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TABLE OF CONTENTS

ARTICLES

COMMENTS

ERRATA

The Board of Editors of the *Indiana International & Comparative Law Review* regretfully acknowledges an error in Volume 6, Issue 3. The following acknowledgment was printed on page 583 of *Lawrence L. C. Lee's* article, **Taiwan's Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law.**

> "Lawrence L.C. Lee is pursuing a doctoral dissertation at the University of Wisconsin School of Law; LL.M., American University, Washington College of Law 1996; LL.M., Boston University School of Law, 1993; and LL.B. Soochow University School of Law, 1990 (Taiwan). The author would also like to extend his appreciation to his parents for their guidance and inspiration and to his wife, Tabatha, for her patience and support. All errors, needless to say, remain those of the author."

The following should have been printed.

> "Lawrence L.C. Lee is pursuing a doctoral dissertation at the University of Wisconsin School of Law; LL.M., American University, Washington College of Law 1996; LL.M., Boston University School of Law, 1993; and LL.B. Soochow University School of Law, 1990 (Taiwan). **The author would like to thank Professors Robert H. Lande and Peter Carstensen for their invaluable comments on earlier drafts of this article.** The author would also like to extend his appreciation to his parents for their guidance and inspiration and to his wife, Tabatha, for her patience and support. All errors, needless to say, remain those of the author."

The Board sincerely regrets this error and apologizes for any inconvenience to all those affected by this ommission.

ERRATA

The Board of Editors of the *Indiana International & Comparative Law Review* regretfully acknowledges editing errors in the article **Choice of Law for Contracts in China: A Proposal for the Objectivization of Standards and the Use in Conflicts of Law** written by *Luo Junming* and published in Volume 6, Issue 2.

The following was printed at the top of page 440:

"The People's Republic of China (PRC), **due to its unique relationships with economic powers such as Hong Kong, Macao, and Taiwan** and its own potential for economic explosion onto the world's economic stage, **can and should** take the lead in coming terms with the myriad and subjective tools currently used by the jurists of the world to decide conflicts of law."

It should have read:

"**Due to economic powers such as Hong Kong, Macao, and Taiwan being part of China according to public international law** and the potential for the People's Republic of China (PRC) to have its own economic explosion onto the world's economic stage, the PRC **could** take the lead in coming to terms with the myriad and subjective tools currently used by the jurists of the world to decide conflicts of law."

The following was printed in the first full paragraph on page 446:

"But it is also apparent that the party autonomy principle and the methods **used to assert it are recognized in theory if not always in adopted law in China**."

It should have read:

"It is apparent that the party autonomy principle and the methods **concerned are recognized and adopted in China**."

The following was printed toward the end of the first paragraph on page 449:

"Chinese jurists should work out the descending-order-of-importance list **of contracts in harmony with these international conventions while continuing to use China's laws and public policy for reference. This combination** will improve the predictability, certainty, serviceability, flexibility and feasibility of choice of law."

It should have read:

"Chinese jurists should work out the descending-order-of-importance list of **the contracts using the international conventions, China's laws and public interests for various kinds of contracts for reference, which** will improve predictability, certainty, serviceability, flexibility and feasibility of choice of law."

In the middle of page 450 the following was printed:

"If both parties do not live in the same place, **the contract is governed by the law of contracts.**"

It should have read:

"If both parties do not live in the same place, **the law of the place of contracting is applied to the contract.**"

The following was printed in the first full paragraph of page 457:

"Each point is given a value according to its importance related to the choice of law issue **with the country who has the most points being designated as the source of the proper law for the contract.**"

It should have read:

"Each point is given a value according to its importance related to the choice of law issue, **whichever country's law gets more points is the proper law of the contract.**"

The following was printed at the bottom of page 458:

"We are willing to absorb all the good legislation, judicial practice, and approaches from any other country in the world to build a **law-governing** China in the near future."

It should have read:

"We are willing to absorb all the good legislation, judicial practice, and approaches from any other country in the world to build an **even better law-governing** China in the near future."

In the following paragraph on page 458, the following was printed:

"But this is not to say that the near future will be easy, especially when Hong Kong, Macao, and later Taiwan come back into a close economic relationship with the People's Republic of China. Soon the PRC will face more complex problems in international private law than even the U.S., as three legal systems (civil, common, and socialist) merge in the realm of international business transaction especially."

