Indiana International & Comparative Law Review Vol. 26 No. 2 2016

INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW

Volume 26 2015-2016

Cite this Publication as IND. INT'L & COMP. L. REV.

The Indiana International and Comparative Law Review publishes professional and student scholarly articles in fields of international or comparative law. The Review welcomes submissions of scholarly legal articles on those topics.

The ideas, views, opinions, and conclusions expressed in articles appearing in this publication are those of the authors and not those of the Review or of Indiana University Robert H. McKinney School of Law.

Currently, the Review is published twice per year. The cost of a single issue is $9.00, and subscription rate is $18.00 per volume. The annual subscription rate for a foreign subscriber is $21.00.

Inquiries regarding submission of articles and comments or subscription may be directed to:

Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, IN 46202
(317) 274-1050
(317) 274-8825(fax)

COPYRIGHT AND FAIR USE

The Review is printed and distributed by Printing Partners
929 W 16th St, Indianapolis, IN 46202

Indiana University Robert H. McKinney School of Law

2015-2016 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

MICHAEL A. MCROBBIE, *President of the University.* Ph.D., Australian National University.

NASSER H. PAYDAR, *IU Executive Vice President and IUPUI Chancellor.* B.S., M.S., Ph.D., Syracuse University.

ANDREW R. KLEIN, *Dean and Paul E. Beam Professor of Law*. B.A., University of Wisconsin; J.D., Emory University School of Law.

ANTONY PAGE, *Vice Dean and Professor of Law.* B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

KAREN E. BRAVO, *Associate Dean for Graduate Studies and International Affairs, Professor of Law, John S. Grimes Fellow; Dean's Fellow.* B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

MIRIAM MURPHY, *Director, Ruth Lilly Law Library.* B.A., Purdue University; J.D., M.L.S., Indiana University.

PATRICIA K. KINNEY, *Assistant Dean for Admissions*. B.S., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

JOHNNY D. PRYOR, *Assistant Dean for Student Affairs.* B.A., Wittenberg University; J.D., Indiana University Maurer School of Law.

JONNA KANE MACDOUGALL, *Assistant Dean for External Affairs and Alumni Relations.* B.A., M.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

VIRGINIA MARSCHAND, *Assistant Dean of Finance and Administration*. B.S., Indiana University—Kokomo; M.P.A., Indiana University Purdue University—Indianapolis; J.D., Indiana University Robert H. McKinney School of Law.

CHASITY Q. THOMPSON, *Assistant Dean for Professional Development*. A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University Robert H. McKinney School of Law.

MARK V. WUNDER, *Assistant Dean for Development.* B.S., J.D., University of Iowa.

ELIZABETH ALLINGTON, *Director of Communications and Creative Services.* B.A., Indiana University; M.A., M. Phil., New York University.

TERESA (TERRI) J. CUELLAR, *Director of Technology Services*. B.S., St. Bonaventure University, New York.

SONJA RICE, *Director of Special Projects.* B.A., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

LISA SCHRAGE, *Director of Development Services.* B.S., Marian University.

JULIE SMITH, *Director of Student Recruitment.* B.S., Indiana University; M.B.A., Keller Graduate School of Management.

LAWANDA W. WARD, *Director of Pro Bono and Public Interest Programs.* B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University Robert H. McKinney School of Law.

PERFECTO BOYET CAPARAS, *Associate Director for Graduate Programs*. A.B., LL.B., Manuel Luis Quezon University; LL.M., University of Hong Kong; LL.M., Indiana University Robert H. McKinney School of Law.

SEAN SOUTHERN, *Associate Director, Office of Professional Development.* B.A., Ball State University; M.A., DePaul University; J.D., Loyola University Chicago School of Law.

SUSAN K. AGNEW, *Assistant Director of Student Affairs*. Clark College.

SUSAN BUSHUE-RUSSELL, *Assistant Director of Administration and Finance*. A.A.S., Lakeland College; B.S., Eastern Illinois University.

AMY ELSON, *Assistant Director, Hall Center for Law and Health.* B.A., M.A., Indiana University; J.D., Indiana University Maurer School of Law.

AMANDA GALLAGA, *Assistant Director of Recruitment.* B.A., Trinity University.

NOAH JOSEPH, *Associate Director of Graduate Admissions*. B.A., Miami University; J.D., Indiana University Maurer School of Law.

KARA PETERSON, *Assistant Director of Advancement.* B.A., Indiana University.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law.* B.A., Kentucky Wesleyan College; J.D., Indiana University Robert H. McKinney School of Law.

CYNTHIA A. BAKER, *Clinical Professor of Law and Director, Program on Law and State Government.* B.A., J.D., Valparaiso University.

GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law.* B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.

SHAWN BOYNE, *Professor of Law, Co-Chair, Global Crisis Leadership Forum, Dean's Fellow, DRIVE Fellow.* B.A., Cornell University; M.B.A., University of Minnesota; J.D., University of Southern California's Gould School of Law, M.A., Ph.D., University of Wisconsin; LL.M., Justus-Liebig-Universität.

ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.

JEFFREY O. COOPER, *Associate Professor of Law.* A.B., Harvard University; J.D., University of Pennsylvania Law School.

ERIC R. DANNENMAIER, *Professor of Law, Dean's Fellow; Director, Environmental, Energy and Natural Resources Law Program.* B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.

JAMES D. DIMITRI, *Clinical Professor of Law.* B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER A. DROBAC, *R. Bruce Townsend Professor of Law*. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

YVONNE M. DUTTON, *Associate Professor Law, Dean's Fellow, Grimes Fellow*. B.A., Columbia University; M.A., Ph.D., University of Colorado at Boulder; J.D., Columbia Law School.

GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Director, Program in International Human Rights Law; John S. Grimes Fellow.* B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law; Executive Director, Center for International and Comparative Law; Director, International and Comparative Law track, LL.M. Program.* Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law*. Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

CARRIE HAGAN, *Clinical Associate Professor of Law; Director, Civil Practice Clinic.* B.A., University of Kansas; J.D., University of Cincinnati College of Law.

JOHN LAWRENCE HILL, *Professor of Law, Adjunct Professor of Philosophy, Grimes Fellow.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

MAX HUFFMAN, *Professor of Law; Director, Corporate and Commercial Law Graduate Certificate Program.* B.A., Cornell University; J.D., University of Cincinnati College of Law.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* B.A., Beloit College; J.D., M.B.A., University of Michigan; LL.M., New York University School of Law.

ROBERT A. KATZ, *Professor of Law*. A.B., Harvard College; J.D., University of Chicago Law School.

LINDA KELLY, *M. Dale Palmer Professor of Law.* B.A., J.D., University of Virginia.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus.* LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

GERARD N. MAGLIOCCA, *Samuel R. Rosen Professor of Law.* B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Professor of Law.* B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law; Director, Master of Jurisprudence Program.* B.A., University of Evansville; J.D., Georgetown University Law Center.

ERIC M. MESLIN, *Professor of Bioethics and Law (secondary appointment).* B.A., York University (Toronto); M.A., Ph.D., Georgetown University.

NOVELLA NEDEFF, *Clinical Associate Professor of Law.* B.A., J.D., Indiana University.

JAMES P. NEHF, *Cleon H. Foust Fellow, John S. Grimes Fellow, and Professor of Law.* B.A., Knox College; J.D., University of North Carolina Law School.

XUAN-THAO NGUYEN, *Gerald L. Bepko Chair in Law and Director, Center for Intellectual Property Law and Innovation.* B.A., Oberlin College; J.D., Northeastern University School of Law.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health.* B.A., Brandeis University; J.D., M.D., Harvard University.

JOANNE ORR, *Clinical Professor of Law.* B.S., Indiana State University; J.D., California Western School of Law.

MICHAEL J. PITTS, *Professor of Law and Dean's Fellow*. B.S.J., Northwestern University; J.D., Georgetown University Law Center.

FRAN QUIGLEY, *Clinical Professor of Law; Director, Health and Human Rights Clinic; Director, International Human Rights track, LL.M. Program.* B.A., Hanover College; M.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

GARY R. ROBERTS, *Dean Emeritus and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law.* B.A., University of Connecticut; LL.B., Harvard Law School.

MARGARET RYNZAR, *Associate Professor of Law; Dean's Fellow, Grimes Fellow*. B.A., University of Chicago; M.A., Jagiellonian University; J.D., University of Notre Dame Law School.

JOEL M. SCHUMM, *Clinical Professor of Law and Director, Experiential Learning*. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University Robert H. McKinney School of Law.

LEA SHAVER, *Associate Professor of Law and Dean's Fellow*. B.A., M.A., University of Chicago; J.D., Yale Law School.

LAHNY R. SILVA, *Associate Professor of Law and Dean's Fellow.* B.A., M.A., Boston University; J.D., University of Connecticut School of Law; LL.M., University of Wisconsin Law School.

ROSS SILVERMAN, *Professor of Public Health and Law (Secondary Appointment).* B.A., Indiana University; J.D., Boston University School of Law; M.P.H., Boston University School of Public Health.

FRANK SULLIVAN, JR., *Professor of Practice*. A.B., Dartmouth College; J.D., Indiana University Maurer School of Law; LL.M., University of Virginia School of Law.

MARGARET C. TARKINGTON, *Professor of Law and Dean's Fellow.* B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University.

NICHOLAS TERRY, *Hall Render Professor of Law; Executive Director of the William S. and Christine S. Hall Center for Law and Health; Director, Health Law, Policy and Bioethics track, LL.M. Program*. B.A., Kingston University; LL.M., Corpus Christi College, University of Cambridge.

CARLTON MARK WATERHOUSE, *Professor of Law and Dean's Fellow.* B.S., Pennsylvania State University; J.D. with honors, Howard University School of Law; M.T.S., Emory University, Chandler School of Theology; Ph.D. with honors, Emory University.

FRANCES WATSON, *Clinical Professor of Law.* B.S., Ball State University; J.D., Indiana University Robert H. McKinney School of Law.

JAMES PATRICK WHITE, *Professor of Law*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LLOYD T. WILSON, JR., *Professor of Law; Director, Joint Center for Asian Law Studies; Director, Chinese Law Summer Program; Director, American Law for Foreign Lawyers track, LL.M. Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University Maurer School of Law.

DIANA R.H. WINTERS, *Associate Professor Law and Dean's Fellow*. B.A., Brown University; M.A., Ph.D., Harvard University; J.D., New York University School of Law.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law*. A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

JUDITH FORD ANSPACH, *Professor of Law Emerita.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus.* B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

PAUL N. COX, *Centennial Professor of Law Emeritus.* B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law Emerita.* A.B., Mount Holyoke College; J.D., Indiana University Robert H. McKinney School of Law.

DAVID A. FUNK, *Professor of Law Emeritus.* A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus.* A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita.* B.S.J., Northwestern University; J.D., University of Colorado School of Law.

JEFFREY W. GROVE, *Professor of Law Emeritus*. A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus.* A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus,* A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

WILLIAM ANDREW KERR, *Professor of Law Emeritus.* A.B., J.D., West Virginia University; B.D., Duke University; LL.M., Harvard Law School.

ELEANOR DEARMAN KINNEY, *Hall Render Professor of Law, Co-director of the William S. and Christine S. Hall Center for Law and Health Emerita.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

WILLIAM E. MARSH, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska.

SUSANAH M. MEAD, *Professor of Law Emerita.* B.A., Smith College; J.D., Indiana University Robert H. McKinney School of Law.

H. KATHLEEN PATCHEL, *Associate Professor Law Emerita*. A.B., Huntingdon College; J.D., University of North Carolina; LL.M., Yale Law School.

RONALD W. POLSTON, *Professor of Law Emeritus.* B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

JOAN M. RUHTENBERG, *Clinical Professor of Law Emerita.* B.A., Mississippi University for Women; J.D., Indiana University Robert H. McKinney School of Law.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus*. B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus.* A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law Emeritus.* B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

MARY THERESE WOLF, *Clinical Professor of Law Emerita.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Ruth Lilly Law Library Faculty

SUSAN DAVID DEMAINE, *Research & Instruction Librarian*. B.A., Pennsylvania State University; M.S.L.S., J.D., University of Kentucky.

RICHARD HUMPHREY, *Reference and Instruction Librarian.* A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Cataloging and Government Documents Librarian.* A.B., Taylor University; M.L.S., Indiana University.

BENJAMIN J. KEELE, *Research and Instruction Librarian.* B.A., University of Nebraska—Lincoln; J.D., Indiana University Maurer School of Law; M.L.S., Indiana University.

CATHERINE LEMMER, *Assistant Director, Information Services.* B.A., Lawrence University; J.D., University of Wisconsin; M.S., University of Illinois.

MIRIAM A. MURPHY, *Interim Director, Ruth Lilly Law Library*. B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

Indiana International & Comparative Law Review

Vol. 26 No. 2 2016

TABLE OF CONTENTS

Articles

Notes

FTAS IN ASIA-PACIFIC: "NEXT GENERATION" OF SOCIAL DIMENSION PROVISIONS ON LABOR?

Ronald C. Brown*

A. Introduction

Recent years have brought a proliferation of Free Trade Agreements ("FTA"),[1] bilateral and multilateral, often regional, with even larger ones being negotiated, such as the European Union ("EU") and United States ("U.S.") Transatlantic Trade and Investment Partnership (TTIP) and the Transpacific Partnership (TPP). The Asia Pacific Economic Cooperation ("APEC") forum members recently discussed plans to "phase out regional free trade agreements" (or supplement them) in favor of creating a singular Free Trade Agreement Asia Pacific ("FTAAP"), covering much of the Asia Pacific Region.[2]

---

* Professor of Law at University of Hawai'i at Mānoa William S. Richardson School of Law.

[1] *Free Trade Agreements and Labor Rights*, INT'L. LABOUR ORG. (ILO), http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm (last visited Aug. 15, 2014) [http://perma.cc/9PTM-DJZ3]; Int'l Labour Org (ILO), *Social Dimensions of Free Trade Agreements*, INT'L. INST. FOR LABOUR STUD. (2013), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf. [http://perma.cc/9MYJ-T7SE]. (explaining that while only four percent of trade agreements that entered into force between 1995 and 1999 included labor provisions, this rose to eleven percent between 2000 and 2004; whereas, between 2005 and 2013 about one third of all trade agreements that came into force included labor provisions, and by June 2013, of the 248 trade agreements that were in force (WTO), 58 contained labor provisions) ("In 34 out of those 58 existing trade agreements, the provisions are exclusively promotional, taking the form of cooperative activities between partner countries.) (explaining that these trade agreements come under different names and in different forms; e.g., EU-US Transatlantic Trade and Investment Partnership (TTIP); Trans-Pacific Partnership (TPP); Regional Comprehensive Economic Partnership (RCEP); Trans-Pacific Strategic Economic Partnership (TPSEP or "P-4"); Agreement bilateral investment treaty (BIT); Free Trade Area of the Asia Pacific (FTAAP)).

[2] *See* He Weiwen, *How the FTAAP Incorporates the TPP*, CHINAUSFOCUS (Nov. 18, 2014), http://www.chinausfocus.com/finance-economy/how-the-ftaap-incorporates-the-tpp/ [http://perma.cc/A8J7-BSUM] (explaining that the 2014 APEC Summit in Beijing initiated the process toward a Free Trade Agreement in Asia and Pacific (FTAAP) by having a collective strategic study to be completed by the end of 2016) ("The APEC region currently accounts for roughly 70% of total world RTAs and FTAs. The APEC official website cited 56 RTAs within APEC. According to Professor Dan Steinbock citing the Asia Development Bank, there are 109 bilateral FTAs in force and another 148 FTAs under negotiation. If this trend continues, which is most likely, the world largest trade area will be highly fragmented, with different RTAs and FTAs intertwined, only to result in a much higher trading cost and trade non-facilitation. All the APEC members, including the US, will be in an unfavorable competitive

http://dx.doi.org/10.18060/7909.0037

The International Labour Organization ("ILO") reports that in the last two decades, there has been an increasing number of FTAs that include labor protections under a social dimension provision, either in the agreement itself or in a parallel agreement.[3] "Of the 185 ILO member countries with trade agreements notified to the World Trade Organization ("WTO"), about 60 percent are covered by at least one trade agreement with labor provisions."[4] On the other hand, the ILO has also stated its studies do not show these labor provisions have any certainty of improving labor standards within the parties' home country.[5]

> In light of the increasing number of labour provisions in trade agreements and the variety of approaches, the question arises as to the practical implications of these provisions; in particular, whether labour provisions have created more space for improving labour standards and whether the ability to implement existing labour standards has improved.[6]

There are widely divergent views on their effectiveness, however. While some consider them a panacea for improving labor standards and working conditions, others criticize them as mere window dressing or even disguised protectionism. The debate is made even more complex by the variety of labor provisions with different legal and institutional implications. This makes it difficult

---

position in the world marketplace . . . . TPP is the most important one among all the APEC RTAs and FTAs. The twelve TPP parties are all APEC members, with the U.S. playing the leading role. Another major RTA is the Regional Comprehensive Economic Partnership, led by ASEAN, which covers all ten ASEAN countries plus China, Japan, South Korea, India, Australia and New Zealand. China is an important partner, but not a leader. In turn, the U.S. is also excluded so far. The FTAAP does not cast aside all of the RTAs and FTAs. Rather, it hopes for an acceleration and smooth conclusion of them all. The FTAAP will not be mapped out from zero, but will be based on those RTAs and FTAs as pathways.").

[3] Int'l Labour Org (ILO), *Social Dimensions of Free Trade Agreements*, INT'L. INST. FOR LABOUR STUD., 20 (2013), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf [http://perma.cc/9MYJ-T7SE] [hereinafter *ILO Report*].

[4] *ILO Report, supra* note 3, at 21. (See illustrative treaties collected on various trade agreements). *International Institute for Labour Studies*, INT'L LAB. ORG. (2014), www.ilo.org/inst/lang--en/index.htm [http://perma.cc/H7ND-GDQX] [hereinafter *IILS*]*; ILO Report, supra* note 3, at 33.

[5] *ILO Report, supra* note 3. *See discussion in*, Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared, in* PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (forthcoming 2015).

[6] *ILO Report, supra* note 3, at 22.

to generalize about their effects.[7] Likewise, the United States finds shortcomings in the effectiveness of FTA labor provisions. A November 2014 report of the U.S. Government Accounting Office ("GAO"), assessing implementation and enforcement of the labor provisions of selected U.S. FTAs found "persistent challenges to labor rights, such as limited enforcement capacity, the use of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders."[8]

The recent disaster in Bangladesh at Rana Plaza caused by substandard building and working conditions, in which over a thousand workers employed by subcontractors of multinational corporations ("MNC") in the garment industry were killed, raised the specter of the difficulties of regulating and protecting the labor rights of these workers.[9] There were domestic labor laws in place, ILO core labor standards ratified, MNCs had their codes of conduct and Corporate Social Responsibility ("CSR") provisions, but still there was little enforced labor protection for these workers. [10]

---

[7] *ILO Report*, *supra* note 3, at 6.

[8] U.S. GOV'T ACCOUNTABILITY OFF., *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed* GAO-15-160, (2014), https://www.hsdl.org/?view&did=759407 [http://perma.cc/V3L2-GUEK] (explaining that more recently, see the political debate in the U.S. on this issue where Senator Elizabeth Warren issued a report chronicling years of "broken promises" to enforce labor protection provisions in the FTAs of the U.S.). *See*, The White House, *See What the Most Progressive Trade Agreement in History Looks Like* (Mar. 4, 2015), https://www.whitehouse.gov/blog/2015/03/04/see-what-most-progressive-trade-agreement-history-looks [http://perma.cc/F283-Y3LS]. *Broken Promises*, Prepared by the Staff of Sen. Elizabeth Warren, http://www.warren.senate.gov/files/documents/BrokenPromises.pdf [http://perma.cc/5SPM-7Y3B].

[9] *See discussion in* Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, __Int'l Labour Rev. (ILR)__ (2015). (explaining that Rana Plaza is where U.S. and other western retailers housed their garment factories and the supply chains are packed with firms and foreign nations competing for the MNC dollar.) ("This competition entails being the cheapest country in which to do business-that is, lowest labor costs or the most lax environmental standards-popularly known as a 'race to the bottom.'"); Krishna Chaitanya Valdamannati, *Rewards of (Dis)Integration: Economic, Social, and Political Globalization and Freedom of Association and Collective Bargaining Rights of Workers in Developing Countries*, 68 IND. & LAB. REL. REV.3, 4 (2015).

[10] *Rana Plaza: Compensation for Victims of Industrial Homicide Still Short of Target*, INT'L TRADE UNION CONFEDERATION (Apr. 24, 2015), http://www.ituc-csi.org/rana-plaza-compensation-for [http://perma.cc/7TY4-SVSW] ("Two years after the deaths of more than 1,100 workers in the Rana Plaza factory collapse in Bangladesh, the compensation fund for their families and for the thousands injured is still US $6 million short of the $30 million target. The legally binding Bangladesh Accord on Fire and Building Safety, negotiated by IndustriALL, UNI and

While inter-Asian business grows and FTAs flourish in and with Asia, the inclusion of social dimension provisions in FTAs or Bilateral Investment Treaties ("BIT") is practically non-existent, except where the Western influence appears to dominate and social dimension provisions are included, such as in FTAs with South Korea and with Singapore.[11] For example, though Korea has social dimension provisions with the United States, E.U., Australia, and Canada, it has no such labor provisions in its FTAs with Singapore or India.[12] By contrast, Japan in its Economic Partnership Agreements ("EPA") with Singapore, Malaysia, Thailand, Indonesia, Brunei, Association of Southeast Asia Nations ("ASEAN"), Philippines, Vietnam, and India,[13] has a modest labor provision entitled 'Investment and Labour'[14] that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement.[15]

NGO partners with the brands after the disaster now has more than 200 brands signed up and has to date completed nearly 1,500 factory inspections, identifying many thousands of safety issues to be remedied.").

[11] *See* Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, *in* PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015)(explaining that "[w]estern" particularly includes the E.U., Canada, and Australia all of which typically include Social Dimension provisions in their FTAs with Asian countries).

[12] *FTA Status of ROK*, MINISTRY OF FOREIGN AFF. REPUBLIC OF KOREA, http://www.mofa.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m_20_80_10 (last visited Jan. 31, 2015) [http://perma.cc/XYA5-5XY4].

[13] Ministerial Comm. Comprehensive Econ. P'ships., *Basic Policy on Comprehensive Economic Partnerships*, MINISTRY OF FOREIGN AFF. JAPAN (Nov. 6, 2010), http://www.mofa.go.jp/policy/economy/fta/policy20101106.html [http://perma.cc/MPY2-F8HQ]. (explaining that Japan's EPAs contain a labor provision entitled "Investment and Labour" that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement). *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY OF FOREIGN AFF. OF JAPAN (April 2014), http://www.mofa.go.jp/policy/economy/fta/ [http://perma.cc/9CJ3-VESM].

[14] *See, e.g.*, *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY OF FOREIGN AFF. JAPAN (April 2014), http://www.mofa.go.jp/policy/economy/fta/ [http://perma.cc/9CJ3-VESM]. (explaining that the Japan-Philippines Economic Partnership Agreements (EPAs) is the exception and has no investment and Labour provision). *Japan-Philippines Economic Partnership Agreement*, Japan-Phil., art. 103, MINISTRY OF FOREIGN AFF. (Sept. 9, 2006), http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf [http://perma.cc/4SSE-LWL8] [hereinafter JPEPA].

[15] *Japan-Indonesia Free Trade Agreement*, Japan-Indon., ch.7, (Aug. 20, 2007), http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf [http://perma.cc/TMT6-LCUF] (explaining that however, Indonesia has an EPA with Japan that has no labor standards but does have chapter 7 that deals with movement of natural persons pertaining only to visas) [hereinafter JIEPA].

Within the Asian Region, there is the Trans Pacific Strategic Economic Partnership Agreement (Pacific Four or "P-4") involving a plurilateral agreement among Brunei Darussalam, Chile, New Zealand, and Singapore. There is also a side agreement of the parties referred to as the "Labour Cooperation Memorandum of Understanding" ("MOU") that provides promises of labor protections by committing to the ILO Declaration, agreeing to improve labor legislation and conditions, and undertaking cooperative activities and institutional contacts to achieve improved labor rights and protections.[16]

There is also the promise of potential inclusion of labor protection provisions in new trade agreements being negotiated inter-Asia, some of which also will include the United States and other western partners. For example, the currently negotiated TPP includes the United States, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. In that negotiation, some of the provisions under discussion are said to include a section on a labor chapter that includes commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern,[17] and likely will build upon and further develop the beginnings of the P-4's MOU on labor cooperation.[18]

Additionally, the United States has a Trade and Investment Framework Arrangement ("TIFA") with ASEAN that states in the preamble that the parties recognize the ILO Declaration's

---

[16] *See Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*, BRUNEI-CHILE-N.Z.-SING. (Jun 19, 1998), http://www.fta.gov.sg/tpfta/p3_authentic_labour_mou_text_english_v1.pdf [http://perma.cc/S8GT-TK73] [hereinafter *MOU*].

[17] *See Labor*, OFFICE. U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-4 (last visited Apr. 17, 2015) [http://perma.cc/2WHJ-JSW3]. *See discussion in*, Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration, LRRN Conference paper (June 25, 2015) (on file with author).

[18] *Trans-Pacific Partnership (TPP)*, OFFICE U.S. TRADE REP,. http://www.ustr.gov/tpp (last visited Jun. 19, 2013) [http://perma.cc/SE7P-EWPN].

core labor standards and the importance of adequate and effective protection of workers' rights in accordance with each participant's 'own law'.[19] The United States and ASEAN are also negotiating the Expanded Economic Engagement ("E3") Initiative, which "establishes a framework to expand cooperation to boost trade and investment between the United States and the ASEAN."[20] The U.S.-Cambodia Textile Agreement demonstrates an additional external source of labor regulation, monitored in part by the ILO, which provides a framework to monitor working conditions in garment factories as well as pave the way for new laws to improve these conditions, increase worker awareness of international labor standards and rights under existing Cambodian law, and increase workers' individual capacities to improve their working conditions to comply with national and international law.[21]

> The United States reportedly is [also] negotiating a labor action plan ("LAP") with Vietnam. This plan may be similar to the LAP negotiated in conjunction with the U.S. FTA with Colombia. That plan included benchmarks to be undertaken by the Colombian government to address perceived weaknesses in Colombian labor laws and practices within specified deadlines. It includes numerous commitments to protect union members and improve worker rights. On May 29, 2014, 153 House Democrats wrote to [United States Trade Representative ("USTR")] Froman requesting that the United States negotiate

---

[19] *See Trade and Investment* Framework *Arrangement. Between U.S. and ASEAN*, OFFICE U.S. TRADE REP., https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf (last visited May 9, 2015) [http://perma.cc/5DHV-7DKH]. Also *see*, Dean A. DeRosa, *US Free Trade Agreements with ASEAN*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES (Jeffrey J. Schott, ed. 2004), http://www.piie.com/publications/chapters_preview/375/06iie3616.pdf [http://perma.cc/A6PC-5BDJ].

[20] *Association of Southeast Asian Nations (ASEAN),* OFFICE OF U.S. TRADE REP., https://ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean (last visited May 9, 2015) [http://perma.cc/VQS5-JGWH]; and Murray Hiebert**,** *The E3 Initiative: The United States and ASEAN Take a Step in the Right Direction*, CENTER STRATEGIC INT'L STUDIES (Dec. 21, 2012), http://csis.org/publication/e3-initiative-united-states-and-asean-take-step-right-direction [http://perma.cc/3PR8-N9LX] (explaining that the E3 will begin by working on four specific priorities: Its initiatives include obtaining a trade facilitation agreement to simplify customs, develop and improve communications technology, address investment policies, and work to harmonize standards across the region).

[21] Don Wells, *"Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement*, 27 COMP. LAB. L. & POL'Y J. 357-375 (2006). *See also* Lejo Sibbel & Petra Borrmann, *Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project*, 24 ARIZ. J. INT'L & COMP. L. 235 (2007); What can bridge compliance gaps? Evidence from Cambodia, Paper presented at the Regulating for Decent Work: Regulating for a Fair Recovery 6- 8 July 2011, Geneva, ILO; Daniel Adler & Michael Woolcock, *Justice without the rule of law? The challenge of rights-based industrial relations in contemporary Cambodia*, *in* HUMAN RIGHTS AT WORK: PERSP. ON L. & REG. 529-554 (Colin Fenwick & Tonia Novitz, eds., Hart Publishing, 2011).

> LAPs with Brunei, Malaysia, and Mexico as well. One issue concerning the LAPs is the stage in which they are implemented: prior to signing the agreement, or before, during, or after any potential congressional consideration of TPP. [22]

Also being negotiated among the ASEAN member states and ASEAN's FTA Partners is the Regional Comprehensive Economic Partnership Agreement ("RCEP"), which begun in 2012 and could create the world's largest trading bloc as well as have significant implications for the world economy [23] as a mutually beneficial economic partnership agreement.[24]

The thesis of this paper is straightforward; there are workers throughout the world, particularly in developing countries, who are subjected to substandard labor standards, and their countries are targeted for investment because of their countries' low wages or lax enforcement of labor laws. The existence of domestic labor laws and ratification of ILO Core Labor Conventions do not necessarily provide labor protection for the workers. Likewise, international treaty obligations under FTAs with social dimension provisions on labor do not necessarily bring labor protections. There are a number of emerging FTAs in the Pacific Region and the several very significant ones on the cusps of conclusion are discussed below so as to evaluate current approaches of labor protections by FTAs. This paper proposes the "new generation" of FTA social dimension provisions should embrace a marriage of international obligations, which incorporate

---

[22] IAN F. FERGUSSON, MARK A. MCMINIMY & BROCK R. WILLIAMS, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS, CRS R42694, at 40 (Mar. 20, 2015), http://fas.org/sgp/crs/row/R42694.pdf [http://perma.cc/6MWY-CSW6] (footnotes omitted).

[23] *ASEAN Regional Comprehensive Economic Partnership,* ASS'N OF SE. ASIAN NATIONS, http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership [http://perma.cc/S4MM-DNX9] (last visited Aug. 16, 2014); WALLAR *supra* note 23, at 20.

[24] *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASEAN.org (Aug. 30, 2012), http://www.asean.org. James Wallar, Nat'l Bureau Asian Research, Achieving the Promise of the ASEAN Economic Community: Less Than You Imagine, More Than You Know 20 n.43 (2014), http://www.nbr.org/downloads/pdfs/ETA/wallar_paper_072814.pdf. *ASEAN Regional Comprehensive Economic Partnership,* Ass'n of Se. Asian Nations, http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership (last visited Aug. 16, 2014); Wallar *supra* note 23, at 20. *See discussion* in Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration. Pacific Basin L. J. (March 2016).

mandates for private contractual remedies under International Framework agreements ("IFA"), CSRs, and Codes of Conduct, with the private obligations contractually enforceable by private parties.

B. FTAs and Asia-Pacific Social Dimension Landscape

While bilateral free trade agreements exist in many forms with multiple purposes, more recently, regional FTAs have taken the spotlight and with so many configurations and acronyms it begins to look like alphabet soup.

P-4; ASEAN; RCEP; TPP; FTAAP; E.U.-U.S. TTPI

Few existing or proposed FTAs have comprehensive or complete provisions protecting labor; and while there is much regional growth in FTAs, Asia-Pacific Economic Cooperation ("APEC") members have signaled they would prefer a multi-regional umbrella FTA, the FTAAP. And so, it is useful to see current and proposed, but pending, social dimension provisions with labor protections to evaluate if they represent the status quo of arguably ineffective provisions or if they propose new initiatives in a step toward more effective protection.

Some trade experts "believe that the Regional Comprehensive Economic Partnership ("RCEP") and the TPP could be harmonized under the larger umbrella organization of the FTAAP.[25] Toward that end, the Asia-Pacific Economic Cooperation (APEC)[26] has directed a

[25] Jeffrey Schott, *Asia-Pacific Economic Integration: Projecting the Path Forward*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION 246–53 (Tang Guoqiang & Peter A. Petri, eds., 2014); *see also*, ELLEN L. FROST, NAT'L BUREAU ASIAN RESEARCH, RIVAL REGIONALISMS & REGIONAL ORDER 8 (2014), http://www.nbr.org/publications/specialreport/pdf/free/021115/SR48.pdf [http://perma.cc/KEG9-QA24].

[26] *History and Membership of APEC*, INTERNATIONAL.GC.CA, http://www.international.gc.ca/apec/map-carte.aspx?lang=eng [http://perma.cc/MTL7-59KA] (last visited May 9, 2015) (*APEC* is a forum for 21 Pacific Rim member economies that seeks to promote free trade and economic cooperation. APEC now comprises 21 member economies: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan,

feasibility study due at the end of 2016, with members agreeing that the smaller FTAs would not be in conflict and would remain in place.[27] Even though many of the TPP participants have FTAs with each other, many also have trade agreements with other partners who will not be part of the TPP.[28] The Trans Pacific Strategic Economic Partnership or more commonly referred to as the Pacific Four (P-4) is also in effect. It is a plurilateral agreement among Brunei Darussalam, Chile, New Zealand and Singapore [29] and includes mechanisms for ongoing cooperation and dialogue on labor and environment issues.[30] The P-4 partners are currently negotiating with Australia, Malaysia, Peru, the U.S., and Vietnam to expand the P-4; and upon its conclusion, it will be referred to as the Trans-Pacific Partnership ("TPP").[31]

Republic of South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Republic of the Philippines, Russia, Singapore, Chinese Taipei (Taiwan), Thailand, the United States, and Vietnam.).

[27] He Weiwen, *How the FTAAP Incorporates the TPP*, CHINAUSFOCUS.COM (Nov. 18, 2014), http://www.chinausfocus.com/finance-economy/how-the-ftaap-incorporates-the-tpp/ [http://perma.cc/8RXC-UKNV] ("[T]he core reason for the final unanimity was that, all the current RTAs and FTAs, including the TPP, could and should continue. The FTAAP will be the ultimate umbrella built on the basis of the former as necessary pathways. Hence, the FTAAP does not conflict with the TPP. In pursuing the FTAAP kick-off, the APEC Beijing Summit fully considered all the existing RTAs and FTAs, the different focuses and interests of various members, only to highlight the shared goals while reserving the particular concerns, thus reaching an inclusive solution through joint efforts."). *Id.*

[28] Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 9 (Spring 2013), http://americasquarterly.org/next-big-thing-trans-pacific-partnership [http://perma.cc/NW4P-LSSL] (Chile and Peru have signed agreements with China and South Korea; Chile and Mexico have negotiated FTAs with Japan; and Colombia recently signed its FTA with South Korea and is in negotiations with Japan.) (Commentators propose if these issues are handled well, "TPP will serve to update and expand existing pacts, as well as reinforce their integration into global supply chains. Equally important, TPP can help set the standard for trade reform not just for the Asia-Pacific region, but for the global trading system. Indeed, precedents developed in the TPP could become a foundation for new initiatives to revive the flagging multilateral trade talks in the World Trade Organization (WTO).").

[29] *Brunei Darussalam's FTA Policy*, MINISTRY OF FOREIGN AFF. TRADE BRUNEI, http://www.mofat.gov.bn/index.php/free-trade-agreements-ftas/brunei-darussalam-s-fta-policy [n/a] (last visited Aug. 17, 2014)

[30] *Id.*

[31] Jonathan Weisman, *Trade Authority Bill Wins Final Approval in Senate* (June 25, 2015), http://www.nytimes.com/2015/06/25/business/trade-pact-senate-vote-obama.html [http://perma.cc/S4ZX-MM3Z]; Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing., May 28, 2006, [hereinafter *P4*] http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php [http://perma.cc/9GFV-EEWT] (The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement that is currently being negotiated by twelve countries throughout the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam). The agreement began in 2005 as the Trans-Pacific Strategic Partnership Agreement (TPSEP or P4).); *see also* Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-

It is said, the "hottest topic" in world trade these days is the TPP. [32]

> Hailed as a state-of-the-art free trade agreement, it will unite 11 countries—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam—with a combined GDP of almost $21 trillion (about 30 percent of world GDP) and $4.4 trillion in exports of goods and services, or about a fifth of total world exports. If Japan and South Korea are added (they are actively exploring entry later this year), TPP would cover 40 percent of world GDP and nearly a third of world exports.[33]

All current TPP participants are members of the Asia Pacific Economic Cooperation ("APEC") Forum;[34] and many see their prospective agreement as a step toward APEC's long-standing goal to create a Free Trade Area of the Asia Pacific ("FTAAP").

At the same time, other trade integration arrangements are in place in the Asia Pacific area.[35] ASEAN,[36] of which four of its ten members are not signatories to APEC; Pacific Alliance;[37] and the Regional Comprehensive Economic Partnership ("RCEP"), in which the ASEAN-10 are

---

Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing (Jun 19, 1998) [hereinafter *MOU*], http://www.fta.gov.sg/tpfta/p3_authentic_labour_mou_text_english_v1.pdf [http://perma.cc/9FLV-KZKA] (The Memorandum aims to improve understanding and encourage dialogue on labor matters, as well as promoting sound labor policies and practices. According to the text of the TPP, article 20.4 states that the TPP amongst the original 4 members would come into effect the 1 January 2006, once the signatories have deposited "instruments of ratification").

[32] Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 8 (Spring 2013), *available at* http://americasquarterly.org/next-big-thing-trans-pacific-partnership [http://perma.cc/5PFR-3TXG].

[33] *Id.*

[34] *History and Membership of APEC*, INTERNATIONAL.GC.CA, http://www.international.gc.ca/apec/map-carte.aspx?lang=eng (last visited May 9, 2015) [https://perma.cc/H5BC-LX4X?type=source] (These countries include Australia, Canada, Chile, China, Indonesia, Japan, Mexico, Peru, and the United States.).

[35] Socorro Ramirez, *Regionalism: The Pacific Alliance*, AMERICAS QUARTERLY (Spring 2013), *available at* http://www.americasquarterly.org/content/regionalism-pacific-alliance [http://perma.cc/T948-HNVK] (These include ASEAN, RCEP, and the Latin America trade bloc, the Pacific Alliance including Chile, Columbia, Mexico, and Peru).

[36] ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

[37], The Pacific Alliance VII Summit (May 23, 2013), *available at* http://alianzapacifico.net/documents/abc_eng.pdf [na]; *see also Pacific Alliance*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pacific_Alliance [http://perma.cc/YNJ6-YB5E] (last visited March 10, 2016) ("The Pacific Alliance is a Latin American trade bloc, beginning toward integration. It currently has four member states—Chile, Colombia, Mexico, and Peru, which all border the Pacific Ocean. Costa Rica began the process of joining the Alliance in February 2014. . . The four founding nations of the Pacific Alliance represent nearly 36% of Latin American GDP. If counted as a single country this group of nations would be the sixth largest economy in the world with a PPP GDP of more than US$3 trillion. Pacific Alliance") (footnotes omitted).

working together to deepen ties with their FTA partners in the region (those six countries are China, India, Japan, South Korea, Australia, and New Zealand). China, thus far, has not agreed to a social dimension provision relating to the protection of labor.[38]

As of 2015, ASEAN has created the ASEAN Economic Community ("AEC"), and with its motto of "ASEAN centrality" it seeks to expand trade and investment regionally and beyond.[39] Currently, the share of inter-ASEAN trade remains at about twenty-five percent while the remaining seventy-five percent is outside the ASEAN region.[40] ASEAN has also reached out to its neighbors in Asia and concluded trade agreements with China, Japan, India, and South Korea.[41] In seeking greater uniformity, ASEAN looks to expand its preferential trading area and in 2012 began engagement for the creation of a sixteen-member Asian FTA called the Regional Comprehensive Economic Partnership ("RCEP"), which includes New Zealand and India (ASEAN+6). All six additions are ASEAN FTA partners, and several are also members of the TPP.[42] The standards of the RCEP, which include poorer Asian nations, will likely be lower than the standards of the TTP, which includes wealthier nations. Therefore, it may be advantageous to join the RCEP, which

---

[38] *See discussion in* Ronald C. Brown, *China: Implementing ILO Standards by BITS and Pieces (within FTAs)*, ILO LABOR RIGHTS IN CHINA: LEGAL IMPLEMENTATION AND CULTURAL LOGIC (eds. Liukkunen, Ulla, Chen, Yifeng (Eds.) (Springer 2016) (On-going negotiations of the U.S.-China BIT, which has U.S.-proposed labor provisions is not concluded at this time and if agreed to would be the first agreement in which China accepts ILO standards in a FTA or BIT.).

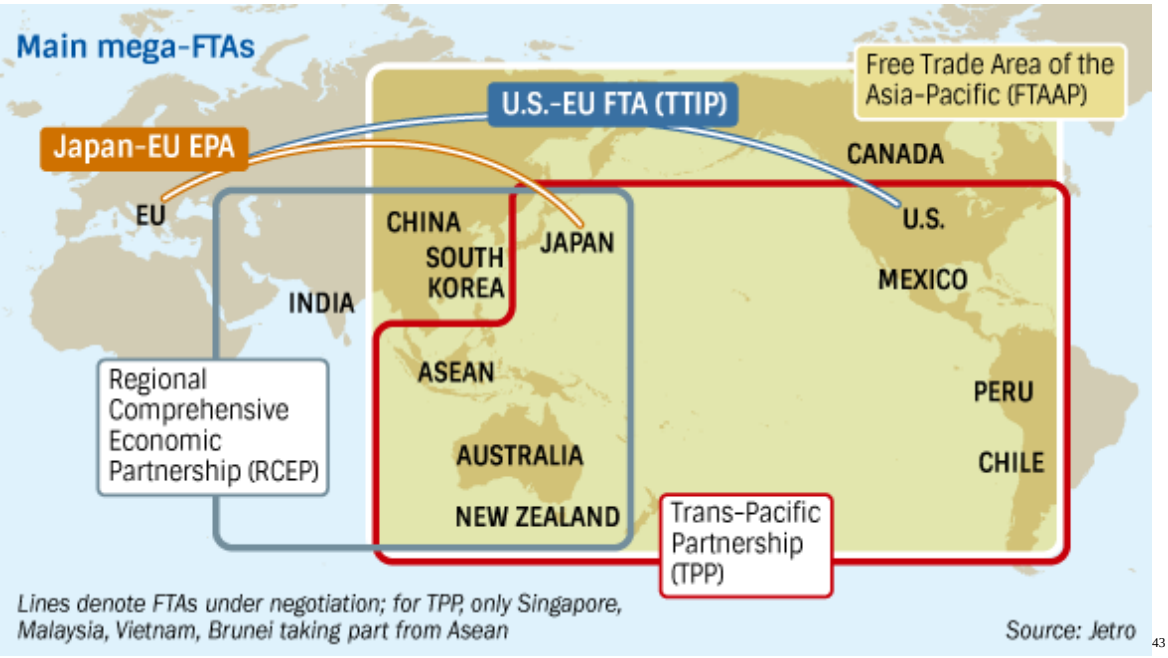
[39] *See discussion in* Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration, LRRN Conference paper (March 2016); *see also*, FROST, *supra* note 25, at 7.

[40] FROST, *supra* note 25, at 7; *see also* Mely Caballero-Anthony, *Understanding ASEAN's Centrality: Bases and Prospects in an Evolving Regional Architecture*, 27 PACIFIC R. 505 (2014) for further discussion; *see* Fukunari Kimura & Ayako Obashi, Working Paper No. 320: *Production Networks in East Asia: What We Know So Far*, ASIAN DEV. BANK INSTITUTE, 10-12 (November 2011), *available at* http://www.adbi.org/files/2011.11.11.wp320.production.networks.east.asia.pdf [https://perma.cc/585H-BLR5?type=source] (Four of ASEAN's members have the highest volume of that export and import trade, led by Singapore, the Philippines, Malaysia, and Thailand.).

[41] FROST, *supra* note 25, at 8.

[42] *Regional Comprehensive Economic Partnership (RCEP)*, N.Z. MINISTRY FOREIGN AFF. & TRADE, http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/ [http://perma.cc/MRG8-HYJ4] (last visited May 10, 2015) (The seven countries presently included in both the TPP and RCEP are Malaysia, Singapore, Vietnam, Brunei, Japan, Australia, and New Zealand. South Korea already qualifies for the TPP but has not applied to join the negotiations. Indonesia, Thailand, and China are potential future members); FROST, *supra* note 25, at 8.

could then be a pathway to harmonization, and an eventual FTAAP.



[43]

In view of the above development of increasing government-to-government free trade agreements, a reasonable question can be asked: what difference does it make to the everyday labor standards in the workplace? In the Rena Plaza disaster in Bangladesh where the government had labor standard laws in place and had ratified most of the ILO's core labor standard conventions, would the additional layer of an international treaty with labor protections in the social dimension provisions have made a difference? If the answer is – "not much," then there is a problem that needs to be fixed with a "new generation" of FTAs that includes and protects workers as the driving means of production of that trade perhaps through a marriage of government obligations with private mandates; i.e., using private contractual obligations under mandated IFAs, CSRs, and Codes of Conduct for employers.

[43] Kazuki Kagaya, Trading up, Nikkei Asian Review (December 5, 2013), at, asian.nikkei.com/magazine/20131205-Rebalancing-act/Cover-Story/Trading-up.

Understanding what an FTA's social dimension provision with labor protections currently does and does not do can help planners fashion what may be needed for the next generation of FTAs now being negotiated. Will they be a "step up" to enforceable and decent labor standards or a "step on" down the path of status quo? Do social provisions really add increased protections for workers in terms of rights or enforcement obligations of the parties? Below is a discussion of the specific social provisions currently in place and those likely to emerge from current negotiations.

1. Social Dimension Labor Provision "Mandates" Currently in place

Free Trade Agreements ("FTA") have proved to be one of the best ways to open up foreign markets[44] and scholars note that the "U.S. has led the way in consistently attempting to make bilateral trade liberalization subject to the observance of labor standards."[45] The social dimension provisions of U.S. trade agreements use a conditional approach and usually link commitments on labor standards to a sanction-based enforcement mechanism and provide for cooperative activities. Additionally, there are obligations to effectively enforce national labor laws in specific areas and

[44] Historically the United States first implemented labor standards in establishing trade agreements in 1890. The United States heightened this standard in 1984 to include penalties for violations of labor standards by withdrawing trade preferences. The idea behind implementing and enforcing a standardization of labor practice and including a Social Dimension to a country's trade agreement was to avoid globalization at the expense of the rights of workers' while aiding in the enforcement of international labor standards. FROST, *supra* note 25, at 17-18; *Free Trade Agreements*, US DEPT. COMMERCE, INT'L TRADE ADMINISTRATION, http://trade.gov/fta/ [http://perma.cc/E8D6-JZXA] (last visited Aug. 15, 2014).

[45] Ludo Cuyvers & Tim De Meyer, *Chapter 5: Market-driven Promotion of International Labour Standards in Southeast-Asia – the Corporatization of Social Justice*, *in* PRIVATE STANDARDS & GLOBAL GOVERNANCE, ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 141, (Alex Marx, Miet Maertens, Johan Swinne & Jan Wouters, eds., 2012). *See also, United States Free Trade Agreements (FTAs)*, INT'L LABOUR ORG. (Oct. 19, 2009), http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115531/lang--en/index.htm#P0_0 [http://perma.cc/2YW2-Q8JA].

also include standards with which the domestic labor law itself must comply.[46] As of January 1, 2014, the United States had 14 FTAs in force with twenty countries.[47]

In identifying a U.S. perspective on labor rights and trade agreements, one might begin with its Model Free Trade Agreement and Model Bilateral Investment Treaty ("BIT"), with respect to labor provisions and relative enforcement mechanisms used in advancing international labor standards.[48] The U.S. perspective might be said to be one that seeks to embrace and promote commitments to the four ILO core labor standards as embodied in the 1998 ILO Declaration on Fundamental Principles and Rights at Work,[49] not its individual conventions, and provide enforcement mechanisms for states and investors for alleged trade or labor violations and with sanctions.[50] The earlier use of related side agreements and its institutions for settlement of disputes, such as North American Agreement on Labor Cooperation ("NAALC") under North American Free Trade Agreement ("NAFTA"), to many appear to be ineffectual and are not currently raised

[46] *See, e.g.*, the US-Peru Trade Agreement; the US-Republic of Korea Trade Agreement; the US-Colom. Trade Agreement; the Can.-Peru Trade Agreement; and the Can.-Colom. Trade Agreement. (Under many earlier United States trade agreements this commitment was not subject to sanctions), (*see* Table 2.1). *ILO Report*, *supra* note 3, at 33.

[47] *Trade Agreements*, OFF. U.S. TRADE REP., https://ustr.gov/trade-agreements (last visited May 11, 2015). *See also Free Trade Agreements*, U.S. DEPT. OF COMMERCE, INT'L TRADE ADMIN., http://trade.gov/fta/ (last visited Aug. 15, 2014) [http://perma.cc/AB65-X7UX].

[48] *See* Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compare*, PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015). (As will be seen, these U.S. frameworks are not fully efficacious to do so, and recommendations to bolster them, including comments on incorporation or utilization of Corporate Social Responsibility (CSR) and International Framework Agreements (IFA) provisions are provided in Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015)) (on file with author). *See* Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, __INT'L LABOUR REV.(ILR)__ (2015), for further information. DOI: 10.1111/j.1564-913X.2015.00038.x, at, onlinelibrary.wiley.com/do/10.1111/j.

[49] *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOUR ORG., http://www.ilo.org/declaration/lang--en/index.htm (last visited Dec. 2, 2014) [http://perma.cc/4AB9-A33A].

[50] The "*EU perspective"* may provide insights about the relative strengths and weaknesses of US FTAs. *See generally*, *Dispute Settlement*, EUROPEAN COMM'N–TRADE, http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/ (last visited Aug. 15, 2014) [http://perma.cc/X8PR-G8ZC].

in negotiations.[51] The United States has adopted only two of the core International Labor Organization Conventions,[52] although it has approved the ILO Constitution vis-à-vis its membership in the ILO.

While the U.S. model bilateral trade and investment frameworks that emerged in recent years are in many ways similar to previous FTA's and BIT's, they are significantly distinguishable from EU FTAs in two important ways. First, alongside trade obligations, the FTA and BIT include labor obligations that incorporate the ILO Declaration, not the *Conventions* as with EU. Second, unlike the EU, the U.S.'s *FTA*, though not the BIT, *weds* bilateral trade with these labor obligations under a new substantive legal procedure and provides an unprecedented unitary enforcement mechanism for both sets of obligations, wherein trade sanctions may be brought for labor violations.[53]

Though the United States is ahead of Asia in implementing labor protections in trade agreements through the social dimension provisions; there are shortcomings of the current U.S. model in furthering ILO Standards. Without question, the U.S. model bilateral trade and investment frameworks are an improvement in that they attempt to wed free trade with

---

[51] It is argued that the system in NAALC is flawed due to the fact that it follows an adversarial and litigious approach towards solving labor issues. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469-490 (2010); *see also*, Tamara Kay, Univ. of Cal. Berkeley, Analysis of the Labour Aspects of NAFTA: Preliminary document for commentaries of Work Group I of the Inter-American Conference of Ministers of Labour, INT'L. LABOUR ORG. (Jun. 2003).

[52] *Ratifications for United States,* INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last updated 2012). [http://perma.cc/JD7D-DFXR]. (The US has ratified 2 of 8 Fundamental Conventions, including (1) Abolition of Forced Labor Convention, (1957 [No. 105]) (Sept. 25, 1991); (2) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999 [No. 182]) (Dec. 02, 1999)). *ILO Country Profile: United States*, INT'LLABOURORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102871 (last updated 2012) [http://perma.cc/G5SG-PVY7](The US has been an ILO member since 1980 and has ratified the ILO Constitution and Declaration).

[53] *See* Ronald C. Brown, *China: Implementing ILO Standards by BITS and Pieces (within FTAs)*, *in* ILO LABOR RIGHTS IN CHINA: LEGAL IMPLEMENTATION & CULTURAL LOGIC (Wolters Kluwer 2015), for further discussion [emphasis added].

international labor norms in an effort to halt the race to the bottom. But, the efficacy of the U.S. model frameworks to advance international labor standards is inadequate for several reasons.[54] First, while the U.S. model frameworks integrate international labor norms, it is clear that the ILO commitments are to the ILO Declaration, not the ILO Conventions, and are, therefore, not likely to be sufficiently substantive for enforcement.[55] Second, the dispute settlement mechanisms for enforcing the labor obligations are somewhat vague on what constitutes a violation and how violations would likely be remedied. Third, while the FTA's dispute settlement mechanisms allow for wedded enforcement of trade and labor obligations,[56] only states and individual investors may directly bring claims that can lead to sanctions;[57] third parties such as non-governmental

[54] *See* Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015) (on file with author). *See also,* Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, __INT'L LABOUR REV. (ILR)__ (2015)(Though the US model has agreement on the "conventions," by a footnote in the treaty it explicitly limits its definition to the Declaration).

[55] "Where labour provisions refer to ILO conventions the parties can rely on the reports of the ILO supervisory bodies, which provide guidance on the interpretation of labour standards. By contrast, the 1998 Declaration is, as such, not subject to the supervision of the ILO's supervisory bodies although some guidance on the 1998 Declaration may be drawn from the comments of the ILO supervisory bodies on the respective fundamental conventions." *ILO Report*, *supra* note 1, at 107. The EU, on the other hand, commits to the Conventions, but its enforcement mechanism is not as strong as that of the U.S. See discussion on the draft EU-Columbia FTA at *Text of Draft EU-Colombia trade deal offers nothing for threatened workers*, TUC.ORG.UK (May 2010), *available at* http://www.tuc.org.uk/international-issues/countries/colombia/human-rights/text-draft-eu-colombia-trade-deal-offers [http://perma.cc/ZNA3-9E9E]. For the U.S. standard language in its FTA's Social Dimension provisions, *see*, KORUS FTA, U.S. OFF. OF TRADE REP. 19.2.1, n.1, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Jan. 31, 2015) [http://perma.cc/3YCU-XZ4C].

[56] However, the European Union (EU) in its FTAs does not wed the labor and trade enforcement mechanisms, each having their own mechanism, with the former, not having trade sanctions available. For more detailed discussion, see Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, __INT'L LABOUR REV. (ILR)__ (2015).

[57] Some FTAs permit third parties to present allegations to institutionalized contact points. *ILO Report*, *supra* note 3, at 32. In a few cases, the only sanction available is the modification of development cooperation. This is the case of the Canada-Costa Rica Trade Agreement and, to some extent, of the EU-Cariforum Economic Partnership Agreement. *Id.*, at 34 n. 30. *See* also, the side agreement of NAFTA, The North American Agreement on Labor Cooperation (NAALC) that authorizes third party complaints on labor disputes, but which is reported ineffective and not used. Frank H. Bieszcat, *Labor Provisions in Trade Agreements: From to Now*, 83 CHI.-KENT L. REV.1387,1388 (2008), *available at* http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3695&context=cklawreview [http://perma.cc/3WPG-A6TF]. It is argued that the system is flawed due to the fact that it follows an adversarial and litigious approach towards solving labor issues. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?* 45 WAKE FOREST L. REV. 469-490 (2010); *see also* Tamara Kay, Univ. of Cal. Berkeley,

organizations, unions and labor groups, and/or workers cannot bring similar challenges, except in some FTAs through cumbersome administrative requests to the state's discretion, thus inhibiting enforcement. And fourth, while the frameworks place an onus on the states to enforce labor standards, they do not *require companies* to adhere to basic corporate social responsibility ("CSR") norms in their operations; and, MNCs can easily evade compliance, through such activities as subcontracting.[58]

Recommendations have been made to improve the U.S. model frameworks that currently place the onus squarely on the parties to advance international labor norms within their domestic laws. That, however, limits effectiveness, given that entities actually transacting across borders are the companies, like U.S. retailers and local employers, who are not obliged to ensure similar standards are adopted in practice, given the frequent local custom of lax enforcement.[59] Under the current U.S. model frameworks, U.S. companies would be able to continue to flaunt international standards by subcontracting with companies in the country to run factories, without meaningful legal responsibility to avoid substandard practices.[60]

While inter-Asian business grows and FTAs flourish in and with Asia, the inclusion of social dimension provisions in FTAs or BITs is practically non-existent except where the Western

---

Analysis of the Labour Aspects of NAFTA: Preliminary document for commentaries of Work Group I of the Inter-American Conference of Ministers of Labour, INT'L. LABOUR ORG. (Jun. 2003).

[58] *See*, Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards 7-8, presented at Marco Biagi Conference, Modena, Italy (Mar. 2015) (on file with author), for further discussion [emphasis added].

[59] *Id.*

[60] *Corporate Social Responsibility: Disaster at Rana Plaza*, ECONOMIST, May 4, 2013, *available at* http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly [http://perma.cc/2VSS-V5S6].

influence appears to dominate and social dimension provisions are included, such as in FTAs with South Korea and with Singapore.[61]

Within the Asian Region, the only plurilateral agreement with labor protections is the Trans Pacific Strategic Economic Partnership Agreement (Pacific Four or P-4), which includes Brunei Darussalam, Chile, New Zealand and Singapore. It is contained in a side agreement of the parties, referred to as the 'Labour Cooperation Memorandum of Understanding' ("MOU") that provides promises of labor protections by committing to the ILO Declaration, agreeing to improve labor legislation and conditions, and undertaking cooperative activities and institutional contacts to achieve improved labor rights and protections.[62] This MOU has the promise of improved labor provisions, placing some obligations on the parties, as described in the labor section below.[63]

Memorandum of Understanding on Labour Cooperation among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement

Article 2: Key Elements/Commitments

1. Parties that are members of the ILO reaffirm their obligations as such.
2. The Parties affirm their commitment to the principles of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).

[61] Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, *in* PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015). ("Western" particularly includes the EU, Canada, and Australia all of which typically include Social Dimension provisions in their FTAs with Asian countries).

[62] *Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*, ORG. AM. STATE FOREIGN TRADE INFO. SYS. (SICE), *available at* http://www.sice.oas.org/Trade/CHL_Asia_e/Side_Agreements/Labor_e.pdf [http://perma.cc/M35C-CBN7] [hereinafter P-4 MOU].

[63] P-4 MOU, *Id.*, arts. 2-3.

3. Each Party shall work to ensure that its labor laws, regulations, policies and practices are in harmony with their international labor commitments.
4. The Parties respect their sovereign rights to set their own policies and national priorities and to set, administer and enforce their own labor laws and regulations.
5. The Parties recognize that it is inappropriate to set or use their labor laws, regulations, policies and practices for trade protectionist purposes.
6. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws.
7. Each Party shall promote public awareness of its labor laws and regulations domestically.[64]

There is also the potential inclusion of *proposed* labor protection provisions in new trade agreements being negotiated inter-Asia, some of which also will include the U.S. and other Western partners, for example in the currently negotiated TPP, discussed below.[65]

Finally, in Asia there are Economic Partnership Agreements ("EPA") which include FTAs. While these do not normally include social dimension provisions, they do often include general goals to protect labor standards and a provision dealing with the movement of natural persons. This is needed to facilitate the trade aspects of the EPA. Though perhaps it is better related to immigration issues than to labor protections, it may be a small step toward recognizing the significance of labor rights in trade agreements.[66]

---

[64] P-4 MOU, *Id.*, art. 2.

[65] In that negotiation, some of the provisions under discussion are said to include a section on a labor chapter that includes commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern. This likely will build upon and further develop the beginnings of the P-4's MOU on labor cooperation. *Outlines of TPP*, OFFICE U.S. TRADE REP., http://www.ustr.gov/tpp/outlines-of-TPP (last visited Jun. 19, 2013) [http://perma.cc/523V-YBMN].

[66] Japan's EPAs contain a labor provision entitled "Investment and Labour" that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement. *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY FOREIGN AFF. JAPAN (April 2014), http://www.mofa.go.jp/policy/economy/fta/ [http://perma.cc/J5RS-7VMS].

2. **Proposed Social Dimension Labor Provision "Mandates"**

In an age of integrated supply chains and fluid movement of capital, business people and digital trade, the TPP has been called the "next generation" of free trade agreements.[67] This, of course, holds no promise that the social dimension provision on labor will be the "next generation."[68] It also has been the target of much criticism by U.S. and international unions. The Labor Advisory Committee ("LAC"), comprised of 19 American labor union leaders, strongly opposes the TPP[69] as does the International Trade Union Confederation ("ITUC").[70] The American Federation of Labor and Congress of Industrial Organizations ("AFL –CIO") shares the reluctance of the ITUC to rely on the agreements' promises, based on the US- Columbia LAP experience.[71]

Highlights of the TPP labor provision found in Chapter 19[72], with its U.S. model language promoting ILO core labor standards, includes emphasis on not using labor standards for protectionist purposes[73] or derogating from its labor standards.[74] The TPP also calls for "impartial

---

[67] Ronald C. Brown, Mega-Regionalism: TPP Labor Provisions: A Game Changer? (Proceedings, at, http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown.pdf (2016) 6-7**.** Presented at the NSF Workshop on Mega-Regionalism: New Challenges for Trade and Innovation (MCTI) at the East-West Center, Honolulu, Hawaii, on January 20-21, 2016. TPP Full Text, at, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. [hereinafter TPP].

[68] Hugh Stephens, *TPP or FTAAP: What It Means for US and the Asia-Pacific Region*, CHINAUSFOCUS.COM (Nov. 25, 2014), http://www.chinausfocus.com/finance-economy/tpp-or-ftaap-what-it-means-for-us-and-the-asia-pacific region/ [http://perma.cc/S8HJ-EXF2]; *See also* Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 9 (Spring 2013), http://americasquarterly.org/next-big-thing-trans-pacific-partnership [http://perma.cc/D54S-BBKG]; Janice Bellace, *How Labor Issues Are Complicating the Latest Wave of Free Trade Pacts*, WHARTON UNIV. PENN. (Jun. 27, 2014), http//knowledge.wharton.upenn.edu/article/labor-issues-complicating-latest-wave-free-trade-pacts/ [http://perma.cc/N32Q-9HFT].

[69] Report on the Impacts of the Trans-Pacific Partnership by The Labor Advisory Committee on Trade Negotiations and Trade Policy (December 2, 2015), *at*, https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf.

[70] TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD FUNDAMENTAL ISSUES REMAIN UNADDRESSED, *at*, http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf.

[71] Making the Columbia Action Plan Work, *at*, http://www.aflcio.org/content/download/123141/3414471/April2014_ColombiaReport.pdf. *See* also, http://www.aflcio.org/content/download/38251/594971/report+version+2+no+bug.pdfs.

[72] TPP *supra* note 18, ch. 19.

[73] *Id*. at ch. 19.2:2.

[74] *Id*. at ch.19.4:b.

and independent tribunals that are fair and transparent."[75] A new provision is to "encourage" enterprises to "voluntarily" adopt corporate social responsibility ("CSR") initiatives.[76] Provisions for cooperative activities, including technical assistance, are very wide in scope and encompass 21 very specific categories of improving labor standards and conditions in a list from a-u.[77] These activities can be accomplished through a variety of modes from workshops to exchange of technical expertise and assistance.[78] Cooperative dialogue is authorized through contact points under the labor ministries[79] and a Labour Council is established to oversee all processes[80] and through labor consultations, use of experts and panels and other means, resolve labor issues that are raised.[81] If there is no resolution by consultation within 60 days, the establishment of a panel can be requested and pursuant to the Dispute Resolution[82] the case may proceed. Under the Dispute Resolution provisions labor violations affecting trade can proceed through the mechanism ultimately resulting in trade sanctions.

> *But by far, the most dramatic break-through on labor protections* is found in the side agreements of the TPP that the U.S. has with Vietnam, Malaysia, and Brunei. By express terms their labor laws must be newly established, changed and improved to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions, *before* they are allowed to export goods duty-free to the United

[75] *Id*. at ch. 19.8:2-3.
[76] *Id*. at ch. 19.7.
[77] *Id*. at ch. 19.10:6.
[78] *Id*. at ch. 19.10:7.
[79] *Id*. at ch. 19.11.
[80] *Id*. at ch. 19.12.
[81] *Id*. at ch. 19.15.
[82] *Id*. at ch. 28.

> States and otherwise use the provisions of the TPP. The side agreements are very detailed in their obligations.[83]

If the TPP falters in Congress, the RCEP is prepared to go forward with China in its membership and without any social dimension provisions on labor.[84]

In 2014, the APEC members issued the Beijing APEC Declaration calling for yet another new regional trade agreement, the Free Trade Area of Asia Pacific ("FTAAP"), which would be a multi-regional, mega-FTA.[85] It was reported that one study concluded the income gains from the FTAAP "would be some eight times that of the 12 nation TPP—close to $2 trillion by 2025—and three times that of another trade agreement that is being negotiated among the Southeast Asian ("ASEAN") nations, that also includes China, India, Japan, Korea and Australia/New Zealand (known as the Regional Comprehensive Economic Partnership or RCEP)." [86] There is of yet no negotiation begun on the proposed FTAAP.

---

[83] Ronald C. Brown, Mega-Regionalism: TPP Labor Provisions: A Game Changer? (Proceedings, at, http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown.pdf (2016) 6-7**.** Presented at the NSF Workshop on Mega-Regionalism: New Challenges for Trade and Innovation (MCTI) at the East-West Center, Honolulu, Hawaii, on January 20-21, 2016. TPP Full Text, at, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. [hereinafter TPP].

[84] Gordon G. Chang, TPP vs. RCEP: America and China Battle for Control of Pacific Trade (October 6, 2015), at, http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021 Also, see Kit Tang, RCEP: The next trade deal you need to know about, at, http://www.cnbc.com/2015/10/14/tpp-deal-pressures-rcep-trade-talks-in-busan-china-keen-for-progress.html

[85] "In this regard, we decide to kick off and advance the process in a comprehensive and systematic manner towards the eventual realization of the FTAAP, and endorse *the Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP (Annex A)*. Through the implementation of this Roadmap, we decide to accelerate our efforts on realizing the FTAAP on the basis of the conclusion of the ongoing pathways, and affirm our commitment to the eventual realization of the FTAAP as early as possible by building on ongoing regional undertakings, which will contribute significantly to regional economic integration, sustained growth and common prosperity in the Asia-Pacific region. We instruct Ministers and officials to undertake the specific actions and report the outcomes to track the achievements." *2014 Leaders' Declaration*, ASIA-PACIFIC ECON. COOP. (Nov. 11, 2014), http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm.aspx [http://perma.cc/92ZJ-CPN4].

[86] These gains are said to be predicated on an FTAAP model that bridges the TPP and RCEP templates. Stephens, *supra* note 64.

As to other proposed or pending FTAs in the Asia-Pacific area with labor provisions, it is unlikely that ASEAN will soon provide labor protections in its FTA;[87] and so optimists might only hope the FTAAP would bring the "new generation of FTAs" needed relief to the workers who support and make possible the trade regulated by the FTAs. But, of course the APEC members in that future negotiation include Asian nations that have yet to include a single social dimension provision on labor in any of their FTAs.

And so, it appears the "next generation" of labor protections in social dimension provisions will look just like they do now, at best, unless new initiatives are considered and adopted.

Not to be overlooked or underestimated is the EU-US Transatlantic Trade and Investment Partnership ("EU-USTTIP") currently being negotiated, which also could provide the "next generation" of FTA's social dimension provisions on labor.[88] It is estimated that these two economies represent about half of the global Gross Domestic Product ("GDP") and nearly a third of the world trade flows. [89] While there are similarities in the labor provisions included in their respective past FTAs, the United States typically obligates itself only to the labor standards of the ILO Declaration[90] while the EU obligates itself to the ILO's Conventions and Decent Work Agenda.

---

[87] *See* Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration. _ Pacific Basin L. J. __ (forthcoming 2016). As discussed earlier, under TIFA, ASEAN has agreed to goals for some general labor protections.

[88] Though, if so, it is not readily apparent. For a European viewpoint, *see* Susanne Kraatz, *Briefing, The Transatlantic Trade and Investment Partnership (TTIP) and Labour*, PARL. EUR. DOC. (PE 536.315) (2014), http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI%282014%29536315 [http://perma.cc/924W-KHGP].

[89] *Id.; see also Trade*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/ [http://perma.cc/KFX7-UTX4] (last visited May 10, 2015).

[90] It is predicted by E.U. sources that "it is not probable that all fundamental conventions will be ratified [by the U.S.] in the near future. This may result in aspirational language in TTIP labour provisions (e.g. to strive for ratification of the Fundamental Conventions) in combination with good monitoring and policy dialogue." Kraatz, *supra* note 76, at 6.

Another difference in approach is their dispute resolution mechanisms, with the United States using economic sanctions and the EU relying on reporting and political dialogue.[91] While the EU makes commitments to ILO Conventions in its FTAs, its enforcement machinery, while easier to access, nonetheless does not typically merge trade and labor violations under a single dispute mechanism and provide sanctions for labor violations as the United States does. It is reported that to meet the United States' lack of ratifications, the EU has proposed a provision different from its recent provisions in Comprehensive Economic and Trade Agreement ("CETA") and earlier agreements, namely, proposing thematic core labor standards articles for each of the four areas of fundamental rights and principles as defined in the ILO declaration 1998. These would "describe in more detail the commitments by each partner; including concrete actions planned for implementation."[92] The "labor provisions of this agreement may become a model, given the shared commitment by both partners who already maintain high levels of protection for their workers." [93]

This "thematic" standard could provide a "next generation" step forward on ensuring labor rights, but possibly mainly for the United States since the EU and others already agree to abide by the conventions themselves.

C. "Next Generation" in Asia-Pacific?

[91] Kraatz, *supra* note 76.
[92] *Id*. at 7. For a summary of the CETA labor provisions, see *id*. at 8.
[93] Kraatz, *supra* note 76, at 8-9 (citing *Trans-Pacific Partnership: Summary of U.S. Objectives*, *supra* note 72).

Proposed new initiatives, which could make a difference in improving workers' labor protections may include some of the below proposals.[94] Some of the proposals are aimed at the MNCs whose cross-border investments and transactions have a big impact on a receiving country's workforce and economic development; this is particularly so in use of their supply chains, subcontractors, and their millions of workers, especially in the Foreign Direct Investment ("FDI") welcoming, developing countries.[95] Upholding standards and remedies for this large bloc of workers should positively affect the labor standards for other workers in the country. It is reported that there are over "63,000 MNCs with over 800,000 subsidiaries multiplied by millions of suppliers and distributors."[96] The number of workers involved is phenomenal; taking just one industrial sector, out of many, "[a]n estimated 40 million workers, most of them women, are employed in the global garment industry. The industry is worth at least $350 billion (£190 billion) and is expanding year by year."[97] Clothing production is a major source of employment in many poor countries and could play an important role in social and economic development on a very large scale. For it to do so, however, there need to be fewer obstacles and more enforceable rights for workers to organize and/or to improve their working conditions. In addition, one could add the

[94] These proposed initiatives were recently presented at the Marco Biagi Conference on March 20, 2015 and are discussed in more depth in that paper. Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015) (on file with author).

[95] ANGELA HALE, RESEARCHING INTERNATIONAL SUBCONTRACTING CHAINS, http://www.cleanclothes.org/resources/national-cccs/garment-report-www.pdf [http://perma.cc/4U7G-CLCX]. The supply chains are packed with firms and foreign nations competing for the MNC dollar. "This competition entails being the cheapest country in which to do business-that is, lowest labor costs or the most lax environmental standards-popularly known as a 'race to the bottom.'" Krishna Chaitanya Valdamannati, *Rewards of (Dis)Integration: Economic, Social, and Political Globalization and Freedom of Association and Collective Bargaining Rights of Workers in Developing Countries*, 68 ILR Rev. 3, 4 (Jan. 2015).

[96] PROMOTING LINKAGES, WORLD INVESTMENT REPORT (U.N. New York and Geneva, 2001), http://unctad.org/en/docs/wir01ove_a4.en.pdf [http://perma.cc/2988-LVKD].

[97] *See* JANE WILLSWITH ANGELA HALE, THREADS OF LABOUR: GARMENT INDUSTRY SUPPLY CHAINS FROM THE WORKERS' PERSPECTIVE 1 (Angela Hale & Jane Wills, eds., Wiley-Blackwell 2005), *available at* http://media.johnwiley.com.au/product_data/excerpt/7X/14051263/140512637X-1.pdf [perma.cc/2P97-FMYU].

flow of millions of migrant workers, many undocumented, going back and forth across borders in the Asia-Pacific region that often fall victim to low labor standards. They too are in a poor position to demand decent labor standards and protections without meaningful enabling legislation.

"In evaluating the new landscape of labor enforcement initiatives after Rana Plaza, The Hague Institute for Global Justice ("The Hague Institute") in 2014 convened a roundtable with a select group of academics, policymakers and practitioners in The Hague" [98] which noted,

> There is a mismatch between the organization of global supply chains and the governance structures for the enforcement of fundamental labor rights. ILO Conventions are addressed to governments while global supply chains require a transnational approach. In the past there have been various innovative ideas to change the normative framework of the ILO, such as a global social label, a global labor inspectorate . . . and broad framework conventions. It is imperative that also the ILO continues to rethink its approach toward the realization of fundamental labor rights, according to the experts.[99]

After reviewing the Post-Rana Plaza Initiatives,[100] recommendations were put forth by authors van der Heijden and Zandvliet which included: (1) CSR commitments regarding labor

---

[98] The roundtable also served as the inaugural event of the Social Justice Expertise Center, a collaborative project with Leiden University to conduct policy-relevant research in the field of fundamental labor rights, facilitate dialogue among stakeholders, and develop capacity-building initiatives to promote social justice. PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 12 (Policy Brief 12, September 2014), *available at* http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf [perma.cc/8B4L-WX5A].

[99] Manuella Appiah & Ruben Zandvliet, *Advancing Fundamental Labor Rights Using The Newly Re-Discovered Multi-Stakeholder Model*, HAGUE INSTITUTE FOR GLOBAL JUSTICE (May 20, 2014), http://thehagueinstituteforglobaljustice.org/index.php?page=Recent_Commentary&pid=176&id=237&zoewoord=labor [perma.cc/5AZ5-ESFG].

