HTML (last visited Jan. 27, 2005) (announcing European Commission request for authorization to negotiate amendments to the constituent treaties of the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) to allow EC participation).

110. MACLEOD ET AL., *supra* note 89, at 40.

111. *Id.* at 124-25; *supra* notes 81-82 and accompanying text (indicating that sovereign states are legally responsible for the treaty commitments of their sub-state entities). It is unclear, however, where legal liability rests in the case of mixed agreements, where both the EC and Member States together accept responsibility to perform the treaty. The reluctance of the EC and its Member States to delineate their respective competences under a treaty may suggest both should be held jointly liable. MACLEOD ET AL., *supra* note 89, at 158-60.

112. AUST, *supra* note 35, at 253.

113. Press Release, European Commission, Commission Takes Action to Enforce 'Open Skies' Court Rulings, Reference IP/04/967 (July 20, 2004), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/967&format=HTML (last visited Jan. 27, 2005) (announcing the Commission's issuance of a "letter of formal notice under Article 228 of the Treaty [on European Union] against eight Member States—Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom—over their failure to comply with the judgments of the European Court of Justice issued against them on 5 November 2002 in the so-called 'open skies' cases").

REIO clause is formulated in such a way that, if other regional groupings of states were to follow the EC example and transfer competence to supranational bodies authorized to act internationally, those entities could utilize REIO clauses in much the same way as the EC. At the present time, however, although bodies such as ASEAN and Mercosur have demonstrated a limited treaty-making capacity,[114] the REIO clause is generally understood to refer only to the EC.[115]

C. *Extra-National Actors*

"Extra-national" actors comprise a third category of entities that may constitute a distinct source of authority in the treaty context. Unlike the sub-state actor that gains its authority from the sovereign state with which it is associated or the supranational actor that exercises competences transferred to it by its member states, the extra-national actor exists separate from nation-state systems. Comprising a category that is vast in quantity and kind, extra-national actors include international organizations and other international institutions created by states for a particular purpose (for example, Conferences of the Parties and Meetings of the Parties), and even individuals to whom states designate the performance of some function.[116] Actors in this category, like their sub-state and supranational counterparts, have the power to conclude treaties. In addition, extra-national actors may also have the authority to apply, interpret, and even modify treaty obligations.

1. *Extra-National Treaty-Makers*

Extra-national actors may negotiate and conclude treaties.[117] International organizations have long possessed the capacity to conclude treaties and their practice of doing so is well-documented.[118] The rules for such treaties are laid

114. For example, the EC has concluded an Interregional Framework Cooperation Agreement between the EC and its Member States and the Southern Cone Common Market (Mercosor). Interregional Framework Cooperation Agreement Between the European Community and its Member States, of the One Part, and the Southern Common Market and its Party States, of the Other Part, Oct. 2, 1995, 1996 O.J. (L 069) 4. The United States and ASEAN concluded an agreement establishing an ASEAN Agricultural Development and Planning Center. Exchange of Notes Constituting an Agreement Concerning an Agricultural Development and Planning Centre, June 28, 1980, U.S.-ASEAN, 32 U.S.T. 1371.

115. MACLEOD ET AL., *supra* note 89, at 32; MCGOLDRICK, *supra* note 89, at 33.

116. Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 658 (describing autonomous institutional arrangements of multilateral environmental agreements (MEAs) as a category of intergovernmental organizations).

117. For example, as of January 1, 2003, in addition to sub-state and EU-related treaties, the United States listed bilateral treaties in force with no less than 45 international organizations, institutions, and tribunals. *See generally* U.S. DEP'T OF STATE, TREATIES IN FORCE (2003).

118. SCHERMERS & BLOKKER, *supra* note 34, at 1096, 1099 n.214 (noting, by 1983, publication in the United Nations Treaty Series of 2000 agreements to which international organizations were parties); AUST, *supra* note 35, at 54; PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 480 n.49 (2001) (noting estimates of more than 10,000 treaties concluded by international organizations by 1973). This practice of treaty-making by extra-national actors should be distinguished from cases where they serve as sponsors or the negotiating forum for treaties solely between states. *Id.* at 483-84.

out in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations ("1986 Vienna Convention").[119]

Although less well-known and more limited in practice, other extra-national actors have also demonstrated a capacity to conclude treaties. For example, even though the Comprehensive Nuclear Test Ban Treaty Organization does not yet exist, its Preparatory Commission has concluded a number of treaties.[120] International institutions and tribunals that were never intended to qualify as international organizations have engaged in treaty-making as well. For example, treaty-based regimes such as the Multilateral Fund of the Montreal Protocol and the Conference of the Parties to the Climate Change Convention have concluded agreements with their host states.[121] Similarly, the Organization for Security and Cooperation in Europe—which, despite its name, does not constitute an international organization—concludes agreements with states hosting its missions such as a 1998 Agreement with the Federal Republic of Yugoslavia on the OSCE Kosovo Verification Mission.[122] Even international tribunals may conclude treaties; both of the International Tribunals established by the U.N. Security Council for prosecuting war crimes in Rwanda and the Former Yugoslavia have concluded agreements relating to the surrender of persons to each Tribunal.[123]

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119. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. Int'l L. Comm'n, U.N. Doc. A/CONF.129/15, *reprinted in* UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, vol. II, 94 (1995), *available at* http://www.un.org/law/ilc/texts/trbtstat.htm (last visited Jan. 27, 2005) [hereinafter 1986 Vienna Convention]. The rules track the 1969 Vienna Convention on the Law of Treaties with modifications to accommodate the different nature of international organizations. AUST, *supra* note 35, at 54.

120. *See, e.g.*, Agreement Between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the Government of the Islamic Republic of Mauritania on the Conduct of Activities, Including Post-Certification Activities, Relating to International Monitoring Facilities for the Comprehensive Nuclear-Test-Ban Treaty (Sept. 16-17, 2003) (copy on file with author); Agreement Between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Sept. 18, 2002) (copy on file with author).

121. Churchill & Ulfstein, *supra,* note 116, at 651-655 (citing the "1998 Agreement between the Multilateral Fund for the Implementation of the Montreal Protocol and Canada" and the "1996 Agreement between the United Nations, the Federal Republic of Germany, and the secretariat of the Climate Change Convention").

122. *See* Agreement Between the Organization for Security and Cooperation in Europe and the Federal Republic of Yugoslavia on the OSCE Kosovo Verification Mission (Oct. 16, 1998) (copy on file with author). Although the text uses the term "will" rather than "shall," it otherwise evidences an intention to create legal obligations. It provides, *inter alia*, that Yugoslavia will accept the OSCE Verification Mission as a diplomatic entity in the terms of the Vienna Convention on Diplomatic Relations and assign it responsibility to verify compliance by all parties in Kosovo with U.N. Security Council Resolution 1199.

123. *See, e.g.*, U.S. DEP'T OF STATE, TREATIES IN FORCE (2003), at 139 (referencing agreements on the surrender of persons with the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Humanitarian Law in the Territory of Rwanda (Jan. 24, 1995) (International Criminal Tribunal for Rwanda, or ICTR) and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in

Examining the basis for this practice, we find that the same prerequisites previously identified for sub-state and supranational treaty-making—internal authorization and external consent—also apply to extra-national actors making treaties. The internal authorization can be explicit or implicit. States and other actors (for example, the U.N. Security Council) that create an extra-national actor or designate it to fulfill some function can explicitly authorize it to conclude treaties on particular subjects.[124] Alternatively, the extra-national actor may rely on the doctrine of implied powers to establish the existence and scope of its treaty-making capacity.[125] As articulated in the Preamble to the 1986 Vienna Convention, international organizations have the capacity to conclude those treaties "necessary for the exercise of their functions and the fulfillment of their purposes."[126] Thus, even though many international organizations, institutions, and tribunals have no explicit authority to conclude treaties, they still do so where necessary. Necessary functions for these actors range from headquarters agreements establishing their status in host states and relationship agreements coordinating activities with other international institutions.[127]

Regardless of whether the extra-national actor's treaty-making authority is explicit or implicit, it does have limits. Extra-national actors may only conclude treaties in those areas in which they are competent to act.[128] As the International Court of Justice reasoned in the *Reparations* case, "the rights and duties of an entity such as the [United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in prac-

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the Territory of the Former Yugoslavia (Oct. 5, 1994) (International Criminal Tribunal for the Former Yugoslavia, or ICTFY)).

124. *See, e.g.*, U.N. CHARTER arts. 57, 63 (envisaging relationship agreements between the United Nations and its specialized agencies); U.N. CHARTER art. 43 (addressing agreements on contributions of armed forces, assistance, and facilities to the Security Council); SCHERMERS & BLOKKER, *supra* note 34, at 1098-1100; SANDS & KLEIN, *supra* note 118, at 480-81.

125. SANDS & KLEIN, *supra* note 118, at 480-81 (citing examples of UN agreements on technical assistance and UNICEF implementing Chapter IX of the Charter even though there is no specific grant of power to conclude those agreements within the Charter); SCHERMERS & BLOKKER, *supra* note 34, at 1100-1101. The doctrine of implied powers has evolved in international institutional law as the principle that an organization must be "deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Rep. 174, 182 (Apr. 11). *See also* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 57 (July 13) (same). These powers are clearly "subsidiary" to those conferred on the organization in its constituent instrument. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 79 (July 8).

126. 1986 Vienna Convention, *supra* note 119.

127. *See, e.g.*, SANDS & KLEIN, *supra* note 118, at 480 (citing the example of Council of Europe inter-governmental agreements); SCHERMERS & BLOKKER, *supra* note 34, at 1097, 1100 (noting that the rules of an international organization could limit its power to conclude treaties, but that the development of international institutional law otherwise appears to generally allow organizations to do so); Churchill & Ulfstein, *supra* note 116, at 649 (applying the implied powers doctrine as a basis for the treaty-making authority of autonomous institutions created by multilateral environmental agreements).

128. *See, e.g.*, SANDS & KLEIN, *supra* note 118, at 481; SCHERMERS & BLOKKER, *supra* note 34, at 1097.

tice."[129] In practice, these limitations have operated to prevent most international organizations from joining multilateral treaties that either create rules of general application or establish other international actors.[130] As Schermers and Blokker observed in their classic treatise, *International Institutional Law*, "[o]rganizations which cannot make binding rules even in their own field of competence—and most international organizations cannot do so—are incompetent to make binding agreements in those fields with others."[131]

In the same vein, the external consent of other treaty partners may also affect the treaty-making power of extra-national actors. Although provisions have been made to accommodate treaty participation by sub-state and supranational actors, states have been reluctant to do the same for extra-national actors, most likely on the ground that extra-national actors lack competence to perform the treaties' obligations.[132] But, this reluctance is also visible even where extra-national actors actually engage in the conduct regulated by the treaty. For example, even though NATO, an extra-national actor, is authorized by its members to use force in certain circumstances, it is not entitled to become a party to international humanitarian law treaties.[133] These limitations help explain why the vast majority of treaties concluded by extra-national actors are bilateral agreements that seek simply to define the organizations' activities and legal status or to provide for cooperation with other organizations.[134]

When they do conclude treaties, extra-national actors, like supranational actors, operate independently. International organizations and other autonomous international institutions concluding treaties bear international legal responsibility for the obligations undertaken.[135] The treaties are not binding or enforceable against the organization's members.[136] In this respect, extra-national actors

129. 1949 I.C.J. at 180. *See also id.* at 198 ("Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted.") (Hackworth, J., dissenting).

130. *See, e.g.*, SANDS & KLEIN, *supra* note 118, at 484; SCHERMERS & BLOKKER, *supra* note 34, at 1101, 1119.

131. SCHERMERS & BLOKKER, *supra* note 34, at 1101.

132. Even where a multilateral agreement purports to be open to participation by "international organizations" (for example, UNCLOS), closer examination demonstrates such participation is usually reserved to supranational actors who are equivalent to REIOs. *See supra* notes 102-107 and accompanying text. The one notable exception to this approach is the 1986 Vienna Convention, *supra* note 119, art. 1, at 95.

133. *See* SCHERMERS & BLOKKER, *supra* note 34, at 1116-17 (acknowledging the current absence of international organization participation in "law-making" treaties, while noting that, in the future, "[o]rganizations using military forces may have to become parties to treaties on the law of war; organizations operating a radio station or operating ships or aircraft may have to become parties to treaties on telecommunications or navigation [and] . . . [i]nternational organizations may wish to adhere to universal or regional conventions on human rights").

134. *See* SANDS & KLEIN, *supra* note 118, at 484.

135. *Id.* at 482 (concerning international organizations); Churchill & Ulfstein, *supra* note 116, at 649 (finding institutions of multilateral environmental agreements possess international legal personality and the capacity to conclude agreements in the form of treaties instead of their states parties or the secretariat of the international organization hosting such institutions). Whether legal responsibility would rest with all extra-national actors would require further study. For example, it is unclear whether the ICTFY and ICTR are legally responsible for their agreements or if responsibility would reside with the United Nations whose Security Council authorized their creation.

136. SANDS & KLEIN, *supra* note 118, at 482.

may possess the same right of autointerpretation as states that are parties to the treaty. Thus, extra-national actors certainly fall within the list of entities that can make treaties. However, the nature and extent of their treaty-making authority is a product of the functions assigned to these actors and the willingness of states to accept their participation. Until changes occur in both these areas, the treaty-making capacity of extra-national actors will remain limited.

2. *Extra-National Interpretation, Application, and Modification of Treaty Obligations*

Extra-national actors play a second and more significant role in the treaty process. In looking at who is authorized to apply, interpret, or even modify treaty obligations, we find that extra-national actors represent new authorities in addition to sovereign states. They may serve as a solution to the traditional state-based autointerpretation framework, where those who make the treaty authorize one or more extra-national actors to apply or interpret it definitively, rather than leaving each state to do so for itself.[137] States parties to a treaty may even empower extra-national actors to define and amend treaty obligations.[138]

States have a long history of using treaties not only to set out legal norms, but also to authorize extra-national actors to interpret and apply treaties in specific cases involving specific parties. The 1794 Jay Treaty, under which the United States committed to pay the British for outstanding debts following the Revolutionary War, established a binational arbitral commission to ascertain the amount of losses and damages to British subjects.[139] Similarly, the 1909 U.S.-Canada Boundary Waters Treaty established an International Joint Commission responsible for making binding determinations about the uses, obstructions, and diversions of boundary waters on one side of the border that affect the natural level or flow of boundary waters on the other side.[140]

The Permanent Court of International Justice and the International Court of Justice that succeeded it represent examples of extra-national actors to whom

137. In some sense, this may also take place with respect to supranational actors, as least in so far as applying, interpreting, or modifying member state treaty relationships *inter se*. Thus, in establishing the EU, the Member States created a structure that includes mechanisms (for example, the ECJ) that can authoritatively pronounce for the Member States the scope and extent of their EC Treaty commitments as between themselves.

138. Of course, states have an equally lengthy and more frequent practice of authorizing extra-national actors to play less formal roles with respect to treaties. For example, extra-national actors may be authorized to make recommendations to states with respect to the application or interpretation of treaty provisions, which lack direct legal force for the parties to those treaties. *See, e.g.*, Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, arts. 1, 2, 1 U.S.T. 230, 232-38, 80 U.N.T.S. 3, 4, 6, 8, 10 (authorizing the Commission to make recommendations on catch limits and other methods for maintaining and increasing the populations of fish covered by the Convention); Churchill & Ulfstein, *supra* note 116, at 642 (discussing "soft law" measures taken by autonomous institutions set up under various multilateral environmental agreements).

139. Treaty of Amity, Commerce and Navigation Between the United States of America and the United Kingdom, Nov. 19, 1794, U.S.-U.K., art. 6, 8 Stat. 116, 119-21.

140. Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Jan. 11, 1909, U.S.-U.K., art. III, 36 Stat. 2448, 2449-50.

states may designate the authority to interpret treaties in specific cases.[141] That trend continues today with more recent creations such as the WTO Dispute Settlement Panels and Appellate Body, NAFTA Panels, and the International Law of the Sea Tribunal (ITLOS).[142] Many multilateral environmental agreements take a slightly different approach, establishing "compliance mechanisms" by which an extra-national actor has the authority to review questions of non-compliance with treaty obligations by individual parties and the treatment accorded to such parties.[143] Of course, no recitation of extra-national authority in interpreting and applying treaty provisions is complete without mentioning the United Nations Security Council and its authority to delineate what constitutes a threat to international peace and security under the U.N. Charter and to decide upon responsive actions to redress such situations.[144]

Nor is this phenomenon limited to cases where the extra-national actor applies a treaty norm to a specific case involving specific parties. States parties to a treaty may also authorize extra-national actors to actually refine or even define treaty norms. How does this occur? Generally, contracting states retain the right to consent individually to amendments to the basic treaty text. In some cases, however, the contracting states will create an extra-national actor and authorize it to modify or amend certain parts of the treaty, such as its annexes.[145]

Most treaties that create extra-national actors and empower them with the affirmative ability to refine and define treaty norms provide dissenting states an "opt out" clause by which dissenting states can avoid being bound by the extra-

141. *See, e.g.*, ICJ Statute, *supra* note 13, art. 36(2)(a), 59 Stat. at 1060.

142. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 79, Annex 2, 1867 U.N.T.S. at 425-29; North American Free Trade Agreement, Dec. 8, 11, 14 and 17, 1992, ch. 20, 32 I.L.M. 289, 298-99 (1993); UNCLOS, *supra* note 76, Pt. XV, Annex VI, 1833 U.N.T.S. at 508-16, 561-70, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, at 129-37, 177-87.

143. This authority may be granted by the treaty itself or the extra-national actor may assert such authority based on its constituent instrument. *See, e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 8, 1522 U.N.T.S. 29, 35 [hereinafter Montreal Protocol]; U.N. ESCOR, Econ. Comm'n for Eur., Executive Body for the Convention on Long-Range Transboundary Air Pollution, 15th Sess., Annex 3, at 28, U.N. Doc. ECE/EB.AIR/53 (1998), *available at* http://www.unece.org/env/documents/1998/ece/eb/ece.eb.air.53.e.pdf (last visited Jan. 27, 2005) (establishing an Implementation Committee to review parties' compliance with their obligations under the LRTAP Convention and its Protocols). In some cases, moreover, the treaty only authorizes recommendations by the extra-national actor with respect to cases of potential non-compliance. *See, e.g.*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. XI(3), 27 U.S.T. 1087, 1104-05, 993 U.N.T.S. 243, 251 [hereinafter CITES]; FCCC, *supra* note 106, art. 13, S. TREATY DOC. 102-38, at 20, 31 I.L.M. at 867; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, art. 18, 37 I.L.M. 22, 40 [hereinafter Kyoto Protocol]. A number of MEAs are still in the process of drafting non-compliance procedures. *See Non-Compliance Regimes in Multilateral Environmental Agreements, Note by the Secretariat*, U.N. Env't Programme, Intergovernmental Negotiating Comm. for an Int'l Legally Binding Instrument for Implementing Int'l Action on Certain Persistent Organic Pollutants, 7th Sess., Agenda Item 5, at 2, U.N. Doc. UNEP/POPS/INC.7/22 (2003), *available at* http://www.pops.int/documents/meetings/inc7/en/K0360754_7_22.pdf, at 2 (last visited Jan. 27, 2005) (reviewing existing and draft non-compliance mechanisms).

144. *See* U.N. CHARTER arts. 39-51.

145. *See generally* Churchill & Ulfstein, *supra* note 116, at 638-641. States may do this, for example, because of a shared interest in creating a more dynamic treaty regime that can be changed even if not all of the states parties consent to a specific change.

national actor's amendments. The International Whaling Convention illustrates how such an "opt out" provision operates. The Convention creates an International Whaling Commission (IWC) that is authorized to amend, by a three-fourths majority vote, the Convention Schedule that contains obligations with respect to the conservation and utilization of whale resources.[146] These amendments are effective for all parties except where a state objects within ninety days. In that case, all parties that then object within 180 days are not bound by the challenged amendment.[147] The International Maritime Organization has followed a similar approach; amendments are adopted by a two-thirds vote and bind all parties except those who indicate they will not accept the amendment within one year of its adoption.[148]

Modern multilateral environmental agreements replicate these procedures for amendments to annexes.[149] For example, under the London Dumping Convention, the annexes listing the substances that may not be dumped and those that may be dumped only with a permit are subject to amendment by a two-thirds majority vote that binds all parties 100 days after adoption. The amendments do not bind states that indicate their objection to the amendment within the 100-day period.[150] Amendments to the rest of the London Dumping Con-

146. International Convention for the Regulation of Whaling, Dec. 2, 1946, arts. III, V, 62 Stat. 1716, 1717-19, 161 U.N.T.S. 72, 76, 78, 80, 82.

147. *Id.*, art. V(3), 62 Stat. at 1719, 161 U.N.T.S. at 80, 82.

148. Convention of the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, art. 52, 9 U.S.T. 621, 635, 289 U.N.T.S. 3, 72. The Intergovernmental Maritime Organization Assembly may also, by a two-thirds vote, determine that a particular amendment is of such a nature that states not accepting it will cease to be party to the Convention within twelve months of the Amendment's adoption. *Id.*

149. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, art. 18, 1673 U.N.T.S. 126, 144-45 (requiring a three-fourths majority vote to amend an annex, with such amendments being binding on all states that do not object within 180 days of adoption); Vienna Ozone Convention, *supra* note 106, art. 10, T.I.A.S. No. 11,097, at 12-13, 1513 U.N.T.S. at 330-31 (requiring a three-fourths majority vote to amend the annex, binding on all states that do not object within six months of circulation of the amendment); FCCC, *supra* note 106, art. 16, 31 I.L.M. at 869, S. TREATY DOC. 102-38 at 22-23 (same); CBD, *supra* note 105, art. 30, 1760 U.N.T.S. at 161 (requiring two-thirds majority vote to amend annexes, binding all states that do not object within one year of the notification of adoption); CITES, *supra* note 143, arts. XV-XVI, 27 U.S.T. at 1110-14, 993 U.N.T.S. at 254-56 (requiring two-thirds majority vote to amend certain annexes binding all states that do not object within 90 days of adoption); Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, arts. 21-22, 40 I.L.M. 532, 548-49 [hereinafter Stockholm POPs Convention] (requiring three-fourths majority vote to amend annexes and binding all states except (a) those who object within one year of adoption and (b) those states which, upon ratification, indicated they would only accept such amendments expressly); Kyoto Protocol, *supra* note 143, art. 20(4), 37 I.L.M. at 41 (requiring three-fourths majority vote to pass a proposed annex or amendment to an annex—other than Annex A or B—and making such annex or amendment to an annex binding on all states that do not object within six months of circulation of the amendment to all parties).

150. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, art. XV(2), 26 U.S.T. 2403, 2413, 1046 U.N.T.S. 137, 144-45 [hereinafter London Dumping Convention]. Article 22 of the 1996 Protocol to the London Dumping Convention follows the same procedure. 1996 Protocol to the London Convention 1972, Nov. 7, 1996, art. 22, 36 I.L.M. 1, 17-18.

vention are adopted by a supermajority vote but, upon entry into force, only bind those states that consented to be bound by the amendment.[151]

The "opt out" approach also has precedents outside of the environmental context. ICAO is authorized to promulgate "international standards" in relation to matters such as communications systems, rules of the air, and air traffic control practices that become part of a state party's obligations under the 1944 Chicago Convention.[152] A state that is unwilling to comply with the international standard has sixty days to notify ICAO of how its own national practice will differ from the standard.[153] Similarly, the World Health Organization has the authority to adopt regulations on various health matters that bind all members except for those that notify their rejection of, or reservations to, the regulations within a set period of time.[154]

Some treaties will not incorporate any "opt out" provision and actually authorize an extra-national actor to amend certain treaty obligations for all parties without exception.[155] This may involve cases where the extra-national actors' authority depends on achieving consensus among its members; certain annex amendments to the POPs and PIC Conventions operate in this fashion.[156] Such consensus requirements make it unclear whether the amendments are truly the product of extra-national authority or simply cases where the states parties use the extra-national entity as a forum in which to conclude the amendments in question.

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151. London Dumping Convention, *supra,* note 150, art. XV(1), 26 U.S.T. at 2413, 1046 U.N.T.S. at 144.

152. Chicago Convention on International Civil Aviation, Dec. 7, 1944, arts. 37, 54, 90, 61 Stat. 1180, 1186-97, 1205, 3 Bevans 944, 953-54, 958-59, 967.

153. *Id.*, art. 38, 61 Stat. at 1191, 3 Bevans at 954.

154. Constitution of the World Health Organization, July 22, 1946, arts. 21-22, 62 Stat. 2679, 2685, 4 Bevans 119, 125.

155. Although the results are similar, such cases should be distinguished from cases where by virtue of the operation of the treaty itself (rather than the action of an extra-national actor in the form of an international organization, standing conference of the parties, etc.) an amendment comes into force for all parties through the consent of some supermajority of states parties. *See, e.g.*, U.N. CHARTER art. 108 (declaring that amendments enter into force for all members upon ratification by two-thirds of the members, including all permanent members of the Security Council); UNCLOS, *supra* note 76, art. 316(5), 1833 U.N.T.S. at 521, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, at 143 (stating that amendments concerning the Area or the International Law of the Sea Tribunal come into force for all states parties upon ratification or accession by three-fourths of the states parties); Statute of the International Atomic Energy Agency, Oct. 23, 1956, art. XVIII, 8 U.S.T. 1093, 1110-11, 276 U.N.T.S. 3, 34, 36 (declaring that amendments come into force for all parties when two thirds of the members have deposited instruments of acceptance of an adopted amendment).

156. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, art. 22(5)(b), 38 I.L.M. 1, 15 (1999) [hereinafter PIC Convention]; Stockholm POPs Convention, *supra* note 149, art. 22(5), 40 I.L.M. at 549. The 2000 U.S.-Russia Polar Bear Agreement would operate in the same vein, albeit on a bilateral basis. It will establish a bi-national Polar Bear Commission consisting of representatives of both governments that will establish, by consensus, limitations on the quantity and methods used with respect to killing the shared polar bear population. Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, Oct. 16, 2000, U.S.-Russ., art. 8, S. TREATY DOC. No. 107-10, at 7-8 (2002).

In other cases, however, the extra-national actor is clearly authorized to act independently from the unanimous views of its members. The most well-known example of this approach is found in the Montreal Protocol on Substances that Deplete the Ozone Layer. That treaty authorizes a supermajority vote of the Meeting of the Parties ("MOP") to adjust for all parties control measures with respect to the consumption and production of ozone depleting substances covered by the treaty.[157] The Chemical Weapons Convention and the Comprehensive Nuclear Test Ban Treaty also contemplate supermajority votes of their respective Conferences of the Parties ("COPs") to change certain annexes for all parties.[158]

Another recent example making the case for extra-national actor autonomy involves the debate over Iceland's attempt to rejoin the International Whaling Convention.[159] In that case, Iceland sought to condition its participation in the Convention on a reservation to the commercial whaling moratorium adopted by the IWC as part of the Convention's Schedule.[160] A number of states, including the United States, opposed the reservation and objected to Iceland's attempt to avoid accepting the moratorium obligation.[161] Nevertheless, states ultimately recognized that the question of the acceptability of the reservation was for the IWC itself, not individual member states. After two hotly contested IWC decisions to reject the reservation in July 2001 and May 2002, the IWC decided in October 2002 that Iceland's reservation was acceptable.[162] As a result of extra-national action, therefore, Iceland became a party to the Convention, albeit without any moratorium obligations.

Generally, the treaty that creates the extra-national actor explicitly authorizes it to obligate member states to some course of conduct.[163] In some cases, however, an extra-national actor may exercise such authority without an explicit treaty basis. Take, for example, the London Dumping Convention. The extra-national actor that it creates, the Consultative Meeting of the Parties ("CMP"),

157. Montreal Protocol, *supra* note 143, art. 2, 1522 U.N.T.S. at 31-33. By contrast, expansion of the Protocol to cover new ozone depleting substances requires an amendment to the Treaty, where individual states cannot be bound absent their consent. It should be noted, however, that consensus has formed the basis for such decisions to date and the supermajority provisions have gone unused. Indeed, the use of consensus is widespread in the MEA context. *See, e.g.*, Churchill & Ulfstein, *supra* note 116, at 642-43.

158. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, arts. VIII(B)(18), XV(4)-(5), 1974 U.N.T.S. 45, 334-35, 351-52 (noting that the Executive Council recommends certain annex amendments, such as listing of chemicals, subject to reporting and verification obligations that are adopted within 90 days unless a party objects, in which case a two thirds majority vote of the Conference of the Parties is required to amend the annex, binding all parties 180 days after adoption); Comprehensive Nuclear Test Ban Treaty, Sept. 10, 1996, art. VII, 35 I.L.M. 1439, 1455-56 (same).

159. Sean D. Murphy, *Blocking of Iceland's Effort to Join the Whaling Convention*, 96 AM J. INT'L L. 712 (2002).

160. *Id.* at 713.

161. *Id.*

162. *Id.*; Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Cases of Cuba and Iceland*, 14 COLO. J. INT'L ENV'TL L. & POL'Y 53, 57 (2003).

163. *See* SCHERMERS & BLOKKER, *supra* note 34, at 813 ("As a general rule of modern international institutional law . . . international organizations cannot take binding external decisions unless their constitutions expressly so provide.").

expanded the definition of "dumping" under the Convention to include the disposal of waste into or under the seabed from the sea but not the disposal of waste from land by tunneling.[164] Although the resulting definition may be considered authoritative for states party to the treaty, it is unclear whether it derives its authoritative status from the collective action of the contracting parties or by virtue of some implied power of the CMP.[165] Another possibility involves extra-national actors using existing authority to address specific cases in ways that actually set out general standards that are effectively equivalent to treaty obligations. For example, U.N. Security Council Resolution 1373, relying on Chapter VII authorities, represents a new form of Security Council decision that does not deal with the behavior of states in the context of a specific crisis or with respect to a specific country. Rather, it sets out general standards of behavior for states to follow in addressing terrorist financing.[166]

States may, however, resist what they consider unauthorized activity by extra-national actors. For example, certain states objected to the decision of the Basel Convention Conference of the Parties (COP) to ban OECD exports of hazardous wastes to developing countries as beyond the COP's authority under that Convention.[167] The COP decision was later revised into an amendment between the states parties.[168] In the Iceland case, two states, Mexico and Italy, challenged the IWC's decision on Iceland's status as a party on the grounds that the IWC improperly allowed Iceland to participate in the votes to decide whether its reservation was acceptable. In a number of controversial cases, losing states have objected to the manner in which the ICJ exercised its authority to interpret and apply various treaties.[169] States may even challenge an extra-national actor's assumption of authority in a given situation by arguing that the authority actually rests with another extra-national actor. At the WTO, for example, member states objected to Appellate Body attempts to authorize NGOs to participate in dispute settlement proceedings as amicus curiae on the grounds that only the WTO General Council could authorize such participation.[170]

What do these examples say about extra-national actors as "new" actors in international law in addition to sovereign states? On the one hand, the case can

164. *See* Churchill & Ulfstein, *supra* note 116, at 641 (also citing example of interpretations advanced by the CITES Conference of the Parties for entry into force of amendments and the criteria for amending the appendices).

165. *See id.* (considering the amended London Convention definition authoritative, but noting different rationales for reaching such a conclusion).

166. *See* U.N. SCOR, 56th Sess., 438th mtg., U.N. Doc. S/RES/1373 (2001).

167. *Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, U.N. Env't Programme, 2d Sess., Decision II/12, at 19-20, U.N. Doc. UNEP/CHW.2/30 (1994), *available at* http://www.basel.int/meetings/cop/cop1-4/cop2repe.pdf (last visited Jan. 27, 2005); Churchill & Ulfstein, *supra* note 116, at 639.

168. Churchill & Ulfstein, *supra* note 116, at 639.

169. *See, e.g.*, Press Release, Embassy of the Federal Republic of Nigeria, Washington, D.C., Nigeria's Reaction to the Judgement of the International Court of Justice at The Hague (Nigeria, Cameroon with Equitorial Guinea Intervening) (Nov. 7, 2002), *available at* http://www.nigeriaembassyusa.org/110802_1.shtml (last visited Jan. 27, 2005); *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, 85 U.S. DEP'T ST. BULL., Mar. 1985, at 64.

170. *See* Hollis, *supra* note 8, at 252-253.

be made that extra-national actors that can apply, interpret, or even amend treaties constitute new "authorities" in international law that are truly autonomous from the states that created them. From the Jay Treaty's Commissioners to ITLOS, states may afford extra-national actors the authority to definitively interpret or apply treaty obligations in ways that are unavailable to any single sovereign state. Examples such as the IWC and the Montreal Protocol MOP demonstrate that extra-national authorities may interpret or amend the very treaty obligations assumed by states even for states that would otherwise oppose such interpretations or amendments.

On the other hand, state consent often continues to have relevance to exercises of extra-national authority in ways that limit an extra-national actor's claim to full autonomy. "Opt-out" clauses deprive extra-national actors of the ability to modify states' obligations against their will. Moreover, in practice, extra-national actors have not actually amended treaty obligations for objecting states, even in the absence of "opt-out" clauses. For example, all adjustments to the Montreal Protocol to date have proceeded on a consensus basis rather than the supermajority vote provided for in the Protocol.[171] States have also demonstrated a willingness to challenge extra-national activity that they view as *ultra vires* or otherwise beyond what the states creating the extra-national actor expected it to do.

Thus, states have clearly invested certain extra-national actors with a level of autonomy in the context of interpreting, applying, and even modifying treaty obligations. As a result, they operate to an extent as independent actors in the treaty context. At the same time, however, the states that create these extra-national actors have placed real limits on the scope of this independence, preventing one from considering these actors without any reference to the states that created them. Such state action suggests that states prefer to rely not only on the original grant of authority to an extra-national actor but also seek to establish contemporaneous consent to the exercise of that authority.[172] Of course, the very fact that states require opt-out clauses, seek consensus decision-making, and resort to claims of *ultra vires* action demonstrates that states accept that extra-national actors may, if authorized, function independently of states and in ways that bind states to particular interpretations, applications, or amendments of their treaty obligations.

171. *See supra* note 157 and accompanying text.

172. The use of the term "contemporaneous consent" should not, however, be confused with notions of voluntarism where state sovereignty is cited as a basis for dismissing international legal commitments as a matter of right. Instead, it should be viewed as the concept of accountability, or what Jose Alvarez suggested might be some form of international administrative law, where states may insist that extra-national actors do not exceed the authorities delegated to them, implicitly or explicitly, by the states that created the actor. *See, e.g.*, Alvarez, *supra* note 30, at 232-33. Of course, absent state consent to some method to definitively review the propriety of an extra-national actors' exercise of authority, the problem of autointerpretation remains. One state's insistence that an extra-national actor's application of its treaty obligation constitutes an improper delegation of authority might be countered by another state's viewing the same action as an entirely appropriate exercise of the extra-national actor's delegated authorities.

CONCLUSION

Writing in 1923, the PCIJ's *Wimbeldon* judgment characterized the right of entering into international agreements as "an attribute of State sovereignty."[173] It remains an attribute of state sovereignty today. States have shown a clear preference to enact legal rules by treaty in lieu of other accepted sources of law under Article 38.

What is no longer clear, however, is whether the treaty-making power constitutes an attribute exclusive to state sovereignty. Sub-state, supranational, and extra-national actors have all demonstrated a capacity to negotiate and conclude treaties in their own names. Extra-national actors may also serve as vehicles for interpreting, applying, and defining treaty obligations separate and apart from the views of individual sovereign states.

At the same time, these actors are not yet entirely free of the states with which they are associated. Questions remain about the need for sovereign state authorization of sub-state agreements and the notion that it is the state, not the sub-state actor, which bears legal responsibility for a sub-state actor's treaty commitments. Although the EC and extra-national actors have demonstrated the capacity to conclude treaties for which they alone bear legal responsibility, even they are not able to do so entirely free from the views of the states that created them. The EC, in practice, shares legal responsibility in many "mixed" agreements where it continues to split competence with its Member States; extra-national actors are limited to treaties that fulfill the powers states expressly or impliedly conferred upon them. In all three cases, moreover, the views of other treaty partners matter. Even when a state or group of states grant treaty-making authority to a non-state actor, that authority has little meaning absent agreement or acquiescence by other state actors to the exercise of such authority.

What do these developments in treaty-making authority say about the changing sources of international law? Despite Fitzmaurice's accurate observation that treaties only create specific obligations for parties rather than general rules of law, evidence of formal participation by non-state actors in treaty-making still has utility in evaluating who makes international law.[174] Even if, as a matter of treaty law, treaties only bind states parties, the reality of modern treaty-making is that treaties serve as the primary vehicle through which general rules of law are now elaborated (or, in the case of customary international law, codified). As such, if sub-state, supranational, and extra-national actors can make such treaties, would not their views and practices have relevance to the content of customary international law and "recognized" general principles of international law as well? The current role non-state actors play in the treaty process may thus reflect the beginning of a shift in the international legal order from a community of sovereign states making the law to one where states and other non-state actors with varying levels of authority make the law.

173. The S.S. Wimbeldon, 1923 P.C.I.J. (ser. A) No. 1, at 25 (June 28).

174. *See supra* note 15 and accompanying text.

That conclusion is not free from doubt, however, so long as state consent to non-state actor treaty participation still matters. The fact that these non-state actors are creatures of state consent, and may in many cases require their continuing consent to operate, suggests that it is premature to disregard the old state-centric paradigm. In the end, the issue may ultimately turn on how one views the concept of continuing state consent to non-state actor participation in law-making. Is it no more than a sociological commentary on the law's efficacy or does it reflect a legal principle that it is states who continue, through their consent, to dictate who forms the law, who interprets it and who applies it?

Returning to the question of the sources of international law, this article has sought to move beyond the traditional questions of what the basis of obligation in international law is and what sources one looks at to see it expressed. The questions raised by non-state actor participation in treaties demonstrate that international lawyers need to devote more attention to the distribution of authority in international law rather than debating only what the law "is." An authority-based perspective calls attention to the possibility that, even if they have not yet done so, states could, by their own consent, change which actors make international law. Therefore, maligned as the doctrine may be, international law needs more scholarship, not less, on the doctrine of consent as a basis of obligation in international law, looking at who is consenting, on whose behalf, and to whom such consent is being given.

This may not unlock all of the stalemates in sources doctrine; scholars will still debate issues such as the legal force of soft law principles and whether other methods beyond state consent create international law. But, by focusing on authority—on who it is that makes the law—international lawyers may gain a fresh perspective on the way the international legal order is presently structured. From this perspective, we can see the increasing importance of non-state actor participation in treaties along with the continuing efforts by states to oversee and control such participation. At present, despite the heightened influence of non-state actors, states have had success in continuing to require that the formal creation and application of treaties turn on the presence of state consent.