It should have read:

"But in the near future, when Hong Kong, Macao and later Taiwan come back to China, the People's Republic of China will face more complex problems in international private law than even the U.S., as three legal systems (civil, common, and socialist) merge in the realm of international business transaction especially."

The Board sincerely regrets these errors resulting in alternate viewpoints to the authors. We apologize to all those affected by these errors.

A COMPARATIVE ANALYSIS OF THE INFLUENCE OF LEGISLATIVE HISTORY ON JUDICIAL DECISION-MAKING AND LEGISLATION

*Robert G. Vaughn**

I. INTRODUCTION

Recent Supreme Court opinions often attack the use of legislative history in the interpretation of statutes.[1] A group of justices, including Justices Scalia, Kennedy, and Thomas, regularly advocate a "plain-meaning" interpretation of statutes.[2] These justices and other critics propose that the use of legislative history be abandoned or that its relevance be dramatically reduced through the rigorous application of interpretive techniques that rely on the language of statutory provisions.[3] These attacks coincide with the Supreme Court's declining use of legislative history in the

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1. *E.g.*, Darby v. Cisneros, 509 U.S. 137, 147 (1993) (Chief Justice Rehnquist and Justices Scalia and Thomas refuse to subscribe to portion of majority opinion discussing the implications of legislative history); Public Citizen v. Department of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (arguing that the plain language of the statute should control unless the result is "absurd" even if it would lead to a constitutional issue); Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part) (commonly used legislative history is unreliable evidence of what members of Congress had in mind when they voted); Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Rehnquist, C.J., Scalia, O'Connor & Kennedy, JJ., dissenting in part) (rejecting the use of legislative history); United States v. Stuart, 489 U.S. 353, 371-77 (1989) (Scalia, J., concurring) (arguing that words of the treaty text are controlling).

2. Plain-meaning interpretation relies on the meaning of the words of the statute without the use, or with only limited use, of the legislative history. The appellation "plain-meaning" implies that the language will be given the meaning that is clear, common, or plain. Judge Wald refers to advocates of plain-meaning interpretation as "textualists" and to supporters of the use of legislative history as the "contextualists." Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990). Plain-meaning interpretation can be literal in that, in defining the meaning of a statutory term, the court will look only to the meaning of those words. Plain-meaning interpretation can also be purposive; that is, the meaning of the words must be determined against the purpose of the statutory provision at issue. As discussed below, a purposive plain-meaning approach can be more difficult to justify. Even the proponents of the use of legislative history assume that interpretation must begin with the words of the statutory provision. Legislative history, however, can inform the choice of meaning to be attached to those words.

3. *E.g.*, *Stuart*, 489 U.S. at 371-73 (Justice Scalia's comments on the primacy of the words of the statute enacted by Congress); *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) (arguing that the plain language of the statute should control unless the result is "absurd"); Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L. J. 371, 374 (expressing reservations about the use of legislative history).

interpretation of federal statutes[4] and with increasing academic debate regarding interpretation.[5]

Those who criticize the use of legislative history envision a world in which courts, bound to apply the language enacted by the legislature, lack discretion to roam through legislative history as they seek a basis for an interpretation which is at odds with the statutory language. Plain-meaning interpretation helps to ensure that judges accept their limited role. In this world, legislatures focus on carefully drafting statutory provisions rather than on creating or manipulating the legislative history. This legislative focus reduces interpretive difficulties, saves legislative resources, and emphasizes the importance of the product of the legislative process. In this world, the legislature, courts, and citizens do not expend time or resources organizing or applying a variety of ambiguous—even suspect—legislative materials.

This vision of theory and practice in interpretation reflects arguments and themes that are at least decades[6] and, in some instances, centuries old.[7] This vision, however, can be evaluated by exploring how comprehensive

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4. Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 285-90 (1982) (noting increased use of legislative history apart from increase in caseload and impact of tax, social security, civil rights, and antitrust legislation). In recent years, however, the Court's use of legislative history has declined. Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992) (contrasting use of legislative history in almost every statutory construction case in 1981 with no use in 10 of 65 statutory construction cases in the 1989 term and in 19 of 55 cases in the 1990 term).

5. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Breyer, *supra* note 4; GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281 (1989); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991); Jerry L. Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113 (1992); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979 (1989); Starr, *supra* note 3; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Wald, *supra* note 2; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

6. *E.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

7. *See* Michael Rawlinson, *Tax Legislation and the Hansard Rule*, 1983 BRIT. TAX REV. 274, 275-79 (tracing *Hansard* rule to 1769); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

social legislation would fare in the world of these critics. Such an evaluation emphasizes detailed analysis of specific legislation and uses a comparative approach. This comparative approach avoids the abstract, while permitting general conclusions about whether the critics' vision is valid.

The world of plain-meaning interpretation envisioned by those who criticize the use of legislative history actually exists. The English rules regarding the use of legislative history satisfactorily embody the theory of interpretation required by the critics of current U.S. practice.[8] An examination of the decisions that interpret the British race and sex discrimination statutes shows how the rejection of legislative history influences judicial decision-making. By comparing these decisions with an available legislative history, it is possible to predict how the use of legislative history could have influenced the outcome of these decisions. The legislative history also allows speculation regarding how the legislative process is affected by the rejection of legislative history. In brief, this comparative analysis permits a look into the world that the critics seek to create.

This world, upon examination, seems far from the paradise envisioned by the critics. It is one in which restrictions on the use of legislative history increase rather than limit the power of judges, often frustrate legislative purpose, hinder rather than improve the legislative process, and restrict the ability of legislative bodies to undertake comprehensive social reform.

For example, the legislative history of the British Race Relations Act of 1976 clearly and unambiguously demonstrates that Parliament included Sikhs within the definition of an "ethnic" group protected by the statute.[9] By relying on a dictionary definition of "ethnic," the Court of Appeal held that Sikhs were not an "ethnic" group.[10] The House of Lords reversed this decision only after struggling with a variety of dictionary definitions, including an exploration of the etymology of the word. The House of Lords itself devised tests for determining whether groups fell within the statutory definition.[11]

The legislative history of the Race Relations Act of 1976 also demonstrates that Parliament sought an approach to interpretation that was broadly inclusive—one that would reach racial discrimination in all its guises rather than one that would focus on the precise meaning of each term Parliament used to describe the coverage of the statute.[12] Sikhs were eventually included within the meaning of "ethnic," but the House of Lords' emphasis on the meaning of individual words undoubtedly has caused lower

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8. Indeed, some critics see the English rules as the traditional and proper approach to the use of legislative history. *E.g.*, Mayton, *supra* note 5, at 119.

9. *See* discussion *infra* notes 206-09.

10. *See infra* text accompanying note 86.

11. *See* discussion *infra* notes 87-94.

12. *See infra* text accompanying notes 210-11.

courts to exclude groups likely covered by the statute.[13] It is ironic that Parliament used a broad listing of terms, including "ethnic," in order to avoid a previous House of Lords decision which narrowly construed the term "national origin."[14]

The first part of this article argues that the English rules regarding the use of legislative history create the world envisioned by the critics of U.S. practice. It also suggests why the British race and sex discrimination statutes provide a particularly useful body of law with which to evaluate the influence of the rules regarding legislative history. This part concludes by considering two differences between the English and American use of legislative history. These differences, the existence of which might be used as an argument against the use of the parliamentary materials in evaluating the English opinions, result from (1) knowledge of members of Parliament that their deliberations will not be used in the interpretation of statutes, and (2) the variances between American and English legislative processes.

Subsequent sections of the article analyze the judicial decisions under these statutes in light of the rejection of the use of legislative history and predict the effect that the use of the legislative history would have had on those decisions. These sections also speculate on how the refusal to use legislative history has influenced the legislative process.

Generally, the failure to use legislative history has adversely affected the decisions that interpret the sex and race discrimination statutes. Many of these decisions address ambiguities and uncertainties that require appeal to sources beyond the statutory language itself. Neither rules of grammar nor canons of interpretation adequately resolve many of these ambiguities. Indeed, resolution requires an examination of statutory purpose. In the absence of legislative history, interpretation resting on purpose is impoverished and judges are inclined toward more narrow interpretations of statutory provisions. A plain-meaning approach to interpretation can undermine Parliament's broader goals in enacting legislation, and this is especially true when the legislation implements significant social changes.