[100] These included: the ILO/UN human rights system ILO Conventions, the ICCP, ICESC, and Rights of the Child; National Tripartite Plan of Action on Fire Safety; The Rana Plaza arrangement; The Bangladesh Sustainability Compact; Better Work Bangladesh; The Bangladesh Accord on Fire and Building Safety; The Alliance for Bangladesh Worker Safety. PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 5-7 (Policy Brief 12, September 2014), *available at* http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf. [perma.cc/8B4L-WX5A]. Details of two of the resulting remedies, the Accord and the Alliance, are outlined in, SARAH LABOWITZ & DORTHEE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION, SUPPLY CHAINS AND OUTSOURCING AFTER RANA PLAZA (2014), *available at*

should be in a contractual form, including referral to binding arbitration processes; (2) An international factory inspectorate should be considered; and (3) The value of trade union representation for garment workers should be highlighted and included in policies.[101]

The present difficulties of affording workers enforceable labor rights and achieving these improved labor protections under international trade agreements, besides the issue of government will, is finding the right balance with the MNCs who benefit from locating in areas with low labor standards. Currently, where there is lax law enforcement of labor standards, even if employers and MNCs have and adhere to codes of conduct, Organization for Economic Co-operation and Development ("OECD") guidelines, and CSRs, they are mostly non-binding and do not restrict the use of contractors and subcontractors who fall outside these "obligations."[102]

In addition to the above approaches, there is the availability of adding legally enforceable international treaties such as FTAs with their social dimension obligations for labor protections and adding or amplifying third-party access to the enforcement mechanisms through more direct

---

http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/business-human-rights/activities/supply-chains-sourcing-after-rana-plaza [perma.cc/Z7PF-83PH].

[101] PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 12 (Policy Brief 12, September 2014), *available at* http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf [perma.cc/8B4L-WX5A].

[102] For an excellent discussion regarding privatizing the obligations of MNCs, see discussion in Zandvliet & Van der Heijden, *supra* note 89, or RUBEN ZANDVLIET & PAUL VAN DER HEIJDEN, THE RAPPROCHEMENT OF ILO STANDARDS AND CSR MECHANISMS: TOWARDS A POSITIVE UNDERSTANDING OF 'PRIVATIZATION' (February 5, 2014), *available at* http://dx.doi.org/10.2139/ssrn.2391295 [perma.cc/J2Z3-GTPQ]. The same authors argue the post- Rana Plaza disaster and its resulting remedial accords made Bangladesh a "policy laboratory for new ways to enforce fundamental labor rights. These responses, which can be characterized as a network approach, involve many stakeholders cooperating in different coalitions to pursue a variety of goals. The network approach aligns with the idea that improving labor rights in global supply chains is not the sole responsibility of the state in which production takes place. A collaborative effort is required. … [The Authorsargue] that businesses with transnational supply chains should cast their labor commitments in a contractual form, following the successful example of the Bangladesh Accord for Fire and Building Safety . . . . Institutionally, the ILO should engage more directly with businesses and use its authoritative role to strengthen supply-chain bargaining." VAN DER HEIJDEN & ZANDVLIET, *supra* note 89, at 3.

and expeditious means.[103] Additionally, further proposals to improve the Social Dimension provisions on labor include clarifying the specific facts necessary to prove a violation of applicable labor standards; and thereby expediting and mandating advancement of the complaint; granting arbitration panels increased authority to implement remedies, including suspending benefits or some FTA mechanisms, such as the dispute resolution mechanism. These proposals, it is submitted, facilitate effectiveness of dispute resolution mechanisms, and in the judgment of some, to actually make them work. A new proposal keyed into the Investor-State Dispute Settlement ("ISDS") mechanism and more worker-friendly, has been issued by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), its Australian and New Zealand counterparts, and other unions. This "is based, in part, on the labour and dispute resolution chapters of the U.S.-Peru Free Trade Agreement (FTA), two of the Parties to the current [TPP] negotiations." [104]

The suggestion of this paper is to have a "new generation" of social dimension labor provisions of FTAs that actually protect the workers. An alternative approach could be to require

---

[103] Third-parties could include unions, NGOs, or even the ILO. *See,* Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, __INT'L LABOUR REV. (ILR)__ (2015) (on file with author). DOI: 10.1111/j.1564-913X.2015.00038.x, at, onlinelibrary.wiley.com/do/10.1111/j. The ability of *stakeholders'* access to enforcement machinery could be better clarified. By merely allowing investor or state complaints, third-parties are left to petition their state though administrative apparatus, such as NAOs or departments of labor, that may leave too much discretion in the state's decision whether to proceed. U.S. – Peru Trade Promotion Agreement, U.S.-Peru, art. 21, Apr. 12, 2006, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [perma.cc/HC47-ZG2S]. *See also*, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), Canada-E.U., arts. 24 and 33, Sep. 26, 2014, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/33.aspx?lang=eng, or http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [perma.cc/R4SF-PG3T].

[104] *The Trans-Pacific Partnership Agreement, A New Model Labour & Dispute Resolution Chapter For The Asia-Pacific Region*, http://www.trungtamwto.vn/sites/default/files/tpp/attachments/Final%20Official%20ITUC%20TransPacificPartnership%20Labor%20Chapter%202b29%20%20TPP%20labor%20rights.pdf [perma.cc/7TMM-CB5F]. (last visited May 11, 2015). Various modifications and approaches have been proposed over the years by the ICFTU and the AFL-CIO and numerous other unions. (Proposals are on file with author).

state party agreement to enforce the above-described deficiencies by mandating that an in-country MNC have binding CSRs with worker rights, grievance procedures, and remedies within the governance document; and, in certain industries be part of an International Framework Agreement ("IFA")[105] that addresses these issues by enforceable contractual obligations. The dispute resolution procedures could include private agreement on mediation and arbitration,[106] with the scope of arbitrable items including alleged violations of contract or domestic or ILO labor law obligations, with venue to be determined. There are new FTAs under negotiation and the opportunity to insert international labor protections is within their reach, if not practicality.[107]

A newly developing innovation might come from a comprehensive United Nations ("U.N.") initiative to regulate corporate responsibilities on human rights if it were to be expanded to include certain fundamental labor rights.[108]

Another proposal is to have a group or network of public interest or labor lawyer advocates to act as *"mobile global lawyers"* to be activated to negotiate or litigate workers' labor violations

---

[105] A global framework agreement, also referred to as an international framework agreement, is "an instrument negotiated between a multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates". The framework agreements cover the same ILO conventions on which the labor principles are based. *Global Framework Agreements*, UNITED NATIONS GLOBAL IMPACT, https://www.unglobalcompact.org/Issues/Labour/Global_Framework_Agreements.html [perma.cc/JH6H-G7S8].(last visited Jan. 31, 2015).

[106] Though litigation could be considered, issues for exhaustion of domestic remedies and deference to sovereignty would first need to be resolved.

[107] For example the TPP and the EU-US TTIP are currently in negotiations. *See*, Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, *in* PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015).

[108] It is reported that "a fierce debate is under way within the UN Human Rights Council on whether a treaty should address binding human rights norms to companies. On June 30, 2014, the Council adopted a resolution that, *inter alia*, established an intergovernmental working group to draft "a legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises." The vote was "twenty in favor, fourteen against, and thirteen abstentions." The authors argue "a binding treaty, with possibly a new supervisory or enforcement institution, would further add to the range of stakeholders in the Asian RMG industry." VAN DER HEIJDEN & RUBEN ZANDVLIET, *supra* note 86, at 12. *See also*, JOHN RUGGIE, REPORT OF THE SPECIAL REP. OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNAT'L CORP. AND OTHER BUS. ENTER. 21 (HUMAN RIGHTS COUNCIL A/HRC/17/31, March 2011), *available at* http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [perma.cc/TZ2U-9642].

under FTAs, contractually-enforceable IFAs, codes of conduct or related obligations, wherever they may occur. Perhaps International Trade Union Confederation ("ITUC") or various Global Union Federations ("GUF") could supply the advocate network to police the obligations; or perhaps other organizations, such as the International Rights Advocate ("IRA") could take on special related projects.[109]

To the extent that the above proposals are not practical or likely, given the power and mobility of MNCs, and the predictable resistance of certain states on the basis it harms their competitiveness, perhaps within an IFA a start could be mandatory transparency and reporting of the subcontractors' compliance with standards, analogous to a California law mandating transparency in supply chains to combat human trafficking and slavery.[110] This approach could be made applicable to decent work standards and be used to raise labor standards and dampen the use of a common techniques resulting in avoidance of labor standards.

---

[109] Terry Collingsworth, *IRAdvocates Team*, INT'L RIGHTS ADVOCATES, http://iradvocates.org/iradvocates-team [perma.cc/D8P5-C5ZR] (last visited May 11, 2015); and see *About ILRF*, LABORRIGHTS.ORG, http://www.laborrights.org/about [perma.cc/AH9L-J7KW] (last visited May 11, 2015). An analogous organization, the Public International Law & Policy Group (PIPLG), now exists as a "global *pro bono* law firm that provides legal assistance to states and governments with the negotiation and implementation of peace agreements, the drafting of post-conflict constitutions, and the creation and operation of war crimes tribunals." PUBLIC INT'L LAW & POLICY GROUP, http://publicinternationallawandpolicygroup.org/ [perma.cc/9LWT-X2WJ] (last visited May 11, 2015). In conversations the author had with officials at ITUC, this concept is reportedly under discussion by international unions.

[110] The California law provides that employers using supply chains must make available information indicating the extent to which a company: "*Verifies* supply chains to evaluate and address risks of human trafficking and slavery, including if the verification was conducted by a third party; *Conducts* unannounced and verified audits of suppliers for trafficking and slavery in supply chains to evaluate compliance with company standards; *Maintains internal accountability standards* and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; *Trains employees and management* with direct responsibility for supply chain management to mitigate risks within the supply chains of products; and *Certifies that materials incorporated into the product* comply with the laws regarding human trafficking of the country or countries in which they are doing business."(emphasis added) EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY: INVESTOR GUIDANCE ON IMPLEMENTATION OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT AND BEYOND 3 (November 2011), *available at* http://www.calvert.com/NRC/literature/documents/WP10009.pdf [perma.cc/QF36-Z6T9]. *See also*, *California Transparency in Supply Chains Act*, STUART WEITZMAN, http://www.stuartweitzman.com/service/california_transparency/ [perma.cc/9TRM-DWVX] (last visited Jan. 31, 2015).

Additionally, lessons from Bangladesh could be used in remedies specifically for MNCs using supply chain workers; wherein obligations from either an international or domestic source, obligates employers as a condition of doing business to provide the following security to the supply chain workers: [111] (1) Peremptorily create a fund to be kept and used for victims in their supply chain for proven labor violations;[112] (2) Require MNCs' contractors and subcontractors down the supply chain to post performance bonds on the extent of compliance of legally enforceable obligations existing in their contractual relations relating to labor protections;[113] (3) Allow supply chain workers a lien on the products they worked on, an approach analogous to an artisan's lien;[114] (4) Create joint employer liability, of the MNC and/or the primary contractor and perhaps with contractors down the supply chain. This is a common law legal doctrine in the U.S. and a statutory rule in South Korea to find enforceable liability between employers working strategically together.[115]

---

[111] Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards; Part II at 169, in *Proceedings* Employment Relations and Transformation of the Enterprise in the Global Economy (eds. Edoardo Ales, Francesco Basenghi, William Bromwich, and Iacopo Senatori), Giappichelli-MBF book series (2016).

[112] The Accord and the Alliance are outlined in SARAH LABOWITZ & DORTHEE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION, SUPPLY CHAINS AND OUTSOURCING AFTER RANA PLAZA 53-57 (Center for Bus. Human Rights, April 2014), *available at* http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/business-human-rights/activities/supply-chains-sourcing-after-rana-plaza [perma.cc/9YDW-ZDVZ].

[113] A performance bond, also known as a contract bond, is a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a project by a contractor. A job requiring a payment and performance bond will usually require a bid bond, to bid the job. *See Performance bond*, WIKIPEDIA, en.wikipedia.org/wiki/Performance_bond [perma.cc/K8LG-DL8N] (last visited Jan. 31, 2015).

[114] It is defined as a "type of lien that gives workers a security interest in personal property until they have been paid for their work on that property. Essentially, a mechanic's lien by another name," *see* LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/artisans_lien [perma.cc/48KQ-963T] (last visited Jan. 31, 2015).

[115] *See cf.*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2003) (Fair Labor Standards case). In South Korea, "under article 44-2 of the revised Labour Standards Act of 2007, the direct upper-tier contractor is jointly liable with the subcontractor to pay wages to a worker of a subcontractor when the subcontractor fails to pay wages to the worker. Article 93 regards a primary contractor as an employer in relation to accident compensation. A subcontractor is regarded as an employer if they are supposed to pay compensation under a written agreement with a primary contractor under article 90(2). Article 90(3) allows a primary contractor to ask the worker to demand compensation first from the subcontractor who has agreed to responsibility for compensation." *Precarious Work in the Asia Pacific Region*, ITUC, [perma.cc/9ZV4-934W] (last visited Jan. 31, 2015).

In sum, to innovate obligations and remedies against domestic or foreign employers, so as to effectively establish meaningful labor standards and protection of workers, it is proposed to marry state obligations under FTA social dimension provisions with private contractual obligations, such as FTA-mandated IFAs, CSRs, and codes of conduct. It would be the obligation of the state, under the FTA, to ensure compliance by employers. Additionally, a dispute settlement forum would be established with direct access by workers and their representatives. This could be the "next generation" of FTA and it would be a "step up," and not a step for status quo.

D. Conclusion

While the proposals in this paper for the "next generation" of FTAs and social dimension provisions may be only a conceptual piece in this era of "race to the bottom," easy mobility of MNCs, and the abundance of willing countries with lax labor standards looking for FDI, nevertheless, protecting workers through minimum labor standards is what most CEOs of MNCs today publicly espouse, and to which most states would agree is a worthy goal. It is also a priority in the ILO's agenda. Tools are available to improve labor conditions of workers by either voluntary undertakings or legal compulsion. By privatizing the obligations, while at the same time maintaining state obligations, there is increased likelihood of enforcement and thereby some advancement of the workers' labor rights. This likelihood is enhanced when combined with local and international enforcement machinery to compel compliance and providing remedies for violations. Finally, domestic limitations may be overcome if there is further added an available and ready team of mobile global advocates. While the ultimate solution to raising labor standards is that each country has and enforces its own domestic labor laws, still more is needed, as was seen

in Bangladesh in the Rana Plaza disaster, where the country had ratified most of the core labor standards and labor laws existed. In the final analysis, it is submitted that an internationally enforced trade agreement with a meaningful social dimension provision on labor, including mandated CSRs and encouraged, if not mandated, utilization of IFAs, may provide the necessary extra-impetus to the beneficiaries of low labor standards – the domestic employers and the foreign MNC employers. For the good corporate citizens, those who not only say it, but just do it, these additional innovative self-help approaches are available, as is the ILO to assist. It would seem this area is not infused with lack of alternative solutions, but rather a lack of will by employers, states, and international negotiators.

Current negotiation of the TPP, the TTIP, the RCEP, and the coming FTAAP present an opportunity for a new beginning in the efforts to protect working people who provide the fuel for international trade. However, the current trajectory of the emerging FTAs discussed appears good for trade, but not for protection of labor rights; and, it looks like the coming scenario is the status quo, at best. Thus, new innovations are required, including consideration of the mandated marriage of public and private rights under FTAs, creating private rights, redressable, possibly with the assistance of mobile global lawyers. If not now, when? The means are available, with only the will in question.

Wrongs, Rights, and Remedies:
A Yankee Romp in Recent European Tort Law

Richard J. Peltz-Steele[*]

Abstract: *This article explores developments in European tort law reported by country at the 2015 European Tort Law Institute. Reported developments were selected for recurring themes and compared with analogous problems in U.S. tort law. Though by no means a statistical survey, the reports are indicative of contemporary issues of interest to informed European lawyers and educators. The recurring themes were (a) damages valuation and compensation for life and death; (b) multiple liabilities; (c) interplay of tort and insurance; (d) official liability and civil rights; and (e) consumer class actions. Analyzing these threads, the article concludes (1) that U.S. and European courts reason similarly on common problems in tort logistics, but differ in justification for employing equity and policy norms; (2) that U.S. and European courts similarly tend to defer to tort legislation, though differ in willingness to imbue statutory construction with normative discretion; and (3) that at least the sampled European courts exhibited a greater willingness than is common among U.S. courts to champion individual causes against the state. These comparisons afford an opportunity to study legal systems of variable geographic and cultural origin, and of common law and civil code tradition, as they wrestle with the simple yet intractable problem of how society should respond to civil wrongs.*

I. I. INTRODUCTION

Each spring, the European Tort Law Institute holds a conference in which representatives of European Union states are invited to present the most interesting developments in tort law from their respective jurisdictions in the preceding year.[1] Of course these selective reports are not necessarily representative of statistically significant trends in the law. Nevertheless, a survey of what informed European observers find compelling is useful for comparative studies. Problems in civil liability transcend borders and cultures. Lawyers and educators in tort law stand to gain

[*] Professor, University of Massachusetts Law School. I am indebted to Emma Wood, M.L.S., and Megan Beyer, J.D. anticipated 2016, for dedicated work in tracking down primary sources for this study. A research grant from UMass Law School also made this study possible. I am most grateful to the organizers of and delegates to the European Tort Law Institute, *infra* note 1, for a supremely educational program.

[1] European Centre of Tort and Insurance Law Institute for European Tort Law, 14th Annual Conference on European Tort Law, Vienna, Austria [hereinafter Institute], (Apr. 9-11, 2015).

http://dx.doi.org/10.18060/7909.0038

from even a selective examination of how people from different legal traditions respond to the common policy problems of our time.

Accordingly, part II of this article reiterates selected developments reported by delegates to the 2015 conference, delving into the primary sources to capture a snapshot of contemporary issues in European tort law,[2] and aligning those images alongside U.S. legal doctrine for comparison. The developments are selected and organized to identify recurring themes, namely: (a) damages valuation and compensation for life and death; (b) multiple liabilities; (c) the interplay of tort and insurance; (d) official liability and civil rights; and (e) consumer class actions.[3] This reiteration at best might inform the debate over comparable questions in U.S. tort law and at least might serve to educate students of U.S. law in comparative studies.

Accordingly, parts III and IV of this article modestly offer analysis and three conclusions. The article concludes first that when controversy centers on the mundane logistics of tort law, such as damages valuation and liability apportionment, there is great commonality between the United States and Europe in courts' reasoning on similar problems. However, European courts are far more likely than U.S. courts to state the explicit influence of human rights norms in construing civil codes, while U.S. courts rely more vaguely on the role of equity and public policy in shaping the common law. The article concludes second that when political policymaking comes into play, it manifests the respective policy priorities of U.S. and European legislators. Courts in both systems tend to respect the legislative prerogative, though U.S. courts are somewhat less inclined than European courts to let their own policy priorities supervene upon libertarian norms or

[2] This article is not a product of the Institute, *id.*, nor any of the delegates to the Institute. Rather, I have used my personal observation of the delegate reports as a springboard for my own inquiry. Any error here in reporting the law or facts of the European cases is mine alone.

[3] For readers interested in the original reports of the delegates or additional country reports not selected here for my thematic inquiry, the Institute, *id.*, annually publishes a *European Tort Law Yearbook*. *See* Institute for European Tort Law, European Tort Law Yearbook, http://www.ectil.org/etl/Publikationen/Yearbook-on-European-Tort-Law.aspx [http://perma.cc/JST4-VHKW] (last visited July 9, 2015).

democratic initiatives. The article concludes third that when public liability is at issue, the recent European decisions consistently exhibit willingness to embrace plaintiffs' causes as against the state. The European courts seem more disposed than the U.S. courts to realize judicial preeminence in the constitutional field, perhaps for reason of legal- and socio-historical differences.

For all the differences in legal traditions between the United States and Europe, between American federalism and EU hybrid federalism, and between common law and predominantly civil code systems, the universal problem of tort proves transcendent of legal jurisdictions and political borders. As articulated by Professor Marshall Shapo:

"A injures B and could have avoided it. What should society do about it?"[4]

II. REPORTED DEVELOPMENTS

A. LIFE, DEATH, AND DAMAGES

Money for physical injury, and even for loss of life, is a central feature of civil justice in modern society, superseding the historic *lex talionis*.[5] But affixing a number to physical loss is a dubious undertaking. And death cases especially lay bare the folly of trying to make a plaintiff whole,[6] especially when considering the range of answers on offer in worker compensation law, environmental law, and wrongful-death litigation.[7] Both the United States and Europe have favored corrective over retributive justice in tort, electing money to serve as proxy for loss. Yet after centuries of experience with this more civilized system, valuation remains a fog.

---

[4] MARSHALL S. SHAPO & RICHARD J. PELTZ, TORT AND INJURY LAW 3 (3d ed. 2006).

[5] *See*, Code of Hammurabi ¶ 196 (c.1850 B.C.) (Ancient Babylon). "*Lex talionis*" refers to the law of retaliation, also termed "eye for an eye." BLACK'S LAW DICTIONARY 1052 (Bryan A. Garner, ed., 10th ed. 2014). *Cf*., *e.g*., Leviticus 24:19-21.

[6] *See generally* Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1 (2005) (lamenting inevitable inadequacy of money obtained through litigation to compensate survivors for loss of loved ones, and proposing memorials and similarly more efficacious remedies alternatively).

[7] *See, e.g.*, SHAPO & PELTZ, *supra* note 4, at 407-08 (excerpting AM. BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY 5-164 to -175 (1984) (Marshall S. Shapo, reporter)).

Accordingly, valuation in cases of property damage, physical injury, death, and survival constituted a recurring theme in the European presentations. Valuation and the scope of consequential damages lay at the heart of the matter in reports from Estonia, Finland, Malta, and Slovakia. Related problems occurred in the reports from Belgium, Italy, and Portugal, which respectively implicated thorny policy problems in "wrongful life," the value of life per se, and parasitic damages in case of a loved one's extraordinary trauma.

1. ESTONIA AND THE CASE OF THE FISHY CAR

At issue in an Estonian case[8] was whether the plaintiff's property damage warranted a replacement car to go fishing.[9] The plaintiff lost the use of his high-end car (a BMW X5) after collision with a Tallinn tram that failed to give way to a traffic light.[10] The plaintiff's damages included a temporary replacement vehicle for daily use, but the defense balked at the steep price tag: €7100 for 5.5 months' rental.[11] The appellate court annulled the damages, opining that pecuniary damages should include only loss of "necessary or useful" activities, not pursuit of mere "hobbies," according to the statute.[12] On remand, plaintiff, who held qualifications and permits to fish,[13] was able to demonstrate that fishing was for him "economic or professional activities or work,"[14] so he recovered.[15]

[8] Riigikohus [Supreme Court] Civ. Chamber Oct. 27, 2014, No. 3-2-1-90-14 (Meier v. Tallinn Urb. Transp. Co.) (Estonia), http://www.nc.ee/?id=11&tekst=RK/3-2-1-90-14 [http://perma.cc/39SS-VJA9] (translated to English by Google Translate).
[9] Irene Kull, Institute, *supra* note 1, Apr. 10, 2015 (Estonia).
[10] *Meier*, No. 3-2-1-90-14, ¶¶ 1-2.
[11] *Id.* ¶ 3.
[12] *Id* ¶ 14 (construing Law of Obligations Act § 132(4) (Estonia), *available at* https://www.riigiteataja.ee/en/eli/516092014001/consolide) (in original, "vajalik või kasulik" and "harrastustega").
[13] *Id.*
[14] *Id.* (in original, "tema majandus- või kutsetegevuseks").
[15] Kull, Institute, *supra* note 1.

Tort law in the United States usually affords a plaintiff recovery for loss of use of a vehicle damaged or destroyed in an accident. The pleasure or commercial purpose of the vehicle may vary the basis for calculating the loss. Lost use of commercial property might be valued in terms of a rental replacement, or if replacement is impossible, of lost profits for want of the vehicle.[16] Recovery for lost use without demonstrated commercial purpose usually,[17] though not universally,[18] also is allowed, whether as rental replacement or general damages.[19] The Estonian court, construing the civil code, was more restrictive in its approach to consequential damages, requiring the plaintiff to show some degree of necessity for rental replacement. But the distinction between commercial and personal use is common to Estonia and the United States, if dispositive in the former and only to suggest the basis of valuation in the latter.

2. FINLAND AND THE CASE OF THE MISSING EDUCATION

At issue in a Finnish case[20] was the quantum of damages for a student whose studies were delayed by injury.[21] Faced with a physical confrontation, the student had been compelled to jump from a window, fracturing his spine and leg.[22] With resulting chronic back pain, the plaintiff discontinued his studies for an academic year and was unable to work for almost two years.[23] The lower courts had disagreed about the calculation of lost earnings under the tort liability statute,

---

[16] 22 AM. JUR. 2d *Damages* § 309 (WestlawNext database updated May 2015).
[17] *E.g.*, Parilli v. Brooklyn City R.R., 236 A.D. 577, 578, 260 N.Y.S. 60, 62 (App. Div. 1932) ("loss of use of a pleasure car").
[18] *E.g.*, Hardy v. National Mut. Casualty Co., 9 So. 2d 346, 349 (La. Ct. App. 2d Cir. 1942) (disallowing loss-of-use damages for want of evidence).
[19] *E.g.*, Lonnecker v. Van Patten, 179 N.W. 432, 433 (Iowa 1920) ("reasonable value of the use of said car during the time it was reasonably necessary to make the repairs on the same"); *see also* Pittari v. Madison Ave. Coach Co., 188 Misc. 614, 616, 68 N.Y.S.2d 741, 742-43 (City Ct. 1947) (allowing recovery predicated on rental replacement even though plaintiff did not hire replacement).
[20] Korkein Oikeus [Supreme Court] Dec. 19, 2014, No. KKO:2014:97 (Fin.), http://www.finlex.fi/fi/oikeus/kko/kko/2014/20140097 [http://perma.cc/8NP2-K5ZY] (translated to English by Google Translate).
[21] Päivi Korpisaari, Institute, *supra* note 1, Apr. 10, 2015 (Finland).
[22] No. KKO:2014:97 (background).
[23] *Id.* (background).

specifically whether compensation should derive from plaintiff's loss of productive time in a future profession, even though he had not yet graduated university at the time of the accident.[24] The trial court awarded heavier compensation, €42,543 for lost professional opportunity (less €7296 paid from social insurance), but the intermediate appellate court reduced the award to €12,743.[25] Restoring the larger award, the Supreme Court concluded that lost earnings should derive from "delay in access to the profession," because expected earnings over a career are diminished.[26] The award is subject, however, to the usual principles that plaintiff must prove causation and must mitigate loss.[27]

Cases involving the permanent disability or death of a child in the United States raise difficult valuation problems because of the need to speculate about numbers such as hypothetical lifetime earnings. Nevertheless, such valuations are done, and in a less speculative vein, a college student whose graduation is delayed by injury may claim lost earnings for the period of delayed entry into the workforce.[28] Of course, the damages must be proved to the usual standard of reasonable certainty, and plaintiffs are not always able to do so.[29] The U.S. and Finnish approaches accord on this point.

---

[24] *Id.* at 3.
[25] *Id.* (background).
[26] *Id.* at 8-9, 11, 21 (construing Damages Act § 2a (Fin.)).
[27] *Id.* at 14, 19.
[28] Martino v. Sunrall, 619 So. 2d 87, 90 (La. Ct. App.), *writ denied sub nom.* Martino v. Sumrall, 621 So. 2d 821 (La. 1993).
[29] Branan v. Allstate Ins. Co., 761 So. 2d 612, 614, 616 (La. Ct. App. 5 Cir. 2000) (doubting that plaintiff, who took 15 years to earn undergraduate degree with "'poor'" academic record, would have attained master's degree as he alleged).

3. MALTA AND THE CASE OF THE DISFIGURED HOMEMAKER

A Maltese case[30] tackled the socially fraught problem of quantifying compensation for the pecuniary and psychological losses of a plaintiff-homemaker injured by a cosmetic medical procedure.[31] The plaintiff sought pulsed dye laser treatment for vascular lesions on her face.[32] The doctor being away from the office, the treatment was administered by a negligent technician, who set the laser to too strong a power.[33] Plaintiff suffered burns and disfigurement, "multiple flat perfectly round white areas (each 7 millimeters in diameter) distributed across both cheeks and the bridge of the nose," made more apparent by contrast with the already existing red blood vessels.[34] An expert quantified the disfigurement at "3% permanent disability."[35] At issue was the quantum of damages; the plaintiff complained of psychological suffering that far outstripped the pecuniary cost of remedial cosmetics. The lower court had pointed to human rights norms in the Maltese Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union to ground a €5000 award for injury to "psycho-physical integrity of the person."[36]

The appellate court disagreed on the rationale, finding no application for EU human rights norms in a domestic civil dispute.[37] Nevertheless, the court upheld the damages award of €5000 under the Maltese Civil Code as a form of "loss of future earnings."[38] The court quoted 1997

[30] Qorti tal-Appell [Court of Appeal] June 27, 2014, Civ. App. No. 2429/1998/1 (Malta) (Cordina *né* Bussutil v. Muscat), http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all [http://perma.cc/VY9Q-DLVD] (registration no. 2429/1998/1) (translated to English by Google Translate).
[31] Giannino Caruana Demajo, Institute, *supra* note 1, Apr. 10, 2015 (Malta).
[32] Civ. App. No. 2429/1998/1 (background).
[33] *Id.* (background and quoting lower court decision ¶¶ 18, 40).
[34] *Id.* (quoting lower court decision ¶¶ 13, 16, 51).
[35] *Id.* (quoting lower court decision ¶ 14 (quoting expert testimony)).
[36] *Id.* (quoting lower court decision ¶ 60) (in original, "[l]-integrità psiko-fiżika tal-persuna").
[37] *Civ. App. No. 2429/1998/1* (court opinion).
[38] *Id.* (court opinion) (construing Civ. Code art. 1045(1) (Malta)) (in original, "ghal telf ta' qliegh futur").

precedent (with gendered terms): "'Housework has economic value, and the contribution that the lady of the house gives to the domestic economy should not be considered to be less than the man's.'"[39] The court calculated that the national minimum wage, an annual €10,500, multiplied by 3% permanent disability, and multiplied by 16 years' remaining work-life for the 48-year-old plaintiff, resulted in an award conveniently approximate to €5000.[40] The Maltese delegate characterized the case as "a missed opportunity" to recognize non-pecuniary damages in civil liability.[41]

The default rule of U.S. tort law being to value a person in terms of his or her economic productivity, U.S. courts too have struggled to value homemaking fairly (at least since modern recognition of gender equality). Typically homemaking is subject to valuation by the jury, and the question may occasion expert testimony.[42] In this sense, the effort at valuation is common to Malta and the United States. The U.S. finder of fact, taking a replacement-cost approach, is likely to arrive at a number consistent with low-wage labor. (That that number hardly reflects the opportunity cost of a spouse's career works an injustice, but an injustice common to both systems.)[43] U.S. case law reflects an additional process, as a jury award for homemaking services may be analyzed for adequacy or excess.[44] The United States diverges from Malta, however, in

[39] *Id.* (court opinion) (quoting Malta Civ. Ct. 1st Hall Feb. 21, 1997 (Grech v. Briffa)) (in original, "xoghol tad-dar ghandu valur ekonomiku, u l-kontribut li taghti l-mara taddar lill-ekonomija domestika ma ghandux jitqies li huwa anqas minn tar-ragel").
[40] *Id.* (court opinion).
[41] Caruana Demajo, Institute, *supra* note 1.
[42] 22A AM. JUR. 2D *Death* § 344 (WestlawNext database updated May 2015).
[43] Frances Jean Pottick, *Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?*, 50 U. COLO. L. REV. 59, 59-61 (1978) (concluding that in light of increasing number of women forced to choose between career and full-time homemaking, opportunity-cost approach more fairly assesses value of services than market-based replacement-cost approach).
[44] *See generally* 47 A.L.R.4TH 100 (originally published 1986) (cataloging awards in homemaker-death cases as excessive or not, and adequate or not, classified according to family circumstances of homemaker).

that there is no U.S. constitutional norm of personal integrity that underpins personal-injury compensation.

4. SLOVAKIA AND THE CASE OF THE SPOILED SOCIAL LIVES

The Slovak Supreme Court[45] held that both a plaintiff injured in a serious car accident and her spouse were entitled at least to lay claims for non-pecuniary damages for impairment of their social lives and for interference with their private lives regardless of the injured plaintiff's pain.[46] The Slovak civil code governing personal injury plainly allowed the injured plaintiff to lay claims for both pain and social impairment.[47] Social losses account for "restriction on the full participation of the victim in personal and family, social, political, cultural and sporting life," as well as "direct compromise [to] the performance or choice of profession, choice of future life partner, [or] possibility of further self-education."[48] The injured plaintiff and her husband also could lay claims under the law of privacy, namely the civil code provision that "confers on every individual [the] right to privacy, particularly life and health, civil honor and human dignity."[49]

However, plaintiff's husband might not have alleged facts sufficient to support his claim. The intermediate appellate court had aptly explained that,

> the right to appropriate financial compensation is reserved for those cases where the intensity of interference in private and family life of the person concerned is substantial and irreparable, for example, in the event of the death of a loved one, a

[45] Najvyšší Súd [Supreme Court] May 28, 2014, No. 7 Cdo 65/2013 (Slovk.), http://www.supcourt.gov.sk/data/att/38289_subor.pdf [http://perma.cc/Z3ZD-8VLU] (translated to English by Google Translate) (construing Civ. Code §§ 11-13 (Slovk.)).
[46] Anton Dulak, Institute, *supra* note 1, Apr. 10, 2015 (Slovakia).
[47] No. 7 Cdo 65/2013 (construing Civ. Code § 444 (Slovk.)).
[48] *Id.* (in original, "Pod sťažením spoločenského uplatnenia treba rozumieť jednak vylúčenie či obmedzenie účasti poškodeného na plnom osobnom a rodinnom, spoločenskom, politickom, kultúrnom a športovom živote, jednak sťaženie či dokonca priamo znemožnenie výkonu či voľby povolania, voľbu budúceho životného partnera, resp. možnosti ďalšieho sebavzdelávania.").
[49] *Id.* (construing Civ. Code § 11 (Slovk.)) (in original, "Občiansky zákonník v ustanovení § 11 priznáva kaţdej fyzickej osobe právo na ochranu osobnosti, najmä ţivota a zdravia, občianskej cti a ľudskej dôstojnosti, ako aj súkromia, svojho mena a prejavov osobnej povahy.").

> serious or persistent disruption of family ties, or, in the case of serious consequences for life.[50]

The plaintiff's husband seemed to have endured only "transient impact"[51] during his wife's recovery, a leisure-opportunity cost comfortably within the non-compensable "scope of mutual rights and obligations inherent in wedlock."[52]

Some U.S. courts balk at distinguishing loss-of-enjoyment-of-life damages from pain and suffering for fear of permitting double recovery.[53] However, many U.S. courts have permitted recovery for lost social opportunity as a form of hedonic damages in tort.[54] Notwithstanding some courts' hypersensitivity to the evil of double recovery, the Slovak and U.S. approaches accord in recognizing social impairments as consequential damages. The Slovak insistence on a degree of severity moreover accords with the U.S. aversion to compensation for purely emotional suffering without a clear evidentiary basis. However, the countries diverge, in that, again, there is no civil right of privacy or personal integrity to ground recovery in common law tort.

5. BELGIUM AND THE CASE OF THE LATE PRENATAL DIAGNOSIS

The Belgian Court of Cassation[55] found itself presented with the very thorny question of whether to compensate a plaintiff for so-called "wrongful birth," or "wrongful life."[56] A gynecologist failed to inform plaintiff-parents of a positive prenatal test at 16 weeks, indicating

---

[50] *Id.* (in original, "právo na primerané finančné zadosťučinenie je vyhradené pre tie prípady, keď intenzita zásahu do súkromného a rodinného života dotknutej osoby je značná a nenapraviteľná, napr. v prípade smrti blízkej osoby, vážneho alebo pretrvávajúceho narušenia rodinných väzieb, alebo v prípade vážnych doživotných následkov").

[51] *Id.* (in original, "prechodnému vplyvu").

[52] No. 7 Cdo 65/2013 (in original, "z rozsahu vzájomných práv a povinností, ktoré sú vlastné manželskému zväzku").

[53] *See e.g., Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, (Cal. Ct. App.1998) (ruling distinct jury instructions as prejudicial for fear of double recovery).

[54] *See e.g., Cormier v. Republic Ins. Co.*, 118 So. 3d 16, 20 (La. Ct. App. 2012) (recognizing impact of hearing impairment on social life).

[55] Hof van Cassatie [Court of Cassation] Nov. 14, 2014, No. C.13.0441.N (B.D. v. W.C.) (Belg.), http://justice.belgium.be/fr/binaries/C_13_0441_N_tcm421-259179.pdf [http://perma.cc/2BQT-A4LQ] (translated to English by Google Translate).

[56] Isabelle C. Durant, Institute, *supra* note 1, Apr. 10, 2015 (Belgium).

spina bifida.[57] The child was subsequently born with severe physical limitations, including limited mobility, a brain abscess, and mental disability.[58] The parents, who were informed of the danger later, at 33 weeks, claimed a missed opportunity to terminate the pregnancy, and the lower courts discounted that claim to an 80% probability of termination.[59] Referencing a child's right to life as articulated in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the European Convention for Protection of Human Rights and Fundamental Freedoms, the court concluded that the civil code could not be read to authorize an award based on a probability of abortion.[60] The Court of Cassation authorized damages insofar as injury to the child resulted from medical negligence in failure to timely diagnose the child's condition.[61] But the court rejected damages insofar as they were based on "a comparison [of the child's existing life] . . . with a state of non-existence."[62]

Regarding damages as impossibly speculative, and asserting a host of public policy reasons, the vast majority of U.S. jurisdictions reject causes of action for "wrongful birth" or "wrongful death."[63] Judges of all political persuasions are loath to characterize a child's life as a form of "damage" in tort. Indeed, regardless of political and moral stances on abortion, courts are reluctant to encourage the inference of the successful tort action that abortion necessarily would have been the preferable, "reasonable" alternative to the extant child.[64] In this sense, the Belgian and the U.S. approaches accord. They also suffer from the same potential shortcoming, which is

[57] No. C.13.0441.N (quoting intermediate appellate court opinion ¶ 1.2).
[58] *Id.* (quoting intermediate appellate court opinion ¶ 1.6).
[59] *Id.* (quoting intermediate appellate court opinion ¶ 1.3.2).
[60] *Id.*
[61] *Id.* (judgment ¶ 7) (construing Civ. Code arts. 1382-1383 (Belg.)).
[62] No. C.13.0441.N (judgment ¶ 8) (in original, "een vergelijking moet worden gemaakt met een toestand van nietbestaan").
[63] Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 160-62 (2005) (citing California, New Jersey, and Washington as exceptional).
[64] Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 328-329 (2003).

that a medical malpractice recovery that does not assume abortion in the hypothetical alternative, is highly unlikely to account for the lifelong costs—pecuniary and non-pecuniary—that a plaintiff family will have to bear (though European social welfare is likely to help out more than the U.S. safety net).[65] In this sense, both systems shortchange plaintiffs by confining the analysis to medical malpractice.

6. ITALY AND THE CASE OF THE LOST LIFE

The Italian courts[66] confronted a claim for life-per-se damages in a tragic case arising from a fatal car accident.[67] In that case, Giuliana Panzavolta died three hours after she suffered injuries in a car accident.[68] The plaintiffs, family of Panzavolta and her husband, Marcello Sopranos, alleged that as a result of Panzavolta's death, Sopranos suffered from depression and committed suicide two years later.[69] In Italy, heirs are entitled at law to recover for "moral suffering" that occurs between a loved one's injury and death while the person "remained lucid and conscious" for "an appreciable time."[70] However, since 2008 the courts have construed the civil code to allow no recovery for non-pecuniary "biological damages." Rather, counts allow recovery only for pecuniary loss, in cases of immediate or nearly immediate death.[71] The lower courts both compensated the plaintiffs with bereavement damages ("iure proprio") for death, as well as pain-and-suffering and physical-injury damages (the latter, "danno biologico") for Sopranos's death.[72]

---

[65] *Id.* at 352-366.
[66] Corte di Cassazione [Court of Cassation] Mar. 4, 2014, No. 5056 (Massaro v. d'Urso) (It.), http://www.foroitaliano.it/cass-ord-4-marzo-2014-n-5056-e-sent-23-gennaio-2014-n-1361-i-719-natura-del-danno-non-patrimoniale-e-danno-tanatologico/ [http://perma.cc/KJK7-ZR84] (translated to English by Google Translate).
[67] Elena Bargelli, Institute, *supra* note 1, Apr. 10, 2015 (Italy).
[68] No. 5056 (part II).
[69] *Id.* (part II).
[70] *Id.* ¶ 4 (in original, "sofferenza morale" and "sia rimasta lucida e cosciente"), ¶ 5 (in original, "un tempo apprezzabile").
[71] *Id.* ¶ 5 (in original, "danno biologico").
[72] Bargelli, Institute, *supra* note 1.

But the courts denied recovery for Panzavolta's pain and suffering, as well as biological damage in loss of life.[73]

On appeal, the Italian Court of Cassation found that precedent supported moral damages upon mere hours of pain and suffering, which illustrated that the lower courts erred.[74] More importantly, though, the court reversed direction on "thanatological damages" ("danno tanatologico"), or damages for loss of life per se.[75] The court found "incongruity" in the rejection of loss-of-life damages, considering the primacy of the right to life itself over the distinguishable right to health.[76] It should not be, the court reasoned, "'economically more "convenient" to kill than to hurt.'"[77] Moreover, loss-of-life damages serve to signal to society the wrongness of killing and accordingly serve the deterrence function of the tort system.

Of interest to the American reader, the Italian court quoted with approval a 1987 federal case from Illinois, in which U.S. District Judge Leighton approved the use of expert testimony to establish for a jury "the hedonic value of the life . . . taken."[78] The Italian court quoted economist Stanley Smith's definition for the jury of "hedonic," which "refers to the larger value of life, the life at the pleasure of society, if you will, the life—the value including economic, including moral, including philosophical, including all the value with which you might hold life."[79] Thus, loss of life is now compensable in Italy regardless of a victim's knowledge of impending death, regardless

---

[73] *Id.*
[74] No. 5056.
[75] *Id.*
[76] *Id.* (in original, "incongruenze").
[77] *Id.* (quoting earlier case law) (in original, "'economicamente più "conveniente" uccidere che ferire'").
[78] *Sherrod v. Berry*, 629 F. Supp. 159, 160 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). Painfully apropos of current events in 2015, Sherrod was a civil rights case arising from the police shooting of an innocent, 19-year-old African-American man in Joliet, Illinois, in 1979. *Id.* at 160-62.
[79] *Id.* at 163, *quoted in* No. 5056 (in original, "e il 'danno edonistico' (figura quest'ultima di diritto americano, concernente il 'più ampio valore della vita,' comprendente 'il profilo economico, quello morale, quello fisiologico; insomma (a) tutto il valore che si può attribuire alla vita' . . .)").

of the intensity of suffering, and regardless of whether an "appreciable time" elapsed between injury and death.[80] Furthermore, the recovery is inheritable.[81] However, these questions are now on further appeal.[82]

Reliance on the federal decision from Illinois was ironic, because U.S. courts generally reject damages for life per se in case of instant death, absent conscious pain and suffering, or at least knowledge of impending death.[83] The lower courts' handling of the Panzavolta-Sopranos claims accords with the vast-majority approach in the United States. Additionally, U.S. courts are unlikely to follow the lead of the court of cassation. Indeed, the U.S. hypersensitivity to double recovery would find distasteful a seemingly standardless inquiry into the value of life per se when it is allowed to persist alongside other death damages, such as suffering before death and familial loss of consortium. Furthermore, most states already define consortium to exclude bereavement.[84] Therefore, if the Italian court's new direction stands, it will mark a point of divergence from both U.S. and Italian precedent.

---

[80] No. 5056.
[81] *Id.*
[82] Bargelli, Institute, *supra* note 1; *see also* Paolo Russo, *Il Danno non Patrimoniale da Perdita del Congiunto Spetta Anche ai Fidanzati*, QUOTIDIANO GIURIDICO, Apr. 30, 2015, http://www.quotidianogiuridico.it/Civile/il_danno_non_patrimoniale_da_perdita_del_congiunto_spetta_anche_ai_fidanzati_id1168531_art.aspx [http://perma.cc/DD9Z-GC7A] (confirming ongoing pendency of appeal); *Rivoluzionaria Pronuncia della Corte di Cassazione sul Danno da Morte Immediata (cd Danno Tanatologico)*, STUDIO LEGALE LDS, Feb. 17, 2015, http://www.studiolegalelds.it/rivoluzionaria-pronuncia-della-corte-di-cassazione-sul-danno-da-morte-immediata-c-d-danno-tanatologico/ [http://perma.cc/B246-7LCL] (reporting case and appeal).
[83] 1 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 3:58 (3d ed. 2015).
[84] *E.g.*, 1 MARC G. PERLIN & DAVALENE COOPER, MASSACHUSETTS PROOF OF CASES CIVIL § 33:71 (2014) (citing Mass. Gen. L. ch. 229, § 2).

7. PORTUGAL AND THE CASE OF THE SUFFERING SPOUSE

Further testing this line between death and near-fatal injury, a Portuguese case[85] contemplated parasitic spousal recovery in case of a victim's traumatic injury and permanent disability.[86] In this case, a garbage collector struck by a vehicle suffered horrifically. His injuries including brain trauma, blunt chest trauma, leg amputation, and renal failure, all amounting to more than 10 months' hospitalization and 80% permanent disability, as well as consequent post-traumatic stress and depression.[87] He will forever need personal assistance to bathe, dress, and travel from his home.[88] At issue was the parasitic recovery of his wife, anguished by her husband's suffering and change in character, deprived of consortium, and burdened with his care.[89] Had the man been killed, the law would have provided bereavement recovery for the surviving spouse. But the Code does not authorize recovery for a spouse's suffering when the victim survives.[90] That approach was an intentional election by legislators when the civil code entered force in 1967.[91]

At the same time, the civil code empowers the appellate courts to harmonize the law.[92] The court examined various European authorities, including European Law Principles of Civil Responsibility, which recognize, "'[i]n cases of death or very serious injury,'" the possibility of "'compensation for non-material damage to persons who have a close relationship with the injured

[85] Supremo Tribunal de Justiça [Supreme Court of Justice] Jan. 16, 2014, No. 6430/07.0TBBRG.S1 (Port.), http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/7bc174e495442fb180257cd8005c93a9?OpenDocument [http://perma.cc/5FU3-ZP3Z] (translated to English by Google Translate).
[86] André Pereira, Institute, *supra* note 1, Apr. 10, 2015 (Portugal).
[87] No. 6430/07.0TBBRG.S1, ¶ III-VI.
[88] *Id*.at 31.
[89] *Id*. at 8.
[90] *See id.* ¶¶ 12-14.
[91] Pereira, Institute, *supra* note 1.
[92] *Id.*

party.'"[93] The court furthermore observed that approach in the laws of Spain, Italy, and Germany.[94] Accordingly, the court confessed its intent to diverge from strict construction of the Portuguese code: "One can even say that the idea of evolution in time is particularly dear to all authors who have addressed the interpretation of the laws."[95] Re-construing the civil code, the court authorized recovery for "personal injuries, particularly severe, suffered by the spouse of [a] surviving victim, hit in a particularly hard way," and affirmed a €15,000 award to the plaintiff spouse.[96] The Portuguese delegate moreover read the decision as not necessarily limited to spousal recovery.[97] He characterized the change as "a turning point in Portuguese tort law" and a move in the direction of European norms.[98]

A victim's spouse in the United States is entitled to loss-of-consortium damages, usually compensating pecuniary and non-pecuniary losses for the services of the injured spouse.[99] Again however, courts jealously guard the line against a spouse's recovery for grief and emotional suffering, fearing that such recovery would unduly double that of the injured party's award for pain and suffering.[100] At first blush, then, the U.S. rule for a spouse's parasitic recovery is consistent, if unfortunate; whether the victim dies or survives, the spouse is not compensated for suffering.[101] But closer scrutiny reveals some inconsistency. Some states—Florida, Louisiana,

---

[93] No. 6430/07.0TBBRG.S1, ¶ 19 (in original, "'Nos casos de morte e de lesão corporal muito grave, pode igualmente ser atribuída uma compensação pelo dano não patrimonial às pessoas que tenham uma relação de grande proximidade com o lesado.'") (quoting European Law Principles of Civil Responsibility art. 10:301).
[94] *Id.* ¶ 20.
[95] *Id.* ¶ 23 (in original, "Pode-se mesmo dizer que a ideia de evolução no tempo é particularmente querida a todos os Autores que se debruçam sobre a interpretação das leis.").
[96] *Id.* ¶ 28 (construing Civ. Code art. 483, § 1, & art. 496, § 1 (Port.)) (in original, "os danos não patrimoniais, particularmente graves, sofridos por cônjuge de vítima sobrevivente, atingida de modo particularmente grave").
[97] Pereira, Institute, *supra* note 1.
[98] *Id.*
[99] 1 JACOB A. STEIN, STEIN on Personal Injury Damages § 3:58 (3d ed. 2015).
[100] *E.g.*, Bailey v. Wilson408, 111 S.E.2d 106, 109 (Ga. Ct. App. 1959).
[101] *E.g.*, 1 MASSACHUSETTS PROOF OF CASES CIVIL § 33:71 (WestlawNext database updated Dec. 2014) (citing Mass. Gen. L. ch. 229, § 2)). *See generally* M.C. Dransfield, *"Sentimental" Losses, Including Mental Anguish, Loss*

South Carolina, Virginia, and West Virginia—do allow recovery for bereavement in death actions.[102] And a small number of state death cases, if dated, have found their way to recovery for a decedent-spouse's "attention" and "care," regarding that loss as pecuniary and somehow distinguishable from the disallowed recovery for "the suffering which the one who is left endures."[103] The significant number of situations in which death cases stretch the notion of pecuniary recovery to consider emotional factors raises the specter of inconsistency that came into being in the Portuguese case of severe injury.[104] At least in states in which statutory wrongful death is more generous than common law personal injury, courts might be inclined to evolve the common law. The U.S. common law provides flexibility comparable to the harmonization norm of the Portuguese civil code.

B. MULTIPLE LIABILITIES

American states in the latter 20th century moved away from historic absolutes such as contributory negligence doctrine and plaintiff's choice in joint-and-several recovery. Doctrines of comparative fault, contribution, and sometimes even several-only recovery raise myriad challenges in contemporary multiple-liability scenarios, especially when common law rules such as active-passive indemnity persist alongside reforms. Common law evolutions and statutory revisions both generate ample questions for judicial interpretation, so the difference between precedent and code matters little in application. Such problems of interpretation in multiple

---

of Society, and Loss of Marital, Filial, or Parental Care and Guidance, as Elements of Damages in Action for Wrongful Death,74 A.L.R. 11, § V(a) (originally published 1931) (summarizing cases).

[102] M.C. Dransfield, *"Sentimental" Losses, Including Mental Anguish, Loss of Society, and Loss of Marital, Filial, or Parental Care and Guidance, as Elements of Damages in Action for Wrongful Death*,74 A.L.R. 11, § IV(a) (originally published 1931) (Florida only in action by parents for death of child).

[103] Kountz v. Toledo, St. L. & W.R. Co., 189 F. 494, 495 (Ohio C.C. 1908).

[104] *Cf.* Scott Korzenowski, *Valuable in Life, Valuable in Death, Why Not Valuable When Severely Injured? The Need to Recognize A Parent's Loss of A Child's Consortium in Minnesota*, 80 MINN. L. REV. 677, 684-89 (1996) (reporting, as exceptional, court awards for parent's loss of consortium upon minor child's severe disability, apparently predicated on injury to emotional edification of parent-child relationship).

liabilities were implicated in the presentations of delegates from Germany, Greece, Ireland, Norway, and Slovenia.

1. GERMANY AND THE CASE OF THE UNUSED HELMET

The line between corrective and distributive justice was sharply implicated in a German case[105] concerning contributory negligence in helmet non-use by a bicyclist.[106] A bicyclist not wearing a helmet suffered traumatic brain injury after running into defendant's opened car door.[107] The intermediate appellate court charged the bicyclist with 20% fault for not having worn a helmet,[108] and the Federal Court of Justice recognized the "predominant view of the literature" that helmets mitigate head injury in bicycle collisions.[109] However, the court observed that German helmet use is low, quoting 11% from a 2011 study,[110] and that the federal legislature opted to encourage voluntary helmet use rather than to compel it.[111] Under those circumstances, the court declined to charge the bicyclist with fault,[112] lest the judiciary usurp the legislative prerogative.[113]

The "helmet defense" has come up more often in the United States in motorcycle accident cases. U.S. courts have divided over whether failure to wear a helmet can signify plaintiff's contributory fault when the legislature had not required helmets. The Wisconsin Court of Appeals, for example, held that the plaintiff's negligence for failing to wear a helmet was a question of fact

---

[105] Bundesgerichtshof [BGH] [Federal Court of Justice] June 17, 2014, No. VI ZR 281/13 [Ger.], https://dejure.org/dienste/internet2?juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=68287&pos=0&anz=1 [http://perma.cc/X374-B5RK] (translated to English by Google Translate).
[106] Jörg Fedtke, Institute, *supra* note 1, Apr. 10, 2015 (Germany).
[107] No. VI ZR 281/13, ¶ 1 (Ger.).
[108] *Id.* ¶ 3.
[109] *Id.* ¶ 15 (in original, "überwiegenden Auffassung der Literatur").
[110] *Id.* ¶ 13.
[111] *Id.* ¶ 14.
[112] *Id.* ¶ 15.
[113] Fedtke, Institute, *supra* note 1.

properly submitted to the jury regardless of any statutory mandate or lack thereof.[114] Plaintiff's failure to wear a helmet passed the evidentiary more-probative-than-prejudicial test, and the jury apportioned 10% fault to plaintiff.[115] But the court remanded, opining that expert testimony was required for the jury to analyze the fault question.[116] In contrast, the Supreme Court of Colorado held plaintiff's failure to wear a helmet inadmissible when the legislature had expressly repealed the state's helmet requirement seven years earlier.[117] The court analogized to the same result upon a plaintiff's failure to wear a seatbelt.[118] However, rather than pointing to the policymaking role of the legislature, the court proffered its own reasons for inadmissibility, including that the helmet question would precipitate an inefficient battle of experts, and a damages reduction would work an unmerited windfall for the plaintiff.[119]

In the fewer bicycle cases, plaintiff's failure to wear a helmet is often admitted only in mitigation of damages, even though the helmet decision is made prior to the accident.[120] The mitigation approach—which is modestly anomalous because the plaintiff's helmet decision precedes the accident—might be an artifact of the pre-comparative fault era. A federal court analyzing New Jersey law decided that the failure of the legislature to require helmets for bicyclists over age 14 did not preclude the defense in case of the death of an adult plaintiff.[121] The court considered state policy promoting voluntary helmet use and the state courts' approval of the

---

[114] Oldakowski v. Heyen,428 N.W.2d 644,(Wis. Ct. App. 1988) (unpublished); *see also* Halvorson v. Voeller, 336 N.W.2d 118, 122 (N.D. 1983) ("Simply because our Legislature has chosen to not make it a traffic violation for a person 18 or over to operate or ride upon a motorcycle without wearing a helmet does not mean it intended that in the exercise of ordinary care a motorcyclist never may be expected to wear a helmet to avoid or mitigate injuries he may sustain in an accident.").
[115] *Oldakowski*,428 N.W.2d at 2.
[116] *Id.* at 3.
[117] Dare v. Sobule, 674 P.2d 960, 962-63 (Colo. 1984).
[118] *Id.* at 962-63 (citing Fischer v. Moore,517 P.2d 458 (Colo. 1973)).
[119] *Id.* at 963.
[120] 11 AM. JUR. PROOF OF FACTS 3D 503, §19 (1991).
[121] Nunez v. Schneider Nat'l Carriers, 217 F. Supp. 2d 562, 569 (D.N.J. 2002).

seatbelt defense to allow the helmet defense to raise a question of fact in comparative fault for the jury.[122] However, the court reported that the majority of courts across the country regard failure to wear a helmet as inadmissible "for assorted reasons,"[123] and that approach in outcome, if not in rationale, accords with the German decision.

2. GREECE AND THE CASE OF THE TWISTED KNEE

In a Greek case,[124] the plaintiff asserted the vicarious liability of a hospital for the medical malpractice of non-employee doctors.[125] In January 2007, the plaintiff was injured in a motorcycle accident that was the fault of an unknown other driver.[126] The plaintiff was evacuated to the co-defendant hospital and treated for a twisted and abraded knee.[127] In April, still in extreme pain after having returned to work, the claimant returned to the hospital and was diagnosed by a co-defendant surgeon-orthopedist with a patellar fracture.[128] Then in May, with the plaintiff experiencing chest pain, doctors at a different hospital determined that late diagnosis and inadequate preventive treatment of the fracture had resulted in a life-threatening blood clot (deep vein thrombosis) that had migrated to plaintiff's lungs (pulmonary embolism).[129] The doctors of the first hospital were culpable;[130] the salient point for the delegate from Greece was the vicarious liability of the hospital.[131]

---

[122] *Id.* at 565, 569.
[123] *Id.* at 567.
[124] Polymeles Protodikio Athinon [Pol. Pr.] [Athens Multi-Member Court of First Instance], 260/2014523 (Greece) (translated to English by Google Translate). I am grateful to Professor Eugenia Dacoronia for sharing with me a copy of this decision, which I have on file.
[125] Eugenia G. Dacoronia, Institute, *supra* note 1.
[126] No. 260/2014, at 526, 540.
[127] *Id.*
[128] *Id.* at 526, 540.
[129] *Id.* at 526, 535, 541-43.
[130] *Id.* at 530, 541-43, 551-52. The case was further complicated by claims and counterclaims, not material here, concerning contributory negligence, data protection law, and legal ethics. *See id.* at 543-48.
[131] Dacoronia, Institute, *supra* note 1.

The Athens court held the hospital liable for the malpractice despite the lack of employment relationship with the doctors.[132] The court found employment-like supervision in the hospital's provision of infrastructure, such as facilities, equipment, and drugs, the latter including the painkillers the plaintiff was prescribed and the anticoagulants he should have been prescribed but was not.[133] Moreover, the court reasoned, the hospital derives profits from medical services, which are provided by doctors operating under common professional standards.[134]And the hospital as a business benefits from the availability of doctors with a range of medical specializations, including orthopedics, in one place.[135]

Typically a hospital in the United States will not be vicariously liable for the medical malpractice of a non-employee professional, because vicarious liability usually arises from agency.[136]A plaintiff in pursuit of the hospital therefore must fashion a theory of direct negligence in the hospital's administrative role, or through the hospital's supervision or retention of service providers. Nevertheless, some U.S. cases have allowed liability for the conduct of a non-employee doctor when the hospital evinced "ostensible agency," "creat[ing] or sustain[ing] the appearance" of an employment relationship.[137] The Arizona Court of Appeals has developed a series of factors to test ostensible agency between a hospital and non-employee doctor:[138] whether the patient was allowed to choose the doctor(s) that treated her; whether the hospital supplied equipment and staff to the doctor; whether there was a contract between the hospital and the doctor; whether the doctor

[132] No. 260/2014, at 550; Dacoronia, Institute, *supra* note 1.
[133] No. 260/2014, at 550-51.
[134] No. 260/2014 at 550.
[135] *Id.*; Dacoronia, Institute, *supra* note 1.
[136] DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 316 (2d ed.), WestlawNext (database updated June 2016).
[137] *Id.*
[138] Barrett v. Samaritan Health Servs., Inc., 153 Ariz. 138, 146, 735 P.2d 460, 468 (Ct. App. 1987) (citing Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 500 P.2d 1153 (1972)).

billed the patient directly or through the hospital; and whether the doctors had to follow hospital policies and regulations to retain staff privileges.[139]

This fact-intensive inquiry accords with the approach of the Athens court, which might gain from the articulation of factors.

3. IRELAND AND THE CASE OF THE EMPTY CHAIR

An Irish case[140] delved into the weeds of liability apportionment.[141] The claimant alleged abuse at St. John's National School in Sligo from 1969 to 1972.[142] The suit was permitted by an extended statute of limitations.[143] The court awarded the plaintiff €350,000 in general damages.[144] Analyzing relative fault, the court assigned 90% fault to the defendant teacher, a brother of the Marist Order, who committed the abuse, and 10% fault to the school manager, whose authority over the Marist brothers was limited.[145] Complicating matters, however, the school manager, Canon Collins, was an empty chair. He could not be sued, because action against him was time-barred—not subject to the extended limitations period—and Collins anyway had since died.[146] The court gave the plaintiff no allowance on the empty-chair recovery; the plaintiff's award against the Marists was reduced by Collins's 10% to €315,000.

Adult plaintiffs alleging child sex abuse in the United States also have met the challenges of statutes of limitation, whether through statutory extension of the limitations period or with a

---

[139] Pollack v. Carondelet Health Network, No. C20014941, 2003 WL 25315324 (Ariz. Super. Ct. July 8, 2003) (unpublished trial order) (citing *Barrett*, 153 Ariz. 138, 735 P.2d 460 (Ct. App. 1987); Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 500 P.2d 1153, 1157-1158 (1972)).

[140] Hickey v. McGowan, [2014] IEHC 19 (H. Ct. Jan. 24, 2014) (Ir.), http://www.bailii.org/ie/cases/IEHC/2014/H19.html [http://perma.cc/9FKM-UWGN]

[141] Eoin Quill, Institute, *supra* note 1, Apr. 10, 2015 (Ireland).

[142] *Hickey*, [2014] IEHC 19,¶ 1. The High Court found the claims incontrovertibly credible. *Id.* ¶ 23.

[143] Quill, Institute, *supra* note 1.

[144] *Hickey*, [2014] IEHC 19, ¶ 35.

[145] *Id.* ¶ 75. The 90% liability advanced furthermore against a second named defendant, the teacher's supervisor in the Marist Order, under ordinary principles of vicarious liability. *Id.* ¶ 84.

[146] *Id.* ¶ 54 (applying Civ. Liab. Act 1961, § 9(2) (Ir.)), ¶ 76.

tolling theory such as delayed discovery because of repressed memory or fraudulent concealment.[147] Cases so delayed are bound to generate evidentiary problems, like the empty chair in comparative fault in the Irish case. California law was amended in 1990 to be more permissive of child sex-abuse claims, allowing them until the plaintiff's twenty-sixth birthday, and a court in 1994 ruled the extension inapplicable to "ancillary" negligence claims—respondeat superior, negligent hiring, and negligent supervision—against third parties to the abuse, namely the dance studio that employed the defendant instructor.[148] Later, in 1998 and again in 2003, the legislature further relaxed the limitations period as to employers and supervisors.[149]

As to apportionment, U.S. courts in the comparative fault era have declined to effect liability allocation with intentional actors in the mix, because comparative fault is not a defense to intentional torts—though the *Restatement (Third), Apportionment* cracks the door open to such mixing.[150] Nevertheless, once comparative fault is properly implicated, most U.S. courts include empty chair in apportionment.[151] Shifting an empty chair's liability allocation to the plaintiff when the chair is empty because of the plaintiff's procedural constraints comports with the rule that only innocent plaintiffs are preferred in liability reallocations for absent parties.[152]

---

[147] Joseph M. Winsby & Elaine D. Walter, *Applying the Statutes of Limitations in Institutional Childhood Sex Abuse Cases*, FLA. B.J., July/Aug. 2014, at 32.
[148] Debbie Reynolds Prof'l Rehearsal Studios v. Superior Court, 25 Cal. App. 4th 222, 230-231, 30 Cal. Rptr. 2d 514, 518 (1994) (citing CAL. CODE CIV. PROC. § 340.1).
[149] Perez v. Richard Roe 1, 146 Cal. App. 4th 171, 175, 52 Cal. Rptr. 3d 762, 764 (2006), *as modified* (Jan. 26, 2007) (citing CAL. CODE CIV. PROC. § 340.1).
[150] Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment As It Affects Joint and Several Liability*, 49 EMORY L.J. 565, 606-607 (2000) (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1, 8 (Proposed Final Draft (Revised), 1999)).
[151] 1 COMPARATIVE NEGLIGENCE MANUAL § 14:9 (3d ed.), WestlawNext (database updated Mar. 2015) ("accepted practice in most jurisdictions").
[152] *Vandall*, *supra* note 149, at 580; *see, e.g.*, Richter v. Presbyterian Healthcare Servs., 326 P.3d 50, 65 (N.M. Ct. App.), *cert. denied*, 326 P.3d 1111 (N.M. 2014) (under state comparative fault statute, allowing defendants to disclaim liability apportioned to nonparties exempt from liability to plaintiff by operation of statute of limitations).

4. NORWAY AND THE CASE OF THE DRUNKEN DECEDENT

A Norwegian case[153] examined the comparative fault of plaintiffs' decedent.[154] A test shortly after a fatal car accident showed the decedent to have been drunk with a blood-alcohol level of 0.166%.[155] He was survived by his wife and unborn daughter, who conceded that their bereavement recovery should be reduced to account for the decedent's fault.[156] At issue was the amount of the reduction. The trial court reduced recovery by a standard 50%, and the intermediate appellate court revised the reduction downward to 30%.[157] The Supreme Court explained that Norwegian law historically charged survivors with the same reductions that the decedent would have suffered had he lived.[158] The civil damages law and the motor vehicle law generally were in accord on that point.[159]

However, a Justice Committee in 1985 commented upon revision of the damages law that survivors' awards perhaps should not be reduced in full when doing so would work unfairness on the family of a negligent decedent.[160] When the decedent was a family breadwinner, the court reasoned, the family's need for replacement income is "completely independent of the specific facts in connection with the fatal accident."[161] The deterrence rationale for a tort award is

---

[153] Norges Høyesterett [Supreme Court] Nov. 12, 2014, No. HR-2014-2423-A (Nor.), http://unneland.as/nyheter/hoyesterettsdom_hr_2014_02423_a/content_1/text_cce429e5-b2ee-4df1-8207-851a37f98132/1420625026128/hrsiv_avgjorelse_hr_2014_2423_a.docx (translated to English by Google Translate)[http://perma.cc/83YM-JXLY].

[154] Knut Martin Tande, Institute, *supra* note 1, Apr. 10, 2015 (Norway).

[155] No. HR-2014-2423-A, ¶ 2.

[156] *Id.* ¶ 3.

[157] *Id.* ¶¶ 4, 6.

[158] *Id.* ¶¶ 19-20 (citing Crim. Code May 22, 1902, no. 11, § 25 (Nor.)). Comparative-fault reduction for plaintiffs dates to 1969. *Id.* ¶ 21 (citing Damages Act June 13, 1969, no. 26, § 5-1 (Nor.)).

[159] *Id.* ¶ 3 (comparing Automobile Liab. Act Feb. 3, 1961, § 7 (Nor.), with Damages Act June 13, 1969, no. 26, § 5-1 (Nor.)). The motor vehicle law explicitly contemplates attribution of fault to a claimant who knew of the driver's dangerous propensity. *Id.* ¶¶ 24, 39. That scenario is not at issue on these facts, though its inconsistency with European law influenced the court's decision in a European direction. *See id.* ¶¶ 43-44.

[160] *Id.* ¶ 29.

[161] Norges Høyesterett [Supreme Court] Nov. 12, 2014, No. HR-2014-2423-A (Nor.), (quoting Justice Committee) (in original, "'helt uavhengig av de nærmere omstendigheter i forbindelse med dødsulykken'").

diminished when the responsible person has died, and, the committee reasoned, deterrence evaporates as a priority anyway when the award will be paid by insurance.[162] Both the Justice Commission and the Parliament concluded that the "reasonable[ness]" rule of the damages act[163] sufficiently contemplated a smaller reduction in award in appropriate circumstances.[164] But neither commented specifically on the applicability of its logic to the motor vehicle law.[165]

Applying this rule of reasonableness, the court looked to European insurance law, which disfavors imputation of a decedent's fault to passengers,[166] and to "the increased emphasis on social concerns within tort law."[167] European law justified the intermediate appellate court's revision of reduction from 50% to 30%, the latter a standard rate for surviving passengers.[168] Changing social policy justified a focus on the needs of the survivors, especially in the context of a compulsory motor vehicle insurance system.[169] Reasoning then that absent survivors could not be more culpable than extant passengers, the Supreme Court concluded that a 20% reduction would be more fitting for the claimants, who still must answer in some measure for the decedent, whose "action is equally reprehensible no matter who the claimants are."[170] At the same time, the court found no ground to differentiate between spouse and child in the imputation of fault.[171]

A decedent's comparative fault in the United States similarly runs through statutory wrongful death claims to their beneficiaries.[172] A downward modification based on social policy

---

[162] *Id.*
[163] *Id.* ¶ 21 (quoting Damages Act June 13, 1969, no. 26, § 5-1 (Nor.)) (in original, "'rimelig'").
[164] *Id.* ¶¶ 29, 33.
[165] *Id.* ¶ 29; *see id.* ¶ 33.
[166] *Id.* ¶¶ 43-46.
[167] Norges Høyesterett [Supreme Court] Nov. 12, 2014, No. HR-2014-2423-A (Nor.),¶ 48 (in original, "den økte vektleggingen av sosiale hensyn innenfor erstatningsretten").
[168] *Id.* ¶ 47.
[169] *Id.* ¶¶ 51-53.
[170] *Id.* ¶¶ 55-56 (in original, "hans handling er like klanderverdig uansett hvem som er skadelidt").
[171] *Id.* ¶ 56. The intermediate appellate court had imputed 20% fault to the spouse and 10% to the child. *Id.* ¶ 15.
[172] DOBBS, HAYDEN, & BUBLICK, *supra* note 136, § 378.

with respect to survivors' needs would be highly unusual to result from judicial prerogative. There is the odd exception. When a truck driver killed in a highway accident was charged with 51% fault, the Iowa Supreme Court decided not to disallow or reduce his widow's claim under the wrongful death statute for loss of consortium.[173] The court had previously refused to reduce spousal consortium recoveries with victim fault in personal-injury cases, also governed by statute, and saw no reason to treat wrongful death claims differently.[174] The court explained: "The services, society, companionship, affection, and other elements of consortium are valuable and necessary ingredients of a satisfactory interspousal relationship. They are not, however, the kind of services the deprivation of which will give rise to a tort action between spouses."[175]

5. SLOVENIA AND THE CASE OF THE DOG THAT BIT THE OWNER

A Slovenian case[176] presented a twisted problem of liability when a plaintiff was injured by her own dog.[177] The plaintiff was a "young and beautiful girl," 27 years old,[178] who was visiting her parents when the injury occurred.[179] She herself was on record with the government vaccination registry as the owner of the dog, which had no known propensity for violence.[180] She had left the dog under the "protection and supervision" of her parents,[181] whom she sued, presumably to access their homeowner's insurance.[182] Over the insurer's objection, the court

---

[173] Nichols v. Schweitzer, 472 N.W.2d 266, at 268, 272 (Iowa 1991).
[174] *Id.* at 271-72 (citing Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988)).
[175] *Id.* at 270 (quoting McIntosh v. Barr, 397 N.W.2d 516, 518 (Iowa 1986)).
[176] Vrhovno Sodišče Civilni Oddelek [Supreme Court Civil Division] Feb. 20, 2014, Sodba [Judgment] No. II Ips 267/2011 (Slovn.), http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113066169/ (translated to English by Google Translate) [http://perma.cc/AFJ7-846L].
[177] Barbara Novak, Institute, *supra* note 1, Apr. 10, 2015 (Slovenia).
[178] No. II Ips 267/2011, ¶ 11 (in original, "mlado in lepo dekle"). Professor Novak reported the plaintiff to be of age 17, Novak, Institute, *supra* note 1, which seems better consistent with the court's characterization of a "girl." Her age was relevant to damages. *See* text accompanying *infra* note 186.
[179] No. II Ips 267/2011, ¶ 1.
[180] *Id.* ¶¶ 5-6, 9.
[181] *Id.* ¶ 5 (in original, "varstvo in nadzorstvo").
[182] *See id.* ¶ 1.

distinguished between the "owner" and "holder" of a dog, maintaining that the latter could bear liability to the exclusion of the former if the owner bore no fault.[183] The Slovenian court further explained that categorical exclusion of dog owners from plaintiff status would offend equal protection under the Slovenian Constitution.[184] The court, furthermore, affirmed an increase in the plaintiff's award for pain and suffering—the intermediate appellate court decided that the trial court had undervalued plaintiff's pain and suffering from disfiguring injury and raised that portion of the recovery from €1900 to €7000[185]—opining that it is appropriate for the court to consider a plaintiff's subjective feelings of disfavor or inferiority based on the nature of the injury and her age.[186]

The approach of the Slovenian court accords with U.S. law, which seeks to hold responsible the "keeper" of a dog—one who "exercise[s] care, custody, or control"[187]—rather than necessarily the owner, even when a statute says "owner."[188] Who is the responsible keeper is a question of fact, and the parent of an absent owner may fit the bill.[189] Inversely, one who "relinquishe[s] care, custody, and control" is not liable, notwithstanding legal ownership.[190] So, there is no reason such a legal owner cannot be a plaintiff.

---

[183] *Id.* ¶ 9 (construing Code of Obligations art. 158 (Slovn.)).
[184] *Id.* (citing Ustava [Constitution] art. 22 (Slovn.)).
[185] *Id.* ¶ 3.
[186] *Id.* ¶ 11.
[187] Spirlong v. Browne, 236 Ariz. 146, 151, 336 P.3d 779, 784 (Ariz. Ct. App. 2014).
[188] Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis. 2d 258, 268, 549 N.W.2d 723, 728 (Wis. 1996) (construing WIS. STAT. § 174.02).
[189] *E.g.*, Abraham v. Ibsen, 213 Ill. App. 210, 219-20 (Ill. App. Ct. 1919) (father of college student).
[190] Hayes v. Adams, 987 N.E.2d 402, 406 (Ill. App. Ct. 2013) (construing 510 ILCS 5/2.16 (West 1996)). *But see* Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 366, 673 S.E.2d 423, 428 (2009) (strictly reading disjunctive strict liability provision of statute, S.C. CODE ANN. § 47-3-110 ("dog owner *or* person having the dog in the person's care or keeping is liable" (emphasis added)), to conclude that "a person injured by a dog may pursue a claim against the owner of the dog when the injury occurs while the dog is in the care or keeping of another").

C. INTERPLAY OF TORT AND INSURANCE

Insurance often overshadows the civil liability system in Europe as in the United States, especially where motor vehicles are concerned. The presentations of delegates from Latvia and Spain focused on these interactions, as did a presentation on the law of the European Union.