An authority-based perspective also offers an opportunity to appreciate how the system could change—how states could, by their own consent, authorize non-state actors to stand alongside states in the creation and application of international law. We can use this authority-based perspective, therefore, to assess the impact globalization is having on the international legal order; to predict under what conditions non-state actors would have sufficient independence to truly constitute new law-makers in addition to sovereign states. In the same way, we can use this approach to assess whether and when a single actor's consent could trump the consent of all other actors such that we would need to revise the theory of general state consent making international law to a more hegemonic perspective. In looking at "who" is making international law, moreover, we inevitably also gain valuable knowledge about "what" states and other actors are actually consenting to. This information, in turn, offers a compelling image of the international legal order in operation, an image that can counteract

those followers of realpolitik who would paint a picture of international law as more theory than practice.

Finally, in offering a new look at who makes international law, an authority-based approach offers hope for a reinvigoration of the doctrine of sources more generally. Without a better understanding of international law as "law" and who has the authority to create and apply it, analyses of compliance and the law's effectiveness may lack a firm foundation. We need to know why states and other actors view law as binding and what they consider to constitute law to provide the necessary baseline for evaluating whether the law generates different patterns of compliance or has greater effectiveness than norms that do not qualify as law. Rather than burying the questions inherent in defining international law, we should take those questions, warts and all, and address them hand in hand with post-ontological inquiries into the law's fairness and effectiveness. In an age of terrorism, hegemony, globalization, and proliferating non-state actors, international lawyers will surely need both approaches to discuss and, it is hoped, develop and defend an international rule of law that is comprehensible, fair, and effective for meeting the challenges of the years to come.

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Recognition and Enforcement of U.S. Money Judgments in Germany

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INTRODUCTION

In many countries around the globe, litigation in the United States is perceived as a "nightmare" due to long-arm jurisdiction statutes, pre-trial discovery proceedings, and the availability of punitive damages—legal instruments often unknown in other jurisdictions.[1] German commentators have coined the phrase

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1. *See, e.g.*, Hanns Prütting, *Ein neues Kapitel im Justizkonflikt USA-Deutschland*, *in* 1 FESTSCHRIFT FÜR ERIK JAYME 709 (Heinz-Peter Mansel et al. eds., 2003) (noting that foreign defendants in the United States often regard litigation as a "horrorvision and nightmare"); ROLF A. SCHÜTZE, DIE ALLZUSTÄNDIGKEIT AMERIKANISCHER GERICHTE 21 (2003) (emphasizing that the U.S. litigation

"jurisdiction conflicts" to describe legal clashes resulting from the application of U.S. law to transnational proceedings in which a foreign defendant is sued before U.S. courts.[2] This general mistrust of U.S. litigation makes the enforcement of U.S. judgments abroad a highly sensitive issue. In Germany, the extent to which U.S. money judgments may be recognized and enforced is far from settled.[3] Like other states, Germany is eager to protect its citizens from judgments considered incompatible with the fundamental standards of its domestic law. Yet the steady growth of cross-border transactions and an ever-increasing rate of direct exports by German entities without a corporate presence in the United States have substantially enhanced the practical relevance of enforcing U.S. judgments in Germany.[4]

Despite a recent spate of relatively U.S.-friendly rulings from the German Federal Court of Justice (*Bundesgerichtshof*),[5] the highest court for civil and criminal matters, some scholars favor greater barriers to prevent the enforcement of U.S. court rulings. Recently, it was suggested that German courts should regard U.S. judgments as prima facie violative of German public policy.[6] It was

system is often used as a basis for "legalized blackmailing"). *See also* Yasuhei Taniguchi, *The Japanese in American Litigations—Problems of Procedural Conflict, in* THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA 93, 95 (Walther J. Habscheid ed., 1986) (explaining that Japanese businessmen and lawyers struggle with the U.S. litigation system due to a wholly different Japanese mentality of conducting litigation).

2. *See, e.g.*, PETER SCHLOSSER, DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA 43 (1985) (arguing that the cause of U.S.-German jurisdiction conflicts is a different understanding of the concept "due process of law"); Rolf Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa, in* THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA, *supra* note 1, at 5, 35 (concluding that the extraterritorial application of U.S. procedural law creates a U.S. "legal hegemony"); Rolf A. Schütze, *Zum Stand des deutsch-amerikanischen Justizkonfliktes*, 2004 Recht der Internationalen Wirtschaft [RIW] 162 (emphasizing that jurisdiction conflicts between Germany and the United States often arise because of liberal U.S. standards for serving foreign defendants, the extraterritorial application of U.S. discovery rules, and the assumption of jurisdiction based on long-arm statutes).

3. The literature regarding the enforceability of punitive, multiple, and treble damages awards alone is extensive. *See, e.g.*, DIRK BROCKMEIER, PUNITIVE DAMAGES, MULTIPLE DAMAGES UND DEUTSCHER ORDRE PUBLIC 207 (1999) (arguing that treble damages violate the German public order and are not enforceable); JULIANA MÖRSDORF-SCHULTE, FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES 298-99 (1999) (concluding that actions for punitive damages may not be served on German defendants because they violate German public policy); JOACHIM ROSENGARTEN, PUNITIVE DAMAGES UND IHRE ANERKENNUNG UND VOLLSTRECKUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 207-08 (1994) (arguing that punitive damage awards generally should be enforceable); Ernst C. Stiefel et al., *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany*, 39 AM. J. COMP. L. 779, 802 (1991) (explaining that punitive damages awards are only recoverable "under German law as far as they really compensate non-physical damages"); PETER MÜLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT 363-65 (2000) (stating that punitive damages awards are enforceable in Germany if they do not exceed the maximum sum that would be awarded by German courts); STEPHAN LÜKE, PUNITIVE DAMAGES IN DER SCHIEDSGERICHTSBARKEIT 306-07 (2003) (analyzing the enforceability of punitive damages arbitral awards).

4. Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641, 641-42 (1992).

5. *See, e.g.*, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 118, 312 (F.R.G.) (upholding a U.S. award in most respects despite differences between U.S. and German law).

6. Rolf A. Schütze, *Überlegungen zur Anerkennung und Vollstreckbarerklärung US-amerikanischer Zivilurteile in Deutschland—Zur Kumulierung von Ordre public Verstößen, in* EINHEIT

argued that while the differences between German and U.S. civil procedure may not alone be cause for concern in all cases, the accumulation of differences renders U.S. judgments inherently incompatible with German standards of justice.[7] According to this rather drastic point of view, a U.S. creditor would bear the burden of proving that, in each particular case, the enforcement of a U.S. judgment in the creditor's favor would not violate German public policy standards.[8] Additionally, the German Federal Constitutional Court (*Bundesverfassungsgericht*), the judicial body with the highest authority to interpret the German Constitution (*Grundgesetz* or GG),[9] recently revived the discussion of jurisdiction conflicts by issuing an interlocutory injunction halting service of a U.S. class action suit seeking punitive damages against a German defendant.[10] The court explained that the plaintiff's claim for $17 billion, coupled with the media pressure initiated by the plaintiff against the defendant, could violate the defendant's constitutional rights.[11]

The cautious enforcement of U.S. judgments abroad is certainly influenced by the fact that the United States is currently not a party to any bilateral treaty or multinational convention concerning the recognition and enforcement of foreign judgments.[12] To overcome this obstacle, the United States strongly supported a worldwide convention on the matter under the auspices of the Hague Conference on Private International Law.[13] While many were optimistic at the start of negotiations in 1992, by 2003 it became apparent that the project was bound to

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UND VIELFALT DES RECHTS: FESTSCHRIFT FÜR REINHOLD GEIMER ZUM 65. GEBURTSTAG 1025, 1041 (Rolf A. Schütze ed., 2002) [hereinafter EINHEIT UND VIELFALT].

7. *Id.* at 1040.

8. *Id.* at 1041.

9. The *Grundgesetz* is commonly translated as the "Basic Law." This title was intended to emphasize the provisional nature of the West German constitution prior to unification of the two German states. *See* Eckart Klein, *The Concept of the Basic Law*, *in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW 25-26 (Christian Starck ed., 1983). However, the name was not altered after reunification.

10. Bundesverfassungsgericht [BVerfG], Juristenzeitung [JZ], 58 (2003), 956 (F.R.G.).

11. *Id.* at (956-58).

12. Zekoll, *supra* note 4, at 642. In 1976, the United States tried but failed to conclude a bilateral agreement with the United Kingdom on the reciprocal recognition and enforcement of judgments in civil matters. *See* Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26, 1976, U.S.-U.K., 16 I.L.M. 71 (1977). For a general overview of this failed agreement, see Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977); Peter Hay & Robert J. Walker, *The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753, 767 (1978) (stating that the convention represents "a long overdue step towards a federal role in the recognition and enforcement of foreign nation judgments, both because it unifies American practice and because it will secure broader recognition of U.S. judgments abroad").

13. For a detailed analysis of the convention, which would only have concerned judgments in civil and commercial matters, see generally Hélène Gaudemet-Tallon, *De quelques raisons de la difficulté d'une entente au niveau mondial sur les règles de compétence judiciare international directe*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 55 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002) [hereinafter LAW & JUSTICE]; SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS (2003).

fail.[14] Designed as a "convention mixte," addressing both jurisdiction and enforcement proceedings, the Hague Conference sought to establish three sets of rules for jurisdiction.[15] Judgments relying on the first set of internationally recognized bases of jurisdiction would have to be enforced by the courts of all member states to the convention, while enforcement of judgments based on a second set of blacklisted jurisdictions would be denied.[16] The Convention would also establish a third category of "grey" jurisdictions under which a member state to the Convention would be permitted to exercise jurisdiction without obliging other member states to enforce judgments based on those rules of jurisdiction.[17] However, a rift between European nations (including Germany) and the United States precluded agreement on the crucial categorization of blacklisted jurisdictions.[18] In April 2004, the drafting committee released the first draft of a downscaled successor to the convention, covering nothing but exclusive choice of court agreements in business-to-business contracts.[19] It is doubt-

14. Members of the Hague Conference did not adopt either the preliminary draft of 1999 or the amended version of 2001. Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention—And Perhaps Beyond, in* LAW AND JUSTICE, *supra* note 13, at 121, 122-24. For a discussion of U.S. criticisms of the preliminary draft convention, see Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 192 (2001).

15. Silberman & Lowenfeld, *supra* note 14, at 123. For background on the history of the Hague Conference, see generally Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998); Russel J. Weintraub, *How Substantial Is Our Need For A Judgments-Recognition Convention and What Should We Bargain Away To Get It?*, 24 BROOK. J. INT'L L. 167 (1998); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001). For a critique of using a multinational convention to reach agreement on these issues, see Antonio F. Perez, *The International Recognition of Judgments: The Debate between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44 (2001) (arguing that the World Trade Organization should be the venue in which to negotiate such an agreement).

16. Silberman & Lowenfeld, *supra* note 14, at 123.

17. *Id.*; Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, 61 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RABELSZ] 86, 88-89 (1997).

18. For example, the European states generally considered jurisdiction based solely on doing business in a particular state as exorbitant, whereas the United States rejected special protective jurisdiction rules for consumers or employees. For a detailed analysis of the controversial transatlantic differences in jurisdiction rules, see generally, Peter Nygh, *Arthur's Baby: The Hague Negotiations for a World-wide Judgments Convention, in* LAW AND JUSTICE, *supra* note 13, at 151; Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319 (2002).

19. *Draft on Exclusive Choice of Court Agreements*, Hague Conference on Private International Law [HCPIL] Working Document No. 110 E, Revised, *at* http://hcch.e-vision.nl/upload/wop/jdgm_wd110_e.pdf (May 2004). *See also* Masato Dogauchi & Trevor C. Hartley, *Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report*, HCPIL Preliminary Document No. 25, *at* http://hcch.e-vision.nl/upload/wop/jdgm_pd25e.pdf (March 2004) (commenting on the draft convention). For an overview of the new proposal, see Jason Webb Yackee, *A Matter of Good Form: The (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements*, 53 DUKE L.J. 1179 (2003); Ronald A. Brand, *A Global Convention of Choice of Court Agreements*, 10 ILSA J. INT'L & COMP. L. 345 (2004).

ful whether this convention, if it is ever ratified, will substantially facilitate transatlantic judgment enforcement.

Thus, without any obligations derived from international law, each sovereign state possesses the power to decide under which circumstances it will recognize and enforce judgments rendered by U.S. courts. U.S. creditors face the difficult task of carefully considering a multitude of foreign laws when assessing their chances of enforcing a favorable judgment abroad. This article highlights the extent to which U.S. money judgments can be enforced in Germany, a major trading partner of the United States. Part I provides a summary of the general principles governing German enforcement of foreign judgments as well as the relevant provisions of German law. Parts II and III outline in further detail the conditions under which German courts will recognize and enforce U.S. money judgments. Part II highlights those factors found in the German Code of Civil Procedure that generally do not hinder the enforcement of U.S. judgments. Part III provides an in-depth analysis of those factors that can prevent the recognition of U.S. judgments. While the recognition of a foreign judgment is granted automatically, *ipso iure*, its enforcement by German courts is contingent on a formal proceeding. Thus, Part IV provides a basic overview of the German legal proceedings that are necessary to obtain a declaration of enforceability. This declaration gives U.S. creditors some recourse to the various execution procedures available in Germany, a topic addressed briefly in Part V.

I.
STATUTORY FRAMEWORK

A. The Broader Picture

U.S. judgments are recognized and enforced in accordance with the German Code of Civil Procedure (*Zivilprozessordnung* or ZPO).[20] The main prerequisites for recognition and enforcement of foreign judgments are enumerated in sections 328 and 723 of the ZPO. However, Germany has also concluded various bilateral and multilateral recognition and enforcement treaties over the years, and recently the European Community (EC) enacted its own rules in this field.[21] Thus, there are various bodies of law governing the recognition and enforcement of foreign judgments, depending on where the foreign judgment was rendered.

EC regulations direct the enforcement of judgments delivered by courts seated in EC Member States, reflecting the EC's strong tradition of facilitating the Europe-wide enforcement of court rulings. In the past, these efforts were undertaken through multilateral conventions (most notably the Brussels Conven-

20. The ZPO has recently been reformed. Gesetz zur Reform des Zivilprozesses (Zivilprozessreformgesetz—ZPO-RG), v. 27.7.2001 (BGBl. I S.1887) (F.R.G.). For an outline of the reforms, see Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55 (2003).

21. With regard to the history and provisions of the various European conventions and regulations, see generally, JAN KROPHOLLER, *Einleitung* to EUROPÄISCHES ZIVILPROZESSRECHT, ¶¶ 6-160 (7th ed. 2002).

tion of 1968)[22] because the EC did not have legislative power over civil procedure until the enactment of the Treaty of Amsterdam in 1997.[23] Article 65 of this treaty granted the EC the authority to enact measures of judicial cooperation in civil matters with cross-border implications, including the improvement and simplification of the rules regarding recognition and enforcement of judgments in both civil and commercial cases. Pursuant to the treaty, the EC has enacted various regulations[24] including the Brussels I Regulation,[25] which replaced the Brussels Convention of 1968.[26] Under the Brussels I Regulation, judgments rendered and enforceable in one EC Member State must automatically be recognized and enforced in all other Member States.[27] Thus, courts in the enforcing state must issue a grant of enforceability (*exequatur*) without special review proceedings, such as to re-examine whether the court that rendered the judgment had proper jurisdiction.

Judgments rendered by courts outside the EC are often enforceable according to a multilateral convention or a bilateral treaty. Unlike the United States, Germany is a party to several such treaties and conventions.[28] These agree-

22. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated version).

23. KROPHOLLER, *supra* note 21, ¶ 15. For a consolidated version of the EC Treaty currently in force, see 2002 O.J. (C 325) 1.

24. For excellent descriptions of these laws, see generally 1 CHRISTIAN v. BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT § 5, ¶¶ 6-11 (2003); JANNET A. PONTIER & EDWIGE BURG, EU PRINCIPLES ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2004). In addition to the Brussels I Regulation, *infra* note 25, the EC also enacted Council Regulation 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial and Parental Matters, 2003 O.J. (L 338) 1 (the Brussels II Regulation, repealing Council Regulation 1347/2000, 2000 O.J. (L 160) 19), and Council Regulation 805/2004, 2004 O.J. (L 143) 15, which accelerated proceedings for uncontested claims by creating a European Enforcement Order to replace the grant of enforceability. Further Brussels regulations are expected in the future, relating to family law matters of succession and other issues. *See* David Hodson, *So That was Brussels II: Now Stand by for Brussels III*, IAML NEWSLETTER (INT'L ACAD. MATRIMONIAL LAWYERS, London), Apr. 2002, at 10-11.

25. Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I regulation]. For a general overview of this regulation, see HÉLÈNE GAUDEMET-TALLON, COMPÉTENCE ET EXÉCUTION DES JUGEMENTS EN EUROPE: RÈGLEMENT NO 44/2001 CONVENTIONS DE BRUXELLES ET DE LUGANO 18-20 (3d ed. 2002); Peter E. Herzog, *Rules on the International Recognition of Judgments (and on International Jurisdiction) by Enactments of an International Organization: European Community Regulations 1347/2000 and 44/2001, in* LAW AND JUSTICE, *supra* note 13, at 83; Rui Manuel Moura Ramos, *The New EC Rules on Jurisdiction and the Recognition and Enforcement of Judgments, in* LAW AND JUSTICE, *supra* note 13, at 199; Wendy A. Kennett, *The Brussels I Regulation*, 50 INT'L & COMP. L.Q. 725 (2001); KROPHOLLER, *supra* note 21, ¶¶ 15-17; REINHOLD GEIMER & ROLF A. SCHÜTZE, *Einleitung* to EUROPÄISCHES ZIVILVERFAHRENSRECHT A1 (2d ed. 2004).

26. Denmark, despite its EC membership, pleaded against the Europeanization of the Brussels Convention and is therefore not bound by the Brussels I Regulation. Kennett, *supra* note 25, at 725. Hence, with regard to Denmark, the provisions of the Brussels Convention continue to apply.

27. Brussels I Regulation, *supra* note 25, art. 33(1), 2001 O.J. (L 12) at 10.

28. For an overview of the conventions and treaties to which Germany is a party, see generally HEINRICH NAGEL & PETER GOTTWALD, INTERNATIONALES ZIVILPROZESSRECHT § 13 (5th ed. 2002); DIETER MARTINY, 3/2 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 111-212 (1984); HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 21 (3d ed. 2002); 1 ARTHUR BÜLOW ET AL., DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL- UND HANDELSSACHEN ¶¶ 540-605 (2004); 2 ARTHUR BÜLOW ET AL., DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL- UND HANDELSSACHEN ¶¶ 606-708 (2004).

ments encompass judgments handed down in other contracting states and are recognized and enforced in accordance with the procedural safeguards designated within them.[29] For judgments rendered in states that have not concluded recognition and enforcement treaties with Germany, the rules of the ZPO apply.

B. The Rules of the German Code of Civil Procedure

Section 328 of the ZPO sets forth the necessary conditions for the recognition of foreign judgments, whereas sections 722 and 723 of the ZPO govern enforcement proceedings. In practice, recognition and enforcement are closely connected because a German judge only reviews the prerequisites for recognition when hearing a motion for a grant of enforceability. As questions of law, however, recognition and enforcement should be distinguished. Recognition involves the general effects of the foreign judgment, while enforcement gives effect to and denotes the execution of the judgment by German courts or other enforcement organs.[30] According to section 722 of the ZPO, a judgment rendered by a foreign court shall only be executed if its admissibility is declared in an enforceable judgment granted by a German court. The courts can only award this grant of enforceability (*Vollstreckbarerklärung*), which opens the way for enforcement of the decision, if the conditions for recognition of the foreign judgment listed in section 328 of the ZPO are met.

The ZPO does not define recognition. The majority view is that recognition gives a foreign judgment the same authority and effect in the recognizing state as in the rendering state (*Wirkungserstreckung*).[31] However, since the effects of a foreign judgment may be much broader than the relatively limited effects of judgments in Germany,[32] some restrictions are desirable. For this reason, it is undisputed that any effect that would be alien under German law cannot be enforced.[33] Some scholars thus favor the theory of accumulation (*Kumulationstheorie*), which provides that a foreign judgment should be en-

29. It should be noted that many bilateral agreements were made with states that are now EC Members. Since EC law generally has priority over national law, these treaties cannot be applied to cases that fall within the scope of EC regulations on the recognition and enforcement of foreign judgments.

30. Dieter Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721, 728 (1987) [hereinafter Martiny, *Recognition and Enforcement*].

31. *See* Peter Gottwald, *Grundfragen der Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivilsachen*, 103 Zeitschrift für Zivilprozess [ZZP] 257, 261 (1990); GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT § 22(V)(1)(a) (8th ed. 2000); JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT § 60(V)(1)(b) (4th ed. 2001); DIETER MARTINY, 3/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS ¶ 364 (1984). Some scholars have argued, however, that the foreign judgment should be given the same effects as a German judgment (*Gleichstellungswirkung*). *See, e.g.*, FRITZ REU, ANWENDUNG FREMDEN RECHTS: EINE EINFÜHRUNG 86 (1938).

32. Report on the Convention on the Ass ociation of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the Convention on Jurisdiction and the Enforcement of Judgments In Civil And Commercial Matters, and the Protocol on Its Interpretation by the Court of Justice, 1979 O.J. (C 59) 71, ¶ 191.

33. *See* KROPHOLLER, *supra* note 31, § 60(V)(1)(b).

forced as it would be in the rendering state, except insofar as its effects exceed those that German law allows for German judgments.[34]

Unlike in many other countries, no judicial or administrative proceeding is required for the recognition of a foreign decision in Germany. Recognition is granted *ipso iure*. An exception applies to decisions regarding matrimonial matters, which, in particular, call for legal certainty. Article 7, section 1, of the Family Law Amendment Act (*Familienrechtsänderungsgesetz* or FamRÄG) requires an administrative proceeding for all decisions affecting the matrimonial status of German citizens.[35] Thus, foreign decisions regarding the divorce or annulment of a marriage involving a German citizen cannot take effect in Germany until one spouse commences a recognition proceeding. If the foreign decision meets all of the German prerequisites, it will be recognized as binding on all German courts and authorities, thus giving the foreign judgment an *erga omnes* effect, the same as it would have in the rendering jurisdiction.[36]

II.
PREREQUISITES WHICH GENERALLY DO NOT HINDER THE RECOGNITION OF U.S. MONEY JUDGMENTS

According to section 328 of the ZPO, a foreign judgment that is barred from re-litigation by res judicata must be recognized, provided that the rendering court had international jurisdiction, the defendant was duly served, the ruling did not conflict with either a prior judgment or with a judgment rendered in Germany, and the judgment does not violate German public policy. In addition, reciprocity with the rendering state must be assured. Below, I highlight those requirements that generally do not pose a threat to the recognition and enforcement of U.S. money judgments.

A. Decisions Entitled to Recognition

1. Judgments of Foreign Courts

Under section 328 of the ZPO, the term "court" is interpreted in a broad sense and includes any public body that is empowered under the law of the rendering state to resolve disputes.[37] Thus, recognition is not limited to decisions of civil and commercial courts, but extends also to those of various administrative bodies, as long as they render judgments in civil law matters.[38] Also, criminal court decisions may be regarded as judgments in civil law if they order

34. SCHACK, *supra* note 28, at 346-47.

35. It is sufficient that one spouse has German nationality or multiple nationalities including Germany. *Cf.* Bayerisches Oberstes Landesgericht [BayObLG] [Court of Appeals for Selected Matters in Bavaria], Zeitschrift für das gesamte Familienrecht [FAMRZ], 8 (1990), 897 (898) (F.R.G.).

36. SCHACK, *supra* note 28, at 382.

37. Martiny, *Recognition and Enforcement*, *supra* note 30, at 730; JULIUS VON STAUDINGER ET AL., J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, § 328 ZPO, ¶ 217 (Ulrich Spellenberg ed., 13th ed. 1997).

38. MARTINY, *supra* note 31, ¶¶ 519-21; SCHACK, supra note 28, at 352; FRIEDRICH STEIN ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 69 (Herbert Roth ed., 21st ed. 1998).

the criminal to pay damages to the injured party.[39] These payments are categorized as civil law matters because they are functionally equivalent to a civil court ordering a tortfeasor to indemnify his victim.[40] However, judgments ordering a criminal to pay a fine to the state fall within the realm of criminal law, and therefore cannot be enforced under section 328 of the ZPO.[41]

The term "judgment" is also broadly defined to cover all decisions resolving disputes between parties.[42] Thus, section 328 of the ZPO covers money judgments, family law decisions, decrees of specific performance, and declaratory judgments.[43] Foreign default judgments can also be recognized, provided that the defendant was given proper notice.[44] However, a foreign settlement or enforceable deed cannot be recognized and enforced in Germany unless it is subject to court approval.[45] Thus, a consent judgment that is rendered by a court on the basis of a settlement between the parties—as is common in U.S. class actions—is enforceable in Germany.[46]

In turn, *exequatur* judgments, that is, judgments of a foreign court declaring a judgment rendered in a third jurisdiction enforceable in its territory, are not enforceable.[47] The same holds true with regard to foreign execution acts such as garnishment orders.[48] Neither type of decisions can be regarded as a judgment since they do not settle disputes between parties, but merely enforce prior judgments. The *exequatur* decision declares a judgment enforceable within a certain territorial area while an execution act forms part of the execution proceeding. The creditor, however, remains free to enforce in Germany the original judgment that formed the basis for the *exequatur* judgment or execution act.

2. *Res Judicata*

Only final judgments—judgments that are barred from re-litigation and appeal under the procedural laws of the rendering court—are entitled to recognition in Germany. Subsequent reopening of the case to alter a final judgment does not bar these decisions from being recognized.[49] Such proceedings are commonplace for maintenance orders, which are often adapted if circumstances

39. Martiny, *Recognition and Enforcement*, *supra* note 30, at 730.

40. MARTINY, *supra* note 31, ¶ 504; SCHACK, supra note 28, at 353-54.

41. MARTINY, *supra* note 31, ¶¶ 505-06.

42. Martiny, *Recognition and Enforcement*, *supra* note 30, at 731; STEIN, *supra* note 38, § 328, ¶ 62; RICHARD ZÖLLER ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 68 (Reinhold Geimer ed., 24th ed. 2004).

43. Dieter Martiny, Federal Republic of Germany, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 179, 182 (Charles Platto & William G. Horton eds., 1993).

44. *Id.*

45. REINHOLD GEIMER, ANERKENNUNG AUSLÄNDISCHER ENTSCHEIDUNGEN IN DEUTSCHLAND 99 (1995); GERHARD LÜKE ET AL., MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 41 (Peter Gottwald ed., 2d ed. 2000).

46. Burkhard Heb, *Die Anerkennung eines Class Action Settlement in Deutschland*, 2000 JZ 373 (377).

47. MARTINY, *supra* note 31, ¶ 372; SCHACK, *supra* note 28, at 399; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 214.

48. SCHACK, supra note 28, at 351.

49. Martiny, *supra* note 43, at 182.

change.[50] Foreign judgments that are only preliminarily enforceable cannot be recognized because they lack finality.[51] Preliminarily enforceable judgments give a creditor the possibility of enforcing the judgment although the defendant has lodged an appeal. As security, the creditor will have to deposit collateral which would go to the debor in case the judgment is reversed on appeal.[52] Similarly, interlocutory injunctions cannot be recognized or enforced in Germany since they order measures of a provisional nature.[53] An exception applies to the enforcement of injunctions that either de facto end the litigation or are not subject to appeal during their period of validity.[54] Such interlocutory injunctions are regarded as final and may be recognized and enforced under German law.[55]

3. Arbitral Awards

Foreign arbitral awards generally are not enforceable under section 328 of the ZPO because they are rendered by arbitral tribunals, which do not have public authority. Instead, foreign arbitral awards are recognized and enforced according to section 1061 of the ZPO and a multitude of conventions. The most important of these is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"),[56] to which Germany is a party. In 1998, Germany abolished its prior two-track system, which allowed for enforcement of foreign arbitral awards under either the New York Convention or the former sections 1042 and 1044 of the ZPO.[57] Today, section 1061(1) of the ZPO states that the New York Convention generally governs recognition and enforcement of such awards, but that they can also be recognized and enforced by reference to other international treaties to which Germany is a signatory. These treaties include the European Convention on International Commercial Arbitration,[58] as well as several investment protection treaties.[59]

Recently, the German Federal Court of Justice has held that foreign arbitral awards can be made enforceable under section 328 of the ZPO if, upon request of one of the parties to the arbitration, a foreign court confirms the arbitral

50. *Id.* Also, certain multilateral conventions allow for the recognition and enforcement of interim measures, especially in the field of family law. *See, e.g.*, Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, art. 4(2), 1021 U.N.T.S. 209, 219.

51. STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 225.

52. § 709 ZPO (F.R.G.).

53. STEIN, *supra* note 38, § 328, ¶ 63; SCHACK, *supra* note 28, at 355.

54. REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT, ¶ 2857 (4th ed. 2001); ZÖLLER, *supra* note 42, § 328, ¶ 70.

55. SCHACK, *supra* note 28, at 356; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 226.

56. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

57. *See* Stefan M. Kröll, *Recognition and Enforcement of Foreign Arbitral Awards in Germany*, 5 INT'L ARBITRATION L. REV. 160 (2002).

58. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

59. *See generally* ADOLF BAUMBACH ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG app. at 2549-2637 (Jan Albers & Peter Hartmann eds., 58th ed. 2000) (providing an overview of the treaties in force).

award by merging it with the judgment.[60] This applies, for example, to judgments rendered in confirmation proceedings in accordance with the U.S. Federal Arbitration Act.[61] Yet commentators have criticized the federal court of justice's holding, arguing that the court's reasoning gives successful U.S. plaintiffs the choice between enforcing the arbitral award under either section 1061 of the ZPO or the merged *exequatur* judgment under sections 328, 722 and 723 of the ZPO.[62] The existence of two enforceable decisions thus carries the risk of both being enforced against the debtor.[63]

B. Conflicting Judgments and Lis Pendens

Conflicting judgments on the same matter between the same parties rendered by different courts present the problem of choosing which judgment to recognize and enforce. There are several possible solutions. In the United States, the later judgment is enforced on the assumption that it was decided on "better," or more recent facts.[64] In contrast, under section 328(1) No. 3 of the ZPO, the judgment rendered first prevails in Germany. The underlying assumption of the "first-in-time" rule is that in parallel proceedings, priority should be given to the first judgment to eliminate any incentive for the plaintiff to initiate a second proceeding in another state. However, this rule is not absolute and an exception applies with regard to judgments rendered by German courts. A foreign judgment cannot be recognized if it is incompatible with the decision of a German court in an action between the same parties, regardless of whether it was rendered first or last.[65] This rule protects the effect of res judicata bestowed on German judgments against conflicting foreign decisions.

In domestic German cases, *lis pendens*, the pending before another court of an action on the same matter between the same parties, bars adjudication by the second court.[66] Section 328(1) No. 3 of the ZPO extends this rule to the recognition of foreign judgments. Thus, where a foreign court has disregarded *lis*

60. BGH [*Bundesgerichtshof*, Senate] [ordinary panels of the highest court], 30 RIW 557 (1984) (F.R.G.).

61. 9 U.S.C. § 9 (2004) (for domestic arbitral awards); 9 U.S.C. § 207 (2004) (for foreign arbitral awards). *See also* GARY A. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 704-14 (2d ed. 2001).

62. *See* SCHACK, *supra* note 28, at 400. *But see* Peter Schlosser, *Doppelexequatur zu Schiedssprüchen und ausländischen Gerichtsentscheidungen?*, 1985 Praxis des Internationalen Privat- und Verfahrensrechts [IPRax] 141 (arguing that the prevailing party should have the choice whether to enforce the award or the confirming exequatur judgment, as long as the exequatur judgment was issued by a court of the state in which the arbitral award was rendered).

63. *See* SCHACK, *supra* note 28, at 400. *But see* GEORG BORGES, DAS DOPPELEXEQUATUR VON SCHIEDSSPRÜCHEN: DIE ANERKENNUNG AUSLÄNDISCHER SCHIEDSSPRÜCHE UND EXEQUATURENTSCHEIDUNGEN 222 (1997) (arguing that there is no danger a debtor will pay twice since German procedural law provides sufficient defenses in the second execution proceeding).

64. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

65. HEINZ THOMAS & HANS PUTZO, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 13 (Rainer Hübtege ed., 26th ed. 2004); SCHACK, *supra* note 28, at 367; STEIN, *supra* note 38, § 328, ¶ 117; Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 25-26 (1988).

66. § 261(3) Nr. 1 ZPO (F.R.G.).

pendens proceedings pending before a German court, its judgment will not be recognized or enforced in Germany.

C. Reciprocity

Some states will only enforce foreign judgments if reciprocity exists between the two nations. Reciprocity exists when two nations enforce the judgments of each other's courts under essentially the same conditions. In the United States, there is no federal reciprocity requirement. In 1938, when the United States Supreme Court held in *Erie Railroad Co. v. Tompkins*[67] that there is no federal common law, it effectively eliminated the federal reciprocity requirement established in *Hilton v. Guyot*.[68] Thus, federal courts faced with diversity jurisdiction must follow the substantive law of the state in which the case arose.[69] Few states require reciprocity.[70]

Conversely, in Germany, reciprocity is firmly established as a prerequisite for the recognition of foreign money judgments.[71] This requirement has blocked the enforcement of U.S. judgments in Germany for a long time. In 1907, the German Imperial Court decided that because reciprocity was not assured with California, it could not enforce default judgments obtained from California courts by parties damaged in the 1906 San Francisco earthquake.[72] The court found that the California statute in force at that time granted California courts broader review powers than German courts possessed.[73] However, even

67. 304 U.S. 64, 78 (1938).

68. 159 U.S. 113, 227-28 (1895).

69. 304 U.S. at 78.

70. 32 states have adopted the Uniform Foreign-Money Judgments Recognition Act, 13 U.L.A. 263 (Supp. 2003), which does not require reciprocity. Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L LAW 239, 253 n.65 (2004). Nine states, however, wrote the reciprocity requirement back into the Act when enacting it: Florida, Ohio, Maine, North Carolina, Idaho, and Texas list reciprocity as a discretionary ground for denying recognition; Massachusetts and Georgia require reciprocity as a precondition to recognition; and New Hampshire only requires reciprocity from Canada. *Id.*

71. § 328(1) Nr. 5 ZPO (F.R.G.). There are, however, exceptions to the principle of reciprocity, including one in the ZPO, several statutes on non-monetary judgments, and certain decrees in the field of family law. According to section 328(2) of the ZPO, reciprocity is not required if the judgment refers to (a) a claim without German jurisdiction that is not of a monetary nature; or (b) a child claim (*Kindschaftssache*), such as for ascertainment of paternity or rescission of fatherhood, as defined in section 640(2) of the ZPO; or (c) a registered partnership claim, such as for the abrogation of, or a declaratory judgment on the existence or non-existence of, a registered partnership, as defined in section 661(1) Nos. 1 and 2 of the ZPO. Further, article 7, section 1, of the FamRÄG provides that reciprocity is not required in matters relating to the status of children, annulment, or termination of marriage.

72. *See* Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] [Imperial Court] 70, 434 (435) (F.R.G.).

73. California amended its Code of Civil Procedure after the earthquake to allow for recognition and enforcement of foreign judgments. *See* CAL. CIV. PROC. CODE § 1915 (West 1907) ("A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state."). The provision was repealed in 1974 because it was "largely ignored by the courts" and "failed to achieve its basic historical purpose when in 1909 the Imperial Court of Germany refused to permit the execution of

at that time, commentators criticized the court's narrow view because the court overstretched the reciprocity requirement by tacitly demanding that foreign enforcement procedures be identical to, and not merely mostly the same as, their German counterparts.[74]

The call for abolition of the reciprocity requirement became stronger over the years. Many academics argue that disregarding the binding effect of a foreign court decision is a drastic measure with which to vindicate sovereignty concerns, and that it ultimately only punishes private litigants.[75] The reciprocity requirement may even harm German citizens: since there is no distinction between national and alien plaintiffs under German law, even a German plaintiff who has obtained a judgment in a foreign court against a German defendant may only enforce it in Germany if the reciprocity prerequisite is met.[76] Despite these criticims, the German legislature continues to require reciprocity.[77]

In reaction to this scholarly criticism, German courts have softened the reciprocity requirement's rough edges by interpreting the notion of reciprocity more broadly, thus silently correcting the Imperial Court's ruling. Today, courts may assume reciprocity without demanding a special guarantee that the rendering state will enforce German judgments, nor must the state have already recognized a German decision.[78] Furthermore, German courts have changed course since the 1907 decision of the Imperial Court, and no longer require that the rendering state enforce German judgments under the same conditions required by German law, so long as the approach is generally similar.[79] Finally, reciprocity may be determined solely within a particular field of law or based on the

California judgments rendered by default against German insurance companies." CAL. CIV. PROC. CODE § 1915 (West 2004) (comment of the Law Revision Commission regarding the 1974 repeal).

74. For sound critiques of the reciprocity requirement, see H. Wittmaack, *Kann ein Vollstreckungsurteil nach §§ 722 und 723 ZPO auf Grund eines nordamerikanischen, insbesondere kalifornischen Urteils erlassen werden?*, 22 Zeitschrift für Internationales Recht 1, 61-121 (1912); Ernest G. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188, 202-07 (1919).

75. *See, e.g.*, Jürgen Basedow, *Internationales Verfahrensrecht*, *in* REFORM DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS 91, 101 (Peter Dopffel et al. eds., 1980) (stating that "scholars have long agreed that the original purpose of the reciprocity requirement, to encourage foreign nations to conclude enforcement agreements with Germany, has not been fulfilled"); Martiny, *Recognition and Enforcement*, *supra* note 30, at 749 (arguing that "the reciprocity requirement . . . should be struck from the statute book"); SCHACK, *supra* note 28, at 377 (indicating that the reciprocity requirement is unfair); Friedrich K. Juenger, *Private International Law and the German Legislature*, *in* THE INTERNATIONAL LAWYER: FREUNDESGABE FÜR WULF H. DÖSER 623, 625 (Friedrich Kübler et al. eds., 1999) ("It appears blatantly unfair to make private parties the whipping boys for perceived inadequacies of foreign legal systems."). *But see* Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 222 (1994) (asserting that "no country should be blamed for continuing to adhere to the reciprocity requirement, although it should eventually be discarded").

76. STEIN, *supra* note 38, § 328, ¶ 144. *See* Hans-Jürgen Puttfarken, *Zur Anerkennung und Vollstreckung ausländischer Urteile deutscher Kläger—verfassungswidrige Gegenseitigkeit*, 1976 RIW 149, 151 (arguing that this effect of the reciprocity requirement is unconstitutional).