1. LATVIA AND THE CASE OF THE COMPANY CAR

In a Latvian case,[191] the court allowed civil liability for a defendant driver to the exclusion of the driver's insured employer.[192] The defendant was driving a company car for the utility company AS Riga Heat when he violated criminal traffic law—seriously enough to win one to two years' imprisonment[193]—and injured plaintiffs, two other drivers.[194] AS Riga Heat held a compulsory third-party insurance policy on the company car.[195] However based on the driver's criminal offense as establishing fault, only he was charged in the trial court award of damages in excess of €8000 for plaintiffs' non-pecuniary losses, including bodily injury, permanent scarring, and psychological trauma.[196] With only the criminal defendant as natural person on the hook, plaintiffs faced the prospect of inability to enforce the judgment fully.[197] Nevertheless, the Supreme Court ruled that neither the civil code nor the motor-vehicle insurance law authorized recovery against the insured owner of the company car.[198] Two justices disagreed with the court's

[191] Augstākās Tiesas Civillietu Departamenta [Supreme Court Civil Department] Nov. 27, 2014, Lietā Nr. [Case No.] SKC-156/2014 (Lat.), http://at.gov.lv/files/files/skc-156-2014.doc (translated to English by Google Translate) [http://perma.cc/78PX-ZMEL].
[192] Agris Bitāns, Institute, *supra* note 1, Apr. 10, 2015 (Latvia).
[193] No. SKC-156/2014, ¶ 6.2.
[194] *Id.* ¶ 1.
[195] *Id.* ¶ 6.2.
[196] *Id.* ¶¶ 1.1, 1.3, 2.
[197] Bitāns, Institute, *supra* note 1.
[198] No. SKC-156/2014, ¶¶ 6.1, 6.3 (construing Civ. Code § 2347 (Lat.); Road Traffic Act art. 44 (Lat.); Motor Third Party Liab. Ins. Act (Lat.)). The insurer paid a modest indemnity of €127 for pecuniary medical losses. *Id.* ¶ 6.3.

decision; they wrote separately to lament that the court's reasoning rendered "vehicle third party liability compulsory insurance . . . completely meaningless."[199]

State vehicle insurance law varies widely in the United States, but the problem presented in the Latvian case unfortunately follows a known pattern. Automobile insurance policies typically exclude coverage from criminal conduct, and such provisions are straightforwardly enforceable in contract law with regard to losses of the insured. However, the matter is more complicated when third-party coverage is implicated because of the risk that an innocent party will go uncompensated in contravention of the purpose behind compulsory insurance requirements. Accordingly, an Illinois Appellate Court, upholding as "reasonable" a drunk-driving exclusion against the insured driver, observed that courts in other states "have been reluctant to apply criminal exclusions" as against "innocent victims of the criminals acts," thus "run[ning] afoul of the mandatory automobile liability insurance statutory provisions enacted in 47 states and the District of Columbia."[200] Were that the case presented, the Illinois court explained, the exclusion might well be held void as against public policy.[201]

Thus, for example, the Supreme Court of Delaware refused to enforce an exclusion clause against both the insured, who drove drunk, and the insured's passenger because the clause was incompatible with the state's adoption of no-fault automobile insurance.[202] However that conclusion is not universal. Strictly interpreting the insurance contract language as controlling under Minnesota law, the Eighth Circuit allowed an insurer to escape liability to a pedestrian

[199] *Id.*, separate opinion of Briede & Salenieks, JJ., ¶ 2.5 (in original, "transportlīdzekļu īpašnieku civiltiesiskās atbildības obligātā apdrošināšana kļūst pilnīgi bezjēdzīga").
[200] Bohner v. Ace Am. Ins. Co., 359 Ill. App. 3d 621, 626, 834 N.E.2d 635, 641 (Ill. App. Ct. 2005).
[201] *Id.*
[202] Bass v. Horizon Assur. Co., 562 A.2d 1194, 1196 (Del. 1989).

injured by the insurer's driver.[203] The driver, who ran off the road while searching for his ringing cell phone on the car's floor, pleaded guilty to attempted assault, triggering the exclusion even in the absence of criminal intent.[204]

2. SPAIN AND THE CASE OF THE DRIVEN GAME

The Spanish delegate[205] reported a curious statutory change in motor-vehicle liability law.[206] By statute, drivers had been responsible in case of collision with animals,[207] except when the animals were driven by hunting.[208] However, an amendment in 2014 narrowed the exception. Under the law as amended, drivers bear responsibility even in the hunting scenario—excluding claims for the value of animals themselves—unless the accident resulted directly from collective big game hunting.[209] Thus, a class of hunting-related animal collisions now leaves drivers without compensation from a defendant hunting party, even when the hunting was a causal factor.[210] The anticipated impact of the change is a rise in the cost of compulsory first-party insurance for

---

[203] Progressive N. Ins. Co. v. McDonough, 608 F.3d 388, 390-92 (8th Cir. 2010) (Minnesota law).
[204] *Id.*
[205] Albert Ruda, Institute, *supra* note 1, Apr. 10, 2015 (Spain).
[206] Ley 6/2014, de 7 de abril, por la que se modifica el texto articulado de la Ley sobre Tráfico, Circulación de Vehículos a Motor y Seguridad Vial, aprobado por el Real Decreto Legislativo 339/1990, de 2 de marzo [Law 6/2014, Apr. 7, whereby is modified the article text of the Law on Traffic, Motor Vehicle Traffic, and Road Safety, approved by Royal Legislative Decree 339/1990, Mar. 2] § IX(30) (B.O.E. Apr. 8, 2014, 85, § 1, at 29,508, 29,520 (9th additional provision)) (Spain), http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3715.
[207] *Cf. generally* Rosell Carme, Marc Fernández-Bou, Ferran Camps, Carles Boronat, Ferran Navàs, Mercè Martinez, & Antoni Sorolla, Animal-Vehicle Collisions: A New Cooperative Strategy Is Needed to Reduce the Conflict, PROCEEDINGS OF THE 2013 INTERNATIONAL CONFERENCE ON ECOLOGY AND TRANSPORTATION (ICOET 2013) (monograph), http://www.icoet.net/ICOET_2013/documents/papers/ICOET2013_Paper206B_Rosell_at_al.pdf (abstract and catalog data available from Transportation Research International Documentation Database, http://trid.trb.org/view.aspx?id=1346136) (describing multifaceted problem of animal-vehicle collisions in Europe and specifically study undertaken in Catalonia, Spain, to inform policy recommendations) [http://perma.cc/7F9X-344F].
[208] Ruda, Institute, *supra* note 1.
[209] Law 6/2014 Apr. 7, § IX(30) ("consecuencia directa de una acción de caza colectiva de una especie de caza mayor").
[210] Ruda, Institute, *supra* note 1.

drivers.[211] In effect, the insurance system will subsidize hunting activity by relieving hunters of responsibility for an externality of their activity.

A hunting party in the United States may be held liable for a vehicle collision under ordinary negligence principles upon proof of fault.[212] In a similar vein, a driver in Arizona successfully sued the state for unsafe highway conditions after he collided with an elk.[213] Evidence submitted to the jury showed state inaction despite a "recorded 168 elk- or deer-related collisions on this eleven-mile stretch of highway within seven years."[214] Shifting collision liability strictly to drivers is unheard of; even in gun-friendly America, the tendency of statutes is to hold hunters accountable for the externalities of the activity.[215] Perhaps the Spanish amendment speaks to the power of a special-interest group there.[216]

3. THE EUROPEAN UNION AND THE CASE OF THE REVERSING TRACTOR

A concluding presentation on European Union ("EU") law focused on insurance requirements at the European federal level.[217] EU motor vehicle directives require that motor vehicles be insured for civil liability arising from the "use" of the vehicle.[218] Slovenian law accordingly provides for compulsory insurance.[219] European directives require implementation in

---

[211] *Id.*
[212] Booth v. State, 207 Ariz. 61, 65, 83 P.3d 61, 65 (Ct. App. 2004), *as amended on reconsideration in part* (Mar. 31, 2004) (contrasting non-liability for conduct of wild animals with negligence-based predicated on defendant's carelessness).
[213] *Id.* at 69.
[214] *Id.* at 68.
[215] *See, e.g.*, MONT. CODE ANN. § 45-8-113 (creating liability for "a person in the act of game hunting [who] acts in a negligent manner or knowingly fails to give all reasonable assistance to any person whom the person has injured"); V.I. Code Ann. tit. 12, § 66 2014. ("Whoever hunts upon the lands, waters, or ponds of another with consent, shall, nevertheless, be responsible to the owner for any damage done by himself or his dogs.").
[216] *See, e.g.*, Ibex Hunt Spain, Spanish Big Game, http://www.ibexhuntspain.com/ban/spanish-big-game.php (last visited July 15, 2015) (commercial website boasting that Spain has largest variety in Europe of "big game trophy animals") [http://perma.cc/AM42-YHF2].
[217] Thomas Thiede, Institute, *supra* note 1, Apr. 10, 2015 (European Union).
[218] Council Directive 84/5/EEC, Dec. 30, 1983, O.J. 1984 L 8, p. 17, art. 1(1) (E.U.); Council Directive 72/166/EEC, Apr. 24, 1972, O.J. English spec. ed. 1972 (II), p. 360, art. 3(1) (E.U.).
[219] Zakon o obveznih zavarovanjih v prometu [Law on compulsory insurance in transport] art. 15 (Slovn.).

national law, but member states may request interpretive guidance from the Court of Justice of the European Union (CJEU).[220] Under this procedure, the Slovenian Supreme Court referred a case in which a man, Vnuk, was working on a farm, on a ladder in front of a barn.[221] He fell from the ladder when the ladder was hit by a reversing tractor.[222] The Slovenian lower courts affirmed the insurer's denial of coverage, holding that compulsory insurance covered only "the use of a tractor as a means of transport, . . . not damage caused when a tractor is used as a machine or propulsion device."[223]

The CJEU answered in agreement with Vnuk, holding that "use" under the directive, so in the insurance coverage, reaches the tractor as a vehicle in agricultural service as long as the Slovenian courts find that service "consistent with the normal function of that vehicle."[224] Offering up a treat for linguaphiles, the court surveyed the implementation of the "use" directives in the languages of various member states.[225] But ultimately, most persuasive was the "general scheme and purpose of the European Union legislation concerning compulsory insurance,"[226] namely, "the dual objective of protecting the victims of accidents caused by motor vehicles and of liberalising the movement of persons and goods"[227]—ends ill served by a restrictive interpretation.

---

[220] Consolidated Version of the Treaty on the Functioning of the European Union art. 267, 2008 O.J. (C 115/47).
[221] Vnuk v. Zavarovalnica Triglav, Case C-162/13, [2013] E.C.R. I____ (delivered Sept. 4, 2014), ¶ 19 (CJEU), http://curia.europa.eu/juris/document/document.jsf?text=&docid=157341&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=217459[http://perma.cc/L3LT-J966]
[222] *Id.*
[223] *Id.* ¶ 20.
[224] *Id.* ¶ 59.
[225] *Id.* ¶¶ 44-45.
[226] *Id.* ¶ 47.
[227] Vnuk v. Zavarovalnica Triglav, Case C-162/13, [2013] E.C.R. I____ (delivered Sept. 4, 2014), ¶ 49 (CJEU), http://curia.europa.eu/juris/document/document.jsf?text=&docid=157341&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=217459[http://perma.cc/L3LT-J966]

Almost all of the states in the United States require auto insurance to protect third parties from loss.[228] But these are road policies. Insurance usually is required only for vehicles used on public roads, and insurance purchased for roadworthy vehicles may be limited on contract terms to exclude recreational or commercial off-road use. Insurers market coverage specially for agribusiness with first-party and third-party options.[229] In the absence of specially applicable coverage, a farmer would have to rely on a farm owner or umbrella policy, or incur personal liability for fault-based injury.

When insurance coverage is disputed in the United States, courts take their cues from policy language. A farm owner's liability policy was at issue, in an Ohio case, in which a farm tractor had been loaned out to pull trailers in a hayride "bar crawl."[230] Plaintiffs were injured when the trailers toppled.[231] The liability policy contemplated coverage for "recreational vehicles" and excluded coverage for "motorized vehicles."[232] The insurer sought to deny coverage under both parts.[233] Recreational coverage extended only to vehicles "'designed for recreational use off public roads.'"[234] Referencing a dictionary definition, the court found the tractor clearly "designed" for farm use, not recreational use, so that part of the policy did not apply.[235] At the same time, the tractor was a "motorized vehicle," so that part of the policy excluded coverage.[236] Were the tractor

---

[228] *E.g.*, Shamit Choksey, Car Insurance Requirements by State, http://www.cars.com/go/advice/Story.jsp?section=ins&subject=ins_req&story=state-insurance-requirements (June 26, 2013) (last visited July 12, 2015)[http://perma.cc/MGT4-CWTG]
[229] *E.g.*, Farm Bureau Financial Services, Farm Vehicle Insurance Coverage for Trucks, Trailers, Tractors and More, https://www.fbfs.com/insurance/auto-insurance/farm-vehicle-insurance (last visited July 12, 2015)[http://perma.cc/UF3P-6CP5].
[230] United Ohio Ins. Co. v. Schaeffer, 18 N.E.3d 863, 864 (Ohio Ct. App. 2014).
[231] *Id.*
[232] *Id.* at 866.
[233] *Id.*
[234] *Id.* (quoting policy).
[235] United Ohio Ins. Co. v. Schaeffer, 18 N.E.3d 863, 864 (Ohio Ct. App. 2014) (citing WEBSTER'S COLLEGIATE DICTIONARY 338 (2003) ("'devise[d] for a specific function or end'")).
[236] *Id.* at 867.

subject to compulsory registration or "'designed for use on public roads,'" it would not have been an excluded "motorized vehicle."[237] So the insurer pointed to the tractor "lights, turn signals, seat belts, a horn, flashing lights, and a slow-moving vehicle sign."[238] But the court found those features adaptations for only short-term, "field to field" road use, not derogating from the farm-focused design that brought the tractor within the exclusion.[239]

When a policy term is ambiguous, it is construed in favor of the insured. In a Wisconsin case, a man's trailer home and vehicle were both damaged when the defendant's tractor was towing the home and stalled on a hill.[240] The defendant tractor owner had insured the tractor under his farm owner's policy against third-party losses.[241] But the insured invoked an exclusion that covered property damage resulting from a mobile home trailer if the trailer was attached to a "motor vehicle,"[242] meaning, a vehicle subject to compulsory registration or "'designed for use on public roads.'"[243] The insured insisted that a tractor when used on a public road comes within the "well-established definition of motor vehicle."[244] But unlike the tractor in Ohio, this Wisconsin tractor, according to the submission of the insured, "was equipped with field tires, and . . . was not equipped with brake lights, tail lights, turn signals, or other safety devices for highway use."[245] Unlike the CJEU, the Wisconsin Supreme Court eschewed reference to other instruments in insurance law and confined itself to the meaning of the policy language.[246] Like the Ohio court, the Wisconsin Supreme Court looked up "design" in the dictionary and determined that the tractor

---

[237] *Id*. at 866 (quoting policy).
[238] *Id.*
[239] *Id.* at 867.
[240] Olson v. Farrar, 809 N.W.2d 1, 5 (Wis. 2012).
[241] *Id*.
[242] *Id.*
[243] *Id*.
[244] *Id.* at 11.
[245] *Id.* at 6.
[246] Olson v. Farrar, 809 N.W.2d 1, 12 (Wis. 2012)..

was designed for farm use, not road use.[247] But unlike the Ohio court, the Wisconsin court found that definition inconclusive, still subject to broad interpretation, as in any "conceivable purpose" for a tractor, or narrow interpretation, as in, "the particular purpose for which the vehicle is contrived."[248] Electing for construction to favor the insured, the court adopted the narrow interpretation.

Both the Ohio and Wisconsin cases involved the same farmowner's policy language, and the courts employed public policy only to achieve proper construction of the terms, not to paint a legal context for a normatively favorable outcome.

D. OFFICIAL LIABILITY AND CIVIL RIGHTS

The closely related areas of official liability and private liability in the enforcement of public equal-protection norms constituted a recurring theme in the reported European cases. Problems in government liability arose in the presentations of delegates from Croatia, Czech Republic, Poland, and Romania. The presentation from Hungary contemplated the related but inverse problem of private persons defending against retaliation by public officials. Meanwhile public anti-discrimination norms, as enforceable against private or public defendants, were the subject of the presentations from England and Sweden.

---

[247] *Id.* (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 506 (3d ed. 1992)) ("'to conceive or fashion in the mind; invent' and 'to create or contrive for a particular purpose or effect'"); RANDOM HOUSE UNABRIDGED DICTIONARY 539 (2d ed. 1993) ("'made or done intentionally; intended, planned'")).
[248] *Id.* at 12-13.

1. **CROATIA** AND THE CASE OF THE UNWANTED BAILIFF

A Croatian case[249] is especially curious, positing a governmental duty of care in law-making.[250] The plaintiff had abandoned his job as a lawyer in anticipation of an appointment as public bailiff in the city of Varaždin.[251] Before he could start work, the national legislature adopted the Law on the Termination of the Public Bailiffs, which abolished plaintiff's position.[252] The plaintiff claimed pecuniary and non-pecuniary damages under EU law, as incorporated by the Croatian constitution and the Croatian Law on Obligations.[253]

The legislative defendant argued that there can be no civil wrong in a properly enacted statute, and "that the legislator is free to choose the model of execution it deems to be most effective."[254] The trial court nevertheless found its way to a damages award, and the Croatian Constitutional Court in 2013 ruled the award permissible.[255] Respecting the opinion of the Constitutional Court, the Croatian County Court, on intermediate appeal, explained that under European human rights norms, the plaintiff, and others similarly situated, suffered a loss of property in the "legitimate expectation" of a public appointment, and that the loss is compensable under the civil code.[256] The County Court remanded to the Varaždin Municipal Court, which had postponed a hearing on damages pending the disposition on appeal.[257] Opening the door to a "duty

---

[249] Županijski [County Court] Jan. 16, 2014, Varaždin No. G-5818/13-2 (Croat.), *available from* http://www.iusinfo.hr/LegisRegistry/Content.aspx?SOPI=ZSRH2013581B8A2&Doc=ZUPSUD_HR[http://perma.cc/5BDU-FU3W]. (pay wall) (translated to English by Google Translate) I am grateful to Professor Marko Baretić for sharing with me a copy of this decision, which I have on file.

[250] Marko Baretić, Institute, *supra* note 1, Apr. 10, 2015 (Croatia).

[251] Varaždin No. G-5818/13-2.

[252] *Id.*

[253] *Id.* (citing Sabor [Constitution] art. 145 (Croat.) (articulating principle of *acquis communautaire*)); Law on Obligations art. 1046 (Croat.).

[254] *Id.* (in original, "da je zakonodavac slobodan odabrati model ovrhe za koji smatra da će najdjelotvornije").

[255] *Id.* (citing Ustavni [Constitutional Court] Jan. 23, 2013, Nos. U-I-5612/2011, U-I-6274/2011, U-I-178/2012, U-I-480/2012 (Croat.), *available from* http://narodne-novine.nn.hr/clanci/sluzbeni/2013_01_13_201.html)[http://perma.cc/MU2X-QKPE].

[256] *Id.* (in original, "legitimno očekivanje").

[257] *Id.*

of care" in law-making, the case raises big questions, from what constitutes a wrongful act to how damages are to be measured.[258]

The withholding of the public appointment in Varaždin has a nostalgic *Marbury v. Madison* ring to it.[259] But *Marbury* pitted President against Congress, not private plaintiffs against Government.[260] The U.S. Supreme Court has rejected theories of affirmative duty on the part of executive officials arising in constitutional law.[261] The notion of legislative negligence vis-à-vis the populace would have vast implications for public policy. Springing to mind is the recent climate change decision in the Netherlands, in which the Hague District Court ordered the Dutch government to cut carbon emissions.[262] The Hague lawsuit was authorized by the Dutch Constitution;[263] statutory waivers of U.S. sovereign immunity are not nearly as generous.[264]

In U.S. common law, the public trust doctrine posits that some natural resources are held in trust by the government for the public, so that they may not be misused or alienated.[265] A "potent common law doctrine" derived from Roman civil law and English common law,[266] public trust has played a meaningful modern role in preserving water resources in the West.[267] The U.S. Supreme Court in 1892 recognized the doctrine in defining Chicago's authority over navigable water in the Great Lakes,[268] though the Court in 2012 had occasion to opine that the public trust

---

[258] Baretić, Institute, *supra* note 1.
[259] Marbury v. Madison, 5 U.S. 137, 138-139 (1803).
[260] *Id.* at 137.
[261] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202, 109 S. Ct. 998, 1007, 103 L. Ed. 2d 249 (1989).
[262] Hague District Court June 24, 2015, No. C/09/456689 / HA ZA 13-1396 (Neth.), http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196 [http://perma.cc/YPW2-MAMS](English translation).
[263] *Id.* ¶ 4.36 (citing Const. art. 21 (Neth.)).
[264] *See* 28 U.S.C. §§ 1346(b)(1), 2680.
[265] 1 ENVTL. L. (West) § 2:20 (WestlawNext database updated June 2015).
[266] Hope M. Babcock, *The Public Trust Doctrine: What A Tall Tale They Tell*, 61 S.C. L. REV. 393, 396-97 (2009).
[267] *E.g.*, Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 451, 658 P.2d 709, 731-32 (1983) (affirming jurisdiction based on public trust doctrine for judicial review of challenged diversions from natural lake).
[268] Ill. Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 458-59, 13 S. Ct. 110, 120, 36 L. Ed. 1018 (1892).

doctrine is a creature of state, not federal, law.[269] Much speculation surrounds potential application of the public trust doctrine in the Dutch vein,[270] but efforts so far have made little headway. Key cases at state and federal levels were dismissed in 2014 for want of subject-matter jurisdiction.[271]

Commenters have observed that the public trust doctrine often gets a chilly reception in U.S. courts because it seems to run counter to private property rights and democratic policymaking.[272] The latter concern is implicated well by a climate-change suit in Oregon, predicated on the public trust doctrine and ongoing at the time of this writing.[273] The trial court has twice rejected the suit, now on appeal for the second time, and the court's reasoning maps four substantial hurdles that are bound to undermine a legislative-duty claim in U.S. law, whether at the state or federal level.

First, the trial court held that the plaintiffs' action was not authorized by the state declaratory judgment statute.[274] The plaintiffs wanted more than just a declaration of state non-compliance with a statute or constitutional provision, the court explained, because there was no pre-existing law requiring the state to regulate greenhouse gas emissions in the manner plaintiffs

---

[269] PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012); *but see* Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, Alec L. v. McCarthy, No. 14-405, 2014 WL 5841697, at 3-8 (U.S. filed Nov. 8, 2015) (arguing that public trust doctrine has role in limiting federal power that simply was not implicated in *PPL Montana*).

[270] *E.g.*, Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 798-805 (2010); Julia B. Wyman, *In States We Trust: The Importance of the Preservation of the Public Trust Doctrine in the Wake of Climate Change*, 35 VT. L. REV. 507, 508-09 (2010).

[271] Alec L. v. McCarthy, 561 Fed. Appx. 7, 8 (D.C. Cir.) (mem. per curiam), *cert. denied*, 135 S. Ct. 774 (2014); Texas Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887, 895 (Tex. Ct. App. 2014).

[272] Babcock, *supra* note 266, at 393 & n.1.

[273] Chernaik v. Brown (*Chernaik III*), No. 16-11-09273 (Or. Cir. Ct. Lane Cty. May 11, 2015), *available from* http://courts.oregon.gov/Lane/docs/Chernaik%20v%20Brown%20Opinion.pdf, *after remand from* (*Chernaik II*) 263 Or. App. 463, 481, 328 P.3d 799, 808 (Or. Ct. App. 2014), *which rev'd* (*Chernaik I*) 2012 WL 10205018 (Or. Cir. Ct. Lane Cnty. Apr. 5, 2012).

[274] *Chernaik I*, 2012 WL 10205018, *4 (Or. Cit. Ct. Lane Cty. May 11, 2015) (construing OR. REV. STAT. §§ 28.010 to 28.160).

demanded.[275] Rather, the plaintiffs sought "to impose a new affirmative duty" on the state, and the declaratory judgment act gave the court no such authority.[276]

Second, the trial court held that the plaintiffs' action was barred by sovereign immunity under the Oregon Constitution.[277] Again, plaintiffs' claims did not assert that public officials had exceeded their delegated authority under any pre-existing law.[278] No statutory waiver of sovereign immunity in Oregon subjects state officials to potential liability for exercising discretion within the scope of their authority.[279]

Third, the trial court held that the plaintiffs' action was barred by the separation of powers doctrine under the Oregon Constitution.[280] Plaintiffs would have had the court direct the legislature to regulate greenhouse gas emissions.[281] In essence, the plaintiffs would have had the court "substitute its judgment for that of the Legislature," creating an undue burden on a coordinate branch of government and usurping the legislation function "to decide politically—based upon whatever facts it deems relevant to the determination—whether or not global warming is a problem and what, if anything, ought to be done about it."[282]

Fourth, the trial court held that the plaintiffs' action was barred by the political question doctrine.[283] The court reasoned that the plaintiffs' sought-after relief first required the court to make "an initial policy determination" on greenhouse gas emissions, a role for which the judiciary

---

[275] *Id.* at *3-*4.
[276] *Id.*
[277] *Id.* at *4-*5 (construing OR. CONST. art. IV, § 24).
[278] *Id.* at *5 & n.6.
[279] *Id.* at *5. *Cf.* 28 U.S.C. § 2680(a) (excepting from sovereign immunity waiver federal official's "discretionary function or duty").
[280] *Chernaik I*, 2012 WL 10205018, at *7 (Or. Cir. Ct. Lane Cty. Apr. 5, 2012) (construing OR. CONST. art. III, § 1).
[281] *Id.* at *6.
[282] *Id.* at *6-*7.
[283] *Id.* at *8.

is ill suited.[284] The plaintiffs' relief would then compel the court to quantify emission targets, a prohibitive chore that unveils in the public trust doctrine an impermissible dearth "of judicially discoverable and manageable standards."[285]

The appellate court remanded the Oregon case, opining that the trial court had improperly focused on plaintiffs' demand for relief with respect to emission regulation, to the detriment of plaintiffs' more modest demands, such as simple declaration that the public trust doctrine does impose a duty on the state to ensure air purity in some measure.[286] On remand, the trial court answered the simple public trust question in the negative, holding that the doctrine applies to water and not to air.[287] Moreover, the court reiterated its position on the separation of powers and political question doctrines.[288] The case is on subsequent appeal, but its prognosis is poor.

2. CZECH REPUBLIC AND THE CASE OF THE NOT-SO-STOLEN COINS

Reminiscent of the Snowden revelations, which boosted the clarion call for privacy protection in the EU, a Czech case[289] involved wiretapping by public officials.[290] Investigating the sale of a coin collection suspected of being stolen, police wiretapped plaintiff's telephone and searched his home.[291] No evidence of wrongdoing was discovered, and the plaintiff demanded an apology and about €3600 in non-pecuniary damages.[292] Statute provided the plaintiff no cause of action predicated on improper judicial approval of the police investigation.[293] But the court

---

[284] *Id.*
[285] *Id.*
[286] (*Chernaik II*) 263 Or. App. 463, 475, 328 P.3d 799, 805 (Or. Ct. App. 2014),
[287] Chernaik v. Brown (*Chernaik III*), No. 16-11-09273 at 13 (Or. Cir. Ct. Lane Cty. May 11, 2015).
[288] *Id.* at 14-18.
[289] Nejvyšší Soud [Supreme Court] Dec. 4, 2014, No. 30 Cdo 4286/2013 (Czech Rep.), http://kraken.slv.cz/30Cdo4286/2013 (translated to English by Google Translate).
[290] Jiří Hrádek, Institute, *supra* note 1, Apr. 10, 2015 (Czech Republic).
[291] No. 30 Cdo 4286/2013.
[292] *Id.*
[293] *Id.*

concluded that a constitutional complaint, predicated on court precedents, must be permitted by the tandem operation of privacy protection under the European Convention on Human Rights and the Czech judicial power under the Czech constitution.[294] A constitutional complaint allows the plaintiff to demand cancellation of the judicial search order, and that cancellation in turn allows the plaintiff to seek damages under the state liability law.[295]

The hang-up in the Czech courts was largely procedural, and human rights norms afforded the court a workaround. In the United States, both the civil rights law[296] and the Constitution itself[297] afford causes of action against public officials for violation of the right against unreasonable search and seizure. Because civil rights violations are treated like torts, the plaintiff who can overcome qualified immunity and meet the burden of proof may claim compensatory damages.[298] Damages may not be awarded to represent abstract rights violation, but may, as in a tort action, include actual non-pecuniary loss, such as reputational harm and mental anguish, in addition to pecuniary loss.[299] This approach is consistent with the Czech case, in which the plaintiff's cause of action was facilitated by human rights norms, but his damages award was dictated by the civil code.

---

[294] *Id*. (citing European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8 (privacy), 13 (remedy); Ústava [Constitution] art. 83 (Czech Republic), *available from* http://www.psp.cz/docs/laws/constitution.html).
[295] *Id*. (citing Reg. No. 82/1998Sb., § 8, ¶ 1 (Czech Rep.)).
[296] 42 U.S.C. § 1983.
[297] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (construing U.S. CONST. amend. IV).
[298] 2 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:24 (WestlawNext database updated June 2015); 1 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 5:18 (3d ed.) (WestlawNext database updated Apr. 2015).
[299] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307, 106 S. Ct. 2537, 2543, 91 L. Ed. 2d 249 (1986).

3. POLAND AND THE CASE OF THE AILING SOLDIER

A Polish case[300] addressed no-fault state liability in a military context with compelling facts.[301] A soldier contracted life-threatening meningitis. He was comatose for three weeks and suffered nephrectomy, skin grafts, and the amputation of fingers and both feet.[302] At age 25, plaintiff is permanently unable to work or live independently, bears scarring over more than half his skin surface, and will face indefinitely ongoing treatment and risk of complications.[303] The plaintiff claimed damages under the civil code from the military, pointing to epidemiological studies tracing infection likely to other soldiers, and claiming failure to vaccinate properly and negligent diagnosis and treatment.[304] The lower court found plaintiff's claim ill founded under the civil code provisions governing fault-based liability and claims against the state for unlawful acts.[305] But the court awarded about €118,000 under the provision for claims against the state for lawful acts.[306] The intermediate appellate court upheld the award but corrected the basis to the provision for claims against the state for *unlawful* acts, and moreover doubled the liability award, in light of plaintiff's extraordinary suffering.[307] The Polish Supreme Court restored the earlier judgment, on the basis of *lawful* acts, holding that the plaintiff had failed to establish the requisite civil probability of causation connecting official misfeasance and the plaintiff's illness.[308] The delegate from Poland explained that the decision is significant both for having observed the civil

---

[300] Sąd Najwyższy [Supreme Court] Mar. 7, 2013, No. II CSK 364/12 (Pol.), http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/II%20CSK%20364-12-1.pdf (translated to English by Google Translate).
[301] Ewa Bagińska, Institute, *supra* note 1, Apr. 10, 2015 (Poland).
[302] Sąd Najwyższy, *supra* note 300.
[303] *Id.*
[304] *Id.*
[305] *Id.* (citing, respectively, Civ. Code arts. 415, 417, § 1 (Pol.)).
[306] *Id.* (citing Civ. Code art. 417, § 2 (Pol.)).
[307] *Id.*
[308] *Id.*

probability standard in probing the lawfulness of official conduct, and for compensating in the interest of justice anyway, on a strict-liability basis, at least in case of "particularly severe personal injury."[309]

Medical malpractice by public officials in the United States can be an authorized claim under the Federal Tort Claims Act.[310] However, the *Feres* doctrine, derived from a 1950 U.S. Supreme Court case, bars claims by service members on active duty whose injuries are incident to military service.[311] Incidence to military service marks a fine line,[312] which is policed by three rationales for the *Feres* doctrine: (1) the "distinctive . . . federal character" of the relationship between Government and soldier; (2) the availability of no-fault veteran benefits for injured soldiers; and (3) the effect on military discipline of allowing a soldier to claim negligence by a superior.[313] Active duty is key, so even a soldier who injured his knee playing basketball "off duty," while on active duty, was barred from a claim arising from his treatment.[314] In more tragic circumstances, the *Feres* doctrine barred the estate claim when improper administration of an epidural resulted in the death from meningitis of an expectant mother on active duty.[315] The Polish facts playing out in the United States therefore would come within the *Feres* doctrine. Close

[309] Bagińska, Institute, *supra* note 1.
[310] 28 U.S.C. §§ 1346(b)(1); *see also* 28 U.S.C. § 2680(j) (disallowing "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").
[311] *Feres v. United States*, 340 U.S. 135, 146, 71 S. Ct. 153, 159, 95 L. Ed. 152 (1950).
[312] For example, a mother who alleged negligent treatment during pregnancy while she was on active duty, resulting in the child's death as a newborn, saw her claim barred by the *Feres* doctrine. *Irvin v. United States*, 845 F.2d 126, 131 (6th Cir. 1988). But, another mother who alleged negligent treatment during pregnancy while she was on active duty, also resulting in the child's death as a newborn, was allowed her claim on the thinly distinguishing ground that the alleged negligence effected no physical injury to the mother, but only to the civilian child. *Brown v. United States*, 462 F.3d 609, 614 (6th Cir. 2006).
[313] *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2058, 52 L. Ed. 2d 665, 671-72 (1977) (internal quotation marks omitted).
[314] *Borden v. Veterans Admin*., 41 F.3d 763, 763 (1st Cir. 1994) ("straightforward application of the 'incident to service' test . . . depends on plaintiff's military status in relation to defendant's allegedly negligent provision of medical treatment").
[315] *Hancox v. Performance Anesthesia, P.A.*, 455 F. Appx. 369, 370-71, 373 (4th Cir. 2011) (per curiam).

quarters and vaccination prescriptions were blamed as causal factors of the Polish plaintiff's suffering, and those factors much more directly implicate military policy and discretion than a soldier's routine healthcare that happens to coincide with time on active duty.[316]

4. ROMANIA AND THE CASE OF THE HOBBLED AIRPORT

The stakes were less dramatic, but the principle similar, in a Romanian case[317] arising from the construction of a public highway.[318] The case represented an exemplary application of a newly adopted civil liability code.[319] A small airport clashed with the government when construction of a city ring road impaired airport operation.[320] The court ran down the essential requirements of tort under the new civil code, and found them present on the facts: the plaintiff's loss in the financial cost of relocating navigation equipment,[321] and a direct causal link between the plaintiff's loss and the defendant's construction.[322] The government, in its defense, tried to move the case into the law of takings, which would implicate far less cost than tort liability for the airport's pecuniary losses.[323] Under the old civil code, a lawful taking for the public good vitiated legal causation in tort, and the trial court had accepted the government's argument that the same theory should apply under the new civil code.[324] The high court reversed and held the government liable, pointing to plain and unqualified language of duty and responsibility in the new civil code.[325]

---

[316] Sąd Najwyższy [Supreme Court] Mar. 7, 2013, No. II CSK 364/12 (Pol.), http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/II%20CSK%20364-12-1.pdf (translated to English by Google Translate).
[317] Înalta Curte de Casație și Justiție [High Court of Cassation and Justice] June 24, 2014, Sec. II Civ. No. 2358 (Rom.), http://www.juridice.ro/wp-content/uploads/2014/10/Dec-iunie-2014.htm [http://perma.cc/EQF8-27X4] (translated to English by Google Translate).
[318] Christian Alunaru, Institute, *supra* note 1, Apr. 10, 2015 (Romania).
[319] *Id.*; *see* No. 2358, ¶ 57 (comparing former Civ. Code art. 998 (Rom.) with new Civ. Code § 1349 (Rom.)).
[320] No. 2358, ¶¶ 21, 24, 26, 30.
[321] *Id.* ¶ 30.
[322] *Id.* ¶ 31.
[323] *Id.* ¶ 35.
[324] *Id.* ¶¶ 37, 43, 48.
[325] *Id.* ¶ 57.

Cases in the United States with similar facts also walk the line between takings and tort. Complaining of negligence, and taking in the alternative, a Texas couple complained that state highway construction caused their land to flood.[326] The court affirmed an award in negligence based on a private claim statute, but observed that the taking claim otherwise would have held water.[327] Framing the two theories as working in tandem, a South Carolina plaintiff alleged that negligent highway relocation effected a taking of his farmland by flooding, though the case failed for insufficient proof of causation.[328] When highway construction in Kansas caused plaintiffs' yards to subside, they were able to pursue a takings theory even when their negligence claims were blocked by sovereign immunity.[329] But, the plaintiff in another Texas case was not as lucky. When the state's roadside grass burning spread to the plaintiff's field and destroyed his hay crop, the plaintiff's negligence claim was blocked by sovereign immunity.[330] The court moreover refused the plaintiff's takings theory, reasoning that takings must be accomplished for the public good, while the fire was purely an accident sounding only in tort.[331] These cases generally accord with the new Romanian approach allowing tort recovery, provided that plaintiff is able to make the proof of negligence and that code vitiates sovereign immunity.[332]

[326] *State v. Hale*, 146 S.W.2d 731, 731-34 (Tex. 1941).
[327] *Id.* at 34-35, 43.
[328] *Owens v. S. Carolina State Highway Dep't*, 121 S.E.2d 240, 241-42, 247 (S.C. 1961).
[329] *Sanders v. State Highway Comm'n*, 508 P.2d 981, 984-85, 987-88 (Kan. 1973).
[330] *Texas Highway Dep't v. Weber*, 219 S.W.2d 70, 70-71 (Tex. 1949).
[331] *Id.* at 71-72.
[332] No. 2358, ¶ 57.

5. HUNGARY AND THE CASE OF THE PICTURED POLICE

Public-private tables were turned in a Hungarian case[333] that started with a civil suit by police against journalists.[334] Hungarian privacy law prohibited publication of identifiable images of persons without their consent,[335] a principle the Constitutional Court traced from the American "right to be let alone" through European concepts of autonomy and personal integrity.[336] The law extended to police, even in the performance of their duties, resulting in edited journalistic images in Hungarian media—sometimes with superimposed cutouts of images such as animal heads, meaning to mock the law.[337] The petitioner, an online news service, published images in violation of the law, in which two officers were recognizable while participating in a demonstration of the law enforcement union.[338] Offended police succeeded in a suit against the newspaper in municipal court.[339] The petitioner brought a constitutional complaint, asking the Constitutional Court to nullify the lower court's ruling on grounds of freedom of expression.[340] The Constitutional Court decided that it bore an obligation to balance the human rights of expression and privacy.[341] Expressive freedom serves functions of public accountability and democratic opinion-forming.[342] Privacy law protects "confidentiality, anonymity, and solitude."[343] On balance, the court found persuasive that the police were pictured in a public place, at an event of public interest, and the portrayal was not "insulting, degrading, hurtful, or distorted . . . or a bad impression of the depicted

---

[333] Alkotmánybíró [Constitutional Court] Sept. 23, 2014, No. 28/2014 (IX.29) (Hung.), http://public.mkab.hu/dev/dontesek.nsf/0/0E56D3CAD2A42323C1257B91001BAA15?OpenDocument [http://perma.cc/2R2J-YH7F] (translated to English by Google Translate).
[334] Attila Menyhárd, Institute, *supra* note 1, Apr. 10, 2015 (Hungary).
[335] No. 28/2014 (IX.29), ¶¶ 24, 28, 32 (citing Civ. Code §§ 2:423, 2:43, 2:48, 80 (Hung.)).
[336] *Id.* ¶¶ 22, 25 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8).
[337] Menyhárd, Institute, *supra* note 1.
[338] No. 28/2014 (IX.29), ¶ 40.
[339] *Id.* ¶ 4.
[340] *Id.* ¶ 1.
[341] *Id.* ¶¶ 18, 35.
[342] *Id.* ¶¶ 16-17.
[343] *Id.* ¶ 22 (in original, "titkosság, az anonimitás, és a magányhoz").

persons."[344] The civil code on its own terms provides that it yields to constitutional imperatives, and the Constitutional Court accordingly nullified the rulings below.[345]

Restrictions on photographing police in public places, or for that matter restrictions on photographing anyone in a public place, would have seemed utterly contrary to the spirit of free expression when the First Amendment emerged from Civil Rights-era transformation 45 years ago. But now, in the age of pervasive media and virtual identity threats, the wall that once neatly divided public and private spheres is giving way[346] to thermal imaging[347] and satellite tracking.[348] The First Amendment never was construed as a right to gather information.[349] But with data protection having emerged in Europe as a new human right,[350] privacy is assuming a new legal character that increasingly resonates with constitutional amplitude.[351] At the same time, police are lately beset with charges of misconduct,[352] precipitating a public desire to know what police are up to. Exhibiting its cliché duality,[353] technology such as police body cameras compromises privacy while promising accountability.[354] Thus far in the United States, lower courts confronted with the

[344] *Id.* ¶¶ 41, 48 (in original, "bántó, lealacsonyító vagy torz képet közvetítenek, vagy rossz benyomást keltenek az ábrázolt személyekről").
[345] *Id.* ¶¶ 44, 49 (citing Civ. Code art. 1:2 (Hung.)).
[346] *E.g.*, Robert Ellis Smith, *Sometimes, What is Public is Private*, 59 R.I. BAR J. 33 (2011).
[347] *See Kyllo v. United States*, 533 U.S. 27, 29-31 (2001).
[348] *See United States v. Jones*, 132 S. Ct. 945, 947 (2012).
[349] *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670, 111 S. Ct. 2513, 2518, 115 L. Ed. 2d 586 (1991) (maintaining that newsgathering must give way to generally applicable laws); *see also Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 238, 955 P.2d 469, 495, *as modified on denial of reh'g* (July 29, 1998) ("the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws").
[350] Charter of Fundamental Rights of the European Union, 2010/C 83/02, art. 8.
[351] *See, e.g., Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 143-47 (2011) (discussing informational privacy right, applied by court of appeals but only assumed *arguendo* in U.S. Supreme Court).
[352] *E.g.*, Michael Hirsh, *Tackling America's Police Abuse Epidemic*, POLITICO (Apr. 9, 2015), http://www.politico.com/magazine/story/2015/04/north-charleston-shooting-americas-police-abuse-epidemic-116838.html#.VaMx6PmnfPI [http://perma.cc/QD43-EBPY].
[353] *See, e.g.*, L. Gordon Crovitz, *Is Technology Good or Bad? Yes.*, WALL. ST. J., (Aug. 23, 2010), http://www.wsj.com/articles/SB10001424052748703579804575441461191438330.
[354] *Chapter Four Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1800-14 (2015) (analyzing pro-con arguments); *see also* Howard M. Wasserman, *Commentary: Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831 (2014) (analyzing argument rhetoric).

audio- and video-recording of police performing official duties have held the activities protected by the First Amendment.[355] Nevertheless, contested cases persist and in time will probe the limits of the right to record.[356]

6. ENGLAND AND THE CASE OF THE CAPTIVE AU PAIR

An English case[357] facilitates the enforcement of public anti-discrimination norms against private parties.[358] Plaintiff Hounga, a 14-year-old Nigerian national, was invited to work as an au pair[359] for the Allen family in the United Kingdom.[360] Hounga knowingly participated in a plan with the Allens to misrepresent her age and identity, to obtain and overstay a six-month visitor's visa, and to work illegally.[361] But contrary to their agreement, Hounga was not compensated with the agreed-upon £50 per month and access to education.[362] To the contrary, she suffered threats and serious physical abuse, and after 18 months was terminated and evicted.[363] Hounga brought actions against Mrs. Allen in tort and contract, and also for violation of the Race Relations Act 1976, claiming discrimination on the impermissible ground of nationality.[364] The lower courts dismissed Hounga's contract and tort claims upon the defense of illegality.[365]

---

[355] *E.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("the First Amendment protects the filming of government officials in public spaces"); *see* Sophia Cope, *Police Must Respect the Right of Citizens to Record Them*, ELEC. FRONTIER FOUND., Apr. 16, 2015, https://www.eff.org/deeplinks/2015/04/police-must-respect-right-citizens-record-them [http://perma.cc/R78R-N8N9].

[356] *See* Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, ATLANTIC, Apr. 28, 2015, http://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tell-you-to-stop-filming-them/391610/ [http://perma.cc/CL4G-PPPW].

[357] Allen v. Hounga, [2014] U.K.S.C. 47, 1 W.L.R. 2889.

[358] Annette Morris, Institute, *supra* note 1, Apr. 10, 2015 (England & Wales).

[359] An "au pair" is a young person, usually a woman, from a foreign country who lives with a family and helps with childcare and housework in return for the opportunity to learn the family's language. *Au Pair*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/au%20pair (last visited Feb. 23, 2016).

[360] *Allen*, 1 W.L.R. 2889, ¶ 2.

[361] *Id.* ¶¶6-11.

[362] *Id.* ¶ 13.

[363] *Id.* ¶¶ 14-15.

[364] *Id.* ¶ 16.

[365] *Allen*, 1 W.L.R. 2889, ¶ 24.

However, the U.K. Supreme Court balked on the application of the defense to the discrimination claim.[366] Ordinarily the defense of illegality preserves the integrity of the legal system by precluding an actor's windfall from unlawful activity.[367] However, "if the defendant's behaviour was truly disproportionate overall, it might be powerful evidence that the claimant's criminal conduct was not sufficiently linked to the injuries so as to attract the defence."[368] To reject Hounga's claim on the basis of her efforts to obtain employment and education, even if through illegal means, would put the court in the position of "appear[ing] to condone the illegality" of human trafficking, which international and U.K. human rights law recognizes as the far greater evil.[369]

Despite the shared common law heritage of the United Kingdom and United States, the British court's trouble with the defense of illegality likely would not be a problem upon similar facts in America. Professor Robert Prentice explicated the history of the illegality defense, otherwise known as the defense of unlawful conduct or the doctrine *ex turpi causa non oritur actio*,[370] beginning with its arguably unwise importation from contract to tort.[371] Analyzing the contemporary plight of the historic defense in tort, Prentice found it thriving in Australia, resurging in England, and "virtually disappeared" in the United States.[372] The *Second Restatement of Torts* trumpeted the defense's demise, declaring simply: "One is not barred from recovery for an

[366] *Id.* ¶ 25.
[367] *Id.* ¶¶ 43-44.
[368] *Id.* ¶ 32.
[369] *Id.* ¶¶ 35, 45-52 (internal quotation marks omitted).
[370] My translation: no action arises from a turpid condition.
[371] Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 57-66 (1995).
[372] *Id.* at 66-88.

interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime . . . ."[373]

Already four decades before the *Second Restatement*, Massachusetts qualified the illegality defense to apply only when the illegality was a "directly contributing cause" to the injury.[374] Thus, the court obviated the absurd outcome that a plaintiff illegally in the United States would be unable to recover when hit by a car.[375] The court explained that the plaintiff's illegal entry "into the country d[id] not so taint his . . . peaceful presence as to preclude . . . redress."[376] As with all analyses of extended causation, the question is one of degree. The *Restatement* illustrated intentional harms between conspirators: "if two robbers dispute over the spoils and one of them shoots the other, the other has a cause of action for the physical harm, although he would not have a cause of action because of a refusal by the other to divide the spoils."[377] The successful robbery was a cause of both the ill division of spoils and the shooting, but a direct, or substantial, cause only of the former.

Similarly, Hounga would not be able to sue Allen in U.S. law (in contract or tort) for the £50 monthly stipend or denial of educational opportunity. Those are spoils ill divided, losses resulting directly from an illegal bargain. But Hounga should be able to sue for physical abuse and civil rights violations, which are beyond the scope of the illegal bargain: closer to the alien hit by the car, about at shooting between conspirators, and well beyond ill divided spoils. The outcome then is the same as the English court's, but "[t]he legal concept of cause comes to the rescue in

[373] RESTATEMENT (SECOND) OF TORTS § 889 (1979).
[374] *Janusis v. Long*, 284 Mass. 403, 410, 188 N.E. 228, 231 (1933).
[375] *Id.* at 231-32.
[376] *Id.*
[377] RESTATEMENT (SECOND) OF TORTS § 889 cmt. c. (internal citation omitted).

these cases"[378] in America, doing the dirty work of an otherwise hazardously idiosyncratic test for disproportionality.

7. SWEDEN AND THE CASES OF THE FOUL-MOUTHED DRIVER AND THE FUSSY FERTILITY CLINIC

Two cases from Sweden, decided the same day in the Swedish Supreme Court,[379] concerned discrimination.[380] In both cases, the methodology and quantum of damages were the issues on appeal; however, the delegate from Sweden brought the cases to the floor to comment on their significance on the merits in anti-discrimination law.[381] Claimants won awards in both cases, signaling expansive judicial interpretation of anti-discrimination offenses.[382] Moreover, the underlying facts are provocative in light of the stress lines appearing recently on the famously welcoming face of Swedish immigration policy.[383]

In the first case, the driver of a crowded Veolia Transport bus was perturbed when a patron, "FJ," repeatedly inadvertently struck a stop-request button with her knee.[384] FJ was accompanied

---

[378] William Landes & Richard Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 130-31 (1983), *quoted in* SHAPO & PELTZ, *supra* note 4, at 561.

[379] Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2014-06-26 p. 499 T 3592-13 (Swed.), *available at* http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2014/2014-06-26%20T%203592-13%20Dom.pdf [http://perma.cc/62YB-NERR]; Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2014-06-26 p. 499 T 5507-12 (Swed.), *available at* http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2014/2014-06-26%20T%205507-12%20Dom%20skiljaktig.pdf [http://perma.cc/B37B-XPFU] (translated to English by Google Translate. I am grateful to Professor Håkan Andersson for pointing me to these decisions and for providing additional resources of his own authorship on the subject of these cases and Swedish anti-discrimination law in general: Håkan Andersson, *Den "Nya" Diskrimineringsersättningen (I)—Nya Explicita Bedömningsgrunder Avseende Upprättelse och Prevention*, INFOTORG JURIDIK, Jan. 2015 (reprint on file with author); *Den "Nya" Diskrimineringsersättningen (II)—Nya Explicita Bedömningsgrunder Avseende Miniminivå*, INFOTORG JURIDIK, Jan. 2015 (reprint on file with author); and *Diskrimineringsjuridikens Ersättningsrättsliga Diskurs—en Argumentativ Inventering*, 2013 SVENSK JURIST TIDNING 779, *available at* http://svjt.se/svjt/2013/779.)

[380] Håkan Andersson, Institute, *supra* note 1, Apr. 10, 2015 (Sweden).

[381] *Id.*

[382] *Id.*

[383] *See, e.g.*, Joanna Kakissis, *Sweden's Tolerance Is Tested By Tide Of Syrian Immigrants*, NPR MORNING EDITION, Dec. 5, 2014, http://www.npr.org/sections/parallels/2014/12/05/368640533/swedens-tolerance-is-tested-by-tide-of-syrian-immigrants [http://perma.cc/E47K-X6NX]; Shaun Ley, *Sweden Offers No Easy Immigration Answers*, BBC RADIO 4, Aug. 5, 2015, http://www.bbc.com/news/uk-33775796 [http://perma.cc/8SEF-AM5J].

[384] NJA 2014-06-26 p. 499 T 3592-13, ¶¶ 1-2.

by "FAI" and their infant son in a stroller.[385] FJ wore a shawl, and FAI, an imam in Eskilstuna, wore a beard.[386] The bus driver left his seat to confront them and physically removed FJ's knee from its position near the button.[387] An argument ensued with FAI, in which the driver said "something like that if FJ and FAI do not speak Swedish, they can 'go home to Taliban country.' He also called them idiots. Later, he made an obscene gesture at them."[388] FJ and FAI left the bus and reported feelings of fright, offense, and concern that FAI was recognized in the public encounter.[389] The discrimination ombudsman sought compensation for FJ and FAI of 100,000 Swedish kronor each (close to US $12,000 each) for violation of dignity through harassment based on ethnicity and religion.[390] The lower courts set the award variously at 15,000 kronor each or 20,000 kronor each, differing over the degree of violence the bus driver had exerted on FJ's knee.[391] Veolia appealed to reduce the award.[392]

In the second case, "DP," a lesbian, sought assistance with fertility at the gynecological clinic of a medical center, "UP," a public agency of Stockholm County in the Liljeholmens district.[393] Because she is lesbian, the medical center refused to see DP, rather referred her to SÖSAM, a facility of South Hospital, purportedly for that facility's specialization in assisting lesbian couples.[394] Some days later, DP spoke to a UP gynecologist to ascertain the reason for the referral policy, and subsequently UP did treat DP.[395] Nevertheless, the discrimination ombudsman

---

[385] *Id.* ¶ 1.
[386] *Id.* ¶¶ 4-5.
[387] *Id.* ¶ 3.
[388] *Id.* (in original, "något i stil med att om FAI och FJ inte talade svenska så kunde de 'åka hem till talibanlandet.' Han kallade dem även för idioter. Senare gjorde han en obscen gest mot dem.").
[389] *Id.* ¶¶ 4-5.
[390] NJA 2014-06-26 p. 499 T 3592-13, ¶ 9.
[391] *Id.* ¶ 10.
[392] *Id.* (Claim in the Supreme Court).
[393] NJA 2014-06-26 p. 499 T 5507-12, ¶ 1.
[394] *Id.*
[395] *Id.* ¶ 2.

ordered the Stockholm County Council to pay 100,000 kronor for having disadvantaged DP for reason of her sexual orientation.[396] Finding no medical justification for the UP referral policy,[397] the district court awarded DP 15,000 kronor, which the intermediate appellate court ultimately upped to 30,000 kronor.[398] The discrimination ombudsman appealed for a higher award.[399]

The Swedish Supreme Court took the occasion of these two challenges to clarify the methodology for damages valuation in cases under the anti-discrimination statute.[400] The valuation has two components, one compensatory, to compensate the plaintiff for harm including pecuniary losses as well as the non-pecuniary loss of moral injury; and the other punitive, to effect deterrence of discrimination in the future.[401] The compensatory analysis operates according to the usual principles of tort law.[402] Assessment of moral damages requires analysis of the egregiousness of the offense and the severity of the injury, checked by an objective perspective.[403] The court must judge "the seriousness of the discrimination by all the negative feelings of humiliation, contempt, deprivation or similar violation—in view of its cause, nature, scope and effects and taking into account the circumstances," including the defendant's intent.[404]

The punitive portion of the award does not depend on tort principles, because Swedish law does not ordinarily permit punitive damages.[405] The focus is not on compensation, but

[396] *Id.* ¶ 3.
[397] *Id.* ¶ 10.
[398] NJA 2014-06-26 p. 499 T 5507-12, ¶ 4.
[399] *Id.* (Claim in the Supreme Court).
[400] *See* NJA 2014-06-26 p. 499 T 3592-13, ¶ 26.
[401] NJA 2014-06-26 p. 499 T 5507-12, ¶ 12.
[402] *Id.* at para. 13.
[403] NJA, I (T 3592-13) at para. 27; NJA, II (T 5507-12) at para. 13.
[404] NJA, I (T 3592-13) at para. 30 (in original, "allvaret av diskrimineringen efter främst de negativa känslor av förnedring, ringaktande, utsatthet eller liknande som kränkningen—i betraktande av dess orsak, art, omfattning och verkningar och med beaktande av omständigheterna runt denna—typiskt sett är ägnad att framkalla").
[405] *Id.* at para. 35.

prevention.[406] Presumptively, the punitive award starts as equal to the compensatory award.[407] The court must then adjust the punitive award upward or downward as circumstances warrant. Factors that press for upward adjustment may include any tangible advantage the defendant obtained because of the discrimination, or a pattern of discriminatory behavior by the defendant.[408] Culpability, from omission or carelessness to intent, and the seriousness of the offense may dictate upward or downward adjustment.[409] Downward adjustment may also be warranted by the defendant's mitigation,[410] such as sincere apology.[411]

In the bus case, the Swedish Supreme Court reduced the award in sum, setting the compensatory award at 15,000 kronor to each defendant and the punitive award at 10,000 kronor to each defendant.[412] FJ and FAI suffered emotional and moral harm, but not tangible loss.[413] The Supreme Court discounted the physical contact with FJ's knee because it could not be tied causally to the bus driver's otherwise discriminatory intent.[414] The driver's misconduct was serious, aggravated by public circumstances and his failure to mitigate in any way.[415] Considering preventive factors, though, the Court considered that Veolia reprimanded its driver and sent him for customer service training, and a company representative promptly telephoned FAI and apologized.[416]

---

[406] *Id.*
[407] *Id.* at para. 36; NJA, II (T 5507-12) at para. 14.
[408] NJA, I (T 3592-13) at para. 37.
[409] *Id.* at para. 37-38.
[410] *Id.* at para. 38.
[411] NJA, II (T 5507-12) at para. 51-52.
[412] *Id.* at para. 21.
[413] NJA, I (T 3592-13) at para. 42, 47.
[414] *Id.* at para. 43.
[415] *Id.* at para. 45-46.
[416] *Id.* at para. 50.

In the medical center case, the Supreme Court concluded that an award of only 10,000 kronor was warranted, comprising of 5,000 kronor for compensation and 5,000 kronor for prevention.[417] The Court let the 30,000 kronor award stand, because the County Council had not appealed.[418] In this case, the Court struggled to find the minimum appropriate compensatory award, because DP's harm was regarded as minimal.[419] She had been discriminated against, and the medical center was without justification.[420] But UP was benevolent in its intentions, meaning to send DP to SÖSAM for better care, and UP later treated DP.[421] The court considered that statutory compensation for minor violations of the national data protection law sits at 3,000 kronor, and European human rights law finds suspect an award that sums less than 10,000 kronor.[422] Accordingly, the court set compensation at 5,000 kronor, which, when doubled by an unadjusted punitive award, hit the 10,000 mark.[423]

Though the damages calculations make for a noteworthy precedent, the delegate from Sweden commented on the cases as evidence of an expansive construction of Swedish anti-discrimination law.[424] Swedish law unremarkably recognizes discrimination based on race, gender, religion, disability, age, and sexual identity.[425] But the potential for a minimum 10,000 kronor (almost US $1,200) award in tort arising from an unfortunate but singular incident, even absent malicious intent, threatens to chill everyday social interaction. The delegate suggested that the Court's approach is too permissive of claimants' assertions of injury based on their subjective

[417] NJA, II (T 5507-12) at para. 28.
[418] *Id.* at para. 29.
[419] *Id.* at para. 17.
[420] *Id.* at para. 15-16.
[421] *Id.* at para. 15.
[422] *Id.* at para. 17.
[423] *Id.*
[424] Andersson, Institute, *supra* note 1.
[425] *Id.*

perceptions, despite the Court's purported insistence on objective perspective.[426] While no one condones the conduct of the bus driver, the case used the mechanism of tort law to redress what might have been better classified in Swedish law as an incident of hate speech.[427] And the Court in the medical center case hit the public treasury with a liability based only on well meaning, if misguided, medical judgment.[428]

The slippery-slope worry accords well with conservative and libertarian anxiety in America over the scope of anti-discrimination law.[429] Categorical protection in federal law against discrimination has grown from "race or color" in Reconstruction[430] to embrace religion,[431] national origin,[432] gender,[433] age,[434] disability[435] and, most recently in the heralded Supreme Court decision *Obergefell v. Hodges*, sexual orientation.[436] Regulation of hate speech in the U.S. has fallen flat against judicial protection for free expression,[437] marking a distinction from European and other jurisdictions.[438] At the same time, the U.S. Constitution permits criminal punishment to turn on hateful motives, which may be evidenced by hateful speech,[439] and probably permits punishment for harassment, which might differ from hate speech only in repetition or degree.[440]

---

[426] *Id.*
[427] *Id.*
[428] *Id.*
[429] *See, e.g.*, DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAW 11-13 (Cato Inst. ed., 2003).
[430] Civil Rights Act of 1866, 42 U.S.C. § 1981.
[431] Civil Rights Act of 1964, 42 U.S.C. § 2000a.
[432] *Id.*
[433] *Id.* § 701.
[434] Age Discrimination in Emp't Act of 1967, 29 U.S.C. § 623.
[435] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.
[436] *See* Obergefell v. Hodges, 576 U.S. ___, (2015).
[437] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 402 (1992) (White, J., concurring).
[438] SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 1-2 (Univ. of Neb. ed., 1994).
[439] Wis. v. Mitchell, 508 U.S. 476, 487 (1993); *see also* 18 U.S.C. § 249 (2009).
[440] *See* Avis Rent A Car Sys. Inc. v. Aguilar, 529 U.S. 1138, 1141 (2000) (Thomas, J., dissenting from cert. denial in case in which state court allowed injunction against employer's use of racial or ethnic epithets to or about Latino employees).

As to damages, U.S. anti-discrimination law also provides for both compensatory and punitive awards, though the specifics vary with statutes.[441] To generalize, compensatory damages follow tort norms, like in Sweden, though the U.S. norms of course derive from common law rather than judicial construction of civil law.[442] Constitutional violation cannot support presumed damages, nor any kind of per se compensatory damages.[443] However, compensatory damages may derive from actual but intangible harms, such as emotional distress, reputational loss, and personal humiliation.[444] The U.S. Supreme Court rejected damages based on mere constitutional infringement as too likely to result in arbitrary awards,[445] though appeals courts have allowed for only nominal damages when no compensatory damages can be proved.[446] Civil rights statutes also authorize punitive damages and sometimes, contrary to the usual "American rule," attorney-fee shifting.[447] Because punitive damages are known to American common law, the common law provides a ready test, allowing punitive damages for common law malice, *i.e.*, evil motive, or, in the alternative, for recklessness.[448]

The outcomes in the bus and medical center cases would be regarded as overreaching by U.S. legal standards, for much the reason that the delegate from Sweden suggested they are worrisome. The quarrel is not with the categorical expansion of anti-discrimination protection, which is a matter principally for policymakers and not at issue in either case. But the potential overlap of anti-discrimination law with the regulation of hate speech in the bus driver case would

---

[441] *See generally* Mary Ann Sedey, Compensatory and Punitive Damages in Federal Civil Rights Actions (2005) (unpublished paper submitted to annual Labor and Employment Law Conference of American Bar Association), http://apps.americanbar.org/labor/lel-aba-annual/papers/2005/033.pdf. [http://perma.cc/PW6F-5QNR].
[442] 42 U.S.C. § 1988(a) (2000); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986) (construing 42 U.S.C. § 1983).
[443] *Stachura*, 477 U.S. at 311-12.
[444] *Id.* at 307.
[445] *Id.* at 310.
[446] Hazle v. Crofoot, 727 F.3d 983, 993 (9th Cir. 2013).
[447] *E.g.*, 42 U.S.C. § 1988(b).
[448] Smith v. Wade, 461 U.S. 30, 48 (1983) (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (1977)).

be highly problematic in the U.S. because of the constitutional protection for the speech. Without a causal link to the bus driver's touching of FJ's knee, or a purposeful ejection of FJ and FAI from the bus, there is no other unlawful, predicate action that can be tested for discriminatory motive. Absent also are the pattern or severity that would characterize harassment. So in U.S. law, such a discrete event, however repugnant, would remain a matter of employee discipline and customer care.

A similar result would pertain in the medical center case. U.S. federal statutes do not prohibit sexual-orientation discrimination; moreover, municipal entities are immune from liability under the flagship federal civil rights law, 42 U.S.C. § 1983, because of federalism constraints.[449] The recent *Obergefell* doctrine in U.S. constitutional law reaches public actors under the state action doctrine, but the contours of the constitutional rule, and whether it operates beyond marriage at all, will be years in the mapping. More saliently, on the damages question, the 10,000-krona award in the Swedish case seemed to be a compensation for rights violation per se. Damages in U,S. civil rights law, derived as they are from common law tort, are measured subjectively; DP would have to prove actual loss, even if intangible, to win damages. And punitive damages would not be available upon a defendant's benevolent motive. Even if DP could get to a nominal award, it likely would be symbolic and negligible in sum.

[449] Monell v. N.Y.C. Dep't of Soc. Serv., 436 U.S. 658, 690-92 (1978).

E. CLASS ACTIONS: FRANCE AND THE CASE OF THE CONSUMER COLLECTIVE

France as well as other countries adopted new laws authorizing or expanding consumer class action litigation,[450] and the French delegate[451] focused on the change.[452] Europe has been slow to develop collective action, and conventional wisdom states that perceived excesses against enterprise in the U.S. have been cautionary. France exemplifies such caution, so the enactment of the law—in development since 2010 and following "decades of debate"[453]—marks a milestone, even though the law is comparatively limited in scope.[454] French legislators were motivated by public demand after a series of ugly product defect incidents.[455]

---

[450] Professor Durant from Belgium, *supra* note 56, split her time discussing the case I selected for discussion in part II.A, *supra*, and Belgian class action legislation. Other delegates in their comments, *supra* note 1, noted that their countries too had innovated in class action legislation, though they had not chosen that topic for discussion. *See also* Roman Madej, *EU Class Actions Gather Pace—Bill Before Belgian Parliament*, BRYAN CAVE (Feb. 5, 2014), http://www.eu-competitionlaw.com/eu-class-actions-gather-pace-bill-before-belgium-parliament/# [http://perma.cc/5YND-QACR]. *See generally* Verica Trstenjak & Petra Weingerl, *Collective Actions in the European Union—American or European Model?*, 5 BEIJING L. REV. 155 (2014), http://dx.doi.org/10.4236/blr.2014.53015 [http://perma.cc/VL3R-HN6K], (reviewing legal developments at European federal level). I focus here on France rather than Belgium because the French law derives some unusual features from deliberate divergence with U.S. law. For a review of European class action legislation, *see* CLASS ACTIONS IN EUROPE AND THE UNITED STATES 5-57 (Georg Lett & Sofie Vang Kryger eds., Sept. 2014), http://www.libralex.com/publications/class-actions-in-europe-and-the-us [http://perma.cc/N2ZQ-J8YT] (last visited July 10, 2015).

[451] Michel Séjean, Institute, *supra* note 1, (France).

[452] Loi n° 2014-344 du 17 mars 2014 relative à la consummation [Law no. 2014-344 of Mar. 17, 2014, regarding consumers], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 18, 2014, p. 5400, art. 1, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036&categorieLien=id [http://perma.cc/P9NL-JMJF]. The law also enhanced the substantive scope of consumer rights. *See generally* Thomas Oster, *Adoption of the "Loi Hamon" Consumer Bill: Overview of the Main Provisions*, LEXOLOGY (Feb. 26, 2014), http://www.lexology.com/library/detail.aspx?g=4256f052-aae8-421d-8e22-4f7b966068c0 [http://perma.cc/YJ5L-Q2BT]. However, note that many provisions of the code as enacted in 2014 did not survive constitutional scrutiny. *See* Law no. 2014-344 (*passim*, "[*Dispositions déclarées non conformes à la Constitution par la décision du Conseil constitutionnel no 2014-690 DC du 13 mars 2014*.]" (original emphasis)).

[453] Louise-Astrid Aberg, Raimbaut Lacoeuilhe, & Lionel Lesur, *France Finally Embraces Class Actions*, MCDERMOTT WILL & EMERY (Mar. 2014), http://www.mwe.com/France-Finally-Embraces-Class-Actions-02-27-2014/ [http://perma.cc/223Z-QHYK] [hereinafter Aberg].

[454] The development of the law from 2010 conception to 2014 enactment is summarized in Marc E. Shelley & Emily R. Fedeles, *New French Class Action Law Could Span the Gamut*, LAW360 (May 5, 2014), https://advance.lexis.com/api/permalink/f57db13f-78d9-488e-ab19-5fe63c336916/?context=1000516 (Lexis Advance).

[455] *Id.* (reporting incidents involving breast implants, horsemeat, and "a diabetes drug, which had also been prescribed as an appetite suppressant, . . . allegedly responsible for the deaths of as many as 2,000 people and cardiovascular complications in countless others"). The first lawsuit under the new law, filed immediately upon its effective date in October 2014, involved real estate rental fees that renters alleged were illegal. Ozan Akyurek & Clémence de Perthuis,

A noteworthy feature of the French law at the outset is that it authorizes only consumer organizations registered with the national government—of which there were only fifteen or sixteen when the law was adopted[456]—to act as plaintiffs on behalf of consumers.[457] Thus actions cannot be initiated by other organizations, nor by attorneys as representatives of consumers, nor on behalf of consumers other than natural persons.[458] The disallowance of attorney-led classes represents a deliberate rejection of the U.S. model for collective action.[459] French legislators perceived the U.S. model as prone to excess because attorneys are motivated by their own financial remuneration too often to the exclusion of the consumers' best interests.[460]

Consistency of claims is ensured by requiring that represented consumers suffered similar loss from the same failure of obligation on the part of the defendant.[461] A certification process occurs upon a plaintiff-favorable outcome on exemplary cases presented to the civil court.[462] Class participation ordinarily works on a consumer opt-in basis.[463] However, the law provides an alternative procedure for cases in which the consumer class is limited in number and fully identifiable, and consumers each suffered the same loss.[464] In such cases, after certification, the court may award damages directly to the identified consumers without the delay of an opt-in procedure.[465] The French law allows recovery only for pecuniary losses in consumer and

---

First-Ever Class Action Filed in France, JONES DAY (Oct. 2014), http://www.jonesday.com/first-ever-class-action-filed-in-france-10-21-2014/ [http://perma.cc/T3QG-S6AE].

[456] Shelley & Fedeles, *supra* note 454; Aberg, *supra* note 453.

[457] Law no. 2014-344 art. 1 (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 1).

[458] Séjean, Institute, *supra* note 1; Aberg, *supra* note 453.

[459] Séjean, Institute, *supra* note 1.

[460] *Id.*

[461] Law no. 2014-344 art. 1 (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 1).

[462] *Id.* (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 2); Shelley & Fedeles, *supra* note 454.

[463] Law no. 2014-344 art. 1 (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 2); *see also* Shelley & Fedeles, *supra* note 454; Séjean, Institute, *supra* note 1.

[464] Law no. 2014-344 art. 1 (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 3).

[465] *Id.* (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 3); *see also* Shelley & Fedeles, *supra* note 454. *Compare* Séjean, Institute, *supra* note 1 ("not far from an opt out system?"), *with* Oster, *supra* note 452 ("('*opt-out*' system)"), *and with* Aberg, *supra* note 453 ("not an opt-out procedure but a specific and unique opt-in procedure").

competition law[466]—thus, significantly and curiously, not for physical injury, nor for environmental harms.[467]

The French law has been criticized from the western side of the Atlantic, in part, for being too cautiously reactionary to U.S. class action practice.[468] Based on exemplary cases, the timing of the responsibility determination because the process precedes class certification.[469] Unaware of the full class membership, the defendant might be deprived of the opportunity to raise defenses that would be effective against only some individual consumers.[470] Inversely, absent class members might suffer because of a pre-certification decision in the defendant's favor.[471] Shelley and Fedeles reported that the ordering of events was a deliberate legislative choice, as socialist-party proponents of the legislation feared that earlier class certification would bog things down.[472] The attorneys also criticized the French law for its lack of a consolidation process, potentially forcing defendants to litigate similar cases in different civil courts, and possibly affording plaintiff more than one bite at the apple.[473]

Of course U.S. class action practice has its supporters and critics, both at home and abroad, and is itself a work in progress. Andrew Trask, an American lawyer based in London, recently reported on comparative discussion of U.S. and European approaches to collective redress.[474] Trask's observations show European systems, like France, struggling with issues such as how to

---

[466] Law no. 2014-344 (amending C. CONSUMMATION bk. IV, tit. II, new ch. III, § 1).
[467] Shelley & Fedeles, *supra* note 454; Séjean, Institute, *supra* note 1.
[468] Aberg, *supra* note 453.
[469] Shelley & Fedeles, *supra* note 454.
[470] *Id.*
[471] *Id.*
[472] *Id.*
[473] *Id.*
[474] Andrew J. Trask, *Perfecting The (European) Class Action*, CLASS ACTION COUNTERMEASURES, (July 7, 2015), http://www.classactioncountermeasures.com/2015/07/articles/uncategorized/perfecting-the-european-class-action/[http://perma.cc/L5M2-AWWS].

ensure the clients' best interests over attorneys'; how to attain claim consistency; whether to allow opt-out litigation; and how to handle multi-jurisdictional cases to avoid parallel claims and manage cross-border disputes.[475] In this light, Trask lauded "the particular genius" of the multi-factor class certification process in U.S. Federal Rule of Civil Procedure 23,[476] in particular the class criteria of "numerosity, commonality, typicality, and adequate representation."[477] At the same time, Trask concluded that there is room to learn from study of Europe's experiments. He opined that "a less expansive Rule 23" would not mean "the death of collective redress," and strict construction of Rule 23 "will not kill the class action; nor will it create a corporate-ruled dystopia."[478]

In just that vein, U.S. legislators who share the European concern that class action latitude hampers enterprise introduced a bill in April 2015; the "Fairness in Class Action Litigation Act of 2015" would tighten the certification process by requiring the petitioner for certification "affirmatively [to] demonstrate[] through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the . . . class representative."[479] This proposal complements an apparent inclination the U.S. Supreme Court has expressed in its rejection of class actions under Rule 23 in 2011 with *Wal-Mart Stores, Inc. v. Dukes*[480] and in 2013 with *Comcast Corp. v. Behrend*.[481] The Court shook up the class action landscape when it found consistency lacking in *Wal-Mart.* It rejected plaintiffs' certification theory of employment discrimination through local supervisors' discretion without proffer of common discriminatory

---

[475] *Id.*
[476] *Id.*
[477] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (characterizing FED R. CIV. P. 23(a)).
[478] Trask, *supra* note 474.
[479] H.R. 1927, 114th Cong., 1st Sess. (introduced Apr. 22, 2015).
[480] *Wal-Mart*, 131 S. Ct. 2541.
[481] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1429 (2013); *see also* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013) (rejecting collective action under Fair Labor Standards Act, 29 U.S.C. § 216(b), as moot, distinguishing FED R. CIV. P. 23, when defendant offered full satisfaction to named plaintiff).

exercises, despite plaintiffs' statistical and anecdotal evidence.[482] The Court further tightened the gantlet in *Comcast Corp.* when it rejected a class of more than two million cable TV subscribers, holding that the plaintiffs' statistical proof of defendant's anticompetitive pricing did not sufficiently demonstrate consistent loss across the class.[483]

Now the Court has granted certiorari in another class action challenge to be heard in the 2015-16 term.[484] This latest case again puts consistency front and center. The Eighth Circuit, relying on plaintiffs' statistical model, affirmed class certification in an employment under-compensation suit, in which defendant and industry giant Tyson Foods asserted prohibitive variation in employees' work gear, work routines, and departmental duties and management.[485] Perhaps lending credence to European suspicions, Circuit Judge Clarence Arlen Beam, who dissented,[486] characterized the case as "yet another manifestation of a professionally assembled class action lurching out of control."[487]

---

[482] *Wal-Mart*, 131 S. Ct. at 2550-57 (construing FED. R. CIV. P. 23(a)). The Court also found the erroneously certified under Rule 23, because the plaintiffs sought monetary relief in back pay, not incidental to injunctive relief. *Id.* at 2557-61 (construing FED R. CIV. P. 23(b)(2), one of three alternative bases for class action described by subpart (b), to permit class seeking only injunctive and incidental monetary remedy).

[483] *Comcast*, 133 S. Ct. at 1437-41 (construing FED. R. CIV. P. 23(b)(3), one of three alternative bases for class action described by subpart (b), which requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy").

[484] Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 797, *reh'g denied*, 593 F. Appx. 578 (8th Cir. 2014), *cert. granted*, No. 14-1146, 83 U.S.L.W. 3765, 3883, 3888, 2015 WL 1278593 (mem.) (U.S. June 8, 2015); *see also* Brent Kendall, *Supreme Court to Hear Case Offering Opportunity to Limit Class-Action Suits*, WALL. ST. J. (June 8, 2015), http://www.wsj.com/articles/supreme-court-to-hear-case-offering-opportunity-to-limit-class-action-suits-1433787388 [http://perma.cc/EJV9-RJMB]. The case features both a Rule 23 class certification and, as in *Genesis Healthcare*, 133 S. Ct. 1523, *see supra* note 481, a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b).

[485] *Bouaphakeo*, 765 F.3d at 797, 800.

[486] *Id.* at 800-05 (Beam, Cir. J., dissenting).

[487] *Bouaphakeo*, 593 F. Appx. at 578 (Beam, Cir. J., dissenting).

III. ANALYSIS

Delegates to the 2015 conference of the European Tort Law Institute presented cases and statutes of interest from their respective countries, and a number of themes recurred in those presentations: (a) damages valuation and compensation for life and death; (b) multiple liabilities; (c) the interplay of tort and insurance; (d) official liability and civil rights; and (e) consumer class actions. Though most of the European countries are civil code jurisdictions, these themes raise issues common to code and common law jurisdictions, and common to U.S. and European tort law.

Cases from seven countries showed courts struggling with the problem of quantifying loss along a broad spectrum, from a ritzy car to the hedonic value of life itself.[488] An Estonian court scrutinized a fisherman's need to replace his BMW.[489] A Finnish court considered the consequences of a lost year at university.[490] A Maltese court wrestled with the value of homemaking,[491] and a Slovak court with the value of social life.[492] Belgian and Portuguese jurists contemplated the impact on family of severe disability.[493] And an Italian court contemplated the hedonic value of life in contrast with the emptiness of death, recognizing "thanatological" damages in contrast with biological loss.[494]

All of these outcomes under civil codes accorded roughly with their disposition in U.S. common law tort, except the new direction marked by Italy, which is on subsequent appeal there. The motivations underlying the constructions of civil code and the development of U.S. common law focus on the same essential rationale, which is to make the plaintiff whole with a monetary

---

[488] *See supra* part II.A.
[489] *See supra* part II.A.1.
[490] *See supra* part II.A.2.
[491] *See supra* part II.A.3.
[492] *See supra* part II.A.4.
[493] *See supra* parts II.A.5 & .7.
[494] *See supra* part II.A.6.

proxy for consequential losses, subject to the rigors of proof. The systems were consistent toward full compensation, as in the consequences of higher education denied. Courts in both systems also evinced similar suspicion of claims less concrete, farther detached from physicality, as in the Slovakian insistence on proof of social injury in comparison with the powerful U.S. aversion to double recovery. The systems also were consistent where they arguably fell short of full recovery, as in fully and fairly quantifying the value of homemaking, and in measuring the lifetime costs to care for a child born with severe and permanent disability.

A difference manifested in some European courts' reliance on European federal or other international law, especially the fundamental value placed on the integrity of the person. Insisting that homemaking must be positively valued, economically, the court in Malta pointed to European human rights as incorporated into European law with the Treaty of Lisbon. U.S. courts have found their way to that outcome without explicit reference to constitutional notions of personal liberty. The Belgian court pointed to the rights of children, even the unborn, both in European human rights and in global international instruments, to limit recovery for "wrongful life," or "wrongful birth." U.S. courts have recognized the same logic in public policy to reach a comparable outcome, but refrain from implicating constitutional rights as a basis. The Portuguese court pointed to pan-European tort principles, along with precedents from three other western European countries, to construe the Portuguese civil code to favor spousal recovery for suffering when an injured person survives. States in the U.S. vary in their approach to the problem.

Cases from five countries showed courts hashing out problems in multiple liabilities, including plaintiff's own fault, imputed fault, vicarious liability, and an empty chair.[495] A German court refused to find a plaintiff's contributory negligence in failure to wear a bicycle helmet when

[495] *See supra* part II.B.

statute did not require one. A Greek court held a hospital liable for misdiagnosis by its non-employee doctors. An Irish court allowed a dated claim of child sex abuse under an extended statute of limitation, but charged the plaintiff with the fault of a secondarily culpable empty chair. A Norwegian court reduced the tax on a family for a decedent loved one's contributory fault for drunk driving. And a Slovenian court allowed a woman to recover when bitten by her own dog on the rationale that her parents were the dog's legal custodians.

These outcomes, all under civil codes save Ireland's, find analogs in U.S. common law tort. The animating principle behind the European decisions is equity with a dash of judicial restraint. The Irish decision was a straightforward application of equity, equally at home in the U.S., in charging the plaintiff rather than the defendant for late filing.[496] The German court was vexed by the prospect of assuming a legislative role, though its helmet decision was informed equitably with reticence to award the defendant a windfall.[497] Though divided on helmet laws, U.S. courts likewise cite windfalls and fairness while quietly nursing a jealous fealty to corrective justice. The Greek decision considered the fair perception of responsible parties from the plaintiff's point of view, just as the U.S. common law boasts the doctrine of ostensible agency.[498] The Slovenian decision likewise turned on the parties' mutually understood, de facto roles, if to the displeasure of the defendants' insurer.[499] That outcome would pertain in the U.S. Norway similarly conferred on plaintiffs an equitable advantage after reasoning that the defendant's insurer would be the one to pay the tab.[500] That outcome is the most peculiar to U.S. common law norms, but it

[496] *See supra* part II.B.3.
[497] *See supra* part II.B.1.
[498] *See supra* part II.B.2.
[499] *See supra* part II.B.5.
[500] *See supra* part II.B.4.

also was peculiar to Norwegian norms. Both systems feature the odd, equity-driven exception in which a court has been willing to parse the fault that ordinarily would be imputed to survivors.

A Latvian case, a European federal case, and a Spanish statute all implicated the interplay of tort and insurance law.[501] In Latvia, the interposition of a commercial driver's criminal fault severed the chain of responsibility between the individual driver and the insured vehicle owner.[502] A statute in Spain shifted the responsibility for some animal-vehicle collisions to compulsorily insured drivers, even when hunters play a causal role in the accident.[503] And the Court of Justice construed the European law of compulsory vehicle insurance with a definition of "use" that afforded a plaintiff victim of a farm tractor accident a chance to recover from the tractor's insurer.[504]

These outcomes are not incompatible with U.S. law, but at the same time cannot be generalized as accordant. Though common law tort in the U.S. heavily implicates insurance law, the latter is a creature substantially of contract law and insurance regulation by statute and administrative law in the states. The result of all that fine-tuning by the political branches is a range of insurance systems that reflect local policy predilections. In this system, state courts have divided on the question presented in Latvia, in part a function of judicial willingness to be "activist," [505] i.e., to void contract terms as against public policy, as might favor a claimant, rather than sticking to the contract text to preclude insurer liability. Understanding that insurers draft adhesion contracts, an American rule of construction puts a thumb in the scale in favor of the insured in case of ambiguity, thereby driving more plaintiff-favorable decisions that one might expect in a legal

[501] *See supra* part II.C.
[502] *See supra* part II.C.1.
[503] *See supra* part II.C.2.
[504] *See supra* part II.C.3.
[505] I use a loaded term. *See, e.g.*, S.M., *Those "Activist" Judges*, ECONOMIST (July 8, 2015), http://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0 [http://perma.cc/3Q2K-8LJN].

system dominated by libertarian, freedom-to-contract principles. That thumb motivates the same occasional deviation from the contract that the strident dissent would have favored in the Latvian case.

The Spanish statute and the CJEU result derogate from U.S. norms. In the case of Spain, the reporting delegate recognized the code amendment as an unusual change, possibly evidencing the political influence of a special interest group. Certainly U.S. law sees similar statutory variations, such as skier responsibility statutes, to protect local economic interests. Risk of loss shifts to first party insureds, and premiums go up, whether for drivers in the Andalusian Sierra Nevadas or for recreational skiers in the Colorado Rockies. The CJEU result in favor of plaintiff Vnuk was surprising only insofar as a U.S. insurer ordinarily would take care to disclaim (or embrace, and charge for) such liability. But the court's reasoning, simply construing a term in European law that had been imported into Slovenian law and contract, squared well with the U.S. rule of construction that favors the insured in case of ambiguity. Thus in both the Spanish and EU cases, the mode of law-making and construction was the same, even if the outcomes were specific to culture and context.

Cases from seven countries, five of them code jurisdictions, showed European courts tackling problems in official liability and the application of public norms, namely anti-discrimination, to private parties.[506] The Croatian court remarkably used a case of a jilted appointee to public office to create potential state liability under a legislative duty of care.[507] The Czech court managed a manipulation of procedure to afford a plaintiff in wrongful search and seizure access to civil recovery.[508] The Polish Supreme Court saw a plaintiff-soldier to recovery for severe illness

[506] *See supra* part II.D.
[507] *See supra* part II.D.1.
[508] *See supra* part II.D.2.

and careless treatment, despite the military milieu of his infection and care.[509] The Romanian court held the state responsible to a local airport for interference with its operations, resisting the government defendant's bid to treat its highway construction as a state taking for the public good.[510] The Hungarian court protected journalists from civil liability to police officers for violating their privacy by publishing photographs of them.[511] The English court, in common law, refused to let the defense of illegality block claims against a defendant who abused a foreign au pair, even though the alien au pair had initially been complicit in the plan to overstay her visitor's visa.[512] And the Swedish court pushed out the boundary of civil liability in two anti-discrimination cases, even while one involved a case more aptly described as hate speech, and the other involved a case of benevolent, if misguided, intentions.[513]

Unsurprisingly, human rights norms animated many of the decisions in this area. The Croatian court cited European human rights in support of the appointee's expectations, vis-à-vis legislative discretion. The Romanian and Polish decisions implicated individual rights implicitly insofar as both allowed recovery against the state and over its claims to sovereign prerogative. The Czech and Hungarian courts cited European human rights, the latter generalizing into the broad notion of personal integrity and balancing against freedoms of expression and information. The English court cited international condemnation of human trafficking to demonstrate the weight of that wrong in comparison with the lesser violation of national immigration law. And the Swedish court decided that discrimination warranted a significant damages award even with minimal emotional, if any actual, injury, and a well intentioned, if misguided, defendant.

---

[509] *See supra* part II.D.3.
[510] *See supra* part II.D.4.
[511] *See supra* part II.D.5.
[512] *See supra* part II.D.6.
[513] *See supra* part II.D.7.

The straightforward Romanian decision accords with notions of official liability in the U.S. Waiver of sovereign immunity varies by state, but appropriate cases tend to be channeled into tort rather than takings, if not without exception. Also Czech operationalization of .the right of privacy through the civil code has a U.S. analog in the realization of constitutional remedies in the U.S. through the functional mechanism of tort law. The Czech court's procedural machinations are reminiscent of a *Bivens*[514] action with its apparent lack of statutory authorization, yet still landing a plaintiff in "constitutional tort."

The Croatian and Polish decisions are at odds with U.S. norms, but their divergences merit study. The Croatian decision at first blush marks a radical doctrine by U.S. standards. Yet the theory advanced in that case enjoys a not-so-secret life in U.S. litigation, in the guise of the public trust doctrine. Substantial hurdles erected by the American constitutional design might mean the doctrine never gains traction in the U.S. law. But the coincidence of efforts to hold legislators accountable, against all odds, is striking.

The Polish decision also seems surprising by U.S. standards, given the *Feres* doctrine. Yet the difference bears understanding if one considers timing. The Polish judiciary is relatively young as a democratic instrument, dating only to the country's 1989 liberation from the Soviet sphere. In contrast, the *Feres* doctrine owes its breadth to the early Cold War, when the Supreme Court produced other curious wonders such as the state secrets privilege.[515] Perhaps *Feres* too will have its wings clipped in the future.[516]

---

[514] Bivens v. Six Unknown Agents, 456 F.2d 1339 (1972) (authorizing suit in manner similar to that set forth in 42 U.S.C. § 1983, but under Constitution directly, for the violation of individuals' constitutional rights by state officials acting under color of state law).

[515] *See* U.S.. v. Reynolds, 345 U.S. 1 (1953). *See generally* BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS (2009) (investigating *Reynolds* and explaining how false military pretenses supported expansive state secrets privilege during early Cold War).

[516] The state secrets privilege as articulated broadly in *Reynolds*, 345 U.S. 1, was (at least on paper) sharply curtailed by order of the U.S. Attorney General after the U.S. was sobered by post-9/11 excesses. *See* Attorney General

The Swedish cases also awarded liability to an extent that U.S. law would not countenance. There was no dispute in the cases, even from the defendants, that their conduct or the conduct of their agents was socially unacceptable. Both cases involved acts of animus against persons for reason of their membership in protected classes recognized to some extent in both Swedish and U.S. law. But the damages awards in both cases lend credence to conservative and libertarian observers in the U.S. who worry that tort liability for psychic harms tends to aggrandize its reach. The slippery-slope argument forecasts a creeping chilling effect on everyday social and economic activity that might be otherwise regulated, or might be unregulated because of a competing public policy such as free expression.

Finally, a number of European countries, France exemplarily in this study, are experimenting with expanded class action litigation.[517] Adopters are cautious, and opponents on edge, for fear of excesses perceived in U.S. class action litigation under Federal Rule of Civil Procedure 23. Accordingly, European actions are as yet largely limited to opt-in mechanisms. And elaborate competing experiments are under way to accomplish class identification, certification, and representation, employing tools such as certified consumer rights advocates, limited-purpose plaintiff corporations, and representative adjudications. Sometimes implicating substantial transaction costs, these mechanisms aim to stave off the perceived thirst of a vampire plaintiffs' bar that would feast on client and defendant alike, compromising public interest and hampering economic development. Meanwhile steady streams of bills and lawsuits in the U.S. squawk their own doubts about Rule 23, and consumer activists shudder with angst at every blow. So on both

Memorandum re Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf [http://perma.cc/B4XL-ZQW4] (last visited July 15, 2015).

[517] *See supra* part II.E.

sides of the Atlantic, policymakers and jurists brawl and labor to build a better mousetrap for collective redress.

IV. CONCLUSIONS

These reports from Europe, compared alongside developments in American tort law, are suggestive of three observations.

First, when controversy centers on the mundane logistics of tort law, such as damages valuation and liability apportionment, there is great commonality between the U.S. and Europe. Similar problems are presented, and courts employ similar tort values—e.g., making plaintiffs whole, deterrence, equity, and fairness—to resolve these problems. European courts in this vein are far more likely than U.S. courts to state the explicit influence of human rights norms, whether derived from national, supra-national, or international instruments, especially when bound to construe civil codes. But U.S. courts often follow a similar course of reasoning, relying more vaguely on the role of equity and public policy in shaping the common law.

Second, when political policymaking comes into play, it manifests its influence over tort law, perhaps by loading the dice for one class of litigant at the expense of another, or by implementing a broader project, such as compulsory insurance, no-fault liability, or collective redress. The different policy priorities of legislators in the states of the U.S. and in the countries of Europe mean that outcomes under these legislative curvatures vary with local agendas. But U.S. and European courts both tend to heed legislative initiative, respecting the division between corrective and distributive justice. U.S. courts might be somewhat less inclined than European courts to let their own policy priorities, such as the protection of fundamental rights, supervene upon libertarian and democratic prerogatives. But the hand of policy is hardly invisible in U.S. case law when ambiguity opens the door to judicial insight.

Third, when public liability is at issue, the recent European decisions demonstrate a willingness—at least lucid, at most enthusiastic—to embrace plaintiffs' causes as against the state. Sovereign immunity yielded to plaintiff claims in all of the reported cases from code jurisdictions, or inversely, private defendants prevailed against public official-plaintiffs in Hungary. The Croatian court opened the door to a radical theory of legislative duty to an individual claimant, and the Swedish court allowed damage awards in discrimination cases against both public and private defendants upon a singular incident or a minimal proof. At common law, the English court found its way to an exception to an exception to tort liability, facilitating human rights enforcement against a private defendant. All of these cases accord with the U.S. model of constitutional enforcement through the functional apparatus of tort. But Europe seems far more disposed to judicial preeminence in the constitutional field than the U.S. And that disparity is consistent with a number of factors: evolving human rights norms embodied in the European charter and interpreted contemporaneously in human rights case law; the ascending eminence of harmonization in European law; and the rapid social development of Eastern Europe in the last 25 years.

It must be restated that these reports are not necessarily indicative of trends in Europe. But they are highly informative in that they reflect changes that European legal scholars find compelling. Accepting this limitation, this study of comparative tort law aims, at minimum, to arm legal thinkers and law makers with alternative perspectives in the common pursuit of civil justice.

AN INTERNATIONAL CASE FOR THE UNITED STATES ADOPTING A QUALIFIED PRIVILEGE FOR SOURCE CONFIDENTIALITY

Bennett D. Fuson*

I. INTRODUCTION

In 2006, James Risen, a Pulitzer Prize winning reporter for *The New York Times*, released a book entitled "State of War."[1] In the book, Risen described "a botched C.I.A. operation in which the agency provided flawed schematics to Iran in hopes of delaying its nuclear program."[2] Risen further suggested that the Iranians noticed the flaw and could have disregarded it.[3] In 2008, after the book's release, the Justice Department (during then President George W. Bush's administration) sought to compel Risen to testify as a witness about his knowledge and, more specifically, his source of information in a case against former C.I.A. officer Jeffrey Sterling, who the Justice Department believed disclosed the confidential information regarding Iran to Risen for his book.[4]

Risen refused to testify pursuant to the 2008 subpoena; the Justice Department, now under the Obama administration's orders, again subpoenaed Risen in 2011.[5] Risen challenged the second subpoena's demands all the way to the Supreme Court, where in 2014 the Court refused to hear Risen's appeal of a judgment from the U.S. Court of Appeals for the Fourth Circuit compelling

---

* J.D. Candidate, Indiana University Robert H. McKinney School of Law

[1] Adam Liptak, *Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Source*, THE NEW YORK TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/james-risen-faces-jail-time-for-refusing-to-identify-a-confidential-source.html [http://perma.cc/Z26R-EQ7Q].

[2] Matt Apuzzo, *Defiant on Witness Stand, Times Reporter Says Little*, THE NEW YORK TIMES (Jan. 5, 2015), http://www.nytimes.com/2015/01/06/us/james-risen-in-tense-testimony-refuses-to-offer-clues-on-sources.html [http://perma.cc/W6QX-GUTV].

[3] *Id*.

[4] *Id*.

[5] *Id*.

http://dx.doi.org/10.18060/7909.0039

the journalist to testify.[6] Ordered before federal prosecutors, Risen maintained his refusal to disclose his source, instead stating, "I am not going to provide the government with information that they seem to want to use to create a mosaic to prove or disprove certain facts…."[7]

If this sounds like a familiar tale – reporter gets confidential information, federal government pursues reporter for disclosure, reporter refuses to disclose – perhaps it is because it is, in fact, part of a vicious, repeating cycle. From this ordeal, Risen finds himself in, if not good, then indeed bountiful company, joining the likes of Judith Miller,[8] Josh Wolf,[9] Jim Taricani,[10] and Vanessa Leggett[11] - all journalists who were incarcerated in some capacity for refusing to provide confidential information or disclose their source's identity. Risen, however, was more fortunate than his peers; Attorney General Eric Holder prohibited federal prosecutors from pressing Risen to reveal his sources after Risen took the stand, and the Justice Department subsequently dropped the subpoena.[12]

For a nation that prides itself on constitutional protections granting a free press, the United States has engaged in a troubling and systematic pursuit of confidential information (and, more specifically, confidential sources) gathered by reporters in an effort to pursue leaked information. Despite Attorney General Holder's restraint on compelling Risen to disclose his confidential source, the Justice Department under the Obama administration has brought more charges for

---

[6] Liptak, *supra* note 1.
[7] Apuzzo, *supra* note 2.
[8] *See* Sandra Davidson and David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL OF RTS. J. 1277 (2012) (discussing Miller's refusal to reveal her source regarding the disclosure of C.I.A. operative Valerie Plame's true identity).
[9] *Id*. at 1285 (discussing Wolf's incarceration for refusing to surrender raw video footage of a G-8 Summit protest).
[10] *Id*. at 1286 (discussing Taricani's house arrest for refusing to reveal his source for an FBI videotape showing a Providence, RI public official's acceptance of a bribe from an undercover FBI agent).
[11] *Id*. at 1288 (discussing Leggett's incarceration for refusing to surrender notes and tapes of interviews she made during an investigation of a murder).
[12] Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, THE NEW YORK TIMES (Jan. 12, 2015), http://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html [http://perma.cc/K5KE-69WU].

instances of leaking information than all previous administrations combined.[13] Indeed, the Obama administration argued in its case against Risen that "reporters have no privilege to refuse to provide direct evidence of criminal wrongdoing by confidential sources."[14] This is largely a problem for journalists facing a subpoena from federal court; virtually all states have extended at least partial protections to journalists from requiring disclosure of their confidential sources.[15]

On this matter the United States stands largely alone, particularly among countries acknowledged for their democratic governance. The European Union has recognized that a qualified reporter's privilege – that is, a privilege to maintain source confidentiality that can be overruled under certain conditions – exists for citizens of its participating nations. More recently, Canada's high court established circumstances under which a qualified reporter's privilege could be found to exist. And, the Organization of American States, an organization to which the United States is a member (and whose headquarters it hosts in Washington, DC) has declared that such protections exist, not only for journalists but for all "social commentators." Yet the United States has continued its refusal, by both Congressional inaction and lack of Supreme Court judicial review, to recognize such a protection as available to its citizens in federal matters.

That the United States chooses to hold onto a position of denying what its peers have determined to be a fundamental right is beyond reproach. As such, this Note argues that, to align itself with its international peers and set an example for the other American nations, the United States should ratify the Inter-American Declaration of Principles on Human Rights to establish a qualified privilege for source confidentiality.

---

[13] Apuzzo, *supra* note 12.
[14] Liptak, *supra* note 1.
[15] Christine Tatum, *Federal Shield Would Protect Public's Right to Know*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/rrr.asp?ref=58&t=foia [http://perma.cc/S9MT-3S9E].

Part II of this Note will briefly discuss the concept of a reporter's "privilege" to maintain source confidentiality, as well as the difference between an "absolute privilege" (a level of protection that a number of states have extended to journalists) and "qualified privilege," which, embracing the reality of contemporary American politics as well as a similar standard applied in both Canada and the European Union, this Note advocates as preferential. Part III of this Note will briefly discuss the United States' history of requiring disclosure of confidential sources, beginning with the Supreme Court's ruling in *Branzburg v. Hayes*, followed by a brief overview of subsequent federal case law dealing with reporter's privilege, as well as Congressional attempts to pass a federal "shield law." Part IV will introduce the Organization of American States (of which the United States is a member) and the Inter-American Declaration of Principles on Freedom of Expression, which this Note will argue is the template for qualified privilege that the United States should adopt. Part V will discuss the qualified privilege granted in both Canada and the European Union as an example of balancing reporters' rights to maintain confidentiality against concerns of national security. Part VI will briefly describe the benefits of ratifying the Inter-American Declaration of Principles on Freedom of Communication rather than enacting (or rather, as recent history demonstrates, failing to enact) federal legislation. Part VII will conclude with a summary of this Note's arguments determining that it is in the United States' best interest to ratify and adopt the provisions of the Inter-American Declaration of Principles on Freedom of Communication to provide journalists with a federal protection of source confidentiality.

II. UNDERSTANDING "PRIVILEGE" AND ITS SCOPE

To adequately present an argument that the United States should embrace a federal reporter's privilege, one must first determine what exactly a reporter's privilege entails. A reporter's privilege is, at its most basic level, analogous to the attorney-client privilege: a source contacts a journalist to disclose certain information, some of which may be confidential, and may sometimes request that his or her identity be kept confidential to avoid any associated repercussions stemming from the disclosure.[16] Journalists frequently use confidential sources;[17] while the Washington Post's coverage of the Watergate scandal most frequently comes to mind when discussing confidential sources (think Deep Throat), journalists' reliance on confidential sources occurs far more regularly and for matters far more commonplace than a presidential scandal. However, attorney-client privilege is codified and regulated; attorneys and clients know the parameters of confidentiality in their relationship and can defer to written rules governing the relationship.[18]

In contrast, the reporter's privilege is far less formal and, thus, far easier to challenge the validity of the agreement to maintain confidentiality. Challenges to a reporter's privilege can come from both sides of a dispute, in either civil or criminal cases. Prosecutors in a criminal case may argue that a reporter is obligated to disclose information related to the commission of a crime, while defense attorneys may argue that their client's "Sixth Amendment right to a fair trial

[16] It is important to acknowledge here that, for the sake of congruity throughout this Note, "journalist" will be used as a catch-all term for individuals participating in the act of journalism or reporting. However, terms representing popular ideas, such as "reporter's privilege," will be used in its common parlance rather than modified to reflect the ubiquity of "journalist."

[17] *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction#sthash.cyF1KXAQ.dpuf [http://perma.cc/LW5B-LPWB].

[18] For example, Rule 1.6 of the Indiana Rules of Professional Conduct provides both rules governing the attorney-client privilege and official comments further expounding on the parameters of the attorney-client relationship in regards to confidentiality. *See* http://www.in.gov/judiciary/rules/prof_conduct/#_Toc407086483 [http://perma.cc/9V6D-UEUF].

outweighs any First Amendment right that the reporter may have."[19] Absent a Supreme Court ruling in favor of establishing a reporter's privilege (which will be discussed at length in Part III), a reporter subpoenaed by the federal government has two choices: disclose the source's identity or confidential information, or risk conviction and incarceration.[20]

Despite a lack of protection at the federal level, journalists enjoy varying levels of protection in state courts. Every state (including the District of Columbia) except Wyoming offers some type of privilege protection for journalists, either derived from case law or enshrined by statute.[21] These state "shield laws" (laws that provide a figurative shield for the journalist to defend himself or herself from subpoenas) fall under two categories: those that provide "absolute privilege" and those that provide "qualified privilege." Twelve states and the District of Columbia provide journalists an absolute privilege for their sources;[22] that is, the journalist's right to maintain confidentiality cannot be defeated under any circumstances. For example, Alabama's shield law, which was originally passed in 1935, provides that "No person . . . shall be compelled to disclose in any legal proceeding or trial . . . the sources of any information procured or obtained by him . . . ."[23] Alternatively, twenty-five states provide journalists a qualified privilege for their sources;[24] such protections establish exceptions where a journalist may not maintain source confidentiality.

---

[19] *The Reporter's Privilege Compendium*, *supra* note 17.
[20] *Id.*
[21] Tatum, *supra* note 15.
[22] *See Shield Laws and Protection of Sources by State*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws [http://perma.cc/8KCH-H9LZ] [hereinafter *Shield Laws*] (last visited Feb. 7, 2015) The twelve states that provide absolute privilege for journalists are: Alabama, Arizona, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, and Washington.
[23] ALA. CODE § 12-21-142 (LexisNexis 2015); *see also Alabama – Shield Law Statute*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/alabama-privilege-compendium/shield-law-statute [http://perma.cc/8KCH-H9LZ] (last visited Feb. 7, 2015).
[24] *See Shield Laws*, *supra* note 22. The twenty-five states that provide a qualified privilege for journalists are: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Utah.

Although the privilege is qualified, that qualification is a flexible standard depending on the state. For example, California's shield law only protects journalists who receive a subpoena (rather than those who are parties to litigation); however, that protection can range from absolute in civil cases to protection subject to a court balancing test when requested by a criminal defendant.[25] Compare that protection to what Indiana offers: absolute privilege for a source's identity, but no protection of the information received by the journalist.[26] Some states, such as New Jersey, establish threshold criteria that, once met, require a journalist to disclose confidential sources and information.[27]

III. DON'T KEEP SECRETS FROM UNCLE SAM: THE UNITED STATES' LACK OF RECOGNITION FOR REPORTER'S PRIVILEGE IN FEDERAL COURT

A. The First Amendment and Other Considerations

Proponents of "American Exceptionalism" frequently cite the Unites States' freedom of speech as a hallmark of the freedoms afforded to its citizens. Indeed, the First Amendment to the

---

[25] *See California – Absolute or Qualified Privilege*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/california-privilege-compendium/b-absolute-or-qualified-privilege [http://perma.cc/KYL4-XMB7] (last visited Feb. 7, 2015); *see* Mitchell v. Superior Court, 37 Cal. 3d 268, 279-83 (Cal. 1984). The balancing test, as first adopted for civil cases by the California Supreme Court instructs courts to consider the following factors in determining whether information should be disclosed: (1) "the nature of the litigation and whether the reporter is a party . . .;" (2) "the relevance of the information sought to plaintiff's cause of action . . .;" (3) whether "the plaintiff has exhausted all alternative sources of obtaining the needed information . . ." (4) "the importance of protecting confidentiality in the case at hand . . .;" and (5) "that the alleged defamatory statements are false . . ." Subsequently, in Delaney v. Superior Court, the California Supreme Court held that a criminal defendant could compel disclosure of information if the defendant demonstrated a "reasonable possibility the information will materially assist his defense," which courts would determine by weighing the following factors: (1) "[w]heather the unpublished information is confidential or sensitive;" (2) "[t]he interests sought to be protected by the shield law;" (3) "[t]he importance of the information to the criminal defendant;" and (4) "[w]hether there is an alternative source for the unpublished information . . . ."50 Cal. 3d 785, 808 (Cal. 1990). For a more detailed reading about the scope and application of California's shield law, see Kelli L. Sager and Rochelle L. Wilcox, *Reporter's Privilege Compendium – California*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/rcfp/orders/docs/privilege/CA.pdf [http://perma.cc/Z2EN-4T4J] (last visited Mar. 21, 2015).

[26] *See Indiana – Information and/or Identity of Source*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/indiana-privilege-compendium/d-information-andor-identity-source [http://perma.cc/68S2-ZJRT] (last visited Feb. 7, 2015).

[27] *See New Jersey – Absolute or Qualified Privilege*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/new-jersey-privilege-compendium/b-absolute-or-qualified-privilege [http://perma.cc/CRW9-2EZ8] (last visited Feb. 7, 2015).

Constitution does provide for free speech and freedom of the press.[28] This, however, is not an unlimited freedom. The Supreme Court of the United States has, time and time again, qualified the right to both free speech and freedom of the press to protect against libelous speech,[29] incendiary speech,[30] and other potentially threatening types of speech that may lead to individual or public safety concerns.[31]

Despite providing its own protections under the Constitution, the United States has voluntarily subjected itself to the constraints of international agreements, including its ratification of the Charter of the Organization of American States (which will be discussed in Part IV). However, when it ratified the Charter, the United States made clear its position on the organization's influence (or indeed lack thereof) in federal jurisprudence:

> That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.[32]

The reservations expressed prior to ratification of the Charter are further evidenced by the United States' refusal to be bound by rulings and principles established by the Inter-American Commission on Human Rights (which will be discussed in Part IV). As an examination of case

---

[28] U.S. CONST. amend. I.

[29] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that actual malice must be demonstrated before a press report about public officials can be considered libelous); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that states can set their own standards for liability for defamatory statements against private individuals that at least meets the minimum of actual malice).

[30] *See* Schenk v. United States, 249 U.S. 47 (1919) (holding that restrictions on speech inciting lawlessness or panic were permissible under the First Amendment).

[31] *See* Miller v. California, 413 U.S. 15 (1973) (holding that words "utterly without socially redeeming value" and lacking "serious literary, artistic, political, or scientific value" constituted obscenity and could be restricted); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that using "fighting words" to breach the peace could be restricted and punished).

[32] Dept. of Int. Law, *Charter of the Organization of American States (A-41)*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm [http://perma.cc/2RYZ-WRP2] (last visited Oct. 18, 2014).

law shows, the Supreme Court has been far more willing to restrict the interpretation of the Constitution rather than "enlarg[e] the powers . . . under the Constitution . . . ."[33]

B. Restricting Source Confidentiality: *Branzburg v. Hayes*

The Supreme Court has historically established protections for numerous types of speech and recognized numerous aspects of journalism as protected under the First Amendment. In seminal cases such as *New York Times v. Sullivan*,[34] the Court has used its discretion and authority to reaffirm the importance of maintaining a free press for the continued function of a democratic society. However, recently courts have shied away from their earlier precedent of expanding and defining the role and importance of journalism in American society, instead taking a less positive view of the press when they choose to hear press cases.[35] One notably glaring omission from such protections determined by the Supreme Court is the ability for reporters to guarantee confidentiality to sources who may not otherwise provide information. In *Branzburg v. Hayes*,[36] one of the most scrutinized free speech cases in American jurisprudence, the Supreme Court held that requiring reporters to testify before juries does not deprive them of their free speech and free press rights under the First Amendment.

Branzburg brought together three different petitioners, all journalists (albeit in varying types of media), who were brought before grand juries to disclose their confidential sources.[37] The named petitioner, Branzburg, was compelled to testify after the Louisville *Courier-Journal*

---

[33] *Id.*
[34] New York Times, *supra* note 29.
[35] RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014).
[36] Branzburg v. Hayes, 408 U.S. 665, 708-09 (1972).
[37] *Id.*

published an article in 1969 in which he wrote about his interactions with two individuals creating marijuana hashish.[38] Branzburg indicated in the article that he promised the two subjects profiled that he would not reveal their identities.[39] Branzburg was subsequently subpoenaed by a grand jury to disclose the identities of the subjects, a request that he refused.[40] Branzburg was ordered by a state trial judge to answer the jury's inquiry; the judge concluded that Branzburg was not protected by the Kentucky reporters' privilege statute, the Kentucky Constitution, or the First Amendment of the US Constitution.[41] On appeal, the Kentucky Court of Appeals held that the Kentucky reporters' privilege statute

> [A]fford[ed] a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information, but … did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.[42]

Branzburg was again subpoenaed in 1971 for a similar article, in which he interviewed subjects about, and observed them ingesting, marijuana.[43] The trial court again compelled Branzburg to testify, and the Court of Appeals again refused to grant his prohibition.[44] The Court of Appeals distinguished Branzburg's case from another, which it believed represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment."[45]

In a 5-4 split decision, Justice Byron White, writing for the majority, declared that the First Amendment "does not invalidate every incidental burdening of the press that may result from the

[38] *Id.* at 667.
[39] *Id.* at 667-68.
[40] *Id.*
[41] *Id.*
[42] Branzburg, 408 U.S. at 668-670.
[43] *Id.* at 669
[44] *Id.*
[45] *Id.* at 670 (distinguishing Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970)).

enforcement of civil or criminal statutes of general applicability . . . ."[46] Justice White observed that the investigative powers granted to grand juries are "necessarily broad" due to its responsibilities for returning "well-founded indictments . . . ."[47] As such, because of the responsibilities placed on grand juries, requiring journalists to testify did not "override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[48]

Justice White also refused to acknowledge the flip-side of the reporters' privilege argument: that sources would necessarily want to make sure their identities were protected from further retribution.[49] Regarding the motives of remaining anonymous, Justice White contended the following:

> There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.[50]

Justice White reserved equal ire for journalists attempting to maintain source confidentiality following the observation of criminal acts (as Branzburg had done). Rejecting the notion that First Amendment privileges applied to journalists who had observed criminal activity, Justice White

---

[46] *Id*. at 682-83.
[47] *Id*. at 688.
[48] *Branzburg*, 408 U.S. at 690-91. *See also id*. at 695 ("[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.").
[49] *Id*. at 693.
[50] *Id*. at 695.

noted that "[t]he crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."[51]

While the majority opinion held that journalists were not necessarily protected from the extensive investigative powers afforded to the grand jury, it is Justice Powell's concurrence that draws the most critical analysis from journalism and legal academia.[52] Justice Powell sided with the majority (as evidenced from the concurrence); however, unlike the majority, he was unwilling to completely write off the prospect of affording journalists' protections, instead advocating for a case-by-case review to determine whether source confidentiality merited omission from grand jury inquiries.[53] Justice Powell argued that "[t]he balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."[54] Based on his concurrence, some legal scholars argue that the outcome of the case should be read more as a plurality, rather than majority, opinion, thus opening up the outcome for more critical analysis.[55] As one scholar observed, "Justice Powell's concurrence, whether he intended it to or not, provided just enough wiggle room for dissatisfied federal courts to use the amorphous guidance in *Branzburg* to establish their own standards governing the reporter's privilege."[56]

Scholars critical of the outcome in *Branzburg* have embraced the dissent posited by Justice Stewart (joined by Justices Brennan and Marshall), which builds off Justice Powell's advocacy for

---

[51] *Id*. at 692.
[52] *See* Michele Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. L. & POL'Y 379 (2008) (For an in-depth discussion of Justice Powell's concurrence and its impact on future holdings and legislative action).
[53] *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).
[54] *Id.*
[55] *See* Davidson, *supra* note 8, at 1302 (citing William E. Lee, *The Priestly Class: Reflections on a Journalists' Privilege*, 23 CARDOZO ARTS & ENT. L. J. 635, 637 (2006)).
[56] Peter Meyer, Note, *Balco, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law*, 83 IND. L.J. 1671 (2008).

case-by-case determination of permission. Justice Stewart expressed grave reservations about the effects of the majority's opinion:

> Today's decision will impede the wide-open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.[57]

Justice Stewart argued that, in order to determine whether source confidentiality should be maintained, a three-part analysis should be conducted to decide if privilege exists.[58] Under Justice Stewart's test,

> the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of the law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[59]

As this article will later discuss, implementing such an element test would reaffirm source confidentiality as a fundamental aspect of freedom of speech – a right that can only be overridden by compelling circumstances.

C. POST-BRANZBURG: THE FIGHT FOR A FEDERAL SHIELD LAW

Branzburg established a vital precedent for the federal government's investigative and subpoena powers. However, the holding, while impacting, does not restrict further action to define the reporters' privilege and override the court's decision. Although the United States has not yet recognized source confidentiality or the concept of "reporters' privilege" at the federal level,

[57] *Branzburg*, 408 U.S. at 720-21 (Stewart, J., dissenting).
[58] *Id*. at 743 (Stewart, J., dissenting).
[59] *Id*.

protections have been instituted by a majority of states.[60] A federal solution resolving the conflicting stances of state shield laws has long been fodder for communications law and journalism scholars.[61] Primarily, the focus has been on the inadequacy of patchwork protections afforded by the states; namely, that a given protection stops at the state's borders.[62]

Yet the idea of a federal shield law has been met with resistance as well. One of the most prevalent arguments against the enactment of a federal shield law is that such a law would, by its nature, present an undue burden on the Fifth Amendment rights of individuals seeking the information.[63] Others argue that the institutional protections developed outside of the courtroom provide enough of a bureaucratic roadblock as to render pursuit of a reporter's confidential sources or information as nearly non-existent.[64] "If there are other avenues to the information, they will be pursued, not only because the regulations require it, but because any alternative means will almost always be faster, easier, and more productive than trying to get the information from a reporter."[65] Additionally at issue is defining who would receive the benefits of the reporter's privilege:

> [a] definition that focuses on the function of journalism will, given today's technology, be extremely broad and will allow any individual, under the right

---

[60] *See Shield Laws and Protection of Sources by State*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws (last visited Oct. 1, 2014.) [http://perma.cc/H4LY-9LZY].

[61] *See generally* Davidson, *supra* note 8 (for a discussion on ideal elements of a federal shield law).

[62] *E.g.*, *see* Davidson, *supra* note 8, at 1294 ("So long as there is no federal shield law, federal judges can, in effect, trump state shield laws. Where state legislators have given shield protection, federal judges can thwart state legislative intent.").

[63] Louis J. Capocasale, Comment, *Using the Shield as a Sword: An Analysis of How the Current Congressional Proposals for a Reporter's Shield Law Wound the Fifth Amendment*, 20 ST. JOHN'S J.L. COMM. 339 (2006) ("By creating an absolute federal reporter's privilege, the current legislative proposals provide newsgatherers with an absolute privilege to withhold evidence that may be valuable or even essential to either the prosecution or vindication of a citizen subject to a federal indictment. Such a sweeping privilege undermines the Fifth Amendment interests the Branzburg Court sought to protect, namely the individual rights of the accused, and the power of government to effectively investigate criminal conduct for the public welfare.").

[64] Randall D. Eliason, *The Problems With the Reporter's Privilege*, 57 AM. U.L. REV. 1341, 1347 (2008) ("Department of Justice ('DOJ') attorneys are required by regulation to seek the Attorney General's approval for subpoenas to the media, and to demonstrate that the information is essential and all reasonable alternatives have been exhausted…. DOJ subpoenas that actually seek confidential source information are even more rare, averaging only about one a year since 1991.").

[65] *Id.* at 1352.

> circumstances, to claim to be a journalist entitled to invoke the privilege…. But a narrower definition of "journalist" will result in legislative line drawing between different First Amendment speakers, and will raise troubling constitutional questions.[66]

The Supreme Court has not reconsidered the reporter's privilege since its holding in *Branzburg*. However, the decision is frequently acknowledged in lower courts, both favorably and critically. All federal appellate courts except for the U.S. Court of Appeals for the Sixth Circuit have recognized the existence of some type of reporter's privilege, rooted in either the First Amendment or common law.[67] Finding the privilege to exist in common law is an important holding, as the *Branzburg* court focused primarily on the First Amendment arguments for the existence of such a privilege. For example, in *Riley v. City of Chester,*[68] the U.S. Court of Appeals for the Third Circuit held that "*Branzburg*'s suggestion that the First Amendment protected newsgathering and the obvious links between effective newsgathering, confidential sources, and an informed public weighed in favor of the privilege."[69] At issue in the case was a reporter's refusal to disclose a source that had provided information about internal investigations regarding a mayoral candidate while the candidate was a police officer for the city.[70] The reporter cited Pennsylvania's state shield law as justification for refusing to disclose who provided her with the information.[71] The court, in finding that the reporter did not have to disclose her source because the information sought had only "marginal relevance"[72] to the plaintiff's suit, concluded that "[t]he strong public policy [behind Pennsylvania's shield law] which supports the unfettered

---

[66] *Id*. at 1367.
[67] Anthony L. Fargo, *Rights and Interpretation: Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 WM. MITCHELL L. REV. 1347, 1359 (2007).
[68] Riley v. City of Chester, 612 F.2d 708 (3d. Cir. 1979).
[69] Fargo, *Rights and Interpretation*, *supra* note 67, at 1360-61.
[70] *Riley*, 612 F.2d at 710.
[71] *Id*. at 711.
[72] *Id*. at 718.

communication to the public of information, comment, and opinion and the Constitutional dimension of that policy… lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."[73]

Similarly (and favorably citing the *Riley* decision), the U.S. Court of Appeals for the First Circuit remanded in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*[74] a lower court dismissal of a negligence charge against a newspaper, concluding that the district court needed to reassess the balancing test it applied to determine whether a reporter was obligated to disclose notes about confidential sources. The lower court dismissed a charge of negligence against the newspaper, stemming from a story written about malfunction instances of the plaintiff manufacturer's boats, after finding that its applied criteria to compel disclosure of notes was satisfied.[75] The appellate court, considering the *Riley* outcome, concluded that "the balancing process [conducted by the district court] was not conducted with sufficient awareness of the contesting values, the factors to be considered, and the options available to the court" regarding the plaintiff's needs for the non-disclosed information in question.[76]

Conversely, in *In re Grand Jury Proceedings*,[77] the U.S. Court of Appeals for the Sixth Circuit split from other federal circuits in holding that, absent state statutory protections preventing disclosure of confidential sources, a Michigan television reporter was, on the balance of interests, not entitled to quash a subpoena requiring disclosure of his confidential sources in a gang-related crime. The reporter was subpoenaed to compel disclosure of information relating to the identity of an assailant in a police officer's murder that he had gathered in the process of filming gang

[73] *Id.* at 715.
[74] Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).
[75] *Id.* at 586.
[76] *Id.* at 599.
[77] Storer Communs. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580 (6th Cir. 1987).

members for a report. The state trial court concluded that "Michigan's statutory news reporters' privilege does not include television news reporters, and ruled that [the reporter] had no constitutional privilege to refuse to divulge to the grand jury the material sought."[78] On appeal, the federal appellate court declined to apply at the reporter's insistence Justice Powell's *Branzburg* concurrence, instead concluding that the *Branzburg* holding did not afford the reporter protection from disclosing his confidential information.[79] The court found that "Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding . . . ."[80] In addition, the court, after considering the legislative history of Michigan's statutory protections for newspaper reporters, found that the reporter was not denied his rights under the Equal Protection Clause of the Fourteenth Amendment by failing to apply the reporter's broad interpretation of qualified individuals under the statute.[81]

Due in part to the Supreme Court's lack of jurisdiction following its decision in *Branzburg*, as well as in consideration to the states' decision to enact its own protections, Congress has considered numerous proposals for a federal shield law in the past decade.[82] The most recent attempt, the Free Flow of Information Act of 2013, was authored by Sen. Charles Schumer of New York.[83] The bill outlined an expansive view of who would qualify for protection under the act as a "covered journalist," including student journalists and freelance "agent[s]" of publications, and more generally any individual who "at the inception of the process of gathering the news or

---

[78] *Id.* at 583.
[79] *Id.* at 584.
[80] *Id.* at 585.
[81] *Id.* at 588.
[82] *See* Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006).
[83] Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013), *available at* https://www.congress.gov/bill/113th-congress/senate-bill/987/summary/100688 (last visited Feb. 8, 2015)[http://perma.cc/5KPU-B9F4].

information sought, had the primary intent to investigate issues or events and procure material in order to disseminate news to the public and regularly conducted interviews, reviewed documents, captured images of events, or directly observed event."[84] The legislation established a qualified privilege, with different thresholds of criteria required to override the privilege. In a federal criminal case, the information and source identities of "covered journalists" would be protected unless a federal judge determined that, among other criteria, the protected information was "essential to the investigation or prosecution or to the defense against the prosecution…" and that "the covered journalist ha[d] not established by clear and convincing evidence that disclosure would be contrary to public interest, including the interest in gathering and disseminating information or news as well as maintaining the free flow of information and the public interest in compelling disclosure, including the extent of any harm to national security."[85] In a federal civil case, the information and source identities of "covered journalists" would be protected unless a federal judge determined that the information sought from the journalist was "essential to the resolution of the matter" and that the disclosure "clearly outweigh[ed] the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information."[86]

Although the legislation provided a decidedly easy threshold for the government to compel disclosure of confidential information, the Free Flow of Information Act did establish fundamental requirements for the protection of journalists, most specifically the range of individuals protected under the privilege. It was not without support, either; the legislation garnered twenty-seven cosponsors, including both Republican and Democratic senators.[87] Sen. Schumer, the bill's author,

[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

said in an interview in March 2014 that the likelihood of getting at least some type of federal shield law passed was "very large," noting that the bill had the sixty votes needed to pass through the Senate without threat of a filibuster.[88] However, despite Schumer's efforts and optimism, Congress has still not voted on a federal shield law. The legislation was last placed on the Senate calendar in November 2013; it has not seen any legislative action since then, despite numerous calls from outside interest groups requesting a vote.[89]

IV. BACKGROUND: THE ORGANIZATION OF AMERICAN STATES AND SOURCE CONFIDENTIALITY

A. Founding and Structure of the Organization of American States

For most laymen, the European Union comes to mind almost exclusively when one recalls a multinational governmental organization tasked with steering and adjudicating policy decisions for its member states. However, the United States is party to (and indeed hosts) a similar – albeit less constraining – membership: the Organization of American States (hereafter OAS).[90] Structured in a generally similar model to its transatlantic peer the EU, the OAS is the "world's oldest regional organization . . . ."[91] The OAS dates back to 1889, when the First International Conference of American States approved the establishment of the International Union of American

[88] Joe Pompeo, *Schumer predicts shield law will pass this year*, CAPITAL NEW YORK (Mar. 21, 2014, 12:23 PM), http://www.capitalnewyork.com/article/media/2014/03/8542441/schumer-predicts-shield-law-will-pass-year [http://perma.cc/UX6H-XSSS].

[89] *See* Sean O'Leary, *75 Media Companies and Journalism Organizations Call for a Senate Floor Vote on the Federal Shield Bill to Protect Journalists' Confidential Sources*, NEWSPAPER ASSOCIATION OF AMERICA, June 11, 2014, http://www.naa.org/News-and-Media/Press-Center/Archives/2014/Shield-Law-Senate-Vote-Coalition-Letter.aspx [http://perma.cc/BH6M-KG44]; *see also* Editorial, *Revive the Free Flow of Information Act*, L.A. TIMES, June 19, 2014, http://www.latimes.com/opinion/editorials/la-ed-shield-20140619-story.html.[http://perma.cc/EHY2-PQ2C].

[90] *See generally Who We Are*, ORG. OF AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited Oct. 18, 2014).[http://perma.cc/S555-EJW7]. The OAS is headquartered in Washington, D.C. *See Our Locations*, ORG. OF AM. STATES, http://www.oas.org/en/about/our_locations.asp (last visited Nov. 7, 2014) [http://perma.cc/NZ6J-RZNE].

[91] *Who We Are*, *supra* note 90.

Republics (the organization's predecessor).[92] The OAS in its current form was established in 1948 by the Charter of the OAS.[93] Twenty-one nation-states signed the original charter, including the United States.[94] After four amendments,[95] the most current version of the charter has been ratified by all thirty-five "independent states of the Americas."[96]

The OAS establishes four "pillars" to "implement its essential purposes" – democracy, human rights, security, and development.[97] Of these pillars, the primary focus of this Note is the OAS's development and implementation of human rights. The OAS monitors the human rights activities of its member nations through the Inter-American Commission on Human Rights (IACHR), which was established in 1959 as the autonomous branch for the regulation of human rights.[98] Actions taken and decisions made by the IACHR are influenced by the commission's three guiding directives: "the individual petition system;" "monitoring of the human rights situation in the Member States…;" and "the attention devoted to priority thematic areas."[99]

The American Convention on Human Rights (hereafter the Convention), which establishes the Inter-American Court of Human Rights and "defines the functions and procedures of both the Commission and the Court" was adopted in 1969.[100] Of particular relevance to this Note, Article

---

[92] *Id.*
[93] *Id.*
[94] The original signatories are: Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela. For ratification information, see General Information of the Treaty: A-41, Charter of the Organization of American States, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm (last visited Oct. 18, 2014) [http://perma.cc/2XGD-4JPT]. Costa Rica was the first nation to formally ratify the Charter on Oct. 30, 1948. *Id.*
[95] The Protocol of Buenos Aires (signed in 1967); the Protocol of Cartegena de Indias (signed in 1985); the Protocol of Managua (signed in 1993); and the Protocol of Washington (signed in 1992). *See Who We Are*, *supra* note 86 .
[96] *Who We Are*, *supra* note 90 .
[97] *What We Do*, ORG. OF AM. STATES, http://www.oas.org/en/about/what_we_do.asp (last visited Oct. 16, 2014) [http://perma.cc/D9F5-3M3Q].
[98] *What is the IACHR?* ORG. OF AM. STATES, http://www.oas.org/en/iachr/mandate/what.asp (last visited Oct. 18, 2014) [http://perma.cc/EH82-B8BX].
[99] *Id.*
[100] *Id.*

13 of the Convention provides the right to freedom of expression for citizens of its member nations.[101] The Convention states that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."[102] The Convention qualifies that right, however, declaring that exercising the right to free expression is not "subject to prior censorship" but can be curtailed to maintain "respect for the rights or reputations of others" and/or "the protection of national security, public order, or public health or morals."[103] Crucially, the Convention provides that

> [t]he right of expression may not be restricted by indirect methods or means, *such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information*, or by any other means tending to impede the communication and circulation of ideas and opinions (emphasis added).[104]

As of 1997, twenty-five nations have ratified the Convention.[105] Noticeably absent from the list of ratifying nations are two of the most high-profile, if not most powerful, member nations of the OAS: Canada and the United States.

B. The Inter-American Declaration of Principles on Human Rights

The IACHR recognizes freedom of expression broadly, pursuant to the terms of the Convention. However, the IACHR further expounded on what constitutes the freedom of expression with the adoption of the Inter-American Declaration of Principles on Human Rights

---

[101] Organization of American States, American Convention on Human Rights, art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm [http://perma.cc/DB7L-JETJ].
[102] *Id*. at ¶ 1.
[103] *Id*. at ¶ 2.
[104] *Id*. at ¶ 3.
[105] *What is the IACHR*, *supra* note 98. The ratifying nations are: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

(hereafter the IADPHR) in 2000.[106] Among other protections, Article 8 of the IADPHR establishes the right to source confidentiality: "[e]very social communicator has the right to keep his or her source of information, notes, personal and professional archives confidential."[107] Additional guidance clarifying the Declaration provides that this right of confidentiality establishes the protection for "every social communicator to refuse to disclose sources of information and research findings to private entities, third parties, or government or legal authorities . . . ."[108] It further provides that the right "does not constitute a duty, as the social communicator does not have the obligation to protect the confidentiality of information sources, except for reasons of professional conduct and ethics."[109] The interpretation of the Declaration states that the underlying rationale to the right of confidentiality acknowledges that

> 'in the scope of [the social communicator's] work to supply the public with the information necessary to satisfy the right to inform, the journalist is providing an *important public service* when he or she collects and disseminates the information that would not be made known without protecting the confidentiality of the sources (emphasis added).[110]

Applying principles from both the American Convention of Human Rights and the Inter-American Declaration of Principles on Freedom of Expression, the Inter-American Court of Human Rights has been able to implement and enforce press freedoms for journalists against government efforts of ratifying nations to restrict their press activities and actors.[111] However, as

---

[106] *Basic Documents in the Inter-American System – Introduction*, ORG. OF AM. STATES, http://www.oas.org/en/iachr/mandate/Basics/intro.asp (last visited Oct. 18, 2014) [http://perma.cc/2A3W-KSC5].

[107] Declaration of Principles on Freedom of Expression, art. 8, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26 (last visited Oct. 18, 2014) [http://perma.cc/4E4K-PS5C].

[108] *Background and Interpretation of the Declaration of Principles*, ORG. OF AM. STATES, at ¶ 36, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1 (last visited Oct. 19, 2014) [http://perma.cc/YGLR-FXCK].

[109] *Id.*

[110] *Id.* at ¶ 37.

[111] *See generally* Jo M. Pascqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39

of 2010, only twenty-one nations recognize the court's jurisdiction and follow its adjudication.[112] As with the Convention, neither Canada nor the United States recognize the jurisdiction of the court nor the right of confidentiality, instead restricting the right based on judicial interpretations of their respective national charter documents.

V. A DIFFERENT APPROACH: CANADA AND THE EUROPEAN UNION'S JUDICIAL OBSERVATIONS OF QUALIFIED SOURCE CONFIDENTIALITY

A. Canada

Canada, another powerful American nation that has not ratified the American Convention on Human Rights or the Inter-American Declaration of Principles on Freedom of Expression, has established a national fundamental right to free speech that, similar to the First Amendment in the United States, extends to journalists. The Canadian Charter of Rights and Freedoms provides that "[e]veryone has the following fundamental freedoms . . . of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . ."[113] However, similar to the *Branzburg* ruling in the United States, Canadian courts have played an active role in qualifying the right to free expression.

i. Privileged Communication in Canada: *R v. Gruenke*

To understand communication rights as they exist in Canada, one must first look to a defining case in determining whether communication is "privileged." In *R v. Gruenke*,[114] the Canadian Supreme Court declared that communications between two individuals could be

---

VAND. J. TRANSNAT'L L. 379 (2006) (discussing the role of the Inter-American Court on Human Rights and difficulties responding to the backlog of cases brought before the court).

[112] *Basic Documents*, *supra* note 106. The 21 nations are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

[113] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 2, being Schedule B to the Canada Act, 1982, c.11 (U.K.)

[114] R. v. Gruenke, [1991] 3 S.C.R. 263, 291 (Can.)

privileged (and thus immune from discovery) under a specific set of circumstances. The case came before the Court on appeal from the appellant, Gruenke, who was convicted of first degree murder after killing her harasser.[115] Gruenke, a reflexologist, lived for a time with a client, Philip Barnett, in a platonic relationship; however, Gruenke moved out when Barnett began making sexual advances towards her.[116] Gruenke also began visiting the Victorious Faith Centre church to seek emotional help.[117] At trial, Gruenke testified that when Barnett came to visit her, and attempted to drive away with her in his car without her consent, Gruenke struck him with a piece of wood.[118] She could not recall at trial any other details, aside from her boyfriend approaching her and Barnett, then the two of them leaving Barnett as he was covered in blood.[119] The trial judge ruled admissible evidence of communication between a church layperson, the church pastor, and Gruenke; the evidence revealed that two days after Barnett was found dead, the pastor had a conversation with Gruenke in which she admitted planning to kill, and indeed killing, Barnett to stop his harassment.[120]

The Supreme Court found at issue the question of whether conversation between an individual and a clergyman or religious figure could be privileged and therefore protected from discovery and admission as evidence.[121] In order to resolve issues of determining whether a communication was privileged in general, the Court established the "Wigmore" test.[122] The test requires that the following four factors be met:

> (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and

[115] *Id.* at 263-64.
[116] *Id*. at 273.
[117] *Id*. at 273-74.
[118] *Id*. at 274.
[119] *Id*.
[120] *Gruenke*, *supra* note 114, at 275.
[121] *Id*. at 264.
[122] *Id*. at 310.

> satisfactory maintenance of the relation between parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[123]

Development of the test would prove to be critical in later analysis of privileged communication and set Canada on a path towards recognizing source confidentiality.

ii. Contemporary Privilege: *R. v. National Post*

With the establishment of the "Wigmore" test, the Canadian Supreme Court outlined conditions in which communication could be found privileged. In 2010, the Court in *R v. National Post* applied the test to determine whether confidential communications between a source and reporter qualified as privileged communication.[124] In *National Post*, the Court determined that a particular confidential communication between a reporter for the National Post and a source regarding a document implicating the Canadian prime minister of a conflict of interest did not satisfy the Wigmore test to keep the information confidential.[125] The reporter for the National Post, M, was investigating the former Prime Minister of Canada, C, regarding alleged improprieties of a federal bank loan to a hotel that owed a debt to C's family investment company.[126] X (the confidential source) provided M with a document purported to be the bank's authorization of the loan on the condition of "blanket, unconditional… confidentiality."[127] M then faxed copies of the document to the bank, C's office, and a lawyer for C to determine the accuracy of the document.[128] All three declared the document to be a forgery.[129] After M met X in person,

---

[123] *Id.* The test appears to originate from 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (2nd ed. 1961).
[124] R. v. National Post, [2010] S.C.R. 447, 482 (Can.).
[125] *Id.* at 482-83.
[126] *Id.* at 494.
[127] *Id.*
[128] *Id.* at 495.
[129] *Id.*

X expressed his belief that the document was genuine requested that the document be destroyed for fear that fingerprints on the document might link him to the disclosure.[130] M refused to destroy the document but promised X that their confidentiality agreement remained in place.[131] Police, at the request of the bank in question, ordered from the newspaper the document as evidence of forgery and "utterance" (circulation) of the modified records.[132] The newspaper refused to surrender the document; M additionally refused to identify X to the police.[133] A warrant was issued giving the newspaper one month to disclose the document; the newspaper responded by filing suit to squash the document.[134] The trial court, setting aside the warrant, found that while "there was sufficient information to conclude the document was a forgery . . . there was only a remote and speculative possibility that disclosure of the document . . . would advance a criminal investigation."[135] The Court of Appeals reversed, and appellants sought review by the Supreme Court.[136]

The Canadian Supreme Court held that the warrant was properly issued and that the newspaper did not satisfy the fourth factor of the "Wigmore" test required to qualify the document as privileged.[137] The Court did, however, explicitly acknowledge that privilege could exist on a case-by-case basis, finding that "[t]he Wigmore criteria provide a workable structure within which to assess, in light of society's evolving values, the sometimes-competing interests of free expression and the administration of justice and other values that promote the public interest."[138]

---

[130] *National Post*, *supra* note 124, at 496.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *National Post*, *supra* note 124.
[137] *Id*.
[138] *Id*.

The Court noted that, in order to meet the criteria of the "Wigmore" test, a media organization or reporter must meet *all* criteria, including "proving that the public interest in protecting a secret source outweighs the public interest in a criminal investigation."[139] Claims under the "Wigmore" test for media parties will also be held under scrutiny for "the nature and seriousness of the [offense] under investigation, and the probative value of the evidence sought to be obtained measured against the public interest in respecting the journalist's promise of confidentiality."[140] The Court, in finding against the National Post, thus proposed a strict, albeit permissive, analysis of privileged communication for future media claims: "Until the media have met all four criteria, no privilege arises and the evidence is presumptively compellable and admissible. Therefore, no journalist can give a secret source an absolute assurance of confidentiality."[141]

B. The European Union

Although numerous actors in the United States have indicated a desire to establish some type of federal protection for source confidentiality, and although Canadian courts have indicated a willingness to recognize source confidentiality as a fundamental right, both nations lag behind many of their transatlantic peers. The EU (and therefore any participating nation) has recognized source confidentiality (and through it, reporters' privilege) as an aspect of the fundamental right to free expression. Article 10 of the European Convention on Human Rights establishes a freedom of expression for European citizens – including journalists: "[t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[142] The Article does qualify the right, subjecting it to "such

[139] *Id*. Note that this test, developed in 2010, echoes the test established by Justice Stewart's *Branzburg* dissent more than 30 years prior. (maybe reference where in the note the Branzburg case comes from)
[140] *Id*.
[141] *Id*.
[142] European Convention on Human Rights art. 10, ¶ 1, June 1, 2010, C.E.T.S. No 194.

formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society" in order to allow nations to maintain national security, prevent crime, protect "the reputation of rights of others," maintain the "authority and impartiality of the judiciary," and, importantly, prevent the "disclosure of information received in confidence . . . ."[143] However, the explicit inclusion of the goal of "preventing the disclosure of information received in confidence" sets apart the article from the First Amendment of the U.S. Constitution and Section 2 of the Canadian Charter of Rights and Freedoms (as previously discussed).

In 1996, the European Court on Human Rights reaffirmed the right of journalists to maintain confidential sources in the seminal case *Goodwin v. United Kingdom*.[144] In *Goodwin*, the Court overruled the U.K.'s order compelling a journalist to disclose his confidential source, deeming his right to maintain such a source as "necessary in a democratic society" in accordance with Article 10.[145] The journalist in question received information from a confidential source about a company's financial mismanagement and contacted the company to verify the claims.[146] The company requested, and U.K. courts administered, an injunction barring the journalist or his publication from releasing the information (which was extended to restrict all national media from publishing the information), as well as requiring the disclosure of the source's identity by the reporter.[147] The Court observed that "[p]rotection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic

[143] *Id*. ¶ 2.
[144] Goodwin v. U.K., 22 Eur. Ct. H.R. 123 (1996), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974#{"itemid":["001-57974"]}[https://perma.cc/3JN6-G5V6?type=source].
[145] *Id*. para. 46.
[146] *Id*.
[147] *Id*.

freedoms . . . ."[148] Absent guaranteed protections for maintaining confidentiality, the Court noted that sources "may be deterred from assisting the press in informing the public on matters of public interest."[149] Thus, the Court expressed concern that "the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."[150] The Court found that the company was afforded adequate protection by UK courts when it received an injunction barring the publication of the confidential materials, and that requiring disclosure overstepped the reasonable protections afforded to the company.[151]

VI. ANALYSIS: WHY RATIFY A TREATY?

This Note has thus far posited that there exists in the Americas a structured and definitive law determining that source confidentiality exists as a human right[152] – a law that is accepted and followed by twenty-one member nations of the OAS.[153] The reservations posited by the United States – an unwillingness to "expand the scope . . . of the Constitution . . ." seems to directly counter the spirit of the Bill of Rights, the first tenet of which establishes the freedom of speech and freedom of the press at issue here. Expanding the scope of defined human rights (which is the stated purpose of the Bill of Rights' existence) does not appear to be either expanding the scope of federal government or restricting states' rights – both fears acknowledged by the United States' reservations when ratifying the Charter of the OAS.[154] Indeed, a majority of states have established

[148] *Id.* para. 39.
[149] *Id*.
[150] *Goodwin*, *supra* note 144.
[151] *Id*. para. 42.
[152] Declaration of Principles, *supra* note 107.
[153] *Basic Documents*, *supra* note 106.
[154] *See Charter of the Organization of American States*, *supra* note 32.

reporters' privilege and source confidentiality protections, some dating back more than a century.[155]

If the first step towards recovery is acknowledging that a problem exists, legal scholars (and indeed Congress) have taken the first step. A federal shield law proposal (or lack thereof) is popular fodder for both legal and journalism academics, who challenge and dispute the notion that the United States cannot enact at the federal level legislation that a majority of states have enforced for years – some for over a century. And members of Congress seem to recognize that there is both a problem and a venue for change; as recently as 2013, legislation has been introduced to establish a federal shield law.[156] But, suffering the same fate as many proposals before it, the legislation seems doomed to wither on the vine as it languishes in the Senate.

All of this seems to spell doom for the prospects of a federal shield law for years to come. With a gridlocked federal government unable to agree on a slate of legislation far more crucial (at least in the eyes of a sizeable number of the population) to maintaining the national status quo, a federal shield law's passage seems as distant as it has ever been (barring, of course, a national tragedy or scandal resulting in a public outcry for passage of the law).[157] Meanwhile, the Supreme Court does not appear willing to reinterpret the idea of reporter's privilege in the near future; by passing on its opportunity to hear Risen's case in 2014, the Court all but committed itself to maintaining the precedent established in *Branzburg*.[158]

---

[155] Maryland passed the first state "shield" law, protecting journalists from disclosing their sources, in 1896. *See* Fargo, *Analyzing Federal Shield Law Proposals*, *supra* note 82, at 46. As of 2014, 37 states and the District of Columbia provide some type of protection for journalists regarding source disclosure. *See Shield Laws*, *supra* note 21.

[156] *See* Free Flow of Information Act, *supra* note 83.

[157] The inverse of such a situation occurred in 2009, when the Wikileaks disclosure of confidential government documents undercut efforts made by both the House and Senate to enact a federal shield law. *See* Rem Rieder, *Shield law for journalists a gridlock casualty*, USA TODAY (Sept. 22, 2014, 6:23 PM), http://www.usatoday.com/story/money/columnist/rieder/2014/09/22/federal-shield-law-for-journalists-doomed-a/16050353/.

[158] Liptak, *supra* note 1.

Yet diminished expectations for federal legislation enacted by Congress's own volition bring forward another alternative: forcing Congress's hand to craft legislation reflecting its own goals by ratifying an existing structure for qualified reporter's privilege as a baseline for establishing federal protections for journalists. The IADPHR presents a perfect opportunity for the United States to consign itself to a structure by which it could establish its own qualified criteria for press freedoms.

Crucially, one of the most appealing aspects of ratifying the IADPHR is the opportunity to bypass the bicameralism that has doomed federal legislation in recent years. Article II of the United States Constitution provides that a president may enter into treaties with two-thirds consent from the Senate.[159] Despite its pursuit of criminal charges in leak cases, the Obama administration has been an advocate for the establishment of a federal shield law,[160] and asking for the consent of two-thirds of the Senate is at this point a far more plausible path to recognition of a reporter's privilege at the federal level than relying on the Senate and House of Representatives to agree to statutory terms creating a federal reporter's privilege.[161]

Ratification of the treaty also gives Congress a reason to move forward legislation clarifying and qualifying the provisions of the IADPHR. One of the chief differences between previous legislation proposed by Congress and provisions in the IADPHR is the use of the term "social communicator" to describe individuals protected by the declaration. The Free Flow of Information Act of 2013, the Senate's most recent attempt at advancing a federal shield law, provided protection for an individual acting as a "covered journalist"[162] – a wide term, but not

[159] *See* Art. II § 2 Cl. 2.
[160] Liptak, *supra* note 1.
[161] Rieder, *supra* note 157. Rieder notes that both the Senate (with Schumer's proposed bill) and the House (with an amendment to an unrelated appropriations bill) both took action towards a federal shield law; however, given the current political circumstances in Congress, a bicameral effort to enact a federal shield law seems at best unlikely.
[162] *See* Free Flow of Information Act, *supra* note 83.

nearly as encompassing as the social communicator protected by the IADPHR. The distinction between a "covered journalist" and "social communicator" might be of benefit to Congress because it lessens the concern of defining an exclusive privilege. As Dr. Anthony Fargo notes in his analysis of federal shield law proposals, "[d]efining a class of persons who would receive special protection from providing evidence to grand juries would be tricky at best and unconstitutional at worst because it would force judges to decide who qualified and who did not . . . ."[163]

Embracing by Congressional inaction the term "social communicator" might be beneficial to accommodate the ever-changing media landscape as more traditional media roles are transferred to the Internet. One of the most pervasive points of contention in contemporary discussions of a federal shield law is the scope of its protections to non-traditional media actors – namely, bloggers and the like. As blogging and other types of "instant journalism" become more commonplace, the individuals who engage in such media actions must be regarded as more than mere citizens.[164] Indeed, blogging now encompasses individuals who would otherwise be regarded as "traditional journalists" as established media outlets utilize various means to produce and disseminate the news.[165] Blogging and other "new media" ventures provide a cheaper, more immediate means to disseminate information,[166] allowing more information to be presented by more "reporters" (adopting a broad interpretation of the word). Advocates for the inclusion of bloggers and other non-traditional reporters argue that the technological advances have redefined the criteria such that

---

[163] Fargo, *Analyzing Federal Shield Law Proposals*, *supra* note 82, at 56.
[164] Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 193 (2006) ("Though bloggers tend to focus more on analysis or opinion than reporting of facts, they are no less 'journalists' in the broad sense of the term.").
[165] Lauren Guicheteau, *What is the Media in the Age of the Internet? Defamation Law and the Blogosphere*, 8 WASH. J.L. TECH. & ARTS 573, 576 (2013).
[166] Ribstein, *supra* note 164, at 193. ("Blogs are a classic example of 'cheap speech.' In terms of capital investment, blogging requires no more than a computer, Internet access, and, perhaps, a blogging program . . . .")

broad inclusion is necessary.[167] Some scholars, however, have expressed concern in previous reporter's privilege debates that determining such delineation would prove difficult to accommodate the needs of both journalists and judicial officers.[168] If Congress thus wishes to restrict the limit of protected individuals under a federal shield law, it would have to enact subsequent federal legislation to do so; otherwise, if left as written and adopted, the reporter's privilege extends to a wider range of individuals, a scenario which most journalism advocates would surely support.[169] In either situation, a level of reporter's privilege is recognized by the federal government.

It is important to recall that the protections outlined in the IADPHR are qualified by the constraints established by the IACHR. The IACHR posits that freedom of expression, and specifically the freedom to maintain source confidentiality, can be curtailed in certain circumstances, such as those dealing with matters of national security.[170] This pretty clearly aligns with ideals presented by Congress: the Free Flow of Information Act of 2013 certainly provided a broad set of criteria under which the federal government could compel a journalist to disclose his confidential source.[171]

Some of the critics advocating for a federal shield law would likely be discontent with the establishment of a qualified reporter's privilege, as ratification of the IADPHR would provide. In

---

[167] *See* Davidson, *supra* note 8, at 1325. ("[P]erhaps this broad definition of journalist is precisely what modern technology calls for. Anyone with a computer and a little bit of knowledge about how to use it can disseminate his or her information instantaneously and globally!")

[168] Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1119 (2006) ("[T]here are dangers there, particularly in regard to defining who may claim protection. There is, in short, no perfect way to balance the needs of journalists and triers of fact.").

[169] State courts have already demonstrated a willingness to broadly interpret who is afforded shield law protections as a "journalist." *See* Fargo, *Analyzing Federal Shield Law Proposals*, *supra* note 82, at 58.

[170] *See* American Convention on Human Rights, *supra* note 102.

[171] Free Flow of Information Act, *supra* note 83.

their 2012 article advocating for a federal shield law, Sandra Davidson and David Herrera argue that "[p]ierce-proof shield laws are . . . important not only for journalists but also for this country. The United States, if it is to be a leader for press freedom in our complex world, must not dissemble by creating shield-law exceptions that inevitably create bias against reporters."[172] The authors again draw on the analogy of attorney-client privilege: "[t]he only shield that is truly worthy of the name is an absolute shield – a declaration that journalists will not be jailed for refusing to divulge the names of confidential sources . . . a federal shield law should discard the case-by-case method of a qualified privilege and give journalists 'an absolute privilege' based on the attorney-client privilege."[173] Indeed, even Justice Stewart expressed concern in his *Branzburg* dissent, noting that "[s]ooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all."[174]

However, while absolute privilege presents obviously preferential rationale for some journalism advocates, one must take a pragmatic approach to the contemporary issues of federal adjudication.[175] It is simply illogical to expect the United States judiciary to create a carte blanche reporter's privilege, particularly in matters of national security. One cannot expect a court to develop a privileged class of potential witnesses with different (and, one might argue, elevated) rights and privileges over another undistinguished witness. As one scholar noted, "[a]n absolute shield against disclosure of confidential sources to federal grand juries would create an 'institutional' privilege unique to the press, in contravention of Supreme Court and federal case

[172] Davidson, *supra* note 8, at 1284.
[173] *Id*. at 1290 (citing Eric M. Freedman, *Reconstructing Journalists' Privilege*, 29 CARDOZO L. REV. 1381, 1386 (2007)).
[174] *Branzburg*, 408 U.S. at 720 (Stewart, J., dissenting).
[175] Capocasale, *supra* note 63, at 363.

law, the Fifth Amendment, sensible public policy concerns, and the Press Clause itself."[176] Such privileges have not been afforded as absolute even in well-recognized institutional privileges, such as the attorney-client privilege, physician-patient privilege, or even concealment of identities of "confidential sources in the context of Congressional investigations and proceedings . . . ."[177]

Yet the benefits of establishing a qualified privilege are twofold. First, it establishes baseline protections for journalists to maintain source and information confidentiality; unlike journalists' reliance on the provisions laid out in *Branzburg*, a qualified privilege at least provides journalists with knowledge of the thresholds that must be overcome to require disclosure. As Justice Powell argued in his *Branzburg* concurrence, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony . . . ."[178]

Second, having an established foundation on which further action can be taken allows for journalists, judges and legislators to assess the effectiveness of the policy and make appropriate changes as necessary. An "all or nothing" approach such as absolute privilege understandably presents concerns for legislators,[179] since it would invite more scrutiny and public ire to whittle down a broad privilege than it would be to expand upon a more narrow privilege as deemed necessary by trial and error. Adopting the IADPHR as a template for establishing a qualified privilege would present such an opportunity, since the United States would not be precluded from

[176] *Id*. at 382-83.
[177] *Id*. at 365.
[178] *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).
[179] *See* Fargo, *supra* note 82, at 73 ("An absolute privilege would bring greater consistency to the law but is likely to be politically unpopular . . . Courts in states with shield laws have not been shy about funding 'absolute' privileges to be less than absolute when they conflict with constitutional rights such as those protected by the Sixth Amendment, so the utility of an absolute privilege is questionable.").

adding circumstances under which journalists could maintain confidential sources that the declaration does not consider.