77. In 1986, the German Parliament concluded that the abolition of the principle of reciprocity would be premature. Bundestagsdrucksache 10/504, at 88 (F.R.G.).

78. BGHZ 42, 194 (F.R.G.). *See also* STEIN, *supra* note 38, § 328, ¶ 156 (describing a willingness to recognize German judgments as sufficient).

79. *See, e.g.*, BGHZ 42, 194 (196) (F.R.G.) (reciprocity assumed with South Africa); BGHZ 59, 116 (121) (F.R.G.) (reciprocity assumed with France).

type of judgment at issue. For example, if the rendering state recognizes German judgments based on certain rules of jurisdiction (such as territorial jurisdiction) or types of judgments (such as final judgments rendered in adversarial proceedings), partial reciprocity is assured for foreign judgments based on similar jurisdiction rules or types of judgments.[80]

Therefore, the reciprocity requirement no longer poses a real threat to U.S. creditors. In the absence of U.S. federal law on recognition and enforcement, reciprocity need only exist with regard to the state in which the rendering court sits.[81] Today, reciprocity is widely assumed with all U.S. states, and there are no recent decisions in German courts denying the enforcement of U.S. money judgments for lack of reciprocity.[82] In past years, commentators had raised objections to the assumption that reciprocity existed with regard to Mississippi and Montana.[83] These commentators argued that Montana state law provided for review on the merits (*révision au fond*) of foreign in personam judgments.[84] However, this was prior to Montana's enactment of the Uniform Money-Judgments Recognition Act, which prohibits review on the merits.[85] Thus, this argument is no longer valid. The observations regarding Mississippi are also outdated. Again, commentators argued that reciprocity was not assured because Mississippi law seemed to allow review on the merits.[86] However, the offending section of the Mississippi Code has since been repealed[87] and the Supreme Court of Mississippi has embraced the principles of the Restatement (Second) of Conflicts of Laws, allowing enforcement of foreign judgments without review on the merits.[88] Therefore, reciprocity with the State of Mississippi should also be assured.

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80. *See, e.g.*, BGHZ 141, 286 (300-301) (F.R.G.) (assuming partial reciprocity despite the rendering state's refusal to recognize asset-based jurisdiction).

81. *See, e.g.*, BGHZ 141, 286 (299) (F.R.G.); ROLF A. SCHÜTZE, DEUTSCH-AMERIKANISCHE URTEILSANERKENNUNG 8 (1992); FRITZ WEINSCHENK, DIE ANERKENNUNG UND VOLLSTRECKUNG BUNDESDEUTSCHER URTEILE IN DEN VEREINIGTEN STAATEN UNTER DEN "FOREIGN MONEY JUDGMENT RECOGNITION ACTS" 37-38 (1988).

82. *See, e.g.*, Behr, *supra* note 76, at 222-23; MARTINY, *supra* note 31, ¶ 1513-71.

83. Despite some earlier uncertainty among commentators, the Higher Regional Court (*Oberlandesgericht* or OLG) of Hamm has held that reciprocity with Florida is assured. OLG Hamm, 1995 Neue Juristische Wochenschrift-Rechtsprechungsreport [NJW-RR] 510 (511) (F.R.G.).

84. SCHÜTZE, *supra* note 81, at 92-93. *See* § 723(1) ZPO (F.R.G.).

85. *See* MONT. CODE ANN. §§ 25-9-601 to -609 (2003).

86. *See* MARTINY, *supra* note 31, ¶ 1543; SCHÜTZE, *supra* note 72, at 89-90 (noting that a foreign creditor could prove the existence of his claims by relying on a foreign judgment as evidence pursuant to the old Mississippi Code section 13-1-101).

87. MISS. CODE ANN. §§ 13-1-83 to -117 (1990), *repealed by* Laws ch. 573, § 141 (1991).

88. *See* Laskosky v. Laskosky, 504 So. 2d 726, 729 (Miss. 1987) ("Enforcement of foreign nation judgments in our courts is governed by the principle of comity. *Restatement*, 2nd, Conflicts of Laws, § 98 (1986 Rev.). The principle of comity is similar to full faith and credit except that it is not governed by Federal statutes and that its application rests in the discretion of the trial judge."); Dep't. of Human Servs. v. Shelnut, 772 So. 2d 1041, 1044 (Miss. 2000) (same). For an overview of the Mississippi law governing the recognition and enforcement of foreign judments, see Michael H. Hoffheimer, *Mississippi Conflict of Laws*, 67 MISS. L. J. 175, 190-195 (1997).

III.
PRINCIPAL OBSTACLES TO RECOGNITION OF U.S. MONEY JUDGMENTS

A. Jurisdiction

As is common in many jurisdictions, Germany exercises review of the rendering court's jurisdiction.[89] Such review is deemed necessary to protect a defendant from being sued in an inappropriate forum, which might impair the defendant's defense. Pursuant to section 328(1) No. 1 of the ZPO, a German judge must verify that the courts of the rendering state had proper jurisdiction in the international sense over the dispute. Since the ZPO does not provide specific rules for determining jurisdiction in international cases, German courts have applied the "mirror-image principle", projecting Germany's own rules of jurisdiction on the foreign court and approving jurisdiction if, in the reverse situation, a German court would have jurisdiction to hear the case.[90] In other words, German courts extend the rules of domestic jurisdiction to international cases.[91] This ensures that judgments based on what Germany considers exorbitant jurisdiction will not be enforced in Germany.

Nonetheless, German law does not go so far as to demand that the exact court rendering the foreign judgment had jurisdiction in the international sense; it suffices that *any* court in the rendering state had jurisdiction pursuant to the mirror-image rule.[92] Thus, if a U.S. state court renders a judgment, it is sufficient if any court in that state had proper jurisdiction over the dispute. As to judgments handed down by U.S. federal courts, international jurisdiction exists if any court in the United States had jurisdiction.[93] However, there is no rule under German law to prevent the plaintiff from forum shopping. Hence, if there is concurrent jurisdiction, the plaintiff may choose which court to bring the case in. On the other hand, if a German court has exclusive jurisdiction over a matter under German law, as is for instance the case with disputes arising from tenancy contracts and residential property,[94] foreign courts may not have jurisdiction in the international sense.

In general, German law provides for a wide range of grounds for jurisdiction.[95] The principal rule is that a suit can be brought before a court where the

89. *See* Juenger, *supra* note 65, at 13-19 (providing a comparative overview of the review standards applied in various legal systems).

90. For an overview of the history of this rule, see MARTIN FRICKE, DIE AUTONOME ANERKENNUNGSZUSTÄNDIGKEITSREGEL IM DEUTSCHEN RECHT DES 19. JAHRHUNDERTS 14 (1993). However, the rather inflexible mirror-image principle is not undisputed among legal scholars. Some argue for acceptance of international jurisdiction if the rendering state had a sufficiently close connection to the dispute. *See, e.g.*, Jürgen Basedow, *Variationen über die spiegelbildliche Anwendung deutschen Zuständigkeitsrechts*, 1994 IPRax 183, 186.

91. Martiny, *Recognition and Enforcement*, *supra* note 30 at 734; Juenger, *supra* note 755, at 624-25; Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 306 (1989).

92. Zekoll, *supra* note 91, at 306.

93. BGHZ 141, 286 (289) (F.R.G.).

94. § 29 ZPO (F.R.G.).

95. *See, e.g.*, LEO ROSENBERG ET AL., ZIVILPROZESSRECHT 172-73 (15th ed. 1993).

defendant resides (*actor sequitur forum rei*),[96] or where a legal entity is incorporated.[97] Special jurisdiction exists, inter alia, at the site of an agency or other establishment of the defendant.[98] In contract cases, a court has jurisdiction at the location where the contract was to be performed.[99] Tort claims can be brought before courts either at the place where the tort was committed or where the damage occurred.[100] Moreover, German law broadly allows for choice of forum clauses in commercial transactions,[101] and courts can hear a case absent in personam jurisdiction if the defendant pleads to the charge without contesting the court's jurisdiction.[102] Finally, pursuant to section 23 of the ZPO, a German court may exercise jurisdiction over any nonresident defendant who owns assets in Germany, irrespective of whether those assets are valuable enough to satisfy the plaintiff's claim.[103]

Because Germany allows for jurisdiction in so many cases, jurisidictional review only hinders the enforcement of U.S. judgments when they are based on jurisdiction rules that Germany finds exorbitant.[104] For example, transient or tag jurisdiction based on purported service of process on a person only transitorily present in a state's territory, permissible in the United States,[105] violates notions of due process in Germany.[106] Further, if a U.S. court assumes jurisdic-

96. §§ 12, 13, 16 ZPO (F.R.G.).
97. § 17 ZPO (F.R.G.).
98. § 21 ZPO (F.R.G.).
99. § 29 ZPO (F.R.G.).
100. § 32 ZPO (F.R.G.).
101. § 38 ZPO (F.R.G.).
102. § 39 ZPO (F.R.G.).
103. § 23 ZPO (F.R.G.). Asset-based jurisdiction under section 23 of the ZPO has sometimes led to untenable results. For example, the Higher Regional Court of Karlsruhe asserted jurisdiction in one case simply because the defendant left behind some journals worth only a few dollars. *See* OLG Karlsruhe, reported by JAN KROPHOLLER, DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS IM JAHRE 1973 (IP-Rechtsprechung 1973), 373-74 (1975) (F.R.G.). The unlimited application of section 23 of the ZPO has long been criticized. *See, e.g.*, JAN KROPHOLLER, 1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS ¶¶ 334-35 (1982); *see also* THOMAS PFEIFFER, INTERNATIONALE ZUSTÄNDIGKEIT UND PROZESSUALE GERECHTIGKEIT 525-31 (1995) (providing an overview of the history of section 23 of the ZPO). Because of extreme cases like this, it did not come as a surprise when the German Federal Supreme Court of Justice considerably restricted the application of asset-based jurisdiction in 1991. *See* BGHZ 115, 90 (97-99) (F.R.G.). The court observed that the legislature had intended to protect German creditors from foreign defendants without any traceable domicile or site in Germany, and had not intended to open the doors of German courthouses to all foreign litigants with minimal connections to the country. BGHZ 115, 90 (94-95) (F.R.G.). Therefore, asset jurisdiction under section 23 of the ZPO can only be asserted if the case has a sufficient connection to Germany. BGHZ 115, 90 (97-99) (F.R.G.). A sufficient connection is commonly assumed, for example, when the plaintiff is domiciled in Germany. *See, e.g.*, LÜKE, *supra* note 45, § 23, ¶ 15.
104. Views on what constitutes an exorbitant basis of jurisdiction differ considerably in the international arena. These conflicting views were highlighted when they derailed negotiations for a worldwide convention on judgments. *See supra* text accompanying note 18.
105. Burnham v. Superior Court of Cal., 495 U.S. 604 (1990). For a general critique of the transient rule, see Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth And Forum Conveniens*, 65 YALE L.J. 289 (1956).
106. SCHACK, *supra* note 28, at 182. *See also* PFEIFFER, *supra* note 99, at 570-77; JOCHEN SCHRÖDER, Internationale Zuständigkeit 171 (1988) (stating that transient jurisdiction is "superfluous and harmful"); GEIMER, *supra* note 54, ¶ 1585 (concluding that transient jurisdiction "rests on medieval conceptions of law"). *But see* Axel Halfmeier, *Menschenrechte und internationales Priva-*

tion merely because a defendant conducts operations otherwise unrelated to the lawsuit in the forum state, it will in most cases violate German jurisdiction standards.[107]

B. *Service of Process*

According to section 328(1) No. 2 of the ZPO, a foreign judgment will not be recognized if the defendant was not duly served with the written pleadings and with sufficient time to prepare a defense. This provision safeguards the rights of the defendant to receive notice and to be heard.[108]

"Duly served" means that service was given in accordance with the rendering state's rules of procedural law[109] and any international agreements to which the state is a party. Such agreements might include, for example, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.[110] Furthermore, Article 103(1) of the German Constitution, which guarantees the right to be heard, establishes minimum standards for sufficient trial preparation. Thus, German courts essentially look first at whether the foreign law regarding service was respected, and then whether the defendant was given a reasonable amount of time to prepare a defense.[111] The determination whether a particular amount of time is reasonable is case-specific.[112] As a basic rule, a defendant should have at least two weeks to prepare for trial, just as German law requires.[113] However, interlocutory proceedings

trecht im Kontext der Globalisierung, 68 RABELSZ 653, 657 (2004) (noting that tag jurisdiction should not be unilaterally condemned since many continental "European states have jurisdictional concepts comparable to the transient rule"). The United Kingdom also allows service on anyone present within the country, regardless of how temporary that presence may be. 1 DICEY & MORRIS ON THE CONFLICT OF LAWS ¶ 11-082 (Lawrence Collins ed., 13th ed. 2000); H.R.H. Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein, 2 Q.B. 283, 292 (Eng. C.A. 1972) (holding that tag jurisdiction is possible if the issue at least has "something of an international character" and if the service of process in the United Kingdom is bona fide and not for the purpose of harassing the defendant).

107. *See* SCHACK, *supra* note 28, at 182; HAIMO SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED 37-40 (1983) (criticizing an expansive view of "doing business"); Zekoll, *supra* note 91, at 308-10; Peter Gottwald, *Internationale Zuständigkeit kraft "business activities" im geplanten Haager Übereinkommen über Zuständigkeit und ausländische Urteile in Zivil- und Handelssachen in* EINHEIT UND VIELFALT, *supra* note 6, at 231 (discussing U.S. grounds for jurisdiction within the context of the Hague Judgment Convention).

108. BAUMBACH, *supra* note 59, § 328, ¶ 20; ZÖLLER, *supra* note 42, § 328, ¶ 134.

109. For example, in transatlantic litigation, U.S. plaintiffs often try to serve the foreign defendant on U.S. territory; if they are successful, and if the service complies with U.S. law, German courts may not deny recognition of a later judgment. Under U.S. law, U.S. courts have jurisdiction over a foreign parent company if the company has an established U.S. subsidiary considered a "mere department" or an "alter ego" of it. *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984). Therefore, a U.S. court will normally have jurisdiction over a foreign company if a U.S. plaintiff serves a U.S. subsidiary of that company. In such a case, German courts will recongize the judgment.

110. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

111. STAUDINGER, *supra* note 37, § 328 ZPO, ¶¶ 443-44.

112. *Id.* § 328 ZPO, ¶ 443.

113. § 274(3) ZPO (F.R.G.).

might require less time given their speedy nature. Conversely, international cases might require more time for translation and procurement of local counsel.[114] Regardless, a defendant who pled to a charge before a foreign court cannot rely on section 328(1) No. 2 of the ZPO even if service was not given in accordance with the foreign state's law. In general, German courts interpret the concept of pleading to a charge broadly to include any action by the defendant showing knowledge of the pending hostile action.[115]

When a party is served abroad in a foreign country that is a signatory to the Hague Service Convention, compliance with the procedures laid down in the Convention is mandatory.[116] Under the Convention, to which both Germany and the United States are parties, each state must designate a central authority to receive requests for service of process.[117] German courts thus have held that service is improper when a U.S. plaintiff mails the complaint directly to a German defendant.[118]

In July 2003, an interlocutory injunction issued by the German Federal Constitutional Court in the *Napster* case dealt a major blow to the Hague Service Convention's goal of providing fast and efficient mechanisms for service abroad.[119] The case concerned a class action claiming $17 billion in punitive

114. SCHACK, *supra* note 28, at ¶ 365.

115. MARTINY, *supra* note 31, ¶ 852; STAUDINGER, *supra* note 37, § 328 ZPO, ¶¶ 442-43.

116. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1998) ("By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies.").

117. Hague Service Convention, *supra* note 110, art. 2, 20 U.S.T. at 362, 658 U.N.T.S. at 165, 167. The Hague Service Convention also provides for several alternative methods of service, but allows signatory countries to object to these methods. *Id.* arts. 8-10, 20 U.S.T. at 363, 658 U.N.T.S. at 169, 171. Because Germany has exercised this right, plaintiffs who sue defendants in Germany must request the designated central authority to execute service of process. *See* HAGUE CONF. ON PRIVATE INT'L L., STATUS TABLE: 14: CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17 (Jan. 18, 2005).

118. *See, e.g.*, BGHZ 120, 305 (309) (F.R.G.).

119. BVerfG, JZ, 58 (2003), 956 (956-58) (F.R.G.). For a critical discussion of the case, see Joachim Zekoll, *Neue Maßstäbe für Zustellungen nach dem Haager Zustellungsübereinkommen?*, 2003 NJW 2885, 2887 (arguing that domestic public policy considerations should not come into play where service of process is concerned); Bettina Friedrich, *Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit*, 4 GERMAN L.J. 1233, 1239 (2003), *available at* http://www.germanlawjournal.com/article.php?id=341 (last visited Dec. 29, 2004) (pointing out that "[t]he practical effect of the Federal Constitutional Court's Order for the case at stake is not very clear."); KLAUS J. HOPT ET AL, DIE ZUSTELLUNG EINER US-AMERIKANISCHEN CLASS ACTION IN DEUTSCHLAND (forthcoming 2005) (arguing from a comparative perspective that article 13 of the Hague Service Convention must be construed narrowly and does not allow the halting of service for domestic public policy reasons); Peter Huber, *Playing the Same Old Song—German Courts, the "Napster" Case and the International Law of Service of Process*, *in* FESTSCHRIFT FÜR ERIK JAYME, *supra* note 1, at 361, 70 ("The law of service of process is not the right forum to argue over the appropriateness of a foreign legal system's rules on civil procedure and private law"). For a defense of the standpoint taken by the German Federal Constitutional Court, see Prütting, *supra* note 1, at 718 (arguing that the court should speak out against the "abuse of judicial institutions by insubstantial damages claims initiated before U.S. courts"); Burkhard Heß, *Transatlantischer Rechtsverkehr heute: Von der Kooperation zum Konflikt?*, 2003 JZ 923, 926 (arguing that only "severe infringements of human rights" should entitle German authorities to halt service); Rolf A. Schütze, *Zur Zustellung US-amerikanischer Klagen in Deutschland*, *in* RUSSIA IN THE INTERNATIONAL CONTEXT: PRIVATE INTERNATIONAL LAW, CULTURAL HERITAGE, INTELLECTUAL PROP-

damages from the German media and entertainment company Bertelsmann.[120] The plaintiffs alleged that Bertelsmann's decision to provide funding to Napster prolonged the life of the company's Internet file-sharing service and thus the copyright infringement Napster has become renowned for.[121] The U.S. plaintiffs applied for service of the lawsuit on Bertelsmann in Germany in accordance with the Hague Service Convention.[122] When the proper German court granted the service order,[123] Bertelsmann sought an interlocutory injunction before the German Federal Constitutional Court, arguing that service must be denied because it would violate Bertelsmann's fundamental rights as defined by the German Constitution and various international conventions to which Germany is a party.[124] The court agreed and invoked the "public order" clause of Article 13, section 1, of the Hague Service Convention[125] to provisionally halt service.[126] The court reasoned that it would violate German public policy to allow a defendant to be served in Germany under the Hague Service Convention when the plaintiffs were obviously misusing the lawsuit to bend the defendant's will through media pressure and the threat of an unfavorable court order.[127] Accordingly, international judicial cooperation remains constrained by the rights found in the German Constitution. Yet the court's decision came as a surprise because in 1995 it had narrowly construed the same clause to hold that service of a U.S. action for punitive damages on a German defendant did not violate German public policy.[128]

It should be reiterated that the court's 2003 decision only related to a motion for preliminary injunctive relief and was not a decision on the merits.[129] If the injunction in the *Napster* case is upheld, the court will have opened a Pandora's box by creating a new defense against service proceedings initiated by

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ERTY, HARMONIZATION OF LAWS 325, 336 (Alexander Trunk et al. eds., 2004) (stating that "service of punitive damages actions can be denied because of their penal character," and because they "infringe German public policy" as they "are particularly prone to pressure from an emotionalized general public").

120. BVerfG, JZ, 58 (2003), 956 (956) (F.R.G.).

121. *Id.*

122. *Id.*

123. *Id. See* OLG Düsseldorf, 2003 WERTPAPIER-MITTEILUNGEN [WM] 1587 (1587-89) (F.R.G.).

124. BVerfG, JZ, 58 (2003), 956 (956) (F.R.G.). *See, e.g.*, HANNO MERKT, ABWEHR DER ZUSTELLUNG VON "PUNITIVE DAMAGES"-KLAGEN: DAS HAAGER ZUSTELLUNGSÜBEREINKOMMEN UND US-AMERIKANISCHE KLAGEN AUF "PUNITIVE DAMAGES," "TREBLE DAMAGES," UND "RICO TREBLE DAMAGES" 147-186 (1995) (arguing that such damages violate the public order). For a critique of this view, see Friedrich K. Juenger & Mathias Reimann, *Zustellung von Klagen auf punitive damages nach dem Haager Zustellungsübereinkommen*, 1994 NJW 3274.

125. Article 13 states: "Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security." Hague Service Convention, *supra* note 110, art. 13, 20 U.S.T. at 364, 658 U.N.T.S. at 171.

126. BVerfG, JZ, 58 (2003), 956 (956-58) (F.R.G.).

127. *Id.*

128. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 91, 335 (F.R.G.). The court had earlier issued a preliminary injunction halting service. BVerfG, 1994 NJW 3281 (F.R.G.). Once a decision was made on the merits, the plaintiff was finally allowed to serve his punitive damages action on the German defendant.

129. A decision on the merits is expected in spring 2005.

U.S. plaintiffs under the Hague Service Convention. The public order defense would not only hamper transatlantic service of process by being repeatedly invoked, it would also increase the workload of German courts, which in literally each case would have to carefully consider whether the service at issue should be regarded as an abuse of process. Such review would be difficult to conduct, since written pleadings rarely provide sufficient information for a thorough assessment. Moreover, the court's 2003 decision jeopardizes the Hague Service Convention's aim of providing efficient methods for service abroad without even truly protecting German defendants: U.S. plaintiffs can still rely on domestic service procedures, such as service on a U.S. subsidiary considered a "mere department" or an "alter ego" of the German defendant.

Fortunately, it seems that the German Federal Constitutional Court has realized the grave consequences of its July 2003 decision. In June 2004, it refused to issue an interlocutory injunction against service of a U.S. civil rights action involving $11 million in punitive damages.[130] Citing its 1995 decision narrowly construing the public order clause,[131] the court reasoned that only circumstances of substantial weight may justify a delay of international service proceedings.[132] Reviewing the claims at stake, the court found that the defendant was not at risk of ruinous litigation and that the service would not cause significant damage to his reputation.[133] Therefore, the court held that halting service was unjustified.[134]

The influence of the *Napster* injunction on the enforcement of future judgments remains to be seen. So far, German courts have applied very liberal standards. They have accepted that service on German-based defendants may be effected within the rendering state, as long as foreign domestic law allows for such service. However, if the German Federal Constitutional Court upholds its 2003 *Napster* decision, courts might begin to review every foreign judgment to determine whether the service in the case violates the Convention's public order clause. If that happens, courts could deny enforcement in numerous cases on grounds of improper service.

C. *Public Policy*

Pursuant to section 328(1) No. 4 of the ZPO, foreign judgments that violate German public policy cannot be recognized or enforced in Germany, just as foreign judgments violating U.S. public policy cannot be enforced in the United States.[135] German public policy is violated when recognition or enforcement of the foreign judgment would produce a result manifestly irreconcilable with fun-

130. BVerfG, 2004 WM 1402 (1402-03) (F.R.G.).

131. *See* BVerfGE 91, 335 (340) (F.R.G.).

132. BVerfG, 2004 WM 1402 (1403) (F.R.G.).

133. *Id.*

134. *Id.*

135. *See, e.g.*, *Hilton*, 159 U.S. at 204-05; UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 U.L.A. at 265.

damental principles of German law, such as basic constitutional rights.[136] Generally speaking, courts have applied rather liberal review standards. Only judgments that are repugnant to Germany's fundamental conceptions of justice and that appear utterly intolerable given the facts are likely to be denied recognition.[137]

1. Violations of German Substantive Law

Most judgments found to violate German public policy are manifestly contrary to German substantive, as opposed to procedural, law. German judges do not examine whether the foreign court applied foreign law correctly; that is, there is no review on the merits (*révision au fond*).[138] However, German courts do compare the outcome of the foreign judgment with the decision that German law would have generated.[139]

Minor differences between foreign and German law will not bar recognition and enforcement of the foreign judgment. Thus, it does not matter that U.S. juries generally award higher damages in tort cases than German courts, especially with regard to damages for pain and suffering,[140] or that U.S. courts sometimes calculate damages differently.[141] Similarly, an award of contingency fees, which are illegal under German law,[142] does not violate German public policy standards since German public policy is not usually concerned with foreign rules for the remuneration of professionals.[143] Only when there is clear evidence that a foreign judgment overcompensates the plaintiff for attorney's fees will German courts refuse, at least in part, to enforce the judgment.[144]

When assessing the extent to which a foreign judgment must deviate from German standards to render it unenforceable, the Federal Court of Justice con-

136. Martiny, *Recognition and Enforcement*, *supra* note 30, at 745; BAUMBACH, *supra* note 59, § 328, ¶ 31; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 502; ZÖLLER, *supra* note 42, § 328, ¶ 70.

137. BGHZ 118, 312 (347-48) (F.R.G.); Martiny, *Recognition and Enforcement*, *supra* note 30, at 745.

138. BGHZ 118, 312 (348) (F.R.G.).

139. *Id.*

140. *See, e.g.*, BGHZ 118, 312 (326-32) (F.R.G.). Interestingly, there is evidence that the amounts awarded by German courts are increasing. Recently, the Higher Regional Court of Hamm awarded a plaintiff _ 500,000—the highest compensation for pain and suffering ever awarded in Germany—against a doctor who was held liable for medical malpractice where his conduct during the plaintiff's birth resulted in severe mental and physical disabilities. *See* OLG Hamm, 2002 Zeitschrift für Versicherungsrecht (VersR) 1163 (F.R.G.); Jörg Fedtke, *Germany, in* TORT AND INSURANCE LAW YEARBOOK: EUROPEAN TORT LAW 2002, 206, 214 (Helmut Koziol & Barbara C. Steininger eds., 2003).

141. *See* Zekoll, *supra* note 4, at 650-51; Gerfried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199, 213-14 (1994).

142. § 49b(2) Bundesrechtsanwaltsordnung (BRAO) (F.R.G.).

143. BGHZ 118, 312 (332-34) (F.R.G.). In this case, the German Federal Court of Justice held that a contingency fee of 40% was not excessive since the plaintiff's lawyer had worked for several years without payment. *Id.* However, if the attorneys are located in Germany and render their services there, a U.S. judgment awarding contingency fees to those attorneys would not be enforceable. *See* Burkhard Heb, *Inländische Rechtsbesorgung gegen Erfolgshonorar?*, 1999 NJW 2485, 2486.

144. BGHZ 118, 312 (334) (F.R.G.).

siders the connection the case has to Germany.[145] The stronger the connection to a German forum, the smaller the deviation needs to be to violate German public policy.[146] For example, the Federal Court of Justice recently held that a case has a very remote connection with Germany when the only connecting factors are the defendant's German citizenship and the fact that he moved back to Germany after committing a tort in the U.S. while he was domiciled there.[147]

Regardless of how closely connected a case is to Germany, it is well established that U.S. judgments awarding punitive damages will generally violate the public policy clause. German law permits awards for compensatory damages, thus effectively allowing aggrieved parties to seek compensation for losses suffered as a direct result of a tortfeasor's action.[148] Unlike U.S. law, however, German law does not provide for punitive, exemplary, or multiple damages, the goals of which are to punish the wrongdoer for his behavior, especially if it was willful or malicious, and to deter other potential wrongdoers from acting similarly.[149] In Germany, the legislature has made it clear that such considerations generally fall within the scope of criminal law and that such damages may not be awarded to punish tortfeasors.[150] Thus, as a basic principle, German civil law provides a remedy for the victim's losses but leaves the question of whether and to what extent the tortfeasor should be punished in the hands of public prosecuters.[151] Given these considerations, German courts will not enforce foreign judgments to the extent that they award punitive, exemplary, or multiple damages.[152]

In dicta, however, the German Federal Court of Justice has established one exception to the general ban on enforcing punitive damages awards: the court

145. *Id.* at (348).

146. *Id.*

147. *Id.* at (348-49).

148. *See* HERMANN LANGE & GOTTFRIED SCHIEMANN, SCHADENSERSATZ 12-13 (3d ed. 2003). For example, the German Federal Court of Justice tends to grant compensatory damages when assessing damages for violations of personality rights by the media. *See* BGH, 1995 NJW 861 (865) (F.R.G.) (considering the magazine defendants' profits when assessing damages in a case of outrageous defamation). For a general overview of punitive elements in German private law, see Carsten Schäfer, *Strafe und Prävention im Bürgerlichen Recht*, 202 Archiv für die civilistische Praxis [AcP] 397 (2002); INA EBERT, PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT (2004).

149. *See* Smith v. Wade, 461 U.S. 30, 54 (1983) ("Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future.") (punctuation omitted). For a general overview of other justifications for punitive damages, see John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 395-96 (2004).

150. *See* 2 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH 17-18 (2d ed. 1896) (stating that recourse to "moral or penal considerations" is not appropriate when assessing damages in civil cases).

151. LANGE & SCHIEMANN, *supra* note 148, at 12-13. For more narrow exceptions to this rule, see *supra* note 148. For a general overview of the delimitation of tort and criminal law in Europe, see 1 CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS ¶¶ 618-23 (1998).

152. BGHZ 118, 312 (334-35) (F.R.G.). For a discussion of this landmark decision, see Zekoll, *supra* note 4, at 655-57; Gerhard Wegen & James Sherer, *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 I.L.M. 1320, 1322 (1993); Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 746 (1992).

stated that it would allow enforcement of punitive or exemplary damages if the award would serve a compensatory purpose.[153] For example, punitive damages may occasionally serve as compensation for non-pecuniary losses that are difficult to prove, or costs and expenses not covered by other types of damages. Nonetheless, it is doubtful that this exception will ever avail a U.S. plaintiff because the court limited its application to cases in which the compensatory objective of a punitive damage award is plainly stated in the foreign court's decision,[154] something that rarely happens in the United States.

The U.S. Supreme Court recently reined in the size of punitive damages awards in *BMW of N. Am., Inc. v. Gore*[155] and *State Farm Mut. Auto. Ins. Co. v. Campbell*,[156] holding that excessive awards violate the Due Process Clause of the U.S. Constitution. In *BMW*, the purchaser of a new vehicle sued the car distributor for damages because the distributor fraudulently failed to disclose that the car had been repainted.[157] The Alabama Supreme Court awarded $4,000 in compensatory damages and $2 million in punitive damages (a ratio of 500:1).[158] The U.S. Supreme Court reversed, holding that the Fourteenth Amendment's Due Process Clause prohibits states from imposing such grossly excessive punishments on tortfeasors.[159] Similarly, in *State Farm*, the Court held that a punitive damages award of $145 million, when compared to compensatory damages of only $1 million, was excessive.[160] However, it is doubtful that the Supreme Court's recent restrictions will change German opposition to punitive damages. While the Court essentially limited the amount of punitive damages that can be awarded, German courts reject them not only because of their excessiveness, but also because of the underlying "penal" rationale behind them, which German courts fear may give plaintiffs a purely commercial incentive to file lawsuits.[161]

2. *Violation of German Procedural Standards*

A manifest deviation from German procedural standards can also trigger the application of the public policy clause.[162] German courts have shown deference for foreign procedures and recognize foreign judgments even if the procedure followed abroad was not identical with German procedure. It is only when

153. BGHZ 118, 312 (334-35) (F.R.G.).

154. *Id.* at (341-42).

155. 517 U.S. 559 (1996).

156. 538 U.S. 408 (2003).

157. 517 U.S. at 563.

158. *Id.* at 565, 567.

159. *Id.* at 562.

160. 538 U.S. at 412, 429.

161. *But see* Volker Behr, *Punitive Damages in American and German Law-Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 161 (2003) (concluding that the shrinking gap between German and U.S. damages awards may lead to the future enforceability of U.S. money judgments).

162. GEIMER, *supra* note 45, at 135; MARTINY, *supra* note 31, ¶¶ 1016, 1021; NAGEL & GOTTWALD, *supra* note 28, §11, ¶ 177; STEIN, *supra* note 38, § 328, ¶ 132.

there is a grave deviation from German procedural standards that recognition is denied.

For example, the Federal Court of Justice has firmly rejected the claim that U.S. discovery rules violate German public policy.[163] Undeniably, U.S. discovery grants litigants more access to evidence held by their opponents and third parties than German procedure, which is based on a tightly controlled judicial fact-finding system. However, the court reasoned that a comparison of U.S. and German discovery methods should not be limited to Germany's rather narrow discovery procedures, but must also take into account the duty of disclosure under German substantive law, which, in practice, may be functionally equivalent to adversarial discovery proceedings in the United States.[164] Differences in how litigation costs are allocated also do not bar the enforcement of U.S. judgments.[165] Thus, the U.S. rule that that each side must bear its own litigation costs has not been regarded as violative of German public policy,[166] even though under German law the victorious party is entitled to recoup from its opponent court fees and attorney's fees.[167] From this discussion it becomes clear that differences in substantive law generally bar enforcement of U.S. judgments in Germany far more often than differences between U.S. and German civil procedure.

IV.
ENFORCEMENT AND EXECUTION

The enforcement of a foreign judgment by German courts and other enforcement organs is contingent on a formal court proceeding. The standard of review depends on the applicable rules. Enforcement under the Brussels Regulations allows for a simplified proceeding,[168] while German domestic law sets stricter standards. Pursuant to sections 722 and 723 of the ZPO, a foreign judgment may only be enforced if a German court renders a judgment of enforcement after determining that all the requirements for recognition set out in section 328 of the ZPO have been met. The action for a declaration of enforceability is an adversarial proceeding and the general rules of jurisdiction apply. The proper

163. BGHZ 118, 312 (323-25) (F.R.G.). Many commentators have argued that the court erred. *See, e.g.*, Rolf A. Schütze, *Die Anerkennung und Vollstreckbarerklärung US-amerikanischer Schadenersatzurteile in Produkthaftungssachen in der Bundesrepublik Deutschland, in* BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT: FESTSCHRIFT FÜR HEINRICH NAGEL ZUM 75. GEBURTSTAG 392, 401 (Walther J. Habscheid & Karl Heinz Schwab eds., 1987).

164. BGHZ 118, 312 (324) (F.R.G.).

165. *Id.* at (325).

166. *Id.* at (326).

167. § 91(1) ZPO (F.R.G.). The recovery of attorney's fees is, however, restricted to the recoupment of statutory fees as established in the Attorney Compensation Act (*Rechtsanwaltsvergütungsgesetz* or RVG). Those fees are calculated in relation to the value of the claim in dispute.

168. *See supra* notes 24-25. Germany also enjoys simplified proceedings with other nations through other bilateral and multilateral enforcement treaties. For more information, see NAGEL & GOTTWALD, *supra* note 28, § 13, ¶¶ 300-559.

venue to file the motion is determined primarily by the defendant's domicile[169] or the location of the assets that are to be seized.[170] The action must be filed before the local court (*Amtsgericht*) if the enforceable amount is _ 5,000 or less;[171] otherwise the regional court (*Landgericht*) has jurisdiction. Either way, the court assesses whether the conditions for recognition set forth in section 328 of the ZPO have been met without reviewing the judgment on its merits.[172] However, the defendant is entitled to raise defenses based on events that occurred after the foreign judgment was rendered.[173] For instance, if a defendant can demonstrate that the judgment has already been paid, the creditor is barred from further pursuing the judgment's execution.[174]

Once the grant of enforceability is rendered, the creditor can apply for an enforceable copy of the judgment, which may be executed in accordance with the German laws of execution (*Zwangsvollstreckung*).[175] While the ZPO provides for a wide range of enforcement mechanisms, only the most important can be named here.[176] Generally speaking, because German and U.S. enforcement procedures are similar, U.S. plaintiffs who have reached the enforcement stage do not encounter more difficulties in Germany than they would if they were trying to collect their awards in the United States.

Money judgments may be enforced by different means, depending on the debtor's assets. A creditor can enforce execution against the assets of the debtor by sending a bailiff to confiscate valuable assets and auction them in a forced sale.[177] In general, to force execution on real estate owned by the debtor, the creditor must choose between a compulsory mortgage of the property (*Zwangshypothek*) as set forth in section 867 of the ZPO, or foreclosure (*Zwangsversteigerung*) or sequestration (*Zwangsverwaltung*) pursuant to section 869 of the ZPO and the provisions of the Foreclosure and Sequestration Act (*Zwangsversteigerungs- und Verwaltungsgesetz* or ZVG).

The plaintiff may also file a motion for a garnishment order with the court that has jurisdiction over enforcement (*Vollstreckungsgericht*). In cases where the debtor does not reside or is not located in Germany, the local court where the debtor's assets are located is the appropriate venue to file such a motion.[178] The *Rechtspfleger*, a court administrator with specialized legal training, will issue the order, which garnishes the debtor's claim against a third party and transfers that

169. § 12 ZPO (F.R.G.).
170. § 23 ZPO (F.R.G.).
171. § 23(1) GERICHTSVERFASSUNGSGESETZ [GVG] [Court organizational statute] (F.R.G.).
172. § 723(1) ZPO (F.R.G.).
173. § 767(2) ZPO (F.R.G.).
174. *See* BORGES, *supra* note 63, at 222.
175. §§ 704-802 ZPO (F.R.G.).
176. For an introduction to the German law of execution, see generally ROLF LACKMANN, ZWANGSVOLLSTRECKUNGSRECHT: MIT GRUNDZÜGEN DES INSOLVENZRECHTS (6th ed. 2003); HANNS PRÜTTING & BARBARA STICKELBROCK, ZWANGSVOLLSTRECKUNGSRECHT (2002); LEO ROSENBERG ET AL., ZWANGSVOLLSTRECKUNGSRECHT (11th ed. 1997); HANS BROX & WOLF-D. WALKER, ZWANGSVOLLSTRECKUNGSRECHT (7th ed. 2003).
177. §§ 808-27 ZPO (F.R.G.).
178. § 828(2) ZPO (F.R.G.).

claim to the creditor for collection. The court serves this order on all three parties: the creditor, the debtor, and the third party. However, German law provides some protection for debtors by restricting garnishment and seizure in certain situations. For example, items that are necessary for personal use or work are exempt from seizure.[179] Further, to prevent the debtor from becoming dependent on public assistance, there is a set minimum wage below which no amount may be seized or garnished.[180] Finally, the heavy emphasis on privacy and confidentiality in German law significantly limits access to information about a debtor's assets outside the debtor's own statement of assets.[181]

CONCLUSION

The laws of recognition and enforcement strongly reflect the level of confidence German law and German judges place in the adjudication proceedings of foreign states. German courts recognize and enforce U.S. money judgments quite liberally. Thus, with regard to judgment enforcement, the phrase "jurisdiction conflicts" does not adequately describe daily court practice. Only in certain situations are creditors prevented from enforcing U.S. money judgments in Germany. These are usually cases where a U.S. court awarded punitive damages, or asserted in personam jurisdiction on grounds of jurisdiction regarded as exorbitant in Germany. It remains to be seen whether the recent *Napster* injunction issued by the German Federal Constitutional Court will affect the relatively liberal approach German courts have taken thus far.