In reality, relying on the Senate to ratify the IADPHR is at best unreasonably optimistic. Contemporary history has shown that the Senate repeatedly demonstrates a decided unwillingness to assign to the United States legal obligations that it has not itself created.[180] Yet efforts to enact a federal shield law by more conventional means (meaning the bicameral legislative process) have failed to make any significant progress on a matter that individual states have been able to regulate. And while the ratification is an unlikely avenue to seeing a federal reporter's privilege enacted, it is still a legal means by which such protections could be enacted. As such, it is worth considering the adoption by ratification of an international agreement (specifically the IADPHR) laying out a framework that would establish protections envisioned by both scholars and legislators in a manner that comports with, and in some instances alleviates, concerns raised with other efforts to enact a federal shield law.

VII. CONCLUSION

The United States is widely considered one of the bellwethers in providing fundamental protections for its citizens. That it does not afford for its journalists protections that its allies have deemed as fundamental rights should be, and indeed is, seen as a gross injustice by a nation that touts its freedom of the press. As Justice Stewart argued in his *Branzburg* dissent, "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and

[180] Joshua Keating, *The U.S. Will Not Ratify Any Treaty Unless It Has To Do With Fish*, SLATE.COM (Aug. 28, 2014, 9:00AM), http://www.slate.com/blogs/the_world_/2014/08/28/obama_s_new_international_climate_change_strategy_how_do_you_negotiate_treaties.html [perma.cc/77A4-FYBZ]("The slew of other treaties that U.S. presidents have signed but the Senate has not ratified include measures to prevent enforced disappearance, torture, cluster munitions, and discrimination against women.").

uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination."[181] Yet despite the vast majority of states offering protections to ensure that information gathered from confidential sources can be disseminated without threat of judicial action, the federal government has thus far been unable to enact similar legislation offering such protections to journalists from the threat of federal subpoena.

Ratifying the IADPHR, therefore, presents arguably the best and likely easiest, opportunity for the United States to enact a federal reporter's privilege. By its language, the IADPHR would extend to a wide range of individuals protections under which they could carry out the fundamental duty of investigative reporting under the definition of "social commentators."[182] By its creation and drafting history, the United States could easily establish threshold criteria under which the federal government could still receive information that is absolutely critical to its obligations. And by having some type of protection in place, Congress and journalists could begin the inevitably long but ultimately productive series of trial and error under which the federal reporter's privilege would be sufficiently clarified and settled. It is not a perfect proposal, but in order to make sure that stories, like those of James Risen and Judith Miller, do not continue to be commonplace, the United States must take initial steps to align itself with its international peers.

[181] *Branzburg*, 408 U.S. at 715 (Stewart, J., dissenting).
[182] Background and Interpretation, *supra* note 108.

RESERVATION AS A MEANS OF RECONCILIATION: A COMPARATIVE ANALYSIS OF THE CEDAW AND THE FUNDAMENTAL TENETS OF THE VATICAN AS CHURCH AND STATE

I. INTRODUCTION

By Marjorie Newell*

The Convention on the Elimination of all forms of Discrimination Against Women was adopted in 1979 by the United Nations General Assembly.[1] The Convention or "CEDAW" was enforced as an international treaty after ratification by its twentieth party in 1981.[2] Broadly speaking, the CEDAW is a human rights treaty which aims at "realizing equality between women and men through ensuring women's equal access to and equal opportunities in, political and public life."[3] As of 2015, 189 parties had ratified or acceded to the CEDAW.[4] The Holy See, the sovereign body of the Roman Catholic Church, is not a party to the Convention.[5]

This Note analyzes the CEDAW's intersection with the Vatican City State, Holy See, and Roman Catholic Church in order to ultimately illustrate that because of the Holy See's unique relationship to the Church, it cannot comport with the entirety of the CEDAW and maintain its religiosity simultaneously. That is, as a party of the CEDAW, the Holy See cannot fully achieve CEDAW's objectives because fundamental tenets of the Roman Catholic Church prohibit it. However, the incompatibility of the Holy See and the CEDAW is not absolute. Rather,

*J.D. candidate, May 2016. B.A., Indiana University, 2013. The author would like to thank the Indiana International and Comparative Law Review's Volume 25 Executive Board for seeing enough potential to select this Note for publication.

[1] THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 6-7 (Marsha A. Freeman, et al. eds., 1st ed. 2012).

[2] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14.

[3] U.N. Entity for Gend. Equal. & the Empowerment of Women, *CEDAW: Overview of the Convention*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/ [https://perma.cc/4BL7-JZ2X] (last visited Mar. 23, 2015).

[4] *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en [http://perma.cc/KWK9-Z28R] (last visited Mar. 23, 2015).

[5] Freeman, *supra* note 1, at 551.; *Holy See*, U.S. DEP'T OF STATE, http://www.state.gov/outofdate/bgn/holysee/73816.htm [http://perma.cc/6A27-VZYJ] (last visited Mar. 23, 2015); UNITED NATIONS TREATY COLLECTION, *supra* note 4.

http://dx.doi.org/10.18060/7909.0040

incompatibility with the CEDAW may be reconciled if, upon ratification of the CEDAW, reservations are made such that the fundamental tenets of both the CEDAW and the Roman Catholic Church are not compromised.

Section II of this Note provides a short history of the CEDAW, focusing primarily on its underlying goals, initiatives, and criticisms. Section III discusses the historical, political, and religious tradition of the Vatican City State and Holy See in addition to illustrating their unique presence and participation in the international community. Section IV examines specific codes of canon law by which the Vatican City State, Holy See, and Roman Catholic community abide that are in direct conflict with the CEDAW's objectives regarding women's equal access to political and public life. Specifically, this section discusses priestly ordination, reproductive health, and the scope of papal authority to amend canon law. Section V proposes a recommendation by exploring the possibility of reservations to the CEDAW and compares such reservations to those of predominately Catholic countries already parties to the Convention. Section VI summarizes and concludes this Note.

Collectively, this Note provides a global discussion of the application of Roman Catholic dogma in an era of rapid social and political change regarding the advancement of women's rights as human rights. This Note does not seek to criticize the Roman Catholic Church for its adherence to traditional religious doctrines nor does it endorse infringement upon the free practice of religion. Rather, it merely proposes an international solution to the Holy See and the CEDAW's seemingly inherent incompatibility.

II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

a. The Emergence of CEDAW

The inclusion of women's rights in the human rights global discourse was largely nonexistent until the post-World War I establishment of the League of Nations ("the League").[6] At least "in international institutional terms" the League began efforts to enhance the women's rights dialogue around the globe.[7] Conversation surrounding the drafting of the League's Covenant included argument by the International Council for Women for the inclusion of the protection of women's rights in the Covenant.[8] However, despite the efforts of a committee of experts appointed by the League "to carry out an inquiry into the legal status of the world's women[,]" World War II brought an end to the committee's work and led to the dissolution of the League.[9]

With the establishment of the United Nations ("UN") in 1945 following World War II and the creation of the UN Charter came the first international agreement to affirm principles of non-discrimination, including on the basis of sex.[10] Specifically, the UN Charter affirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ."[11] As a result of the Charter, "[t]he status of human rights, including the goal of equality between women and men, [was] thereby elevated: a matter of ethics [became] a contractual obligation of all Governments and of the UN."[12] However, despite the commitment to

---

[6] Freeman, *supra* note 1, at 3.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 4.; U.N. Entity for Gend. Equal. & the Empowerment of Women, *CEDAW: A Short History of CEDAW*, U.N. WOMEN, http://www.un.org/c/daw/cedaw/history.htm [http://perma.cc/U28S-H7ZV] (last visited Mar. 23, 2015); *see* U.N. Charter Preamble.
[11] U.N. Charter Preamble.; *See generally* U.N. Charter.
[12] U.N. Entity for Gend. Equal. & the Empowerment of Women, *CEDAW: A Short History of CEDAW*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/history.htm [http://perma.cc/BGM4-VN2X] (last visited Mar. 23, 2015).

women in the UN Charter, by the 1960s it remained evident that discrimination against women continued to manifest because of an inability to escape traditional notions of the roles of men and women in society.[13] To accomplish this needed change, "demands began to be made for a more comprehensive and well-targeted international focus on women" within the "emerging human rights legal framework."[14]

The U.N. establishment of the Declaration on the Elimination of Discrimination against Women in 1967 was a response to these demands.[15] On the twenty-fifth anniversary for the Commission on the Status of Women ("CSW") in 1972, the United Nations General Assembly ("UNGA") agreed to hold "a world summit on women in Mexico City in 1975, focusing on the themes of equality, development, and peace and [designated] 1975 International Women's Year."[16] The Mexico City Conference resulted in the UNGA's proclamation of 1975-85 as the U.N. Decade for Women.[17]

Thereafter, "[t]he 1975 Mexico City World Plan of Action . . . recommended that '[h]igh priority should be given to the preparation and adoption of the convention on the elimination of discrimination against women, with effective procedures for its implementation.'"[18] In 1977, the CSW completed its work on a draft and forwarded it to the UNGA where it was adopted in December 1979 "with 130 votes in favour, none against and 10 abstentions."[19] In 1981, the

[13] Freeman, *supra* note 1, at 5.
[14] *Id.*
[15] *Id.* (citing UNGA Res. 2263 (XXII) (Nov. 7, 1976)).
[16] *Id.* at 6.
[17] *Id.*
[18] *Id.* at 7. (quoting World Plan of Action for the Implementation of the Objectives of the International Women's Year, the Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace, U.N. Doc E/CONF.66/34 (76.IV.1)(1976) Part 1 para 198).
[19] *Id.*

Convention on the Elimination of all forms of Discrimination against Women or "CEDAW" was officially enforced as an international treaty.[20]

b. The CEDAW's Objectives

The CEDAW has been described by the UN as "'an international bill of rights for women.'"[21] Its final text includes a preamble and six parts comprised of thirty articles.[22] While each article recognizes the elimination of discrimination as fundamental to State parties' obligations in narrowed fields, the "scope [of the Convention] is wide, requiring States parties to address how the enjoyment of recognized human rights is adversely affected by gender-based distinctions, exclusions, and stereotypes."[23]

The CEDAW defines discrimination "in terms of its impact on women's equal enjoyment of their human rights and fundamental freedoms."[24] It provides broad safeguards against discrimination:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[25]

It is upon these principles the CEDAW binds States parties both publically and privately. Namely, the CEDAW binds public actors "with respect to public actions, laws and policies" but also prevents and encourages the imposition of sanctions on "[private] actors, including within the

---

[20] *Id.*
[21] *Id.* at 2. (quoting The United Nations and The Advancement of Women, 1945-1995, U.N. Blue Book Series, Vol. VI (rev. edn, 1996) 5); *see also* U.N. Entity for Gend. Equal. & the Empowerment of Women, *supra* note 3.
[22] Freeman, *supra* note 1, at 8.
[23] *Id.* at 2.
[24] *Id.*
[25] Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 2, art. 1.

family, the community, and the commercial sector" that partake in the discriminatory treatment of women.[26] The CEDAW does so by obligating States parties upon ratification to undertake whatever measures necessary in order to achieve equality between men and women which includes, but is not limited to, the repeal of discriminatory laws, policies, and procedures.[27] The Committee on the Elimination of Discrimination against Women ("the Committee") was established to monitor the realization of these measures.[28] The Committee is composed of "experts nominated by their Governments and elected by the State's parties as individuals of high moral standing and competence in the field covered by the Convention."[29]

Each State party is expected to submit a report ("Country Report") to the Committee every four years indicating what measures, if any, have been adopted in order to implement the CEDAW.[30] In order to aid States parties in preparation of these reports, the Committee has established a set of guidelines.[31] Pursuant to these guidelines initial reports are "intended to be a detailed and comprehensive description of the position of women in that country at the time progress can be measured. Second and subsequent national reports are intended to update the previous report detailing significant developments that have occurred over the last four years, noting key trends, and identifying obstacles to the full achievement of the Convention."[32] During

[26] Freeman, *supra* note 1, at 2.
[27] U.N. Entity for Gend. Equal. & the Empowerment of Women, *Overview of the Convention*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/ [https://perma.cc/4BL7-JZ2X] (last visited Mar. 15, 2015) (stating the CEDAW aims "to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises").
[28] Freeman, *supra* note 1, at 476.
[29] Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 2, art. 17.
[30] *Id.* art. 18.
[31] Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, U.N. Doc. HRI/GEN/Rev. 1/Add. 2 (2003).
[32] U.N. Entity for Gend. Equal. & the Empowerment of Women, *CEDAW: Reporting*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/reporting.htm [http://perma.cc/LWN7-RAHC] (last visited Mar. 23, 2015).

its annual session to the UNGA, "the Committee members discuss these reports with the Government representatives and explore with them areas for further action by the specific country."[33]

Notably and apart from its growing number of signatories, the CEDAW has been subject to a fair amount of caution and criticism.[34] The United States, for example, has expressed a great deal of hesitancy towards the CEDAW.[35] In the US, the CEDAW has not been ratified despite being originally proposed and signed by the Carter Administration in 1980 and the current endorsement of "[o]ver 190 U.S. religious, civic and community organizations . . . such as the American Federation of Labor and Congress of Industrial Organizations, the United Methodist Church, and the League of Women Voters."[36] One critic argues the CEDAW creates a binary between the sexes and "cannot succeed in creating gender equality if its scope remains limited to women."[37] Contrastingly, others more broadly claim the CEDAW does not reflect "American values" and supports "radical feminist views[.]"[38]

Despite these criticisms and misconceptions, the CEDAW "is *intended* to be universal [and] to apply to all women across the globe regardless of the prevailing ideology or economic development of the State in which they live . . . or its dominant religious belief systems."[39] Indeed, rather than ascribing to any particular political or legal theory the CEDAW "builds on overlapping

---

[33] U.N. Entity for Gend. Equal. & the Empowerment of Women, *CEDAW: Introduction*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro [http://perma.cc/4HDZ-SQDV] (last visited Mar. 23, 2015).

[34] *See, e.g.*, Women's Environment and Development Organization, *CEDAW in the United States: Why a Treaty for the Rights of Women?*, http://www.wedo.org/wp-content/uploads/cedaw-factsheet.pdf [http://perma.cc/ZZ72-2VZD] (last visited Mar. 23, 2015).

[35] *Id.*

[36] *Id.*

[37] Darren Rosenblum, *Unsex CEDAW: What's Wrong with Women's Rights*, 20 COLUM. J. GEND. & L. 1 (2011).

[38] Lisa Baldez, *U.S. Drops the Ball on Women's Rights*, CNN (Mar. 8, 2013), http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/ [http://perma.cc/F2TA-ATZB].

[39] Freeman, *supra* note 1, at 30 (emphasis added).

consensus of different moral, cultural, and legal approaches" in spite of being "at odds with the beliefs associated with certain religious communities and cultural traditions."[40] Arguably, one such religious community at odds with the CEDAW's commitment to women's equality and empowerment is the Vatican, center of the Roman Catholic Church.

III. THE VATICAN

Among other things the Vatican City State or "Vatican City" serves as the political and spiritual center of the Roman Catholic Church, Michelangelo's Sistine Chapel, and destination for millions of pilgrims and tourists annually.[41] With a current population of only 842, Vatican City is approximately 0.7 times the size of the National Mall in Washington, D.C. and is considered the world's smallest State.[42] An estimated 450 of those people actually enjoy Vatican citizenship and serve as "high-ranking dignitaries, priests, nuns, and guards" while the remaining numbers have merely permission to reside there.[43] Interestingly, because the majority of Vatican citizens are diplomatic personnel, about half of the Vatican City State's citizens do not live within its walls but rather, in different countries around the world.[44]

The internal structure of the Vatican and its unique status as both Church and sovereign State has been subject to a substantial amount of scholarship. This Note briefly discusses such

---

[40] *Id.*

[41] *Vatican Fast Facts*, CNN, http://www.cnn.com/2013/10/30/world/vatican-fast-facts/ [http://perma.cc/DYC9-2PDX] (last visited Mar. 23, 2015); Cindy Wooden, *Number of Vatican Museums' Visitors Tops 5 Million*, CATH. NEWS SERV. (Jan. 11, 2012), http://www.catholicnews.com/data/stories/cns/1200122.htm [http://perma.cc/EDQ9-RPFV].

[42] *Holy See (Vatican City)*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html [http://perma.cc/C7SM-DK6J] (last visited Mar. 23, 2015).

[43] *Population*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/note-generali/popolazione.html [http://perma.cc/PLT3-84MA] (last visited Mar. 23, 2015); *Holy See*, U.S. DEP'T OF STATE., http://www.state.gov/outofdate/bgn/holysee/73816.htm [http://perma.cc/3AVR-7QZX] (last visited Mar. 23, 2015).

[44] *Population*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/note-generali/popolazione.html [http://perma.cc/76AL-3ANR] (last visited Mar. 23, 2015).

scholarship by beginning with a brief account of the Vatican City State's historical, political, and religious origin.

a. *A Brief History of the Vatican as Church and State*

Until the mid-nineteenth century, Roman Catholic popes ruled portions of the Italian Peninsula known as the Papal States.[45] However, Victor Emmanuel led the Kingdom of Italy to conquer the Papal States in 1870 and in doing so, acquired Rome as the Kingdom of Italy's capital.[46] Pope Pius IX and several of his successors believed Victor Emmanuel's conquest was illegitimate and declared themselves "prisoners" in the Vatican.[47] Thereafter, "disputes between a series of 'prisoner' popes and Italy were resolved in 1929 by three Lateran Treaties, which established the independent state of Vatican City and granted Roman Catholicism special status in Italy."[48] That is, among other things, the Lateran Treaties between the Vatican and the Kingdom of Italy established the autonomy and independence of the "Holy See," the sovereign body and universal government of the Roman Catholic Church.[49]

Today, the Vatican City State has all the characteristics expected of a sovereign nation including its own government, laws, industry, police force, and bank.[50] Yet, despite these features the Vatican City State remains distinct from any other country because of its unique relationship with the Holy See. That is, though the Lateran Treaty created the Vatican City State's sovereignty

---

[45] CENT. INTELLIGENCE AGENCY, *supra* note 42.
[46] *Id.*; *Holy See*, U.S. DEP'T OF STATE, http://www.state.gov/outofdate/bgn/holysee/73816.htm (last visited Mar. 23, 2015) [hereinafter *Holy See*, state.gov] [http://perma.cc/AU6J-2H7Z].
[47] *Holy See*, state.gov, *supra* note 46.
[48] CENT. INTELLIGENCE AGENCY, *supra* note 42; *Treaty Between the Holy See and Italy*, VATICAN CITY STATE, http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/LateranTreaty.pdf [http://perma.cc/CQ4G-5QTH] (last visited Mar. 23, 2015).
[49] *Holy See*, state.gov, *supra* note 46; *see also U.S. Relations with the Holy See*, U.S. DEP'T OF STATE, http://www.state.gov/r/pa/ei/bgn/3819.htm [http://perma.cc/5ADR-BDSS] (last visited Mar. 23, 2015).
[50] CENT. INTELLIGENCE AGENCY, *supra* note 42.

distinct from the Holy See, the differences between the two entities is not always entirely clear.[51] Arguably, the most poignant complication to the mystery of the Vatican City State and Holy See is the dual role played by the Pope who "exercises supreme legislative executive, and judicial power over [both] the Holy See and the State of Vatican City."[52]

i. The Pope and the Vatican City State

The Vatican City State is technically governed as an absolute monarchy but is more commonly considered a papacy.[53] Elected by a College of Cardinals, the Pope becomes Sovereign of the Vatican City State at the moment he accepts his election.[54] He is nominated for life or until voluntary resignation.[55] As such, the Pope acts as Head of State and "holds full legislative, executive and judicial powers" over the Vatican City State.[56]

Notably, there is some delegation of the Pope's authority as the Vatican City's Head of State. Indeed, the Vatican City State also consists of a legislative body and judicial body, which exercise their authority in the name of the Pope and consist of members appointed by the pope himself.[57] There is also an executive body with authority delegated to the President of the

---

[51] *Treaty Between the Holy See and Italy*, VATICAN CITY STATE, http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/LateranTreaty.pdf [http://perma.cc/5JN3-AL6A?type=live] (last visited Mar. 23, 2015).
[52] *Holy See*, state.gov, *supra* note 46.
[53] *State Departments*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html [http://perma.cc/T6CC-822X (last visited Mar. 23, 2015); *Holy See*, state.gov, *supra* note 46.
[54] *State Departments*, *supra* note 53.
[55] CENT. INTELLIGENCE AGENCY, *supra* note 42.
[56] *State Departments*, *supra* note 53.
[57] CENT. INTELLIGENCE AGENCY, *supra* note 42.

Pontifical Commission of the Vatican City State, Secretary General, and Deputy Secretary General.[58]

Each of these members of the Vatican City State's government including the Pope, Cardinal President of the Pontifical Commission for the Vatican City State, Secretary of State, Deputy Secretary of State, and the Pope's College of Cardinals are ordained male members of the Roman Catholic priesthood.[59]

ii. The Pope and the Holy See

As mentioned, in addition to serving as the sovereign of Vatican City State, the Pope serves as sovereign of the Holy See. The Holy See is considered the "universal Church" and is the non-territorial sovereign body of the Roman Catholic Church.[60] As sovereign of the Holy See, the Pope is responsible for carrying out the Church's "mission of announcing the truth of the Gospel for the salvation of all humanity and in the service of peace and justice in favour of all peoples, both through the various specific and local Churches spread throughout the world, as well as through its central government."[61] A more sacred description of the Pope's role as sovereign of the Holy See, found in the Catechism of the Catholic Faith provides, "[t]he Pope, Bishop of Rome and [Saint] Peter's successor, is the perpetual and visible source and foundation of the unity both of the bishops and of the whole company of the faithful."[62] Another portion of the Catechism

---

[58] *Legislative and Executive Bodies*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato/organi-del-potere-giudiziario.html [http://perma.cc/F5Y7-6DPB] (last visited Mar. 23, 2015).

[59] *Vatican City State*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/struttura-del-governatorato/organigramma/stato-citta-del-vaticano.html [http://perma.cc/PZU9-94U2] (last visited Mar. 23, 2015).

[60] *Origins and Nature*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/note-generali/origini-e-natura.html [http://perma.cc/VX5S-RNFT] (last visited Mar. 23, 2015).

[61] *Id.*

[62] CATECHISM OF THE CATHOLIC CHURCH, ¶ 882, http://www.vatican.va/archive/ENG0015/__P2A.HTM [http://perma.cc/44PH-ZMXA] (last visited Mar. 23, 2015).

describes the Pope as "Vicar of Christ, and as pastor of the entire Church has full, supreme, and universal power over the whole Church, a power which he can always exercise unhindered."[63]

While the Pope's authority in the Holy See is supreme and unhindered, he works in coordination with the Roman Curia and the Papal Civil Service in executing the mission of the Church and its affairs.[64] The Roman Curia essentially functions as the centralized government of the Holy See with the Cardinal Secretariat of State as its chief administrator and implements its mission through various departments comprised of members of the clergy.[65] For example, one of the most dynamic institutions of the Roman Curia is the Congregation for the Doctrine of Faith "which oversees church doctrine; the Congregation for Bishops, which coordinates the appointment of bishops worldwide; the Congregation for the Evangelization of Peoples, which oversees all missionary activities; and Pontifical Council for Justice and Peace, which deals with international peace and social issues."[66]

Importantly, the Code of Canon Law acts as the principle legislative document of Holy See and is considered an "indispensable instrument to ensure order both in individual and social life and also, in the Church's activity itself."[67] As a result, Vatican City State citizens and Roman Catholics across the globe today abide by the 1983 Code of Canon Law promulgated by Pope John Paul II.[68] In Pope John Paul II's promulgation he declared that canon law "is in no way intended

---

[63] *Id.*
[64] *Holy See*, state.gov, *supra* note 46.
[65] *Id.*; *The Roman Curia*, THE HOLY SEE, http://www.vatican.va/roman_curia/index.htm (last visited Mar. 23, 2015) ("In exercising supreme, full, and immediate power in the universal Church, the Roman pontiff makes use of the departments of the Roman Curia which, therefore, perform their duties in his name and with his authority for the good of the churches and in the service of the sacred pastors.") [http://www.vatican.va/roman_curia/index.htm].
[66] *Holy See*, state.gov, *supra* note 46.
[67] Pope John Paul II, *Sacrae Disiplinae Leges*, THE HOLY SEE (Jan. 25, 1983), http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_25011983_sacrae-disciplinae-leges_en.html [http://perma.cc/K2R4-8VCN].
[68] *Id.*

as a substitute for faith, grace and the charisms in the life of the Church and of the faithful."[69] Instead, "its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to faith, grace and charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it."[70]

Summarily, the Holy See is a non-territorial entity acting as the sovereign authority of the Roman Catholic Church whereas the Vatican City State is a territorial entity, acting as an independent nation—both with the Pope as their sovereign, individualized forms of governance, and directly influenced by teachings of Roman Catholicism. It is unsurprising that the complicated and unique nature of the Vatican as both Church and State has been a recurrent issue in international law.

b. *The Vatican City State and Holy See's Status in International Law*

Along with being the sovereign of Church and State, the Pope is also primarily responsible for the representation of Vatican City State in its relations with foreign States though he works through another clergy member, the Secretariat of State.[71] Both the Vatican City State and the Holy See receive recognition under international law, each taking part in international conferences and international agreements.[72]

---

[69] *Id.*
[70] *Id.*
[71] *Diplomatic Relations*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/rapporti-internazionali/rapporti-diplomatici.html [http://perma.cc/8YH6-G3GH] (last visited Mar. 23, 2015).
[72] *Id.*; see *Participation in International Organizations*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/rapporti-internazionali/partecipazioni-ad-organizzazioni-internazionali.html [http://perma.cc/KB5C-QSLF] (last visited Mar. 23, 2015), for a list of participation in international organizations [hereinafter *Participation*]; see *Adherence to International Conventions*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/rapporti-internazionali/adesione-a-convenzioni-internazionali.html [http://perma.cc/Z8TY-LKKR] (last visited Mar. 23, 2015), for a list of international conventions.

Despite seeming to be of the same construct, the Holy See and the Vatican City State have different roles in the international community. "The Holy See, whose international legal personality is best as defined *sui generis,* is legally competent to ratify multilateral treaties."[73] Significantly, the Holy See rather than the Vatican City State holds status as a permanent observer at the United Nations and its Conferences.[74] Currently, the Holy See maintains diplomatic relations with 174 nations and acts as a permanent observer not only with the U.N. but also with the World Health Organization, World Tourist Organization, World Trade Organization, among others.[75]

Controversially, after questioning whether the Vatican City State or the Holy See would maintain relations with the U.N., it was eventually decided "in an exchange of letters between the Secretary General of the United Nations and the Holy See that 'the presence of papal representatives under the title of the State of the Vatican City would have unduly stressed the temporal aspects of the Pope's sovereignty.'"[76] Casting the Holy See, rather than Vatican City State, as permanent observer "immediately broadened the scope of the papacy's interest in U.N. activities from mere temporal affairs affecting the Vatican City [State] to the greater social and moral concerns of the Catholic Church."[77] As a result of the expanded scope of the papacy's interest, the Holy See's participation in the U.N. is "fundamentally religious and spiritual in nature" as indicated by remarks such as those from Pope John Paul II who emphasized the "spiritual" mission of the Holy See in an address to the UNGA.[78]

---

[73] THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY, *supra* note 1, at 551.
[74] *Participation*, *supra* note 72.
[75] *Holy See*, state.gov, *supra* note 46.
[76] Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. Rev. 1835, 1843 (1996).
[77] *Id.*
[78] *Id.*

The inherent religious implications that pervade the Holy See's participation at the U.N. has created debate as to whether the Holy See and Vatican City State, when considered together, even satisfy the requirements for statehood in international law.[79] A petition was presented at the Fourth World Conference on Women held in Beijing in September 1995 urging the U.N. "'to evaluate the appropriateness of allowing the Holy See, a religious entity, to act on par with states.'"[80] Proponents of the petition argued, "[T]he use of the U.N. system by the Holy See to advance the theological positions of the Roman Catholic Church was inappropriate." [81] Additionally, they argued the Holy See's status enabled it to enjoy "greater privileges than other world religions or non-governmental organizations at the UN."[82]

Nonetheless, despite the controversy surrounding the Holy See's legal status and participation at UN Conferences like those exhibited at the Fourth World Conference, the Roman Catholic Church, via the Holy See, is the only religion which "is accorded statehood status" currently with the UN.[83] Thus, any participation by the Holy See in an international convention such as the CEDAW implicates the Roman Catholic Church and its fundamental tenets.

IV. THE CODE OF CANON LAW'S CONFLICT WITH CEDAW AND THE SCOPE OF PAPAL AUTHORITY TO AMEND CONFLICTING CANONS

Having established the Holy See's status in international law and the resultant implication of the Roman Catholic Church, any discussion of CEDAW's ratification by the Holy See must be considered in light of the fundamental tenets of the Roman Catholic Church. These tenets are principally manifested in the code of canon law, which while fascinating, is undeniably complex.[84]

---

[79] *Id.* at 1858-1860.
[80] *Id.* at 1835.
[81] *Id.* at 1836.
[82] *Id.*
[83] *Id.* at 1868.
[84] FRANCIS MORRISEY, THE CANONICAL SIGNIFICANCE OF PAPAL AND CURIAL PRONOUNCEMENTS 1 (1981).

Among other things, the code provides for the spiritual needs of millions of the Church's members.[85] It has been considered "the inner principle guiding the Church in its activity" and is "derived from the very essence of the Church."[86]

One commentator suggests "[c]anon law touches, to one degree or another, practically every aspect of Church life. [However,] [c]ontrary perhaps to popular impression; the operation of canon law is almost always limited to matters which concern the external conduct of Church members."[87] Canon law does not regulate or determine the Roman Catholic Church's "teaching or principles of morality" but rather, it "receives Church teaching from the magisterium and adduces rules, or canons, which protect that teaching in appropriate ways."[88] Thus, the canons themselves are manifestations of "the teachings of Christ and the principles of faith."[89] To some, the essences of the various codes of canon law "are at least as connected to a legal tradition as they are to a theological tradition."[90]

In an Apostolic Constitution the Second Vatican Counsel declared, "every type of discrimination, whether social or cultural, *whether based on sex*, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent."[91] Apostolic Constitutions are "considered the most solemn form of document issued by the Pope in his own

---

[85] *Id.*
[86] *Id.* at 16.
[87] Edward Peters, *What Canon Lawyers Are and Are'nt,* CANONLAW.INFO (Jan. 03, 2013), http://www.canonlaw.info/a_canonlawyersarearent.htm [http://perma.cc/2W4J-5W4H].
[88] *Id.*; *See also* Morrisey, *supra* note 84, at 16; *Magisterium Definition,* MERRIAM-WEBSTER , (defining Magisterium as "teaching authority especially of the Roman Catholic Church"), http://www.merriam-webster.com/dictionary/magisterium [http://perma.cc/5CX8-EF5T].
[89] MORRISEY, *supra* note 84, at 16.
[90] Terrance Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priest*, 7 RUTGERS J. LAW & RELIG. 3 (2005).
[91] *Pastoral Constitution on the Church in the Modern World Guadium Et Spes*, THE HOLY SEE (Dec. 7. 1965) http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (emphasis added) [http://perma.cc/6PDV-85WM].

name" and are "issued only in relation to the most weighty questions."[92] However, despite these weighty affirmations and as illustrated by the proceeding sections, canons informed by the Church's teachings foster patriarchal ideologies which lead to discriminatory practices against women.[93]

Because of the unique extraterritorial relationship of the Vatican City State and Holy See with the Roman Catholic community, the effects of these discriminatory practices and ideologies are not limited to the few women who live within the Vatican City State. Rather, the discriminatory effects of these ideologies and practices extend to the estimated 1.2 billion Roman Catholic faithful scattered across the globe.[94]

a. *The Exclusion of Women from the Priesthood*

The CEDAW's mission of eliminating discrimination against women in political and public life may be considered incapable of reconciliation with the Vatican City State and Holy See because of the Roman Catholic Church's refusal to admit women into the ordained priesthood. That is, the practice of reserving ordination to men excludes women from the structures and practices of the Vatican and Holy See: a practice, which the CEDAW formally rejects in Articles 7 and 8. Article 7 of the CEDAW provides,

> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To *vote in all elections and public referenda* and to be *eligible for election to all publicly elected bodies*; (b) To *participate in the formulation of government policy and the implementation thereof* and *to hold public office and perform all public functions at all levels of*

[92] Morrisey, *supra* note 84, at 4.
[93] "Patriarchy" MERRIAM-WEBSTER ONLINE DICTIONARY (2015), http://www.merriam-webster.com/dictionary/patriarchy (defining Patriarchy as "(1) a family, group, or government controlled by a man or a group of men (2) a social system in which family members are related to each other through their fathers").
[94] CENT. INTELLIGENCE AGENCY, *supra* note 42.

> *government*; (c) To participate in non-governmental organizations and associations concerned with the *public and political life* of the country.[95]

Similarly, Article 8 of the CEDAW posits that States' parties shall ensure women "the opportunity to represent their Governments at the international level and to participate in the work of international organizations."[96] Commentators suggest, most obviously, that Article 7 proposes "the mere presence of women in decision-making bodies is not a goal in itself, but rather, in the sense of meaningful presence, requires that women be given the opportunity to have a real and viable input in all decision making processes."[97] Article 8 echoes and extends the same protection and enhancement of women's equalized and meaningful presence into the realm of international affairs.[98]

As a preliminary matter, the Vatican City State and Holy See's unique and non-secular political system would not inhibit the CEDAW's applicability to Article 7 or 8 in any formal sense because the "CEDAW does not expressly require any particular form of political system."[99] Nonetheless, impediment to the Holy See's adoption of these articles of the CEDAW lay, at least in part, with the Roman Catholic Church's practice of excluding of women from the ordained ministry.[100]

---

[95] Convention on the Elimination of All Forms of Discrimination Against Women, art. 7, Dec. 18, 1979, 1249 U.N.T.S. 17 (emphasis added).
[96] *Id.* at art. 8.
[97] Freeman, *supra* note 1, at 198-199.
[98] Convention on the Elimination of All Forms of Discrimination Against Women, art. 8, Dec. 18, 1979, 1249 U.N.T.S. 17.
[99] Freeman, *supra* note 1, at 202.
[100] 1983 CODE C.1024.

The refusal of female ordination is not a modern concept but instead one that has been integral to the Roman Catholic Church over several centuries.[101] In fact, at various points during the Roman Catholic Church's history,

> [w]omen were strictly forbidden to touch 'sacred objects', such as the chalice, the paten or altar linen. They certainly could not distribute [or receive] [H]oly [C]ommunion. In church, women needed to have their heads veiled at all times. Women were also barred from: entering the sanctuary except for cleaning purposes; reading Sacred Scripture from the pulpit; preaching; singing in a church choir; being Mass servers; [and] becoming full members of confraternities and organizations of the laity.[102]

While the majority of these exclusions have been eradicated, women remain barred from receiving the sacrament of Holy Orders.[103] Indeed, some suggest the Roman Catholic Church "has attempted to shelter its male-only priesthood doctrine, and halt development of an opposition, with declarations that its male-only doctrine is infallible, irreformable, definitive, and a [c]onstant [t]radition, along with instructions that the issue must not be discussed, and even denying ordination to men who believe that women may be fit for ordination."[104] These suggestions are not completely unfounded.

In 1976, Pope Paul VI acknowledged, "[w]omen who express a desire for the ministerial priesthood are doubtlessly motivated by the desire to serve Christ and the Church."[105] He continued and noted that in response to women's awareness of their exclusion, it is probable "they

---

[101] Wijngaards Institute for Catholic Research, *Letting Go of Past Prejudices*, WOMEN PRIESTS, http://www.womenpriests.org/story.asp [http://perma.cc/XRT8-WLLG] (last visited Mar. 23, 2015).
[102] *Id.*
[103] *Id.* (noting that some Catholic sects are currently allowing women to be "readers, Mass servers, cantors, preachers, leaders of prayer services, ministers of baptism and of holy communion."); *See also* Catechism of the Catholic Faith, *The Sacrament of Holy Orders*, THE HOLY SEE, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a6.htm [http://perma.cc/E5BR-KHJU] (last visited Mar. 31, 2015).
[104] Kelly, *supra* note 90 (internal quotations omitted).
[105] Sacred Congregation for the Doctrine of Faith, *Declaration Inter Insigniores*, THE HOLY SEE (Oct. 15, 1976), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html [http://perma.cc/DDN4-R8LU].

should desire the ministerial priesthood itself."[106] Yet, despite the acknowledgment of the inequality attributed to this practice, Pope Paul VI concluded in support of reserving priestly ordination to men citing the tradition of the Church to inform his conclusion.[107]

More recently in 1994, Pope John Paul II echoed these principals and elaborated upon the justifications of his predecessors when he similarly issued a statement to the bishops of the Church citing "fundamental reasons" for the exclusion of women in the priesthood.[108]

> [T]he example recorded in the Sacred Scriptures of Christ choosing his Apostles only from among men; the constant practice of the Church, which has imitated Christ in choosing only men; and her living teaching authority which has consistently held that the exclusion of women from the priesthood is in accordance with God's plan for his Church.[109]

Said differently, the Pope proclaims the Roman Catholic Church is bound to this practice because of long-established and Christ-instructed tradition. This, he interprets, is the way God set up the Church.

In light of these papal professions, the codification of the exclusion of women from the priesthood is hardly surprising. Canon 1024 provides, "a baptized male *alone* receive[s] sacred ordination validly."[110] In light of Canon 1024, the governance and overall jurisdiction of the Vatican and Holy See is explicitly reserved to those who may receive ordination validly, baptized men.

Recall, the Pope alone exercises supreme legislative, executive, and judicial power over the Holy See and the Vatican City State.[111] Therefore, the Pope decides (or at least has the supreme

---

[106] *Id*.
[107] *Id.*
[108] John Paul II, *Ordinatio Sacerdotalis*, THE HOLY SEE (May 22, 1994), http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html [http://perma.cc/W9R2-LXQA].
[109] *Id.*
[110] 1983 CODE C.1024 (emphasis added).
[111] *Holy See*, state.gov, *supra* note 46.

authority to decide) all matters of both Church and State. Without the possibility of ordination, a woman can never become Pope, much less a priest, and is deprived of any significant executive, legislative, or judicial involvement in the Vatican and Holy See. Moreover, aside from the obvious authority of the Pope, subordinate members of Church authority, including each member of the Roman Curia and Vatican City State polity, are male members of the clergy. Without women in these positions of authority, women have no formal or tangible say in both the governance of the Vatican and Holy See's domestic and international relations because the "exercise of power is, by policy, in the hands of men alone."[112]

Having addressed the utter absence of women in positions of Church and State authority, it is also important to note women's inability to vote in the election process of the Vatican City State. Unlike Article 7 of the CEDAW, which protects women's rights to vote in political elections, in Vatican City the ability to vote in political elections is limited to cardinals less than 80 years old.[113] Therefore, not only are women formally excluded from holding these positions—they are also denied the ability to have any influence over who should be chosen to fill them through the voting process.

It is important to note that the Vatican's hierarchy is not the entire body of the Roman Catholic Church. As the hierarchy trickles down from the Pope, to his cardinals, bishops, priests, deacons, and finally to the laity, the presence of women only slightly increases.[114] As members of the laity or "lay people[,]" women play an important role in the Roman Catholic community.[115]

---

[112] Mary Luke Tobin, *Women in the Church Since Vatican II*, NATIONAL CATHOLIC REPORTER (Nov. 1, 1986) http://americamagazine.org/issue/100/women-church-vatican-ii [http://perma.cc/QMV4-WGQ8].

[113] *Holy See*, state.gov, *supra* note 46.; Convention on the Elimination of All Forms of Discrimination Against Women, art. 7, Dec. 18, 1979, 1249 U.N.T.S. 17.

[114] *See generally* Catechism of the Catholic Church, *Part One the Profession of the Christian Faith*, THE HOLY SEE, http://www.vatican.va/archive/ccc_css/archive/catechism/p123a9p4.htm [http://perma.cc/TZB3-BXXM] (last visited Mar. 23, 2015).

[115] See 1983 CODE C.207 (defining "lay persons" as "By divine institution, there are among the Christian faithful in

Other women take solemn religious vows committing themselves to lives of chastity, poverty, and piety: promising to "serve the Church in special ways; work for the salvation of the world; and strive for the perfection of charity in their own lives" as nuns and sisters.[116] Though they are not entirely similar, nuns and sisters are primarily responsible for carrying out the mission of the Vatican and Holy See across the globe in the areas of education, charity, and social work.[117]

Indeed, one of the most popular figures of the Roman Catholic Church is Mother Teresa of Calcutta. Described by the Vatican as "[s]mall of stature, rocklike in faith, Mother Teresa of Calcutta was entrusted with the mission of proclaiming God's thirsting love for humanity, especially for the poorest of the poor."[118] Her many accomplishments include the establishment the Missionaries of Charity, candidacy for sainthood, and receipt of the Nobel Peace Prize in 1979.[119] The tremendous accomplishments of Mother Teresa and other sisters and nuns across the globe indicate that it is not a woman's charity, piousness, or ability preventing her from ordination. Rather, the refusal from the priesthood is not based upon deed. It is based upon her status as a

---

the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons. There are members of the Christian faithful from both these groups who, through the profession of the evangelical counsels by means of vows or other sacred bonds recognized and sanctioned by the Church, are consecrated to God in their own special way and contribute to the salvific mission of the Church; although their state does not belong to the hierarchical structure of the Church, it nevertheless belongs to its life and holiness.");
See also Catechism of the Catholic Church, *Part One the Profession of the Christian Faith*, THE HOLY SEE, http://www.vatican.va/archive/ccc_css/archive/catechism/p123a9p4.htm (last visited Mar. 23, 2015) [http://perma.cc/TZB3-BXXM](stating "The term 'laity' is here understood to mean all the faithful except those in Holy Orders and those who belong to a religious state approved by the Church. That is, the faithful, who by Baptism are incorporated into Christ and integrated into the People of God, are made sharers in their particular way in the priestly, prophetic, and kingly office of Christ, and have their own part to play in the mission of the whole Christian people in the Church and in the World.").

[116] Fr. William Saunders, *The Meaning of the Terms Nun, Sister, Monk, Priest, and Brother*, CATH. EDUC. RES. CTR., http://www.catholiceducation.org/en/culture/catholic-contributions/the-meaning-of-the-terms-nun-sister-monk-priest-and-brother.html [http://perma.cc/N9TY-BW7Z] (last visited Mar. 23, 2015).

[117] Jacov Broadley, *The Role of Catholic Nuns*, http://people.opposingviews.com/role-catholic-nuns-5701.html (last visited Mar. 23, 2015) [http://perma.cc/6ZR5-3S45].

[118] *Mother Teresa of Calcutta (1910-1997)*, VATICAN CITY STATE, http://www.vatican.va/news_services/liturgy/saints/ns_lit_doc_20031019_madre-teresa_en.html [http://perma.cc/6NR7-P9CL] (last visited Mar. 23, 2015).

[119] *Id.*

woman which the Vatican has continually justified as being "founded on the principle of the written Word of God, and from the beginning constantly preserved and applied in the Tradition of the Church."[120]

In affirming the refusal of the ordination of women the Roman Curia has stated, "[i]t is a position which will perhaps cause pain but whose positive value will become apparent in the long run, since it can be of help in deepening understanding of the respective roles of men and of women."[121] For the CEDAW, understanding the respective roles of men and women denotes an understanding of absolute equality between men and women and ensuring its practice. Yet, for the Roman Catholic Church, it seems to mean something different: an understanding that equality between men and women is contrary to fundamental tenets of the faith. Arguably, these tenets negatively reinforce the differences between the sexes and perhaps even "breeds disdain for women and their gifts and reinforce their invisibility."[122] Moreover, in addition to her earthly limitations, women are unable to fully participate in the Church's teachings and validate their calling toward priestly ordination. Simply stated, the central and sole role of men in the Church implies male privilege and effectively subordinates and limits women's role in the Roman Catholic Church.

---

[120] Sacred Congregation on the Doctrine of Faith, *Responsum Ad Propositum Dubium Concerning the Teaching Contained in "Ordinatio Sacerdotalis"*, THE HOLY SEE (Oct. 25, 1995), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19951028_dubium-ordinatio-sac_en.html [http://perma.cc/D2WA-GL52].

[121] Sacred Congregation for the Doctrine of the Faith, *Declaration Inter Insigniores*, THE HOLY SEE (Oct. 15, 1976), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html [http://perma.cc/DDN4-R8LU].

[122] Tobin, *supra* note 112.

In light of the refusal of women into the priesthood, the incompatibility of Articles 7 and 8 of the CEDAW regarding the equal inclusion of women in political and public life is apparent. Therefore, the possibility of the Holy See's adoption of these provisions is limited.

b. *The Opposition to the Affirmation of Women's Reproductive Rights*

Perhaps more controversial is the CEDAW's position as the first human rights treaty affirming a woman's right to reproductive choice.[123] Article 12 of the CEDAW aims to protect women from discrimination "in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services including, those related to family planning."[124] In the same respect, Article 16 protects a woman's right "to decide freely and responsibly on the number and spacing of her children and to have access to the information, education and means to exercise" that right.[125] The Committee has declared that "States parties' failure to remove barriers to women's effective access to reproductive and sexual health services constitutes discrimination against women" and is a violation of the CEDAW.[126]

"The Committee interprets the term 'health' consistently with the [World Health Organization's] description of health as a state of physical mental and social well-being not merely the absence of disease or infirmity."[127] However, above this the Committee also requires States parties to "interpret rights relating to health 'from the perspective of women's needs and interests'"

[123] Freeman, *supra* note 1, at 320.
[124] Convention on the Elimination of All Forms of Discrimination Against Women, art. 12, Dec. 18, 1979, 1249 U.N.T.C. 19.
[125] *Id.* at 20.
[126] Freeman, *supra* note 1, at 320.
[127] *Id.* at 315. (citing Constitution of the WHO, Preamble).

and thus, requires consideration of both the biological and social constructions of women which take into account women's capacity to make their own decisions about health care.[128]

Unsurprisingly, the Holy See has unambiguously condemned Articles 12, 14, and 16 of the CEDAW because the possibility of freedom in family planning make it impossible for the Holy See to fully accept obligations under the CEDAW.[129] Specifically, the Holy See noted to the U.N., "family planning services have been defined to include reproductive health services which might include abortion ... a definition that the Holy See has never accepted and something to which the Holy See can never agree."[130] Interestingly, the CEDAW is silent on the issue of abortion and has even been deemed by the U.S. State Department to be "abortion neutral."[131] Nonetheless, as indicated, the mere *possibility* of abortion's inclusion in family planning and reproductive choice sufficed to warrant the Holy See's condemnation of the CEDAW.

Much like the refusal of female ordination, the Holy See's disapproval of these provisions is founded in the fundamental tenets of the Roman Catholic Church. Indeed, abortion has long been considered a sin within the eyes of the Church.[132] Under the code of canon law, it is considered a crime under most circumstances.[133] Specifically, abortion is considered "an act of murder."[134] Moreover, the code provides, "a person who procures a successful abortion incurs an automatic (*latae sententiae*) excommunication" from the Church.[135] Importantly,

---

[128] *Id.* at 315-316. (citing GR 24 para 12).
[129] *Id.* at 551.
[130] *CEDAW Action Alert!*, WOMEN FOR FAITH & FAMILY, http://www.wf-f.org/CEDAW-ActionAlert.html (last visited Mar. 23, 2015) [http://perma.cc/785D-UZZW].
[131] *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY USA (Aug. 25, 2005) https://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf [http://perma.cc/HPM5-6Q3Q].
[132] Edward Peters, *Pope Francis on Reconciliation for Abortion*, A CANON LAWYER'S BLOG (Sep. 1, 2015) https://canonlawblog.wordpress.com/2015/09/01/pope-francis-on-reconciliation-for-abortion [http://perma.cc/5CX8-EF5T].
[133] *Id.*
[134] *Id.*; JUDIE BROWN, SAVING THOSE DAMNED CATHOLICS 83 (2007).
[135] 1983 CODE c.1398.

excommunication is not always deemed necessary when an abortion is procured but the complexity of these laws is outside the scope of this Note.[136]

These principles reflect a practice former Pope John Paul II declared in 1995 to be "based upon that unwritten law which man, in the light of reason . . . is reaffirmed by Sacred Scripture, transmitted by the Tradition of the Church and taught by the ordinary and universal Magisterium."[137] Similarly, years prior in 1974,[138] Pope Paul VI issued a "Declaration on Procured Abortion" in which he cited authority including authors of the Sacred Scripture, Pope Pius XI, Pope Pius XII, St. Augustine, St. Thomas Aquinas and concluded that abortion violates the right to life that each individual possesses simply by being a human.[139]

Much like the refusal of women's ordination, the Vatican City State and Holy See cannot comport with the CEDAW's provisions regarding family planning because the fundamental tenets of the Roman Catholic Church prohibit it. The Vatican, Holy See, and Roman Catholic Church's position with respect to family planning is largely incompatible with the CEDAW's affirmation of women's rights to their reproductive autonomy. Thus, the outright condemnation of abortion and other forms of family planning by the Roman Catholic Church makes reconciliation with the Articles 12, 14, and 16 of the CEDAW unlikely.

c. *The Scope of Papal Authority and the Possibility of Doctrinal Amendment*

[136] Peters, *supra* note 132.
[137] John Paul II, *Evangelium Vitae*, THE HOLY SEE par. 57 (Mar. 25, 1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [http://perma.cc/9DDR-AP9G].
[138] Interestingly, this declaration came just following the landmark decision by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) which had tremendous effect on the legalization of abortion procedures.
[139] Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, THE HOLY SEE (Nov. 18, 1974), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html [http://perma.cc/QD7D-HXQU].

Having acknowledged the incompatibility of fundamental tenets of the Roman Catholic Church's teachings with specific provisions of the CEDAW, one possibility for reconciliation may be through amendment to the code of canon law. Throughout several centuries, "the Catholic Church has become accustomed to reform and renew the laws of canonical discipline so that in constant fidelity to its divine Founder, they may be better adapted to the saving mission entrusted to her."[140] However, determining whether the Pope has the authority and is willing to amend these canons in the face of these conflicts is both complex and controversial.

Pope Francis, the current Pope, is known as the "Pope of Firsts" and is responsible, some say, for reinvigorating the Roman Catholic Church.[141] Consistently, he has captivated the world's attention by re-evaluating the conservative boundaries of his predecessors.[142] In 2014 alone, Pope Francis discussed the importance of increasing women's role in the Catholic community and the acceptance of gays and lesbians into the Church.[143] He has called for the global abolition of the death penalty and professed the compatibility of evolution and creation.[144] While Pope Francis' charisma and interpretation of the Roman Catholic faith excites progressive Roman Catholics

---

[140] Pope John Paul II, *Sacrae Disiplinae Leges*, THE HOLY SEE (Jan. 25, 1983), http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_25011983_sacrae-disciplinae-leges_en.html. [http://perma.cc/HM4Q-GGK8].

[141] Chelsea J Carter, Hada Messia, and Richard Allen Greene, *Pope Francis, the Pontiff of Firsts, Breaks with Tradition*, CNN (last updated Mar. 14, 2013), http://www.cnn.com/2013/03/13/world/europe/vatican-pope-selection/ [http://perma.cc/ZFJ2-9LT4].

[142] Robert Draper, *Will the Pope Change the Vatican? Or Will the Vatican Change the Pope?*, NAT'L GEOGRAPHIC, Aug. 2015, at 59.

[143] *Pope Francis says Women Should Play Expanded Role in Church*, FOX NEWS (Jan. 25, 2014), http://www.foxnews.com/world/2014/01/25/pope-francis-says-women-should-play-expanded-role-in-church/ [http://perma.cc/T4NM-H7YN].; Willa Frej, *Vatican Document on Gays Draws Cautious, Mixed Response*, MSNBC (last updated Oct. 16, 2014), http://www.msnbc.com/ronan-farrow-daily/vatican-document-gays-draws-cautious-mixed-response [http://perma.cc/364V-HTUL].; *Pope Francis' Address at Inauguration of Bronze Bust of Benedict XVI*, ZENIT (Oct. 27, 2014), http://www.zenit.org/en/articles/pope-francis-address-at-inauguration-of-bronze-bust-of-benedict-xvi [http://perma.cc/U9CZ-UFSE].

[144] Ariane de Vogue, *Pope Francis and the Future of the Death Penalty*, CNN (Sept. 24, 2015) http://www.cnn.com/2015/09/24/politics/pope-francis-death-penalty-future/index.html [http://perma.cc/5RXZ-QLC6].; Pope Francis, *On Care for Our Common Home*, THE HOLY SEE (May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [http://perma.cc/97X9-6MV3].

across the globe willing to depart from the Church's traditions, his willingness and limited authority to change the doctrine promulgated by the code of canon law may impede such reform. Indeed, "[l]ike many institutions, the Vatican is unreceptive to change and suspicious of those who would bring it."[145]

The answer to whether the Pope has the authority to amend canonical law hinges upon the original authority of the existing canon.[146] If the law is "written and promulgated by human church authority" it may be changed.[147] "If, however, it has its origins in divine [or] natural law, there is no authority on earth that may alter it," including the Pope.[148] In other words, canons stemming from divine writ are immutable if not propagated by human church authority.

The possibility of amendment to canonical law governing the ordination of women is highly unlikely due to its "divine" origin.[149] As mentioned, the reservation of priestly ordination to men has been defended over several centuries, and has been justified according to the Sacred Scripture and the pronouncements of countless Popes.[150] In fact, the Vatican has explicitly stated it "does not consider herself authorized to admit women to priestly ordination" because of its divine writ.[151] Therefore, the likelihood of amendment of canonical law governing priestly ordination is extremely limited.[152]

---

[145] Draper, *supra* note 142, at 51.
[146] Cathy Caridi, *Could the Pope Change the Law to Allow Women Priests?*, CANON LAW MADE EASY (Mar. 28, 2008),http://canonlawmadeeasy.com/2008/03/28/could-the-pope-change-the-law-to-allow-women-priests/ [http://perma.cc/J7MD-U3PZ].
[147] *Id.*
[148] *Id.*
[149] John Paul II, *Ordinatio Sacerdotalis*, THE HOLY SEE (May 22, 1994), http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html[http://perma.cc/3NYB-D59T].
[150] *Id.*
[151] Sacred Congregation for the Doctrine of the Faith, *Declaration Inter Insignoiores*, THE HOLY SEE (Oct. 15, 1976), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html [http://perma.cc/SMW5-QY7K].
[152] 1983 CODE c.1024.

Likewise, the Vatican has defended the condemnation of abortion over several centuries citing the Sacred Scripture, the tradition of the Church, and the teachings of the Pope and his clergy.[153] Therefore, it is also improbable that those provisions of canonical law governing abortion and birth control within the church are likely to be amended. Indeed, it is highly unlikely the Church will ever accept the practice of abortion, let alone amend those canons, which prohibit it.[154]

Even in light of the limited scope of papal authority to amend the code of canon law, the mere suggestion of amendment may be considered prejudicial to the Vatican City State and Holy See. Several proponents of the CEDAW and other human rights bodies present at the U.N. have encouraged the amendment of canonical law to reflect current social, moral, and political trends by reinterpreting the scripture and altering its teachings.[155] However, forcing the Roman Catholic Church to abandon its fundamental religious doctrine to satisfy the CEDAW, is a challenging demand.[156] The Vatican has stated that the U.N. Committee's proposal to "reinterpret Scripture and amend canonical laws to reflect current trends" infringes upon "matters protected by the right to freedom of religion."[157] The Vatican's argument is inarguably valid. By virtue of being, the Vatican City State and Holy See remain entitled to inalienable freedom of religion equal to any other nation.[158] Arguably, by politicizing statements about Catholic dogma, on issues such as

---

[153] *See generally* Paul VI, *Humanae Vitae*, THE HOLY SEE (July 25, 1968), http://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanaevitae.html [http://perma.cc/4G6W-N7Z5].; John Paul II, *Faithfulness to the Divine Plan in the Transmission of Life*, ETWN (Aug. 8, 1984), https://www.ewtn.com/library/PAPALDOC/JP840808.htm [http://perma.cc/YDL3-4QFL].

[154] 1983 CODE c.1398.

[155] Carol Glatz, *Vatican Warns Against Misinterpreting International Human Rights*, NAT'L CATH. REP. (Sep. 26, 2014), http://ncronline.org/news/accountability/vatican-warns-against-misinterpreting-international-law-human-rights [http://perma.cc/6S2T-5C6P].

[156] Brett Schaefer, *U.S. Caution on Joining U.N. Human-Rights Treaties is Invalidated*, NAT'L REV. (Fed. 11, 2014) http://www.nationalreview.com/article/370775/un-preaches-vatican-brett-schaefer-steven-groves [http://perma.cc/36YY-G3D9].

[157] Glatz, *supra* note 155.

[158] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Pt. 1 (Dec. 10, 1948).

family planning and female ordination, principles of religious freedom as outlined by the Universal Declaration of Human Rights are diminished if not destroyed.[159]

However, at a fundamental level, the Vatican City State and Holy See have the ability to insulate themselves from human rights obligations through their own proclamations of immunity.[160] Critics suggest the Vatican City State and Holy See, via canon law, are able to evade basic human rights obligations on the basis of their diplomatic immunity.[161] For instance, in the aftermath of the sex abuse scandals that riddled the Roman Catholic Church during the early 2000s, the Vatican City State and Holy See came under fire for their simultaneous declarations of legal immunity and obligation to the Scripture, and were considered a "rogue state" in the realm of international human rights as a result.[162] While the Roman Catholic Church is committed to a number of human rights efforts, "the myth of the inequality of peoples . . . is still alive" within the Church, specifically with regard to women.[163]

In light of these revelations, even if the Pope were to have some authority to amend canonical law, his willingness to do so may be limited after considering the Vatican City State and Holy See's insularly religious and political tradition. Nonetheless, amendment to canonical law may not be the Vatican City State and Holy See's only resolve in terms of elevating their status in the international discourse of women's rights as human rights.

V. RECOMMENDATION

---

[159] *Id.*

[160] *How the Vatican Evades Human Rights Obligations Through Canon Law, Diplomatic Immunity and Other Dodges*, CONCORD WATCH, http://www.concordatwatch.eu/topic-47307.843 [http://perma.cc/EG82-JAGL] (last visited Mar. 23, 2015).

[161] *Id.*

[162] Paola Totaro, *Call to Treat Vatican as Rogue State*, THE SYDNEY MORNING HERALD (Sep. 9, 2010), http://www.smh.com.au/world/call-to-treat-vatican-as-a-rogue-state-20100908-151cg.html [http://perma.cc/G5FU-KL3B].

[163] *The Church and the Rights of Man*, EWTN, http://www.ewtn.com/library/HUMANITY/RIGHTSMN.HTM [http://perma.cc/K7S3-EAMU] (last visited Sept. 25, 2015).

The incompatibility of the Roman Catholic Church's treatment of women and the difficulty of amendment to canonical law does not necessarily preclude the Holy See from adopting the CEDAW altogether. The Holy See, as a U.N. permanent observer and like several current parties to the CEDAW, could make reservations to specific articles of the Convention with which its interests conflict. Doing so would allow the Holy See to elevate its standing in the international dialogue surrounding women's rights without compromising its religiosity. Moreover, ratifying the CEDAW with reservation will symbolize the Vatican City State, Holy See, and Roman Catholic Church's willingness to finally reconcile with growing social, moral, and political trends regarding equality between men and women.

In international law, a reservation is a unilateral statement made by a State whereby "it purports to exclude or to modify the legal effect of certain provisions of the treaty in application to that State."[164] With such reservations, it is plausible that the Vatican City State and Holy See could comport with the CEDAW and maintain their religiosity simultaneously, because the Holy See could freely choose with which provisions it would be formally obligated. The CEDAW's broadly written language allows for such flexibility. In fact, the CEDAW approves these reservations to the extent they are made "on the ground that national law, tradition, religion or culture are not congruent with Convention principles and purport to justify the reservation on that basis."[165]

a. *A Global Comparison*

[164] Office of the United Nations High Commissioner for Human Rights, *Human Rights Treaty Bodies*, U.N., http://www2.ohchr.org/english/bodies/treaty/glossary.htm [http://perma.cc/AKZ5-FSY6] (last visited Mar. 23, 2015).
[165] United Nations Entity for Gender Equality & the Empowerment of Women, *CEDAW: Reservations to CEDAW*, U.N. WOMEN, http://www.un.org/womenwatch//daw/cedaw/reservations.htm [http://perma.cc/BJE6-E6WZ] (last visited Mar. 15, 2015).

The vast majority of the world's countries with the highest populations of Roman Catholic citizens have ratified the CEDAW, which should encourage the Holy See's ratification of the Convention and may suggest the centralized Roman Catholic Church's disconnect with people of the faith.[166] Such countries include Brazil, Mexico, Philippines, Italy, Colombia, France, Poland, Spain, and the Congo.[167] Several of these countries have made reservations to specific portions of the CEDAW with which their interests conflict.[168]

For example, Brazil adopted the CEDAW in 1984 but upon signature and ratification made several reservations.[169] Upon ratification, Brazil opposed the guarantee of equal personal rights between men and women, including those provisions which dictate the right to choose place of domicile, family name, and the equality of men and women entering, during the course of, and in the dissolution of marriage.[170] Four years later, Brazil amended its constitution to include provisions to ensure the equality of men and women.[171] In 1994, upon the realization by Brazil's National Congress that its reservations were in violation of their new Constitutional guarantees, the country notified the Secretary-General of its withdrawal of those reservations.[172] Thus, without

---

[166] *Compare* Max Fisher, *This Map of Global Catholic Populations Shows the Church's Looming Dilemma*, THE WASH. POST (Feb. 12, 2013), http://www.washingtonpost.com/blogs/worldviews/wp/2013/02/12/this-map-of-global-catholic-populations-shows-the-churchs-looming-dilemma/ [http://perma.cc/9Y5C-W3DZ] *with Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en [http://perma.cc/3SCM-EYSB] (last visited Mar. 23, 2015).

[167] *Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en [http://perma.cc/3SCM-EYSB] (last visited Mar. 23, 2015).

[168] *Id.* (follow hyperlinks to respective countries).

[169] *Id.* (follow "Brazil[8]" hyperlink to End Note).

[170] Jodie G. Roure, *Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform*, COLUM. HUM. RTS. L. REV. 67, 71 (2009).

[171] *Id.*

[172] *Id.*

reservation, Brazil has currently accepted the CEDAW in full and as a result, is internationally legally bound to ensure the implementation of its objectives.[173]

Interestingly, upon ratification, Brazil did not make reservations to the CEDAW's provisions pertaining to women's reproductive health rights despite 75% of its population describing itself as Roman Catholic.[174] Currently, while abortion is not prohibited altogether, Brazil maintains stringent laws limiting abortion to those pregnancies resulting from rape or those in cases where the mother's survival is at risk.[175] In its combined initial, second, third, fourth, and fifth report, Brazil noted with respect to Article 12 of the CEDAW and its affirmation of women's equal access to health services, "[t]he exclusion of abortion from the crime list still faces strong resistance, especially in social segments linked to the Catholic Church."[176]

The Committee has warned, "neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention."[177] Therefore, if Brazil should continue to encounter resistance to the liberalization of family planning laws, including those with respect to abortion, it should make reservation to Article 12 in order to prevent further compromise to its obligations under the CEDAW. Such a reservation would likely be comparable to that of the Holy See, if it were to ratify the Convention.

---

[173] *Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en [http://perma.cc/3SCM-EYSB] (follow "Brazil[8]" hyperlink to End Note) (last visited Mar. 23, 2015).
[174] Convention on the Elimination of Discrimination Against Women, Brazil Rep. Combined Initial, Second, Third, Fourth, and Fifth, U.N. Doc. CEDAW/C/BRA/1-5, 6 (Nov. 7, 2002).
[175] Alessandra Casanova Guedes, *Abortion in Brazil: Legislation, Reality and Options*, 8 REPROD. HEALTH MATTERS 66 (Nov. 2000).
[176] Convention on the Elimination of Discrimination Against Women, Brazil Rep. Combined Initial, Second, Third, Fourth, and Fifth, U.N. Doc. CEDAW/C/BRA/1-5, 170 (Nov. 7, 2002).
[177] *CEDAW: Reservations to CEDAW*, *supra* note 155.

The Holy See could adopt a similar approach to the CEDAW as did Ireland, who ratified the treaty in December of 1985.[178] Their approach would likely be similar because the politics of Ireland have been historically influenced by the country's relationship to the Holy See and Vatican.[179] In fact, the Committee has criticized Ireland, a secular State, for "the influence of the [Roman Catholic] Church in attitudes and stereotypes, but also in official state policy."[180] Specifically, the Committee has noted that though Ireland did not make reservations to Article 12, "women's right to health, including reproductive health, is compromised by this influence."[181] Nonetheless, Ireland conveyed to the Committee in its fourth and fifth report the implementation of specific measures in response to ratification in areas related to pensions, maternity, adoptive leave, family law, and equal opportunity employment for women.[182] Moreover, in response to ratification and despite being eventually defeated, Ireland reported a proposed constitutional amendment that would lift the current prohibition on abortion unless in certain dire circumstance.[183]

As exhibited by the reports provided by both Brazil and Ireland, the CEDAW's ratification has enabled the eradication of several inequalities in areas both directly and indirectly tied to religion. Therefore, if the Holy See were to consider ratification of the CEDAW either in whole

---

[178] *Convention on the Elimination of All Forms of Discrimination Against Women*, U. N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Mar. 23, 2015).

[179] *See generally* DERMOT KEOGH, IRELAND AND THE VATICAN: THE POLITICS AND DIPLOMACY OF CHURCH-STATE RELATIONS 1922-1960 (1997).

[180] *Concluding comments of the Committee on the Elimination of Discrimination against Women: Ireland*, Comm. on the Elimination of All Forms of Discrimination Against Women, June 7-25, 1999, U.N. Doc. A/54/38/Rev.1, Supp. No. 38, ¶ 180 (1999).

[181] *Id.*

[182] Ireland, Combined fourth and fifth periodic report to the Comm. on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/IRL/4-5, 10-21 (Jun. 10, 2003).

[183] *Id.*

or in part, the Committee should encourage the Holy See to re-examine its reservations in light of the evolving influence of religion within predominately Roman Catholic countries.

It is crucial to note the Holy See has informed the U.N. Committee, "[t]he Holy See does not ratify a treaty on behalf of every Catholic in the world, and therefore, does not have obligations to 'implement' the convention within the territories of other states parties on behalf of Catholics," who should be subject to the national laws of the countries they find themselves.[184] The Holy See continued noting the "Holy See's religious and moral mission which transcends geographical boundaries cannot be transformed into a universal legal jurisdiction, which somehow becomes a matter under the mandate of a treaty body."[185] Contrary to the proclamations of the Holy See, it is evident the Roman Catholic Church influences States parties' implementation of the CEDAW in some respects. Undoubtedly, the Church's influence is extra-territorial despite the Holy See's contradictions. That is, while formally the Holy See's obligations under the CEDAW would not be different than other States parties, the effects of the Holy See's ratification are even greater because of the Holy See's relationship and direct influence over the global Roman Catholic community.

b. *The Possibility of Reservation*

Despite having to make some initial reservations, there are several provisions of the CEDAW with which the Vatican City State and Holy See could oblige without compromising their religiosity. Generally, such provisions may include those protecting and affirming women's equal rights with men in the ability to change or retain their nationalities, promoting equal opportunity

---

[184] *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of a Child*, THE HOLY SEE (Jan. 31, 2014), http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html [http://perma.cc/CNB2-3NQS] (last visited Mar. 23, 2015).
[185] *Id*.

in the fields of education, solidifying equal economic and social benefits upon men and women, maintaining equality before the law, and recognizing equality at all stages in marriage.[186]

Notably, some reservations are impermissible under the CEDAW.[187] Impermissible reservations include those which would "challenge the central principles of the Convention[.]"[188] Specifically, the Committee cautions States parties' reservations to Articles 2 and 16, which it considers "core provisions of the Convention."[189] The Committee maintains that with respect to Article 16 reservations "whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn."[190] On the other hand, Article 2 sets out the general obligations of States parties, focusing "on law and the role of legislation and legal institutions in ensuring that women are not subject to discrimination, whether formal (*de jure*) or in practice (*de facto*)."[191] Essentially, via Article 2 and 16's catchall, the Committee requires States parties to abandon their religious or cultural reasons for formal and informal discrimination against women by adopting laws and other policies to eradicate such traditions.

The prospect of the Roman Catholic Church abandoning all tradition is extremely unlikely. Therefore, if the Holy See were to make reservations to provisions with which its interest conflicts, the effectiveness of the treaty could be potentially undermined. In fact, the CEDAW has been subject to criticism regarding the frequency of States parties' reservations, which undermine the overall effectiveness of the treaty.[192] In response, the Committee "[i]n more recent years [ ] has

---

[186] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14.
[187] *CEDAW: Reservations to CEDAW*, *supra* note 155.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Freeman*, *supra* note 1, at 72.
[192] *See generally*, Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605 (2002).

encouraged States parties to address cultural issues by viewing culture as dynamic rather than as monolithic or immutable."[193]

Thus, if the Holy See were to consider ratifying the CEDAW it must view its divine texts and canonical law as dynamic: considering current social, political, moral, and ideological trends. This challenge, as the Committee notes, involves "the actual understanding and the social and regulatory incorporation of women's rights as human rights, and therefore implies, necessarily, changes in cultural values as practices."[194] Certainly, this would present a challenge for the Holy See, Vatican City State, and Roman Catholic Church. While its inner doctrine will not change, its outer principles and practices may evolve. Such a challenge should be met in order to put an end to the stagnation of the Roman Catholic Church's progress in supporting women's equality.

In order to encourage inherently religious nations to become parties to the CEDAW, the Committee should relax its somewhat inflexible approach to the reservations of fundamentally religious bodies like the Holy See. Currently, the CEDAW suggests that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields[.]"[195] Certainly this position is optimal and "States which remove reservations would be making a major contribution to achieving the objectives of both formal and de facto or substantive compliance with the Convention."[196] However, the Committee should not be absolute if it wants religious states to become active participants in the international effort of ensuring the equal rights of women through CEDAW. Without the relaxation of the Committee's approach to these fundamentally religious states, the

[193] Freeman, *supra* note 1, at 31.
[194] Brazil, Combined initial, second, third, fourth, and fifth periodic report to the Comm. on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/BRA/1-5, 202 (Nov. 7, 2002).
[195] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 15.
[196] Comm. on the Elimination of Discrimination against Women, on its Eighteenth and Nineteenth Session, U.N. Doc A/53/38/Rev.1 (1998).

CEDAW runs a great risk of jeopardizing the free practice of religion and by extension, likely discourages accession, signature, or ratification of the Convention. Arguably, some involvement by these countries, though inherently limited because of religious obligation, is better than no involvement at all.

VI. CONCLUSION

As a party to the CEDAW, the Holy See cannot fully achieve the CEDAW's objectives because fundamental tenets of the Roman Catholic Church prohibit it. However, their incompatibility is not absolute. Ratifying the CEDAW, but with specific reservations may reconcile their incompatibility and result in the implementation of efforts by the Vatican City State, Holy See, and Roman Catholic Church to achieve equality between women and men.

More broadly speaking, it would elevate the Vatican City State, Holy See, and Roman Catholic Church's status in the international dialogue concerning women's rights as human rights. It would also provide at least partial relief to the socially, politically, and religiously progressive Roman Catholics who find the application of traditional Church dogmas in the modern day fundamentally troubling. While arguably these significant reservations could lead to the overall ineffectiveness of the treaty, several provisions of the CEDAW do not conflict with traditional Roman Catholic principle and discipline. Therefore, the effectiveness of the CEDAW would not be substantially jeopardized by the proposed reservations. Moreover, it is a misnomer that approving the CEDAW as a solid piece of public policy would somehow compromise the Roman Catholic faith. The CEDAW will provide an important framework through which the Vatican and Holy See can work with other countries to advance the rights of women throughout the world.

On a more localized scale, what are progressive Roman Catholics that simultaneously believe in certain aspects of Roman Catholic doctrine and the affirmation of women's rights as codified in the CEDAW to do? Pope Benedict XVI, the immediate predecessor to Pope Francis, may have addressed this issue, albeit indirectly, when he stated, "[o]ver the Pope as the expression of the binding claim of ecclesiastical authority[,] there still stands one's own conscience, which must be obeyed before all else, if necessary even against the requirement of ecclesiastical authority."[197] While the CEDAW's affirmation of women's rights is incapable of reconciliation with the Roman Catholic Church without reservation, progressive Roman Catholics resolve may simply be religious self-determination, "beyond the claim of external social groups, even of the official [C]hurch."[198]

As for the official Church, some commentators suggest Pope Francis will continue "to ignite a revolution inside the Vatican and beyond its walls, without overturning a host of long-held precepts."[199] That is, "[h]e won't change doctrine" but what he will do "is return the church to its true doctrine—the one it has forgotten, the one that puts man back in the center . . . . "[200] Maybe, when man is returned to the center, woman will be placed alongside him as his equal. Indeed, "[t]he Church has always been in the vanguard in affirming, defending and promoting the rights of man."[201] With the help of the CEDAW, maybe now is the time for affirming, defending, and promoting the rights of woman.

---

[197] Wijngaards Institute for Catholic Research, *Quotes from Josef Ratzinger, Now Pope Benedict XVI*, WOMEN PRIESTS, http://www.womenpriests.org/ratz1.asp (citing COMMENTARY ON THE DOCUMENTS OF VATICAN II (ed. Vorgrimler) 1968.) [http://perma.cc/GU3Q-YWQK] (last visited Mar. 23, 2015).
[198] *Id*.
[199] *See generally* Draper, *supra* note 142, at 59.
[200] *Id*.
[201] *The Church and the Rights of Man*, http://www.ewtn.com/library/HUMANITY/RIGHTSMN.HTM [http://perma.cc/R49Z-QCPW] (last visited Sept. 25, 2015).

IN SEARCH OF REFUGE:
THE UNITED STATES' DOMESTIC AND INTERNATIONAL OBLIGATIONS TO PROTECT UNACCOMPANIED IMMIGRANT CHILDREN

Megan Smith-Pastrana ∗

"They undertake difficult journeys, often across numerous international borders, and often alone. Unaccompanied children are some of the most vulnerable migrants who cross our borders, and are in need of special protections appropriate for their situation."[1]

"Abuse at the hands of immigration officers and agents compounds the trauma and abuse that many of these children have already suffered. Greater oversight and accountability is needed for CBP as it encounters and interacts with children, many of whom have fled violence and persecution in their home countries and are in the aftermath of a dangerous journey here. Short-term detention facilities must also be regulated and improved as they are the first stop for the children in the process."[2]

MELVIN'S STORY

In search of protection from the gang violence in El Salvador, Melvin made the extremely difficult journey of coming to the United States unaccompanied and illegally.[3] With one of the highest per capita murder rates in the world, El Salvador is considered one of the most dangerous

∗ Candidate for Doctor of Jurisprudence and Graduate Certificate in International and Comparative Law, Indiana University Robert H. McKinney School of Law, 2016. Received Best Student Note Award for the 2015 selection cycle. To my Mom, Dad, Grandparents, and my husband Carlos Pastrana for your love and support during my journey through law school. I am extremely grateful to Professor Karen E. Bravo for her guidance and assistance in writing this Note. Furthermore, thank you to my mentors, Attorney Aimee Heitz and Noemí Gallegos for sharing with me your knowledge of and passion for the field of immigration.

[1] WOMEN'S REFUGEE COMM'N & ORRICK, HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 1 (2009), http://www.womensrefugeecommission.org/programs/migrant-rights/unaccompanied-children [http://perma.cc/DY67-PKWF] (follow Halfway Home: Unaccompanied Children in Immigration Custody hyperlink) [hereinafter HALFWAY HOME].

[2] *Statement of the American Immigration Lawyers Association Submitted to the Committee on the Judiciary of the U.S. House of Representatives Hearing on "An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors,"* AM. IMMIGR. LAWYERS ASS'N (June 25, 2014), http://www.aila.org/content/default.aspx?docid=49015 [http://perma.cc/FMR9-MFKP] [hereinafter *Statement of the American Immigration Lawyers Association*].

[3] Corinne Lestch, *Children who crossed the border recall horror stories back home as they fight to stay in U.S.*, N.Y. DAILY NEWS (Aug. 13, 2014, 10:20 PM), http://www.nydailynews.com/news/national/immigrant-kids-judge-horror-stories-article-1.1902877 [http://perma.cc/RK7H-SMYH].

http://dx.doi.org/10.18060/7909.0041

co\untries.[4] For many children, the decision to come to the United States is a decision of life or death.[5] In recalling his life in El Salvador, Melvin describes that "[w]hen kids leave school, (the gang members) come up to you and wrap their arms around you like they're your friend . . . . And then they put a pistol on your waist and tell you to come with them."[6] Melvin is one of the thousands of unaccompanied minors who entered the United States illegally since the start of the 2014 fiscal year.[7]

I. INTRODUCTION

Unfortunately, for many of these children, the treacherous journey does not stop once they cross into the United States.[8] Children without a legal guardian in the United States to whom they can be released while their immigration case is pending are placed in the custody of immigration.[9] There are numerous reports of severe abuse and mistreatment of the children under the care of the United States Custom and Border Protection ("CBP").[10] The reports include children being shackled, refused proper medical care, and being physically, emotionally and sexually abused.[11] Instead of finding the refuge they so desperately need, the children are crowded into detention centers to face inhumane living conditions and horrendous acts of mistreatment.[12]

---

[4] U.S. DEP'T OF STATE BUREAU OF DIPLOMATIC SECURITY, EL SALVADOR 2013 CRIME AND SAFETY REP. 1-2 (2013) ("El Salvador has the second highest per capita murder rate in the world: 69:100,000 in 2012 (UNODC statistics) (by comparison the murder rate in Massachusetts, with a similar geographical area and population, was 2.6 per 100,000).").
[5] Lestch, *supra* note 3.
[6] *Id*.
[7] *Statement of the American Immigration Lawyers Association*, *supra* note 2.
[8] *See* HALFWAY HOME, *supra* note 1, at 4. The Women's Refugee Commission completed a study regarding the care and custody of unaccompanied alien children in immigration custody. The report provides a firsthand insight on the shortcoming of the current system in place and will be referenced several times throughout this Note.
[9] *Id.* at 1.
[10] *Statement of the American Immigration Lawyers Association*, *supra* note 2 ("A report by the American Immigration Council shows over 800 complaints received by CBP from 2009-2012 . . . .").
[11] *Id*.
[12] *Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention*, AM. CIV. LIBERTIES UNION (June 11, 2014), https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during [http://perma.cc/V745-G6XA] [hereinafter AM, CIV. LIBERTIES UNION].

This Note will discuss the United States' failure to adhere to its current domestic laws and to international conventions and customs regarding the humane treatment of immigrant children. There are extreme human rights violations occurring within the United States, and it is imperative that changes be made to the current system in order to comply with not only domestically-implemented obligations, but also with international conventions and customs. Specific changes that must be made for the United States to come into compliance with its obligations include codification of the *Flores* Settlement Agreement,[13] ratification of the Convention of the Rights of the Child,[14] and a detention system with a focus on the "best interest of the child" principle. Additionally, the United States should provide meaningful access to legal counsel and eliminate the use of expedited removal. Finally, the United States must take foreign policy initiatives to address the reasons why the children are fleeing their countries of origin.

Section II of this Note will examine the current landscape of immigration issues surrounding unaccompanied immigrant children in the United States.[15] Section III will provide an analysis of the domestic and international laws and customs pertaining to the treatment of immigrants. Section IV will make a comparative analysis between the United States' current immigration policies with those of Sweden and the United Kingdom. Section V of the Note will review the material presented and provide potential solutions for how the United States can make changes within its system to comply with its domestic and international obligations to unaccompanied immigrant children. Finally, Section VI of the Note will summarize the solutions

[13] Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544 (C.D. Cal. Jan. 17, 1997), https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf [http://perma.cc/J3QF-5L8L] [hereinafter *Flores* Settlement Agreement].
[14] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx [http://perma.cc/TXR6-BR4A] [hereinafter CRC].
[15] This Note will focus specifically on the recent increase of unaccompanied children arriving to the U.S. from Mexico, El Salvador, Guatemala, and Honduras.

presented and explain how fulfillment of those objectives will provide the most appropriate humanitarian protection for unaccompanied immigrant children.

II. BACKGROUND AND HISTORY: UNACCOMPANIED IMMIGRANT CHILDREN IN THE UNITED STATES

On June 2, 2014, in response to hundreds of unaccompanied immigrant children crossing the United States' southwest border, President Obama declared an "urgent humanitarian crisis."[16] In 2011, approximately 4,059 unaccompanied immigrant children from Mexico, El Salvador, Honduras, and Guatemala entered the United States in search of refuge.[17] In fiscal year 2014, the U.S. Border Patrol agents apprehended 66,127 unaccompanied immigrant children.[18] The U.S. Senate Appropriations Committee further estimates that the number of unaccompanied children will continue to increase to around 127,000 to 145,000 unaccompanied children in 2015.[19] This Note focuses specifically on the recent increase in children arriving to the United States from Mexico, El Salvador, Guatemala, and Honduras.

A. WHY ARE THOUSANDS OF CHILDREN CROSSING THE UNITED STATES BORDER ALONE?

[16] Devin Dwyer, *Obama Calls Surge of Children Across US Border 'Urgent Humanitarian Situation'*, ABC NEWS (June 2, 2014), http://abcnews.go.com/blogs/politics/2014/06/president-obama-calls-surge-of-children-across-us-border-urgent-humanitarian-situation/ [http://perma.cc/37UW-ZC47].

[17] Dara Lind, *Thousands of children are fleeing Central America to Texas—alone*, VOX (June 4, 2014, 8:00 AM), http://www.vox.com/2014/6/4/5773268/children-migration-central-america-texas-unaccompanied-alien-children-border-crisis [http://perma.cc/2B3G-6H6P].

[18] Muzaffar Chishti & Faye Hipsman, *Unaccompanied Minors Crisis Has Receded from Headlines But Major Issues Remain*, MIGRATION POL'Y INST. (Sept. 25, 2014), http://www.migrationpolicy.org/article/unaccompanied-minors-crisis-has-receded-headlines-major-issues-remain [http://perma.cc/MY5R-R4B7].

[19] U.S. S. Comm. on Appropriations, *Opening Statement of Chairwoman Barbara A. Mikulski* (June 10, 2014), http://www.appropriations.senate.gov/sites/default/files/hearings/06_10_14%20lhhs%20markup%20bam%20remarks%20w%20UAC%20intro.pdf [http://perma.cc/3AUU-5UX7].

The United Nations High Commissioner for Refugees ("UNHCR") completed a study to determine the reasons for why children are fleeing their home countries of Mexico, Honduras, El Salvador, and Guatemala.[20] The study found that "[t]wo overarching patterns of harm related to potential international protection needs emerged: violence by organized armed criminal actors and violence in the home."[21] Forty-eight percent of the children interviewed "shared experiences of how they had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors."[22] Twenty-one percent indicated that the reason for fleeing their country of origin was "abuse and violence in their homes by their caretakers."[23] Eleven percent of the children interviewed "reported having suffered or being in fear of both violence in society and abuse in the home."[24] Finally, thirty-eight percent of the children, specifically children from Mexico, were escaping "recruitment into and exploitation by the criminal industry of human smuggling—that is, facilitating others in crossing into the United States unlawfully."[25]

---

[20] U.N. HIGH COMM'R FOR REFUGEES REGIONAL OFFICE FOR THE U.S. AND THE CARIBBEAN, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 6 (May 2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20On%20the%20Run_Executive%20Summary.pdf [http://perma.cc/4PY6-BDDH] [hereinafter CHILDREN ON THE RUN].

[21] *Id*. Protection related reasons were found to be a very prominent trend in the data collected. The data from the survey revealed "that no less than 58% of the 404 children interviewed were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection." *Id.*

[22] *Id*. The report divided the results by country, and children from El Salvador and Honduras were found to have the highest potential for international protection needs with 72% and 57% of total number for unaccompanied minors from each state. *Id.*

[23] *Id*.

[24] *Id.* at 7.

[25] *Id*. at 6-7. The "push factors" are not the only variables contributing to the recent surge in unaccompanied minors arriving to the U.S. *Child Migrants to the United States*, NAT'L CONF. OF STATE LEGISLATURES (revised Oct. 28, 2014), http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx [http://perma.cc/J7R6-TPDW] [hereinafter NAT'L CONF. OF STATE LEGISLATURES]. For many children escaping violence in their home countries, their decision was also driven by the "pull factor" of wanting to reunite with family in the United States. *Id.*

Given that the unaccompanied minors are escaping from such serious circumstances, the importance of conducting interviews with each child and completing reports regarding each child's circumstances is extremely important.[26] Knowing and understanding the reasons why a child has escaped his or her country to come to the United States is the only way to ensure that children will receive the required international protection.[27]

B. DETENTION OF IMMIGRANT CHILDREN IN THE UNITED STATES

The Homeland Security Act ("HSA") of 2002 transferred the custody of unaccompanied children from the Immigration and Naturalization Service ("INS") to the Office of the Refugee Resettlement ("ORR").[28] ORR then created a division called the Department of Unaccompanied Children's Services ("DUCS"), which in turn contracted with private facilities to provide the needed services and care to unaccompanied minors.[29] Currently, most immigrant children are housed in the private facilities operated by DUCS.[30] In order to analyze the effectiveness of the transfer, the Women's Refugee Commission conducted a study in 2009 of the privately held DUCS facilities.[31] While the Women's Refugee Commission noted that the children are better off under the care of the DUCS as opposed to the INS, there are still numerous pitfalls within the newly implemented system.[32]

A main shortfall of the system is that DUCS maintains dual roles of "prosecutor and caretaker."[33] These competing roles have led to the location of facilities in remote locations to

[26] *See* CHILDREN ON THE RUN, *supra* note 20, at 7.
[27] *Id.*
[28] 6 U.S.C. § 279(a) (2006).
[29] HALFWAY HOME, *supra* note 1, at 4.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 14.
[33] *Id.*

facilitate transfer between Department of Homeland Security ("DHS") and DUCS.[34] Remote areas provide little to no access for children to medical and legal services.[35] Furthermore, DUCS facilities unable to handle large numbers of children more closely resemble the restrictive settings of prisons or juvenile detention centers, which compromise the "best interest of the child."[36] Additionally, many of the private DUCS facilities, as a result of little to no oversight, have failed to comply with proper policies and procedures.[37] The lack of oversight leaves children subject to not only harsh living conditions, but also to physical and mental abuse.[38]

Since the Women's Refugee Commission report of 2009, the brokenness of the immigration system continues to show, as the flood of unaccompanied immigrant children entering the United States increases.[39] While DHS has made improvements in the system by attempting to shorten the length of time children spend in detention and to improve the care and treatment of children, the abuse of children in detention facilities persists.[40] Numerous complaints were filed against DUCS facilities for abuse and neglect of children.[41] Recently filed complaints include details "that children were shackled, subjected to inhumane detention conditions, had inadequate access to medical care, and were verbally, sexually, and physically abused."[42]

On June 11, 2014, the American Civil Liberties Union ("ACLU"), along with other civil, immigrant, and human rights groups, filed a complaint on behalf of more than one hundred

---

[34] *Id*.
[35] *Id*.
[36] *Id*. at 15, 18.
[37] *Id*. at 24-5.
[38] *Id*. at 24.
[39] *A Fair and Responsible Response to the Recent Influx of Unaccompanied Immigrant Minors*, THE CHI. BAR FOUND. (Aug. 5, 2014), http://chicagobarfoundation.org/news_item/fair-responsible-response-recent-influx-unaccompanied-immigrant-minors/ [http://perma.cc/ZX4F-PFE7].
[40] *American Immigration Lawyers Association*, *supra* note 2.
[41] *Id*.
[42] *Id*.

children who had reported abuse and mistreatment at the hands of CBP.[43] The managing attorney for the Immigrant Children's Protection Project at the National Immigrant Justice Center made the following statement with regard to the current treatment of unaccompanied minors:

> Border Patrol agents are committing appalling abuses of children all along the border. Even worse, Border Patrol has been committing these abuses for years, and our organizations have notified the agency numerous times, yet nothing has changed. The recent increase in arrivals of young people at the border makes it especially urgent that CBP ensure all children in their custody are treated safely and humanely.[44]

Among the reports of abuse referenced in the ACLU complaint, is that of a fourteen-year-old girl who was forced to stay in an unsanitary and overcrowded holding cell after having her asthma medication confiscated by the CBP agent. [45] While in the cell, the young girl suffered from multiple asthma attacks. [46] The CBP officials refused to assist her and only threatened her with punishment for faking.[47]

Another seventeen-year-old girl was placed in what is referred to as a *hielera*, or freezer, in her wet clothes. [48] The *hielera* prevented her clothes from drying for three whole days. [49] Additionally, CBP did not provide the girl any drinking water, leaving her only with the water

---

[43] AM. CIV. LIBERTIES UNION, *supra* note 12 ("The complaint describes Border Patrol agents denying necessary medical care to children as young as five-months-old, refusing to provide diapers for infants, confiscating and not returning legal documents and personal belongings, making racially-charged insults and death threats, and strip searching and shackling children in three-point restraints during transport. Reports of such abuse have been documented and reported for years, but no reforms have been implemented, nor have any actions been taken to hold agents accountable.").

[44] *Id.* James Lyall of the ACLU commented, "Border agents operate in a zone of impunity. Given CBP's recent promise to be more accountable and transparent, we call on the agency to finally address these systemic abuses in a serious and meaningful way." *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

from the toilet in her cell, which was in plain view of all of the other detainees and located in front of one of the security cameras.[50]

An additional report of abuse includes a seven-year-old boy who was developmentally disabled.[51] When he was detained by CBP he was suffering from acute malnourishment, yet CBP held him in custody for five days and refused him medical treatment.[52] He ultimately was released from CBP and required surgery and hospitalization.[53]

The stories of these young children shed light on the horrendous abuses of children within the United States' immigration system.[54] Unfortunately, the reports of abuse of children at the hands of border patrol agents are not a new occurrence.[55] From January 2009 through January 2012, approximately 809 complaints of alleged abuse were lodged against Border Patrol agents.[56] As the influx of unaccompanied minors continues to grow, the brokenness of the current system becomes even more apparent.[57] On June 25, 2014, the American Immigration Lawyers Association ("AILA") urged the U.S. House of Representatives and the Administration to take the complaints against CBP officials seriously in an effort to prevent continued abuse.[58] Furthermore, AILA urged the Administration to implement "greater oversight and accountability" for CBP noting that

---

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] AM. CIV. LIBERTIES UNION, *supra* note 12.
[55] *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, IMMIGR. POL'Y CTR. (May 4, 2014), http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse [http://perma.cc/V8NQ-PTY7].
[56] *Id.*
[57] *Id.*
[58] *Statement of the American Immigration Lawyers Association*, *supra* note 2 ("AILA recognizes that most officers and agents perform their jobs professionally and do not engage in abuses. However, the Administration should take these complaints seriously to ensure that the culture at CBP does not accept abuse. Abuse at the hands of immigration officers and agents compounds the trauma and abuse that many of these children have already suffered. Greater oversight and accountability is needed for CBP as it encounters and interacts with children, many of whom have fled violence and persecution in their home countries and are in the aftermath of a dangerous journey here. Short-term detention facilities must also be regulated and improved as they are the first stop for the children in the process.").

"[a]buse at the hands of immigration officers and agents compounds the trauma and abuse that many of these children have already suffered."[59]

III. ANALYSIS: DOMESTIC AND INTERNATIONAL LAWS REGARDING THE TREATMENT OF UNDOCUMENTED IMMIGRANTS

The United States' obligation to treat unaccompanied minors and undocumented immigrants in a humane manner is rooted in both domestic and international law.[60] This Note will specifically explore the domestic obligations created by the *Flores* Settlement Agreement.[61] Additionally, this Note will analyze the United States' international obligations under the Convention on the Rights of the Child ("CRC")[62] along with the Convention Relating to the Status of Refugees ("CRSR").[63] In finding an adequate solution to remedy the shortcomings of the current immigration system, it is vital that the United States takes into consideration both its domestic and international obligations.[64]

A. THE *FLORES* SETTLEMENT AGREEMENT

In 1985, Jenny Flores fled the violence of El Salvador in an attempt to find safety in the home of her aunt in the United States.[65] The INS detained Jenny before she could reach her aunt's home.[66] While in INS custody, Jenny was "'handcuffed, strip searched, and placed … in a juvenile detention center where she spent the next two months waiting for her deportation hearing.'"[67]

---

[59] *Id.*
[60] *Id.*
[61] *Flores* Settlement Agreement, *supra* note 13.
[62] CRC, *supra* note 14, art. 3.
[63] Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention].
[64] *Statement of the American Immigration Lawyers Association*, *supra* note 2.
[65] Rebecca M. Lopez, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1648 (2012).
[66] *Id.*
[67] *Id.*

Jenny's experience, along with that of four other minors, became part of the *Flores v. Reno* case filed by the ACLU.[68] The lawsuit contested the manner in which the INS apprehended, detained, and released immigrant children in its custody.[69]

The case eventually resulted in the *Flores v. Reno* Settlement Agreement ("FSA").[70] In 1997, a California federal court approved the agreement, which set forth national standards and responsibilities for the INS in the detention, release, and treatment of children under INS custody.[71]Since 1997, the FSA has governed how both unaccompanied and accompanied children are treated while in the custody of the federal government.[72] Two main provisions of the FSA include placing the minor in the least restrictive setting and treating the minor with dignity.[73] Section eleven of the agreement provides:

> The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others. Nothing herein shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.[74]

The FSA further requires that the INS "hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors."[75]

---

[68] *Id.*
[69] *Fact Sheet: Children Detained by the Department of Homeland Security in Adult Detention Facilities*, NAT'L IMMIGRANT JUST. CTR., http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL.pdf [http://perma.cc/9F6Z-2VET] (last visited September 28, 2014).
[70] Flores Settlement Agreement, *supra* note 13.
[71] NAT'L IMMIGRANT JUST. CTR., *supra* note 69.
[72] Lopez, *supra* note 65, at 1642.
[73] Flores Settlement Agreement, *supra* note 13, at 11.
[74] *Id.*
[75] *Id.* at 12.

Furthermore, facilities are required to "provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor."[76]

While the FSA confers legal obligations on the United States' immigration system, the INS has frequently been found to not be in compliance with the guidelines.[77] The failure to comply has largely been a result of the lack of oversight and enforcement mechanisms of the FSA.[78] Many sections of the FSA have been codified, and the codified sections of the FSA include provisions regarding the detention and release of juveniles.[79] The codified section of the FSA regarding the detention of juveniles provides that

> In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile . . . the juvenile may be temporarily held by Service authorities or placed in any Service detention facility having separate accommodations for juveniles.[80]

---

[76] *Id.*

[77] Lopez, *supra* note 65, at 1644. On February 2, 2015, the Youth Law Center and other organizations filed a motion in U.S. District Court challenging the Department of Homeland Security's ("DHS") no-release policy for women and children arriving from Central America. Notice of Motion and Motion to Enforce Settlement of Class Action, Flores v. Johnson, No. CV 85-4544-RJK(Px) at 8-9 (C.D. Cal. Feb. 2, 2015), http://www.ylc.org/wp/wp-content/uploads/Flores%20Notice%20of%20Motion%20and%20Memorandum%20to%20Enforce%20Settlement.pdf [http://perma.cc/X26Z-QMZ7]. Judge Dolly Gee of the Central District of California found the Defendants' no-release policy to be a material breach of the 1997 FSA agreement, specifically noting the provision barring immigrant children from being held in secure facilities. In Chambers—Order re Plaintiff's Motion, Flores v. Johnson, No. CV 85-4544 DMG(AGRx) (C.D. Cal. July 24, 2015), http://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf [http://perma.cc/8XUM-T2NQ]. DHS responded by releasing more mothers and children, lowering bonds, and many of the mothers from the facilities were fitted with ankle monitors. *US Officials Ask Judge Not to End Immigrant Family Detention*, N.Y. TIMES (Aug. 7, 2015, 11:07 A.M. E.D.T.), http://www.nytimes.com/aponline/2015/08/07/us/ap-us-immigration-family-detention.html. While Judge Dee's order is a step toward strengthening the provisions of the FSA, it is still uncertain as to the long-term impact the order will have. *See id.* As of August 2015, over 170 House Democrats have urged the closure of the family detention facilities, and two complaints filed by immigrant rights advocates demand an immediate investigation of the facilities. *Id.*

[78] Lopez, *supra* note 65, at 1644.

[79] 8 C.F.R. § 236.3 (2015); 8 C.F.R. § 1236.3 (2015).

[80] 8 C.F.R. § 236.3(d) (2015).

While the codified sections of the FSA provide important protections for unaccompanied minors, the remaining uncodified sections of the agreement are left to the discretion of DHS authorities.[81] In order to prevent future mistreatment and abuse of unaccompanied minors, the United States must take steps to see that the obligations under the FSA are fulfilled.[82]

B. THE CONVENTION ON THE RIGHTS OF THE CHILD & THE "BEST INTEREST OF THE CHILD" PRINCIPLE

International law also plays an important role in the United States' obligations to unaccompanied children.[83] The United States signed the Convention on the Rights of the Child on February 16, 1995.[84] The United States and Somalia are the only two nations in the world that have not ratified the Convention and are, therefore, not bound by its terms.[85] One of the reasons for the United States' refusal to ratify the Convention is its fear of potential encroachment on parental rights.[86] Constitutional lawyer and president of ParentalRights.org Michael P. Farris was quoted by *The Washington Post* stating, "The chief threat posed by the CRC is the denial of American self-government in accord with our constitutional processes."[87]

---

[81] NAT'L IMMIGRANT JUST.CTR., *supra* note 69; Lopez, *supra* note 65, at 1644.
[82] Lopez, *supra* note 65, at 1644.
[83] *Statement of the American Immigration Lawyers Ass'n.*, *supra* note 2.
[84] CRC, *supra* note 14.
[85] *Convention on the Rights of the Child: Frequently Asked Questions*, UNICEF, http://www.unicef.org/crc/index_30229.html [http://perma.cc/H68J-ZYBN] (last updated Nov. 30, 2005).
[86] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW CASES AND MATERIALS 872 (5th ed. 2013). Another reason for the United States' refusal to ratify is that it is not in full compliance with Article 37 of the Convention that prohibits sentencing children under eighteen years old to death or life imprisonment; See *also* Richard C. Dieter, *The US. Death Penalty and Int'l Law: US. Compliance with the Torture and Race Conventions*, DEATH PENALTY INFO. CTR. (Nov. 12, 1998), http://www.deathpenaltyinfo.org/us-death-penalty-and-international-law-us-compliance-torture-and-race-conventions [http://perma.cc/2YYD-BQRY].
[87] Karen Attiah, *Why Won't the US. Ratify the U.N.'s Child Rights Treaty*, WASH. POST (Nov. 21, 2014), http://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/ [http://perma.cc/KT3Y-3ZUL].

In order to understand the significance of the United States' refusal to ratify the CRC, it is important to note the distinction between signature and ratification.[88] When a State signs a treaty it "is obliged to refrain, in good faith, from acts that would defeat the object and purpose of the treaty."[89] A signature alone does not signify consent to be bound nor does it require that the State later ratify the treaty.[90] The treaty only takes on a binding nature once a State has ratified it.[91]

Ratification, as opposed to signature, "signifies an agreement to be legally bound by the terms of the Convention."[92] Although the process for ratification varies by country, it generally involves a two-step process.[93] The first-step of the process involves the country reviewing the terms of the Convention to determine whether or not the terms conflict with existing domestic laws.[94] If there are no conflicting provisions then the State incorporates the treaty into domestic law via domestic constitutional procedures.[95] Second, the document of ratification is forwarded in a formal sealed letter to the United Nations Secretary-General located in New York.[96]

---

[88] *EU Member States Signing and Ratifying a Treaty*, CTR. FOR BIOMEDICAL ETHICS AND L., http://europatientrights.eu/countries/signing_and_ratifying_a_treaty.html [http://perma.cc/WD5R-V3R7] (last visited Jan. 25, 2015).

[89] *Id*. ("'Signature' is a process that has different legal meanings depending on the circumstances in which it is performed. A distinction is made between "simple signature", which is subject to ratification, and "definitive signature", which is not subject to ratification. The "simple signature" applies to most multilateral treaties. This means that when a State signs the treaty, the signature is subject to ratification, acceptance or approval. The State has not expressed its consent to be bound by the treaty until it ratifies, accepts or approves it."). The United States' "signature" on the CRC was a "simple signature" and therefore requires further ratification for the United States to be bound by the terms of the CRC. *See id.*

[90] *Id*.

[91] *Signature, Ratification and Accession*, UNICEF, http://www.unicef.org/crc/index_30207.html [http://perma.cc/5ZQ2-A9NF] (last updated May 19, 2014).

[92] *Id*.

[93] *Id*.

[94] *Id*. ("The formal procedures for ratification or accession vary according to the national legislative requirements of the State. Prior to ratification or accession, a country normally reviews the treaty to determine whether national laws are consistent with its provisions and to consider the most appropriate means of promoting compliance with the treaty.")

[95] *Id*. ("Most commonly, countries that are promoting the Convention sign shortly after it has been adopted. They then ratify the treaty when all of their domestically required legal procedures have been fulfilled. Other States may begin with the domestic approval process and accede to the treaty once their domestic procedures have been completed, without signing the treaty first.")

[96] *Id*.

Although the United States has not ratified the Convention, it could be argued that the expansive international acceptance has allowed the Convention to rise to the level of customary international law.[97] Customary international law is a term of art used to describe a type of law that arises from the particular practices that States engage in "from a sense of legal obligation."[98] Customary international law has both an objective element of "general practice" and a subjective element of "general acceptance," or *opinio juris*.[99] "*Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question."[100] The fact that every country in the world has signed the CRC and almost every country has ratified it provides strong support that the CRC has reached the level of customary international law and is therefore binding on the United States.[101]

It may also be argued, however, that the United States is a persistent objector to the terms of the CRC and is therefore not bound to the terms of the Convention.[102] Under international law, States become bound to customary law through actions of assent on the global stage.[103] In the alternative, a State may oppose customary law in a similar manner.[104] Just as States may refuse to

---

[97] *How Children's Voices are Heard in Child Protective Proceedings*, YALE L. SCH. (last modified December 2005), http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/united_states/frontpage.htm [http://perma.cc/388U-5BF3] ("Although the United States has not yet ratified the Convention on the Rights of the Child, the convention nevertheless creates duties for the United States in two ways. First, as a signatory to the convention, the United States is bound not to contravene the object and purpose of the convention. In addition, American courts have just begun to examine whether or not the Convention on the Rights of the Child constitutes customary international law, binding the United States despite its failure to ratify the convention. The broad consensus concerning the rights of the child codified in the CRC, evidenced by the universality of its signatures and the near universality of its ratifications, suggests to many observers that these rights are quintessential customary international law.").

[98] JEFFREY L. DUNOFF ET AL., INT'L LAW NORMS, ACTORS, PROCESS A PROBLEM-ORIENTED APPROACH 77-9 (3d ed. 2010).

[99] *Id.*

[100] *Opinio juris*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/opinio_juris_international_law [http://perma.cc/V2WX-AFJR] (last visited March 13, 2015).

[101] YALE L. SCH., *supra* note 97.

[102] UNICEF, *supra* note 91.

[103] *Id.*

[104] *Id.*

ratify a treaty or later withdraw from a treaty that they have signed, States may also take actions to avoid becoming bound by customary law.[105] States that act publicly in an attempt to show their objection to customary international law are said to be persistent objectors.[106] According to the rule of the persistent objector, "a state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule."[107]

Despite the United States' potential status as a persistent objector, a study completed by Yale Law School noted that the CRC, even if found to be nonbinding, creates duties for the United States for the following two reasons.[108] First, Article 18 of the Vienna Convention on the Law of Treaties provides: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty … until it shall have made its intentions clear not to become a party to the treaty."[109] Second, the United States' courts have provided analysis of the extent that the CRC fulfills the role of customary international law.[110] Specifically, in *Beharry v. Reno*, the court opined that "given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law."[111] Although this remark by the court was not part of its holding, it nevertheless provides support of how the court analyzes and views the CRC.[112]

Additionally, the actions of the United States in adopting provisions of the CRC for its own domestic law provide support that the provisions of the CRC have risen to the level of customary

---

[105] Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int'l. L.J. 457 (1985).
[106] *Id.*
[107] *Id.*
[108] YALE L. SCH., *supra* note 97.
[109] Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); YALE L. SCH., *supra* note 97.
[110] YALE L. SCH., *supra* note 97.
[111] Beharry v. Reno, 183 F. Supp.2d 584, 601 (E.D. N.Y. 2002); YALE L. SCH., *supra* note 97.
[112] *Id*.

international law. Art. 3, one of the main sections of the CRC, provides in clause 1 that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[113] This provision of the CRC has become known as the "best interest of the child" principle, and it plays a central role within the domestic sphere of the United States.[114] The principle is used to refer to the factors that the courts must take into consideration when determining what actions are appropriate for the care, protection and well-being of children in domestic child welfare cases.[115] The principle does not, however, fully extend to the sphere of immigration law.[116] By failing to incorporate the "best interest of the child" principle into the sphere of immigration law, the United States is essentially ignoring not only international law but also its own domestic law.[117] The "best interest of the child" principle should be applied to all children within the U.S. immigration system, as it would ensure that the children are treated humanely.[118]

C. THE CONVENTION RELATING TO THE STATUS OF REFUGEES

Another important international agreement that has an impact on the United States' obligations in regard to unaccompanied minors is the Convention Relating to the Status of

---

[113] CRC, *supra* note 14, art. 3.
[114] CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTEREST OF THE CHILD 1-2 (2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf#Page=1&view=Fit [http://perma.cc/JHZ8-DFAK] [hereinafter CHILD WELFARE].
[115] *Id.* at 2.
[116] Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon With Few Easy Solutions*, MIGRATION POL'Y INST., http://www.migrationpolicy.org/article/unaccompanied-immigrant-children-growing-phenomenon-few-easy-solutions [http://perma.cc/N9N8-9AJL] (Jan. 24, 2011). The reason that the "best interest of the child" principle is not fully integrated into the U.S.' immigration system is that for many years there was a lack of distinction between adults and children, leaving children to be shuffled through the system as if they were adults. *Id.* The landscape of U.S. immigration began to change with the 1993 Flores v. Reno case. *Id.*
[117] *See id.*
[118] *Id.*

Refugees ("CRSR").[119] The CRSR came into force on April 22, 1954, and has its foundation in Article 14 of the Universal Declaration of Human Rights ("UDHR").[120] The CRSR was created during a time of war when there was an estimated 1 million refugees in search of refuge.[121] The Convention was formed with the objective of providing protection to those who had experienced human rights violations.[122] Article 14 of the UDHR provides that "everyone has the right to seek and enjoy in other countries asylum from persecution."[123] The United States did not sign the initial version of the CRSR, but in 1968 it ratified the amended version of the Convention known as the 1967 UN Protocol relating to the Status of Refugees ("Protocol").[124] The Protocol adjusted the temporal limitations for when an individual could be considered a refugee by removing the "before 1951" language.[125]

Another important point is the strong relationship between the language of Article 1 of the CRSR and United States' asylum provisions of §§ 101(a)(42)(A) and 208 of the Immigration and Nationality Act ("INA").[126] The INA § 241(b)(3)(A) regarding the mandatory withholding of deportation and Article 33 of the CRSR also use almost identical language to describe when a refugee may not be returned to his or her home State.[127] The United States expressed its intent to

---

[119] *Statement of the American Immigration Lawyers Ass'n*, *supra* note 2.
[120] Introductory Note by the Office of the United.Nations High Commissioner for Refugees to the Text of the 1951 Convention Relating to the Status of Refugees, http://www.unhcr.org/3b66c2aa10.html [http://perma.cc/NP36-X3BG] [hereinafter Introductory Note].
[121] *The Rights of Refugees*, THE U.N. REFUGEE AGENCY, http://www.unhcr.org/pages/4ab388876.html [http://perma.cc/5LVF-4CXG] (last visited May 13, 2015).
[122] *Id.*
[123] Convention Relating to the Status of Refugees, art. 14(1), *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954).
[124] Joan Fitzpatrick, *The International Dimension of US. Refugee Law*, 15 BERKELEY J. OF INT'L L. 1 (1997); *see also* 1967 Protocol.
[125] Introductory Note, *supra* note 120.
[126] Fitzpatrick, *supra* note 124, at 1-2.
[127] *Id.*

be bound and adhere to internationally set obligations when dealing with refugees, by ratifying the Protocol and transposing the CRSR into its domestic immigration laws.[128]

The Convention, along with the Protocol, provide the international rules States must follow regarding the status, treatment, and protection of refugees.[129] A refugee is defined by the Convention as a person who:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[130]

An individual must fit the above definition of a refugee in order to receive international protection.[131] The unaccompanied children fleeing Mexico, Honduras, Guatemala, and El Salvador are likely considered refugees, because the governments in their home countries are either unable to provide or have refused to provide protection of their basic human rights.[132] Under the Convention and the Protocol, an individual who falls under the definition of a refugee is in turn afforded special protections.[133] Those protections specifically include the obligation to not return a refugee to a country where he or she would be subjected to death.[134]

Unfortunately, the United States has failed to adhere to the obligations set forth under the Convention and Protocol.[135] The DHS has increasingly used expedited removal proceedings, a

---

[128] *Id.*
[129] Introductory Note, *supra* note 120.
[130] Convention Relating to the Status of Refugees, *supra* note 123, art. 1(A)(2).
[131] CHILDREN ON THE RUN, *supra* note 20, at 8.
[132] *Id.*at 9-11.
[133] *Id.* at 8.
[134] *Id.*
[135] *See Statement of the American Immigration Lawyers Association*, *supra* note 2.

process that will be explained in detail later in this Note, to return the unaccompanied minors back to the turmoil of their countries of origin.[136] Moreover, the unaccompanied minors are not provided with any type of legal representation, which only serves to aggravate their already dire and vulnerable circumstances.[137]

IV. COMPARATIVE ANALYSIS OF THE CURRENT POLICIES OF THE UNITED STATES WITH SWEDEN AND THE UNITED KINGDOM

A. UNITED STATES

Historically, the United States has not made special provisions for children within its immigration system and has basically treated children in the same manner as adults.[138] The approach of the U.S. immigration system conflicts with its family law system, which focuses on the "best interest of the child" principle.[139] Although the special status of children is now taken into consideration by the U.S. immigration system, the system is often still found to fall short of the "best interests of the child."[140]

When unaccompanied minors are caught crossing the border they are often detained and remain in the custody of Border Patrol officials.[141] Children from Mexico and Canada "must be screened by CBP officers to determine if each child is unable to make independent decisions, is a victim of trafficking, or fears persecution in his home country."[142] If a child does not meet one of the aforementioned requirements, he or she will be immediately returned to their country of

---

[136] *See id.*
[137] *Id*.
[138] Levinson, *supra* note 116.
[139] *Id*.
[140] *See* HALFWAY HOME, *supra* note 1, at 14.
[141] *Why are so Many Children Trying to Cross the US Border?*, BBC NEWS U.S. & CAN., (Sept. 30, 2014), http://www.bbc.com/news/world-us-canada-28203923 [http://perma.cc/5QXK-9P2L].
[142] *Children in Danger: A Guide to the Humanitarian Challenge at the Border*, IMMIGR. POL'Y CTR. (July 10, 2014), http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border [http://perma.cc/YK49-VNG7].

origin.[143] Some non-governmental actors argue that the CBP is not the correct agency to screen children.[144]

The Department of Homeland Security transfers the unaccompanied minors who are allowed to remain in the United States, while their court case proceeds, to Health and Human Services within 72 hours of apprehension.[145] As previously discussed, the Department of Unaccompanied Children's Services ("DUCS"), created by the Office of Refugee Settlement ("ORR"), contracts with private facilities to provide the needed services and care to unaccompanied minors.[146]

For children with family located in the United States, the *Flores* Settlement Agreement provides a general policy favoring the release of unaccompanied minors in custody to a parent or guardian.[147] Under Section VI General Policy Favoring Release, the *Flores* Settlement Agreement states as follows:

> Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay.[148]

The release to a parent or other legal guardian prevents the child from remaining in a detention center, a setting which may cause additional trauma for the unaccompanied minor.[149] The person

---

[143] *Id.*
[144] *Id. (*"Non-governmental organizations (NGOs) have expressed concern that CBP is the 'wrong agency' to screen children for signs of trauma, abuse, or persecution. Appleseed issued a report that stated 'as a practical matter,' CBP screening 'translates into less searching inquiries regarding any danger they are in and what legal rights they may have.' Appleseed also expressed concern that the U.S.-Mexico repatriation agreement has been geared towards 'protocols of repatriations logistics,' rather than best practices for child welfare.").
[145] BBC NEWS U.S. & CAN., *supra* note 141.
[146] HALFWAY HOME, *supra* note 1, at 4.
[147] Flores Settlement Agreement, *supra* note 13.
[148] *Id.*
[149] IMMIGR. POL'Y CTR., *supra* note 142.

to whom the child is released is responsible to see that the child attends all immigration hearings and proceedings.[150]

The United States has historically not provided any type of guardian *ad litem* or social representative to be appointed to oversee that the rights of the child are fulfilled.[151] Furthermore, children, like adults within the immigration system, are not provided any type of legal counsel.[152] The Immigration and Naturalization Act provides that government funding should not be used to provide legal counsel for persons in removal proceedings.[153] The lack of access to legal representation and services that provide an explanation to children of their rights only increases their vulnerability.[154] "UNHCR and many U.S.-based groups that monitor U.S. refugee and asylum practices have cautioned that concerns over illegal immigration should not trump the United States' international obligations to protect those fleeing persecution or other harm."[155] Without adequate protections, children become lost in the United States' complex removal system.[156]

B. SWEDEN

All European Union ("EU") Member States have ratified the CRC.[157] The greatest distinction of the EU system from the U.S. system is in its application of the "best interests of the

---

[150] *Id*.
[151] *Id*. In order to fulfill its duties under the statute, ORR created the Unaccompanied Children Program ("UAC Program"). *See* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. Third World L.J. 41, 48 (2011). Due to a lack of funding, the program has helped less than half of all unaccompanied minors. *Id.* at 49-50. The UAC Program will be discussed in more detail later in this Note.
[152] IMMIGR. POL'Y CTR., *supra* note 142.
[153] 8 U.S.C. § 1362 (2006) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").
[154] *Statement of the American Immigration Lawyers Association*, *supra* note 2.
[155] IMMIGR. POL'Y CTR., *supra* note 142.
[156] *See id*.
[157] CRC, *supra* note 14.

child" principle within the realm of immigration.[158] In some EU Member States, children are appointed a guardian *ad litem* if the child is without a legal guardian.[159] Other EU Member States provide the child with other forms of representation such as a social worker.[160] Unaccompanied minors in the EU are only placed in detention if no other options exist, and they are provided with legal counsel. Furthermore, children are only returned to their home country "as a last resort and only if it is in their best interest."[161]

Given the variation of approaches among EU Member States, this Note will specifically focus on Sweden's and the UK's approaches to unaccompanied minors, as these two Member States have had success in creating a more humane system for dealing with unaccompanied minors. Sweden receives more unaccompanied minors seeking asylum than any other country in the EU.[162] Sweden, similar to the United States, has experienced a large increase in the number of unaccompanied minors entering its borders.[163] In 2014, approximately 7,000 unaccompanied children arrived to Sweden, which is double the number of 2013.[164]

When an unaccompanied minor arrives in Sweden, the Migration Board is the government body in charge of seeing that the minor is placed in one of the nine receiving municipalities.[165] In

---

[158] Levinson, *supra* note 116.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Policies, practices and data on unaccompanied minors in 2014—Sweden*, EUROPEISKA MIGRATIONSNÄTVERKET, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/16_swedish_case_factsheet_/16_swedish_case_factsheet_en.pdf [http://perma.cc/B75A-LPPG] (last visited Aug. 24, 2015).
[163] *Lone child migrants to Sweden double in 2014*, THE LOCAL (Jan. 2, 2015), http://www.thelocal.se/20150102/lone-child-migrants-double-in-2014 [http://perma.cc/7QML-55K7].
[164] *Id.*
[165] Anna Lundberg & Lisa Dahlquist, *Unaccompanied Children Seeking Asylum in Sweden: Living Conditions from a Child-Centred Perspective*, 31 REFUGEE SURV. Q. 54, 56 (2012). "These are municipalities that are in geographical proximity to the main cities of arrival, namely Malmo, Stockholm, and Gothenburg. Here the children live in temporary housing, commonly referred to as transit housing. The child stays in the transit housing until a place has been found in one of the assigned municipalities that the Swedish Migration Board has entered into an agreement with on longer term housing." *Id.*

most cases, the Migration Board also appoints legal counsel for the child.[166] Before being transferred to the municipalities, the children are placed in temporary housing.[167] The child remains in the temporary housing, until a long-term placement is established in one of the municipalities.[168] The municipality is responsible for the child's care and wellbeing while the child awaits a decision regarding his or her asylum application by the Migration Board.[169] The Social Welfare Board located in the municipality where the child has been placed is responsible for the placement of children.[170] Children are often placed in municipality accommodations centers located near the city center, schools, and other public and social service agencies.[171] Staff members who have received some form of social work training oversee the center, and the children have access to common social areas where they can watch television and interact with other children.[172]

In addition to providing housing, the municipality is responsible for appointing a legal guardian.[173] The legal guardian, sometimes referred to as a "deputy parent," is responsible for acting as both a guardian and a custodian of the child.[174] The main duty of the legal guardian is to ensure that the decisions made on behalf of the child by the municipality are in the child's best interest.[175]

---

[166] *Id.* at 57.
[167] *Id.* at 56.
[168] *Id.*
[169] *Id.* at 58.
[170] *Id.* at 59.
[171] U.N. HIGH COMM'R FOR REFUGEES REGIONAL OFF. FOR THE BALTIC AND NORDIC COUNTRIES, VOICES OF AFGHAN CHILDREN- A STUDY OF ASYLUM-SEEKING CHILDREN IN SWEDEN 52 (June 2010), http://www.unhcr.org/4c8e24a16.pdf [http://perma.cc/U3FH-WE9N] [hereinafter VOICES OF AFGHAN CHILDREN].
[172] *Id.*
[173] Lundberg & Dahlquist, *supra* note 165, at 58.
[174] *Id.*
[175] *Id.*

In Sweden, detention of children is only used as a last resort.[176] A detention order "may only be used if there is reason on account of the alien's personal situation or other circumstances to assume that the alien may otherwise go into hiding or pursue criminal activities in Sweden."[177] Other protections afforded unaccompanied minors in Sweden include the right to school and health care.[178] Unaccompanied minors are afforded the right to receive an education at the school located within the municipality where they are placed.[179] Moreover, children have the same right to healthcare as Swedish children, and the county councils receive reimbursement from the Government for providing healthcare. [180]

The Swedish immigration system for unaccompanied minors is focused and driven by the protection of the child.[181] Children within the system are generally found to be content with the accommodations they are afforded.[182] A criticism of the Swedish immigration system, along with the immigration systems of other EU Member States, is that they are too lenient and in turn encourage illegal immigration.[183] Nevertheless, the Swedish system for handling unaccompanied minors provides more protections to children who are in vulnerable situations.[184]

C. UNITED KINGDOM

[176] UTLÄNNINGSLAGEN [Utl] [ALIENS ACT] 10:2 (Swed.), http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf.
[177] *Id.* 10:1
[178] Lundberg & Dahlquist, *supra* note 165, at 59.
[179] *Id.*
[180] *Id.*
[181] *Policies, practices and data on unaccompanied minors*, *supra* note 162.
[182] Lundberg & Dahlquist, *supra* note 165, at 67-72.
[183] Levinson, *supra* note 116.
[184] Lundberg & Dahlquist, *supra* note 165, at 72.

In 2012, the UK received approximately 1,200 unaccompanied minors who sought asylum.[185] Local authorities cared for an additional 2,150 unaccompanied minors.[186] Struggling to adequately care for the unaccompanied minors, the UK was often found to place a higher importance on immigration regulations than on the best interest of the children.[187] In 2013, the UK's Joint Committee on Human Rights ("JCHR") urged the State to make changes.[188] The report of the JCHR noted, "[p]roviding protection and support effectively is crucial: the asylum and immigration process can be complex, and the stress it can cause can be particularly acute for children."[189]

In an attempt to improve the system in place, the UK introduced new immigration rules that provide a framework based on the best interests of children.[190] When an unaccompanied minor arrives in the UK, he or she is the responsibility of the local social services department in the area where the minor is located.[191] After completing an assessment, the social service center provides needed services to the child.[192] Children under the age of sixteen are placed in some type of foster care, whereas children over the age of sixteen are place in some type of independent living facility that provides supervised accommodation.[193] Additionally, the local social service authority will

[185] Amelia Gentleman, *Children seeking asylum should 'be better cared for' by the state*, THE GUARDIAN (June 11, 2013), http://www.theguardian.com/uk/2013/jun/12/children-seeking-asylum-better-care [http://perma.cc/KM4J-JC9F].
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] SEC'Y OF STATE FOR THE HOME DEP'T BY COMMAND OF HER MAJESTY, HUMAN RIGHTS OF UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE IN THE UK 2 (Feb. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279104/UnaccompaniedMigrantMinors.pdf [http://perma.cc/FWY6-CXZD] [hereinafter HUMAN RIGHTS].
[191] Katia Bianchini, *Unaccompanied asylum-seeker children: flawed processes and protection gaps in the UK*, FORCED MIGRATION REV. (Mar. 2011), http://www.fmreview.org/en/non-state/52-53.pdf [http://perma.cc/5JLL-EW9W].
[192] *Id.*
[193] *Id.*

oversee the care and treatment of the child "on a regular basis to ensure that the child's needs are being met."[194]

The UK's Secretary of State Report for 2014 provided additional recommendations to further improve the system in place.[195] The following statement was included among the recommendations:

> We recommend that the Government work with child welfare and safeguarding experts to develop a specific training programme to improve awareness and understanding of the UNCRC and its application to unaccompanied migrant children, particularly with respect to properly considering children's best interests. Such a programme, delivered by external providers, should be rolled out first to staff in frontline immigration and asylum roles, and to those in local authorities that deal regularly with unaccompanied migrant children. The programme should then be rolled out more widely as resources allow.[196]

The UK's Secretary of State Report also includes recommendations that the Government create a more defined role for the Children's Champion, "confirming that it is invested with a proactive duty of care to ensure that the agency meets its international and domestic obligations . . . ."[197] The role of the Children's Champion is provided for under section 55 of the Borders Citizenship and Immigration Act of 2009:

> 2.9 There shall be a senior member of staff (the "Children's Champion") who is responsible to the Chief Executive of the UK Border Agency for promoting the duty to safeguard and promote the welfare of children throughout the UK Border Agency, for offering advice and support to UK Border Agency staff in issues related to children, and identifying and escalating issues of concern.[198]

---

[194] *Id.*

[195] HUMAN RIGHTS, *supra* note 190, at 2-23. The U.K.'s Secretary of State of the Home Department is responsible for overseeing the areas of security and terrorism, legislative programme, and expenditure issues in the U.K. as a whole. *Secretary of State for the Home Department*, GOV. U.K., https://www.gov.uk/government/ministers/secretary-of-state-for-the-home-department [http://perma.cc/E24B-ZVT6] (last visited Aug. 23, 2015).

[196] HUMAN RIGHTS, *supra* note 190, at 6.

[197] *Id.* at 7.

[198] *Id.* at 7-8. ("As the guidance makes clear, the primary responsibility for ensuring that the business meets its obligations in respect of children rests with senior managers in the business. The Children's

Just as the United States, both Sweden and the UK have experienced similar issues with the arrival of unaccompanied minors and both countries have created uniquely tailored solutions to address the issues.[199] Although neither the approach of Sweden or the UK is completely flawless nor easily transferable to the United States, they each provide meaningful contributions as to how to best address the issues associated with unaccompanied minors.

V. RECOMMENDATIONS: THE CHANGES THE UNITED STATES SHOULD MAKE TO COME INTO COMPLIANCE WITH ITS OBLIGATIONS

In order for the United States to come into compliance with its international and domestic obligations, it must make significant changes in the way it addresses the situation of unaccompanied minors. The following section of this Note will discuss several important steps the United States should take, in order to properly address the shortfalls of the current immigration system for handling unaccompanied minors. Specific changes that must be made for the United States to come into compliance with its obligations include codification of the *Flores* Settlement Agreement,[200] ratification of the Convention of the Rights of the Child,[201] and a detention system with a focus on the "best interest of the child" principle. Additionally, the United States should provide meaningful access to legal counsel and decrease the use of expedited removal. Finally, the United States must take foreign policy initiatives to address the reasons why the children are fleeing their countries of origin.

A. FULFILLMENT AND CODIFICATION OF THE *FLORES* SETTLEMENT AGREEMENT

Champion is there to offer support, guidance and challenge, including heading up the network of senior children's leads. The Children's Champion is supported in this role by the Office of the Children's Champion which includes two senior social workers with extensive experience in the UK and internationally.")

[199] Levinson, *supra* note 116.

[200] Flores Settlement Agreement, *supra* note 13.

[201] CRC, *supra* note 14, art. 3.

As previously mentioned, some sections of the FSA have been codified, allowing for more successful enforcement.[202] While the codified sections of the FSA provide important protections for unaccompanied minors, the remaining uncodified sections of the agreement are left to the discretion of DHS authorities.[203] In order to prevent future mistreatment and abuse of unaccompanied minors, the United States must take steps to see that the obligations under the FSA are fulfilled.[204]

The Department of Homeland Security is bound to comply with the FSA.[205] Nevertheless, breaches of the FSA terms continue to surface, given the lack of oversight and enforcement mechanisms to ensure that DHS maintains compliance.[206] Failure of DHS to comply, along with the lack of enforcement mechanisms, stems from the fact that the agreement itself does not provide any type of constitutional right for minors.[207]

In *Walding v. United States*, several unaccompanied minors filed suit against federal officials for abuses they endured while at the Nixon facility[208] that violated the terms of the *Flores* Settlement Agreement.[209] In the Complaint, the "Plaintiffs allege[d] that '[a]ll Defendants knew and/or should have known and/or were deliberately indifferent to the rampant physical and sexual abuse of the Plaintiffs at the Nixon facility."[210] The claim was asserted on the foundation "that the provisions of the *Flores* Agreement created liberty and property interests protected by the Due

---

[202] NAT'L IMMIGRANT JUST. CTR., *supra* note 69, at 1.
[203] NAT'L IMMIGRANT JUST. CTR., *supra* note 69, at 2; Lopez, *supra* note 65, at 1644-45.
[204] Lopez, *supra* note 65, at 1645-46.
[205] NAT'L IMMIGRANT JUST. CTR., *supra* note 69.
[206] Lopez, *supra* note 65, at 1644.
[207] *See* Walding v. U.S., No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 116932, at *12 (W.D. Tex. Dec. 15, 2009).
[208] Susan Carroll, *Unaccompanied children in country illegally still lack federal protection*, HOUS. CHRON. (May 29, 2014), http://www.houstonchronicle.com/news/houston-texas/houston/article/Unaccompanied-children-in-country-illegally-still-5514344.php [http://perma.cc/Q5QD-5346] ("ORR pulled the children out of Nixon after the worker's arrest and pledged reforms, including creating a "zero tolerance" policy for abuse. Brané, with the Women's Refugee Commission, said her concerns about the handling of abuse allegations deepened after the Nixon shelter shut down.").
[209] Walding v. U.S., No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 116932, at *12 (W.D. Tex. Dec. 15, 2009).
[210] *Id.* at 5.

Process Clause of the Fifth Amendment, and thus due process was violated when the *Flores* Agreement's provisions were violated."[211] In the court's reasoning, it "noted that it was apparently undisputed that the *Flores* settlement agreement, which is in effect a remedial decree, does not in and of itself confer any constitutional rights upon the plaintiffs, and that Fifth Circuit case law is clear that remedial decrees confer no such rights."[212]

Because the plaintiffs were unable to establish a deprivation of an established protected right under the *Flores* Settlement Agreement, the court found that it was unable to interfere with the "officials' discretion."[213] The court went on further to explain the following:

> The Agreement's intent was to create minimum guidelines and requirements regarding the minors' conditions of confinement to try to ensure their well-being and safety, and it does not purport to guarantee prevention of the episodic acts of abuse by program staff such as occurred here. The Court concluded that the plaintiffs failed to show that they were deprived of any entitlement to "safe conditions" created by the Agreement. The Court further concluded that, even if Plaintiffs had established an entitlement protected by due process . . . the defendants would be entitled to qualified immunity because the plaintiffs' constitutional rights were not clearly established at the time.[214]

The unfortunate lack of constitutional protection for unaccompanied minors leaves them without any form of recourse and essentially without any protection.[215] Codification of the entire *Flores* Settlement Agreement would not only allow for more defined standards but would also give courts the power to hold DHS accountable for shortcomings in the treatment of unaccompanied minors.[216]

---

[211] *Id.* at 9.
[212] *Id.* at 12.
[213] *Id.* at 14.
[214] *Id.* at 14-15.
[215] Lopez, *supra* note 65, at 1669.
[216] *Id.* at 1670-71.

B. RATIFICATION OF THE CONVENTION OF THE RIGHTS OF THE CHILD AND IMPLEMENTATION OF THE BEST INTEREST OF THE CHILD PRINCIPLE

Ratification of the CRC is an important first step in securing the rights of immigrant children in the United States.[217] Article 3 of the CRC provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[218] Children escaping the turmoil of their home countries should be treated in a manner specifically tailored for their particular situation in an attempt to protect them from further harm.[219] As provided by the American Immigration Lawyers' report: "Abuse at the hands of immigration officers and agents compounds the trauma and abuse that many of these children have already suffered."[220] It is imperative that children receive humane treatment while they are within the U.S. immigration system.[221] In order to achieve this goal, the CRC would provide children with the specific protection they need to ensure that their best interests are fulfilled.[222]

Nevertheless, the United States is hesitant to ratify the CRC and unlikely to do so any time soon.[223] As previously mentioned, the United States' refusal to ratify the Convention has been attributed to the fear of potential encroachment on parental rights.[224] Even if the United States does not ratify the CRC it is important for it to fulfill its obligation under the "best interests of the child"

---

[217] Kate Englund, *Protecting the Human Rights of Unaccompanied Immigrant Minors*, THE UNIV. OF CHI. SCH. OF SOC. SERV. ADMIN. (2011), http://ssa.uchicago.edu/protecting-human-rights-unaccompanied-immigrant-minors [http://perma.cc/V2ES-TUWF].
[218] CRC, *supra* note 14, art. 3.
[219] HALFWAY HOME, *supra* note 1, at 1.
[220] *Statement of the American Immigration Lawyers Association*, *supra* note 2.
[221] HALFWAY HOME, *supra* note 1, at 1.
[222] Englund, *supra* note 217.
[223] WEISBERG & APPLETON, *supra* note 86, at 872.
[224] *Id.*

principle already integrated into domestic law.[225] By making the "best interest of the child" principle a priority in the care and treatment of children within the U.S. immigration system, children within the system would be treated with respect and dignity.[226]

Fulfillment of the "best interest of the child" principle could be achieved by incorporating aspects of the Swedish and UK systems of appointed guardian *ad litems* and by providing access to legal counsel.[227] Because children as refugees escaping the violence of their home countries potentially qualify as asylum seekers, it is important that their claims of a well-founded fear are heard.[228]

Furthermore, children have a limited ability to make meaningful decisions for themselves regarding their best interests, especially in a time of crisis.[229] The objectives of attorneys and DUCS staff can come into conflict, leaving the child in between competing interests.[230] A guardian *ad litem* would play an independent role of helping to balance the objectives of the other adults involved in making decisions for the child who is attempting to navigate the complexities of the immigration process.[231]

A guardian *ad litem* would also be able to provide important emotional support for the unaccompanied minor, as the guardian would maintain a continuous presence in the child's life.[232]

---

[225] Levinson, *supra* note 116.
[226] Englund, *supra* note 217.
[227] Levinson, *supra* note 116.
[228] Englund, *supra* note 217.
[229] HALFWAY HOME, *supra* note 1, at 23-4.
[230] *Id.* at 24.
[231] *Id.* ("The need for assistance from an independent adult is particularly important because of the adversarial nature of immigration proceedings and the complicated circumstances unaccompanied children face. Children come into contact with an endless number of adults, all demanding information, and all with different roles. Children in immigration proceedings often fail to understand how their experiences relate to a possible application for asylum or other legal protections to which they may be entitled. Many children have been told repeatedly by adults, family or traffickers to keep their stories secret. Further, children have no tangible way to exercise their rights under the Flores Settlement absent the assistance of an advocate.")
[232] *Id.*

As the child is moved to another facility or receives a new attorney, the child may feel as if he or she is being shuffled through the system.[233] Feeling as though he or she does not have a connection with the adults with whom the child comes in contact, the child is unlikely to express his or her concerns or needs.[234] Randy's story is one example of the success that a guardian *ad litem* can have in providing care to an unaccompanied minor:[235]

> A guardian ad litem represented Randy, a child in secure custody at the Southwest Indiana Regional Youth Village in Vincennes, Indiana, where he complained of being kept in his cell for 23 hours per day. He was not given reading material, the staff did not support him and he complained of being extremely depressed and bored. Because the child had no criminal record, and was being detained under harsh and unnecessary conditions, the guardian ad litem worked on the child's behalf to argue that he was not being kept in the least restrictive setting appropriate as mandated under the *Flores* Settlement. Fortunately, and because of his guardian ad litem, Randy was stepped down to a less restrictive staff-secure placement within the facility. After the transfer, the guardian ad litem reported that the child's mental health and outlook had improved significantly.[236]

Additionally, the United States should promote the "best interest of the child" principle for unaccompanied minors by providing some type of social worker representative for children who have no family in the United States.[237] The duty of the social worker, similar to the guardian *ad litem* in the Swedish and UK systems, would insure that the child in custody is receiving the appropriate medical care, food, clothing, and other essential services.[238] The protections provided to children in the domestic welfare system "that prioritize the safety, permanency, and well-being

---

[233] *See id.*
[234] *See id.*
[235] HALFWAY HOME, *supra* note 1, at 24.
[236] *Id.*
[237] Englund, *supra* note 217.
[238] *Id.*

of the child can and should be translated into work with immigrant children."[239] This will ensure that children as a whole, regardless of where they are from are treated with dignity and respect.[240]

Moreover, for children who have no family or legal guardian to whom they can be released within the United States, it is imperative that they are placed in a less restrictive setting.[241] The less restrictive setting requirement is provided for in the *Flores* Settlement Agreement.[242] A "best interest of the child" alternative to the detention would be a more community-based system, similar to those found in Sweden.[243] Instead of a focus on detention and punishment mechanisms, the facilities should provide more child friendly accommodations.[244]

Finally, in order to further the "best interest of the child" principle, it is important that unaccompanied minors are provided with legal counsel to ensure that the child's rights are protected throughout the immigration process.[245] Unaccompanied minors, just as adults in an immigration removal proceeding, have no right to government funded legal counsel.[246] "Children, even those who survived trauma or persecution or live in fear of return, are left to navigate our laws and to present their claims without any legal assistance when representation by an attorney is the 'single most important factor' affecting the result in an asylum case."[247]

In an attempt to remedy the issue, the United States took measures to provide legal counsel

---

[239] *Id.*
[240] *Id.*
[241] Flores Settlement Agreement, *supra* note 13.
[242] *Id.*
[243] VOICES OF AFGHAN CHILDREN, *supra* note 170, at 52.
[244] Levinson, *supra* note 116.
[245] *See* Kelly Hill, *supra* note 151, at 42-5. (discussing the importance of legal counsel for unaccompanied minors); *See also Statement of the American Immigration Lawyers Association*, *supra* note 2.
[246] *See* 8 U.S.C. § 1362 (2006). The language of the statute provides: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."
[247] *Statement of the American Immigration Lawyers Association*, *supra* note 2.

for some unaccompanied minors.[248] This was accomplished via HSA's statutory mandate to ORR to provide assistance to unaccompanied minors in securing legal counsel.[249] The language of the statute is as follows:

> (A) coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002. However, an estimated sixty percent of children in immigration proceedings remain unrepresented.[250]

In order to fulfill its duties under the statute, ORR created the Unaccompanied Children Program ("UAC Program").[251] With Congressional funding and the assistance of a pro bono legal program called the Vera Institute, non-profit organizations were able to receive funding to provide legal services to unrepresented persons in immigration custody.[252] Despite these efforts, the program was not large enough to reach all children in need of legal counsel and approximately sixty percent of unaccompanied minors in immigration proceedings still remain unrepresented.[253] It is imperative that additional funding be provided to support the expansion of pro-bono legal services for unaccompanied minors to ensure that their rights are protected.[254]

---

[248] *See* Kelly Hill, *supra* note 151, at 48-9.
[249] *Id.*
[250] 6 U.S.C. § 279(b)(1)(A) (2006).; *See also* Kelly Hill, *supra* note 151, at 48. The statute's requirement of ORR to assist with appointment of legal counsel for unaccompanied minors is structured in a way to not violate the prohibition of government funding being used to provide public council.
[251] *See* Kelly Hill, *supra* note 151, at 48.; *See also About Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/programs/ucs/about [http://perma.cc/NY99-9JAL]. "Following the Office of Refugee Resettlement (ORR) mission, which is founded on the belief that new arriving populations have inherent capabilities when given opportunities, ORR/ Division of Children's Services/Unaccompanied Alien Children's program provides unaccompanied children with a safe and appropriate environment until they are released to an appropriate sponsor while their immigration cases proceed."
[252] Kelly Hill, *supra* note 151, at 48-9.
[253] *Id.* at 49.
[254] *See Statement of the American Immigration Lawyers Association*, *supra* note 2.

Along with providing legal counsel for unaccompanied minors, is the need for the elimination of the use of expedited removal.[255] Expedited removal is a procedure that allows immigration officers to issue expedited removal orders against non-U.S. citizens, resulting in removals that, except in very limited circumstances, are carried out with no hearing or review by an immigration judge."[256] The process of expedited removal is being used at higher levels in an attempt to deport the unaccompanied minors without having to provide them with any type of international protection.[257] The use of expedited removal deprives the unaccompanied minors of "meaningful access to asylum and other humanitarian relief."[258] In order for the United States to fulfill its domestic and international obligations, it must eliminate the use of expedited removal for unaccompanied minors.[259] It is vital that the cases of the unaccompanied children are heard, so they may receive the protection they need.[260]

Providing care, protection, and legal counsel for the surge or unaccompanied minors will undoubtedly raise questions regarding funding.[261] Emergency funding of $3.7 billion was requested on July 8, 2014.[262] An additional $9 million will be made available by the Department

---

[255] *Id.*

[256] *DHS Announces Latest in Series of Expedited Removal Expansions*, 20 IMMIGRANTS' RIGHTS UPDATE, (Mar. 23, 2006), at 1, https://nilc.org/removpsds151.html [http://perma.cc/XFY6-WVV3].; *See* 8 U.S.C. § 1225(b)(1)(A)(i) (2014). "**(**i) In general. If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) [8 USCS § 1182(a)(6)(C) or 1182(a)(7)], the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 [8 USCS § 1158] or a fear of persecution." Unaccompanied minors who are placed in expedited removal and provided no access to legal counsel are left voiceless and without a meaningful opportunity to seek the humanitarian relief they need.

[257] *See Statement of the American Immigration Lawyers Association*, *supra* note 2.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 25.

[262] *Id.* "The FY13 HHS appropriation for the Unaccompanied Minor Program was $376 million, increased to $868 million in FY14. The FY2015 Administration proposal remains at $868 million, due to the unpredictable number of arrivals. In May, 2014, the Office of Management and Budget revised cost projections for FY2015 to $2.28 billion for the Unaccompanied Alien Children program in ORR, an increase of $1.412 billion from FY14. Funding covers costs for shelter, medical care, support services, and grants to state-licensed facilities for shelter and foster care."

of Health and Human Services ("HHS") with the objective of providing legal representation for unaccompanied minors through nonprofit organization.[263] Additionally, "the Senate Appropriations subcommittee on Labor, Health and Human Services and Education indicated it would increase funding for the UAC[264] program by $1.03 billion in FY 2015 bringing the total funding proposal to $1.94 billion."[265] It is imperative that this funding be approved so that unaccompanied minors may receive the protection they require.[266] Approval of the funding will allow for accommodations to be made that take into account the "best interest of the child."[267]

C. FOREIGN POLICY INITIATIVES

The Chicago Bar Foundation noted foreign policy initiatives as an important step to solving the issue of unaccompanied minor children arriving in such large numbers to the United States.[268] Foreign policy initiatives go to the heart of solving the negative treatment of children in the immigration system.[269] Foreign policy initiatives are one of the most important steps in "resolv[ing] the current humanitarian crisis and refocuses attention to the broader and much-needed task of comprehensively reforming the U.S. immigration system."[270]

The United States is a country that often is found to be "turning inward" to domestic affairs. In failing to engage in the international community and to set an example, the United States is

---

[263] *Id.*
[264] *See Statement of the American Immigration Lawyers Association*, *supra* note 2.; *See also About Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/programs/ucs/about [http://perma.cc/SKP8-GSKY]. "Following the Office of Refugee Resettlement (ORR) mission, which is founded on the belief that new arriving populations have inherent capabilities when given opportunities, ORR/ Division of Children's Services/Unaccompanied Alien Children's program provides unaccompanied children with a safe and appropriate environment until they are released to an appropriate sponsor while their immigration cases proceed."
[265] *Statement of the American Immigration Lawyers Association*, *supra* note 2.
[266] *Id.*
[267] *Id.*
[268] THE CHICAGO BAR FOUNDATION, *supra* note 39.
[269] *Id.*
[270] *Id.*

doing a huge disfavor to human rights, specifically the treatment of children.[271] "The United States continues to have more influence than any other country in shaping global affairs."[272] Pretending that the crisis does not exist will not make it disappear. In order to protect children's rights a global initiative must be taken.[273]

This is not to say that the United States has failed to address the issue at all.[274] Remedying the root problems of large numbers of unaccompanied minors entering the United States will require an extremely complex approach.[275] The reasons for the unaccompanied minors entering the United States, as discussed earlier in the Note, include "violence by organized armed criminal actors and violence in the home."[276] These factors are what are referred to as the "push factors" of children fleeing.[277] There is no consensus as to the central reason for the children fleeing their countries of origin, as there is a complex set of interwoven factors.[278]

The reasons are multifaceted and also involve "pull factors" which include a "desire to join family members in the United States and perceptions about U.S. immigration policies."[279] The "pull factors" are a root cause of the influx that the United States may attempt to remedy with

---

[271] Carl Gershman, *America's Purpose and Role in a Changed World*, WORLD AFFAIRS (May/June 2014), 2http://www.worldaffairsjournal.org/article/america's-purpose-and-role-changed-world- [http://perma.cc/GU52-Z88Q].
[272] *Id.*
[273] Jean M. Geran, *What Can Obama Do About the Surge of Minors from Central America?*, FOREIGN POLICY (June 12, 2014, 11:35 AM), http://shadow.foreignpolicy.com/posts/2014/06/12/what_can_obama_do_about_the_surge_of_minors_from_central_america [http://perma.cc/7YB6-QN2M].
[274] PETER J. MEYER, CONG. RESEARCH SERV., R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS 2 (2014).
[275] *Id.* at 19.
[276] CHILDREN ON THE RUN, *supra* note 20, at 6.
[277] MEYER, *supra* note 274, at 2.
[278] *Id.*
[279] *Id.* at 1-2.

foreign policy initiatives.[280] However, the "pull factors" are a bit more complex and will likely involve an interior solution such as an immigration reform targeted at family reunification.[281]

The United States has taken actions in attempt to remedy the situation and repatriate the children to their countries of origin.[282] Congress has held numerous hearings, Members have traveled to the regions in crisis, and Congress has introduced legislation to provide funding for foreign policy initiatives.[283] Senate Bill 2499 is included in the funding proposals, and it would provide $100 million "to address the root causes pushing children to leave Central America, ensure the safe return and reintegration of such minors, and address the need for family support, foster care, and adoption programs."[284]

Moreover, House Bill 5013 would provide approximately $120 million "to address the increased number of unaccompanied children arriving at the U.S. border."[285] The funds would be appropriated as follows: "$88 million would support border security initiatives—with a focus on Mexico's southern border, $20 million would be used to combat human trafficking and smuggling, $10 million would support repatriation and reintegration efforts, and $2 million would support regional dialogue on the issue."[286]

While the United States has taken actions to address foreign policy initiatives, those actions are often met with additional obstacles that limit the ability of the United States to remedy the root causes.[287] The limitations include the, "Central American governments' limited capacities to receive and reintegrate repatriated children, and their inability and/or unwillingness to address the

[280] *Id.* at 2.
[281] *Id.* at 1-2.
[282] MEYER, *supra* note 274, at 7.
[283] *Id.* at 9.
[284] *Id.* at 10.
[285] *Id.* at 10-11.
[286] *Id.* at 11.
[287] MEYER, *supra* note 274, at 10-11.

pervasive insecurity and lack of socioeconomic opportunities in their countries that cause many children to leave."[288]

Finding a solution presents an extremely complex set of issues for the United States to take into consideration.[289] As a leader on the global stage, the United States must identify a workable foreign policy initiative that is targeted at the "push factors."[290] Furthermore, the United States must also take into consideration the limitations of the foreign policy initiatives and seek to resolve the "pull factors" by focusing on interior solutions such as immigration reform.[291]

VI. CONCLUSION

The United States has legal obligations both domestically and internationally to protect the unaccompanied immigrant children that enter its borders. While the United States has taken steps toward improving the system in place, a great deal of change must be made in order for the United States to come into compliance with its domestic and international human rights obligations.

For ethical and humanitarian reasons, the inhumane treatment of children within the U.S. detention centers must be stopped. It is imperative that the United States codifies the *Flores* Settlement Agreement along with providing funding for expansion of the immigration judicial system and to provide legal counsel to all immigrant children. Additionally, the United States should implement a child friendly detention system aimed at protection of children instead of punishment. Finally, it is imperative that the United States engages in foreign policy initiatives in an attempt to identify and remedy the reasons for which the children are fleeing their countries of origin. As a leader, the United States must set an example for the rest of the world to follow, especially given that the lives of children are of central issue.

---

[288] *Id.* at 11.
[289] *Id.* at 18-19.
[290] *Id.* at 2, 19.
[291] *Id.*

Finding a solution to this delicate humanitarian crisis will be nothing short of complicated. A great deal of collaborative effort both domestically and internationally will need to occur in order to reach a resolution. With change comes the need for patience, as it will take time for improvement and implementations to be made to the current system. The United States must focus on both its domestic and international obligations to the unaccompanied minors and maintain its commitment to humanitarian principles.