179. § 811 ZPO (F.R.G.).
180. § 850(a)-850(k) ZPO (F.R.G.).
181. WENDY KENNETT, THE ENFORCEMENT OF JUDGMENTS IN EUROPE 83 (2000).

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Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India

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By
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INTRODUCTION

Can domestic legislation honor both the rights of women and the rights of cultural minorities within liberal political systems?[1] Or are the two goals necessarily at odds? Policy makers debate the role of multiculturalism in modern liberal societies and its effect on rights of women. Determining the most constructive approach for a state seeking to accommodate these competing interests requires that policy makers be sensitive to the needs of various cultural communities as well as to the needs of women or other marginalized populations. Perhaps nowhere is this challenge as currently significant as it is in India, a majority Hindu nation that is also home to 138,000,000 Muslims—the third largest Muslim community in the world—and 24,000,000 Christians,[2] and which has seen recent and vehement upsurges in both demands for minority rights and concomitant violence against religious minorities.

This paper studies the impacts of granting group rights to religious and cultural minorities within a nation-state, recognizing that such an entity can be comprised of multiple nations,[3] and examines the methods legislators and judges

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1. For the purpose of this paper, I assume legal and political equality for all citizens to be a basic tenet that defines liberal democracies. For example, India guarantees equal rights to its citizens irrespective of race, gender, ethnicity, or language through its Constitution, whereas theocratic states have legal structures that reflect the religious laws of the majority religious communities in those countries.

2. Census of India, DATA ON RELIGION 2001, *at* http://www.censusindia.net/religiondata/Religiondata_2001.xls.

3. Sarah V. Wayland explains that a nation-state requires both "common culture, broadly defined . . . [and] bounded territorial space . . . . A 'nation-state' exists when the boundaries of the nation, or people, are the same as the boundaries of the state, or political entity." Sarah V. Wayland, *Citizenship and Incorporation: How Nation States Respond to the Challenges of Migration*, 20 FLETCHER F. WORLD AFF. 35, 36 (1996).

in India have used to navigate this balancing act as an example. India is a multicultural and pluralistic democracy, which through its Constitution provides a comprehensive framework for protecting and promoting the rights of religious, cultural, and linguistic minorities. Its successes and failures in balancing multiculturalist goals against women's rights are instructive of viable and non-viable constitutional, legislative, and judicial strategies a state might adopt to protect both the rights of women and the rights of cultural minorities.[4]

Part II outlines the debate surrounding the role of multiculturalism in modern liberal societies and its effect on the rights of women. Part III briefly discusses terminology and then deconstructs certain assumptions within the above debate as to the meanings of *culture*, *multiculturalism*, and *group rights*. Part IV considers multicultural approaches to governance, with India as a case study of successes and lessons for the future. Part V explores possible solutions, including a constitutional amendment that would affirm the rights of women within a scheme that still protects group rights.

I.
THE DEBATE

A classical liberal rights scheme bestows rights on individuals rather than groups. These rights are generally "negative" rights such as freedom from government interference in one's speech, religion, and political ideology, or the right to freedom from discrimination. Barry Brian explains that this "strategy of privatization" can only conceive of individuals, and not groups, as possessors of human rights, because providing individuals with civil and political rights against state action gives them the necessary protection to promote their cultural identities without sacrificing either their individual rights or their right to culture.[5]

Those concerned with maintaining the existence of minority cultures within a dominant national majority culture worry that such a classical scheme based on individual rights cannot adequately protect minority cultures. They seek the implementation of specific legal obligations on the state not only to abstain from interfering with the group rights of minorities but also to provide affirmative support for the enjoyment of such rights, which range from negative rights such as the right to group existence[6] and the right to equality and freedom from discrimination, to positive rights such as the right to establish autonomous regimes through their right to self-determination and fulfillment of social and economic rights.

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4. *See generally* Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35 (2001).

5. BARRY BRIAN, *The Strategy of Privatization*, *in* CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 19-62 (2001).

6. The right to group existence is established in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, G.A. Res. 2670, 3 U.N. GAOR, pt. 1, U.N. Doc. A/810, p. 174, 78 U.N.T.S. 277 (criminalizing "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such").

Without legal protection, group-rights advocates worry that minority groups will always be at a disadvantage within the wider society.[7] In a rapidly changing world, in which cultural identity forms states, and in which mass media can penetrate even the most isolated village, minority cultures are frequently undermined by social and economic forces beyond their control and the control of their governments, no matter how sympathetic. These advocates argue that only when states recognize group rights as necessary human rights will cultural minorities be able to survive in a global environment that is often hostile to their very existence.[8]

Article 27 of the International Convention on Civil and Political Rights (ICCPR) exemplifies this conception of group rights, guaranteeing "ethnic, religious, or linguistic minorities . . . the right . . . to enjoy their culture, to profess and practice their own religion, or to use their own language."[9] Couched in both individualistic and collective terms,[10] the notion of group rights has been used to advocate for the governance of minority groups by separate and culturally specific laws. In India, such group rights include personal law regimes, the concept of which can be traced back to the colonial era wherein the early colonial states promised the various religious communities their own set of laws to govern "inheritance, marriage, caste, and other religious usages or institutions."[11] Personal laws are sometimes used as cultural defenses to criminal prosecutions and as justification for the observation of cultural practices that have a tendency to discriminate against women.[12] Such discriminatory personal or group laws govern women in various Indian communities.[13]

Feminist legal scholars worry about the impact group rights have on the rights of women.[14] Because group rights provide the leaders within a group the power to discriminate against the weaker members within the group, a legal commitment to group rights may prove detrimental to women.[15] Combined with the fact that defining culture seems to be the prerogative of the leaders

7. *See generally* BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY (2000).

8. *See, e.g.*, Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215 (2004).

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 27, GA res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171 [hereinafter ICCPR].

10. *See* HENRY J. STEINER & PHILIP ALSTON, *Comment on Autonomy Regimes*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 992-93 (Henry J. Steiner & Philip Alston eds., 1st ed. 1996).

11. Kunal Parker, *Observations on the Historical Destruction of Separate Legal Regimes*, *in* RELIGION AND PERSONAL LAW IN SECULAR INDIA—A CALL TO JUDGMENT 184 (Gerald James Larson ed., 2001).

12. *See, e.g.*, Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

13. *See* Kirti Singh, *Obstacles to Women's Rights in India*, *in* HUMAN RIGHTS OF WOMEN—NATIONAL & INTERNATIONAL PERSPECTIVES 375-396 (Rebecca Cook ed., 1994).

14. *See generally* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996).

15. *See generally*, Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537 (2004).

within the group, who are traditionally men, group rights appear juxtaposed against women's rights. In India for example, Muslim fundamentalist leaders historically used the personal laws as tools for denying equality to Muslim women, while "[t]he state continued to privilege group rights over the equality rights of Muslim women, rather than insisting on reform."[16] Granting group rights to preserve patriarchal traditional cultures thus sometimes appears at odds with a feminist project.

The ever-widening wealth disparity between first-world and third-world nations, increasing global poverty, international market integration, and globalization has spawned massive trans-border displacement of peoples and cultures. Multicultural populations are a reality facing most states today, forcing them to utilize political and legislative tools to balance the rights of women with the cultural rights of minority groups. Since its independence, India has relied on a two-tier system of personal laws that are specific to particular religious communities and universal civil codes that apply to all citizens. While the latter appear to protect the rights of Indian women to equal treatment and equal opportunity, the personal laws of most religious communities have historically undercut women's access to judicially enforceable civil rights.

II.
DEFINITIONS AND ASSUMPTIONS

Before proceeding with an exploration of the successes and failures of various Indian legislation and case law that address the balance between minority group rights and the rights of women, I would like to define a few concepts that are crucial to this paper's exploration.

A. Culture

None of the international conventions that purport to protect or promote group rights for minority cultures have defined what they mean by "culture," however, it is necessary to explain exactly what is being protected. J. Oloka-Onyango and Sylvia Tamale believe that the most important aspect of culture is that it is a "dynamic and evolving feature of human action," thought, and identity.[17] The United Nations Development Programme echoes this notion, asserting that "[c]ulture is not a frozen set of values and practices. It is constantly recreated as people question, adapt and redefine their values and practices to changing realities and exchanges of ideas."[18] Such a progressive understanding

16. VRINDA NARAIN, GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA 107 (2001).

17. J. Oloka-Onyango & Sylvia Tamale, *"The Personal is Political" or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691, 707 (1995).

18. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD 4 (2004).

of culture as dynamic and disunited appeals to those who favor granting group rights to minorities.[19]

I would, however, contend that the term *culture*, when used to determine the rights or privileges to be given to any community, must refer to those practices that have a positive effect on the wellbeing of all group members and not just the dominant few.[20] This assertion is based on the basic goal of liberalism: ensuring the welfare of all within a community, without regard to gender, race, ethnicity, religion, or culture.

Moreover, one must take care not to essentialize culture. By describing cultural practices in homogenous terms, one ignores the relativism of these practices. Cultural relativism must be considered in any discussion on the power relationships within a culture and in determining who has the right to define what culture means. By denouncing acts practiced by certain members of a community, we help in informally institutionalizing these practices. Traces of this trend can be found in the revival of fundamentalism in some religions, which is premised on protecting the communities from outside influences alleged to desire the destruction of these groups' religious and cultural heritages. For example, after the Indian Bhartiya Janata Party (BJP) hijacked the agenda of a uniform civil code from the progressive liberals and feminists, the Indian Muslim community has more stiffly resisted a move towards formulation of a uniform civil code.

B. Multiculturalism and Gender Justice

Given that multiculturalism is a reality in almost every nation and that some traditional cultures have historically oppressed women, governments bear the burden of formulating policies that protect women's rights within a multicultural framework. Post-independence India has a strong democratic tradition and a commitment to protecting individual civil and political rights. Yet Indian society is also one of the world's most culturally diverse, with innumerable linguistic, cultural, and religious groups and influences from Dravidian, Aryan, Mughal, British, and recently U.S. traditions. Due to the sheer diversity of the Indian populace, Indian policy makers have faced a tough challenge in providing space to various minority groups to prosper while also ensuring that the individual rights of its citizens, including women, are protected.

Will Kymlicka believes that it is possible to protect multicultural ideals within a liberal democratic framework. On the importance of culture to an individual's development of self-identity, he notes: "Liberal values require both individual freedom of choice and a secure cultural context from which individuals can make their choices. Thus liberalism requires that we can identify, protect,

19. *See generally*, Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1992).

20. *See generally*, David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143 (1995-96).

and promote cultural membership, as a primary good."[21] Therefore, the importance of culture and group identity to an individual's development as a participating citizen requires leaders of multicultural liberal societies to protect both individuality and group identity.

There is merit to the argument made by "multiculturalist liberals" like Kymlicka, that membership in a group with its own language and history is important to an individual's sense of self and self-respect. But, as I argue in the beginning of this Article, within a liberal framework, no justification exists for granting group rights to minorities. Is there then any means of achieving the balance between the competing interests of multiculturalism and individual rights, including women's rights? Yes. The legitimate goal of protecting minority cultures can be accomplished by giving minority groups privileges, instead of rights, to employ necessary means aimed at preserving their group identities without infringing on the individual rights of those who constitute these groups. *Rights* differ from *privileges* in the sense that a fundamental right granted under a constitution imposes a corresponding duty on the state to protect that right. A privilege, on the other hand, does not impose any such obligation on the state. It merely gives an individual the liberty to do something without interference from the state; in other words, an individual has no legal duty to refrain from doing that privileged action.[22] Granting privileges to groups for the preservation of their religious or cultural identity, does, however, require that the limits to such privileges be defined. The limits must be in consonance with the purpose of granting these privileges in the first place, that is, to further the wellbeing of an individual. In this sense, any practice, whether cultural or religious, that hampers the growth or well-being of an individual within that minority culture *cannot* be legally protected within a rights-based framework.[23] So, in the example of India, even the personal laws would be subject to the test of fundamental rights enshrined in the Indian Constitution, including the right to equality.

An ideal strategy, then, would be for the Indian legislature to honor the Constitution by drafting a uniform *secular* civil code that meets the test of equality guaranteed under the Constitution, providing individuals with the option to be governed by their personal laws. This uniform civil code would achieve twin objectives: protecting the individual rights of citizens from being subsumed by group rights, and offering individuals the privilege to choose to be governed by their personal laws. In addition, the code would put pressure on minority groups and less powerful individuals within these groups, whether they are women or other sub-groups, to take the initiative to bring their personal laws into parity with the secular civil code with regard to the equality of rights to all members within the group.

21. WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 169 (1989).

22. For further discussion on the difference between *rights* and *privileges*, see WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 71 (1923).

23. For a discussion of minority rights in an Asian context, see Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

The above discussion regarding privileges underlies "reasonable pluralism,"[24] which aims to create a civic nation in which the state protects diverse religious or cultural practices so as to promote harmonious co-existence of majority and minority groups, as well as the well-being of all individuals. Reasonable pluralism incorporates the conceptions of tolerance and recognition of diversity among views. However, it restricts cultural and religious values to the private sphere, the consensus being the norm for regulating political associations. Thus, a state pursuing this model of liberalism could not authorize practices that are repugnant to the well-being of individuals—men or women.

Granting group rights in an unrestricted fashion would protect some cultural practices that have historically oppressed women. Condoning the oppression of some group members through legally protecting those cultural practices is at odds with a liberal rights agenda minded towards ensuring equal rights for all citizens. There is no doubt that globalization has profoundly influenced multiculturalism, and controversies and disagreements are bound to surround the contours of a multicultural society. In the words of Aung San Suu Kyi, "[i]t is precisely because of the cultural diversity of the world that it is necessary for different nations and peoples to agree on those basic human values which will act as a unifying factor."[25] We ought to ensure that multiculturalist notions conform to universal human rights norms, thereby ensuring women's rights within a protected culture or group.

III.
MULTICULTURAL APPROACHES TO LAW AND GOVERNANCE

A. The Three Multicultural Approaches to National Governance: Assimilation, Integration, and Social or Cultural Pluralism

1. Assimilation

An assimilationist approach imposes the dominant national culture on minority groups. Some feminist scholars believe that this is the best strategy that western states can follow to ensure the protection of rights of women within immigrant minority groups. Assuming that at least some forms of gender discrimination are culturally-based, Susan Moller Okin suggests that women in patriarchal minority cultures might benefit from integration into a less patriarchal majority culture.[26] I do not believe, however, that such drastic measures would necessarily be in the interest of women within minority groups in such countries. First, any such attempt would be met with strong resistance within the community, which might result in strengthening the cultural practices, thus putting a stronger pressure on the women in these groups to observe those oppressive

24. JOHN RAWLS, POLITICAL LIBERALISM 36 (1993).

25. Aung San Suu Kyi, Empowerment for a Culture of Peace and Development, Address to the WCCD in Manila (Nov. 21, 1994), *at* http://www.ibiblio.org/freeburma/assk/assk3-2c.html.

26. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 22-23 (Joshua Cohen et al. eds., 1999). *See also* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996).

cultural practices. A state can do very little to control the exercise of cultural practices in the private sphere; it could not, for example, realistically prevent a Muslim woman from wearing a veil inside her home. Second, even if the government can implement strong measures to control such practices and to assimilate minorities into the mainstream culture, women who have often lived in a protected environment might find themselves more vulnerable and exposed. If a state were suddenly to proscribe a particular cultural practice with gender implications, a woman might not consider herself liberated. If, however, the practice were to be weakened over a period of time through giving her tools for growth such as education and economic independence, the movement for change would come from within rather than without, increasing her ability to make a meaningful choice.

As an example, consider the interpretation of Muslim personal laws in India, where Muslims are a minority, as compared to other Muslim countries. In India, attempts to modernize Muslim personal laws, especially the laws affecting women's rights, have met with stiff resistance within the Muslim community. Courts in other Islamic countries, however, have modernized their interpretations of Muslim personal laws without any outcry from the religious clerics or the community in general.[27]

Thus, the key to reconciling the goals of multiculturalism and feminism lies not in asking women from minority cultures to assimilate, but rather recognizing that multiculturalism and feminism are neither polar opposites nor mutually detrimental. Relativism exists within the discourses of both multiculturalism and feminism. Western feminists who have branded non-western cultures as sexist and inferior to their western counterparts in assaults against multiculturalism are in no sense less relativist than those outside of western societies who use the rhetoric of culture *qua* group rights to maintain patriarchal systems.[28] Arguments on both sides harm the women's rights movement.[29]

2. *Integration*

An integrationist approach asks citizens to restrict the practice of their minority religion, language, or ethnic heritage to the private domain. Article 44 of the Indian Constitution, which directs the state to create a uniform civil code, is representative of an integrationist approach towards multiculturalism, as it aims to create a civil code that applies to all communities in India, irrespective of

27. *See, e.g.*, A.G. Noorani, *Shah Bano: Bangladesh Shows the Way*, *in* SHAH BANO AND THE MUSLIM WOMEN'S ACT A DECADE ON: THE RIGHT OF DIVORCED MUSLIM WOMEN TO *Mataa*, Readers and Compilations Series 25–26 (Women Living Under Muslim Laws, Readers and Compilations Series, 1998) (noting that the High Court Division in Bangladesh has interpreted Aiyats 240-242 of Quran to hold that a divorced woman has the right to receive a reasonable sum for maintenance for an indefinite period beyond *iddat*).

28. *See generally* Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

29. *See generally* Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201 (1999).

religion, while simultaneously protecting individuals' right to practice their religion privately.[30]

3. Social/Cultural Pluralism Approach

A social or cultural pluralism approach allows the existence of different religious, cultural, and ethnic principles in the public sphere. India's framework of separate personal laws for various religious communities is representative of this model and is also a good example of how a multiculturalist approach to law and governance in India has resulted in undermining women's rights. As discussed later in this Article, some people have used the rhetoric of cultural pluralism mainly for political gains without taking into account the suffering of the weaker members of the minority groups that enjoy the protection of multicultural policies.

B. Multicultural Governance in India

The task of creating a democratic system of governance after India's independence was enormous. The sheer linguistic, ethnic, religious, racial, and cultural diversity of the Indian populace posed special challenges to the constitutional framers, who understood that national unity and inter-group harmony would require protection for minority groups. While the members of the Constituent Assembly agreed on the need for a solid framework of fundamental rights, they did not agree on how to blend a scheme of civil and political rights with the concurrent challenges of forging structures for economic and social governance. It is in this context of formational dilemmas that the contemporary debate surrounding multiculturalism and its impact on women's rights in India needs to be examined.

1. The Indian Constitution

Post-independence India followed a policy of cultural pluralism by maintaining systems of separate personal laws for Hindu, Muslim, and Christian communities, while concurrently assigning itself the goal of working towards a uniform civil code. Including a Declaration of Rights was very important to the early drafters. As Granville Austin noted: "India was a land of communities, of minorities, racial, religious, linguistic social and caste. . . . Indians believed that in their 'federation of minorities' a declaration of rights was as necessary as it had been for the Americans."[31]

When addressing minority group safeguards in the Draft Constitution to the Assembly, Dr. B.R. Ambedkar, Chairman of the Drafting Committee, observed:

> I have no doubt that the Constituent Assembly has done wisely in providing such safeguards for minorities as it has done. In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate

30. INDIA CONST. art. 44.

31. GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 54 (1999).

> themselves. A solution must be found which will serve a double purpose. It must recognize the existence of minorities to start with . . . . The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish.[32]

The group rights granted to minorities, including restricting practices that were per se discriminatory against women, were not absolute, but rather were subject to state intervention. In sub-committee meetings, some members opposed allowing the free practice of religion and thought the definition of "practice" was too wide, since this could include such anti-social practices as *devadasi*,[33] *purdah*,[34] and *sat.i*[35] Due to protest by the sub-committee members, the Advisory Committee on Fundamental Rights altered the Minorities Sub-Committee's provisions, and in its own report instructed that the right to practice religion freely should not prevent the state from making laws providing for social welfare and reforms, including laws protecting the rights of women, a provision established in Article 15 of the Constitution.[36]

Consequently, the drafters created fundamental constitutional rights with an explicit recognition of the need to protect group rights as well. Article 29, for example, protects the rights of groups to preserve their language, script, and culture and prohibits discrimination in access to public educational institutions based on religion, race, caste, or language.[37] Article 30 protects the right of religious and linguistic minority groups to establish educational institutions.[38] Other articles of the Constitution that guarantee certain fundamental rights to all citizens also operate as safeguards for groups, such as equality before the law (Article 14), freedom from discrimination on the basis of religion, race, caste, sex or place of birth (Article 15), and equal opportunity in public employment (Article 16).[39] Articles 29 and 30 bestow a positive right on groups to preserve their culture, whereas Articles 14 and 15 are couched in more individualistic terms, granting negative rights to individuals to protect them from excesses of the State.

While the negative protections from discrimination based on cultural affiliation appear in the early articles, the possibility of a uniform civil code that would ensure all citizens' equal rights to freedom from oppression appears in Part IV of the Constitution. This Part, named the "Directive Principles of State Policy," contains a range of directives to the state to seek economic, social, and

32. Constituent Assembly of India—Volume VII (Nov. 4, 1948), *available at* http://parliamentofindia.nic.in/ls/debates/vol7p1b.htm.

33. The practice of marrying a woman to a deity or temple.

34. *Purdah* literally means screen or veil. Women observing *purdah* cover themselves from head to toe and avoid the male gaze at home by remaining behind curtains and screens. *See, e.g.*, Kings College History Department, *Purdah*, *at* http://www.kings.edu/womens_history/purdah.html.

35. A widow observing *sati* immolates herself on her husband's funeral pyre.

36. INDIA CONST. art. 15 (prohibiting the state from discriminating "against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them" and providing that "[n]othing in this article shall prevent the State from making any special provision for women and children.").

37. *Id.* art. 29.

38. *Id.* art. 30.

39. *Id.* arts. 14, 15, 16.

cultural protections for Indian citizens. Article 41, for example, addresses the right to work, education, and public assistance.[40] Article 38A addresses access to justice and free legal aid.[41] Article 44 establishes the goal of a uniform civil code, though its language, like the language of the other articles in Part IV, is only exhortatory: "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."[42]

The drafters hoped that a civil code would ensure harmony between groups and strengthen the secular fabric of the country. Instead, contemporary India suffers from internal strife and communal violence. The goal of harmonious multicultural co-existence has not yet succeeded in India where manifestations of continued inter-group tensions include the demolition of the Babri Masjid by a Hindu mob in 1993, followed by the Bombay Riots, in which over 400 persons were killed; the murder of a Christian missionary and his two sons by a Hindu mob in 1999; the Best Bakery case, in which eleven Muslims and three Hindus were burned alive in March 2002 to avenge the death of fifty-eight people on a train carrying Hindu activists in February of the same year; and the attack by Muslim terrorists on a Hindu temple in Gujarat that killed thirty persons in September 2002. Moreover, Indian leaders have failed to prioritize gender justice within the governance system, leading to a lack of protection for women whose communities operate under the personal religious laws. More recently, support for the adoption of a uniform civil code has not been based on a recognition that women's rights might otherwise suffer under the personal laws. Rather, the support, especially from the Hindu Right, stems from a desire to limit the rights of cultural minorities. Ratna Kapur and Brenda Cossman have observed:

> It was this dichotomized discourse of the debate that inadvertently allied the women's movement with the Hindu Right and its vicious attack on minority rights. Despite the efforts of some feminist activists and organizations to distinguish their position, within the broader political discourse the positions were seen as one and the same. Feminist efforts to challenge the oppression of women within the private sphere of the family were appropriated, and transformed to support the communalist discourse of the Hindu Right.[43]

2. *Legislation*

As discussed above, the Indian Constitution exhorts the state to create a uniform civil code. Indeed, the idea of a uniform civil code predates the Constitution to the time of the British rule in India. Historians have noted that the institutionalization of separate laws reinforced the boundaries between minority communities and solidified identities along religious affiliations.[44] Instead of

40. *Id.* art. 41.

41. *Id.* art. 39A.

42. *Id.* art. 44; *see also* P.M. Bakshi, The Constitution of India: with comments & subject index / selective comments (1992).

43. RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES—FEMINIST ENGAGEMENTS WITH LAW IN INDIA 64 (1996).

44. *See* Maitrayee Mukhopadhyay, *Between Community And State: The Question Of Women's Rights And Personal Laws*, *in* FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA 108-129 (Zoya Hasan ed., 1994).

moving toward a secular, equality-based legal system, the recognition of personal laws under the guise of protecting minorities from a dominant majority culture helped institutionalize patriarchal traditional practices that disadvantage Indian women. In particular, support for personal laws relating to polygamy, divorce, property inheritance, and maintenance, all of which directly impact the lives of women, lies at the center of the historical resistance to the implementation of a uniform civil code.

At present, India does not have a uniform civil code that would apply to all citizens irrespective of their religious or cultural identity.[45] However, all Indians can choose a civil marriage under the Special Marriage Act of 1954[46] irrespective of their religion. Should a couple register under this Act, they are bound by the Act's provisions, along with the provisions of the Indian Succession Act,[47] which relates to the succession of property, instead of their respective personal laws.[48] If a couple does not register under the Special Marriage Act, their respective personal laws apply. Thus the Special Marriage Act is an "opt out" provision for individuals who do not want to be bound to the marriage rules of their religious communities. Other examples of optional civil codes are the Guardian and Wards Act of 1890,[49] which allows civil courts to appoint a guardian for a minor. While the court is required to consider the minor's religion and governing personal laws, the minor's overall welfare is paramount. Also, the Medical Termination of Pregnancy Act of 1971[50] permits any woman in India to have an abortion irrespective of her religious or cultural identity.

Legislative reforms have followed different courses within the various religious communities. The first progressive legislation for women's rights related to restricting the practice of child marriages. Child marriage was a common practice among most Indians during the British rule, and various leaders attempted to abolish the practice. The first attempt was the Indian Christian Marriage Act of 1872, which proscribed marriage to girls under the age of twelve.[51] Due to this Act's social ineffectiveness, in 1891 the government passed the Age of Consent Act to prevent the consummation of marriages before the age of twelve.[52] Despite different practices across the various religious communities and avowed dissatisfaction amongst orthodox Hindu and Muslim classes, all political parties ultimately accepted the legislation.[53] Further, in

45. Criminal laws, on the other hand, are applicable irrespective of the caste, sex, religion or culture.

46. Special Marriage Act, No. 43 (1954) (India).

47. Indian Succession Act, No. 39 (1925) (India).

48. If two Hindus marry they may choose to be bound instead by the Hindu Succession Act No. 30 of 1956.

49. Guardian and Wards Act, No. 8 (1890) (India).

50. Medical Termination of Pregnancy Act, No. 34 (1971) (India).

51. Indian Christian Marriage Act, No. 15 (1872) (India).

52. Previous to this reform, a husband could legally cohabit with his wife if she was at least ten years old.

53. Shahida Lateef, *Defining Women through Legislation*, *in* DEFINING WOMEN THROUGH LEGISLATION IN FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA 43 (Zoya Hasan ed., 1994).

1929, the Child Marriage Restraint Act raised the minimum marrying age for girls to fourteen.[54]

The Muslim Personal Law (Shariat) Application Act of 1937[55] was the first women's-rights legislation targeted at Muslim communities. The Shariat Act clarified and codified civil marriage laws to ensure the protection of divorced Muslim women's inheritance rights.[56] In support of the Bill, a Member of Parliament, Mr. Abdul Qaiyam, a Muslim himself, noted, "the *Shariat* Act [is] the result and the outcome of the great awakening that has taken place in the Muhammadan community in India . . . to restore all the rights which were granted by the Koran to Muslim women so as to put them on terms of absolute equality with men."[57] Another Member of Parliament, Mr. M.S. Aney from Berar, suggested doing away with the office of the *qazis*, which registers Muslim marriage deeds and conducts Muslim marriages, given that the Muslim community had turned to secular legislative remedies to this aspect of women's oppression. The Dissolution of Muslim Marriage Act of 1939,[58] giving Muslim women a right to unilateral divorce, was the last progressive legislation in favor of Muslim women in India. Previous to the passage of the Dissolution of Muslim Marriages Act, the Gazette of India noted:

> There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India.[59]

The Act was compiled as an amalgamation of four different schools of jurisprudence under Islam, "picking the most liberal features from each of them."[60]

Civil legislation impacting the rights of women affected Muslim communities before addressing the rights of women under the Hindu personal laws. The second Hindu Law Committee appointed in 1944 to look into legislative reforms for a comprehensive code of marriage and succession submitted its recommendations for enacting a Hindu Code in 1947.[61] Committee reports indicate that improving women's status was the principle motivation for changes proposed to the Hindu Law in the draft code.[62] Accordingly, the Committee recommended

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54. Child Marriage Restraint Act, No. 19 (1929) (India).

55. Muslim Personal Law (Shariat) Application Act, No. 26 (1937) (India).

56. *Id.*

57. 1939: I LEGISLATIVE ASSEMBLY DEBATES (OFFICIAL REPORT), 621 (1939).

58. Dissolution of Muslim Marriages Act, No. 8 (1939) (India). *See also* Lateef, *supra* note 53..

59. *Statement of Objects and Reasons Issued With the Bill Which Became the Dissolution of Muslim Marriages Act, 1939*, GAZETTE OF INDIA, 1936, Part 5:154, *reprinted in* SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON: THE RIGHT OF DIVORCED WOMEN TO *Mataa* 33 (Women Living Under Muslim Laws, Readers and Compilations Series, 1998).

60. SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA, POLITICAL AND PRIVATE REALITIES: 1890s - 1980s 71 (1990).

61. FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 78 (1999).

62. Robert D. Baird, *Gender Implications for a Uniform Civil Code, in* RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 145 (Gerald James Larson ed., 2001).

allowing divorce and abolishing the traditional practice of polygamy. The Committee further recommended granting equal property rights to daughters and sons. Traditionalists opposed the Bill on many grounds, claiming that the grant of such rights to women impermissibly deviated from traditional Hindu practices. For example, the Shastra Dharma Prachar Sabha, a Hindu organization, distributed pamphlets during the debates on the Bill titled "Why Hindu Code Is Detestable," which proclaimed that the bill would allow inter-caste marriage, Sagotra marriage,[63] and free divorce, while criminalizing bigamy and giving married women rights to their father's property. This last consequence was especially alarming to Hindu traditionalists who saw women's property rights as a Muslim practice with no place under Hindu family law.

3. *Roleof the Judiciary*

The Indian judiciary, especially the Supreme Court, in its role as the defender of the Constitution, has been the forerunner in protecting minorities and safeguarding the multicultural ethos of the polity.[64] Though the Supreme Court has adjudicated a plethora of cases balancing the rights of minorities against more universal civil rights, I will limit my discussion here to those cases that have impacted the rights of women within minority communities.

The question of who has the power to interpret the personal laws of the various religious communities within India has plagued the judiciary from its post-independence beginnings. In *Ratilal v. State of Bombay*,[65] the Indian Supreme Court ruled that no outside authority had the right to proclaim the essential parts of a religion. The case dealt with the constitutionality of certain state Trust Acts passed with a view to regulate religious and charitable trusts. The petitioner challenged the validity of these Acts on the ground that they violated the right to freedom of religion under Articles 25 and 26 of the Constitution. The Court, allowing the appeal in part, held:

> What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run contrary to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.[66]

Further clarifying the Court's position, Justice Mukherjea wrote, "[n]o outside authority has any right to say that these [religious practices] are not essential parts of religion and it is not open to the secular authority of the state to restrict or prohibit them in any manner they like under the guise of administering the trust estate."[67] According to the Court, the state had power to regulate the trusts by a valid law, but administration of the trust in accordance with the

63. Marriage to one's relatives.

64. *See* P. Ishwara Bhat, *Constitutional Feminism: An Overview*, (2001) 2 S.C.C. (Jour) 1, *at* http://www.ebc-india.com/lawyer/articles/2001v2a1.htm.

65. A.I.R. 1954 S.C. 388.

66. *Id.* at 391.

67. *Id.* at 392.

laws was the prerogative of the religious bodies.[68] This holding demonstrated a break with prior doctrine, which considered personal views and reactions to be irrelevant even when the belief was a genuine and conscious part of the profession or the religion.

In the 1958 case *Mohammad Hanif Qureshi v. State of Bihar*, the Court reversed itself, holding that it was competent to adjudicate on the essentials of any religious practice.[69] The petitioners in this case, Muslim butchers, challenged the validity of certain state laws banning the slaughter of certain animals, including cows, on the grounds that the prohibitions violated their fundamental right to freedom of religion under Article Twenty-Five. They claimed that Islam required Muslims to sacrifice a cow on Bakr-Id-Day, a holy day in Islam.[70] Referring to interpretations of various religious books and practices of Muslims in India, the Court declined to hold that sacrificing a cow was an obligatory practice under Islam.[71]

In *Durgah Committee v. Hussan Ali*, the Court further clarified its position on adjudicating right-to-religion claims:

> In order that the practices in question should be treated as part of religion, they must be regarded by the said religion as its essential and integral part . . . unless such practices are found to constitute an essential or integral part of a religion, their claim for protection under Art. 26 may have to be carefully scrutinized.[72]

The Court went on to add that it would decide what constitutes an essential part of religion or religious practice with reference to the doctrine of that particular religion.[73] Thus, current doctrine gives courts the power to interpret the personal laws of India's religious communities. Courts had exercised this power in a number of cases,[74] but it was not until the Supreme Court's ruling in *Mohammed Ahmed Khan v. Shah Bano Begum*,[75] which granted maintenance rights to a destitute woman, did fundamentalist religious leaders create enough pressure on the Parliament to overrule the judgment and the doctrine.

Shah Bano was an aging Muslim woman whose husband unilaterally divorced her and then refused to pay her maintenance beyond the period of *iddat*, an obligatory three-month waiting period after a divorce during which remarriage is prohibited. Shah Bano sued her husband under the Criminal Procedure Code Section 125, which allows destitute wives to sue their husbands for maintenance.[76] Before *Shah Bano*, the Supreme Court had already ruled in two separate decisions that divorced Muslim women were entitled to maintenance even when they had received the customary one-time sum due to them under Muslim

68. *Id.* at 391.
69. A.I.R. 1958 S.C. 731.
70. *Id.* at 739.
71. *Id.* at 740.
72. A.I.R. 1961 S.C. 1402, 1415.
73. *Id.*
74. *E.g.*, Abdul Jalil v. Uttar Pradesh, A.I.R. 1984 S.C. 882 (holding that no text in the Holy Koran prohibits removal or shifting of graves); R.M.K Singh v. State, A.I.R. 1976 Pat. 198 (holding that the performance of particular Hindu religious ceremonies is an integral part of Hinduism).
75. (1985) 1 S.C.S. 96 [hereinafter *Shah Bano*].
76. *Id.*; INDIA CODE CRIM. PROC. § 125.

Personal Law, provided that sum was not adequate for their maintenance. In *Bai Tahira v. Ali Hussain Fidaalli Chothia*,[77] the Court ruled that Criminal Procedure Code Section 127, which provides that a woman is not entitled to maintenance if she receives sums under any customary or personal law payable to her on divorce, does not negate the social purpose underlying Section 125 and that "ill-used wives and desperate divorcees" could not be driven "to seek sanctuary on the streets."[78] The Court further held that the purpose of payment "under any customary or personal law" is to provide the divorcee with maintenance and to keep her from destitution. *Bai Tahira* proscribes a husband from hiding behind Section 127(3)(b) to shirk his Section 125 maintenance responsibilities.

Fazlunbi v. Vali reached the Supreme Court one year after *Bai Tahira*, in 1980.[79] *Fazlunbi* also involved a wife's petition for maintenance. The high court[80] sought to distinguish this case from the Supreme Court's binding judgment in *Bai Tahira*, under which the wife would be entitled to maintenance, on the ground that the husband in *Bai Tahira* had not raised a plea based on Section 127(3)(b). On appeal to the Supreme Court, that tribunal made clear in the course of overruling the lower court's decision not to grant relief to the ex-wife that "[n]either personal law nor other salvationary plea will hold against the policy of public law pervading S.127 (3)(b) as much as it does [not hold against] S.125."[81] *Bai Tahira* and *Fazlunbi*, therefore, clearly established that Muslim women have a right to continued maintenance under Section 125 if the customary amount paid at divorce is insufficient for their livelihood.

Shah Bano, issued five years later, went a step further, holding that a Muslim man has an obligation to pay maintenance to his ex-wife irrespective of the adequacy of the customary payment. It further held that in cases of conflict between the criminal code and personal laws, the criminal code would prevail. Writing for the Court, Chief Justice Chandrachud explained:

> [S]ection 125 is a part of the Code of Criminal Procedure, not of the civil laws which define and govern the rights and obligations of the parties belonging to particular religions . . . . Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it make as to what is the religion professed by the neglected wife, child, or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of Section 125.[82]

However, the Court held that Section 125 did not contradict the Muslim Personal Law. In support of this holding, the Court noted:

77. (1979) 2 S.C.R. 75 [hereinafter *Bai Tahira*].

78. *Id.* at 98.

79. (1980) 3 S.C.R. 1127 [hereinafter *Fazlunbi*].

80. High courts in India besides the Supreme Court of India are the courts which have both original and appellate jurisdiction, in addition to having writ jurisdictions.

81. *Fazlunbi*, (1980) 3 S.C.R. at 1141.

82. *Shah Bano*, (1985) 1 S.C.S. at 101.