Kosher Babies: How Israel's Approach to IVF Can Guide the United States in Fighting Separation of Church and State Abuses

Tyler J. Smith*

"*In Israel, in order to be a realist you must believe in miracles*."[1]

I. INTRODUCTION

In August 2014, Barbara Webb, a chemistry teacher working at a Catholic high school in Detroit, was terminated from her job after nine years of employment.[2] Though she has yet to file a lawsuit, she claims her firing was a result of her "non-traditional" pregnancy.[3] Webb's conversations with the school administrators had made it clear their concerns were tied to "lifestyle or actions contradictory to the Catholic faith."[4] The circumstances surrounding Ms. Webb's firing are not unique. In October 2010, Christa Dias, a non-Catholic computer teacher in the Archdiocese of Cincinnati was happy to find out that she was pregnant.[5] She informed her boss of the good news.[6] The principal congratulated her, but other school officials did not share the sentiment.[7] Three days later Dias was fired for being unmarried, and pregnant via artificial insemination.[8] The school informed her that she was terminated for "failure to comply and act consistently in

* J.D., 2015, Indiana University Robert H. McKinney School of Law.

[1] Interview with David Ben-Guiron, CBS (Oct. 5, 1956), https://en.wikiquote.org/wiki/David_Ben-Guiron.3 [http://perma.cc/8SM4-NSRK].

[2] Robert Allen & Katrease Stafford, *Gay Teacher Says Pregnancy Cost Her Catholic School Job*, USA TODAY (Sep. 3, 2014), http://www.usatoday.com/story/new/nation/2014/09/03/gay-teacher-says-pregnancy-cost-her-job/15004783/ [http://perma.cc/GTN9-U4TR].

[3] *Id.*

[4] *Id.*

[5] Bridgette Dunlap, *Why a Catholic School Teacher Was Fired for an IVF Pregnancy and Why She Was Awarded $171,000*, RH REALITY CHECK, http://rhrealitycheck.org/article/2013/06/10/why-a-catholic-school-teacher-was-fired-for-an-ivf-pregnancy-and-why-she-was-awarded-171000/ (last updated Jun. 18, 2013, 11:30 am) [http://perma.cc/7AFV-JUQH].

[6] *Id.*

[7] *Id.*

[8] *Id.*

http://dx.doi.org/10.18060/7909.0042

accordance with the stated philosophy and teachings of the Roman Catholic Church."[9] She filed suit and a jury awarded her $171,000 in damages.[10] In 2012, Emily Herx, an elementary school teacher, filed an anti-discrimination suit against the Archdiocese of Fort Wayne.[11] School officials declined to renew her contract after she underwent a third round of IVF treatment.[12] The school put forth an argument, "used by a growing number of religious groups to justify firings related to IVF treatment or pregnancies outside of marriage: freedom of religion gives them the right to hire (or fire) whomever they choose."[13] The school took it one step further by arguing, "religious liberty protects the school from having to have to go to court at all."[14] The 7th Circuit awarded Herx $1.9 million in damages.[15]

These stories are not uncommon. There are many people for whom problems with infertility or their sexual orientation force them to seek alternative means to creating a family. Because of the continued development of Assisted Reproductive Technologies ("ARTs"), their use doubled over the past decade, even though it is still relatively rare when compared to traditional pregnancy methods.[16] However, religious organizations often have legal justifications for the firing of their employees for public conduct that is otherwise explicitly prohibited by law. Although the

---

[9] Dias v. Archdiocese of Cincinnati, 2012 WL 1068165 (2012).
[10] Dunlap, *supra* note 6.
[11] MOLLY REDDEN, *CATHOLIC CHURCH ARGUES IT DOESN'T HAVE TO SHOW UP IN COURT BECAUSE RELIGIOUS FREEDOM*, MOTHER JONES (NOV. 17, 2014), http://www.motherjones.com/politics/2014/11/catholic-school-fires-teacher-using-ivf-unusual-religious-freedom-defense [http://perma.cc/D5YB-VACE].
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] REBECCA GREEN, *INDIANA DECISIONS - MORE ON: THE EMILY HERX CASE ISN'T OVER YET* (JAN. 22, 2015), INDIANA LAW BLOG, http://indianalawblog.com/archives/2015/01/indiana_decisio_619.html [http://perma.cc/EUD6-FE9K].
[16] *Outline for a National Action Plan for the Prevention, Detection, and Management of Infertility* (May 7, 2010), CENTERS FOR DISEASE CONTROL, 5, http://www.cdc.gov/art/PDF/NationalActionPlan.pdf [http://perma.cc/6X3Q-MUAD].

Pregnancy Discrimination Act of 1978 ("PDA") clearly prohibits discrimination based on pregnancy, childbirth, or related medical conditions[17], the PDA, as interpreted by the courts, has yet to explicitly cover Assisted Reproductive Technologies.[18] Discrimination in any form is very clearly prohibited in numerous laws, yet it is still happening in America today.[19]

It comes as no surprise to many that religion seems to be central to the practice of discrimination, legal or not.[20] This may be due in part to the rise of the modern western state "as a political organization that has bid farewell to the medieval union of church and state in the *res publica christiana.*"[21] However, the division between church and state has continued to evolve in Europe, and in the United States as well.[22] Modern constitutions promote the separation of church and state in many different ways, and therefore, promote protections in different ways, also. The First Amendment of the United States Constitution was written to address "religious activities by delineating the structural relationship between church and state and guaranteeing individual freedom from state coercion."[23] The Establishment Clause and the Free Exercise Clause of the United States Constitution are not unique as other modern constitutions contain these two clauses

---

[17] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.
[18] *SEE* VALERIE GUTMANN, *ASSISTED REPRODUCTIVE TECHNOLOGIES: FAILURE TO COVER DOES NOT VIOLATE ADA, TITLE VII, OR PDA*, 31 J.L. MED. & ETHICS 2, 314-16 (2003).
[19] *See* Venessa Wong, *Workplace Discrimination Charges at Record High*, BLOOMBERG BUSINESS (July 29 2011), http://www.bloomberg.com/bw/lifestyle/workplace-discrimination-charges-at-record-high-07292011.html [http://perma.cc/S8PR-J4YP].
[20] According to a national survey released by the Tanenbaum Center for Interreligious Understanding, more than one-third of workers surveyed say they have personally experienced or witnessed some form of religious non-accommodation in their workplace. Additionally, nearly half-non Christian workers reported experiencing or witnessing religious non-accommodation at work. *See What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion*, p. 8.
[21] WINFRIED BRUGGER, ON THE RELATIONSHIP BETWEEN STRUCTURAL NORMS AND CONSTITUTIONAL RIGHTS IN CHURCH-STATE-RELATIONS 21 (2007), http://www.encyclo.co.uk/meaning-of-Res%20publica%20christiana [http://perma.cc/ZJT5-QJFR]. *Res publica christiana* is a Latin phrase combining the idea of res publica and christiana to describe the worldwide community of Christianity and its well-being, *id.*
[22] *Id*. at 22.
[23] *Id*. at 23.

as well.[24] A constitution containing the two clauses, however, does not necessarily mean a barrier between church and state has been created, nor is it easy to enforce.[25] Like the German Basic Law, for example, the clauses "tend to be more specific in the scope of protection."[26]

In Israel, the relationship between church and state is not one of strict separation in theory and accommodation, as in the United States, or of division and cooperation, as in Germany.[27] Instead, there is a formal unity between the church and state with a substantive division.[28] People who are associated with a religion are subject to religious law when the issue involves an area that the Israeli law has authorized to be controlled by religious law.[29] When someone is not associated with a religion, in those specific areas where religious law applies, they are considered to be self-governing.[30] For example, because Israeli law does not currently allow civil marriage,[31] "the only form of standard marriage that can take place in Israel is marriage through the religious courts of one of the recognized religious communities." In the United States, when people are associated with any religion, they are still thought to be subject to federal and state laws; however, when that person is a pregnant woman who works for a religious-based employer federal or state law does not protect her. She is subjected to the whim of that religious employer, in many cases, even if she

---

[24] *Id.* at 25.
[25] *Id.* at 27.
[26] *See* BRUGGER, *supra* note 22, at 25.
[27] *Id.* at 40.
[28] *Id.*
[29] *See* MARCIA GELPE, THE ISRAELI LEGAL SYSTEM 5, 287 (2013). All religious courts have subject matter jurisdiction over issues of personal status. However, the scope of exclusive jurisdiction differs for the different religious courts. Christian religious courts have exclusive jurisdiction over marriage, divorce, and alimony. Jewish and Druze religious courts have exclusive jurisdiction over only marriage and divorce, *id.*
[30] *Id.* at 284. The current arrangement draws influence from the rule of the Ottoman Empire and its continuation into the British Mandate. When Israel became a state, the British laws of the Mandate were left in place. Over time those laws, including marriage and divorce, were revised or replaced. However, the basic principle of leaving each religious community to manage its own affairs remained, *id.*
[31] A bill proposed in the Israeli Parliament, the Knesset, that would have instituted civil marriage, including for gays, failed by a margin of 39-50 in July 2015. *See* Eric Cortellessa, *Why is There No Civil Marriage in Israel?*, THE TIMES OF ISRAEL (July 12, 2015), http://www.timesofisrael.com/why-is-there-no-civil-marriage-in-israel/ [http://perma.cc/T25T-CZQ6].

does not associate herself with that religion beyond employment with the organization. Female church employees who are thinking about starting a family using procreative technologies may think otherwise if they know they will lose their jobs. This forms the basis for the analysis of how the two rights must be reconciled.

This Note will analyze the legal foundations of pregnancy discrimination that is permitted by the freedom of religion, and will explore the relationship between religion and law in Israel that can provide insight into eliminating the discrimination women face from their religious employers in America. This Note will argue that an alternative model of the separation of church and state may provide for a framework that fulfills the aims of the freedom of religion while preventing discrimination of pregnant women employed by religious organizations. Open discussion of the separation of church and state issues is an important step in achieving the aims of the freedom of religion provisions in the Constitution and anti-discrimination laws. Part II briefly describes the process and moral issues related to In vitro fertilization. Part III examines employment and pregnancy discrimination in the United States. Part IV gives an analysis of rights in the philosophical context. Part V gives an overview of the separation of church and state in the United States. Part VI gives an overview of the Israeli legal system. Part VII describes the compatibility of ART's with the exercise of religion. Part VIII describes the reconciliation of religions adherence and democratic values.

II. IN VITRO FERTILIZATION

It is estimated that one out of six couples experience at least one form of infertility problem throughout their reproductive lifetime.[32] In vitro fertilization ("IVF") is one of many Assisted Reproductive Technologies ("ART's") that have been developed to treat infertility. The term "in vitro" means 'outside the living body and in an artificial environment,' and literally is Latin for "in glass."[33] According to estimates, more than five million babies have been born worldwide since the first baby was born via IVF in 1978.[34] IVF is the process of manually combining an egg and sperm in a laboratory, thus creating an embryo. [35] The process occurs in four stages.[36] During the first stage, ovulation induction, the woman is given hormones to stimulate her ovaries in order to facilitate the production of multiple eggs.[37] During the second stage, the eggs are surgically removed.[38] The third stage is where the fertilization occurs.[39] The eggs are first placed in a petri dish, and then sperm is introduced.[40] After approximately eighteen hours, the first egg divides into two cells, and shortly after divides again into a pre-embryo.[41] During the last stage, if the embryo

---

[32] ART Fact Sheet, *EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY* (June 2014), http://www.eshre.eu/Guidelines-and-Legal/ART-fact-sheet.aspx [http://perma.cc/F5WU-46KS].
[33] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/in%20vitro [http://perma.cc/8FX4-3F3H].
[34]ART Fact Sheet, *supra* note 33. Louise Joy Brown was the first "test tube baby" born on July 25, 1978. *See The World's First Test Tube Baby*, PBS (Aug. 5, 2015), *http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-worlds-first/* [http://perma.cc/U4PN-9T8E].
[35] Nivin Todd, *Infertility and In Vitro Fertilization*, WEBMD MEDICAL REFERENCE, (Last visited Mar. 10, 2015), http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization [http://perma.cc/84WU-NL4V].
[36] Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 420-21 (2012).
[37] *Id.* at 420-21
[38] *Id.* at 421.
[39] *Id.*
[40] *Id.*
[41] Cucci, *supra* note 37 at 420-21.

is not frozen for later use, one to three embryos[42] are implanted into the uterus[43] of the biological mother, non-biological mother, or surrogate.[44] These procedures offer couples the opportunity to produce a child when their own sperm and/or eggs may not be healthy enough to do so (or are actually nonexistent), and may be a couple's best option or only reproduction option available.[45]

A. MORAL ISSUES WITH IVF

IVF is a controversial subject and "[d]ebates on IVF are clouded by different ethical value systems and deep prejudices."[46] When that debate does occur, many questions are raised that have no easy answer. Surplus embryos are used to substantially enhance the chance of success. This inevitably leads to the question of whether or not they are life forms. If so, then the next question is, who gets to decide how those "surplus" embryos are treated? The answers to these questions are based on one's belief on when life is said to begin; whether it begins at conception or implantation. Science has its view, and each world religion has its own view. Despite the controversy, adjustments have been made within Islam, Judaism, Confucianism, Hinduism, and most forms of Christianity, to facilitate the fertility of their adherents.[47] The only world religion

---

[42] *Id.*
[43] *In Vitro Fertilization: IVF*, AMERICAN PREGNANCY ASSOCIATION (last updated, Sep. 2014), http://americanpregnancy.org/infertility/in-vitro-fertilization [http://perma.cc/4RPM-MSFT].
[44] *Surrogacy*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html [http://perma.cc/CWB9-XDD9].
[45] *Gamete and Embryo Donation: Deciding Whether to Tell*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (last visited Oct. 1, 2014), http://www.reproductivefacts.org/FACTSHEET_Gamete_Donation_Deciding_Whether_To_Tell/ [http://perma.cc/W8YU-BE8F].
[46] Amit Banerjee, *An Insight into the Ethical Issues Related to In Vitro Fertilization*, THE INTERNET JOURNAL OF HEALTH (2006), https://ispub.com/IJH/6/1/4581 [http://perma.cc/AQ3W-LYYQ].
[47] *Id.*

that "unequivocally condemns the use of IVF" is Catholicism.[48] Specific religious views on IVF will be discussed at length in Part V.

III. EMPLOYMENT AND PREGNANCY DISCRIMINATION

No single factor has contributed more to the growth and development of the United States labor force than the rise of the working woman.[49] A combination of factors led to the increased number of women in the workplace.[50] The post-World War II economy enjoyed major growth that vastly increased the labor demand.[51] The increased demand of labor in combination with "[t]he civil rights movement, legislation promoting equal opportunity in employment, and the women's rights movement created an atmosphere that was hospitable to more women working outside the home."[52] Though, this does not mean women were automatically granted equal rights in the workplace.

A. PREGNANCY DISCRIMINATION ACT

Several Supreme Court cases in the 1970's laid the foundation for women gaining equal rights in the workplace. In *Cleveland Board of Education v. LaFleur,* two pregnant school teachers brought suit to challenge a mandatory maternity leave rule that forced them to quit their jobs without pay several months before giving birth.[53] The Court held that the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violated the Due

---

[48] *Id.*
[49] Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LABOR REVIEW, 18, (May 2002) available at http://www.bls.gov/opub/mlr/2002/05/art2full.pdf [http://perma.cc/W5B8-ME9G].
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] 414 U.S. 632 (1974).

Process Clause of the Fourteenth Amendment.[54] This was a crucial case for female workers. However, the Court reversed course in two subsequent cases decided later in 1974 and in 1976 that left pregnant women unequal and unprotected.[55]

Congress then enacted the Pregnancy Discrimination Act of 1978 ("PDA") to make it clear that, "discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII")."[56] Title VII, however, provides an exemption that allows religious organizations to discriminate on the basis of religion.[57] More specifically, it authorizes religious organizations to make decisions for their employees regardless of the employee's connection to the function of the church in a religious capacity.[58] In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[59] the Supreme Court upheld this broad exemption when the church fired one of its maintenance workers for failing to qualify for a certificate that he was a member of the Church and eligible to attend its temples.[60] It is easy to see though, the justifications a religious organization such as a Catholic church might have, in situations such as the insistence that its priests be Catholic.[61]

---

[54] Cleveland Board of Education v. LaFleur, 414 U.S. 632, 651 (1974).
[55] Lauren Khouri & Liz Watson, *Pregnancy and Pink Slips: Yesterday, Today, Not Tomorrow*, National Women's Law Center (Oct. 31, 2013) http://www.nwlc.org/our-blog/pregnancy-and-pink-slips-yesterday-today-not-tomorrow [http://perma.cc/GT75-K6LB].
[56] Jenny Yang, *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC (Jun 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [http://perma.cc/M9S4-SABU].
[57] *SEE QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE*, EEOC http://www.eeoc.gov/policy/docs/qanda_religion.html [http://perma.cc/TP6M-HVYG].
[58] CHRISTOPHER L. EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION, 249-50 (2007).
[59] 483 U.S. 327 (1987).
[60] Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
[61] EISGRUBER & SAGER, *supra* note 58 at 249.

B. AMERICANS WITH DISABILITIES ACT

Title I of the Americans with Disabilities Act of 1990 ("ADA"), protects "individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability."[62] Even though pregnancy itself is not a disability, "pregnant workers are and job applicants are not excluded from the protections of the ADA."[63]

C. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDANCE

Since the PDA was enacted, charges of pregnancy discrimination have increased substantially.[64] In 1997, more than 3,900 charges were filed with the Equal Employment Opportunity Commission ("EEOC") and state and local fair employment practices agencies. In 2013, more than 5,300 charges were filed.[65] In July 2014, the EEOC issued updated enforcement guidance regarding the PDA and the ADA as they apply to pregnant workers.[66] According to the EEOC Guidance, Title VII of the Civil Rights Act of 1964 as amended by the PDA prohibits discrimination based on the following: current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.[67] This guidance requires employers to make reasonable accommodations for pregnant employees. The EEOC puts forth the position that reasonable accommodations be made "available to individuals with temporary impairments, including impairments related to pregnancy."[68] Essentially, the EEOC supports

---

[62] *Supra* note 56. *See* 42 U.S.C. § 12112 (2015).
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Yang, *supra* note 56.
[67] *Id.*
[68] *Id.*

reasonable accommodations for normal pregnancies, not just those that rise to the level of disability under the ADA.

IV. RIGHTS IN THE PHILOSOPHICAL CONTEXT

A. BACKGROUND

Despite being founded by those who sought freedom from religious persecution, historians maintain that America was not intended to be a Christian nation.[69] Nowhere in the Constitution or the Bill of Rights is there a single mention of "God."[70] Further, those documents have also set three commitments to religious freedom; prohibitions on the free exercise of religion, laws regarding the establishment of religion, and laws placing a condition of a religious oath on holding public office, as unconstitutional.[71] The freedom of religion is guaranteed by two clauses in the First Amendment of the Constitution; "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[72]

The Constitution is a living document that established the Supreme Court.[73] However, the Constitution does not explicitly establish the role of the Court in making judicial decisions.[74]

---

[69] *See Is America a Christian Nation?*, Americans United https://www.au.org/resources/publications/is-america-a-christian-nation [http://perma.cc/X9R8-N8FT].
[70] EISGRUBER & SAGER, *supra* note 58, at 1.
[71] *Id*. at 2.
[72] U.S. CONST. amend. I.
[73] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 2 HARV. J.L. & PUB. POL'Y 29 (1976); U.S. CONST. art. III, § 1.
[74] *See id.*

Judicial review was established initially on the state level and in the debates over ratification.[75] In the landmark case *Marbury v. Madison,*[76] the Supreme Court had to define its role in determining whether or not legislation is consistent with the Constitution.[77] Primarily in the 20th century, "the Supreme Court has become a powerful vehicle for making public policy as it interprets law."[78]

B. RIGHT TO PRIVACY

The Supreme Court has defined the right to privacy as, "the right of the individual . . . to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[79]

Rooted in the right to privacy is the fundamental right to procreation. That right was first declared as such in *Skinner v. Oklahoma,*[80] in which the court held that, "marriage and procreation are fundamental to the very existence and survival of the race."[81] Additionally, the Court declared strict scrutiny is required when the government attempts to impose involuntary sterilization.[82] In 1965, the Supreme Court further protected the right to control one's reproductive choice in *Griswold v. Connecticut.*[83] Here, the Court held the state statute prohibiting the use of

---

[75] *See Annotation 13-Article III*, FindLaw, http://constitution.findlaw.com/article3/annotation13.html [http://perma.cc/AVU5-Q9MA].
[76] 5 U.S. 137 (1803).
[77] Steven Mintz, *The Survival of the Constitution*, The Gilder Lehrman Institute of American History, http://www.gilderlehrman.org/history-by-era/creating-new-government/resources/survival-us-constitution [http://perma.cc/9VSX-VDPM].
[78] *Id.*
[79] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[80] 316 U.S. 535 (1942).
[81] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[82] *See* Skinner v. Oklahoma, 316 U.S. at 535 ("strict scrutiny of the classification which a State makes in a sterilization law is essential …").
[83] Griswold v. Connecticut, 381 U.S. 479 (1965).

contraceptives to be unconstitutional on the grounds that the law violated the right to marital privacy.[84]

Procreational autonomy has continued to be reinforced mainly in a series of cases in which embryos created via IVF and then frozen, are the center of a divorce dispute.[85] IVF is currently not considered to be included in the fundamental right to procreate, though a few courts have recognized that it is implicit in one's ability to exercise the right.[86] If more courts hold that IVF is included in the right to procreation, pregnant female church employees will, at the very least, have a more solid constitutional ground to stand on in court.

C. PHILOSOPHICAL ANALYSIS OF RIGHTS AND THE SEPARATION OF CHURCH AND STATE

In 1920, Zechariah Chafee, a Harvard professor of law and well-known champion of civil liberties[87], presented an illustrative way to view the conflict of two rights and the challenge of analyzing competing rights.[88] When one man was arrested for swinging his arms and hitting another man in the nose, the man asked the judge if he had a right to swing his arms in a free country.[89] The judge replied, "[y]our right to swing your arms ends just where the other man's nose begins."[90] So the question becomes, how do we analyze the conflict of two rights?

Laying out the philosophical framework and defining what our rights are, will help in understanding how they interact with each other. Rights are defined as "entitlements (not) to

---

[84] *Id*. at 485-86.
[85] *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998), *A.Z v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000); Reber v. Reis, 42 A.3d 1131 (Pa. Super. 2012).
[86] *See* GREGORY DOLIN ET. AL, MEDICAL HOPE, LEGAL PITFALLS: POTENTIAL LEGAL ISSUES IN THE EMERGING FIELD OF ONCOFERTILITY, 114 (2010).
[87] Marcel Green, *Zechariah Chafee Jr (1885-1957)*, http://uscivilliberties.org/biography/3317-zechariah-chafee-jr-18851957.html [http://perma.cc/2HZ9-ACJP].
[88] ZECHARIAH CHAFEE, FREEDOM OF SPEECH, 34 (1920).
[89] *Id.*
[90] *Id.* at 34-35.

perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states."[91] The Hohfeldian Analytical System is a widely accepted system used in the conceptual and philosophical analysis of rights. When analyzed, rights are said to contain ordered arrangements of components, similar to the way molecules are ordered arrangements of chemical elements.[92] Wesley Hohfeld formulated the four components that make up the "elements" of rights, known as the "Hohfeld incidents;" (1) Privilege (or Liberties), (2) Claim, (3) Power, and (4) Immunity.[93] The first two, privileges and claims, are called "primary rules" and the last two are called "secondary rules."[94] The secondary rules are rules that specify how the first two can be changed or altered.[95]

Privilege rights involve what their bearer has no duty not to do.[96] In other words, a license, such as the license to drive a motor vehicle endows one with the privilege to engage in that activity. But it is well known that the right to drive a vehicle is an activity in which A has a privilege to drive only if A has a privilege not to drive.[97] A right is a claim, when A has a claim that B does X, and only if B has a duty to A to do X. An employee has a claim that the employer pays him wages, meaning that the employer has a duty to pay the employee the wages.[98]

Powers are the first of the secondary rules that enables the alteration of the privileges and claims. A has the power to alter his own or the right of another, if and only if A has within a set of

---

[91] *Rights*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/ [http://perma.cc/KJ7Y-PMAC].
[92] *Id.*
[93] *2.1 THE FORM OF RIGHTS: THE HOHFELDIAN ANALYTICAL SYSTEM*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/2UM6-UE62].
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *2.1 The Form of Rights, supra* note 89.
[98] *Id.*

rules the ability to do so.[99] A governmental agency has the power to alter one's privilege or claim. For example, the Department of Motor Vehicles has the power (stemming from various legal sources) to suspend one's privilege to drive a vehicle. In addition, powers can be used to alter the power of others.

Immunity is the absence of a power. If A has a power to change the right of B, then A has a power. If A lacks the power, then B has immunity. Immunity is a "core element of an American citizen's right to religious freedom."[100] The government lacks the power to change the religious rights of Americans, thus giving Americans immunity.

Each of the "atomic" incidents can be a right when it occurs in isolation. However, they also bond together in characteristic ways to form complex rights.[101] Each of the incidents are arranged and distinguished in different ways. The "active" and "passive" distinction fits neatly into the Hohfeldian system. Privilege and power are active in that they are concerned with their holder's actions.[102] A has a right to do X. Claim and immunity are passive in that they regulate the actions of others.[103] A has a right that B does X. In addition, the distinction between "positive" and "negative" is popular among some normative theorists.[104]

D. APPLICATION OF THE PHILOSOPHICAL ANALYSIS

---

[99] *Id.*
[100] *Id*.
[101] *2.1.6 The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/TH9C-8HPY].
[102] *2.1.7 The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/87F2-94PD].
[103] *Id.*
[104] *Id.*

An important distinction should be made between the conceptual analysis and definitional stipulation. All rights can be represented by the Hohfeldian incidences; however, some diagrams of incidences that can be constructed do not correspond to any right.[105] In other words, "all thrones are chairs, but only chairs with a certain function are thrones."[106] The question becomes what do rights do for those that hold them? The two major positions on this area, the Will Theory and the Interest Theory, shed light on this question.[107] Will theorists maintain that the holders of rights are sovereigns on a small scale.[108] The function of a right is to give the holder control over the other's duty.[109] Interest theorists maintain that "[a]n owner has a right . . . not because owners have choices, but because the ownership makes the owner better off."[110]

There are numerous theories as to how to reconcile the conflicts between rights, and if that is even possible. One theory called specificationism, holds "that each right is defined by an elaborate set of qualifications that specify when it does and when it does not apply: a set of qualifications that define the right's 'space.'"[111] Rights in the view of specificationists never conflict, but instead fit together like jigsaw puzzles, "so that in each circumstance there is only one right which determines what is permitted, forbidden or required."[112]

---

[105] *2.2.1 The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/79FP-NPEV].
[106] *Id.*
[107] *Id.*
[108] *2.2 THE FUNCTION OF RIGHTS: THE WILL THEORY AND THE INTEREST THEORY*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/9RTY-8YGG].
[109] *Id.*
[110] *Id.*
[111] *5.2 Conflicts of Rights?*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rights/ [http://perma.cc/3WZ2-XYLC].
[112] *Id.*

There are well-founded objections to this theory.[113] First, every qualification of a particular right would have to be set forth in order to be fully specified.[114] Second, rights that are so understood lose their force to be explainable in that they can only be conclusions, not the arguments of which side of a dispute should prevail.[115] Third, specificationists cannot explain the "moral residue" when a right is "defeated."[116] For example, A has a property right over a pie and B has a right to not starve. If B eats A's pie, B has a moral obligation to apologize and compensate A if he can.[117] Specificationists cannot explain the moral obligation B has on A, because A's right was not violated when B ate the pie. A proponent that conflicts of rights do exist suggests that, "we should speak of a 'defeated' right as being permissibly 'infringed' (instead of 'violated'), leaving residual obligations on the infringer."[118]

Rights can also be viewed as "trumps" with reasons that are weighty, and can cause an override of other reasons.[119] In other words, rights "give reasons to treat their holders in certain ways or permit their holders to act in certain ways, even if some social aim would be served by doing otherwise."[120] If the rights are framed as trumps, one is inevitably led to the question of who decides which rights are of higher status than others? Is there an "ace" of rights that trumps all others? In the real world, courts decide in non-theoretical and philosophical terms, the hierarchy

---

[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *5.2 Conflicts of Rights?*, *supra* note 107.
[117] *Id*.
[118] *Id*.
[119] Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/ [http://perma.cc/8ESK-D7F3]; *Rights as Trumps*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/#5.1 [http://perma.cc/9J8Q-BA7Z].
[120] *Id*.

of rights and how they interact with each other. As is evidenced by the many cases of freedom of religion implications, courts have seemingly ruled the freedom of religion right an "ace."

V. SEPARATION OF CHURCH AND STATE

Many scholars have developed their own frameworks for the separation of church and state that are representative of a basic continuum. No state fits perfectly within each model but they provide a useful tool in analyzing the relationship a state has with religion along the continuum. Winfried Brugger's framework provides six models on the relationship between church and state: 1) aggressive animosity between church and state; 2) strict separation in theory and in practice; 3) strict separation in theory, accommodation in practice; 4) division and cooperation; 5) formal unity of church and state, with substantive division; and 6) formal and substantive unity of church and state.[121]

The first model, aggressive animosity between church and state often exists in communist countries driven by Marxist-Lennist ideology and practice. Three different kinds of animosity or hostility have been distinguished: adversarial tones towards religion in general calling for its total elimination and replacement with secular ideas, softer hostility towards religion while fighting civilly for a secular outlook, and adversarial tones towards a particular religion.[122]

The next model, strict separation in theory and practice, is "a variation of the wall-of-separation doctrine to the extent that it refers to spatial and organization entanglements as well as common policies of church and state, and it is strictly applied in practice."[123] An example of this

---

[121] BRUGGER, *supra* note 22, at 31.
[122] *Id.* at 33.
[123] *Id.*

model was the decision reached in *Everson v. Board of Education*.[124] Here, a New Jersey statute authorized local school districts to make contracts and rules for the transportation of children to and from school.[125] The township board of education authorized, pursuant to this statute, reimbursement to parents who paid for their students' transportation via public transit.[126] A portion of the money went to pay for the transportation of some children to Catholic parochial schools.[127] The right of the board to allocate this money for that particular purpose was challenged on the grounds that the statute and resolution violated the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment.[128]

The Supreme Court held that pursuant to the language of the First Amendment, New Jersey could not "hamper its citizens in the free exercise of their own religion."[129] Consequently, New Jersey could not exclude individuals belonging to any faith, because of their faith, or lack thereof, from receiving public welfare benefits.[130] Thus, the Court reasoned that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[131] As interpreted by this Court, the "First Amendment has erected a wall between church and state…that must be kept high and impregnable."[132] In his history-laden dissent, Justice Rutledge disagreed with the majority's view of the scope of the statute and its interpretation of the First Amendment. He believed that New

---

[124] Everson v. Board of Ed. of Ewing Twp., 330 U.S. 1 (1947).
[125] *Id*. at 3.
[126] *Id*.
[127] *Id.*
[128] *Id.* at 5.
[129] *Id.* at 16.
[130] *Everson v. Board of Ed. of Ewing Twp*., 330 U.S. at 16.
[131] *Id*.
[132] *Id.*

Jersey had favored one particular religion since "the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools."[133] Thus, Justice Rutledge maintained, "it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in dissensions inevitable when sect opposes sect over demands for public funds to further religious education, teaching or training in any form or degree, directly or indirectly."[134] Though different in the conclusion they reached, the majority in *Everson* accepted the wall-of-separation doctrine.[135]

The third model, strict separation in theory with accommodation in practice, is primarily the model used in the United States. The practical application of this model lends itself to the complex interplay of church and state. As this Note will explore, despite the constitutional provisions guiding what can and cannot be done, each provision is open to interpretation by the courts. In *Everson*, the majority found it acceptable when taxes are raised neutrally and the state provides a service for both public and private schools.[136] Providing bus reimbursement from neutrally raised taxes is a "traditional state duty similar to providing police protection, trash collection, fire-fighting or ensuring the safety of public streets."[137] Thus, "the Non-establishment Clause does not exclude religious schools and students from receiving state support."[138] This view

---

[133] *Id.* at 62.
[134] *Id.* at 59.
[135] BRUGGER, *supra* note 22, at 35.
[136] *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. at 17.
[137] BRUGGER, *supra* note 22, at 35.
[138] *Id*.

of separation is more accommodating than its stricter counterpart.[139] It suggests that the "wall need not be quite as high and thick as the other, stricter version."[140]

The fourth model, division and cooperation, is the primary model in Germany. A wall of separation cannot exist where the church and state actually cooperate with each other beyond mere accommodation.[141] Article 137 (1) of the German Weimar Constitution and Article 140 Basic Law stipulate that state churches are not allowed.[142] Interestingly, this does not lead to strict separation, but instead leads to "partial cooperation and mutual coordination."[143] Basic Law articles and other provisions of the Weimar Constitution provide for various methods of support and cooperation. The German government supports churches by way of statutes and contracts. Examples of such contracts include the administration of cemeteries, spiritual care of inmates and members of the German military, the organization of religious classes in public schools, as well as medical, education, and social activities of the church that are deemed to be in the public interest by the state.[144]

Israel fits into the fifth model of formal unity of church and state with substantive division. Despite the lack of a textual description of the relationship between church and state or religious freedom and Israel's clear foundation as a "Jewish" homeland[145], debate exists as to what the term "Jewish" means in the Basic Law.[146] As will be explored in more detail in Section VI, "the very

---

[139] *Id*. at 36.
[140] *Id*.
[141] *Id*. at 38.
[142] BRUGGER, *supra* note 22, at 38.
[143] *Id.*
[144] *Id.* at 38-39.
[145] *Id.* at 44.
[146] The Basic Law: Human Dignity and Liberty provides, "The purpose of this basic law is to protect human dignity and liberty so as to anchor in basic law the values of the state of Israel as a Jewish and democratic state." Prominent Israeli jurists have debated the phrases "Jewish state" and "democratic state". As Israeli Supreme Court Justice

existence of a religious sector as a distinctive cultural subgroup within the population prevents the organic integration of religion into the national elements of the political culture."[147]

In the sixth model, formal and substantive unity of church and state, the church is not merely symbolically, formally, or even softly associated.[148] Instead, practical policies and organizational structures of the state church or national religion and state authority are extensively intertwined.[149] Religious duties are often synonymous with legal obligations, and illegal acts are often seen as "sins."[150] Moderate forms of the Muslim theocracy do exist, as well as extreme examples. The Taliban in Afghanistan prior to the U.S./North Atlantic Treaty Organization ("NATO") intervention in 2002, for example, is an extreme form of this model.[151]

A. RELIGIOUS FREEDOM RESTORATION ACT OF 1993

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA") in response to what was perceived as an attack on the freedom of religion.[152] This act provides for religious exemption from federal law. The government may "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that

---

Aharon Barak maintains, the term "Jewish" can have a wider level of abstraction "so that it will coincide with the democratic character of the state." In contrast, Justice Menachem Elon notes "the concept of a *Jewish* state be interpreted by *studying* the Jewish sources as the heart of Judaism and *engaging* them." *See The Jewish Political Tradition*, 502, 505.

[147] CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, 28 (1984).

[148] BRUGGER, *supra* note 22, at 46.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] EISGRUBER & SAGER, *supra* note 58, at 46.

compelling interest."[153] In the less than five years following its passing, the Supreme Court held much of RFRA to be unconstitutional.[154]

Congress had passed the Religious Freedom Restoration Act in an urgent response to the Supreme Court's decision in *Employment Div. v. Smith*.[155] The *Smith* case had ignited a firestorm of controversy that created a prolonged conflict between Congress and the Supreme Court.[156] Based on this case and the perceived threat from the Court to the freedom of religion, Congress nearly unanimously passed RFRA in 1993, with only three dissenting votes in the Senate and none in the House.[157]

In 1990, two men, Alfred Smith and Galen Black, were fired from a private drug rehabilitation facility when they ingested peyote, an illegal hallucinogenic drug, during a religious ceremony as members of the Native American Church. Smith and Black were denied unemployment compensation "because they had been discharged for work-related 'misconduct.'"[158] The Oregon Court of Appeals reversed the trial court holding that the denial of benefits violated their free exercise right under the First Amendment.[159] On appeal to the Oregon Supreme Court, the Employment Division argued that the denial of benefits was permitted because of the criminality of peyote use under Oregon law.[160] The Oregon Supreme Court disagreed and concluded that Smith and Black were entitled to unemployment benefits.[161] The Court reasoned

---

[153] 42 U.S.C § 2000bb-1.
[154] EISGRUBER & SAGER, *supra* note 147, at 46.
[155] Employment Div. v. Smith, 494 U.S. 872 (1990).
[156] *Id.*
[157] *Id.*
[158] Employment Div. v. Smith, 494 U.S. 872, 874 (1990).
[159] *Id.*
[160] *Id.*
[161] *Id.*

that the criminality of the peyote use was irrelevant to their constitutional claim.[162] The purpose of the provision used to disqualify Smith and Black was not to enforce the criminal laws of Oregon, but to maintain the integrity of the compensation fund.[163] The Court further reasoned, that purpose was inadequate justification to the burden imposed on Smith and Black from their denial of unemployment benefits.[164]

In a six to three decision written by Justice Scalia, the Supreme Court held that Oregon could deny unemployment compensation for Smith and Black when their dismissal for ingesting peyote was constitutionally prohibited under Oregon law. [165] Justice O'Connor, in her concurring opinion, acknowledged that "[t]here is no dispute that Oregon's prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion."[166] In deciding this case, the Court declined to apply the *Sherbert* test.[167] This balancing test would have asked "whether Oregon's prohibition substantially burdened a religious practice, and if it did, whether the burden was justified by a compelling government interest."[168] The Court declined using this, reasoning that it would have created a "constitutional right to ignore laws of general applicability."[169] The Court in *Smith* held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." [170] Congress disagreed with this ruling and as a direct result passed RFRA.[171]

---

[162] *Id*. at 875.
[163] *Employment Div. v. Smith*, 494 U.S. at 875.
[164] *Id*.
[165] *Id.* at 890.
[166] *Id.* at 903.
[167] *See* Sherbert v. Verner, 374 U.S. 398 (U.S.1963).
[168] City of Boerne v. Flores, 521 US 507, 513 (1997).
[169] *Id.* at 513.
[170] *Id.* at 514.
[171] EISGRUBER & SAGER, *supra* note 147, at 46.

While the *Smith* case involved a question to the First Amendment, *City of Boerne v. Flores*, was an important case following the passage of RFRA dealing with Congress' enforcement powers of the RFRA to the states under the Fourteenth Amendment.[172] In this case, the Archbishop of the historic St. Peter Catholic Church applied for a building permit with the City of Boerne, Texas, to expand the church. A few months prior to the application, the Boerne City Council had passed an ordinance allowing the city's Historic Landmark Commission to prepare a preservation plan.[173] Under this plan, the Commission had to pre-approve any construction plans affecting historic buildings or landmarks in a historic district.[174] Pursuant to this ordinance the Commission denied the Archbishop's application to expand the church. The District Court held that by enacting RFRA, Congress exceeded the scope of its enforcement power under the Fourteenth amendment.[175] The Fifth Circuit disagreed and reversed.[176] The Supreme Court looked to the legislative history of RFRA in reversing the Fifth Circuit and declaring RFRA unconstitutional.[177] Though the Court declared RFRA unconstitutional to the extent that it applies to state and local laws, RFRA still has force with federal statutes and regulations.[178]

The most recent Supreme Court case to further interpret the application of RFRA was *Burwell v. Hobby Lobby*.[179] In 2010, Congress passed the Affordable Care Act, mandating certain

---

[172] City of Boerne v. Flores, 521 U.S. 507 (1997).
[173] *Id*. at 512.
[174] *Id*.
[175] *Id*.
[176] *Id*.
[177] *Id*.
[178] *See* EISGRUBER & SAGER, *supra* note 58, at 47.
[179] Burwell v. Hobby Lobby, Inc., 134 U.S. 2751 (2014).

employers to cover certain contraceptives.[180] As a result of this mandate, three closely held business corporations (Hobby Lobby, Conestoga, and Mardel) filed suit alleging the mandate violated their religious rights under RFRA.[181] In a 5-4 decision, the Supreme Court held "the regulations that impose the obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[182]

B. INDIANA SENATE BILL 101

In light of the Court declaring RFRA to be unconstitutional when applied to state and local laws, many states have adopted or attempted to adopt similar religious freedom restoration laws.[183] In January 2014, Indiana lawmakers introduced Indiana's version of the Religious Freedom Restoration Act, Senate Bill 101. The text of this bill was based on the Federal version of RFRA. On February 24, 2015, SB 101 passed the Senate by a vote of 40 to 10. About a month later the House of Representatives passed it by a vote of 63 to 31, mainly along party lines.[184]

This bill created a firestorm of controversy as soon as Governor Mike Pence signed it. Major Indiana businesses and organizations expressed concern over the message the bill sent about tolerance and acceptance in the state, and as a result some cancelled plans to expand business

---

[180] RENEE MATTEI MYERS & REDEATE DESSALEGN, *DON'T BELIEVE THE HYPE: THE REAL EFFECT OF HOBBY LOBBY ON EMPLOYERS & EMPLOYEES* (JUL. 23, 2014), Jurist, http://jurist.org/hotline/2014/07/myers-dessalegn-hobby-lobby.php [http://perma.cc/W4WH-TAKB].
[181] *Id*.
[182] Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751, 2759 (2014).
[183] States that currently have freedom restoration acts: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, and Texas. *See* Lewis Roca Rothberger, *State Religious Freedom Restoration Acts*, http://www.churchstatelaw.com/statestatutes/religiousfreedom.asp (last accessed Jan. 14, 2015) [http://perma.cc/KQZ4-ADEF].
[184] *Actions for Senate Bill 101*, INDIANA GENERAL ASSEMBLY, https://iga.in.gov/legislative/2015/bills/senate/101# [http://perma.cc/S8XX-A3T7].

operations or threatened to hold events elsewhere.[185] Some businesses outside of Indiana even went so far as to cancel plans to send employees to Indiana for training.[186] In addition, the mayor of Seattle banned municipal employees from traveling to Indiana on city funds.[187] The nationwide backlash was swift and severe.

In response to the economic damage and harm to the Indiana's image, lawmakers quickly acted to stop the bleeding. The governor signed an amendment to SB 101 explicitly stating that the law does not authorize "a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment or housing to any member of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service."[188] For the first time in the state's two hundred year history, the terms "gender identity" and "sexual orientation" appear in Indiana State law.

Though the language of the statute[189] even as amended, appears to not apply to religious employers in discriminating against their employees, it does illustrate the other side of the coin. The exercise of the freedom of religion by business owners denying service to gays based on the business owner's religious beliefs would have been made legal under this law. Religious employers firing employees based on the employer's religious beliefs invoke the employer's right

---

[185] David Badash, Angie's List Cancels $40 million 1000 Jobs Indiana Expansion Over Anti-Gay 'Religious Freedom' Law (Mar. 28, 2015), NEW CIVIL RIGHTS MOVEMENT, http://www.thenewcivilrightsmovement.com/davidbadash/angie_s_list_cancels_40_million_1000_jobs_indiana_expansion_over_anti_gay_religious_freedom_law [http://perma.cc/8CU5-XYSQ].

[186] Mollie Hemingway, *Salesforce CEO: I Can Do Business with Communist China, But Not Indiana* (Mar. 26, 2015), THE FEDERALIST, http://thefederalist.com/2015/03/26/salesforce-ceo-i-can-do-business-with-communist-china-but-not-indiana/ [http://perma.cc/K4UL-CM5J].

[187] Emily Shapiro, *Seattle Mayor Prohibits City Employees From Traveling to Indiana* (Mar. 28, 2015), ABC NEWS, http://abcnews.go.com/Politics/seattle-mayor-prohibits-city-employees-traveling-indiana/story?id=29979438 [http://perma.cc/BMD7-H5BY].

[188] ESB 50, https://tribwttv.files.wordpress.com/2015/04/rfra-sb-50-conference-committee-report.pdf [http://perma.cc/K6C6-MJ6M].

[189] *See* I.C. § 34-19-4.

to free exercise, but should trigger protection under Title VII for the employee. However, as this Note attempts to explain, the controversies stem from clashes between fundamental rights expressly identified in the Constitution and those formed through court interpretations.

C. THE MINISTERIAL EXCEPTION

An employment discrimination case brought by a teacher at a church was the vehicle for the Supreme Court to consider whether a ministerial exception to federal employment discrimination laws complies with the Constitution. Until *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[190] the Supreme Court had not heard a case to consider this issue. However, the Court of Appeals has extensive experience with this issue and has uniformly recognized the ministerial exception that is grounded in the First Amendment.[191] This exception "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[192]

In *Hosanna-Tabor*, Cheryl Perich had filed a charge with the Equal Employment Opportunity Commission after she was fired from the school following a diagnosis of narcolepsy.[193] The EEOC then brought suit against Hosanna-Tabor claiming that a former employee of the Evangelical Lutheran Church and School had been fired in retaliation for threatening to file an Americans with Disabilities Act (ADA) lawsuit.[194]

---

[190] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).
[191] *Id*. at 705.
[192] *Id.*
[193] *Id*. at 700.
[194] *Id*. at 701.

The church and school classify teachers in two categories: "lay" and "called."[195] A lay teacher is not required to be trained by the Synod or required to be Lutheran.[196] The school board hired teachers to one-year terms, and the school hired Cheryl Perich first as a lay teacher.[197] The other category, "called," are teachers that have "been called to their vocation by God through a congregation."[198] Once qualified as a called teacher, they receive the formal title "Minister of Religion, Commissioned."[199] Perich had been teaching for four years as a commissioned minister before her diagnosis.[200]

In deciding whether or not Perich was entitled to relief for her former employer's alleged violation of the ADA, the court first had to consider the ministerial exception. The Supreme Court agreed with the Courts of Appeals that there actually is such a ministerial exception and that it does not violate the First Amendment.[201] Requiring a church to keep a minister they do not want to keep goes beyond merely an employment decision because, this "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[202] The Court made it clear that the imposition of a minister on a religious employer would infringe the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.[203]

---

[195] *Id*. at 699.
[196] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct at 699.
[197] *Id*. at 700.
[198] *Id*. at 699.
[199] *Id*.
[200] *Id*. at 700.
[201] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. at 706.
[202] *Id*. at 706.
[203] *Id*. at 703.

Secondly, the Court had to decide if the ministerial exception applied in the case before it. In deciding that it did, the Court concluded that it was reluctant "to adopt a rigid formula for deciding when an employee qualifies as a minister."[204] Perich was educated and commissioned as a minister within the system of the Church. She had to complete eight college-level courses, submit a petition to her local synod containing academic transcripts, letters of recommendation, a personal statement, and written answers to ministry related questions.[205] In addition, she had to pass an oral examination at a Lutheran College.[206] Perich took six years to complete these rigorous requirements. Once she became a commissioned minister, she fulfilled her "important role in transmitting the Lutheran faith to the next generation."[207] The Court, therefore, concluded that Perich was a minister covered by the ministerial exception.[208] When a minister brings a lawsuit for alleging her termination was discriminatory, the Court proclaimed, "the first Amendment has struck the balance for us . . . [t]he church must be free to choose those who will guide it on its way."[209]

Smith and *Hosanna-Tabor* certainly can be distinguished from the cases involving infertile women who seek IVF treatments. Women seeking IVF treatments is not the same as someone ingesting peyote, which is prohibited under a valid and neutral law of general applicability.[210] *Hosanna-Tabor* came down to "the governmental interference with an internal church decision that affects faith and mission of the church itself."[211] Women seeking IVF treatments who happen

---

[204] *Id*. at 707.
[205] *Id*.
[206] *Id.*
[207] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. at 708.
[208] *Id*. at 708.
[209] *Id*. at 710.
[210] *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. at 707.
[211] *Id*.

to be members of churches should be protected by governmental interference from an internal church decision. In application of the exemption provided for by RFRA, the government may only substantially burden a person's exercise of religion, if proven, in furtherance of a compelling state interest. The compelling state interest in cases when female employees are fired from their religious employers for using IVF should be to ensure compliance with federal anti-discrimination laws by allowing women to use reproductive technologies.

VI. THE ISRAELI LEGAL SYSTEM

The legal implications of religion and reproductive technologies in Israel would not have nearly as much meaning without first exploring some of the history behind the State of Israel. To better understand the boundaries of legal rights, "we must get behind rules of law to human facts."[212] The exercise of religion plays an integral role in the shaping of laws a society deems important. Examining how religion in Israel influences society and the development of the systems of law will help determine how to prevent discrimination against women in our own country who use ART's, while still maintaining the balance of freedom of religion.

A. WHY ISRAEL?

The State of Israel is an important backdrop for studying issues of law, religion, and reproductive technologies for several reasons. First, what makes Israel "a curious democracy" is that it was "founded to be the national homeland of the Jewish people" while priding "itself on treating all religious communities in a fair and equitable manner."[213] In 2010, Jews comprised 75.4 percent of Israel's population of 7,587,000; 20.5 percent of the people were Arabic, and 4.1 percent

---

[212] CHAFEE, *supra* note 84, at 34.
[213] Marc Galanter & Jayanth Krishman, *Personal Law and Human Rights in India*, 34 ISR. L. REV. 101, 120. (2000).

were classified as "other".[214] Almost all of the Arab people in Israel are Sunni Muslims. The "other" category comprises 2 percent Christian, and 1.7 percent Druze.[215] While Jews undeniably make up the majority, "Judaism is not a state religion, but the state recognizes a special relation to it."[216]

Secondly, the State of Israel has been an important political ally for the United States since the State's establishment in 1948. A Gallup Poll conducted in 2013 suggests American sympathies heavily favor Israel over Palestine.[217] Since 2010, American partiality towards Israel has been consistently over 60%.[218] American sympathies towards Israel can be attributed in part to the philosophical ideals of its people.

Thirdly, the United States and Israel share similar legal upbringings, as both countries "were born from entities governed largely by British law."[219] The ideological goals in our own Declaration of Independence are echoed in The Declaration of the Establishment of the State of Israel:

> THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of Exiles; it will foster the development of the country for the benefit of all its inhabitants; . . . it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.[220]

---

[214] GELPE, *supra* note 30, at 15.
[215] *Id*.
[216] Galanter & Krishman, *supra* note 203 at 120.
[217] Lydia Saad, *Americans' Sympathies For Israel Match All-Time High* (March 15, 2013), http://www.gallup.com/poll/161387/americans-sympathies-israel-match-time-high.aspx [http://perma.cc/M59Q-PZ7T].
[218] *Id*.
[219] GELPE, *supra* note 30 at 5.
[220] Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3 (1948;, *see* GELPE, *supra* note 30 at 5.

Even though the foundations of the United States and the State of Israel were based on similar philosophical ideals, "law has developed in the two countries in different historical and social contexts."[221] Two major influences are cited in the development of Israeli constitutional and parliamentary development; British and Zionism. Modern political science has emphasized the difference between the written and unwritten constitution as basic to understanding constitutionalism.[222] The American Constitution is the prime example of the written constitution, while the British Constitution is an excellent example of unwritten.[223] An unwritten constitution is built around a series of documents generally viewed as fundamental and as hallowed as the written constitution.[224] The term itself refers to the fact that there is not a single document that embodies all that is actually compiled in a single constitutional document. A country that does not have a written constitution has other documents to establish the fundamental laws of that country. Israel has no written constitution, though the outlines of an unwritten constitution emerged in other documents within a few months of the establishment of the State.[225]

B. THE KNESSET AND BASIC LAWS

Israel's unicameral parliament, made up of 120 members is called the Knesset. The word Knesset means assembly and has a historical connection to an institution called The Men of the Great Assembly,[226] which dates back to the Second Temple Period (538 BCE-70 CE).[227] Shortly

---

[221] GELPE, *supra* note 30 at 5.
[222] DANIEL J ELAZAR, CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES, 19 (1990).
[223] *Id*.
[224] *Id*.
[225] ELIAHU LIKHOVSKI, ISRAEL'S PARLIAMENT: THE LAW OF THE KNESSET, 1 (1971).
[226] GELPE, *supra* note 30 at 27.
[227] Lili Eylon, *History of Jerusalem: Four Periods in the History of Jerusalem*, http://www.jewishvirtuallibrary.org/jsource/History/jeru4.html, (last visited on November 8, 2014)[http://perma.cc/RTV3-YES9].

after the founding of the State of Israel, The Constituent Assembly was elected and immediately turned themselves into the First Knesset.[228] The First Knesset adopted the *Harrari Resolution* that charged the Committee on the Constitution, Legislation, and Law to prepare a recommended constitution.[229]

In 1958, the Knesset began enacting a series of Basic Laws.[230] There are twelve basic laws. The two dealing with individual rights were passed by the Knesset in March 1992: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation.[231] The rights set forth in these two Basic Laws "became constitutionally protected and were accorded supra-legislative constitutional status."[232] In a case regarding an amendment to a regular statute passed shortly after the Basic Law: Human Dignity and Freedom, the Supreme Court of Israel reaffirmed that the Knesset had clear authority to pass laws of constitutional quality.[233] Justice Aharon Barak wrote that the Knesset, an ordinary legislative body, had authority to enact laws of constitutionality that cannot be changed by regular legislation.[234] However, not all members of the Knesset agreed with Justice Barak's assertion.[235] In 1992, when the Knesset enacted the Basic Law, some members did not even realize they were adopting a constitution at the time.[236]

---

[228] GELPE, *supra* note 30 at 134.
[229] *Id*.
[230] GELPE, *supra* note 30 at 135.
[231] CA 6821/93United Mizrahi Bank v. Migdal Communal Village 49(4) PD 221 [1995] (Isr.).
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] GELPE, *supra* note 30 at 155.
[236] GELPE, *supra* note 30, at 155-56. Knesset member Michael Eitan reflected:
"I was in the Knesset in 1992. I clashed with the Chairman of the Constitution, Law and Justice Committee when he brought the law to the final reading and I can testify personally that the word constitution was not mentioned by anyone of the members of the Knesset. Ninety-five percent of them never thought that they had a constitutional power. It's the first time I hear that a country can get a constitution retroactively. At the time of the legislation, the members of the Knesset did not know that they were adopting a constitution for the State of Israel, nor did anyone else. How do I know? In the newspapers the day after the enactment of the law, no one mentioned it. It came to our knowledge that

C. THE DIFFERENCE BETWEEN JEWISH AND ISRAELI LAW

For most American Jews, being Jewish is mainly a matter of ancestry and culture, while a comparatively small portion say that being Jewish is mainly a matter of religion.[237] Most Jews in Israel "see themselves as a national group with a shared history, as an ethnic group with a shared culture . . . and as a people with a shared identity."[238] Due to extraordinary high levels of immigration, Israel is very diverse.[239] Despite high levels of racial diversity, "the major fault line of diversity is different from that in the United States." Israelis do not think in terms of American racial diversity between African-Americans, whites, Hispanics, and Asian-Americans.[240] The major "fault line" is between Arabs and Jews.[241]

Great diversity also exists within the Jewish community. The three major groupings are Sepharadim, Mizrahim, and Ashkenazim.[242] Israeli Jews are also grouped along the lines of religious observance: secular, traditional, national religious, and Ultra-Orthodox.[243] Secular Jews identify themselves as Jewish, though they are typically not religious observers.[244] Traditional Jews may strictly observe some Jewish practices while not observing others.[245] National religious

---

we made the constitution a few months later, when Barak said the words I quoted, in a speech and later in an article. But, no one contemplated it at the time the law was enacted, *id.*"

[237] *A Portrait of Jewish Americans* (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/ [http://perma.cc/L6UH-CXD5].

[238] GELPE, *supra* note 30 at 16.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* Sepharadim Jews are descendants of the large and influential community that lived in Spain and Portugal before their expulsion in 1492 and 1497. Mizrahim Jews are descendants from the communities that existed for centuries in the Middle East, North Africa, and the Caucuses. These two terms are often used interchangeably because of the significant similarities and overlaps. Ashkenazim are Jews who came from communities in northern and Eastern Europe, *id.*

[243] GELPE, *supra* note 30, at 17.

[244] *Id.*

[245] *Id.*

Jews combine their Jewish religious practice with being "fully integrated into the fabric of modern life."[246] Ultra-Orthodox Jews limit their modernity by living in separate enclaves.[247] The men are often pictured wearing long black coats, fur hats, and side-curls.[248] While the divisions do exist and each group has its particular characteristics, they are not as clear-cut in practice.[249]

Reflected in this view of themselves as an ethnic group, is an important characteristic of the systems of law in Israel; Jewish law and Israeli law are not the same things. They are distinct legal systems. Matters of personal status, such as marriage and divorce, are brought in religious courts that have exclusive jurisdiction authorized by Israeli statutes.[250] This system allows the law of each recognized religion to apply to people only within those communities, rather than Israel applying the law of one particular religion to its entire people.[251] Other systems of law operate in Israel, with the Jewish law system and the Islamic law system being the most prominent. These are very old systems, and are neither common law nor civil law.[252]

Despite the prominence of the Jewish law system, from a legal system development perspective "[t]he influence of Jewish law on the Israeli legal system has been limited."[253] Several factors may have contributed to this. First, the secular Jews that founded and first populated the State did not feel bound to Jewish religious doctrine or Jewish law despite identifying themselves as members of the Jewish religion.[254] Second, in 1948 the need was strong for adopting a legal

---

[246] *Id*.
[247] *Id*.
[248] *Id. See* Leviticus 19:27, "Ye shall not round the corners of your heads, neither shalt thou mar the corners of they beard, *id.*"
[249] GELPE, *supra* note 30, at 17.
[250] *Id.* at 284.
[251] *Id*. at 285.
[252] *Id.* at 66.
[253] *Id*.
[254] GELPE, *supra* note 30, at 66.

system that could become effective immediately. In addition, because of the ongoing war, there was limited time for modifying the legal system they inherited from the British, and there were few judges who were trained in Jewish law.[255]

D. COMMON LAW OR CIVIL LAW, OR BOTH?

Israel's legal system is a mixture of common law and civil law systems. The common law aspects of the Israeli legal system were inherited from the British with the termination of the British Mandate.[256] The origins of Israel's civil laws are more complex.[257] In 1516, the area that now makes up the modern State of Israel became part of the Ottoman Empire. In the nineteenth century, the Ottoman Empire was importing mainly French law in the form of procedural codes, commercial, and criminal law.[258] In 1917, Britain conquered Ottoman Palestine, and then in 1922 ruled it under a League of Nations Mandate.[259] English law was imported and large elements of "civil" law were overlaid with the common law, thus creating a mixed system.[260] After the establishment of the State in 1948, the founders decided to leave all of the existing law in place.

Influential jurists in academia and The Ministry of Justice active during the early years of the State of Israel were trained in Europe; Germany in particular.[261] The civil law orientation of these jurists helped shape the legal system of the new State.[262] In the 1960's and 1970's Israel decided to adopt a series of code-like laws that were based largely on the German model.[263] This

---

[255] *Id*. at 66-67.
[256] *Id.* at 65.
[257] *Id*.
[258] Celia Fasserstein Fassberg, *Language and Style in a Mixed System*, 78 TUL. L. REV. 151, 155-156 (2003).
[259] *Id*. at 156.
[260] *Id*.
[261] Fassberg, *supra* note 248, at 157 n. 16.
[262] GELPE, *supra* note 30, at 65.
[263] Fassberg, *supra* note 248, at 157. The irony of Israelis adopting some features of the German legal system is not lost on commentators, *id.*

step created what is now the mixed system of public law dominated by common law, a court system that is largely common law, and codified private law.[264] Even though Israeli jurists now receive their legal educations from Israeli institutions, "Israeli authorities continue to look to European countries as sources of legal concepts."[265]

VII. ART'S AND THE FREEDOM OF RELIGION

Up until early 2014, Israel offered unlimited and nearly free IVF treatments to women up to age forty-five, or to those that had already had two children using the procedure.[266] Women are now limited to eight treatments funded by the state, and women over the age of forty-two are limited to three unsuccessful treatment cycles.[267] The Health Ministry defends its new restrictions, claiming that according to worldwide medical literature, the chances for success after three unsuccessful attempts of IVF at the age of forty-five are nearly zero.[268]

A. RELIGIOUS PERSPECTIVES

Individual attitudes towards reproductive technologies "are likely the result in whole or in part of their individual beliefs systems."[269] Since the development of IVF in the late 1960's,[270] "most major religions have established teachings and philosophies pertaining to the existence of and use of assisted reproduction, each of them drawing from and interpreting their key doctrines for guidance."[271] Catholicism and Judaism take positions that are on opposite sides of the

---

[264] *Id*. at 157-158.
[265] GELPE, *supra* note 30, at 65.
[266] Ilene Prusher, *New IVF Policy Have Israeli Women Worried About Being Left Behind*, HAARETZ (Feb. 21, 2014), http://www.haaretz.com/news/features/.premium-1.575442 [http://perma.cc/K4GH-NCJH].
[267] *Id*.
[268] *Id*.
[269] Melodie Shank, *Religion and Third-Party Reproduction*, FERTILITY AUTHORITY (Mar. 7, 2012), https://www.fertilityauthority.com/articles/religion-and-third-party-reproduction [https://perma.cc/P9DP-HFQY].
[270] *See* Bart C. Fauser & Robert G. Edwards, *The Early Days of IVF*, HUMAN REPRODUCTION UPDATE (August 2, 2005), http://humupd.oxfordjournals.org/content/11/5/437.full [http://perma.cc/AEK3-N755].
[271] Shank, *supra* note 267.

spectrum. The Catholic position on reproductive issues, such as ART's, abortion, and contraception, is set forth by their views on when life actually begins and how exactly the life was conceived. They base their position on a combination of the scientific fact that life begins at conception, along with moral implications stemming from various teachings they interpret from their Bible. In contrast, Judaism shifts the focus from the act of creating life itself, to what the purpose of creating life actually is.

I. CATHOLIC APPROACH

According to Pope John XXIII "[h]uman life is sacred—all men must recognize that fact."[272] However, from the strictest interpretation of the Catholic position, human life is only sacred when it is conceived in the proper way in which it "reveals the creating hand of God."[273] If the creation of life does not reveal the creating hand of God, i.e. a life form created by artificial means, neither the life form nor the conceiver can be protected under Catholic ideology. This points directly to the perceived immorality of ART's. Though the document issued in 1987 by the Sacred Congregation for the Doctrine of Faith, known as the *Donum Vitae*, did not directly declare using all ARTs wrong, it did specifically state that some methods are definitely immoral.[274] The Church is morally opposed to any type of reproductive technologies that involve the creation of life outside of marriage or outside the body.[275]

In November 2014, Pope Francis reaffirmed the Catholic Church's position with remarks

---

[272] Pope Paul VI, *Humanae Vitae* (July 25, 1968), http://www.wf-f.org/HumVitae.html [http://perma.cc/76YC-ZT8D].
[273] *Id.*
[274] John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, U. S. CONF. OF CATH. BISHOPS (1998), http://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive-technology/begotten-not-made-a-catholic-view-of-reproductive-technology.cfm [http://perma.cc/E5X2-95XU].
[275] *Id.*

he made in a meeting with members of the Association of Italian Catholic Medical Doctors. The Pope denounced a "false compassion" that "believes it is helpful to women to promote abortion . . . a scientific breakthrough to produce a child and consider it to be a right, rather than a gift to welcome; or to use human lives as guinea pigs, presumably to save others."[276] He went on to say that we are in a time of experimentation "[m]aking children rather than accepting them as a gift . . . [b]e careful, because this is a sin against the Creator: against God the creator, who created things this way."[277]

Marriage is very much a foundational principle for the conception of a child in accordance with Catholic teachings.[278] The transmission of human life requires "responsible collaboration with the fruitless love of God; the gift of human life must be actualized through specific and exclusive acts of husband and wife."[279] Reproductive technologies utilizing gametes from third parties are explicitly immoral according to the Church because these methods are "contrary to the unity of marriage, to the dignity of the spouses, to the vocation proper to parents, and to the child's right to be conceived and brought into the world in marriage and from marriage."[280] Conceiving a child in marriage respects the unity and conjugal fidelity of marriage, according to the Church.[281] The marital bond created "accords the spouses, in a[n] objective and unalienable manner, the exclusive right to become father and mother solely through each other."[282] Even if two infertile

---

[276] Francis X. Roca, *Pope Calls Abortion, Euthanasia, IVF Sins 'against God the creator'*, CATH. NEWS SERV. (Nov. 17, 2014), http://www.catholicnews.com/data/stories/cns/1404767.htm [http://perma.cc/ZM8V-AU57].
[277] *Id.*
[278] *About Catholic Marriage FAQ's*, FOR YOUR MARRIAGE, http://www.foryourmarriage.org/catholic-marriage/faqs/ (last visited Feb. 8, 2015) [http://perma.cc/2K9H-K5XR].
[279] *Donum Vitae*, CONGREGATION FOR THE DOCTRINE OF FAITH, 7 (Feb. 22, 1987).
[280] *Id.* at 16.
[281] *Id.*
[282] *Id.*

married people wish to create child through the only possible means, the Church remains opposed to it because "the act of conjugal love is considered in the teaching of the Church as the only setting worthy of human procreation."[283]

II. JEWISH APPROACH

Despite the long shared history with Catholicism, the Jewish position on procreative technologies is generally much more pragmatic. The modern day acceptance of IVF in Israel is founded in part on the ancient Jewish commandment to "be fruitful and multiply,"[284] that is "the cornerstone of the obligation and need of Jews to reproduce."[285] The authors of the Bible could not have foreseen the scientific advances that have allowed humans to be conceived through means other than the natural process.[286] However, looking deeper into the ancient texts there are some instances in which we can "interpret religious directives in light of new technologies."[287]

Historically, birthrates had to be very high in order for humanity to survive epidemics, wars, and famine.[288] Israel's legal policy acceptance of reproductive technologies is linked to, "the Jewish quest for survival, 'the dreadful memory of the Holocaust, the permanent loss of life in terrorist attacks and military battles, the demographic concern caused by competition with surrounding Arab nations, and the strong cultural perception of raising a family as a patriotic

---

[283] *Id.* at 21.
[284] *Genesis* 1:28.
[285] Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law*, 9 J. GENDER RACE & JUST. 109, 110 (2005).
[286] *Id.* at 112.
[287] *Id.* at 110.
[288] Jeff Wise, *About That Overpopulation Problem*, SLATE (Jan. 9, 2013), http://www.slate.com/articles/technology/future_tense/2013/01/world_population_may_actually_start_declining_not_exploding.html [http://perma.cc/RUK9-CPVF].

endeavor.'"[289] Becoming a parent is a desire that "is deeply rooted in the Israeli psyche — perhaps more so than in other countries."[290]

The Israeli government has made the conscious decision to allow the Ministry of Health to provide all citizens of Israel (and medical tourists) with subsidized IVF treatments. Because of this, Israel has become an extremely popular choice in medical tourism, particularly for infertility treatments. Israel has become known as the IVF capital of the world.[291] One hospital in Tel Aviv performs about 7,000 procedures each year, one quarter of the country's approximately 28,000 procedures performed annually.[292]

VIII. RECONCILIATION OF RELIGIOUS ADHERENCE AND DEMOCRATIC VALUES

A. ADDRESSING THE STATUS QUO

It is an unwritten rule among Americans that the there are two main taboo subjects of discussion, particularly when people meet for the first time or in the workplace, politics and religion.[293] If they are brave enough to leave the confines of the trench and venture into no-man's land to enter into what can be described as a heated debate, each is often driven back with heavy volleys of deeply rooted beliefs that inevitably lead to a stalemate. These issues are common in Israel, as well, and the status quo must be addressed there, but for reasons that do not even involve

---

[289] LAW LIBRARY OF CONG., ISRAEL: REPRODUCTION AND ABORTION: LAW AND POLICY, GLOB. LEGAL RESEARCH CENTER 6 (Feb. 2012) http://www.loc.gov/law/help/il-reproduction-and-abortion/israel-reproduction-and-abortion.pdf [http://perma.cc/JGS9-VEWL].

[290] Shir Dar, *In Israel, One Less Worry*, SHMA (Oct. 1, 2014), http://shma.com/2014/10/in-israel-one-less-worry/ [http://perma.cc/MCD2-5D9P].

[291] Dina Kraft, *Where Families Are Prized, Help is Free*, N. Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html?pagewanted=all&_r=0 [http://perma.cc/WWG5-CFRZ].

[292] *Id.*

[293] *See* Bruce Weinstein, *The Ethics of Talking Politics at Work*, BLOOMBERG BUS. (Jan. 15, 2008), http://www.bloomberg.com/bw/stories/2008-01-15/the-ethics-of-talking-politics-at-workbusinessweek-business-news-stock-market-and-financial-advice [http://perma.cc/2NFU-JSP3].

IVF.[294] In the political and legal sphere, conflicts about specific application and fundamental principles in religion and state have become more and more common.[295]

Because Israel does not have a constitution that determines the underlying basis for the relationship between church and state, questions regarding this relationship were managed through the "Status Quo" doctrine.[296] This doctrine preserved, or was assumed to preserve, "a wide range of legal and practical arrangements of religious matters which were prevalent during the very beginning of Israel as an independent state."[297]

In Israel, some suggest there is no way to find a common solution, "because the gaps are so wide that even the very general conceptions about the model for structuring the relationship are sharply different."[298] While democracy calls for a separation of religion and state, Judaism must advance a union between them.[299]

As this Note argued, the legal status quo of the relationship between religion and state must be addressed in the United States. Something needs to be done to generate a working solution to prevent infertile women and couples from having to make a choice between their desires to start a family and their employment merely because a religious employer disagrees with someone's individual choice. Court decisions, statutes passed by Congress, and the media all play a role in perpetuating the prevalent separation of church and doctrine.

---

[294] Elazar Nachlon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: Inevitable Contradiction? The Challenge for Israel*, 22 TOURO L. REV. 613, 623 (2006).
[295] *Id.* at 624.
[296] CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31 (Steven M. Cohen & Daniel J. Elazar eds.,1984); *See* Elazar Nachlon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: Inevitable Contradiction? The Challenge for Israel*, 22 TOURO L. REV. 613, 622 (2006).
[297] Nachlon, *supra* note 294, at 622.
[298] *Id.* at 631-32.
[299] *Id.*

IX. CONCLUSION

By strictly adhering to the principles of the freedom of religion, the courts and the legislature allow discrimination in certain circumstances. Though several cases have resulted in favorable outcomes in the lower courts, the stage is set for the Supreme Court to make a decision that could have substantial ramifications. Cases in which religious employers discriminate against female church employees for seeking to start a family by the only means medically possible will continue unless something changes. Opening a dialogue between churches that strictly adhere to a condemnation of ART's and members of the public could eventually bring an understanding of what each side is attempting to accomplish. Israel's funding of IVF procedures provides proof that religion and reproductive procedures can be compatible with one another, and that everything can be *kosher* between the two sides.

In America, the courts and legal bodies have made decisions for our society, which professes to view personal choice, to be stripped of it, in the name of another belief that they characterize as a freedom. A model of separation of church and state that allows accommodation in order to be constitutional, provides room for laws that create justified discrimination. The "wall" of separation perpetuates difficulties in the reconciliation of rights.

The struggle is perpetuated by court decisions that carve out exceptions for religious employers, stripping the constitutional protections for infertile women seeking to start a family. Even when they are a religious employee, the right a woman has to procreate, through whatever means necessary, should not be trumped by the freedom of religion "ace" as declared by some courts. Including IVF in the procreational protections would give infertile women more legal protections when faced with religious freedom challenges from the other side.

CLIPPING THE STORK'S WINGS: COMMERCIAL SURROGACY REGULATION AND ITS IMPACT ON FERTILITY TOURISM

Katherine Voskoboynik*

Introduction

In 2007, fertility issues led Crystal Travis and her husband, Colin McRae, to pursue surrogacy.[1] However, in the United States, the cost of paying someone to carry their baby ranged from $120,000 to $170,000.[2] Unable to afford the hefty price, the couple explored cheaper options and embarked on a journey to India, where surrogacy costs between $20,000 and $60,000.[3] Nine months later, the couple's son Mark was born and they became parents at "a fraction" of what the cost would have been in the United States.[4]

Conversely, Paulo and João of Portugal, where surrogacy is prohibited, traveled to the United States to welcome their son into the world.[5] A surrogate mother in Pennsylvania carried their baby.[6] Paulo and João are part of the "increasing flow" of affluent international couples who come to the United States to escape their home countries' restrictive surrogacy laws.[7]

---

* B.A. DePauw University, 2013; J.D. Indiana University Robert H. McKinney School of Law, expected May 2016. The author gratefully acknowledges her family, Jason Schwartz, and Michele Jackson, Esq. for their support and assistance. The author also thanks the members of Volume XXVI of the Indiana International and Comparative Law Review for their diligence and expertise.

[1] Nicole Grether & Adam May, *Going Global for a Family: Why International Surrogacy is Booming*, Al JazeeraAmerica,May12,2014,http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/12/going-global-forafamilywhyinternationalsurrogacyisbooming.html[http://perma.cc/UN6J-RXYN].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, New York Times, July 5, 2014, http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html[http://perma.cc/38N6-BWAY].

[6] *Id.*

[7] *Id.*

http://dx.doi.org/10.18060/7909.0043

Technological advancements have paved the way for individuals living with infertility to realize their dream of creating a family.[8] In vitro fertilization ("IVF") has become more accessible and affordable, thus creating multiple roads to parenthood for those with reproductive difficulties.[9] One of these paths is to have babies through surrogacy, which is becoming increasingly common.[10] In an era of globalization, individuals seeking to become parents through surrogacy are able to travel to other countries to achieve this goal.[11] Individuals whose countries of origin restrict or forbid surrogacy often use this route to become parents.[12] Additionally, exorbitant costs compel potential parents to seek cheaper surrogacy alternatives elsewhere.[13]

The recent advances in assisted reproductive technology ("ART") have prompted states and countries to update their laws to reflect this growing field.[14] Commercial gestational surrogacy is currently legal in the following countries:[15] The United States, India, Ukraine, Russia, and Mexico.[16] Some of these countries are currently experiencing a great deal of legislative movement, and others have recently enacted changes in their surrogacy laws.[17]

---

[8] Vanessa S. Browne-Barbour, *Bartering For Babies: Are Preconception Agreements in the Best Interests of Children*? 26 Whittier L. Rev. 429, 434 (2004).
[9] April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U.PA. J.L. & SOC. CHANGE 257, 260 (2014).
[10] Sarah Mortazavi, *Note, It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2250 (2012).
[11] Cherry, *supra* note 9, at 260.
[12] *Id. at* 261.
[13] *Id.*
[14] Ailis L. Burpee, *Note, Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305, 310 (2009).
[15] Thailand was originally a part of this list. However, in February 2015, Thailand's legislature enacted a law banning commercial surrogacy and forbidding foreigners from pursuing surrogacy in Thailand. Thailand provides an essential example of the intersection of fertility tourism and commercial surrogacy, and will remain one of the countries examined in this Note.
[16] Helier Cheung, *Surrogate Babies: Where can you have them, and is it legal?*, BBC News, Aug. 6, 2014, http://www.bbc.com/news/world-28679020. [http://perma.cc/ME3R-JBWR].
[17] Burpee, *supra* note 14, at 310.