> There can be no greater authority on this question than the holy Quran . . . . Verses (Aiyats) 241 and 242 of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives.[83]

The *Shah Bano* judgment caused agitation among Muslim religious communities, especially the portion of the Court's opinion that held the Quran itself supported the argument that continuing maintenance did not violate the tenets of Islam. Under political pressure from the leaders of the Muslim community, which resulted from the *Shah Bano* judgment, Parliament, dominated by a Congress Party majority, passed the Muslim Women's (Protection of Rights on Divorce) Act in 1986 (MWA).[84] The effect of the MWA was to reverse the right to continuing maintenance for divorced Muslims pursuant to Section 125 of the Criminal Code.[85] The MWA provides for a one-time payment within the *iddat* period. Section 3(1), "Mahr or other properties of Muslim women to be given to her at the time of divorce," states:

> Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband; (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.[86]

Recently, various high courts in India have interpreted the scope of Section 3(1) to hold that a divorced Muslim woman is entitled to fair and reasonable maintenance within the *iddat* period, contemplating her future needs. For example, the Gujarat High Court's judgment in *Arab Ahmad bin Abdullah v. Arab Bail Mohamuna Sauyadbhari*, held that "in simplest language the Parliament has stated that the [MWA] is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking away some rights which a Muslim Woman was having either under the Personal Law or under the general law i.e. S. 125 . . . of the [Criminal Code]."[87] The judgment relies on the Preamble to the MWA and the "reasonable and fair provision and maintenance" clause in Section 3(1)(a) of the Act in concluding that *Shah Bano* is still good law and that Section 125 of the Criminal Code still applies to divorced Muslim women.[88] Thus, although the Supreme Court has not yet ruled on the MWA, the spirit of

83. *Id.* at 105. The opinion reproduces English translations of Aiyats 241 and 242.

84. C.I.S. Part II (1986), The Muslim Women's (Protection of Rights on Divorce) Act by the Government of India, Chandigrah, May 19, 1986 [hereinafter MWA].

85. However the Act did not take away the power of the courts to interpret the personal laws.

86. MWA, § 3(1).

87. A.I.R. 1988 (Guj.) 141, 142.

88. The Preamble to the MWA states: "An Act to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto." *See also* Ali v. Sufaira, (1988) 2 Kerala Law Times 94.

Section 125 is being upheld by lower courts by interpreting MWA Section 3(1) in favor of divorced Muslim women's right to adequate maintenance.

The Supreme Court's judgment in *Sarla Mudgal v. Union of India*[89] supports the adoption of a uniform civil code. Mudgal, president of Kalyani, a social welfare organization, brought a case involving three Hindu wives whose husbands had deserted them after marrying Muslim women and embracing Islam. The Supreme Court observed:

> Freedom of religion is the core of our culture . . . But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Therefore, a uniform civil code is imperative both for protection of the oppressed and promotion of national unity and solidarity.[90]

While the question of the uniform civil code was not an issue in this case, the Court's language here indicates a judicial willingness for such a code that would protect all individuals, even within a scheme of group rights. A division bench of the Supreme Court, headed by Justice Singh, then directed the Government of India to file an affidavit detailing efforts to enact a universal civil code as urged by Article 44 of the Constitution.

In the recent case *John Vallamattom v. Union of India*,[91] the Court again made reference to a uniform civil code, which was not, however, relevant to the Court's judgment. In dictum, the Court expressed regret that Parliament had still not framed a common civil code in order to fulfill the urging of Article 44 and urged that "a common civil code will help the cause of national integration by removing the contradictions based on ideologies."[92] The government has not, however, responded to the Supreme Court's indications for a common civil code, demonstrating the inherent limitations on the judiciary's ability to pursue social and religious transformation in India. Without social and political consensus on the need for a uniform civil code among the general citizenry and the political brass, the courts will suffer from a limited ability to formulate laws and policy regulations that promote uniformity among personal laws.

Hasina Khan, a social reformer, points out that after the 1937 Shariat Act and the 1939 Dissolution of Muslim Marriages Act, Muslim women have not attained any new legislative protection against Muslim personal laws.[93] Indian courts have proved a more hospitable forum for protecting and promoting women's rights than political branches or minority institutions. The sluggishness of the latter two explains the continued Muslim practice of "triple talaq," which enables a man to divorce his wife by repeating aloud "I divorce you" three times. Even though this practice has been abolished in many Islamic nations, it still prevails in Indian Muslim communities. Recently, there were high expectations that at its annual meeting the All India Muslim Law Board would adopt a

89. A.I.R. 1995 S.C. 1531.
90. *Id.* at 1540 (internal citations omitted).
91. John Vallamattom v. Union of India, A.I.R. 2003 S.C. 2902.
92. *Id.*
93. *Help for Distressed Muslim Women*, THE HINDU, Apr. 10, 2001, *available at* http://www.hinduonnet.com/thehindu/2001/04/11/stories/14112185.htm.

model *nikahnama*, or marriage contract, with more equitable divorce laws.[94] However, the Board declared after the meeting that "law cannot ensure reforms" and that instead they would try to create more awareness among the community on the issue of divorce.[95]

In short, while the Indian model of cultural pluralism aimed to provide minority groups with protection from the imposition of a dominant majority culture while simultaneously bridging gaps between various communities, the model has instead achieved the exact opposite result. The preservation of separate personal laws has spread seeds of division among different religious communities. The continued existence of these parallel legal systems has reinforced separatist tendencies, resulting in a negative impact on the rights of Indian women in two key ways: the very creation of a system of parallel personal laws denied women their constitutional right to equal treatment, while the continued existence of this two-tier system reinforces patriarchal traditional practices, subjecting women to fixed gender roles based on pre-independence authoritarian structures.

IV.
THE WAY FORWARD: LAW REFORMS AND POLICY CHANGES

Democracies like India will always face challenges of providing space for discourse among different interests. India can protect its religious, cultural, and linguistic diversity only on the basis of multiculturalism. However, zealous protection of multiculturalism through the provision of group rights must not ignore the rights of women and the equally viable goal of gender justice. The present discourse on multiculturalism in India celebrates the country's diversity without sufficiently acknowledging the existence of discrimination against women based on the personal laws. Supporters of multiculturalism should also pursue feminist and gender-based alignments within cultural practices so that Indian society can realize the constitutional goals of universal equality and justice.

Some innovative legislation within the personal law systems provides hope for continuing change. The Hindu Marriage Act of 1955,[96] for example, which took its inspiration from the Special Marriage Act, is considered a piece of progressive legislation protecting Hindu women's rights. This legislation put an end to age-old practices such as polygamy. It also transformed Hindu marriage, traditionally considered to be a sacrament, into a contract, thereby providing for divorce by mutual consent.[97] However, the Hindu Succession Act of 1956[98] still allows for discrimination in the granting of rights to ancestral property. Under the Act, daughters and wives can only claim a joint share in family prop-

94. A. Faizur Rahman, Editorial, *Triple Talaq: Bad in Law and Theology*, THE HINDU, July 13, 2004, *available at* http://www.thehindu.com/thehindu/op/2004/07/13/stories/2004071300491500.htm.

95. *Id.*

96. Hindu Marriage Act, No. 25 (1955) (India).

97. *Id. at* § 13.

98. Hindu Succession Act, No. 30 (1956) (India).

erty upon the death of their fathers or husbands.[99] Even when they are able to claim this share, their claim is less than that of the sons in the family.[100] Recently, the Fifteenth Law Commission, led by Justice B. P. Jeevan Reddy, proposed amending the Hindu Succession Act to provide for women's right to an equal share in ancestral property.[101] The Muslim personal laws still fail to provide equal treatment for women as well. The Muslim Personal Law in India is still uncodified. Polygamy and triple talaq are still legal. A woman desiring to divorce her husband under certain grounds, however, has recourse to a court of law under the provisions of the Dissolution of Muslim Marriage Act 1939.

Contemporary Christian personal laws also restrict the rights of women. A Christian man can divorce his wife, for example, if he finds she has committed adultery. A Christian woman, on the other hand, can seek divorce only if the charge of adultery is coupled with complaints of serious, life-endangering cruelty, or after two years of desertion without reasonable cause.[102] A Christian woman found guilty of adultery can lose her entire property to her children and husband. Interestingly, the failure of Christian personal laws to provide equal rights to women might result less from resistance within the Indian Christian community and more from the callous indifference of the government in bringing about the necessary change within Christian minority communities.[103] Any proposed change to Muslim personal laws, in contrast, generally faces stiff resistance from certain parts of the Muslim community. Most Muslim leaders maintain their right to be governed by Shariat and are in opposition to the possibility of a uniform civil code. They rely on Articles 25 and 26 of the Constitution to assert their right to practice Islam without interference by national civil laws.

The fact that religious issues have been politicized since the BJP government's ascent to power has affected the development of a meaningful discourse on the passing of uniform civil code. The growing distrust among religious communities that has resulted from sporadic instances of inter-group violence has only contributed to a fractured debate on the need for a uniform civil code. The power struggle between the fundamentalist forces within the communities, resulted in the withdrawal of the feminists from the debate. Further, the rise in communalism due to the "hindutavization" of the debate over a uniform civil code has resulted in increased pressure on women in these communities to conform to traditional practices that reinforce patriarchal structures, protected under the guise of religion or culture. Delhi recently saw attempts by the BJP govern-

99. See *id.* § 6, on the concept of *mitakshara* property.

100. Madhu Kishwar, *What Women Want*, THE INDIAN EXPRESS, Apr. 10, 2004, *available at* http://www.indianexpress.com/archive_frame.php.

101. Swati Chaturvedi and Rajesh Kumar, *Law Panel Proposes Equal Share In Ancestral Property For Hindu Women*, THE INDIAN EXPRESS, May 12, 2000, *available at* http://www.indianexpress.com/ie/daily/20000512/ina12053.html.

102. Sumedha Raikar-Mhatre, *Divorce & Christian Marriages in India: Till Cruelty do us Part*, THE INDIAN EXPRESS, May 20 1997, *available at* http://www.goacom.com/news/news97/may/marriages.html. Recently, however, a judgment of the Bombay high court has made it possible for Christian women to get a divorce solely on the grounds of cruelty and desertion. *Id.*

103. *See generally* Javed Anand, *Behind Demands for a Uniform Civil Code*, *in* THE SHAH BANO CONTROVERSY (Asghar Ali Engineer ed., 1987).

ment to ban girls from wearing skirts to schools. On similar footings, the fundamentalist forces in Kashmir have been exhorting women to wear *burqa.*

Policing culture is extremely controversial, and problems arise when governments start to dictate how people ought to act according to their religious faiths. It is impossible to have serious discourse regarding the formation of a uniform civil code in this hostile environment. However, there exists the possibility to develop awareness and facilitate meaningful dialogue among different communities with regard to how society can achieve equality between men and women within various religious frameworks. Since the problem has its roots in politics, the solution too has to be political. Without political will, the quest for women's rights will not be fulfilled. Though a uniform civil code based on the principle of equality between the sexes would have been an ideal solution, the hijacking of this issue by fundamentalist forces has made its adoption a difficult if not impossible tool for protecting Indian women's rights. In the highly charged political and religious atmosphere of contemporary Indian governance, with right-wing political parties and groups supporting adoption of such a code, no minority community would welcome such a measure.[104]

As an alternative to a uniform civil code, I propose a constitutional amendment to Articles 25 and 29, making the rights to practice religion and conserve culture subject to ensuring the right of equality between men and women. Consequently, this Amendment would make all personal laws subject to the test of equality. The Indian Constitution already contains precedents in this regard—Article 15, for example, carves out an exception to the right of equality, allowing the state to make special provisions for women.[105] Moreover, an amendment would further be justified by Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which India is a signatory. Article 5requires signatories to:

> modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[106]

My proposed amendment does not explicitly deal with the personal laws of different religious communities but arguably aims to protect them. Yet the amendment would negate claims of the right to practice gender discrimination based on religion or culture through a universal application of this proposed constitutional exception based on the individual-rights ideals of liberalism.

The paradox that protecting multiculturalism can hinder women's rights can be solved only by creating a civil society based on the separation between

104. *See* Pratap Bhanu Mehta, *Obscuring Real Issues*, THE HINDU, July 30, 2003, *available at* http://www.thehindu.com/2003/07/30/stories/2003073001431000.htm.

105. INDIA CONST. art 15(3) ("Nothing in this article shall prevent the State from making any special provision for women and children.").

106. Convention on the Elimination of All Forms of Discrimination against Women, art. 5, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46.

religion and state as envisaged in the Indian Constitution.[107] Political leaders must be sensitive to increasing demands for recognition of religious and cultural rights, but subject to the limitations imposed by the Constitution and Article 5 of the CEDAW. The Indian experience demonstrates that that there is a need to declare unambiguously the superiority of the right to gender equality over demands for preserving the sovereignty of religious or cultural groups. This Declaration should be included with other fundamental rights in the basic text or law containing these rights, whether it is the Constitution or a Declaration of Rights. Unless this is done, there are no safeguards for the protection of women's rights and the assurance of gender justice.[108]

107. *See* INDIA CONST. pmbl. Also, in a number of cases, including the case of S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1, the Supreme Court held that religion is a matter of individual faith and cannot be mixed with secular activities, which only the state can regulate by enacting laws.

108. *See* Justice S. Rajendra Babu, *Third Shri Akella Satyanarayana Memorial Endowment Lecture on Gender Justice—Indian Perspective*, (2002) 5 S.C.C. (Jour) 1, *available at* http://www.ebc-india.com/lawyer/articles/2002v5a1.htm.

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Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective

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Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective

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INTRODUCTION

In the 2004 Treaty Establishing a Constitution for Europe,[1] the European Union (EU) took a bold step toward integrating the Continent. A key component of this enterprise is Part II of the Treaty, the Charter of Fundamental Rights. It establishes for the first time a detailed system of legal defense shields for citizens of the Union against the exercise of Union power. Whether the European Constitution is seen as just a "tidying-up exercise" or a "blueprint for a European super-state,"[2] it has been a thorny issue to tackle. It intensifies the process of integration while, at the same time, extending it through the accession of new members in May 2004. Before EU members agreed upon a final text, constitution-making for Europe encountered serious difficulties over the issue of representation of certain Member States in decision-making processes.[3] On June 18, 2004, Mr. Bertie Ahern, the Irish Prime Minister and the President of the European Council of the EU at that time, announced the finalization of the Constitution, commenting that "you'll get a few generations out of it."[4]

This article will focus on the concept of rights under the new Constitution, especially its innovative part, the Charter of Fundamental Rights, and explore the approach taken to limit these rights. This article also places this discussion within the context of fundamental rights in general, starting with the assumption that the legal effect of a right cannot be assessed properly by only ascertaining

1. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Dec. 16, 2004, O.J. (C 310) 47 (2004), *available at* http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML. The Convention on the Future of Europe, which prepared this treaty, was established in December 2001. Led by former French president Valéry Giscard d'Estaing, the Convention was composed of 16 representatives from the EU Parliament, 32 representatives of national parliaments, 15 representatives of national governments, and two representatives from the Commission. The Convention produced a draft Constitution, which was agreed upon by consensus at the Convention on June 13, 2003 and then presented to the heads of governments and states in Thessaloniki, Greece on June 20, 2003. Following further negotiations, the EU leaders agreed on a final text on June 17-18, 2004 in Brussels, Belgium. The Constitution Treaty is composed of four parts: Part I—Definition and Objectives of the Union; Part II—The Charter of Fundamental Rights of the Union; Part III—The Policies and Functioning of the Union; Part IV—General and Final Provisions.

2. Simon Jeffery, *Q & A: The European Constitution*, GUARDIAN UNLIMITED, *at* http://www.guardian.co.uk/theissues/article/0,6512,1092917,00.html (Nov. 25, 2003). For further discussion and analysis of the EU Constitution, see, for example, Eckart Klein, *Europäische Verfassung im Werden*, *at* http://www.europa-bremen.de/europa/charta/TEIL_E.pdf (last visited Feb. 12, 2005); Joanna Griffin, *The European Press and the European Constitution*, *at* www.worldpress.org/Europe/1232.cfm (June 26, 2003); EUR. CONVENTION, DRAFT EU CONSTITUTION PRESENTED TO THE THESSALONIKI COUNCIL, *at* http://www.eiro.eurofound.ie/2003/07/feature/eu0307204f.html (last visited Feb. 12, 2005); *Excerpts: Europe's draft constitution*, BBC NEWS, UK EDITION, *at* http://news.bbc.co.uk/1/hi/uk_politics/2938272.stm (June 21, 2004); Thomas Fuller, *In a Europe of 25 Equals, No Consensus on a Charter*, N.Y. TIMES, Oct. 6, 2003, at A4; William Pfaff, *Constitution for Europe*, INT'L HERALD TRIB., Nov. 4, 2002, at 6.

3. For developments in the negotiations regarding the Treaty, see Paul Ames, *European Constitution Summit Collapses*, Boston.com News, Dec. 14, 2003, *at* http://www.boston.com/news/world/europe/articles/2003/12/14/european_constitution_summit_collapses/#; *Ireland Begins EU Presidency With Constitution Headaches*, EU BUSINESS, *at* http://www.eubusiness.com/afp/031228021601.psvrd1gm (Dec. 28, 2003).

4. Honor Mahony, *Constitution for Europe Agreed*, EU OBSERVER, *available at* http://www.euobserver.com/?sid=9&aid=16671, *available at* http://www.unieurope.org/showarticle.php?id=741 (June 18, 2004).

the definition of its substantive scope. The limitations on a right are as important as its scope in determining its legal content,[5] as virtually no right is absolute in light of the need to balance individual interests and the requirements of community life. Since the very first formulations of human and civil rights instruments, jurists have had to interpret the limits on those rights. For example, can domestic constitutional rights, which can be limited "by law," be made legally meaningless by a domestic legislature? Can international guarantees be outmaneuvered by domestic measures in the case of a right guaranteed only through, or within the confines of, national legislation?

Thus, the doctrine of limitations on rights arose within the context of the general doctrine of fundamental rights. Particular guarantees of rights are tethered to the context and text of the specific document embodying both rights and limits. Still, the various national, regional, and universal guarantees have cross-fertilized each other. In the context of the EU, limits to Union power, in the absence of a Union rights catalog, were drawn up in close approximation to national rights catalogs and the regional human rights instrument—the European Convention on Human Rights (ECHR). So were the limits to those limits. Section 3[6] of Article 52 of the Charter of Fundamental Rights of the European Union, now Article II-112 of the Constitution, reflects this heritage by attempting to harmonize the interpretation of Charter rights with the jurisprudence of rights under the ECHR and common domestic constitutional traditions. Section 1 of this general provision on the Charter's limitation of rights,[7] refers to categories of limitations derived from both domestic constitutions and the ECHR and other rights catalogs, such as the United Nations' International Covenant on Civil and Political Rights (ICCPR).

It is apposite, therefore, to present first the nature of this new Europe, as envisioned and defined by the new Constitution. This article will then delimit the rights under the Constitution by reference to (1) the history of rights, (2) important domestic traditions—in particular, the U.S. Bill of Rights and the German Basic Law, and (3) international guarantees and their limits, such as those established universally under the ICCPR and regionally under the ECHR. Fi-

5. Eckart Klein, *The Position under International Law, in* BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES (1971-1988) 7 (Georg Brunner et al. eds., 1990).

6. Article 52(3) of the 2000 Charter, now Article II-112 of the 2004 Constitution, states: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Dec. 7, 2000, O.J. (C 364) 21 (2000). For details of the Charter and its legal nature, *see infra*, notes 257-264. The 2000 Charter became, in essence, Part II of the 2004 Constitution for Europe. In the official version of the Constitution, *supra* note 1, the articles of the Charter were renumbered consecutively, succeeding upon the 60 articles of Part I. Thus, e.g., Article 52 of the Charter became Article II-112 of the Constitution. In this article, the Constitution's enumeration of the Charter's provisions will be used.

7. Article 52(1), now Article II-112(1), states: "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." *Id.*

nally, this article will evaluate the limits drawn in the Charter of Fundamental Rights. In addition to analyzing the contents of the Charter, this comparative and international legal analysis will allow us to answer the question: Does the Charter do justice to the critical issue of how to properly limit rights?

I.
THE CONSTITUTION FOR EUROPE

The "constitutionalization" of a community is properly characterized as the "solidification of structures, the definition of community interests, and the creation of rights for individuals and the protection of such rights against violations."[8] The inherited notion of a constitution is that of the "basic law of the state," "governing law of the land," or "fundamental law of society," thus referring to the founding document of a nation-state that aims at self-rule and claims for itself ultimate authority.[9] In modern democratic times, this claim to "ultimate authority" would usually require, for the constitution to be legitimate, that the process of constitutionalization be a voluntary act involving direct participation of the people. Generally, a constitution is embodied in a written text, and most of the EU Member States do have a written constitution.[10] International organizations (such as the International Labour Organization or the Universal Postal Union) might also be founded on the basis of a "constitution." Consequently, merely having a basic document designated as a constitution does not reveal much about the existing or prospective nature of the EU.[11] The broader, functional definition of a constitution, however, would allow the inclusion of deliberate legal acts constituting a political community beyond the nation-state, through the integrative processes mentioned above.[12] In Europe, the process of constitutionalization appears to have been set in motion.

As to the integrative processes of the exercise of legislative powers and judicial review, the doctrines of "direct effect" and "supremacy" of European law over national laws, though sometimes challenged by national constitutional courts,[13] have been established since the Community's early years.[14] According

8. Klein, *supra* note 2, at 2 (translation).

9. Peter Badura, *Verfassung*, *in* EVANGELISCHES STAATSLEXIKON 2708 (Hermann Kunst et al. eds., 2d ed. 1975).

10. The United Kingdom does not have a written constitution but makes up for this deficiency with ironclad "constitutional conventions." Also, some in the United States argue that the Constitution does not consist only of the written document, but also includes the "basic legal order" of the country. In this view, the U.S. Constitution consisted of both the written document and the common law at the time the document was adopted. However, although the written constitutional document supersedes the common law where they might be in conflict, it does not replace it. The courts must refer to the common law for guidance where the written document is silent or ambiguous. For more detail, see CONST. SOC'Y, SUMMARY OF CONSTITUTIONAL RIGHTS, POWERS AND DUTIES, *at* http://www.constitution.org/powright.htm (last visited Feb. 12, 2005)

11. *See* Franklin Dehousse & Wouter Coussens, THE PERILS OF A EUROPEAN CONSTITUTION 1-2 (2002), *at* http://www.irri-kiib.be/papers/ConstitutionofEuropemotivation.pdf.

12. Klein, *supra* note 2, at 2.

13. For comparative legal interpretations of the decisions of the German Constitutional Court and the Danish Supreme Court, see Beate Kohler-Koch, A CONSTITUTION FOR EUROPE? 4-5, (Mannheimer Zentrum für Europäische Sozialforschung, Working Paper No. 8, 1999), *available at* http://

to proponents of the Treaty, the formalization of the European Constitution not only simplifies and reorganizes existing treaties, but also provides a clearer picture of the nature of the Union, making it more transparent, effective, and participatory.[15] Simply stated, the Constitution for Europe radically reforms the institutions.[16] Despite various modifications, the document as a whole remains coherent. Most importantly, it accelerates the transformation of the mainly diplomatic European system into a powerful system of political decision-making.

Others see the Constitution as simply another step in the gradual process of European constitutionalization since there already exists a "material" constitution central to the legal and institutional framework of the European communities and the EU.[17] So, is this new "Constitution for Europe" a real constitution?

Even under the traditional concept of a constitution as the foundational document of a state, one element is virtually always present: a catalog of fundamental individual rights. The EU Constitution not only solidifies Union structures for decision-making, it also formulates the EU's system of values. By integrating *expressis verbis* the Charter of Fundamental Rights,[18] the EU Constitution not only makes these common values "more visible,"[19] but it also makes them justiciable; it ordains the observance and judicial enforcement of fundamental rights in the EU. It adds one more layer to the "multi-level constitutionalism"[20] that protects human rights in Europe. In light of future EU enlargement, the protection of fundamental rights will likely become an essential component of negotiations with candidate countries. Also, Article I-9(2) of the Constitution mandates EU accession to the European Convention on Human Rights, which would lead to external scrutiny of Union power. Most importantly, limits on individual rights vis-à-vis Union power will enhance the perception of European citizens that they are connected to the process of European

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www.mzes.uni-mannheim.de/publications/wp/wp-8.pdf; Line Olsen Ring, *Dänemarks EU-Mitgliedschaft zwischen Politik und Recht. Schwierige freiwillige Abgabe von Hoheitsrechten*, NEUE ZÜRCHER ZEITUNG, May 28, 1998, at 7.

14. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585; VOLKER ROEBEN, CONSTITUTIONALISM OF INVERSE HIERARCHY: THE CASE OF THE EUROPEAN UNION (N.Y.U. Sch. of L., Jean Monnet Working Paper 8/03, 2003), *at* http://www.jeanmonnetprogram.org/papers/03/030801.pdf.

15. Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 8 (2001) (referring to a "catalytic constitution"), *available at* http://newleftreview.net/PDFarticles/NLR24501.pdf.

16. For an analysis of the argument that the Nice Treaty did not provide answers to the challenge of European enlargement and more on this issue, see FRANKLIN DEHOUSSE & WOUTER COUSSENS, *The Enlargement of the European Union: Opportunities and Threats*, *in* STUDIA DIPLOMATICA 54, 97-101 (2001).

17. DARIO CASTIGLIONE, FROM THE CHARTER TO THE CONSTITUTION OF EUROPE? NOTES ON THE CONSTITUTIONALISATION PROCESS IN THE EU 2-4 (Queen's Papers on Europeanisation No. 5, 2002).

18. The EU Charter of Fundamental Rights was adopted in Nice in December 2000 as a political declaration. Though not legally binding, the Charter nevertheless set standards; the EU Court institutions have already referred to the Charter in several cases. *See infra*, at notes 260-264.

19. Preamble, Charter of Fundamental Rights of the European Union, CONSTITUTION FOR EUROPE, *supra* note 1, at para. 4.

20. Kohler-Koch, *supra* note 13, at 4.

integration.[21] Thus, the elements of a functional concept of a constitution, set out at the beginning of this section, appear to be met.[22]

As these fundamental rights are being chiseled out in the text of the Charter, their limits are also being formulated in broad concordance with member states' constitutional traditions and regional human rights jurisprudence. To properly evaluate these limits, a brief recounting of the history of rights and their limitations must be undertaken.

II.
RIGHTS AND THEIR LIMITS: AN OVERVIEW

The EU's Charter of Fundamental Rights is only the most recent regional catalog of individual rights. The notion of "rights" is commonplace; to understand this notion properly, however, it is necessary to ask more profound questions: Where do "rights" come from? Where are they properly anchored? Are there any limits to "rights"? If yes, what are they, and where are they to be found? What justifications are persuasive?

It is widely held that the concept of human rights stems from the doctrine of natural rights,[23] which holds that individuals are entitled to fundamental rights beyond those prescribed by law, merely by virtue of being humans possessed with sympathy and psychological imagination. The idea of human rights is an essential part of the liberal creed, since it refers more to a state of feeling, rather than to a statutory provision. The positive manifestation of human rights law can be traced back hundreds of years through the development of the legal history of many Western countries, which progressively recognized that human rights cannot be created or granted, but are firmly grounded in the basic dignity and equality of each person.[24]

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21. This would especially hold true for the citizens of Member States (i.e., Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Spain and the United Kingdom) that have already committed themselves to holding a referendum on the ratification of the Constitution, *see* http://alde.europarl.eu.int/content/default.asp?PageID=607. The people of Spain just approved the Constitution for Europe by a wide margin, *see Spain Voters Approve EU Charter at* http://news.bbc.co.uk/1/hi/world/europe/4280841.stm. In the United Kingdom, France and Germany, there was great pressure to have the Constitution approved by referendum. It was argued, *inter alia*, that it would be "hopelessly weak unless founded on clearly expressed public support." *See* DAVID HEATHCOAT-AMORY, THE EUROPEAN CONSTITUTION AND WHAT IT MEANS FOR BRITAIN 35 (2003), *available at* http://www.v63.net/wellsconservatives/Newgraphics/the_european_constitution.pdf. Prime Minister Tony Blair and President Jacques Chirac will hold a referendum on the Constitution for Europe in their respective countries, but a constitutional prohibition on referenda on the federal level stands in the way of Germany allowing for a similar direct expression of the will of the people.

22. Klein, *supra* note 2.

23. *See* LOUIS HENKIN, THE AGE OF RIGHTS 1-5 (1990).

24. *See* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002). For insights regarding the use of the term "human dignity" in legal parlance, see Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 GLOBAL JURIST TOPICS No. 3-3 (2003), *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1110&context=gj.

For example, elements of human rights were enshrined in early English law, mainly the Magna Carta[25] of 1215 and the Bill of Rights[26] of 1689. Though these instruments are primarily contracts between, respectively, the King and the barons, and the King and the House of Barons, thus applicable only to aristocracy or to members of Parliament, and deal very little with the rights and issues of ordinary people, they are still significant in the development of human rights because they granted certain individuals limited rights against the sovereign, puncturing holes into the feudal obligations of perpetual allegiance and total obedience.

Also worthy of mention is the principle of non-discrimination on the basis of religion, developed by various treaties between countries and declarations within countries, such as the Treaty of Westphalia between Roman Catholics and Protestants in 1648,[27] Turkey's guarantees to Russia regarding Orthodox Christians in the 1774 Treaty of Kuchuk Kainarji,[28] or Napoleon's emancipation of the Jews.[29] In particular, the *jus emigrationis*[30] for persons who espoused a religion different from that of their feudal lord, has been viewed by some as the first human right. Such elements and statements of human rights gradually developed into a more comprehensive international law of human rights.

The 1789 French Declaration of the Rights of Man and the Citizen, which arose out of the French Revolution, is a much fuller expression of human rights than that found in early English law. The first legal enactment of a catalog of rights, however, was made on the other side of the Atlantic.

The Virginia Bill of Rights of June 12, 1776 expressed for the first time the idea of natural rights for human beings;[31] the United States Declaration of Inde-

25. Paragraph 1 reads: "We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever." The text is available at http://www.constitution.org/cons/magnacar.htm (last visited Feb. 13, 2005).

26. The English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, is similar in structure to today's resolutions and declarations. The text is available at http://www.yale.edu/lawweb/avalon/england.htm (last visited Feb. 13, 2005). Another interesting document that sets out the rights and liberties of the subject as opposed to the prerogatives of the Crown, favoring the common man, is the Petition of Right of 1628, championed by Sir Edward Coke, Speaker of the House of Commons, Attorney General, Chief Justice of the Court of Common Pleas and Chief Justice of the King's Bench. The text is available at http://www.britannia.com/history/docs/petition.html (last visited Feb. 13, 2005).

27. Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, *in* 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F.L. Israel ed., 1967).

28. Relevant here is the part of the Treaty that conceded to Russia the role of protector of the Sultan's Orthodox subjects. Information about the treaty is available at http://reference.allrefer.com/encyclopedia/R/RussoTur.html.

29. A summary of resolutions and decrees on this issue, in chronological order, is available at http://www.virginia.edu/history/courses/fall.01/hieu210/intro/chronology.html (last visited Feb. 13, 2005).

30. The 1555 Augsburg Treaty of Religious Peace granted individuals, formerly devoid of positive rights because of their status as feudal subjects owing perpetual allegiance to their feudal lord, a right to emigrate (*jus emigrationis*) for religious reasons. Siegfried Wiessner, *Blessed be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 499 (1986).

31. HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103-04 (9th ed. 1973).

pendence immediately followed on July 4, 1776. After further formulation of rights in other state constitutions, the 1791 "Bill of Rights" amendments to the U.S. Constitution established the first positive law recognition of rights that were universal in their application to all citizens of a country. Nowadays, most countries' constitutions contain an extensive rights catalog.

The early human rights documents reflected the political and philosophical thought of the time. Although sometimes contradictory, the various interpretations of the concept of "natural rights," have been essential parts of the French Enlightenment movement, as well as the 17th century works of Hugo Grotius and John Locke; the 18th century works of Jean-Jacques Rousseau, Thomas Paine and Edmund Burke; and the 19th century works of John Stuart Mill.[32] In particular, the German philosopher Immanuel Kant contributed substantially to the conception and essence of rights. In 1785, he expressed the view that we, as human beings, should always treat humanity with liberty and equality, without one trying to overpower the other purely for personal gains in the most selfish manner.[33]

While Kant's philosophy is idealistically grounded in the principle of the autonomy of the will of the "rational being," religious views—in particular, the Catholic tradition—anchor rights in God's will since He created man in His own vision, maintaining that "men are by grace the children and friends of God and heirs of eternal glory."[34] According to Catholic social teachings, since all human beings are endowed with intelligence and free will, they have rights and obligations flowing directly and simultaneously from their own nature. Similarly, these rights and obligations are universal and inviolable, so they cannot be surrendered. On the other hand, these natural rights are inseparably connected

32. "As soon as any part of any persons conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion." JOHN STUART MILL, OF THE LIMITS TO THE AUTHORITY OF SOCIETY OVER THE INDIVIDUAL (1859), *reprinted in* HUMAN RIGHTS IN WESTERN CIVILIZATION: 1600-PRESENT, at 52 (John A. Maxwell & James J. Friedberg eds., 1994).

33. Kant states that "the imperative [is to] act in such a way that you treat humanity . . . always as an end in itself" and to him this imperative is universal. He also adds that "[t]his principle of humanity . . . is the supreme limiting condition of everyman's freedom of action." Of course, Kant does not base it on experience because "no experience is capable of determining anything about [rational beings]." He also recognizes dignity "infinitely beyond all price, with which it cannot in the least be brought into competition or comparison without, as it were, violating its sanctity." He finds autonomy as "[t]he ground of the dignity of human nature and of every rational nature" because "the will of every rational being is a will that legislates universal law." IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 36-37 (James W. Ellington trans., 3d ed. 1993) (1785). Reference to Kant's philosophy can also be found in the reasonings of the Federal Constitutional Court of Germany. For example, in the *Life Imprisonment* case, the Court held that "even in the community the individual must be recognized as a member with equal rights and an intrinsic value. It is therefore contrary to human dignity to make persons the mere objects of the state . . . . The phrase 'the human being must always remain an end in himself' is of unlimited validity in all areas of law; for the dignity of the human being as a person which cannot be lost, consists exactly of the maintenance of his recognition as an autonomous personality." 45 BVerfGE 187, 227-28 (1977). *See also* Eckart Klein, *Human Dignity in German Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 145-59 (David Kretzmer & Eckart Klein eds., 2002).

34. For a full enumeration of the rights to which man is entitled, see JOHN XXIII, PACEM IN TERRIS: THE ENCYCLICAL LETTER OF POPE JOHN XXIII ON ESTABLISHING UNIVERSAL PEACE IN TRUTH, JUSTICE, CHARITY AND LIBERTY (Apr. 11, 1963), *at* http://www.osjspm.org/cst/pt.htm.

with just as many respective duties. Rights as well as duties find their source in natural law, which grants or enjoins them. In other words, natural law, by granting every fundamental human right, imposes at the same time a corresponding obligation—thus, there should exist limitations to rights.[35]

Another interesting approach to the concept of liberty, which underlies positive law in the civil law tradition, stems from the assumption that rights guarantee relatively autonomous spheres of life and gradually bring about new developments and social change. According to this view, the individual is a "part of the human community, not isolated but embedded in a number of structures and interactions which are supported by law."[36] This concept of liberty includes limitations on individual action as well as obligations, allowing for "fast adaptations to public necessities, which result in restrictions on individual rights, may this be in the field of economic or social legislation or in that of private behaviour or individual lifestyle."[37]

III.
NATIONAL TRADITIONS: LIMITATIONS ON RIGHTS IN CONSTITUTIONAL LAW AND JURISPRUDENCE

A. The United States Constitution and the Jurisprudence of the Supreme Court

Strangely enough, the United States Constitution has been the best export article in a country whose business is business.[38] It has influenced many other constitutional orders, not only with respect to its Bill of Rights, but also with respect to fundamental structurings of authority, such as federalism, separation of powers, and judicial review.

The original Bill of Rights, a catalog of ten amendments added to the 1787 Constitution as a virtual afterthought in 1791, as well as the rights added via amendment in subsequent years, (most notably the abolition of slavery and the equal protection clause), focus on the guarantee itself without, in many cases, spelling out express limitations on the right formulated. For example, the First Amendment guarantees apodictically that "Congress shall make no laws abridging the freedom of speech, or of the press . . ." It was left to the Supreme Court, however, to formulate the limits that any right must have in a well-ordered society.

35. "The natural rights with which We have been dealing are, however, inseparably connected, in the very person who is their subject, with just as many respective duties; and rights as well as duties find their source, their sustenance and their inviolability in the natural law which grants or enjoins them." *Id.* at para. 28.

36. Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 55 (Ulrich Karpen ed., 1988).

37. *Id.*

38. Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUR. L. REV. 129 (1993); CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

In drawing these limits, the Supreme Court did not try to codify, via its power of precedent, "formal or "substantive" limitations in a general and abstract sense. Instead, it followed a more pragmatic approach; guided as much by the country's common law tradition as its deep distrust of government, the Court developed a case-by-case jurisprudence that strikes a balance between individual rights and interests of the community. The Court's jurisprudence tries to minimize restrictions on individual freedom, while still protecting against real, concrete threats to the community that could materialize in spasms of unauthorized violence and coercion. Thus, for example, politically subversive action could only be criminalized if it incited imminent lawless action, and that action was likely to occur—the famous two-prong *Brandenburg* test of "clear and present danger" to the community.[39] "Fighting words" could only be prohibited if they would have "caused an average addressee to fight."[40] Even incitement to racial hatred was protected[41] unless it amounted to a "true threat."[42] Public figures, such as well-known politicians or celebrities, could not successfully file a libel suit, even if defamatory and false statements of fact were made about them, unless those statements were made with "actual malice" (that is, with knowledge of their falsity or reckless disregard for the truth).[43] Injunctions against the publication of any communication could only be obtained if there was a specified threat to national security, an impending breach of internal peace, or if obscene material was involved, under the prior restraint theory inherited from the English common law.[44] Less protection was afforded commercial expression.[45] Thus the Supreme Court developed a highly diverse and concrete set of tests applied to different fields of expression: a theme park of jurisprudence focusing on the context of the particular communication involved.

Similarly, the equal protection clause was differentiated out into quite disparate "standards of review." The highest standard, "strict scrutiny," requires the demonstration of a "compelling governmental interest" for differential treat-

39. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a state could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). This interpretation of the "clear and present danger" doctrine, formulated first in Schenck v. United States, 249 U.S. 47 (1919), and Abrams v. United States, 250 U.S. 616 (1919), is the most speech-protective theory of the limits on freedom of expression encountered not only in domestic constitutional systems, but also internationally.

40. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (explaining that "face-to-face words" could be banned if "men of common intelligence" considered them "likely to cause an average addressee to fight").

41. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *but cf.* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (holding that it is constitutional to enhance the penalty for a non-speech related crime if it is motivated, for example, by racial hatred).

42. Virginia v. Black, 538 U.S. 343, 359-60 (2003).

43. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

44. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971).

45. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) ("There are commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties. . . . [T]hey . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.") (citation omitted).

ment, and the "narrow tailoring" of the means to achieving the end of this governmental objective. This standard was reserved for discrimination on the basis of race or ethnic origin,[46] or if certain "fundamental rights," such as the right to vote[47] or the right to travel,[48] were involved. On the other end of the spectrum, only rational basis review[49] is guaranteed, applying to the residual of all other differentiating criteria or interests that are not subject to heightened judicial scrutiny—an easy standard to pass for governmental action. In between, the court developed standards of "intermediate strict scrutiny" (for instance, with respect to illegitimate children[50]), "enhanced intermediate scrutiny" (regarding gender, focusing on "exceedingly persuasive justifications"[51]), "enhanced rational basis tests" (for instance, for the handicapped,[52] homosexuals,[53] etc.). Aliens enjoyed strict scrutiny vis-à-vis *state* governmental discriminatory action, but only if they were not excluded from jobs that went to the "heart of representative government;" there was no special equal protection for them against exclusionary acts by the *federal* government.[54]

The famous right to "privacy," found by the U.S. Supreme Court in *Griswold v. Connecticut*[55] to be within the "penumbra" of other rights (that is, the First, Fourth, Fifth, Ninth, and Fourteenth Amendments), reviving older concepts of a "substantive" due process clause, does not exist in this generality. It is largely confined to the facts of the case decided, originally to the right to use contraceptives[56] and later to the right to choose an abortion within certain time frames of pregnancy.[57] Arguably, a "right to loiter" has now been deduced from

46. Applied first in the Japanese-American internment case, Korematsu v. United States, 323 U.S. 214 (1944), the strict scrutiny test is now used to review all forms of differential treatment of racial or ethnic groups, regardless of intent.

47. Interpreted as giving a right to cast a ballot, the limitations of which have to pass strict scrutiny, *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), this "fundamental" right, however, also ensures the approximately equal impact of each vote on representative bodies, which has led to decisions forcing redistricting, *see, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Shaw v. Reno, 509 U.S. 630 (1993); Hunt v. Cromartie, 532 U.S. 234 (2001).

48. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

49. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); United States R.R Ret. Bd. v. Fritz, 449 U.S. 166 (1980).

50. *See* Clark v. Jeter, 486 U.S. 456 (1988).

51. *See* United States v. Virginia, 518 U.S. 515 (1996).

52. *See* City of Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432 (1985).

53. *See* Romer v. Evans, 517 U.S. 620 (1996).

54. Sugarman v. Dougall, 413 U.S. 634 (1973) (applying scrutiny with respect to the exclusion of aliens from state jobs that do not go to the "heart of government"); *see also In re* Griffiths, 413 U.S. 717 (1973); Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that the federal government, based on its authority to control immigration, was not obligated to provide equal access to federal jobs to aliens as long as the President or Congress made that determination); Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny with respect to access to state government benefits); Mathews v. Diaz, 426 U.S. 67 (1976) (denying strict scrutiny with respect to federal assistance programs).

55. 381 U.S. 479, 486 (1965) ("We deal with a right to privacy older than the Bill of Rights . . .").

56. *Id.*

57. Roe v. Wade, 410 U.S. 113 (1973); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (reaffirming the essential holding in Roe v. Wade but reinterpreting the ability of states to regulate).

the substantive due process clause of the Constitution.[58] In the summer of 2003, however, in *Lawrence v. Texas*,[59] a broader right to intimate sexual contact, including private homosexual activity, was proclaimed by the Court.

In sum, there is no general doctrine of limitations upon rights under American constitutional jurisprudence. Courts impose and affirm limits in response to the particular circumstances of fact patterns. This pragmatic archetype contrasts starkly with the more formal constitutional arrangements found mostly in civil law countries. Their ideas about rights and limits thereof are of a more general and abstract nature, as exemplified in the jurisprudence of the German Federal Constitutional Court.

B. The German Basic Law and the Jurisprudence of the Federal Constitutional Court

The German Constitution of May 23, 1949, designated as the Basic Law of the Federal Republic of Germany,[60] determines the relationship between the State[61] and the individual in addition to shaping the organization and the institutions of the Republic. The Basic Law puts individual rights and the protection of human dignity front and center, at the very beginning of the document. Rights are seen not only as shields against the state, but also as constitutive of the purposes and structure of government. The liberty of the individual, as recognized in Articles 1 and 2, is at the core of the Basic Law and is derived from the dignity of man/woman and his/her right to self-determination. Consequently, liberty cannot be granted, but is only recognized by the positive provisions of the Basic Law. The role of the State in the Basic Law, therefore, is to secure the liberty of the people.[62] The State exists for the benefit of the human

58. City of Chicago v. Morales, 527 U.S. 41 (1999) (overturning loitering prohibition on vagueness grounds).

59. 539 U.S. 558 (2003), *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986).

60. The Basic Law of the Federal Republic of Germany of May 23, 1949, or Grundgesetz [GG] (F.R.G.), consists of 146 Articles. Articles 1 through 19 include a catalog of basic rights that guarantee mainly civil liberties. These initial articles either recognize and guarantee human rights or expressly grant rights to German citizens only. The Basic Law also contains more articles that function similarly to the basic rights, including GG art. 20(4) (F.R.G.): The right to resist any persons seeking to abolish this constitutional order; GG art. 33 (F.R.G.): Equal citizenship of all Germans and equal access to the civil service; GG art. 38 (F.R.G.): The right to general, direct, free, equal, and secret elections; GG art. 101 (F.R.G.): The right to a legally competent judge; GG art. 103 (F.R.G.): The right to a hearing, the prohibition of retroactive laws, and the prohibition of dual punishment; and GG art. 104 (F.R.G.): Legal guarantees in the event of detention. The Basic Law is believed to have created safeguards against the emergence of either an overly fragmented and multiparty democracy, similar to the Weimar Republic (1918-1933), or overly authoritarian institutions characteristic of the dictatorship of the Third Reich (1933-1945). GERMAN CULTURE, THE CONSTITUTION, *at* http://www.germanculture.com.ua/library/facts/bl_constitution.htm (last visited Feb. 13, 2005).

61. This article uses the term "State" with a capital "S" to refer to all governmental authority in Germany, be it on the federal, the state (*Länder*), or local level.

62. Eckart Klein, *The Concept of the Basic Law*, *in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW 15-16 (Christian Starck ed., 1983).

being and not the reverse—a concept wholly different from, say, Communist ideology.[63]

The Basic Law prescribes rights, the majority of which can be claimed by "everyone." This category of rights can be referred to, in the German context, as "human" rights. There is also a set of rights[64] linked to citizenship that are applicable to German citizens only, including freedom of assembly, Article 8(1); freedom of association, Article 9(1); and freedom of profession and business, Article 12(1). These rights are granted to "all Germans," though there are other German laws that extend these rights to aliens as well.[65] European and international law appears now to go further and overrule such citizenship limitations.[66]

The Basic Law guarantees through its articles a free democracy governed by the rule of law, ensuring the liberty of the individual. Unlike the Weimar Republic constitution, however, it is a *wehrhafte Demokratie*—a democracy that can defend itself.[67]

The Basic Law, as the supreme law of the State, guarantees a democracy where the majority is not identical with the people and the State is not identical with society. Consequently, neither the State nor the majority can claim absolute power.[68] The idea of limited government adopted by the Basic Law, as well as its guaranteed respect for liberty and fundamental rights, is obvious in the institutional precautions it takes to avoid potential abuse of powers. Thus, certain provisions of the Basic Law cannot be amended: those providing for the essential structures of federalism; the separation of powers; the principles of democracy, social welfare, and fundamental rights; and the principle of State power based on law.

The Basic Law charges the State with the duty to refrain from violating the fundamental rights (*status negativus* or *libertatis* and the duty of the State to respect those rights), as well as the duty to ensure that the individual has realistic

63. For an analysis of this issue, see Hans von Mangoldt, *The Communist Concept of Civil Rights and Human Rights under International Law*, *in* BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES (1971-1988) 27-57 (Georg Brunner et al. eds., 1990).

64. Goerlich, *supra* note 36, at 47-48. Article 16(2)(2) offers protection to every refugee who fulfills the requirement of political persecution, albeit now under highly restricted conditions. GRUNDGESETZ [GG] [Constitution] art. 16(2)(2) (F.R.G.). Citizenship guarantees are also contained in GG art. 16(1) (F.R.G.) ("[citizenship] cannot be withdrawn"); GG art. 16(2)(1) (F.R.G.) (no German may be extradited); GG art. 116 (F.R.G.) (access to citizenship offered to all persons of German origin); GG art. 38 (F.R.G.) (the right to vote and to be elected); and GG art. 33(1) (F.R.G.) (access to public office).

65. § 1 of the Statute on Assemblies and Demonstrations, v. 11.15.1978 (BGBl. I S. 1790) grants the right of assembly to "everyone." In § 1 and § 14 of the Statute on Regulating Associations, v. 8.5.1964 (BGBl. I S. 593) affords a right to associate to aliens, albeit with limits additional to those imposed on citizens.

66. Goerlich, *supra* note 36, at 47-48.

67. *The Constitution*, *supra* note 60. Article 18, which was employed twice in the 1950s to ban political parties of the extreme right and left, states: "Whoever abuses freedom of expression of opinion, in particular freedom of press (Article 5(1)), freedom of teaching (Article 5(3)), freedom of assembly (Article 8), freedom of association (Article 9), privacy of letters, posts, and telecommunications (Article 10), rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. Such forfeiture and its extent is determined by the Federal Constitutional Court."

68. Klein, *supra* note 62, at 17.

opportunities to realize his freedoms (*status positivus* and the duty of the State to protect and ensure freedoms). All State authority is constrained by the basic rights set forth in Article 1(3), which states that the "following basic rights are binding on legislature, executive, and judiciary as directly enforceable law."[69]

This formal normative enactment of the constitutional rights of the individual leaves no room for the misinterpretation of constitutional rights as purely programmatic statements or non-self-executing provisions. The fundamental constitutional rights are subjective rights. The individuals entitled to these rights can claim these rights and the courts will enforce them when rightly claimed. These rights do not merely reflect a "programmatic intent" for the legislature to make corresponding law, but are also subject to judicial enforcement (that is, they constitute standards for judicial review of governmental action at all levels). These rights are often self-executing; some of them, however, require legislative or administrative action to make them effective in the courts of law.[70]

It is not only the State, however, that is restricted by an obligation of the Basic Law. While respecting the autonomy of the individual, the Basic Law has to secure the liberty and freedom of all. Thus, it provides for potential governmental limitations on individual rights to benefit other individuals, the community, or society. An individual is not an island, isolated from others. Rather, human beings are social by nature and are meant to live with others. Hence, a well-ordered society requires that individuals recognize and observe each other's rights and duties, based on perfect reciprocity. Absolute freedom for the individual would be at the expense of society and the rights and freedoms of others.

The Basic Law ensures that restrictions are set up and required in certain situations "to maintain and advance social life." In addition, the dignity of the human personality is allowed to develop freely within the social community.[71] At the same time, gross inequalities in power exist between the state and the individual as well as between individuals and private organizations. Thus, there may be good reasons to extend the binding force of the basic rights to relations between private individuals and private entities.[72] The Federal Constitutional Court has held that the normative character of the basic rights expresses itself

69. GRUNDGESETZ [GG] art. 1(3) (F.R.G.).

70. Goerlich, *supra* note 36, at 49.

71. Entscheidungen des Bundesverfassungsgericht [BVerGE] [Federal Constitutional Court] 7, 198 (205) (F.R.G.).

72. SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 72 (1999). The Federal Constitutional Court, in its decision of the *Lüth* case, affirmed the primary role of the basic rights as rights against the state: "The basic rights within the Basic Law have this meaning: the Basic Law is intended to emphasize the priority of the human being and his dignity over the power of the State by placing the basic rights section at the beginning of the Basic Law. It corresponds with this that the legislator has granted the special legal remedy of the constitutional complaint against acts of public authorities alone." BVerfGE 7, 198 (204-05).

indirectly in private law via the "interpretation of the general clauses" of the Civil Code.[73]

The unlimited exercise of basic individual rights can conflict with the public interest or the interests and rights of other individuals. To resolve such conflicts, there must be a legal demarcation of circumstances where the restriction of basic rights is justified. This line can be drawn in the constitution itself, or the constitution-maker, the *pouvoir constituant*, can delegate this power to other actors, such as the legislature, authorized to make decisions for the community.

Most of the rights under the Basic Law contain a statutory reservation. These reservations can be general or specific. Statutory reservations are general when the rights at issue are limited by or pursuant to law without any mention of specific requirements for the law restricting the right. For example, such general reservations are seen in Article 5(2), freedom of expression; Article 8(2), freedom of assembly; and Article 10(2), privacy of letters, posts, and telecommunications. Statutory reservations are specific when a right is restricted to protect the interests specified in the article concerned. For example, specific reservations are embodied in Article 11(2)[74] regarding the freedom of movement; Article 6(3) demonstrating that the right of parents to raise their children can be restricted only to guarantee the more important goal of not having children "endangered to become seriously neglected;"[75] and Article 13(7) regarding the inviolability of the home. There are also some basic rights that are not limited by any statutory reservation. However, this does not mean that they can be exercised without any bounds. There are cases when these rights might conflict with other rights and thus, can be restricted by conflicting constitutional interests.[76]

Accordingly, constitutional rights are not an isolated part of the constitution; they are part of its normative structure and must be read in conjunction with its general principles.[77] As mentioned above, the Basic Law contains reasonable restrictions and abridgments of those constitutional rights. However, this does not mean that the legislature has unlimited discretion in restricting basic rights. There are five requirements found in Article 19 that apply gener-

73. The basic rights have an effect on "third parties" in the private sector ("Drittwirkung der Grundrechte") since the Basic Law has established an "objective order based on values" ("objektive Wertordnung"). *Id.* at 205.

74. Article 11(2) of the Basic Law states: "This right may be restricted only by or pursuant to a statute and only in cases in which an adequate basis for personal existence is lacking and special burdens would result therefrom for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a State (*Land*) to combat the danger of epidemics, to deal with natural disasters or particularly great accidents, to protect young people from neglect, or to prevent crime."

75. GRUNDGESETZ [GG] art. 6(3) (F.R.G.).

76. For example, if parents do not allow a blood transfusion for their child because it runs against their religious belief, there might be a conflict between, on one side, Article 4(1), freedom of religion, and Article 6(2) regarding parental rights and on the other, Article 2(2), the right to life of the child. It would be the duty of the State to decide whether it is right to remove the need for parental consent to the blood transfusion in order to protect the child's constitutional right to life.

77. For an analysis of constitutional principles (e.g., the democratic process, the federal principle, separation of powers, etc.), see Goerlich, *supra* note 36, at 63; *see also* MAIN PRINCIPLES OF THE GERMAN BASIC LAW (Christian Starck ed., 1983).

ally to limitations on rights. This clause includes certain absolute limitations on State authority and, under certain circumstances, private action (Article 19(3)). These five requirements are:

> (1) The statute must guarantee the basic right's untouchable core. Article 19(2) states that "[i]n no case may the essence of a basic right be infringed."[78]
>
> (2) The statute restricting the right must apply generally and not solely to an individual case. This requirement serves a dual purpose by preventing the legislature from getting involved in individual cases and also protecting the individual from arbitrariness.
>
> (3) The statute must provide an express restriction by naming the basic right and the relevant article so that the restriction is intentional and not incidental or accidental. Article 19(1) requires the statute to articulate the restriction of a constitutional right, meaning that such limitations can only be placed by legislation and not by administrative ordinances or decrees.
>
> (4) The statute must provide legal certainty by being clear and unequivocal.
>
> (5) The statute must satisfy the three tests of the principle of proportionality: suitability, necessity, and appropriateness.[79]

The Federal Constitutional Court, as "guardian" of the constitution,[80] developed these requirements by establishing not only procedural safeguards and limitations, but also limits on unnecessary restrictions of rights. The Court is also vested with the power of constitutional review; it safeguards the constitutionality of the conduct of the State and its organs.[81] The Court's wide-ranging competencies have allowed for detailed jurisprudence regarding the content and limits of rights. The examples below illustrate how the Court[82] has interpreted some of the limitations on rights provided for in the Basic Law.

The *Pharmacy* case provides the Court's general interpretation of the reservations:

> [W]hen becoming active in the area protected by a basic right, the legislature must take the significance of the basic right within the social order as the starting point of its regulation. The legislature does not freely determine the content of the basic right; rather, the opposite is true: the content of the basic right may result in a substantive restriction of the legislative discretion. . .. The basic right is intended to protect the freedom of the individual, the statutory reservation is intended to secure a sufficient protection of community interests.[83]

78. Of course, defining the "core" of the right is quite subjective, and case law is usually expected to provide further elucidation. Nevertheless, the Federal Constitutional Court has seen little need to refer to Article 19(2). In pertinent cases, it prefers to apply the principle of proportionality, as detailed below. MICHALOWSKI & WOODS, *supra* note 72, at 82 (citation omitted).

79. *Id.* at 83-85.

80. Goerlich, *supra* note 36, at 51.

81. Klein, *supra* note 62, at 17.

82. *Id.* at 20 ("Moreover, the values-oriented interpretation of the constitutional norms, particularly of the basic rights articles, and thereby their influence on the drafting and interpretation of the legal norms regulating the relations between private persons, have had the effect that the Basic Law cannot be understood only as the framework and constitution of the State, its institutions, powers and activities, but also as the 'fundamental law' of the society, its institutions and activities.").

83. BVerfGE 7, 377 (404) (F.R.G.).

In the *Strauss* case,[84] the Court balanced the principle of protection of personal honor against the freedom of expression. The Court held that in cases of defamatory criticism, the violation of human dignity can never be justified by competing constitutional interests.[85] This decision ignited a heavy debate, which focused mostly on the argument that such an absolute protection of human dignity and personal honor would only be possible if the concept of human dignity is interpreted narrowly.[86]

In the *Elfes* case, the Court interpreted the concept of "constitutional order" contained in Article 2(1), which guarantees the exercise of personal freedom as long as "it does not violate the rights of others or offend the constitutional order or morality."[87] The Court stated that "[t]he individual's freedom of action can legitimately be restricted not only by the Basic Law or by 'fundamental constitutional principles,' but also by every legal provision that is formally and substantively compatible with the Basic Law."[88]

The Court further developed its interpretation of "constitutional order" in the *Horse Riding in the Woods* case, where it stated:

> Freedom of action is only guaranteed within the restrictions imposed by Article 2(1) BL and is thus in particular subject to the constitutional order. . . .If an act of a public authority that affects freedom of action is based on a statutory provision, in the context of a constitutional complaint based on Article 2(1) BL, it will be examined whether it is formally and substantively compatible with the provisions of the Basic Law.[89]

Essentially, the Court subjectively interpreted objective law by holding that every governmental action impinging upon individual freedom may now be challenged if it is based on a formally or substantively unconstitutional act. Formal unconstitutionality may arise from factors such as *ultra vires* acts of legislatures or administrative bodies or procedural defects in the legislative process that amount to a violation of the constitution. Regarding substantive unconstitutionality, the Court in the same case invoked the principle of proportionality as the correct "yardstick" for measuring the permissibility of restrictions on general freedom of action.[90]

The Court's broad interpretation of "constitutional order" also encompasses the interests of others and the community. In the *Safety Helmet* case, the Court argued that the obligation of motorcyclists to wear safety helmets was reasona-

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84. BVerfGE 82, 43 (F.R.G.). For details on the colorful background of this case involving a prominent Bavarian political leader who was accused of "protecting fascists," see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797 (1997).

85. "Freedom of expression finds its limits in the general laws and the prescriptions protecting personal honor. Still, the law limiting the basic right itself has to be interpreted again in light of the right limited." BVerfGE 82, 43 (50) (F.R.G.).

86. MICHALOWSKI & WOODS, *supra* note 72, at 107.

87. BVerfGE 6, 32 (F.R.G.).

88. "Anybody can bring a constitutional complaint on the grounds that a statute restricting his freedom of action is not part of the constitutional order since it violates, formally or substantively, individual provisions of the Basic Law or general constitutional principles, particularly, his basic right under Article 2(1)." *Id.* at 41.

89. BVerfGE 80, 137 (153) (F.R.G.).

90. *Id.*

bly necessary to avoid the costs of accidents to the public and that this duty was not disproportionate.[91]

However, in the *Lebach* case, the Court stated that showing a television documentary "about a criminal offence which presents the name, picture or image of the offender. . .will generally constitute a serious violation of his personal sphere."[92] It further added that "[t]he right to the free development of one's personality and human dignity awards every individual an autonomous sphere of private life in which he can develop and maintain his personality."[93] Essentially, the Federal Constitutional Court distinguished between two spheres of private life—an intimate personal sphere that cannot be violated or restricted despite an overriding community interest and a personal sphere in which the individual is not isolated but operates with others and therefore, can balance his or her privacy interest against competing interests.[94]

Nevertheless, differentiating between these two spheres cannot be discussed in the abstract but must rather be determined case by case. In the same decision, the Court, while balancing the importance of the "personality right" against the importance of freedom of television broadcasting, reasoned that the weight of the personality right can change at different times.[95] Its weight can be relatively low compared to the public right to be informed when the person commits a criminal offense and thus exposes himself to the public; whereas it becomes more important several years later, when the public interest to be informed about the offender decreases and the interest in the resocialization of the offender grows.[96]

The Court used the same reasoning in the *Secret Tape Recording* case, stating that "[e]ven overriding community interests cannot justify a violation of the absolutely protected core sphere of private life; a balancing process in accordance with the principle of proportionality is not to be performed."[97] However, the Court also added a limit on this sphere, stating:

> [I]t is not the entire sphere of the private life which falls under absolute protection of the basic right under Article 2(1) in conjunction with Article 1(1) BL . . . . The individual, as part of the community, rather has to accept such state interventions

91. "According to the Basic Law, the individual must accept restrictions on his freedom of action which the legislator imposes within the limits of what is reasonable in the particular case, for the purpose of promoting the social life of man, as long as the person's autonomy will remain intact. . . .A motorcyclist who drives without a safety helmet and who will therefore in the case of an accident, suffer great head injury, not only harms himself. . . .If the consequences of a calculable and high risk taken in the realm of traffic create a severe burden for the public, it is reasonable to expect the individual to decrease this risk by simple and easily acceptable means." BVerfGE 59, 275 (279) (F.R.G.).

92. BVerfGE 35, 202 (219) (F.R.G.).

93. *Id.* at (220).

94. "If the individual as a citizen living in a community communicates with others, or influences others by his existence or his behavior, thereby touching upon the personal sphere of others or concerns of social life, his absolute autonomy to determine his private life can be restricted, unless his inviolable most intimate sphere of life is concerned. Such a social reference, when of sufficient intensity, can make State measures for the protection of community interests necessary." *Id.*

95. *Id.* at (225).

96. *Id.* at (233-34).

97. BVerfGE 34, 238 (245) (F.R.G.).

> which are based on an overriding community interest under the strict application of the principle of proportionality, as long as they do not affect the inviolable sphere of private life.[98]

Similar principles apply to the use of personal diaries in criminal proceedings.[99]

In the *Eppler* case, the Court decided whether the personality right protects against false or inaccurate quotations attributed to one person by another.[100] Though this constitutional complaint was unsuccessful, it is interesting to note the Court's reasoning with respect to Article 2(1), especially regarding the individual's right to be regarded by the public in the way he wants to present himself, not as others view him:

> The personality right is violated if words are put into someone's mouth which he has not voiced and which harm his claim for social respect as defined by himself. This follows from the principle of autonomy . . . .[T]he content of the personality right is essentially shaped by the way he sees himself.[101]

In the *Flag Desecration* case, the Court addressed the issue of whether the desecration of the German flag was protected by the constitutional right of freedom of speech, Article 5(1), and the right to artistic freedom, Article 5(3), which grants broad freedom to arts and sciences.[102] The rights guaranteed in Article 5(1) are strictly limited in Article 5(2), but the freedom of expression in an artistic form guaranteed in Article 5(3) might be unrestricted since it is granted without express reservation. The Court held, however, that Article 5(3) BL does not exclude punishment under Section 90(a)(I)(2) of the German Penal Code (StGB) for desecrating the German flag, even through the medium of art:

> Although artistic freedom is granted unreservedly, it does not generally preclude punishment under Section 90(a)(I)(2) StGB. The guarantee of Article 5(3) BL is not only limited by constitutional rights of third persons, but it can also collide with various constitutional regulations, for orderly human co-existence requires not only mutual respect of the citizens, but also a functioning public State order which secures, in the first place, the efficacy of the protection of constitutional rights.[103]

Here, the Court found that artistic freedom collided with the protection of the symbols of the State and that the purpose of the symbols was to appeal to the civic consciousness of its citizens.[104] If the flag serves as an important medium of cohesion, the desecration of the flag can undermine State authority, which is

98. *Id.* at 246. Regarding the strictly private or social dimensions of private life, the Court observed that "[w]hether secret tape recordings touch upon the inviolable sphere of private life, or whether they only concern that sphere of private life that, under circumstances, is open to State access, can hardly be described in an abstract manner. This question can only be answered satisfactorily, on a case by case basis, taking account of the particularities of any given case. In the present case, we are concerned with a business conversation. . . .Highly personal subjects which belong to the inviolable intimate sphere were not mentioned." *Id.* at (248).

99. BVerfGE 80, 367 (373) (F.R.G.).

100. BVerfGE 54, 148 (F.R.G.).

101. *Id.* at (155-56).

102. BVerfGE 81, 278 (F.R.G.).

103. *Id.* at (292).

104. "As a free State, the Federal Republic [of Germany] depends upon the identification of its citizens with basic values symbolized by the flag." *Id.* at (293).

necessary for the State's internal peace.[105] However, the protection of State symbols cannot immunize the State against criticism and even rejection.[106] Although the Court ultimately found the acts to be constitutionally protected, it still reasoned that the freedom of artistic expression, as granted by Article 5(3), is not absolutely insulated from criminal prosecution.[107]

In conclusion, the German Basic Law is characterized by tailor-made general and specific limitations on its rights dedicated to striking a careful balance between the interests of the community and the individual in each area of protected activity, thus ensuring the central goal of protecting and respecting human dignity. The Federal Constitutional Court, as the Basic Law's ultimate guardian, has interpreted the limits to the Constitution's general guarantee of freedom to act as necessitating formally and substantively constitutional governmental action. Substantive constitutional action not only prohibits the impairment of the essence of a right but also requires governmental action to conform with the principle of proportionality. A careful balancing is needed when overriding community interests are involved, even when the freedoms are expressly guaranteed without formal or substantive limitation.

In many important ways, the Basic Law signified a collective rejection of the country's Nazi past. The Holocaust also highlighted certain limits that any domestic legal system may encounter in curbing tyrannical and genocidal aspirations. Furthermore, it gave rise to the international legal guarantees of fundamental human rights, which any individual can raise against the awesome power of the State. The nation-states themselves agreed to such self-limitations of power as a fundamental principle of the post-World War II order, expressed in the United Nations Charter, the 1948 Universal Declaration of Human Rights and the twin UN human rights treaties of 1966, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For purposes of comparison, this article will focus on the ICCPR.

IV.
INTERNATIONAL PRESCRIPTIONS

A. Universal Parameters: The International Covenant on Civil and Political Rights

The ICCPR,[108] like other liberal catalogs of basic rights, enumerates rights expressed in prohibition norms (i.e., prescriptions that require the State to refrain from performing certain acts). The ICCPR also contains various requirement norms that compel the State to take positive action in order to guarantee the enjoyment of the rights. Also, as in all catalogs of basic rights, the ICCPR

105. Bernhard Jürgen Bleise, *Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws*, 20 DEN. J. INT'L L. & POL'Y 471, 476 (1992). *See also* Eberle, *supra* note 84, at 863-66.

106. BVerfGE 81, 278 (294) (F.R.G.).

107. *Id.* at (292).

108. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

provides the possibility of restricting rights for reasons of overriding general public interest or overriding interests of others, thereby circumscribing the legal ambit of individual freedom.[109]

Each article of the ICCPR starts with a general statement of the right concerned, followed by a more detailed formulation of the content or scope *ratione materiae* of that right, and then by limitations or restrictions where applicable. The ICCPR contains two types of provisions on limitations. It permits State Parties under closely stated conditions to restrict or condition to varying degrees the exercise of the rights enshrined in the ICCPR. In addition, Article 4 allows for derogation or the temporary and limited suspension of rights "[i]n time of public emergency which threatens the life of the nation," provided that those rights are not abridged on a discriminatory basis.[110] However, there are also some rights that are "emergency-proof."[111]

In general, the Covenant recognizes the power of State Parties to limit, in exceptional circumstances, certain rights otherwise protected. For example, Article 12(3) has a limitation clause allowing for restrictions on the right to liberty of movement and the freedom to choose a residence when it is "necessary to protect national security, public order, public health or morals, or the rights and freedoms of others." Similar permissible restrictions can be found in Article 21, the right to peaceful assembly, and Article 22(2), freedom of association. Somewhat narrower restrictions are permitted regarding the right to a fair and public hearing, Article 14(1); freedom of religion, Article 18(3); and the right to freedom of expression, Article 19(3).

Article 4(2) of the ICCPR explicitly outlines the set of rights that cannot be derogated from, even in times of emergency. It includes Article 6, the right to life; Article 7, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; Article 8, the right not to be held in slavery or servitude; Article 11, the right not to be imprisoned for failure to perform contractual obligations; Article 15, the right not to be subject to retroactive criminal prosecutions; Article 16, the right to recognition as a person before the law; and Article 18, the right to freedom of thought, conscience, and religion.

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109. Klein, *supra* note 5.

110. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1188 (1993); *see also* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT-LAW, POLITICS, MORALS 144 (2d ed., 2000).

111. Erica-Irene A. Daes, *Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, U.N. Doc. E/CN4/Sub.2/432/Rev.2, at 197-202 (1983).

The Human Rights Committee (HRC)[112] is the only organ with express functions with respect to the Covenant and the Optional Protocol.[113] By exercising its functions through the mandatory reporting procedure, the elaboration of general comments, and application of the optional individual communications procedure, the HRC has generated a body of authoritative interpretation of the Covenant provisions. The Committee's position on the limitation clauses are found in the General Comments[114] regarding the implementation of Articles 4, 12, 18, and 19.

In General Comment 5, regarding Article 4 of the ICCPR, the HRC indicated that a claimed emergency would justify a derogation of rights under that article only if the circumstances are of an exceptional and a temporary nature.[115]

In General Comment 29, paragraph 2, which replaced General Comment 5,[116] the HRC emphasized that the State party officially proclaim the state of emergency and stated that this condition "is essential for the maintenance of the principles of legality and rule of law when they are most needed."[117] This interpretation is much stricter than that offered by the European Court of Human Rights (ECtHR), but understandably so, since the respective provisions are for-

112. The Human Rights Committee, established under Article 28(1) of the Covenant, is a quasi-judicial organ. Professor Tomuschat has commented that, "though its members are not judges," they have the task of applying the provisions laid down in the Covenant and therefore have to exercise legal judgment. It is the duty of the Committee to ensure that the State parties fulfill their obligations under the Covenant. DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE. ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 54 (1991). For more on the Human Rights Committee, see Torkel Opsahl, *The Human Rights Committee*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 369-444 (Philip Alston ed., 1992).

113. G.A. Res. 2200A(XXI), U.N. GAOR, I 496th meeting, at 6, para. 60 (1966), *available at* http://www.un.org/Depts/dhl/resguide/resins.htm. The Optional Protocol to the International Covenant on Civil and Political Rights, which entered into force on March 23, 1976, deals with the right to petition to or against governments. Under Article 1 of the Protocol, the State party recognizes the competence of the Human Rights Committee "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

114. See Human Rights Committee—General Comments, *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm. The General Comments are designed to provide clear guidelines for the State parties. They also give substantive content to the articles concerned. General Comment on Article 19, regarding the limitation clauses, has been criticized as "both weak and disappointing, being little more than a reiteration of Article 19 . . . .The fundamental norms within Article 19 remain undefined and largely undeveloped." MCGOLDRICK, *supra* note 112, at 471. For a detailed analysis of the Committee's interpretation of Article 19, see *id.* at 459-79.

115. Paragraph 3 of General Comment 5, *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm, provides: "The Committee holds the view that measures taken under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for State Parties, in time of public emergency, to inform the other State Parties of the nature and extent of the derogations they have made and of the reasons therefore and, further, to fulfill their reporting obligations under Article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation."

116. U.N. Doc., CCPR/C/21/Rev.1/Add.11 (2001), *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm.

117. *Id.* at para. 2.

mulated differently.[118] In General Comment 29, paragraph 3, the HRC elaborated on the prerequisites of invoking Article 4, stating:

> Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1 . . . . The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If State parties consider invoking article 4 in other situations than in armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over State parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.

The HRC also decided that in cases which appear before the Committee in accordance with the mechanism set forth in the Optional Protocol,[119] the state holds the burden of showing that these requirements have been fulfilled. The Committee considered the principles set forth in the General Comments as guidelines when it examined the state reports under the procedure provided for in Article 40.

In General Comment 22, regarding Article 18 (the right to freedom of thought, conscience, and religion), the HRC states: "Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[120] The HRC adds that Article 18, paragraph 3, is to be strictly interpreted, with attention to the principles of proportionality and non-discrimination.[121] When it comes to restrictions based on morals, the HRC seems to ask for a wider interpretation of the term, not exclusively an interpretation suggested by one single tradition:[122]

> [R]estrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their relig-

118. *See* discussion *infra* pp. 34-35.

119. An interesting discussion on the Optional Protocol can be found in JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 83-114 (1994).

120. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm.

121. *Id.*

122. *Id.* The ECtHR has interpreted General Comment 22, regarding Article 18, paragraph 3, differently, widening the margin of appreciation of the State when its challenged measure is based on morals; *see generally* Sunday Times v. United Kingdom, No. 2 (A/38), 3 Eur. H.R. Rep. 317 (1981).

> ion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

In General Comment 10, regarding Article 19 (freedom of expression), paragraph 3, the HRC stresses that the core of the right should not be jeopardized:[123]

> Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.

Paragraph 3 lays down the conditions under which restrictions may be imposed: the restrictions must be "provided by law," imposed for one of the purposes set out in subparagraphs (a) and (b) of Paragraph 3, and justified as being "necessary" for that State party for one of those purposes.

The HRC has, on several occasions, expressed its views regarding Article 4 and Article 19 of the ICCPR.[124] In *Silva v. Uruguay*,[125] the Government of Uruguay, in its July 10, 1980 submissions, invoked Article 4(1) of the Covenant to justify the ban imposed on the authors of the communication brought before the HRC. However, the HRC felt that the Article 4(1) requirements had not been met, stating that:

> Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant.[126]

The Committee found that the Government of Uruguay failed to show that interdiction of political dissent was required in order to deal with the alleged emergency situation and pave the way to political freedom.[127]

Article 4(2) and Article 6 of the ICCPR covers the non-derogable right to life. In *Suárez de Guerrero v. Colombia*,[128] the HRC examined a case in which the alleged victim and six other persons were killed during a police raid because

123. General Comment 10, para. 3, *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm.

124. For the jurisprudence of the Human Rights Committee, see P.R. GHANDHI, THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION: LAW AND PRACTICE (1998).

125. Case No. 034/1978, U.N. Doc. CCPR/C/OP/1 at 65 (1984), *available at* http://www1.umn.edu/humanrts/undocs/html/34_1978.htm.

126. Id. at para. 8.3. The Committee further noted that "even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means."

127. *Id.* at para. 8.4.

128. Case No. 45/1979, U.N. Doc. CCPR/C/15/D/45/1979 (1982).

they were suspected, as members of a guerilla organization, of having kidnapped a former ambassador. The Committee found that the police action was not necessary for its own defense or that of others and that "the death of Mrs. Maria Fanny Suárez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to articles 4(2) and 6(1) of the [ICCPR]."[129] Then, the Committee proposed a remedy where the State Party would take the necessary measures to compensate the victim's husband for the death of his wife and ensure that the right to life is duly protected by amending the law.

The HRC has published its views on Article 19 in a number of cases. These opinions establish clearly that punishment for the expression of views violates Article 19, unless justified by Paragraph 3. Among the most interesting cases is *Faurisson v. France*, in which the complainant attacked the 1990 Gayssot Act, which amended freedom of the press laws to make it an offense to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 and applied against Nazi leaders, as a threat to academic freedom, including freedom of research and expression.[130] The Committee noted that it was not abstractly criticizing laws created by State Parties but rather was trying "to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it."[131] The Committee held that the restrictions of the Gayssot Act were justified because they were provided by law, addressed the aims set out in Paragraph 3(a) and (b) of Article 19, and were necessary to achieve the legitimate purpose of curbing racism and anti-semitism.[132]

In other cases, the HRC has found insufficient evidence to justify a violation of Article 19. In *Perdoma and De Lanza v. Uruguay*,[133] the HRC found that because the Government of Uruguay "submitted no evidence regarding the nature of the political activities in which [the complainants] were alleged to have been engaged and which led to their arrest, detention and trial," the Committee was unable to conclude that the arrest and detention were justified on any Article 19(3) grounds.

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129. *Id.* at para. 13.3.

130. Communication No. 550/1993, para. 3.1, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

131. *Id.* at para. 9.3.

132. "[Mr. Faurisson's] conviction did not encroach upon his right to hold and express an opinion in general, rather the court convicted [him] for having violated the rights and reputation of others. For these reasons, the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant." *Id.* at para. 9.5. It is interesting to read the reasoning and arguments brought forth by the members of the Committee in several concurring opinions, for example, the opinion by Prafullachandra Bhagwati: "[T]he rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3(a), may relate to the interests of other persons or to those of the community as a whole. Since the statement made by author. . .was at least of such a nature as to raise or strengthen anti-semitic feelings. . .the second element required for the applicability of article 19, paragraph 3, was therefore satisfied"; *cf.* STEINER & ALSTON, *supra* note 110, at 755-61; *see also* GHANDHI, *supra* note 124, at 34.

133. MCGOLDRICK, *supra* note 112, at 465 (quoting U.N. Doc. A/35/40 at 111).

Other cases have required interpretation of what constitutes a legitimate purpose. In *Hertzberg and Others v. Finland*, the HRC considered a case in which the Finnish government invoked public morals to justify its restrictive actions.[134] The HRC found no violation of Article 19, stating that:

> It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities. . . .According to Article 19(3), the exercise of the rights provided for in Article 19(2) carries with it special duties and responsibilities for those organs [radio and TV]. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.[135]

This case's introduction of the "margin of discretion" argument is an important element in the development of HRC jurisprudence, but it seems that this concept was interpreted too broadly in this case.[136] There was no consideration on the part of the Committee of the necessity of the restrictions imposed.[137] In analyzing this case, McGoldrick commented that the HRC did not attempt to establish any standard of international morality, but only stated that "there are no universally applicable moral standards."[138]

The HRC has thus come far in developing a theory of limitations, drawing on national and regional rights instruments. Since it has fewer opportunities than national courts and regional bodies, such as the European Court of Human Rights, to express itself in individual case opinions, the HRC lays out its understanding in General Comments that track established human rights doctrines. The derogation clause has been strictly interpreted, while other limitations seem to have been afforded less searching scrutiny at times.