This Note explores the following in the context of the countries that allow commercial gestational surrogacy (the United States, India, Ukraine, Russia, Mexico, and until recently, Thailand[18]): I) the connection between fertility tourism and commercial surrogacy; II) the legal issues generated by the intersection of fertility tourism and commercial surrogacy; and III) the ethical issues generated by the intersection of fertility tourism and commercial surrogacy. This Note ultimately observes that stringent commercial surrogacy regulation unintentionally breeds deregulation. As laws become stricter, individuals flock to dangerously unregulated countries to pursue surrogacy, promulgating the anarchic environment the laws sought to prevent. This Note concludes with an evaluation of the solutions proposed by scholars and practitioners to the aforementioned issue.

I. The Connection Between Fertility Tourism and Surrogacy

A. Definitions

1. Fertility Tourism

Fertility tourism is described as "the act of traveling abroad to take advantage of assisted reproductive technologies."[19] This recent phenomenon emerged as a byproduct of technological advances in assisted reproduction.[20] In the late 1970s, industrialized countries began to offer services such as egg and sperm donation, third-party gamete transfer, and in vitro fertilization.[21] One of the more rapidly evolving areas affected by these scientific developments is surrogacy.[22]

---

[18] The ban is to be enforced by June 2015.. *Thai Parliament Bans Surrogacy for Foreigners*, France 24, February 20, 2015, http://www.france24.com/en/20150220-thailand-parliament-bans-surrogacy-foreigners-gammy/. [http://perma.cc/M9CM-XQBR].

[19]Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1430 (2009).

[20] Browne-Barbour, *supra* note 8, at 434.

[21]Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*,THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf.

[22] *Id.*

In response, nations have modernized their laws to address the swift progress in this growing field. Certain countries have enacted permissive laws, while others have opted to install prohibitive legislation or simply not acknowledge surrogacy.[23]

Those who pursue fertility services abroad are driven by both economic and non-economic factors.[24] The primary economic incentive is the reduced cost of surrogacy in foreign nations.[25] In the United States, gestational surrogacy costs between $110,000 and $150,000.[26] The surrogate's average compensation is approximately $25,000,[27] with the rest going towards agency fees, medical costs, legal fees, and incidental expenses such as travel.[28] However, surrogacy costs are considerably lower in Eastern Europe and Southeast Asia.[29] For example, gestational surrogacy in Ukraine costs approximately $45,000, and the surrogate receives between $10,000 and $15,000.[30] The average cost of gestational surrogacy declines further in India, where intended parents pay approximately $25,000 and the surrogate earns $2,000 to $10,000.[31]

Various non-economic factors induce the pursuit of surrogacy arrangements abroad.[32] For example, the desired treatment may be unavailable in an individual's home country.[33] This may be due to lack of equipment, medical expertise, or socialized healthcare systems with long waiting lists to undergo a procedure.[34] Furthermore, countries may prohibit reproductive services on moral

---

[23] Burpee, *supra* note 14, at 310.
[24] Cherry, *supra* note 9, at 260.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Deborah L. Cohen, *Surrogate Pregnancies On Rise Despite Cost Hurdles*, Reuters, Mar. 18, 2013, http://www.reuters.com/article/2013/03/18/us-parent-surrogate-idUSBRE92H11Q20130318[http://perma.cc/87SK-5MWW].
[29] Cherry, *supra* note 9, at 260.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 261.
[33] *Id.*
[34] *Id.*

grounds and implement discriminatory legislation.[35] For example, certain countries forbid gays, lesbians, and single persons from pursuing surrogacy.[36] Additionally, individuals travel to foreign countries that have methods of surveillance to observe surrogates and track their progress.[37] Such methods include attaching surrogate living quarters to fertility clinics, where doctors can closely monitor the women and exercise control over their care.[38]

As the demand for surrogacy rose, nations that offered assisted reproductive technologies encountered domestic pressure relating to ethical, religious, and safety concerns.[39] In response, some Westernized countries enacted regulatory legislation that limited access to treatment.[40] The strict barriers included, but were not limited to, constraints on procedures such as implantation of multiple embryos; the exclusion of gays, lesbians, and single persons; and limitations on payments to gamete donors.[41] As a result, surrogacy and assisted reproductive technology clinics emerged in less industrialized countries such as India, Thailand, and Mexico.[42] Strict regulations created a "niche marke[t] of fertility tourism" to foreign couples struggling with infertility.[43]

2. Surrogacy

Surrogacy is divided into two distinct categories known as traditional surrogacy and gestational surrogacy. This Note focuses on gestational surrogacy. The surrogate's genetic contribution is the distinguishing factor between the two classifications.[44] In traditional surrogacy

---

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Rimm, *supra* note 19, at 1436.

arrangements, the surrogate contributes her egg and is therefore genetically related to the child she is carrying.[45] The commissioning father (hereafter referred to as "intended father") supplies the sperm.[46] In contrast, the surrogate has no genetic link to the child in a gestational surrogacy arrangement.[47]

Gestational surrogacy is the newer of the two categories and was first reported in 1985.[48] Gestational surrogacy involves the surrogate mother carrying an embryo created from the genetic material of one or both of the commissioning parents (hereafter referred to as "intended parents").[49] If an intended parent is unable to supply his or her genetic material, he or she will utilize donor egg or sperm.[50] Gestational surrogacy is considered "legally safer" than traditional surrogacy, because the child has no biological relation to the gestational surrogate.[51] Gestational surrogacy poses fewer hurdles to the establishment of legal parentage, as Western legal norms lean towards recognizing the genetic parent as the legal parent.[52]

The shift from traditional surrogacy towards gestational surrogacy was propelled by the *Baby M* case decided by the New Jersey Supreme Court in 1986, where two families "f[ought] over a baby who belonged to both of them."[53] In *Baby M.*, the surrogate refused to return the child, born through traditional surrogacy, to the biological father and his wife.[54] The embryo was created using the biological father's sperm and the surrogate's egg.[55] The intended parents sued to

[45] Rimm, *supra* note 19, at 1436.
[46] *Id.*
[47] *Id.*
[48] Burpee, *supra* note 14, at 308.
[49] Rimm, *supra* note 19, at 1437.
[50] Burpee, *supra* note 14, at 308.
[51] *Id.*.
[52] *Id.* 308-309.
[53] Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It,* N. Y. Times, July 5, 2014, http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html[https://perma.cc/N9WE-589E]
[54] In re Baby M, 109 N.J. 396, 415-16 (N.J.1988).
[55] *Id.* at 412.

relinquish the surrogate's parental rights and sought to establish legal parentage in the biological father's wife.[56] However, the New Jersey court ruled that the surrogate was the child's legal mother.[57] The use of traditional surrogacy declined following the outcome of *Baby M.*[58] Courts' inclination to establish legal parentage due to the genetic link and the accessibility of reproductive technology popularized gestational surrogacy.[59]

3. Commercial Surrogacy vs. Altruistic Surrogacy

Two categories of arrangements exist in regard to surrogate compensation: commercial and altruistic.[60] In a commercial surrogacy arrangement, the surrogate "stands to gain financially" from giving birth to the child.[61] The intended parents not only reimburse the surrogate for pregnancy-related expenses, but also pay a fee for the surrogate carrying and birthing the child.[62] Altruistic surrogacy arrangements differ from commercial surrogacy arrangements in that the surrogate is not paid for gestating and delivering the child.[63] Nonetheless, the intended parents may still reimburse the surrogate for pregnancy-related medical expenses and living expenses in an altruistic surrogacy arrangement.[64] The commercial and altruistic classifications are applicable to both gestational surrogacy arrangements and traditional surrogacy arrangements.[65]

Opponents of commercial surrogacy present two principal arguments.[66] First, they assert that commercial surrogacy agreements are banned by public policy, even if all parties are in

[56] *Id.* at 417.
[57] *Id.* at 450-51.
[58] Burpee, *supra* note 14, at 308-09.
[59] *Id.*
[60] *Id.* at 309.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 322.

agreement.[67] This perspective approximates commercial surrogacy to the sale of children and prostitution, emphasizing that surrogacy "is a form of labor that should never be exchanged for money."[68] Second, opponents equate commercial surrogacy to "womb-rent[ing]," which would subject economically vulnerable women to exploitation.[69] They contend that commercial surrogacy creates a market that forces poor women to succumb to financial pressures and coerces them into becoming surrogates.[70] Commercial surrogacy opponents also argue that financially compensating surrogates will highlight class divisions, "lead[ing] to a society in which wealthy women use a surrogate because they are either too busy for pregnancy or do not want to ruin their figures."[71]

Meanwhile, commercial surrogacy proponents maintain that surrogacy arrangements are "freely entered into by informed adults."[72] Advocates stress that providing the surrogate with financial compensation will incentivize her to fulfill the terms of the agreement.[73] This also bolsters the intended parents' confidence that the surrogate will maintain her end of the bargain.[74] Proponents of this view believe that not paying a surrogate may cause her to feel that "she has more discretion to cancel or default on the contract."[75] Additionally, commercial surrogacy advocates assert that prohibiting the practice altogether will further the exploitation of women, as commercial surrogacy will be "forced underground" and surrogates will have "no legal recourse for abuse."[76]

---

[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 322.-23.
[72] *Id.* at 323.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

B. Snapshot of Surrogacy Laws

1. The United States of America

As nations that have legalized commercial surrogacy begin to impose legislative and/or cost-prohibitive restrictions, the link between surrogacy and fertility tourism becomes stronger than ever. The United States perceives surrogacy as a state law matter.[77] Some states, such as California and Illinois, are very favorable toward commercial surrogacy.[78] Meanwhile, states such as New York and Michigan not only ban the practice, but also effectuate civil and criminal sanctions upon those who participate in surrogacy arrangements.[79] For example, the District of Columbia[80] and New York[81] hold parties who enter into a commercial surrogacy contract civilly liable. Michigan imposes penalties such as a fine of up to $10,000 and/or one year in prison for surrogates in a commercial surrogacy arrangement.[82] Other states, such as Arizona,[83] Indiana,[84] North Dakota,[85] and Louisiana[86] prohibit both commercial and altruistic surrogacy. Rather than impose sanctions, they simply consider surrogacy contracts unenforceable.[87]

---

[77] Lisa C. Ikemoto, *Article: Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 297-98 (2009).
[78] *Id.* at 298.
[79] *Id.*
[80] D.C. CODE § 16-402 (2001).
[81] N.Y. DOM. REL. LAW § 123 (McKinney 2010).
[82] MICH. COMP. LAWS ANN. § 722.859 (West 2011).
[83] ARIZ. REV. STAT. ANN. § 25-218(A) (2007).
[84] IND. CODE ANN. § 31-20-1-1 (West 2008).
[85] N.D. CENT. CODE § 14-18-05 (2009).
[86] LA. STAT. ANN. § 9:2713 (2005).
[87] Mortazavi, *supra* note 10, at 2259.

Meanwhile, certain states "implicitly permit altruistic surrogacy" because their legislation explicitly prohibits only commercial surrogacy.[88] For example, Washington[89] and Louisiana[90] consider commercial surrogacy arrangements as void against public policy, while Kentucky[91] and Nebraska[92] explicitly prohibit commercial surrogacy. Arkansas,[93] Florida,[94] Nevada,[95] New Hampshire,[96] New Mexico,[97] and Virginia[98] permit altruistic surrogacy arrangements that are heavily regulated. For example, both the New Hampshire[99] and Florida[100] statutes dictate that the intended parents must demonstrate a medical need for surrogacy. Regulations in other states vary in strictness..[101] New Hampshire requires the intended parents, the surrogate, and her husband to attend counseling prior to entering into a surrogacy arrangement.[102] Florida does not have such a requirement, but the statute mandates specific qualifications such as the marital status of the parties (the intended parents must be married).[103]

[88] *Id.* at 2259-60.
[89] WASH. REV. CODE § 26.26.240 (2010).
[90] LA. STAT. ANN. § 9:2713 (2005).
[91] KY. REV. STAT. ANN. § 199.590(4) (West 2006).
[92] NEB. REV. STAT. ANN. § 25-21-200 (LEXISNEXIS 2008).
[93] ARK. CODE ANN. § 9-10-201 (2009).
[94] FLA. STAT. ANN. § 742.15 (West 2010).
[95] NEV. REV. STAT. § 126.710 (2011).
[96] N.H. REV. STAT. ANN. §§ 168-B:1-:32 (LexisNexis 2010).
[97] N.M. STAT. ANN. § 40-11A-801 (2010).
[98] VA. CODE ANN. §§ 20-156-165 (2008).
[99] Guide to State Surrogacy laws, American Progress, December 2007, https://www.americanprogress.org/issues/women/news/2007/12/17/3758/guide-to-state-surrogacy-laws/. [https://perma.cc/27PC-VAJU]
[100] FLA. STAT. ANN. § 742.15 (West 2010).
[101] Mortazavi, *supra* note 10, at 2260.
[102] N.H. REV. STAT. ANN. §§ 168-B: 8 (LexisNexis 2010).
[103] FLA. STAT. ANN. § 742.15(1) (West 2010).

Illinois,[104] Texas,[105] and Utah[106] explicitly permit commercial surrogacy, and California implicitly allows commercial surrogacy.[107] Texas[108] and Utah's[109] statutes recognize "reasonable remuneration paid to the surrogate."[110] However, these statutes impose heavy restrictions on commercial surrogacy.[111] For example, the Illinois Gestational Surrogacy Act of 1995 limits recognition of commercial surrogacy arrangements to gestational surrogacy.[112] The statute also necessitates a demonstration of medical need, typically procured through a doctor's affidavit, and requires that intended parents and the gestational surrogate submit to a psychological evaluation.[113] While California is legislatively silent on surrogacy, its case law indicates that California courts will enforce surrogacy agreements and establish legal parentage in the intended parents rather than the surrogate.[114] States that expressly and implicitly permit commercial surrogacy are more popular destinations.

Surrogacy legislation has recently become a heavily debated issue in state legislatures. New Hampshire followed the example of pro-surrogacy states such as Illinois and California and, in 2014, enacted a law allowing commercial surrogacy.[115] As states move towards legalizing surrogacy, more avenues become open to potential intended parents who can afford the cost of

[104] 750 III. COMP. STAT. § 47/5 (2011).
[105] TEX. FAM. CODE ANN. § 160.756 (West 2008).
[106] UTAH CODE ANN. § 78B-15-803 (LexisNexis 2008).
[107] *See* Mortazavi, *supra* note 10, at 2261.
[108] TEX. FAM. CODE ANN. § 160.756 (West 2008).
[109] UTAH CODE ANN. § 78B-15-803 (LexisNexis 2008).
[110] Mortazavi, *supra* note 10, at 2261.
[111] *Id.* at 2260.
[112] 750 III. COMP. STAT. § 47/1 (2011).
[113] *Id.*
[114] Mortazavi, *supra* note 10, at 2261. *See* Johnson v. Calvert, 851 P.2d 776, 783-87 (Cal. 1993); Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998).
[115] Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N. Y. Times, July 5, 2014, http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html [http://perma.cc/38N6-BWAY]..

surrogacy in the United States.[116] The number of babies born through surrogacy in the United States has tripled over the last ten years.[117] In 2014, over two thousand babies were born through gestational surrogacy in the United States.[118]

2. India

Individuals unable to pursue surrogacy in the United States have often utilized India as a cheaper alternative.[119] Surrogacy became legal in India in 2002, and the industry has grown to be the "world's top destination for commercial surrogacy."[120] The approximately three thousand clinics that provide surrogacy services to international clients in India generate more than $400 million per year, and the number of clinics is increasing yearly by twenty-five percent.[121] Indian surrogates give birth to approximately two thousand foreign babies each year."[122] India's dominance is attributed to its affordability, high-quality private healthcare, English-speaking clinics, extensive number of women willing to participate in surrogacy, a "business climate that encourages the outsourcing of Indian labor," and the legality of commercial surrogacy.[123] However, in 2013, India enacted a law restricting surrogacy only to heterosexual couples who have been married for a minimum of two years, and who come from countries where surrogacy is

[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf[http://perma.cc/X4C9-PXG6]
[121] Natalie Akoorie, *Fertility Tourism: Couples Desperate for a Baby Heading Overseas*, New Zealand Herald, April 15, 2014, http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11238149[http://perma.cc/DEK3-LTJN].
[122] *Id*.
[123] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf. [http://perma.cc/X4C9-PXG6]

legal.[124] This legislation bans single, same-sex, and unmarried individuals from pursuing surrogacy in India, as well as those "circumventing their home laws to have children."[125]

3. Ukraine

Ukraine is "quickly gaining traction" as an international surrogacy destination due to its liberal surrogacy laws.[126] In Ukraine, only infertile, legally married heterosexual couples are permitted to pursue surrogacy, but the laws are otherwise surrogacy-friendly.[127] Ukraine legally recognizes commercial surrogacy and is protective of intended parents' rights by granting them legal parentage upon the notarized written consent of the surrogate.[128] Ukraine is home to numerous surrogacy clinics that "advertise the … favorable policies toward intended parents as selling points."[129] Statistics for the annual number of surrogacy arrangements are difficult to obtain, as no regulatory bodies exist to monitor surrogacy in Ukraine.[130] A news source recently stated that in 2011, one hundred and twenty successful surrogacy pregnancies occurred in Ukraine.[131] However, that number is believed to be much higher because surrogacy agencies are not required to report statistics to a governing body.[132] Roughly half of the surrogacy arrangements in Ukraine involve international intended parents.[133] In Ukraine, foreign intended parents spend approximately $30,000 to $45,000, with the surrogate receiving $10,000 to $15,000.[134] Ukraine is

---

[124] Jennifer Kirby, *Fertility Tourism: Seeking Surrogacy in India, Thailand, Mexico*. New Republic, December 10, 2013,http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand mexico[http://perma.cc/DEK3-LTJN].
[125] *Id.*
[126] Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L LAW. 412, 415 (2012).
[127] *Id.* at 431.
[128] *Id.*
[129] *Id.* at 430.
[130] *Id.* at 430-431.
[131] *Id.*
[132] *Id.*
[133] Mohapatra, *supra* note 126, at 431.
[134] *Id.*

currently experiencing a "surplus of women who desire to be surrogates" and the costs of surrogates are expected to decrease as a result.[135]

4. Russia

India's strict restrictions and Ukraine's unfavorable treatment of unmarried persons and same-sex couples are popularizing other surrogacy destinations, such as Russia, Mexico, and Thailand.[136] In Russia, gestational surrogacy is officially only legal for married heterosexual couples and single women.[137] However, the law's position on same-sex couples, unmarried couples, and single persons "is not clearly spelled out," and as a result, "surrogacy is largely unrestricted."[138] Therefore, unlike India and Ukraine, Russia does not expressly ban same-sex couples and single persons from pursuing surrogacy.[139] Russian law does not acknowledge same-sex marriage, and lesbian couples are treated as single women for purposes of surrogacy.[140] Similar to Ukraine, Russia also protects intended parents' rights by granting legal parentage upon notarized written consent of the surrogate.[141] With the ongoing restrictions in India and Ukraine, "Russia is one such country that commentators have suggested foreign intended parents may travel to now because it is one of the countries where commercial surrogacy is legal and the cost appears to be relatively low."[142]

---

[135] *Id.*
[136] Charles P. Kindregan and Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements,* 36 SUFFOLK TRANSNAT'L L. REV. 527, 619 (2013).
[137] *Id.*
[138] *Id.*
[139] *Id.* at 620.
[140] *Id.* at 619.
[141] *Id.* at 620.
[142] *Id.* at 619.

5. Mexico

Mexico is another destination where international clients are "[flock]ing" to evade other countries' restrictive laws.[143] Mexico does not address surrogacy, except in the state of Tabasco.[144] Tabasco's civil code legalized gestational surrogacy in 1998.[145] However, international surrogacy arrangements are considered relatively new in Tabasco, as foreign intended parents have only recently begun favoring countries such as Russia, Mexico, and Thailand over the United States, Ukraine, and India.[146] Agencies were first based in Cancun, which is "already an established cent[er] of medical tourism."[147] Many surrogacy programs, agencies, and clinics now exist throughout Mexico, where IVF treatment is permitted anywhere as long as the babies are born in Tabasco.[148] The law allows payment for surrogates' medical and living expenses, but contains an "altruism requirement."[149] Nevertheless, commercial surrogacy persists, as this requirement is "an easily circumvented legal nuance."[150] Agencies do not mention surrogate compensation on their websites or marketing materials, but calling the earnings "economic assistance" renders the payments permissible.[151]

6. Thailand

---

[143] Jennifer Kirby, *Fertility Tourism: Seeking Surrogacy in India, Thailand, Mexico*. New Republic, December 10, 2013,http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico[http://perma.cc/DEK3-LTJN].

[144] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs*, The Guardian, September 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico[http://perma.cc/K4GB-V8XQ].

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs*, The Guardian, September 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico[http://perma.cc/K4GB-V8XQ].

[151] *Id.*

Until recently, Thailand was another desirable destination for foreign clients because no laws against surrogacy existed.[152] Therefore, surrogacy was *de facto* legal.[153] Thailand's Medical Council banned commercial surrogacy in 1997, imposing restrictions such as "no compensation may be made" to the woman carrying the baby and that the surrogate must be "relative by blood of either party of the couple."[154] Nonetheless, Thailand experienced a boom of surrogacy-related tourism due to its large IVF market and restrictive legislation in other countries where commercial surrogacy is legal.[155] Over the past few years, the use of surrogacy in Thailand has increased by fifty-four percent.[156] Compared to the United States, surrogacy is also considerably more affordable, costing between $38,000 and $50,000.[157]

However, a series of surrogacy-related scandals erupted in the summer of 2014, such as an Australian couple's alleged abandonment of a baby with Down syndrome while taking home his healthy twin sister.[158] As a result of the industry's rapid growth and the outrage created by the scandals, a draft bill banning and criminalizing commercial surrogacy passed its first reading with overwhelming support in November 2014.[159] Thailand's Parliament passed the bill in February 2015,[160] which prevents foreigners from pursuing surrogacy in Thailand, forbids the "recei[pt] of any assets or benefits" stemming from a surrogacy arrangement[,] and seeks to punish violators

---

[152] Trisha A. Wolf, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL'Y J. 461, 486 (2014).
[153] Jennifer Kirby, *Fertility Tourism: Seeking Surrogacy in India, Thailand, Mexico*. New Republic, December 10, 2013, http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico[http://perma.cc/DEK3-LTJN].
[154] *Thai Parliament Votes to Ban Commercial Surrogacy Trade*, BBC News Asia, November 28, 2014, http://www.bbc.com/news/world-asia-30243707[http://perma.cc/QL8K-C8JU].
[155] Wolf, *supra* note 152, at 486.
[156] *Id.*
[157] *Id.*
[158] *Thai Parliament Votes to Ban Commercial Surrogacy Trade*, BBC News Asia, November 28, 2014, http://www.bbc.com/news/world-asia-30243707[http://perma.cc/QL8K-C8JU].
[159] *Id.*
[160] Jonathan Head, *Thailand's Crackdown on 'Wombs for Rent'*, BBC News, February 20, 2015, http://www.bbc.com/news/world-asia-31556597[http://perma.cc/R2QL-6LLD].

with up to ten years in prison.[161] The future of ongoing commercial surrogacy arrangements in Thailand is presently unclear, as the government seeking to pass the bill is composed of military junta members that took power through a coup d'état in May 2014.[162] Additionally, Dr. Somsak Lolekha, a member of the Thai Medical Council, stated in a recent interview with the British Broadcasting Corporation that "[w]e have no law enforcement . . . [j]ust like drinking and driving. We have the law. But they never enforce it . . . [t]hat is a weak point of Thailand."[163] According to a representative of Families Through Surrogacy in Australia, "[h]undreds of intended parents from Australia, or the US and European countries currently have pregnancies underway with Thai surrogates."[164] Foreign intended parents with present surrogacy arrangements in Thailand may now be caught in limbo.[165]

II. Legal Considerations in Fertility Tourism

A. Difficulties in the Establishment of Legal Parentage

The establishment of legal parentage poses problems in countries with lax and largely undefined laws. As a result, babies are caught in "legal limbo" due to the inconsistent surrogacy laws in various countries.[166] For example, in Thailand, the surrogate and her husband are listed as the parents on the child's birth certificate.[167] They must "renounce their parental rights" and the court subsequently must appoint a legal guardian.[168] The risk of encountering difficulties

---

[161] *Id*.
[162] *Thai Parliament Votes to Ban Commercial Surrogacy Trade*, BBC News Asia, November 28, 2014, http://www.bbc.com/news/world-asia-30243707[http://perma.cc/QL8K-C8JU].
[163] Jonathan Head, *Thailand's Crackdown on 'Wombs for Rent'*, BBC News, February 20, 2015, http://www.bbc.com/news/world-asia-31556597[http://perma.cc/R2QL-6LLD].
[164] *Another Step to Ban Commerical Surrogacy*, Nation, November 28, 2014, http://www.nationmultimedia.com/breakingnews/Another-step-to-ban-commercial-surrogacy-30248827.html[http://perma.cc/PS4X-MDYS].
[165] *Id*.
[166] Mohapatra, *supra* note 126, at 415.
[167] Wolf, *supra* note 152, at 486.
[168] *Id*.

establishing legal parentage is therefore heightened.[169] The absence of clear law regarding the enforceability of surrogacy contracts in Thailand also contributes to uncertainties involving legal parentage.[170] Thai surrogacy agreements contain a provision declaring a "precommitment to transfer parental rights to intended parents."[171] However, this "precommitment" fails to take into account that the surrogate is unable to predict her level of attachment to the baby at the time the agreement is executed.[172] The "precommitment" also ignores the surrogate's potential desire to keep the baby, which is unforeseeable and can only be determined after the surrogate has gestated the baby for nine months.[173]

However, India, Ukraine, Russia, Mexico, and several states in the U.S. have enacted clear law regarding the establishment of legal parentage. Under Indian law, the intended parents are automatically recognized as the legal parents."[174] Once the baby is born, the surrogate has no legal rights to the child.[175] Ukraine has also codified the establishment of legal parentage.[176] Ukraine's Family Code registers intended parents as the legal parents of the child "upon the notarized written consent of the surrogate."[177] The Russian Federation Family Code also permits the registration of intended parent(s) as the legal parents of the child upon the notarized written consent of the surrogate.[178] The Tabasco Civil Code expressly allows the placement of the intended parents' names on the birth certificate.[179] In the United States, various states uphold the legal parentage of

---

[169] *Id.*
[170] *Id.*
[171] Rimm, *supra* note 19, at 1447.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 1446.
[175] *Id.*
[176] Mohapatra, *supra* note 126, at 431.
[177] *Id.*
[178] *Id.*
[179] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs*, The Guardian, September 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico[http://perma.cc/K4GB-V8XQ].

intended parents in surrogacy arrangements. For example, the Indiana Court of Appeals ruled in 2010 that Indiana paternity statutes grant legal parentage to the intended and genetic parents, unless it can be proven by clear and convincing evidence that the surrogate is the genetic mother of the child she carried.[180] In 1993, the Supreme Court of California held that genetic parents involved in a gestational surrogacy agreement are considered the intended legal parents of the child carried by the surrogate.[181] Additionally, the Illinois Gestational Surrogacy Act of 1995 grants legal parentage to the intended parents "immediately upon the birth of the child."[182]

B. Citizenship Controversies: Stateless Children

Citizenship controversies often arise as a result of inconsistent surrogacy laws. These hurdles appear in countries where the law is unclear or nonexistent in regard to the citizenship of children born through surrogacy.[183] Out of the countries profiled in this Note, only the U.S. appears to possess clear laws regarding this issue.[184] Children born in the U.S. receive birthright citizenship and may apply for a Green Card for their parents when they reach the age of twenty-one.[185] This is one factor that draws a large amount of international intended parents to the U.S.[186]

Citizenship difficulties may result in a predicament where the child is considered "stateless."[187] This issue was popularized by the Indian case *Baby Manji Yamada v. Union of India*,

[180] Matter of Paternity and Maternity of Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010).
[181] Johnson v. Calvert, 851 P.2d 776 (Cal. Sup. Ct. 1993).
[182] 750 III. COMP. STAT. § 40/16 (2011).
[183] Mortazavi, *supra* note 10, at 2285.
[184] Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, New York Times, July 5, 2014, http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html[http://perma.cc/N9WE-589E].
[185] *Id*.
[186] *Id*.
[187] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf[http://perma.cc/X4C9-PXG6].

where a Japanese couple entered into a gestational surrogacy arrangement with an Indian surrogate.[188] The intended mother did not have parental rights, because unlike the intended father, she was not genetically related to the baby, Manji.[189] However, the anonymous egg donor did not have any rights or responsibilities towards the child, the surrogate's parental rights had been contractually terminated, and the contract did not create any legally binding parental responsibilities in the intended mother.[190] The intended father was unable to secure a Japanese passport or visa for Manji's return to Japan, because the Japanese Civil Code determines the child's nationality based on the birth mother's nationality.[191] Manji was therefore not deemed a Japanese citizen.[192] At the time, India's laws did not address commercial surrogacy, and required genetic parents to adopt their children born through surrogacy.[193] However, the intended father was prevented from adopting Manji because of a 120-year-old law that forbade single men from adopting children.[194] The intended father was also unable to secure an Indian passport for Manji because she did not have Indian parents.[195] Manji was considered "stateless," and the case was referred to a national level.[196] The court issued a "one-time" court order permitting Manji to receive an Indian birth certificate, thus granting her an Indian passport to travel to Japan.[197]

In 2008, The Gujarat High Court of India issued a similar "one-time" ruling in *Jan Balaz v. Union of India*.[198] A German couple entered into a surrogacy arrangement with a surrogate mother

---

[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf[http://perma.cc/X4C9-PXG6].
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] Mortazavi, *supra* note 10, at 2275.

to carry their twins.[199] Although the children were genetically related to both intended parents, the Indian government withdrew previously issued Indian passports on grounds that the children did not have Indian parents.[200] The German government refused to recognize the intended parents' legal parentage and grant the children passports because surrogacy is illegal in Germany.[201] India eventually permitted one of the intended parents to adopt the children, granting them eligibility to receive a German visa and reside in Germany.[202]

Although certain countries may recognize the legal parentage of children born through surrogacy, citizenship difficulties emerge when these children return to their parents' home country. For example, a French court refused to register children born to a California surrogate as French citizens, despite a California court order establishing the intended parents' legal parentage.[203] While the court did not dispute the children's parentage or their right to travel to and reside in France, it denied them citizenship.[204] Legal parentage recognition and the ability to travel are only part of the desired outcome; the denial of citizenship to children born through surrogacy creates significant complications.

The pursuit of surrogacy in Mexico, which is becoming a more popular destination with the recent legislative restrictions implemented in India and the prohibition introduced in Thailand, will likely trigger citizenship difficulties in the future.[205] Since commercial surrogacy is only legal in the state of Tabasco, a risk exists that federal regulations may interfere with local surrogacy clinics

---

[199] *Id*.
[200] *Id.*
[201] *Id.*
[202] *Id.* at 2276.
[203] *Id*.
[204] Mortazavi, *supra note 10, at 2276.*
[205] *Where to Have Your Surrogacy Procedure*, SENSIBLE SURROGACY (2014), http://www.sensiblesurrogacy.com/where-to-have-surrogacy/ [http://perma.cc/X8CX-HSL6].

in Tabasco.[206] Additional concerns include the separation of the federal government, which issues passports and visas, from the state of Tabasco, which provides birth certificates.[207]

C. RECENT LANDMARK DECISIONS

The legal atmosphere surrounding the citizenship and parentage of children born to foreign surrogates is rapidly evolving in the European Union.[208] In the summer of 2014, the European Court of Human Rights ("ECHR") ruled that France must recognize the citizenship of children born through surrogacy.[209] France has banned surrogacy, and prior to this ruling, French authorities refused to enter these children into the country's registry of births, marriages, and deaths.[210] This practice deprived children born through surrogacy of their citizenship, despite their genetic link to one or both parents.[211] Previous court decisions ruled that entering these children into the French registry would legally condone surrogacy arrangements, which are void and unenforceable under France's laws.[212] Children born through surrogacy were therefore stuck in "legal limbo."[213] Although they were residents of France, they were not recognized as citizens or as the legal offspring of their parents.[214] This ruling extends to member countries of the ECHR where surrogacy is not recognized, such as Italy, Spain, and Germany.[215] While these countries prohibit surrogacy, children born abroad are no longer in "limbo," as they are now granted legal recognition by their home country.[216]

---

[206] *Id.*
[207] *Id.*
[208] Michael Cook, *Court Orders France to Recognise Surrogacy Children*, BIOEDGE (Jul. 5, 2014) http://www.bioedge.org/index.php/bioethics/bioethics_article/11044 [http://perma.cc/WD2A-BSHN].
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Michael Cook, Court Orders France to Recognise Surrogacy Children, BIOEDGE,* (Jul. 5, 2014), http://www.bioedge.org/index.php/bioethics/bioethics_article/11044 *[{https://perma.cc/WD2A-BSHN]*
[215] *Id.*
[216] *Id.*

The ECHR decision has also prompted flexibility in the realm of establishing and solidifying legal parentage.[217] In December 2014, the Federal Constitutional Court, Germany's highest court, issued a landmark ruling that permits the recognition of German intended parents as the legal parents of children born through surrogacy.[218] The case involved a same-sex couple whose child was born to a California surrogate.[219] The Superior Court in Placer County, California issued a court order ruling that the couple was the legal parents of the child.[220] When they returned to Germany, the couple petitioned the Berlin courts to list them as the child's parents on the birth certificate.[221] This request was denied because the California surrogate was considered the child's mother under German law.[222] The court reasoned that the California court order was null and void, as Germany considers surrogacy agreements to be against public policy.[223]

The couple appealed the decision to the Federal Supreme Court, which reversed the prior rulings.[224] The court ordered the couple be registered as the child's legal parents, reasoning that the California court order is presumed valid under the comity principle and that German courts are not permitted to question a foreign court's ruling.[225] Although German law prohibits surrogacy, the court emphasized that children born through surrogacy are entitled to have legal parents.[226]

---

[217] *Id.*
[218] *Limited Win for Surrogacy, Gay Parenthood in Germany*, DEUTSCHE WELLE (Dec. 19, 2014), http://www.dw.de/limited-win-for-surrogacy-gay-parenthood-in-germany/a-18142883 [http://perma.cc/Q7G3-TU35].
[219] *Id.*
[220] Rich Vaughn, *Children Born Abroad via Surrogacy Entitled to Legal Parents, German Court Rules*, THE INTERNATIONAL FERTILITY LAW GROUP (Dec. 23, 2014), http://www.iflg.net/children-born-abroad-via-surrogacy-entitled-to-legal-parents-german-court-rules/ [http://perma.cc/V3EZ-DE73].
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Rich Vaughn, Children Born Abroad via Surrogacy Entitled to Legal Parents, German Court Rules*, THE INTERNATIONAL FERTILITY LAW GROUP, (Dec. 23, 2014), *http://www.iflg.net/children-born-abroad-via-surrogacy-entitled-to-legal-parents-german-court-rules/.*

The court also reasoned that denying the couple's legal parentage would be an infringement of the child's human rights, because the surrogate is not recognized as the child's mother in her jurisdiction and is not prepared to take responsibility for the child.[227]

The ECHR decision, in conjunction with the "one-time" Indian court orders, illustrates a movement towards implementing protections to curb statelessness.[228] Although the legalization of commercial surrogacy may not be in the foreseeable future, several countries that strictly prohibit surrogacy are nonetheless creating mechanisms to address issues arising from international surrogacy arrangements.[229] As countries become more amenable to citizenship and parentage recognition, intended parents are incentivized to partake in cross-border surrogacy arrangements. These recent decisions forge a path to resolve legal issues involving parents and children, and will likely encourage the fertility industry's international growth.

III. ETHICAL CONSIDERATIONS IN FERTILITY TOURISM

A. PAID CHILDBIRTH: SERVICE OR EXPLOITATION?

A notable consequence of cheaper surrogacy arrangements is the potentially exploitative nature of the industry. Surrogacy advertising in less industrialized countries mostly occurs in poverty-stricken locations.[230] This elicits concern that surrogates only "enter these agreements out of economic necessity, without fully understanding the psychological and physical burdens that they stand to endure in the process."[231] India's booming surrogacy industry has provided the opportunity to study surrogates' motivations to enter into an arrangement with international intended parents. One concern is the unequal bargaining power of the surrogates, demonstrated by

---

[227] *Id.*
[228] Mortazavi, *supra* note 10, at 2275.
[229] *Id.*
[230] Rimm, *supra* note 19, at 1444.
[231] *Id.* at 1445.

the flagrant contrast between what surrogates earn in the U.S. and how much they are compensated abroad.[232] Student note author Jennifer Rimm found that "most individuals who participate as surrogates . . . are economically-deprived women who will admit to being attracted by the opportunity to earn as much as fifteen years of their income in nine months."[233] She maintains that cheaper surrogacy costs abroad "merely exploit the diminished negotiating power of the potential surrogates" and worries that "[w]ithout regulation, international arrangements could become even more predatory, particularly with competition among women driving prices even lower."[234] This phenomenon has also been observed in Thailand, where, although surrogates "are likely to be more educated and in a higher social strata than surrogates in India, they are still not in a position of power."[235]

However, surrogacy arrangements can also provide life-changing advantages to Indian surrogates in poor areas because "the money they earn may allow them to buy a home for their family, start a small business or educate their own children."[236] In many situations, the money is used to provide the surrogate's children with better education.[237] Similarly, surrogates in Thailand mostly use the money to fund their education, satisfy their debts, or support their families.[238] Dr. Nayna Patel, medical director of Akanksha Infertility Clinic in Gujarat, India, describes the benefits surrogates derive from engaging in commercial surrogacy:

> A woman who becomes a surrogate is paid more money than she could earn in her entire lifetime. She is doing something that she believes is good and makes her proud—bearing a child for a couple desperate to start a family, while at the same time providing for her own family...It is easy for people in India and abroad who have

[232] *Id.* at 1444.
[233] *Id.*
[234] *Id.* at 1445.
[235] Wolf, *supra* note 152, at 487.
[236] *Id.*
[237] Rimm, *supra* note 19, at 1446.
[238] Wolf, *supra* note 152, at 487.

> never experienced infertility or poverty to say this is exploitation. But we are providing a service that profoundly changes people's lives for the better.[239]

Although Dr. Patel ensures that surrogates are not coerced or pressured by their family into entering a contract, she acknowledges the potential for exploitation.[240] She recognizes that the booming industry necessitates further government supervision, and states that "[r]ules do need to be tighter to ensure women are not exploited in the future."[241]

B. PROTECTION OF SURROGATE RIGHTS

Certain countries that have enacted laws allowing surrogacy have failed to account for the surrogate's rights. For example, Ukrainian law expressly protects the intended parents and the child, but does not mention the surrogate's rights.[242] Should a surrogate wish to enforce her rights through a surrogacy contract, Ukrainian law is unclear in regard to the enforceability of such contracts.[243] Legislation has been drafted to protect surrogates, but the government support for these bills has been nonexistent.[244] Economically disadvantaged surrogates also lack access to legal counsel, as the surrogate would need to retain an attorney to draft or review the surrogacy agreement on her behalf.[245] This option is not always financially feasible for surrogates.[246] However, clinics are often unwilling to conduct embryo transfers without a surrogacy agreement in place.[247] The disregard for surrogates' rights can result in dire consequences. For example, the discovery of a "baby-selling ring" by two prominent U.S. surrogacy attorneys has created

---

[239] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, Case Studies in Ethics*, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf [http://perma.cc/79ZA-366K].
[240] *Id.*
[241] *Id.*
[242] Mohapatra, *supra* note 126, at 432.
[243] *Id.*
[244] *Id.*
[245] *Id.* at 432.
[246] *Id.*
[247] *Id.* at 415-416.

controversy and compelled Ukraine to tread more cautiously in commercial surrogacy arrangements.[248]

Countries where surrogacy is minimally regulated also lack a mechanism for enforcing surrogacy arrangements.[249] As surrogacy contracts may be invalid in these nations, surrogates have no legal avenues to collect damages or obtain redress for violations of the surrogacy agreement.[250] For example, surrogates' rights are surrounded by ambiguity in India.[251] No legislative mechanism addresses surrogacy agreements, so the Indian Contract Act is applied in surrogacy disputes.[252] Indian clinics follow unofficial guidelines, including limiting the surrogate's maximum age to forty, only accepting women deemed medically fit, and only permitting married women who have previously given birth to at least one child to become surrogates.[253] However, these "unofficial rules" are not enforceable, and certain practices may be deemed questionable for the surrogate's health.[254] For example, India does not limit the amount of times a woman can become a surrogate as long as she is healthy, without enacting mandatory standards to characterize what it means to be healthy for surrogacy purposes.[255]

Critics of commercial surrogacy legalization further the concern of the surrogate's unequal bargaining power.[256] India's surrogacy framework is particularly scrutinized given the economic

---

[248] Mohapatra, *supra* note 126, at 415-416. *See* 'Baby-selling Ring' Lawyer Pleads Guilty, THE ASSOCIATED PRESS, Aug. 10, 2011, http://www.cbc.ca/news/world/baby-selling-ring-lawyer-pleads-guilty-1.1114712. [http://perma.cc/EQP9-TNBG].
[249] Wolf, *supra* note 152, at 486.
[250] *Id.*
[251] Vinita Lavania, *Commercial Surrogacy in India: Exploitation or Mutual Assistance?*, Infertility Awareness Association of Canada (Summer 2014), http://www.iaac.ca/en/commercial-surrogacy-in-india-exploitation-or-mutual-assistance-4. [http://perma.cc/DEA7-GXEC].
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] Cherry, *supra* note 9, at 264.

vulnerability of Indian surrogates.[257] Many surrogates are illiterate and poor, with a median family income of $60 per month.[258] One study reported that thirty-two out of forty-two women who volunteer to be gestational surrogates live at or below the poverty line. Indian surrogates earn fees that are equivalent to "approximately five years of family income."[259] Certain scholars believe that this is coercive, as women are left with little choice but to adopt surrogacy as a strategy for survival.[260] However, the global recession has altered the socioeconomic demographic of Indian surrogates.[261] Educated, middle-class women are becoming gestational surrogates to supplement their family income or provide financial support when their husbands become unemployed.[262]

C. COMMODIFICATION OF HUMAN LIFE

Some scholars have characterized India's commercial surrogacy industry as a "reproductive brothel."[263] Feminist theorist Andrea Dworkin coined this term to describe the "cultivation of surrogacy hostels."[264] Surrogates reside in these "hostels" throughout the entire surrogacy process, and are observed by doctors and clinic staff before and after the embryo transfer.[265] Every aspect of their life is monitored, including food, medicine, and activities.[266] Life in a "hostel" is described as follows:

> [S]urrogates live together in a room lined with iron beds and nothing else. Husbands and family members are allowed to visit but not stay overnight. The women have nothing to do the whole day except

[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.* at 277.
[261] *Id.* at 264.
[262] Cherry, *supra* note 9, at 264.
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Commercial Surrogacy in India: Exploitation or Mutual Assistance?*, Infertility Awareness Association of Canada, Summer 2014, http://www.iaac.ca/en/commercial-surrogacy-in-india-exploitation-or-mutual-assistance-4 [https://perma.cc/DEA7-GXEC].

> walk around the hostel, share their woes, experiences and gossip with the other surrogates while they wait for the next injection.[267]

Commercial surrogacy opponents believe the "hostel"-style living arrangement promotes the commodification of human life, where surrogates are heavily supervised in order to provide "the best product (i.e., baby)" to the commissioning intended parents.[268] Critics worry that other countries will replicate the "reproductive brothel model," especially those nations where surrogates live at or below the poverty line, and where the laws favor intended parents.[269] April J. Cherry, Professor of Law at Cleveland-Marshall College of Law, attributes the model to a 1950s-60s movement in the United States, where pregnant teenage girls were moved from their homes to reside in "maternity homes" until their children were born.[270]

The "reproductive brothel" theory parallels commercial surrogacy to prostitution, where a woman "is easily reduced to what she sells."[271] Proponents of this model assert that commercial surrogates are "fungible" and "simply nothing more than reproductive commodities."[272] Cherry evaluates these issues and determines that between the choices of regulation and prohibition, the appropriate response is prohibition.[273] She argues that regulation will further commodify and degrade surrogates, thus perpetuating class and gender disparities.[274]

However, others assert that the prevalence of gestational surrogacy arrangements "diminish[es] the commodification frame."[275] The laws facilitating the establishment of legal

---

[267] *Id.*
[268] Cherry, *supra* note 9, at 264.
[269] *Id.* at 265.
[270] *Id.*
[271] *Id.* at 288.
[272] *Id.* at 257.
[273] *Id.* at 286.
[274] *Cherry, supra note 9, at* 286.
[275] Transcript: What to Expect: Legal Developments and Challenges in Reproductive Justice, 15 CARDOZO J.L. & GENDER 503, 536 (2009).

parentage in countries such as the United States, India, Russia, Mexico, and Ukraine indicate that intended parents have a strong parental claim to their genetic offspring.[276] Additionally, the media's lens is refocusing, and surrogates are increasingly being perceived as "performing a valuable service," rather than selling their child.[277]

D. STIGMATIZATION

Stigmatization is another fate that befalls the parties in commercial surrogacy arrangements.[278] The level varies among countries. Surrogacy is highly stigmatized in India, driven by the belief that poor women's bodies are commoditized and that motherhood is "immoral[ly] commerciali[zed]".[279] Surrogates are not the only persons stigmatized in this process.[280] India's largely patriarchal society attaches shame to infertile women, even if the infertility stems from the male.[281] Womanhood is defined by a woman's "capacity to be a mother" in a patriarchal culture, and infertility is therefore perceived as a "curse."[282] As a result, infertile couples in India favor assisted reproductive technologies such as gamete donation over adoption because they can be carried out in secret.[283] While a surrogacy may not be as easily hidden, a preference may still exist for surrogacy over adoption due to the genetic link to the child.[284]

---

[276] *Id*.
[277] *Id*.
[278] Kindregan & White, *supra* note 136, at 605.
[279] *Id*.
[280] Gregory Pence, *Symposium, The Baby Market: Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 14, 28 (2008).
[281] *Id*.
[282] *Id*. at 28-29.
[283] *Id*. at 28.
[284] *Id*.

Meanwhile, the social stigma is lower in Ukraine, where "surrogacy is no longer taboo."[285] This is evidenced by the "availability and willingness" of women to become surrogate mothers.[286] The acceptance is largely driven by the preference for genetically-related children through contemporary technology options rather than adoption if unable to conceive naturally.[287] The technology is now available and readily accessible in Ukraine.[288]

Pop culture can manifest surrogacy stereotypes and stigmas, particularly in the United States.[289] For example, in the 2008 film "Baby Mama," Tina Fey plays an accomplished executive who hires a working class girl (Amy Poehler) as her surrogate.[290] While Fey's character is "a savvy, smart and well-to-do health-store-chain exec," Poehler's character is an "unemployed, deceitful wild child who wants easy money."[291] However, evidence indicates that American surrogates perceive themselves as "performing a service of great social value for the benefit of others"[292] and "value their ability to help others start families."[293]

III. THE GREAT JUXTAPOSITION: HOW OVERLY STRINGENT REGULATION LEADS TO DEREGULATION

A. INTENDED PARENT DISCRIMINATION AND ITS EFFECTS ON FERTILITY TOURISM

[285] Claire Bigg & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE RADIO LIBERTY (Jun. 9, 2011), http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html. [http://perma.cc/B5PX-JTR2].
[286] Kindregan & White, *supra* note 136, at 605.
[287] *Id.*
[288] *Id.*
[289] Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, http://www.newsweek.com/curious-lives-surrogates-84469 [https://perma.cc/3C3J-YJLT].
[290] *Id.*
[291] *Id.*
[292] Elizabeth S. Scott, *Show Me the Money: Making Market in Forbidden Exchange: Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROB. 109, 138-39 (2009).
[293] Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar.29, 2008, http://www.newsweek.com/curious-lives-surrogates-84469.

Although regulation establishes a framework and provides certain legal protections to the parties of a surrogacy agreement, it also functions as an exclusionary mechanism. These restrictions range from intended parent discrimination based on marital status, to discrimination based on sexual orientation. India enacted legislation in 2013 that restricts surrogacy to married heterosexual couples, therefore closing its doors to same-sex couples, unmarried couples, and single persons seeking to engage in surrogacy.[294] Similarly, in Ukraine, surrogacy is restricted to infertile, heterosexual married couples.[295]

Russia currently has pending legislation imposing similar restrictions on commercial surrogacy.[296] In 2014, Russian lawmakers drafted legislation that would prohibit the use of surrogacy by single men and women. Same-sex unions are illegal in Russia and same-sex couples are legally regarded as single men or women.[297] The enactment of this legislation would therefore restrict same-sex couples from pursuing surrogacy in Russia.[298] In contrast, the lack of strict regulation renders Russia a popular destination for surrogacy and also permits intended parents to bypass discriminatory legislation. The law is not clearly spelled out in regard to same-sex couples, unmarried couples, or single persons, so surrogacy is largely unrestricted in Russia.[299] Gestational surrogacy is currently only legal for married couples and single women.[300] Since Russian law does not recognize same-sex marriage, lesbian intended parents are considered single women for

[294] Jennifer Kirby, *Fertility Tourism: Seeking Surrogacy in India, Thailand, Mexico*, NEW REPUBLIC, December 10, 2013, http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico. [http://perma.cc/B5PX-JTR2].
[295] Mohapatra, *supra* note 126, at 420.
[296] *Draft Russian Law Restricts Surrogacy For Single People*, RUSSIA TODAY, Apr. 24, 2014, http://rt.com/politics/154496-russia-surrogacy-single-bill/. [http://perma.cc/ZZU3-SU2Q].
[297] *Id.*
[298] *Id.*
[299] Kindregan and White, *supra* note 136, at 619.
[300] *Id.*

surrogacy purposes."[301] Nevertheless, such an approach perpetuates discrimination based on marital status.[302] Russia's laws also render surrogacy entirely inaccessible to male same-sex couples.[303]

The assortment of restrictions persuades intended parents to pursue surrogacy in destination countries with "lower prices and lax governmental regulations."[304] These countries often lack a legal framework for surrogacy, and certainly do not offer protections to the parties involved in a surrogacy arrangement.[305] For example, the state of Tabasco in Mexico is becoming "the world's most dynamic new cent[er] of international surrogacy, fuelled by the tightening of restrictions in other countries."[306] However, the "legal gr[a]y area" set forth by the circumvented altruism requirement signals the lack of regulation to which the parties in a commercial surrogacy arrangement are forced to resign.[307]

Mexico's lack of regulation poses a threat to all parties in a commercial surrogacy arrangement.[308] Stories abound of agency mismanagement of client money, egg theft, psychological abuse of surrogates, and payment withholding.[309] For example, Planet Hospital, a California-based surrogacy agency operating in Cancun, allegedly withheld reimbursements to intended parents after procedures were improperly conducted or incomplete.[310] Planet Hospital

---

[301] *Id.*
[302] *Thai Parliament Votes to Ban Commercial Surrogacy Trade*, BBC NEWS ASIA, Nov. 28, 2014, http://www.bbc.com/news/world-asia-30243707. [http://perma.cc/XMG9-BYCX].
[303] *Id.*
[304] Rimm, *supra* note 19, at 1436.
[305] Vinita Lavania, *Commercial Surrogacy in India: Exploitation or Mutual Assistance?*, INFERTILITY AWARENESS ASSOCIATION OF CANADA (Summer 2014), http://www.iaac.ca/en/commercial-surrogacy-in-india-exploitation-or-mutual-assistance-4. [http://perma.cc/VGV4-UMJG].
[306] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs*, THE GUARDIAN, Sep. 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico. [http://perma.cc/5GEN-2N9P].
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*

declared involuntary bankruptcy in 2014, and is now the subject of a Federal Bureau of Investigation probe.[311] Evidence also exists that, to the detriment of intended parents, "many surrogates are recruited without rigorous screening of their mental and physica[l] suitability."[312] For example, the newborn child of Thomas Chomko, an intended parent from New Jersey who pursued surrogacy in Mexico, spent three weeks in the intensive care unit battling an infection that likely "stemmed from inadequate screening of the surrogate before implantation."[313]

In addition to Mexico, agencies have begun offering services in Nepal and Cambodia due to the recently enacted restrictions in Thailand and India.[314] However, no legal surrogacy framework exists in Nepal and Cambodia, thus posing a great deal of risks to intended parents, surrogates, and children.[315] According to the director of the Reproductive Health Association of Cambodia, surrogacy is not yet "common or explicitly legal, as "the law has yet to catch up to technology."[316]

B. DANGERS POSED TO SURROGATES AS A CONSEQUENCE OF TRAVEL TO LESS REGULATED COUNTRIES

As laws become more restrictive, potential intended parents develop a preference for cheaper and less regulated countries.[317] Tighter restrictions have popularized other countries as surrogacy destinations, where inequality is rampant and the surrogates' safety is often

---

[311] *Id.*
[312] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs*, THE GUARDIAN, September 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico[http://perma.cc/5GEN-2N9P].
[313] *Id.*
[314] Hilary Whiteman, *Anxious Parents Fear for Babies as Military Tightens Surrogacy Laws*, CNN, Aug. 19, 2014, http://www.cnn.com/2014/08/19/world/asia/thailand-surrogacy-laws-change/[http://perma.cc/9739-LKWB].
[315] *Id.*
[316] Laignee Barron & Mom Kunthear, *'Baby Factory' Suspect Living in Cambodia*, PHNOM PENH POST, Aug.18, 2014, http://www.phnompenhpost.com/national/%E2%80%98baby-factory%E2%80%99-suspect-living-cambodia. [http://perma.cc/J3EE-BY2H].
[317] Cherry, *supra* note 9, at 260.

disregarded.[318] People "enter into surrogacy agreements where the conditions are even riskier for all parties."[319] As a result, the link between legalized surrogacy and fertility tourism becomes based on "the cultural and structural inequalities that create conditions in which some women's best economic opportunity is to undergo either egg retrieval, or pregnancy and childbirth for another."[320]

Consequently, traveling to countries where surrogacy is minimally regulated endangers the surrogate in various manners.[321] The surrogate risks exploitation by a third party, such as an agency or a fertility clinic.[322] Reports also exist that women have been forcibly trafficked to Thailand to work as surrogates.[323] Another concern is lack of fully informed consent, as surrogates in poorer areas may be less educated, and obtaining a lawyer to represent them may not be financially feasible. [324] Additional dangers include threats to surrogates' mental and physical health during the pregnancy and after the child's birth.[325]

C. EXAMPLES OF DANGERS ENCOUNTERED IN COUNTRIES THAT LACK REGULATION

a. MEXICO

In Mexico, no legal recourse exists to enforce agencies' promises to surrogates.[326] Should the intended parents change their minds during the pregnancy, the surrogate may find herself responsible for an unplanned child.[327] While the intended parents' contract with the surrogate may

[318]Wolf, *supra* note 152, at 483.
[319] *Id.* at 481.
[320] Ikemoto, *supra* note 77, at 300.
[321] Rimm, *supra* note 19, at 1461.
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs,* THE GUARDIAN, Sep. 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico. [http://perma.cc/5GEN-2N9P]
[327] *Id.*

list the intended parents as the child's legal parents, the law provides no guidance or enforcement mechanism if the intended parents do not arrive for the child's birth.[328] Additionally, agencies in Mexico control nearly all aspects of a surrogate's care, including the limitation of contact between parties.[329] As a result, the surrogate has limited options to seek help should something go wrong.[330] For example, when Planet Hospital was dismantled, the Planet Hospital owner created a new agency called Babies at Home.[331] Claudia, a surrogate with the former Planet Hospital agency, was transferred to Babies at Home.[332] During this transition, the former Planet Hospital surrogates moved to new apartments that lacked running water, electricity, and sufficient food.[333] Claudia was unable to leave the apartments without the intended parents' authorization, and was not permitted to contact them through the agency due to the limitation on contact between parties.[334] Claudia desperately contacted the intended parents through a Facebook message, who removed her from the care of Babies at Home and transferred her to a new agency.[335]

b. THAILAND

In 2011, fifteen Vietnamese women were discovered in an apartment in Bangkok, Thailand.[336] Seven of them were between twelve and thirty-four weeks pregnant, and two had recently given birth.[337] They stated they had been lured there under the pretense of well-

---

[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] Jo Tuckman, *Surrogacy Boom in Mexico Brings Tales of Missing Money and Stolen Eggs,* THE GUARDIAN, Sep. 25, 2014, http://www.theguardian.com/world/2014/sep/25/tales-of-missing-money-stolen-eggs-surrogacy-mexico. [http://perma.cc/5GEN-2N9P]
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] Richard Ehrlich, *Taiwan Company Accused of Trafficking Vietnamese Women to Breed*, WASHINGTON TIMES, Mar. 6, 2011, http://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnam-women-breed/?page=all. [http://perma.cc/M5S2-88E5].
[337] *Id.*

compensated employment.[338] When the women arrived to Thailand, their passports were seized by the Taiwan-based surrogacy agency Babe-101, and the women stated they were forced to become surrogates.[339] The situation gave rise to potential criminal charges such as human trafficking, false imprisonment, and kidnapping.[340] The scenario presented further issues, such as the parentage and citizenship of the children, the intended parents' rights to the children, and the pregnant surrogates' care.[341] However, Thai authorities did not pursue charges against Babe-101.[342] Although the agency has shut down since the controversy, the doctor who supervised the medical aspects of the agency's surrogacies continues to practice at a "well-known" hospital in Bangkok.[343]

c. INDIA

The story of Anandhi embodies the dangers posed by laws that are overly stringent in some respects, but perilously lax in the protection of surrogate's rights.[344] Anandhi, a "dirt poor" single mother of two from Chennai, India, volunteered to become a surrogate in hopes that the payment would enable her to establish a business.[345] Despite delivering a healthy child, Anandhi only received $1,653.00 of the $3,306.00 that she was promised.[346] A rickshaw driver who served as the middleman in the arrangement pocketed a fifty-percent cut of her earnings. Anandhi was also

---

[338] *Id.*
[339] *Id.*
[340] Richard Ehrlich, *Surrogate Mothers Offered Everyone an "Efficient Embryo*," FREE PRESS, Mar. 2, 2011, http://freepress.org/article/surrogate-mothers-offered-everyone-efficient-embryo. [http://perma.cc/Q69V-KBFL].
[341] Patrick Winn, *Underworld: Upending an Asian Baby Farm*, GLOBAL POST, Mar. 18, 2011, http://www.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacy-human-trafficking?page=full. [http://perma.cc/WF4V-87U6].
[342] Jonathan Head, *Thailand's Crackdown on 'Wombs for Rent'*, BBC NEWS, Feb. 20, 2015, http://www.bbc.com/news/world-asia-31556597. [http://perma.cc/L5E7-C9RB].
[343] *Id.*
[344] Shaikh Azizur Rahman, *Indian Surrogate Mothers Suffer Exploitation*, ALJAZEERA, Mar. 27, 2015, http://www.aljazeera.com/news/asia/2014/03/indian-surrogate-mothers-suffer-exploitation-20143276727538166.html. [http://perma.cc/CAG8-4VLY].
[345] *Id.*
[346] *Id.*

denied free treatment by the hospital when she experienced post-delivery complications.[347] The hospital refused to administer free treatment because she had already delivered the child.[348]

The Indian government's 2010 draft of the Assisted Reproductive Technologies Regulation Bill, which would "curb unregulated growth of ART clinics and better monitor existing clinics," has yet to become law.[349] As a result, non-governmental organizations such as the Global Surrogate Mothers Advancing Rights Trust ("G-SMART") emerged to protect the rights of poor women who become surrogates.[350] G-SMART's advocacy includes eliminating middlemen, such as the rickshaw driver in Anandhi's case, who deliver prospective surrogates to Chennai hospitals.[351] G-SMART also safeguards the interests of surrogates by ensuring that "surrogacy deals [are] transparent for all parties," and helps them obtain protections such as insurance.[352] G-SMART's success in curbing the exploitation of economically disadvantaged Indian surrogates demonstrates the need to instill protections for surrogates' rights in any form of regulatory legislation.[353] However, India has advanced laws compared to countries such as Mexico, Thailand, and entirely unregulated countries such as Nepal and Cambodia (where intended parents are starting to travel due to overly restrictive laws in India, Russia, and Ukraine).[354] The dangers surrogates experience in those countries are even greater than the ordeals exhibited in cases like Anandhi's.[355]

---

[347] *Id.*
[348] *Id.*
[349] *Id.*
[350] Shaikh Azizur Rahman, *Indian Surrogate Mothers Suffer Exploitation*, ALJAZEERA, Mar. 27, 2015, http://www.aljazeera.com/news/asia/2014/03/indian-surrogate-mothers-suffer-exploitation-20143276727538166.html. [http://perma.cc/CAG8-4VLY].
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] *Id.*

IV. SOLUTIONS

Stringent commercial surrogacy regulation leads to deregulation. As surrogacy laws become more exclusionary, intended parents pursue surrogacy in unregulated countries, thus maximizing the risk posed to all parties involved in a surrogacy arrangement. This section surveys and evaluates the potential solutions to this dangerous consequence of strict surrogacy regulation.

A. DOMESTIC REGULATION

Scholars and practitioners advocate for regulation and establishment of clear law as solutions to the problems posed by the intersection of fertility tourism and legalized commercial surrogacy. John Weltman, an attorney who practices assisted reproductive law, proposes the establishment of a regulatory body for surrogacy agencies.[356] Weltman notes that "[t]here are currently no requirements for establishing a surrogacy agency-anyone can start one- and there is no organization that oversees and regulates them."[357] Weltman expresses concerns that in the absence of surrogacy legislation in many states, agencies regulate themselves and create their own rules.[358]

Jennifer Rimm recommends that commercial surrogacy be restricted to non-profit agencies, charities, or governmental agencies to avoid potentially exploitative treatment of the surrogate.[359] Rimm posits that this solution would "dramatically reduce the risk to surrogates that intermediaries introduce" and "protect potential surrogates . . . from the black market industry that would develop if brokering surrogacy contracts was completely outlawed."[360] Rimm also advocates for the

---

[356] John Weltman, *Comments on Recent International Surrogacy Stories*, CIRCLE SURROGACY BLOG (Aug. 11, 2014), http://blog.circlesurrogacy.com/2014/08/11/comments-international-surrogacy-stories/[http://perma.cc/4VX6-2PBL].
[357] *Id.*
[358] *Id.*
[359] Rimm, *supra* note 19, at1458.
[360] *Id.*

enactment of comprehensive legislation that would impose minimum standards for payment.[361] These standards would include the requirement that payment be put into escrow, minimal standards of care during pregnancy and after birth, and required compensation for permanent injuries that occur as a result of pregnancy and/or labor.[362] While Weltman and Rimm's proposed forms of domestic regulation will certainly increase protection for surrogates' legal rights, they fail to address issues that arise on an international level. Commercial surrogacy is becoming increasingly more globalized with the number of individuals that pursue fertility tourism, and any regulatory mechanism needs to address citizenship difficulties and parentage issues that emerge from cross-border surrogacy arrangements.

B. INTERNATIONAL REGULATION

Lisa Ikemoto, Professor of Law at the University of California, suggests that international law should play a greater role in surrogacy.[363] Ikemoto proposes to regulate surrogacy through the Hague Convention on Intercountry Adoption (hereafter referred to as "the Convention").[364] Ikemoto notes that "[t]he absence of law . . . serves agencies and clinics well, but leaves surrogates, intended parents, and children unprotected."[365] Ikemoto believes that including surrogacy under the Convention will compel nations to ameliorate their laws.[366] However, a Hague Special Commission on surrogacy convened in June 2010 and determined that the Convention was not an

[361] *Id.* at 1461.
[362] *Id.*
[363] Lisa Ikemoto, *The Role of International Law for Surrogacy Must Be Expanded*, NEW YORK TIMES, Sep. 22, 2014, http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb/the-role-of-international-law-for-surrogacy-must-be-expanded [https://perma.cc/7N5B-F337].
[364] *Id.*
[365] *Id.*
[366] *Id.*

appropriate instrument to regulate international surrogacy.[367] The members' chief concern was that the Convention does not address surrogate children and would further obscure their legal status.[368]

Attempts have been made to apply the Convention to international surrogacy disputes.[369] Sarah Mortazavi, a student note author, argues that their fruitlessness illustrates the Convention's shortcomings in addressing surrogacy issues.[370] Mortazavi presents the United Kingdom case *W. & B. v. H* as an example, where a California couple entered into a traditional surrogacy agreement with a British surrogate.[371] The intended parents obtained a court order in California that would grant them custody of the children after birth.[372] However, the surrogate violated their agreement by giving birth in England and thereafter refusing to relinquish the babies.[373] In the ensuing custody suit, the surrogate sought to apply the Convention, which would enforce the laws of the child's habitual residence.[374] British law would grant legal parentage to the surrogate whereas California law would grant legal parentage to the intended parents.[375] The Court considered the children to be habitual residents of England, as they had never lived in California.[376] Under the Convention, British law would, therefore, be applicable.[377] However, the British High Court deferred to the California court's order and ruled in favor of the intended parents.[378] The Court abstained from applying the Convention, reasoning that the case was not compatible with the

[367] Mortazavi, *supra* note 10, at 2255.
[368] *Id.*, FN 29.
[369] *Id.* at 2255.
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] Mortazavi, *supra* note 10, at 2255.
[374] *Id.*
[375] *Id.*
[376] *Id.*
[377] *Id.*
[378] *Id.*

Convention's "original intent".[379] The Court explained that the Convention was "not drafted with surrogacy in mind."[380]

Mortazavi further contends that the Convention is not equipped to resolve major international surrogacy issues; namely commercial disputes and citizenship difficulties.[381] First, Mortazavi maintains, the Convention "strongly discourages" compensation for adoption due to the semblance of providing payment for the mother's consent to relinquish her parental rights.[382] Mortazavi is concerned that since surrogacy may include compensation, the Convention does not provide an adequate framework for dealing with commercial disputes.[383] She states that strict adherence to the Convention and the prohibition of compensation might nullify a commercial surrogacy arrangement.[384] She also believes that utilizing the Convention may lead to parentage issues that preclude intended parents from taking custody of their child.[385]

Mortazavi also asserts that the Convention "falls short when dealing with the statelessness of children."[386] She notes that adoptions automatically entitle newborns to the citizenship of their birth mother, as her legal parentage is not "legally relinquished" until after the birth.[387] However, in a surrogacy, the birth mother's parental rights may be terminated prior to the child's birth.[388] In the event of conflicting surrogacy laws in the intended parents' home country, the child may be born without legal parents and considered "stateless".[389] Mortazavi contends that the Convention

[379] Mortazavi, *supra* note 10, at 2255.
[380] *Id.* at 2256.
[381] *Id.*
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] Mortazavi, *supra* note 10, at 2256.
[386] *Id.*
[387] *Id.*
[388] *Id.*
[389] *Id.*

offers no guidance for scenarios where intended parents must return to their home country with their "stateless child."[390] Mortazavi concludes that any potential international treaty regulating surrogacy must address the aforementioned issues.[391]

C. CHILD'S BEST INTERESTS STANDARD

Mortazavi advocates for the creation of international surrogacy legislation, reasoning that the "stark differences between states . . . and . . . between nations . . . highlight the imperative for uniform transnational rules."[392] She suggests applying the child's best interests standard to guide any international surrogacy treaties.[393] Mortazavi acknowledges that the standard is imprecise and lacks a universal definition.[394] She cites various existing definitions of the child's best interests standard, and settles on the definition used in the Hague Conference Permanent Bureau's report for applying the best practices to the Convention, which includes the following factors:

> [E]fforts to maintain or reintegrate the child in his/her birth family; a consideration of national solutions first (implementing the principle of subsidiarity); ensuring the child is adoptable, in particular, by establishing that necessary consents were obtained; preserving information about the child and his/her parents; evaluating thoroughly the prospective adoptive parents; matching the child with a suitable family; imposing additional safeguards where necessary to meet local conditions; providing professional services.[395]

This approach, which would permit the child's best interests standard to supersede national policy, is another form of regulation that would benefit rather than curb fertility tourism.[396] Applying the child's best interests standard would implement safeguards to protect intended parents from citizenship and parentage issues.[397] Mortazavi argues that "deferring to the child's-

---

[390] *Id.*
[391] Mortazavi, *supra* note 10, at 2256.
[392] *Id.* at 2257.
[393] *Id.*
[394] *Id.*
[395] *Id.*
[396] *Id.*
[397] *Id.*

best-interest standard may necessitate countries being flexible when granting citizenship, issuing exit permits, or awarding custody based on the best outcome for the child, not the nation."[398] The resolution of these prevalent issues would promote fertility tourism by offering protections to intended foreign parents in the realm of legal parentage and immigration.[399]

D. A COMPREHENSIVE APPROACH

What distinguishes Mortazavi's approach from that of other scholars and practitioners is that it also advocates for a comprehensive solution that addresses the negative consequences of strict regulation, such as the one identified in this Note. Mortazavi calls for legalized commercial surrogacy to be accompanied by several requirements: the assurance of legal parentage and citizenship of children born through surrogacy, the prioritization of surrogates' health and well-being, and the shielding of intended parents from discrimination based on their marital status and/or sexual orientation.[400]

Mortazavi suggests a step-by-step approach to achieve this goal.[401] First, individual state legislatures, national governments, and international instruments such as the Hague Convention must enact laws directing potential intended parents to establish that they are fit parents.[402] Once they are deemed fit and receive authorization, the intended parents' home countries should allow them to apply to nations where commercial surrogacy is legal.[403] These nations must recognize the intended parents' establishment of legal parentage, place funds in legally monitored accounts, and screen surrogates and match them with intended parents based on not only "their similar views on

[398] Mortazavi, *supra* note 10, at 2258.
[399] *Id.*
[400] *Id.*
[401] Mortazavi, *supra* note 10, at 2290.
[402] *Id.*
[403] *Id.*

termination and selective reduction, but also for their financial stability and their thoughtful motivations for moving forward with a surrogacy journey."[404]

Some of these countries that legalize surrogacy already follow certain regulatory practices proposed by Mortazavi. For example, Russian legislation delineates surrogacy procedures followed by IVF clinics.[405] Russian physicians are only permitted to transfer up to three embryos during each embryo transfer.[406] This limitation is in stark contrast with India's laws, where clinics are largely unregulated and impose no limit on the number of embryos implanted in a surrogate at a time.[407] Russian law also explicitly permits a surrogate to "get remuneration for her services and be compensated for the actual expenses as well."[408] Although no regulatory body exists in Russia to provide permission to enter into a gestational surrogacy arrangement, Russian law imposes certain requirements.[409] For example, intended parents must indicate a medical need for surrogacy, such as "repeatedly failed IVF attempts when high quality embryos were repeatedly obtained and their transfer was not followed by their pregnancy." [410] The surrogate is also prohibited from having any relation to the intended parents.[411]

However, Mortazavi's proposed recommendations are not without flaws. The creation of international surrogacy legislation is problematic because it may breach other nations' sovereignty in establishing their own public policy. [412] Additionally, some countries may not wish to

[404] John Weltman, *Comments on Recent International Surrogacy Stories*, CIRCLE SURROGACY BLOG, (Aug. 11, 2014), http://blog.circlesurrogacy.com/2014/08/11/comments-international-surrogacy-stories/.
[405] Kindregan & White, *supra* note 136, at 621.
[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.*
[410] *Id.* at 620.
[411] Kindregan & White, *supra* note 136, at 621.
[412] Mortazavi, *supra* note 10, at 2257.

compromise a portion of their sovereignty to enter into a treaty.[413] Enforcement issues may arise in dualist nations such as the United States, where international law is separate from domestic law.[414] In order to transpose a treaty into domestic law, the United States will need to enact federal legislation.[415] Not only will this be a lengthy process; it may also create federalism issues because family law is typically "within the purview of the state."[416] Nonetheless, certain treaties such as the Convention on the Rights of the Child have been signed and ratified by almost all countries.[417] This indicates that states may be willing to forego part of their sovereignty to achieve a common objective.

While Mortazavi's approach contains potential difficulties, no perfect solution exists to resolve the issues that arise in international commercial surrogacy.[418] Nations must comprehensively address the ethical and legal aspects of surrogacy on a global level, and any solution should implement the ideas that Mortazavi advances.

V. CONCLUSION

Stringent regulation in countries that permit commercial surrogacy proliferates travel to unregulated countries that lack protective safeguards. As these nations adopt stricter surrogacy laws, intended parents flock to countries without a framework to protect the rights of parties involved in a surrogacy arrangement. To prevent this phenomenon, countries that permit and regulate commercial surrogacy must take a step further to offer legal protections to each party.

---

[413] Michael Mansell, A Treaty as a Final Settlement?, speech delivered at Murdoch University Treaty -- Advancing Reconciliation Conference, Perth, (June 27, 2002) <www.treaty.murdoch.edu.au/ Conference%20Papers/Michael%20Mansell.htm> (August 16, 2004). ("the nature of a treaty involves compromise.").
[414] *Id.*
[415] Martin Rogoff, *Application of Treaties and the Decisions of International Tribunal in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405, 448 (2006). ("The [international] agreement must be properly incorporated into the domestic legal order before a domestic court can apply it.").
[416] Mortazavi, *supra* note 10, at 2257.
[417] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
[418] Cherry, *supra* note 9, at 259.

They must recognize the legal parentage and citizenship of children born through surrogacy, establish a regulatory framework that safeguards the rights of surrogate mothers, and protect intended parents from discrimination based on their marital status and/or sexual orientation.