B. The Regional Prototype: Limitations Upon Rights Under the European Convention on Human Rights and Fundamental Freedoms

As stated above, the Holocaust made it abundantly clear that domestic guarantees could not ensure protection of human dignity against abusive governments. In response, the United Nations and regional intergovernmental organizations established standards and mechanisms designed to ensure that such abuses would not be repeated. In 1950, the Council of Europe adopted the European Convention on Human Rights and Fundamental Freedoms—the first and, to date, most effective system of protecting individual rights under international law. It set up a system of rights as well as specific limitations.

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134. U.N. Doc. CCPR/C/15/D/61/1979 (2 April 1982).

135. *Id.* at paras. 10.3-10.4. The Committee's views on morals, at that time, seem to differ from the later ones (e.g., General Comment 22 on Article 18).

136. On the other hand, it must be noted that the HRC never repeated the reference to "margin of appreciation" *per se*. The Committee appears to distrust this type of formula, fearing that states might abuse it.

137. MCGOLDRICK, *supra* note 112, at 468.

138. *Id.* at 467-68. For further analysis of the role, weaknesses, and strengths of the Committee, as well as its challenges and suggestions for change, see Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 38 (Philip Alston & James Crawford eds., 2000).

Since there are only a few "absolute" rights (for example, the right not to be tortured and the right to think whatever one pleases), it is generally accepted that restrictions on individual rights, whether express or implied,[139] are specifically designed to secure the liberty of individuals in a given society and to harmonize individuals' rights with the interests of society.[140] When the drafters of international human rights instruments limited a right specifically or provided more general limitations, they knew that although the agreed formulation served as a compromise on controversial matters at the time of drafting, it would also lead to wider or narrower interpretations of the instrument in the future.[141]

At the outset, a distinction should be made between the limits to the scope of a right enshrined in the European Convention on Human Rights and the restrictions regarding the exercise of such right.[142] The first set of limitations has to do with the formulation of the substantive scope of a right and its express restrictions through specific qualifications. For example, Article 11 of the Convention, freedom of peaceful assembly, automatically excludes, *ratione materiae*, from the scope of the right assemblies that are not peaceful. Also, Article 12, the right to marry and to found a family, pertains, *expressis verbis*, only to men and women of marriageable age, according to national laws governing the exercise of this right—a right whose very essence cannot be denied.[143] Interestingly, in a recent decision based on "major social changes in the institution of marriage . . . as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality," the European Court of Human Rights (ECtHR) dropped the restriction to "men and women" in the case of transsexuals.[144] The interpretation of the scope of rights by the Commission and Court has thus shown that societal values and conditions, as well as prevailing morals, work to delineate the substantive contours of rights, and allow for an evolutionary, dynamic understanding of the scope of rights. While the scope of

139. Contrary to the early doctrine of "inherent limitations" developed by the Commission, it is now established that the only permissible restrictions are the ones clearly provided for in the general provisions of the Convention or in the individual articles. The European Court of Human Rights has held that there is no room for "implied limitations" where the Convention expressly provides for the right and for its limitations. *See* Golder v. U.K., (A/18), 1 Eur. H.R. Rep. 524, para. 44 (1979-80). Nevertheless, when a particular right is guaranteed by implication (i.e., without express provision in the Convention), the Court held that this right may be subject to implied limitations (e.g., the right of a convicted prisoner to take civil proceedings, which is derived from Article 6—the right of access to the courts). In Deweer v. Belgium, (A/35), 2 Eur. H.R. Rep. 439 (1979-1980), the Court held that the right to have a criminal charge determined by a court can be subject to implied limitations (e.g., the authorities may legitimately decide not to prosecute or to discontinue the proceedings).

140. Klein, *supra* note 5.

141. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 16-17, 251-56 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999); *see also* von Mangoldt, *supra* note 63, at 33, 47.

142. LOUKIS G. LOUCAIDES, ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS 179 (1995).

143. *See* Rees v. United Kingdom, (A/106), 9 Eur. H.R. Rep. 56 at para. 50 (1987); F v. Switzerland, (A/128), 10 Eur. H.R. Rep. 411 at para. 36-40 (1988) (The Swiss court's imposition of a three-year ban on remarriage upon a third-time divorcee "affected the very essence of the right to marry" and "was disproportionate to the legitimate aim pursued").

144. Goodwin v. United Kingdom, 35 Eur. H.R. Rep. 18, at para. 100 (2002) (referring to Article 9 of the Draft Charter of Fundamental Rights of the European Union as evidence of these changes).

rights can thus be extended, it can also be limited: several complaints were dismissed on the grounds that they fell outside of the protected substantive scope of the rights invoked.[145]

The latter, more pertinent concept of limitations on rights pertains to the specific limitation clauses provided for in the Convention. There are three types of limitation clauses in the ECHR:[146]

> (1) Limitations attached to a provision of a right for certain prescribed purposes (e.g., national security, public safety, health, morals, rights of others, etc.)
>
> (2) Limitations referring to certain activities (e.g., political activity of aliens, activities subversive of Convention rights)
>
> (3) Limitations referring to the suspension of a group of rights during public emergencies threatening the life of a nation (e.g., war, earthquake, etc.).

1. Limitations for Certain Prescribed Purposes

The first category of limitations affects the rights guaranteed in Articles 8 through 11 of the Convention; they also constitute the most common type of limitation. The terminology used to authorize limitations for certain prescribed purposes is more or less similar in each article, and the pertinent case law of the Commission and the ECtHR is exceptionally rich and developed.

Article 8, the right to respect for private and family life, home, and correspondence, states in paragraph 2:

> There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.

Similar, but not identical, grounds for restrictions are provided in Article 9(2), limiting the right to freedom of thought, conscience, and religion; Article 10(2), qualifying the right to freedom of expression; and Article 11(2), limiting the right to freedom of peaceful assembly and to freedom of association, as well as the right to form and to join trade unions.[147] The Fourth Protocol to the Convention, Article 2, paragraph 4 also contains limitation clauses regarding freedom of movement, refering to restrictions "justified by the public interest in a democratic society" without specifying particular aims. Also, Article 1 of the Seventh Protocol refers only to "necessary" restrictions while Article 1 of the First Protocol refers to the "public interest" and the "general interest."

145. LOUCAIDES, *supra* note 142, at 181 (citing Application No. 87007/79, D.R., Vol.18, p.255 (obligation of drivers and passengers of motor vehicles to wear safety belts); Application No. 6454/74 (obligation of motor-cyclists to wear helmets); Application No. 9101/80 (prohibition of pigeon-feeding in public streets)).

146. *Id.* at 179.

147. For cases and the application of Article 9, see MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 315-341 (1997); Javier Martinez-Torron, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights*, GLOBAL JURIST ADVANCES Vol. 3, No.2, Art. 3, *available at* http://www.bepress.com/gj/advances/vol3/iss2/art3.

These restrictions must be (1) *in accordance with the law*, (2) *pursue one of the specific aims* described therein, and (3) be *necessary in a democratic society*.[148] As the main interpretative authority and "guardian" of the ECHR, the ECtHR, which supervises forty-six states' compliance with human rights obligations,[149] has long been at the forefront of developing general doctrines of human rights law, including the doctrine of limitations. Its case law abounds with interpretation of limitation clauses—in particular, whether an interference with a right is in compliance with the requirements set out in the limitation clause.

a. "In accordance with the law"

Despite slight differences in the wording (that is, "in accordance with the law," "prescribed by law," or "provided for by law"), the meaning of these limitations upon limitations and their legal effect are essentially the same.[150] Restrictions must have an adequate basis in domestic law and the domestic law must satisfy the Convention requirements. Interference with a right is justified when the relevant domestic law is characterized by a reasonably precise delimitation of circumstances and procedures, causing the restriction on a person's freedom to act to be sufficiently foreseeable, and by the compatibility of the law with the idea of the rule of law, shielding against the abuse of power and arbitrariness.[151] In *Sunday Times v. United Kingdom (No. 1)*, the ECtHR first interpreted the "prescribed by law" requirement.[152] The Court reasoned:

> [T]he law must be adequately accessible, i.e., the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case . . . [A] norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able . . . to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[153]

Furthermore, the court rejected the British government's argument that it is sufficient for a law to qualify as such within the legal system of a country. Instead, the court adopted an autonomous interpretation demonstrating how the concept of the rule of law can be used to elucidate and consolidate the Convention safeguards.[154]

The court also approached developing a rule of law-based system of limitations with an awareness of its practical limitations. Analyzing the issue of sufficient precision in the text of legislation, the court accepted the notion of "initial vagueness" of laws, which was later clarified by national courts. In the abovementioned case, the court found that:

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148. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 222 (hereinafter "ECHR").

149. Council of Europe, The Council of Europe's Member States, *at* http://www.coe.int/T/e/com/about_coe/member_states/default.asp. (last visited Jan. 17, 2005).

150. A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 196 (3d ed. 1993).

151. Olsson v. Sweden, (A/250), 17 Eur. H.R. Rep. 134, 162 (1994).

152. (A/30), 2 Eur. H.R. Rep. 245 (1979-80)

153. *Id.* at 271.

154. ROBERTSON & MERRILLS, *supra* note 150, at 197.

> whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[155]

The court developed this concept further in a number of other cases.[156]

The court's interpretation of the living law in changing conditions includes several elements. One element is the court's interpretation of the addressees of law. Thus, in *Groppera v. Switzerland*, the court held that "the scope of the concepts of foreseeability and accessability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."[157] Another interpretation, set forth in *The Observer and Guardian v. U.K.*, is the use of a different "application of existing rules to a different set of circumstances."[158] In *Leander v. Sweden,* the court noted that "account may also be taken of administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents."[159]

b. "Legitimate aim"

This criterion essentially requires that the authorities act in good faith when restricting rights. Though not listed exactly the same way in each qualifying provision, the concept is defined similarly in all of them. Legitimate interests include national security; territorial integrity and public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; the protection of the rights, freedoms, and reputation of others; the prevention of disclosure of information received in confidence; and the impartiality of the judiciary. The case law of the Strasbourg institutions has shown that, although the above-mentioned purposes are sometimes expressed in vague terms, they are interpreted fairly easily because they are closely related to the third requirement of the measures being "necessary in the democratic society," which plays a decisive role in defining the meaning and application of such general "legitimate aims."

These aims cannot be employed by the state in an uncontrolled or absolute way. In *Klass v. Germany*, the court held that the contracting states do not enjoy "an unlimited discretion to subject persons within their jurisdiction to secret surveillance."[160] The court, aware that such a law could undermine or even destroy democracy in the name of defending it, affirmed that contracting states "may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate," and that states must ensure that "whatever system of surveillance is adopted, there exist adequate and effective safeguards

155. 2 Eur. H.R. Rep. at 271.
156. Geywitz v. The Federal Republic of Germany, D.R., Vol.60, p.256; Kokkinakis v. Greece, (A/40), 17 Eur. H.R. Rep. 397 (1994); Zamir v. United Kingdom, D.R., Vol.40, p.42.
157. (A/173), 12 Eur. H.R. Rep. 321, 322 (1990).
158. (A/216), 14 Eur. H.R. Rep. 153, 189 (1992).
159. (A/116), 9 Eur. H.R. Rep. 433, 451 (1987).
160. (A/28), 2 Eur .H.R. Rep. 214, 232 (1979-80).

against abuse."[161] The court further agreed with the Commission that "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention."[162]

The Preamble to the "Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism,"[163] based primarily on the European Convention and the case law of the court,[164] states clearly that the fight against terrorism is a legitimate goal. Nevertheless, the guidelines concentrate mainly on the limits states must respect in all circumstances in their legitimate fight against terrorism. Thus, Article 2 (prohibition of arbitrariness) states that "[a]ll measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness." Article 3 provides additional guidelines for the lawfulness of anti-terrorist measures:

> (1) All measures taken by States to combat terrorism must be lawful.
>
> (2) When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

In *Rotaru v. Romania*, a case concerning the collection and processing of personal data, the court interpreted the legitimate aim of national security, noting that "although section 2 of the law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision."[165] Although disputes do not often arise over a recognized aim for limitations, they are often analyzed in close proximity with the test of what is "necessary in a democratic society."

c. *"Necessary in a democratic society"*

The third prerequisite is that the limiting measure be "necessary in a democratic society." In *Silver v. United Kingdom*,[166] the court summarized its jurisprudence regarding this requirement:

> (a) the adjective 'necessary' is not synonymous with 'indispensable,' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'reasonable,' or 'desirable";

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161. *Id.*

162. *Id.* at 237 (footnote omitted); *see also* Brogan v. United Kingdom, (A/145-B), 11 Eur. H.R. Rep. 117, 129 (1989).

163. Guidelines on Human Rights and the Fight Against Terrorism, adopted by the Committee of Ministers of the Council of Europe, on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Council of Europe, Sept. 2002, *available at* http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf.

164. *See* Incal v. Turkey, 29 Eur. H.R. Rep. 448, 483 (1998); Ireland v. U.K., (A/25), 2 Eur. H.R. Rep. 25 at paras. 11 et seq (1978); Aksoy v. Turkey, 23 Eur. H.R. Rep. 553 at paras. 70 and 84 (1996); Zana v. Turkey, 27 Eur. H.R. Rep. 667 at paras. 59 and 60 (1997); and United Communist Party of Turkey v. Turkey, 26 Eur. H.R. Rep. 121 at para. 59 (1998).

165. Rotaru v. Romania, 2000 Eur. Ct. H.R. 191, *available at* http://www.worldlii.org/eu/cases/ECHR/2000/191.html.

166. (A/61), 5 Eur. H.R. Rep. 347, 376 (1983) (citing Handyside v. United Kingdom, (A/24), 1 E.H.R.R. 737, 754-55 (1979-80)); *see also* ROBERTSON & MERRILLS, *supra* note 150, at 199.

> (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
>
> (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued';
>
> (d) those paragraphs of . . . the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.[167]

When judging the validity of restrictions, there is room for flexibility, especially in the doctrine of "margin of appreciation," or level of discretion, which varies a great deal from case to case depending on different rights, claims, justifications, and times. The *Handyside v. United Kingdom* case, which dealt with freedom of expression, is probably the most cited case exploring the meaning of the term "necessary in a democratic society."[168] According to the court, the adjective "necessary," within the meaning of Article 10, paragraph 2, implies the existence of a "pressing social need."[169] The Contracting States retain a certain margin of appreciation in assessing whether such a need exists, but this freedom/flexibility "goes hand in hand with a European supervision" of both the legislation and the decisions applying it.[170] In exercising its supervisory jurisdiction, the court is not to "take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation."[171]

The court further explained that it must not only ascertain whether the respondent state exercised its discretion reasonably, carefully, and in good faith, but must also determine whether it was "proportionate to the legitimate aim pursued" and whether the state's justifications were "relevant and sufficient."[172]

The concept of a "democratic society" has been understood to refer to both the member states of the Council of Europe as well as to other democratic states. When considering the objectives of a "democratic society" in *Handyside*, the court reasoned:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[173]

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167. Silver v. United Kingdom, *supra* note 166 at para. 97.

168. 1 Eur. H.R. Rep. at 737.

169. *Id.* at 754.

170. *Id.* For more details on the application of the doctrine of "margin of appreciation," see HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996). *See also* Christian Bonat, *The European Court of Human Rights*, The Federalist Society for Law and Public Policy Studies 25-26 (2000), *at* http://www.fed-soc.org/Intllaw&%20AmerSov/eurocourthr.pdf.

171. Handyside, *supra* note 168, at 755.

172. *Id.* at 754, 755.

173. *Id.* at 754.

In *Handyside,* the court mentioned the criteria of duties described in Article 10(2) by stating, "whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses."[174] The court developed this view further in *Müller v. Switzerland,* which considered whether artistic freedom is protected under Article 10 (freedom of expression).[175] The court held that it had to review the duties and responsibilities of individuals in order to answer the question of whether or not the conviction was necessary in a democratic society.[176] The court was criticized for infringing upon the creativity of artists; it was considered to be a heavy burden for an artist to think of duties while creating art. Also, in *Müller,* the court mentioned the impossibility of finding a common view of morals among the diverse Contracting States to the ECHR.[177]

In the *Sunday Times* case,[178] the court confirmed the same approach to the protection of morals: "The view taken by the Contracting States of the 'requirements of morals' . . . 'varies from time to time and from place to place,' and 'State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.'" However, the majority found the appropriate margin of appreciation to be narrower than in *Handyside* because parties to the Convention agreed that judicial authority should be subject to a "far more objective notion" than should the protection of morals.[179] In other words, when it comes to legitimate purposes other than morals, more extensive European supervision might lead to a less discretionary power of appreciation. In the *Sunday Times* case, the court concluded that interference could not be justified under Article 10(2) because the social need was not "sufficiently pressing to outweigh the public interest in freedom of expression," the restraint was not "proportionate to the legitimate aim pursued," and it was "not necessary in a democratic society for maintaining the authority of the judiciary."[180]

The *Observer and Guardian v. United Kingdom* case deals with another legitimate aim—national security.[181] The court held that the injunction sought to restrict publication was not necessary in a democratic society because it "prevented the newspapers from exercising their right and duty to convey information already available on a matter of legitimate concern."[182]

Freedom of speech and its limitations based on the rights of others is another area that requires flexible application of the necessity test. Generally, the court has held that the limits of acceptable criticism could be wider if directed

174. *Id.* at 755.
175. (A/133), 13 Eur. H.R. Rep. 212 (1991).
176. *Id.* at 228.
177. 13 Eur. H.R. Rep. at 228-29.
178. 2. Eur. H. R. Rep. at 276 (quoting *Handyside,* 1 Eur. H.R. Rep. at 753) (alterations in original).
179. *Id.*
180. *Id.* at 282.
181. 14 Eur. H.R. Rep. at 153.
182. *Id.* at 196.

against a politician than a private individual,[183] and such limits are wider with regard to the government than to a private citizen or even a politician.[184]

The principle of proportionality, an important criterion for assessing whether an interference with a right is "necessary in a democratic society," has long been used by many constitutional courts in various legal systems, as well as by the European Court of Justice. The court has used the proportionality test as a key means of control, applying it concretely and meticulously to balance the legitimate purpose of safeguarding individual rights.[185] The European Court of Human Rights first adopted the principle in 1968 in the *Belgian Linguistic Case* (No. 2),[186] which dealt with Article 14—the prohibition of discrimination. The Court held that "Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aims sought to be realized."[187]

In *Dudgeon v. United Kingdom*, which addressed Article 8(2) (respect for private life), the court concluded that the government failed to justify its legislation criminalizing "buggery," which it compared to legislation regarding homosexual conduct in other European states.[188] The court held that whatever benefits flowed from the law, they did not outweigh its disadvantages, as required by the principle of proportionality.[189] The court emphasized the fact that the legislation targeted the "most intimate aspect of private life."[190] In the realm of Article 8, in *DP v. United Kingdom*, it is interesting to note that the court stated that "Article 8 may impose positive obligations to protect the physical and moral integrity of an individual from other persons."[191]

Another pertinent decision is the *Sporrong-Loennroth* case,[192] which examined interferences with the right to property addressed by Article 1 of First Protocol. Although there is no requirement of objective necessity in the limitation clause of this provision, the court stated that it:

> must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of Protocol 1.]

Restrictions on the rights of certain persons can be stricter than limits on others, as exemplified by Article 11(2).[193] Article 16 limits the political activity

183. *See* Lingens (1986), D.R., Vol. 26, p.171, at 181, para. 10(c) ("a politician must be prepared to accept even harsh criticism of his public activities and statements.").

184. *See* Castells v. Spain, (A/103), 14 Eur. H.R. Rep. 445, 463-64 (1992).

185. LOUCAIDES, *supra* note 142, at 198.

186. (A/6), 1 Eur. H.R. Rep. 252 (1968).

187. *Id.* at 284.

188. (A/45), 4 Eur. H.R. Rep. 149, 168 (1982).

189. *Id.*

190. *Id.* at 165.

191. 36 Eur. H.R. Rep. 14, at para. 116 (2003).

192. 1982 Eur. Ct. H.R. 5, at 24-28.

193. Article 11(2) states: "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the

of aliens.[194] As for the cases mentioned above (addressing politicians, etc.), it cannot be said that the jurisprudence of the court has established any restrictions *ratione personae*, but it has held that such restrictions might justifiably affect certain classes of individuals more than others.[195] Conflicting claims might arise in cases of concurrent exercise of several rights or the same right by several people. The margin of appreciation would again come to the fore in these situations to clarify decisions on the legality or the objective of the restrictive measure on a case-by-case basis. The maxim *in dubio pro libertate*, so useful in relations between individuals and their governments, dictates favoring the freedom of the individual, which is not useful in conflicts among individuals: interpreting rights broadly for one would in many cases narrow the scope of the rights of others.

2. Limitations on Certain Activities

The second category of limitations, found within Article 16 through 18, refers to specific activities.[196] Article 16, which contains restrictions on the political rights of aliens, provides that "[n]othing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens."[197] This article seems to run counter to Article 1, which states that rights in the Convention are to be enjoyed by "everyone within [the state's] jurisdiction."[198] Potentially, Article 16 permits a wide range of state interference with the political rights of aliens. Unfortunately, the jurisprudence regarding this article is not well-developed. In *Piermont v. France*, the Commission indicated that the provision expressed an outdated view of the rights of aliens.[199] The article applies expressly to political activities that might be interpreted narrowly to include matters of political process, such as organizing and setting up political parties and relations with the parties' programs and campaigns.[200]

Article 17 safeguards the free operation of democratic institutions but imposes narrow restrictions on activities subversive of Convention rights.[201] It can

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imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

194. ECHR, *supra* note 148, at art. 16.

195. *See* Engel v. Netherlands, (A/22), 1 Eur. H.R. Rep. 647, 669 (1979-80) (stating that the existence of "a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians" does not in itself run counter to their obligations).

196. *Compare* JUKKA VILJANEN, THE EUROPEAN COURT OF HUMAN RIGHTS AS A DEVELOPER OF THE GENERAL DOCTRINES OF HUMAN RIGHTS LAW: A STUDY OF LIMITATION CLAUSES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003).

197. ECHR, *supra* note 148, art. 16.

198. *Id.* at art. 1.

199. 314 Eur. Ct. H.R. (ser. A) 14 (1995); Application 15773/89 1995 Eur. Ct. H.R. 14 (27 April 1995). Series A. No. 314.

200. DAVID HARRIS, MICHAEL O'BOYLE, & CHRIS WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 510 (1995).

201. "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights

be invoked both by an individual against the State and by a State to justify interference with individual rights. In *Parti Communiste v. Federal Republic of Germany*, the Commission applied Article 17, rejecting the complaint by the German Communist Party against its prohibition as incompatible with the provisions of the Convention, since the party aimed to establish a dictatorship that would suppress a number of rights and freedoms enshrined in the Convention.[202] In *Kühnen v. Federal Republic of Germany*, the Commission again invoked Article 17, stating that this article covered those rights that might facilitate an attempt to derive from them a right to engage in activities aimed at the destruction of any of the protected rights and freedoms.[203] The Commission found that the freedom of expression enshrined in Article 10 may not be invoked in a sense contrary to Article 17.[204]

Regarding the court's case law, *Lawless v. Ireland* (No. 3),[205] one of its earliest decisions, represents a much stricter view[206] of the application of Article 17: "no person may be able to take advantage of the provisions of the Convention to perform any act aimed at destroying the aforesaid rights and freedoms."[207] Hence, Article 17 cannot be used to deprive an individual of his political freedom simply on the ground that he has supported a totalitarian government in the past."[208] In *Lehideux v. France*,[209] the court found a breach of Article 10 and decided that it was not appropriate to apply Article 17, contrary to the French Government's approach.[210] In a concurring opinion, Judge Jambrek stated, "In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others. . . . Therefore, the requirements of Article 17 are strictly scrutinized, and rightly so."[211]

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and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." ECHR, *supa* note 148.

202. Application No. 250/57, 1955-57 Y.B. Eur. Conv. on H.R. 222, 224 (Eur. Ct.).

203. Application 12194/86, 56 D.R. 205 (1988); *see also* Glimmerveen and Hagenbeek v. Netherlands, Applications 8348/78 and 8406/78, 18 D.R. 187, 195-96 (1979).

204. 56 D.R. at 209.

205. (A/1), 1 Eur. H.R. Rep. 15 (1979-80).

206. CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 363 (3d ed., 2002); *see also* HARRIS, O'BOYLE, & WARBRICK, *supra* note 200, at 510-13.

207. 1 Eur. H.R. Rep. at 22.

208. OVEY & WHITE, *supra* note 206, at 363 (citing De Becker, Report of the Commission, 8 Jan. 1960, Ser. B, No. 2, at 137-38). *See also* Vogt v. Germany, (A/323), 21 Eur. H.R. Rep. 205, 239 (1996) (holding that the dismissal from civil service of a member of the German Community Party was not, in this case, "necessary in a democratic society").

209. 30 Eur. H.R. Rep. 665 (2000).

210. *Id.* at 705.

211. *Id.* at 707, para. 2.

Article 18 allows for the inference that there cannot be inherent or implied restrictions on guaranteed rights.[212] It does not have a character independent of other articles, and can only be invoked in conjunction with an article that contains a limitation when that limitation is used for a purpose other than the one for which it is authorized. Thus, Article 18 gives protection against misuse of powers or breaches of good faith. Yet, because the Court rarely invokes Article 18, the relevant jurisprudence is undeveloped.

a. Derogation in War and Other Emergencies

The third category, codified in Article 15, includes limitations on rights during public emergencies threatening the life of a nation (for example, wars, earthquakes, and so on).[213] This article incorporates the principle of necessity common to all legal systems. Various constitutions and domestic statutes empower states to take otherwise unlawful measures that interfere with individual rights during emergency situations. Because European states have not often relied on Article 15, the jurisprudence of the Strasbourg institutions is not as developed as it is under other international instruments.

Several cases have expanded the definition of "public emergency" beyond war-like situations.[214] The definition includes incidents of serious violence, civil war, and insurrection as main categories, but also low-intensity, irregular violence. Although the cases before the court have all dealt with threats to internal security, the concept of public emergency arguably also covers other types of crises such as grave economic dislocations or natural disasters.[215]

The requirement of "threatening the life of the nation" refers "to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed."[216] To address the crisis, States can take "measures . . . to the extent strictly required" by the exigencies of the situation. These measures will probably involve derogations from Articles 5 and 6. In such situations, emergency legislation tends to extend the powers of the executive to arrest and detain the

212. "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." ECHR, *supra* note 148.

213. "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." ECHR, *supra* note 148. For a chart of limitations on rights, including derogation in times of emergencies, that are included in several constitutions and international instruments, see Human Rights and Constitutional Rights, Limitations on Rights, *at* http://www.hrcr.org/chart/limitations†uties/limits_general.html.

214. Greece v. United Kingdom, No.176/56, 12 Y.B. Eur. Conv. on H.R. 71, 71-76 (1958); Lawless, 1 Eur. H.R. Rep. 15, at para. 28; Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 33-50 (1978); Brannigan v. United Kingdom (A 258-B), 17 Eur. H.R. Rep. 539, 557 (1993).

215. HARRIS, O'BOYLE, & WARBRICK, *supra* note 200, at 493. For a thorough analysis of the states of emergency, see JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING HUMAN RIGHTS DURING STATES OF EMERGENCY (1994); Oren Gross, Exception and Emergency Powers: *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm- Exception" Dichotomy*, 21 CARDOZO L. REV. 1825 (2000).

216. Lawless, 1 Eur. H.R. Rep. at 31, para. 28.

individuals suspected to be involved in forbidden activities. In *Brannigan*, the court accepted the position of the government and the Commission on this matter and concluded that the 1988 derogation was a genuine response to a persistent emergency situation.[217] It decided that in so far as the "strictly required" question was concerned, it could not say that the government had overstepped its margin of appreciation[218] in its decision that judicial control should not be made part of the process of extending detention.[219]

"Other international obligations" are to be observed by the state when introducing measures of derogation. The obvious sources of international law in this case would be the ICCPR and the Geneva Conventions and its Protocols, though Article 15(1) does not preclude obligation under customary international law. In *Brannigan*, the court argued that the more stringent provisions of Article 4 of the ICCPR had been satisfied in "officially proclaiming" the emergency.[220]

Article 15(2) also contains certain non-derogable rights.[221] In no circumstances may a state depart from its obligation under Articles 2, 3, 4(1), and 7 of the ECHR, and Article 3 of the Sixth Protocol. The rights enshrined in these articles cannot be abrogated or derogated from even in times of war and other emergencies.[222] Three of these rights, the right to life, freedom from torture, and freedom from slavery and servitude constitute *jus cogens* norms.[223] The only limitations on the scope of non-derogable rights are intrinsic to each right, which is protected within its own definition and its internal range of application. The range of non-derogable rights differs from one instrument to another. The ECHR, which is the oldest of the conventions, contains the shortest list of non-derogable rights. The enumeration of the four common non-derogable rights in the ECHR reflects existing conventional and customary international law.[224]

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217. Brannigan, 17 Eur. H.R. Rep. at 576.

218. For more on this issue, see Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

219. 17 Eur. H.R. Rep. at 575-76, para. 60. The Court noted: "[I]n the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the government attaches great importance." *Id.* para. 59. *See also* Brogan v. U.K., (A 145-B) 11 Eur. H.R. Rep. 117, 131-36, paras. 55-62 (1988).

220. 17 Eur. H.R. Rep. at 577, para. 75; *see also* Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976-1977).

221. For a detailed analysis of the nature of non-derogable rights and the reasons for their inclusion in this section, see FITZPATRICK, *supra* note 215; *see also* Science and Technique of Democracy No.17, HUMAN RIGHTS AND THE FUNCTIONING OF THE DEMOCRATIC INSTITUTIONS IN EMERGENCY SITUATIONS, Wroclaw, Proceedings of European Commission for Democracy Through Law, Council of Europe (Oct. 3-5, 1996).

222. For a critical analysis of the jurisprudence of Strasbourg institutions, see Oren Gross, *"Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998).

223. Daphna Shraga, *Human Rights in Emergency Situations under the European Convention on Human Rights*, 16 ISR. Y.B. HUM. RTS. 217, 232-234 (1986); *see also* Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 230-231 (1997).

224. *See* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 2 (1981).

V.

FUNDAMENTAL RIGHTS IN EUROPEAN UNION LAW AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

The Constitution for Europe and its integration of the Charter of Fundamental Rights constitute major breakthroughs in the protection of human rights and the development of human rights as a structural principle of the European Union. The European Union's accession to the European Convention on Human Rights is the logical final step in the ongoing convergence of fundamental rights standards throughout Europe. This process was also fueled by the main judicial organ of the European Community—the European Court of Justice—which accelerated the transformation of the originally economic unit into a political community, and moved from the guarantee of trade-related "freedoms" to broader-based "fundamental rights" of Union citizens.

Initially, the 1957 Rome Treaty established four basic Community freedoms: the free movement of goods, labor, services, and capital. Structurally, those freedoms resemble traditional basic rights, as contained in the Member States' written constitutions. The Community's law prohibits interferences with trade. First, these Treaty provisions define a particular scope of protection, such as the free movement of goods.[225] Second, the Treaty allows limitations on these rights for certain defined purposes. For example, the free movement of goods may be limited on grounds of "public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures . . . ; or the protection of industrial and commercial property."[226] Third, these limitations are restricted, either expressly or through judicial interpretation, in order to avoid abuse. The most important limiting principle (*"Schrankenschranke"*) is the proportionality principle, which is derived from the legal systems of the Member States and structurally embodies many elements of national constitutional law. It states that the restricting provisions must serve a purpose compatible with the principles of the Community and be suitable for achieving that purpose (suitability). It further states that the restrictions must be necessary, meaning that there must not be any other less restrictive means of achieving the same purpose.[227]

Gradually, human rights guarantees were developed in Community legislation. In particular, the Single European Act of 1987 was an important document in Community human rights law and is frequently cited in case law.[228] The involvement of the European Court of Justice in human rights matters—an area not directly within the realm of its main or natural competencies—was also significant.

225. Treaty Establishing the European Community, Mar. 25 1957, art. 28, 298 U.N.T.S. 11 [hereinafter Rome Treaty]. ("Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.").

226. Rome Treaty, *supra* note 225, at art. 30(1).

227. *See* Christoph U. Schmid, *Pattern of Legislative and Adjudicative Integration of Private Law*, 8 Colum. J. Eur. L. 415, 446 (2002); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW 191 (1996).

228. Single European Act, Feb. 17, 1986, 25 I.L.M. 506 (entered into force July 1, 1987).

The question of human rights within the ambit of Community law arose when the national constitutional courts of Germany and Italy challenged the validity of secondary Community legislation before the European Court of Justice, on the grounds that such legislation infringed upon the fundamental rights enshrined in their national constitutions. As mentioned above, the ECJ stressed the supremacy of Community law and its direct application within national jurisdictions. Nevertheless, the debate continued, focusing on the premise that the Community law should not fall behind the national constitutions with regard to the protection of fundamental rights.[229] The ECJ's eventual innovation was the enunciation and application of a Europe-wide fundamental rights infrastructure beyond the expressly defined economic freedoms.[230]

Recognizing these "fundamental rights" as part of Community law in order to fill its perceived *lacunae*, the ECJ emphasized that they were part of the general principles of law[231] that the Court was required to apply pursuant to Article 164 of the Treaty of Rome. Community institutions thus had to act in accordance with these rights whenever they exercised their competences under the Treaty.

In *Stauder v. City of Ulm*, the ECJ reviewed the validity of Article 4 of Decision No.69/71 and held that this provision "contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."[232] While this judgment contained only a vague introduction to the concept, the ECJ affirmed this position in *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*:

> [R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[233]

In 1974, the ECJ conveyed the same message in *Nold v. Commission*[234] and even made reference to international treaties:

> [I]nternational treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

A year later in *Rutili*, the court specifically referred to the European Convention on Human Rights and its Fourth Protocol.[235] In that decision, it did not

229. Alain Van Hamme, *Human Rights and the Treaty of Rome, in* HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 70-81 (Liz Heffernan ed., 1994).

230. Vincent J.G. Power, *Human Rights and the EEC, in* HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 81-99 (Liz Heffernan ed., 1994).

231. Van Hamme, *supra* note 229, at72-73.

232. Case 29/69, 1969 E.C.R. 419, 425.

233. Case 11/70, 1970 E.C.R. 1125, 1134.

234. Case 4/73, 1974 E.C.R. 491, 507.

235. Case 36/75, 1975 E.C.R. 1219.

apply the provisions of the Convention *per se*, but rather construed them with specific reference to the relevant context of Community Law.[236]

The ECJ's later jurisprudence addressed the provisions of the European Convention more directly.[237] In *Commission v. Germany*,[238] the Court held that:

> Regulation No. 1612/68 must also be interpreted in the light of the requirement of respect for family set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of the fundamental rights which, according to the Court's settled case law, restated in the preamble to the Single European Act,[239] are recognized by Community law.

In *National Panasonic*, the court directly applied the limitations contained in Article 8(2) ECHR to justify the investigatory power of the Commission under Regulation 17.[240] In *Dow Benelux*, the Court limited the applicability of Article 8, as under the Convention, to "private dwellings of natural persons," rather than the premises of "undertakings."[241] Still, it held that the investigative powers of the Commission in this case could not be "arbitrary or disproportionate."[242] Similarly, in *Wachauf*, the ECJ, while supporting the applicability of fundamental rights in the Community system, held that these rights are nevertheless subject to proportionate restrictions:

> The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.[243]

Other fundamental rights enunciated by the court include the right to property and the right to exercise an economic activity[244]—two key concepts of a market-based system. In *Baustahlgewerbe GmbH v. Commission*, referring to Article 6(1) ECHR as interpreted in particular decisions of the ECtHR, the Court

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236. *Id.* at 1232; *see also* Vaughne Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, Research paper 00/32 at 11 (March 20, 2000), *at* http://www.parliament.uk/commons/lib/research/rp2000/rp00-032.pdf.

237. *See* ANTHONY ARNULL ET AL., WYATT & DASHWOOD'S EUROPEAN UNION LAW 146-49 (4th ed. 2000); *see also* The EU and Human Rights (Philip Alston ed., 1999).

238. Case 249/86, 1989 E.C.R. 1290.

239. The Preamble of the Single European Act (1987), *supra* note 228, states that the Member States adopted the Act, "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."

240. Case 136/79, 1980 E.C.R. 2033, 2057.

241. Case 85/87, 1989 E.C.R. 3137, at paras. 28-29.

242. *Id.* at para. 30.

243. Case 5/88, 1989 E.C.R. 2609, at para. 18.

244. This right may be limited by "the general objectives pursued by the Community, on condition that the substance of the right is left untouched." Case 234/85, Keller, 1986 E.C.R. 2897 at para. 8, [1987] 1 C.M.L.R. 875; Case C-370/88, Marshall, 1990 E.C.R. I-4071 at para. 27, [1991] 1 C.M.L.R. 419; Case T-521/93, Atlanta AG, 1996 E.C.R. II-1707 at para. 62.

also proclaimed a fundamental right to a fair legal process within a reasonable time.[245]

One other interesting case is that of *Bosman*.[246] It addressed, and declared illegal under European law, the transfer system of FIFA and UEFA—the leading world and European football associations—which allowed transfers of professional soccer players to other clubs only if their new club paid the old club a transfer fee based, inter alia, on the player's age and earnings. The ECJ discussed the conflict between free movement of labor and freedom of association and the consequent associational autonomy protected as a fundamental right under the ECHR and Community law. Balancing both of those rights, the court gave primacy to the free movement of labor noting that "the associations' rules at issue were neither necessary to the realization of associational freedom nor a binding consequence of it."[247] With regard to the admissible restrictions on free movement, the court followed the *Cassis*[248] formula, holding that the limitations must serve a legitimate objective compatible with the treaties and must be necessitated by public policy concerns. The court found that none of the arguments put forward to justify such an obstacle to the freedom of movement could be upheld.[249] In particular, the transfer rules did not maintain financial and competitive balance in the world of football since they did not prevent the richest clubs from securing the services of the best players on the market;[250] nor were the rules in question an adequate means of encouraging and financing clubs that provide training for young players, in particular the smaller clubs, since the prospect of receiving fees was uncertain and the amount of any fee was unrelated to the actual costs.[251] The associations' rules thus had to bow to this version of the proportionality principle.[252]

The dual obligation arising from Member States' compliance with both Community law and the European Convention may endanger uniform application and interpretation of human rights guarantees if cases are decided by the

245. Case C-185/95P, 1998 E.C.R. I-8417, [1995] 5 C.M.L.R. 239 at para. 29 (stating that the reasonableness of the duration of the proceedings "must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, by analogy, the judgments of the European Court of Human Rights in the cases of *Erkner and Hofauer* of 23 April 1987, Series A No 117, § 66; *Kemmache* of 27 November 1991, Series A No 218, § 60; *Phocas* v *France* of 23 April 1996, *Recueil des arrêts et décisions* 1996-II, p. 546, § 71, and *Garyfallou AEBE* v *Greece* of 27 September 1997, *Recueil des arrêts et décisions* 1997-V, p. 1821, § 39)"). In Case 63/83, R. v. Kent Kirk, 1984 E.C.R. 2689, 2718, the Court also affirmed the fundamental right not be subjected to *ex post facto* criminal legislation.

246. Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosman, 1995 E.C.R. I-4921. For a good discussion of this case, see Schmid, *supra* note 227, at 473-475, and Amikam Omer Kranz, *The Bosman Case: The Relationship between European Union Law and the Transfer System in European Football*, 5 COLUM. J. EUR. L. 431 (1999).

247. Case C-415/93, 1995 E.C.R. I-4921, *supra* note 246, at para. 80.

248. Case 120/78, 1979 E.C.R. 1-6097. The formula concerns the mandatory requirements of general interest, protection of public health, fair trading, and consumer protection (compelling requirements of general welfare).

249. Bosman, *supra* note 246, at paras. 105-114.

250. *Id.* at para. 107.

251. *Id.* at para. 109.

252. *Id.* at para. 110.

ECJ on one hand, and by the ECtHR on the other. Some of this concern has been addressed by the ECJ in its case law. For example, in *Cinéthèque SA v. Fédération Nationale des Cinémas Françaises*, the ECJ refused to review French legislation under Article 10 (freedom of expression) of the European Convention on Human Rights, stating that:

> Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.[253]

In *Meryem Demirel v. Town of Schwäbisch Gmünd*, the court reiterated that it "has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law."[254] Still, with the scope of Community power increasing, the need to limit that power through an express catalog of rights became more urgent. Community legislation to provide a systematic and comprehensive protection of fundamental rights became necessary to achieve legal certainty or predictability. Consequently, there were a number of resolutions, declarations, and memoranda attaching prime importance to the protection of fundamental human rights. Accession to the European Convention on Human Rights and a proposal to draft an autonomous charter of fundamental human rights had been suggested since 1974; these calls were renewed in 1990.[255] Those attempts initially failed; but ultimately the European Parliament, the Council, and the Commission responded in December 2000 with their solemn proclamation of the "Charter of Fundamental Rights of the European Union."[256]

VI.
THE CHARTER OF FUNDAMENTAL RIGHTS OF THE CONSTITUTION FOR EUROPE: ITS RIGHTS AND LIMITATIONS

Under a mandate given by the Cologne European Council, Roman Herzog, former President of Germany and a distinguished professor of constitutional law, presided over the convention that established the Charter of Fundamental Rights. The Charter "brought together in a single instrument the rights hitherto scattered over a range of national and international instruments . . . enshrin[ing] the very essence of the European *acquis* regarding fundamental rights."[257] The legal nature and effects of this Charter have sparked intense controversy; however, it was ultimately integrated into the new Constitution for Europe, becom-

253. Case 60/84, 1985 E.C.R. 2605, at para. 26.

254. Case 12/86, 1987 E.C.R. 3719.

255. Power, *supra* note 230, at 83; Van Hamme, *supra* note 229, at 75.

256. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 40 I.L.M. 266, *available at* http://europa.eu.int/comm/justice_home/unit/charte/en/links.html. For recent commentary, see THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS (Steve Peer & Angela Ward eds., 2004).

257. Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM (2000) 644, O.J. C 364/1 (Oct. 10, 2000), para. 1, *available at* http://europa.eu.int/comm/justice_home/unit/charte/en/links.html

ing one of the main elements of the constitutionalization of the continent.[258] For the EU, this inclusion was of utmost importance in changing the paradigm of the EU from an institution of markets, supporting of the interests of economic forces, into a new institution upholding a broader concept of fundamental rights.

A. *Rights under the Charter*

Though not yet legally binding *per se*, the Charter of Fundamental Rights has become part of the *acquis communautaire*, not just politically, but legally.[259] It has already acquired the status of "soft law," as the judiciaries on the European and national levels become ever more comfortable invoking the Charter in the interpretation of the European law. Although the ECJ itself has not yet based a decision on the Charter as such, the Court of First Instance, the Commission, the European Parliament, and the Court's Advocates General have all started to routinely refer to it.[260] While Advocate General Léger noted that "[t]he Charter was intended to constitute a privileged instrument for identifying fundamental rights," and stated that "[i]t is a source of guidance as to the true nature of the Community rules of positive law,"[261] the ECJ itself has failed to refer to it in some successful fundamental rights cases.[262] However, the European Court of Human Rights, in a decision reversing its own jurisprudence with regard to the Convention's Article 12 right to marry, relied, in part, on Article 9 of the Charter. As the court noted, Article 9 "departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women."[263] Thus, as the Commission[264] predicted at the time of the proclamation, the Charter has increasingly been used as a legal reference point.

258. Klein, *supra* note 2; *see also* Volker Roeben, *Constitutionalism of Inverse Hierarchy: The Case of the European Union*, Jean Monnet Working Paper 8/03, N.Y.U. School of Law (2003) (stating that individual rights are one of the three institutions of constitutionalism, the other two being democracy and the rule of law), *available at* http://www.jeanmonnetprogram.org/papers/03/030801.pdf.

259. Erich Vranes, *The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention*, European Integration, online Papers (EIoP), vol. 7, no. 7, at 1 (2003) (stating that the Charter "arguably should have the same legal status as the general principles"), *at* http://eiop.or.at/eiop/texte/2003-007a.htm.

260. A LEXIS search of February 2, 2004 revealed nine references to the Charter in the database of the European Court of Justice.

261. Case C-353/99P, Council of Europe v. Hautala, 2001 E.C.R. I-9565, at para. 83.

262. *See, e.g.*, Case C-60/00, Carpenter v. Secretary of State for the Home Department, 2000 E.C.R. I-6279; Case C-112/00, Schmidberger, Internationale Transporte und Planzüge v. Austria, [2003] 2 C.M.L.R. 34.

263. *Goodwin*, *supra* note 144, at 5. Other cases have made reference to the Charter, including I v. United Kingdom, 36 Eur. H.R. Rep. 53 (2003) (regarding Article 9 of the Charter); Hatton v. United Kingdom, 37 Eur. H.R. Rep. 28 (2003) (regarding Article 37 on environmental protection); and Fretté v. France, 38 Eur. H.R. Rep. 21 (2004) (regarding Article 21 on discrimination based on sexual orientation).

264. As far as the legal nature of the Charter is concerned, the Commission stated that "[i]t can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law." Communication, *supra* note 257, at para. 10. It considered it, however, "preferable, for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation." *Id.* at para. 11. This goal has been reached through the Treaty Establishing a Constitution for Europe.

The Charter's inclusion in the Constitution for Europe reinforced, at least prospectively, its legally binding character.

The Charter is now an integral part of the Constitutional Treaty, which lists the Charter itself, the European Convention on Human Rights, and the constitutional traditions of the Member States as the sources of individual rights against the Union. This is stipulated in Article I-9, which (1) recognizes the rights, freedoms, and principles set out in the Charter, (2) mandates accession of the Union to the European Convention on Human Rights,[265] and (3) confirms that the fundamental rights guaranteed in the ECHR and rooted in the constitutional traditions common to Member States shall constitute general principles of EU law. While a substantial body of fundamental rights jurisprudence has already been developed by the ECJ, the Preamble states that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."[266]

The Charter of Fundamental Rights, as now contained in the Constitution, is divided into seven parts: Title I: Dignity (Articles II-61 to II-65); Title II: Freedoms (Articles II-66 to II-79); Title III: Equality (Articles II-80 to II-86); Title IV: Solidarity (Articles II-87 to II-98); Title V: Citizens' Rights (Articles II-99 to II-106); Title VI: Justice (Articles II-107 to II-110); and Title VII: Final Dispositions (Articles II-111 to II-114). It includes not only restatements of traditional rights, but also innovations.

While a detailed analysis of these rights would go beyond the scope of this article, two aspects of the rights enumerated in the Charter are significant. First, a number of socioeconomic rights are included side-by-side with civil and political rights. The decision to do so confirms, in a way, the indivisibility of human rights. The justiciability of economic, social, and cultural rights remains a contentious issue, and their inclusion in the constitution suggests that important policy decisions in this field will be disputed in the courts. The drafters apparently were attempting to reassure the states, which view these rights as requiring positive government action; but this mitigation effort may have brought other con-

265. The changes in the final draft of Article I-9, using the words "shall accede" instead of the phrase "seeking accession" used in the previous draft, show that there must have been some understanding between the Council of Europe and the EU regarding the modalities of such accession. The Parliamentary Assembly of the Council of Europe explicitly invited the Union to negotiate accession to the Convention. *See* Council of Europe Resolution 1228 (2000), Sept. 29, 2000, Charte 4500/00 (Apr. 10, 2000). The ECJ argued against such a step in its Opinion 2/94 of March 28, 1996, Accession of the European Community to the European Convention of Human Rights and Fundamental Freedoms, 1996 ECR I-1763. The ECJ said that the treaty, neither on its face nor under Article 308, conferred competence on the Community to accede to the ECHR since such accession would entail a fundamental reordering of the Community's judicial system. On the other hand, the European Court of Human Rights, in the case of *Matthews v. United Kingdom*, Case 40302/98, 2002 Eur. Ct. H.R. 592 (July 15, 2002), stated that "States Parties to the Convention may not dispense themselves from their obligations under the Convention by transferring powers on an international organization." The ECtHR upheld the same reasoning in *Waite & Kennedy v. Germany* (26083/94) 1999 Eur. Ct. H.R. 13 (February 18, 1999). Accession of the Union to the ECHR would appear to submit acts of organs of the Union, not only those of the member states, to review by the ECtHR.

266. Charter, Preamble, *supra* note 256, at para. 4.

cerns and difficulties to the application and interpretation of the Charter.[267] Nevertheless, the inclusion of economic, social, and cultural rights is encouraging and potentially significant.[268]

Second, the wording of a certain number of rights has been changed in the Charter, contrasting with their existing codifications in international law and in the ECHR. The new language aims to extend the scope of these rights and adapt to contemporary changes and to the characteristics of the Community. For example, Article II-67—the right to respect of private and family life—now applies to "communications," instead of "correspondence," which is the term used in the corresponding article of the ECHR, in order to adapt to changes in technology. Similarly, the wording of Article II-69—which includes the right to marry and found a family—now arguably recognizes unconventional families as well as traditional marriage. Other examples include Article II-72, the freedom of assembly and of association, which now includes the recognition and guarantee of exercising this right at the European level, and Article II-74, the right to education, which is formulated more broadly and includes the right to vocational and continuing training.

B. Limitations on the Rights of the Charter

As previously discussed, limitations on rights are a *sine qua non,* a necessary feature of any human rights system. The Charter is no exception. This section will discuss the manner in which these limitations manifest themselves in the Charter and evaluate whether they are appropriate or whether we can learn from other regimes with regard to their content and meaning.

The Preamble of the Charter reads: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations."[269] This explicitly introduces the policy foundation for restrictions on rights, which are then provided in Title VII, Final Dispositions. This chapter establishes a complex system of formal and substantive limitations on the Charter's fundamental rights. Article II-111(1), in determining the field of application of the Charter, distinguishes between "rights" and "principles." An analysis of the limiting "principles" reveals that they are mostly socioeconomic in nature and leave room for a narrow interpretation of their

267. For an analysis of the Charter's content and justiciability, its potential federalizing force, and its impact on Member States' actions through the European Court of Justice, see Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document,* E.H.R.L.R. 2004, 1, 37-50.

268. However, others would argue that the Charter provisions pertaining to social and economic rights do not introduce any new "legal instruments to foster social solidarity in the Union." Rather, they are seen as a mere summary of existing legal positions. *See* Matthias Mahlmann, *1789 Renewed? Prospects of the Protection of Human Rights in Europe,* 11 CARDOZO J. INT'L & COMP. L. 903, 923 (2004). *But see* Aileen McColgan, *The EU Charter of Fundamental Rights,* E.H.R.L.R. 2004, 1, 2-5 (arguing that though there is an overall greater weight accorded to civil and political rights than to economic and social ones, in light of the records of states' non-compliance with the terms of Social Charters, their inclusion in the Charter, and consequently in the EU Constitution, is promising).

269. Charter, Preamble, *supra* note 256, at para. 6.

scope. In particular, Paragraph 2 of Article II-111 states that it "does not extend the field of application of Union Law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in other Parts of the Constitution."[270] Thus, the fundamental rights guaranteed in the Union "do not have any effect other than in the context of the power determined by the Treaty."[271] This would somewhat minimize the impact of certain articles. For example, the effect of the guarantees of Article II-98 ("The Union shall ensure a high level of consumer protection") is difficult to predict.[272] Though some critics say that Paragraph 2 is legally superfluous,[273] it significantly reduces the potential of overbroad interpretation of Union powers.[274] On the other hand, in contrast to the ECHR, the Charter has no derogation clause for states of emergency.

1. The General Limitation Clause: Article II-112(1)

Article II-112 addresses the scope and interpretation of rights and principles. It contains a general, "horizontal" clause, which sets out the accepted limits on, and the conditions for the exercise of, the rights and freedoms protected by the Charter. Paragraph 1 reads:

> Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The requirements of this provision will be analyzed *seriatim.*

a. Guarantee of the Essence of the Rights Protected by the Charter

Article II-112(1) gives the essence of all rights and freedoms absolute protection.[275] This reflects the guarantee of the core of rights inspired by German

270. *Id.* at Art. II-111(2).

271. Council of the European Union, *Charter of Fundamental Rights of European Union: Explanations relating to the complete text of the Charter*, at 73 (December 2000).

272. McColgan, *supra* note 268, at 3.

273. Nevertheless, they find it politically important in overcoming the fear that "the Charter provides a secret path to widening the legal competencies of the Union." *See* Mahlmann, *supra* note 268, at 931.

274. *But see* Heathcoat-Amory, *supra* note 21, at 18 (expressing doubts that the language of Article 51(1) [now Art. II-111(1)] would safeguard domestic laws against interference and stating that "[t]he European Court of Justice is never a neutral observer and has consistently decided in favor of more centralization, being an EU institution itself.").

275. Christoph Engel, *The European Charter of Fundamental Rights. A Changed Political Opportunity Structure and its Dogmatic Consequences*, 7 EUR. L.J. 151-170 (2001), *available at* http://www.mpp-rdg.mpg.de/e_75.html.

constitutional doctrine, as formulated in Article 19 of the German Basic Law[276] and confirmed in the jurisprudence of the ECJ.[277]

b. "Provided for by Law"

In general terms, as provided for in other texts on the protection of fundamental rights, and as established by ECtHR and ECJ jurisprudence, any limits placed on the exercise of these rights must be subject to the guarantees of legal security. In effect, it must be provided for by law and subjected to the principle of proportionality. The formal limitation "provided for by law" has been developed by ECtHR jurisprudence to mean that the law not only has to be foreseeable and accessible but also have a "qualitative" dimension conforming to the ideals of the rule of law.[278]

On the other hand, as demonstrated in a number of cases, the Strasbourg organs have been careful to avoid the danger of being transformed into an additional appellate court for the Member States, since not all limitation laws produce a significant abuse of rights. Still, the Union stands to gain additional legitimacy when citizens challenge Union acts before the ECJ. As Engel explains: "This way the formal limitations of the fundamental rights become the dogmatic instrument to transform the principle of jurisdiction limited to specific issues and the principle of subsidiarity into standards against which individuals can have the European Court of Justice check Community acts affecting them."[279]

c. Proportionality

With regard to substantive limitations on fundamental rights, the principle of proportionality, as a restriction on these limitations, is critical. In Article II-112, Paragraph 1, proportionality is defined as requiring that limitations must be "necessary" and pursue a legitimate aim, such as the "objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."[280] The ECJ has been criticized for not sufficiently scrutinizing Community acts under the proportionality principle,[281] despite the fact that the Court did introduce this principle in *Internationale Handelsgesellschaft*,[282] and later in *Schräder v. Hauptzollamt Gronau*.[283] This criticism is based on the premise that the ECJ has failed to develop a sophisticated legal theory of human rights, and has dealt with the concept rather vaguely. The ECtHR has established cer-

276. Mahlmann, *supra* note 268, at 913 (explaining that the doctrine of limitations developed by the ECJ, especially as dictated by Community interests, have been criticized as "undetermined and nebulous."). The Court has developed its doctrine of limitations applicable uniformly to all rights, different from the systems of limitations of German Constitutional Law or European Convention of Human Rights that go specifically to individual rights.

277. Case 4/73, 1974 E.C.R. at 507, para. 14; Case 11/70, 1970 E.C.R. at 1134, para. 4.

278. (A/250), 17 Eur. H.R. Rep. at 162.

279. Engel, *supra* note 275.

280. Charter, *supra* note 256, at Art. 52(1).

281. Vranes, *supra* note 259, at 5.

282. Case 11/70, 1970 E.C.R. at 1134, para. 4.

283. Schräder v. Hauptzollamt Gronau, 1989 E.C.R. 2237, 2269, at para. 21.

tain standards regarding the principle of proportionality—even though the jurisprudence fails to define coherent and consistent categories of "necessities," "general interest recognized by the Union," and infringements upon "others' rights"—making decisions in this area difficult to predict.

i. "Necessary"

As noted above, the case law on the substantive criteria for permissible limitations more closely resembles a collage than a well-structured subtitled series of decisions. Further judicial review and interpretative refinement could help elaborate more detailed substantive standards to which EU institutions could more easily conform. On the other hand, overly rigid categorizing of legitimate "necessities" would not allow for changes over time that a Constitution and a Charter of Fundamental Rights must be ready to accommodate.[284] Thus, a dynamic definition, developed through case-by-case adjudication, might ultimately be preferable to determine the presence or absence of a necessity.

ii. "Genuinely meeting objectives of general interest recognized by the Union"

When determining the legitimate goals of a system of multilevel governance, the particularities of fundamental rights should of course be considered. The Union's economic origin and focus make the discussion of potential conflict between institutions in terms of fundamental rights all the more complex. The work of the ECJ will be difficult, especially taking into account the three sources of existing standards in the field of fundamental rights, and those provided for in the Charter. The phrase "objectives of general interest recognized by the Union" is so vague and over-inclusive that the prior jurisprudence will not be of much help. This phrase should have been defined more strictly, because otherwise rights may be restricted for any given "objective." The other norms of Union law could also form part of the legitimate aims. The doctrine of "margin of appreciation," introduced and extensively implemented by the ECtHR and the ECJ, will need to be invoked to allow for differentiation in the level of protection provided by the regulatory scheme of Article II-112. Moreover, it might help if, over time, the organs of the Union truly consider and dogmatically integrate the jurisprudence of fundamental rights—particularly now that the Charter is rapidly becoming of ever greater legal relevancy.[285] However, changing this mindset is not going to be an easy job for institutions that for years have consciously omitted human rights from their legal vocabulary. While it may be seen as a way to ensure effectiveness of Community regulations, including the particular rights of "easy freedoms"—free movement of labor, services, capital,

284. Conceptions of permissible social conduct are changing over time. A dynamic concept of limitations thus appears to be more appropriate than a static one, as a Constitution should be written to last for the ages. Compare Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*, that, after, all, "we must never forget that it is *a constitution* we are expounding." 17 U.S. 316, 407 (1819).

285. Engel, *supra* note 275, at 14-15.

and free foundations of enterprise—the drafters of the Community treaties clearly saw the danger of human rights being used by Member States as a pretext to thwart the goals and purposes of the Community.[286]

iii. "Need to protect the rights and freedoms of others"

As analyzed in the previous sections, the Federal Constitutional Court of Germany and the European Court of Human Rights have derived from their respective instruments the duty of the state to protect fundamental human rights. Article II-112(1) lists the "need to protect the rights and freedoms of others" as a permissible limitation. Beyond simply allowing the government to protect the rights of others, the Court of Justice, in accordance with the *acquis*, may have to develop a duty to affirmatively protect those rights. The duty to protect is, however, more difficult to realize and allocate in a multilevel system of governance, such as the European Union. The Charter of Fundamental Rights imposes the duty to legislate on organs of the Union, whereas a duty to protect deriving from Union law, but addressing the Member States, could be derived from Charter law in appropriate cases. The complete protection of the fundamental rights of the individual is thus provided by Union law as well as by the national constitutions, dividing the protection into two procedural mechanisms.[287] Still, the Charter does not expand the powers of the Union, which may limit any attempt by the ECJ to aggressively impose a duty to act.[288]

2. Article II-112(2)

Paragraph 2 of Article II-112 reads:

> Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within limits defined by these relevant Parts.

This paragraph emphasizes respect for Union law, since the Charter rights constitute a standard of review only for authoritative actions attributed to the Union or Member States. It imposes the Union's legal framework for the exercise of the rights set out in the Treaties. Where the rights established in the Charter are based on the Treaties, the conditions for and limits to their exercise are the same as those defined by the Treaties; they are not modified by the Charter. This paragraph particularly concerns the rights guaranteed to citizens of the Union, but also the articles providing for the protection of personal data (Article II-68); the respect for the freedom and pluralism of the media (Article II-71 (2)); the recognition of political parties at Union level in the context of the freedom of assembly and of association (Article II-72 (2)); the freedom to choose an occupation and the right to engage in work (Article II-75); the free-

286. Mahlmann, *supra* note 268, at 905 (citing Manfred Zuleeg, *Fundamental Rights and the Law of the European Communities*, 8 COMMON MKT. L. REV. 446, 447 (1971)).

287. For a detailed analysis of the duty to protect in the case of the European Union, see Engel, *supra* note 275, at 15-16.

288. "This Charter does not extend the scope of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution." Charter, *supra* note 256, at Art. II-112(1).

dom to conduct a business (Article II-76); the protection of intellectual property in the context of the right to property (Article II-77 (2)); and the right to asylum (Article II-78).

The principle of conformity, set forth in this paragraph, is rather complex. It has been argued that this clause might not be applicable to those fundamental rights which have been established as general principles of Community law through the jurisprudence of the European Court of Justice.[289] Such an application would compromise the main function of the Charter itself as stated in the Preamble (that is, the enhancement of the visibility of the fundamental rights). The other issue in the context of Paragraph 2 concerns the fact that even secondary law may function as a barrier to the scope of fundamental rights of the Charter.[290]

The wording of the Charter seems to delimit the exact content of these rights, compromising the more concrete definitions of previous documents or allowing deviations from established jurisprudence, without increasing the transparency of the human rights regime.[291] This problem, however, seems to have been solved by the guarantee provided in Article II-113, Level of Protection, which provides that:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized in their respective fields of application by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."[292]

Ultimately, the Court must determine this issue.

3. Article II-112(3)

Paragraph 3 reads:

> Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of these rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This section establishes the framework for the legal relationship between the Charter and the European Convention on Human Rights to ensure legal coherence and security. As a result, where a right established by the Charter corresponds to a right guaranteed by the ECHR, its meaning and scope, as well as

289. Vranes, *supra* note 259, at 5 (citing e.g., Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, in GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA 131, 145 (A. Duschanek & S. Griller eds., 2002)).

290. *Id.* ("[T]he right to free movement embodied in Article 45(1) [now Art. II-105] of the Charter is limited by the EC Treaty as well as pertinent secondary law. The definitive barriers for limitations contained in secondary law ("*Schrankenschranken*") are to be derived in this view, from the EC Treaty and, pursuant to Article 6 EU Treaty, from the ECHR.") (citation omitted).

291. Mahlmann, *supra* note 268, at 931-32.

292. Charter, *supra* note 256, at Art. 53.

authorized limitations, are the same as those laid down by the ECHR. In the context of the Charter, these rights receive at least the same level of protection as they would under the ECHR. The ECHR thus serves as a minimum standard of protection, and the limits placed on its rights must not go beyond the standards established by its provisions. This is further confirmed in Article II-113. Although not explicitly mentioned in the text of Article II-112, the authoritative commentary to the Charter specifies that references to the ECHR mean the European Convention itself, its protocols, and the jurisprudence of the ECtHR and the ECJ.[293] Also, it states that "the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities."[294]

To define the principle articulated in Article II-112 (3), the authors of the Charter made an inventory of the rights prescribed in the articles of the Charter whose meaning and scope are the same as the corresponding rights enshrined in the ECHR. This inventory constituted a total of twelve articles,[295] including the right to liberty and security; respect for private and family life; freedom of thought, conscience, and religion; freedom of expression and information; freedom of assembly and of association; freedom of the arts and sciences; the right to property; and protection in the event of removal, expulsion, or extradition. All of the above have the same meaning and scope as the corresponding rights established by the ECHR. The limitations on these parallel rights, as accepted and listed by the ECHR, are thus considered to be included in the Charter. This also applies, in principle, to those rights whose meaning is the same as the corresponding articles of the ECHR, but whose scope is wider. This group includes a total of five articles.[296] The due process guarantees of Article II-107(2) and (3) of the Charter correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply with regard to Union law and its implementation.[297] Also, since the Charter's prohibition of any discrimination on grounds of nationality (Article II-81(2)) enables citizens of the Union not to be considered foreigners in the sense of Article 16 of the ECHR, the limitations provided for by Article 16 of ECHR do not apply to them in this context.[298] In general terms, the coherence of the Charter's legal relationship with the ECHR must be ensured without compromising the autonomy of Union law or of the Court of Justice.

4. Article II-112(4)

Paragraph 4 provides:

293. Council of the EU, *supra* note 271, at 74-75.
294. *Id.* at 74.
295. *Id.* at 75-76.
296. *Id.* at 76.
297. *Id.*
298. *Id.*

> Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

This clause can be interpreted as an attempt to prevent a discrepancy between the standard of protection offered on the Union level and that offered on the national levels. It also mitigates the already perceived threat of supremacy of Union law by ensuring that the Charter does not encroach upon the legal domain of Member States.[299] Faced with the diversity of the fundamental rights protected by Member States, the Court of Justice might not be in the best position to set common standards; their setting will still remain, in the aggregate, the domain of the respective national laws and legal systems. The court, faced with the interpretation of multi-faceted and heterogeneous catalogues of rights and systems of limitations on national, supra-national, and regional levels, must, above all, achieve consistency in this potentially powerful system of judicial review.

In this respect, no innovative solutions have been advanced. On the contrary, problems may arise because the method to determine the relevant level of protection will continue to be a comparison between the laws of the Member States and the Charter, in addition to taking into account the jurisprudence of the European Court of Human Rights. The result of such a comparison would not necessarily coincide with the standards of any individual Member State.[300] Discrepancies may result because the Court of Justice must take the "objective of general interest recognized by the Union" into account, or that the number and content of the fundamental rights recognized on the European level and in the Member States may vary, and, in cases of conflict, may not be given the same weight. This confusion does not seem to solve the problem of divergence of standards or the problem of conflicting claims between the Court of Justice and the national courts where there are divergent levels of protection.

5. Article II-112(5)

Paragraph 5 provides:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.

The problématique of this provision derives from the distinction between rights and principles as stated in the Charter. This paragraph returns to the issue of justiciability of social and economic rights, most of them called "principles" in the Charter. They will be open for judicial review in national law only if they have been implemented by legislative or executive acts of the EU, or in the interpretation of the legislative measures of the Member States that give effect to

299. Mahlmann, *supra* note 268, at 932.

300. Vranes, *supra* note 259, at 7; *see also* Mahlmann, *supra* note 268, at 910 n.32 (citing IRMGARD WETTER, DIE GRUNDRECHTSCHARTA DES EUROPÄISCHEN GERICHTSHOFES 42 (1998)).

these principles.[301] It is believed that the policy underlying this distinction is the desire to prevent the development of an aggressive fundamental rights jurisprudence by the ECJ, especially in the fields of economic and social rights, which are traditionally regarded as non-self-executing.[302] However, this goal is hindered by the formulation of traditional civil rights, such as the prohibition of *ex post facto* laws in Article II-109 of the Charter,[303] as "principles" of legality. What, then, is the difference in the Charter between a right and a principle that requires legislation?[304] It is obvious that the "principle" set forth in Article II-109 would not need executing legislation in order to take effect, while access to preventive health care, traditionally defined as non-self-executing, is protected in Article II-95 as a "right." Thus, this distinction is somewhat misleading and further clarification of the meaning of Paragraph 5 may needed. Alternately, the ECJ might very well decide to take another approach towards "principles," create its own interpretation despite this limiting clause, and "transform some of these principles into directly effective rights."[305]

6. Article II-112(6)

Paragraph 6 provides:

> Full account shall be taken of national laws and practices as specified in this Charter.

This paragraph is another manifestation of the principle of subsidiarity, which is already stated in Article II-111(1) as well as in a number of other articles referring to "national laws and practices." In general, this provision adds nothing new and thus can be considered superfluous.

7. Article II-112(7)

Paragraph 7 provides:

> The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.

Paragraph 7 appears in the Charter as a product of the final negotiations completed on June 18, 2004. It is a departure from the original disclaimer to the legislative commentary, which explicitly stated that "they [the explanations relating to the complete text of the Charter] have no legal value," but were intended to clarify the provisions. These explanations are now given full legal status as *travaux préparatoires*, or legislative history. It was believed that the

301. Sionaidh Douglas-Scott, *Memorandum of Sionaidh Douglas-Scott, King's College London*, at para. 7, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldconst/168/16808.html.

302. Vranes, *supra* note 259, at 8.

303. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed."

304. Douglas-Scott, *supra* note 267, at 44-45.

305. Douglas-Scott, *supra* note 301, at para. 7.

explanations accompanying the Charter might temper potentially expansive interpretations.[306]

8. Specific Limitations

In addition to Article II-112, certain restrictive qualifications on the content of rights or specific limitations can also be found in other articles throughout the Charter. Some of them closely resemble the limitations attached to certain rights in other constitutional or international texts. One such qualification requiring that rights be "laid down by law/ provided by law/ regulated by law/ in accordance with the Union law" accompanies, among others, the rights guaranteed in Article II-68 (protection of personal data); Article II-77 (right to property); Article II-87 (workers' right to information and consultation within the undertaking); Article II-88 (right of collective bargaining and action); and Article II-90 (protection in the event of unjustified dismissal). Obviously, this seems to be most common in the provisions enshrining social and economic rights.[307] The reference to "national laws and practices" is another qualification found in a number of articles, such as Article II-70 (freedom of thought, conscience, and religion); Article II-74 (right to education); Article II-90 (protection in the event of unjustified dismissal); and Article II-94 (social security and social assistance). Specifically, Article II-74(3), the right to education, adds the qualification "with due respect for democratic principles and the right of parents" to the freedom to found educational establishments.

The right to property, contained in Article II-77(1), permits deprivations "in the public interest . . . under conditions provided for by law, subject to fair compensation being paid in good time for their loss." This is slightly weaker than the classical Hull formula of "adequate, prompt and effective compensation," which has been, by and large, reaffirmed by the U.S.-Iran Claims Tribunal, but stronger than the "appropriate compensation" standard created in 1963 by UN General Assembly Resolution 1803.[308] In addition, Article II-77(1) provides that the "use of property may be regulated by law in so far as is necessary for the general interest."

As well as with other rights,[309] these limits have been carefully tailored to the context of individual vulnerability and countervailing interests.

306. The British government had asked that the explanations accompanying the Charter become legally binding, under the assumption that they moderate the text as it stands. *See* Heathcoat-Amory, *supra* note 21.

307. For a critique of the EU Charter of Fundamental Rights, especially the "unequal respect" accorded to economic, social, and cultural rights as compared to the civil and political rights, see McColgan, *supra* note 268.

308. *See* 1 OPPENHEIM'S INTERNATIONAL LAW 920-927 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

309. Article II-78, the right to asylum, as well as Article II-105, the freedom of movement and of residence grant those rights "in accordance with the constitution." Article II-84, the rights of the child, recognizes the right to protection and care "as is necessary for their well-being" and freedom of expression "in accordance with their age and maturity," as well as the right to a personal relationship with their parent(s) "unless that is contrary to his or her interests." Article II-101, the right to good administration, refers to handling of affairs "within a reasonable time." Also, it grants access to one's file "while respecting the legitimate interests of confidentiality and of professional and

C. The Role of the European Court of Justice

The inclusion of the Charter in the Constitution for Europe will unquestionably give the Charter a high profile in the jurisprudence of the European Court of Justice. From a dogmatic point of view, it is obvious that the Court's task in interpreting the provisions of the Charter, the legitimacy of Union acts, and the Constitutionality of Union laws in light of fundamental rights is not an easy one, especially given the open-ended and somewhat ill-defined principle of subsidiarity.[310] It is imperative that the court apply consistent standards in all its decisions. Given its own jurisprudence, the introduction of new rights, the complicated system of limitations, and the multiple sources of the rights it must consider, the court might move to restrict the scope of its "margin of discretion" doctrine, gradually leading to a more precise doctrine of the content of rights and their limitations. Also, the abstract nature of human rights norms in general, and specifically a number of provisions of the Charter, leaves substantially more room for judicial interpretation on the part of the court than most other provisions in the Constitution.[311]

This might give rise to the question whether the Charter and the ECJ's power over its interpretation will, in the long run, render obsolete the other two sources mentioned in Article I-9. The danger of this happening, however, is distant, given the vigorous jurisprudence of the domestic constitutional courts intent on maintaining their powers of review.[312]

The ECJ has, over time, grappled with four interrelated issues: the autonomy of its fundamental rights law, the scope of its application, the coherence of its interpretation, and its application to acts of the Community and of the Member States. Before the Charter, there was no written bill of rights. Thus, the ECJ developed those rights jurisprudentially, ultimately resorting to the ECHR as *de facto* binding on Member States when implementing Union law.[313] But the ECJ has never addressed the issue of using the ECHR as a common standard, meaning that more issues have arisen now that the new constitution mandates accession to the ECHR. For example, many Member States have stated reservations to the ECHR and its Additional Protocols, raising the issue of whether the Convention will be acceded to as a whole, including its entire network of reservations. In addition, the ECJ has frequently avoided deciding contentious fundamental rights issues involving social choices because they were beyond the specific scope of Community competences.[314] As a result, the decisions of national constitutional courts have often influenced the ECJ's own jurispru-

business secrecy." Article II-107, the right to an effective remedy and to a fair trial, guarantees legal aid "in so far as such aid is necessary to ensure effective access to justice."

310. Charter, *supra* note 256, at Art. 51(1), Art. 52(6), now Art. II-111(1) and II-112(6).

311. Mahlmann, *supra* note 268, at 910.

312. Compare the Federal Constitution Court of Germany's decision in Maastricht, 89 BVerfGE 155, and the ECtHR's decision in Matthews, Judgment of 18 February 1999, Case 24833/94, R 32.

313. *See* Case C-7/98, Krombach v. Bamberski, 2000 ECR I-1935, para.31.

314. *See* Case C-159/90, Society for the Protection of Unborn Children Ireland v. Grogan, 1991 E.C.R. 1991, I-4685.

dence.[315] Given the number and the "competition of interpreters," successfully imposing a uniform interpretation of the Charter of Fundamental Rights seems unlikely. Competing interpretations are essentially unavoidable because the law of the Union is generally enforced by the Member States, and anyone could file suit before a national court, claiming a violation of the fundamental rights as enshrined in the Charter. Although the exclusive jurisdiction of the Court of Justice precludes a national court from rendering invalid a secondary law of the Union, "the national courts gain at least an autonomous competence of examination."[316]

Besides the possible competition with domestic courts, the ECJ might also face competition from the European Court of Human Rights, especially with the European Union acceding to the European Convention. However, this conflict could be minimized if the ECtHR applies its wise doctrine of "margin of appreciation" to the acts of European Community organs, including the interpretation of new Charter rights by the ECJ. Conversely, the ECJ might do well to adhere to the Charter by following the ECtHR's interpretation of Charter rights that dovetail ECHR guarantees. Therefore, the complex issue of who may properly and authoritatively interpret the Charter, and thus become the ultimate arbiter of human rights, may be delimited substantively by deferring to the legal system (that is, Charter, ECHR, national constitutional traditions[317]) from which the right at issue stems.

VII.
CONCLUSION

The limitations on rights in the Charter of Fundamental Rights of the Constitution for Europe are an amalgam of standards developed in prescription and application of national constitutional laws, the European Convention on Human Rights, and other international instruments. Their general formulation in Article II-112 may not do justice to the problématique of limits,[318] but it reflects a civil-law concern for limiting governmental power in a formal and substantive, as well as general and abstract, way. The courts, in particular the European Court of Justice, are called upon to bestow content upon the rather rarefied concepts of formal limitations as "provided by law," and substantive limits such as the principle of proportionality, which is a tool to strengthen the courts. Specific limitations, or content restrictions, are applied to particular guarantees throughout the

315. *See* the Bananas cases, Case C-466/93, Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft, 1995 E.C.R. I-3799, and Case C-280/93, Germany/Council, 1994 E.C.R. I-4973, in which the ECJ first ruled that no fundamental rights were raised by the Community regulation abolishing an import contingent of so-called "dollar-zone" bananas to German importers. Afterwards, when the Federal Constitutional Court of Germany found a retroactivity problem with the regulation, the ECJ reversed itself.

316. Engel, *supra* note 275, at 20.

317. In a Union of twenty-five nations, with different languages, legal traditions, attitudes towards rights and their origin, and moral values, the Court will have to struggle to find some common standards regarding the scope of rights and their limitations. For more on this issue, see Mahlmann, *supra* note 268, at 910 n.32.

318. Klein, *supra* note 2.

document, reflecting unique historical threats and the fine-tuned balancing of rights with the interest of the community and the needs of others.

A rich body of domestic and international jurisprudence is available to give meaning to both the content and limits of the new Charter, since many of the terms chosen in defining and limiting its rights are familiar concepts. In addition, the multi-level nature of government in Europe is countered by multi-level rights catalogs, which counsel humility in the exercise of aggressive reinterpretation of the content and limits of rights. The Charter is an essential new element in the Constitution for Europe. It is built on the wisdom of the ages, reaching far beyond its geographic confines and drawing, inter alia, from the rich and deep fount of the American Bill of Rights. Its interpretation should take that valuable stock of inherited prescription and interpretation into proper account.