Adherence to a plain-meaning interpretive approach also increases the discretion of judges. The practice of attaching meaning to words without reference to any source, the similar method of finding purpose, and the ability of judges to select interpretations of language create room for much judicial discretion. Moreover, plain-meaning interpretation draws on societal expectations regarding racial and gender stereotypes that the race and sex discrimination legislation intended to alter. The judges who exercise the discretion inherent in plain-meaning interpretation represent an extremely narrow portion of the English population—a narrow portion with specific

13. *See infra* note 94.
14. *See infra* note 203.

views and perspectives. This discretion inclines toward more, rather than less, narrow interpretations, especially in the case of the conscientious judge committed to the English rules. Many sets of opinions show the often arbitrary resolution of conflicting interpretations that involve important statutory policies.

Plain-meaning interpretation also fails to account for the ways in which context can modify the meaning of terms. The meaning of a statutory term can never be completely fixed either by reference to a dictionary or by judicial adoption of a definition. Indeed, precedent combined with the absence of legislative history magnifies the weaknesses of plain-meaning interpretation.

The legislative history of the race and sex discrimination statutes is used in this article to explore how it might have affected judicial interpretation. Exploration of the legislative history identifies a number of important judicial decisions that are inconsistent with clear and authoritative legislative history. Also, the legislative history raises serious doubts about other judicial opinions—doubts which are sufficient to require additional justification of these opinions. Finally, the legislative history is helpful in confirming correct but troublesome interpretations.

Most important, perhaps, is that the legislative history includes statements of legislative purpose that could have supported broader judicial construction of the statutes. This history, as the example of the Sikhs illustrates, specifically commends approaches to interpretation different from the plain-meaning approach used by the courts. The examination of the legislative history indicates that, over time, plain-meaning interpretation tends to narrow the scope of the legislation.

An examination of the legislative history also permits informed speculation about the influence that the English rules have had on the legislative process. Generally, the benefits claimed to have accrued to the legislative process by using a plain-meaning interpretive approach—i.e., one which eschews the use of legislative history—are seriously overstated.

Parliament, including parliamentary committees, gave detailed attention to the language of individual clauses of the sex and race discrimination statutes. Still, the legislative history reveals a number of concerns about judicial interpretation as well as considerable criticism of the drafting process. The remarks of government ministers highlight the impossibility of parliamentary compliance with the standards of drafting imposed by the English rules of interpretation. The examination of judicial opinions shows that even careful drafting leaves a large number of interpretive problems. In fact, legislative anxiety about restrictive judicial interpretation motivated efforts at comprehensiveness that obscured, rather than clarified, meaning. Parliamentary deliberations also express frustration with the inability of Parliament to convey to the courts the broader goals and purposes of the legislation. The inability of a legislative body to speak the language

demanded by plain-meaning interpretation particularly debilitates the drafting and application of social legislation. It is ironic that, in interpreting their own precedent regarding the race and sex legislation, the courts reject an interpretive approach that relies on the specific words chosen and follow one that emphasizes broader readings of policy and purpose.

The article concludes with a brief exploration of the value of its comparative analysis of statutory interpretation. By illuminating the world imagined by the supporters of plain-meaning interpretation, comparative analysis reveals the close relationship between social reform, ideology, and judicial technique.

II. A WORLD OF JUDICIAL INTERPRETATION WITHOUT LEGISLATIVE HISTORY

The English rules regarding the use of legislative history satisfy the critics of current U.S. practice by creating a world of judicial interpretation that rarely uses legislative history. The British race and sex discrimination statutes attempt broad social change by protecting women and minorities. These statutes reflect policies similar to ones contained in antidiscrimination provisions in the United States. A significant body of judicial opinions interprets these British statutes.

A. *The Use of Legislative History in the Interpretation of Statutes*

The rules regarding the use of legislative history described below were in effect until 1993 and cover the period during which most of the opinions interpreting the race and sex discrimination legislation were issued. In general, these English legal principles eschew reliance on legislative history. A 1993 change in the rules regarding the use of legislative history permits reference to parliamentary debates and committee deliberations in limited circumstances, namely, where the clear statement of a minister responsible for the legislation resolves an ambiguity in the statute.[15] Decisions subsequent to the change show that it has, thus far, had negligible impact on interpretations of the race and sex discrimination statutes.[16] The opinions

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15. In Pepper v. Hart, [1993] 1 All E.R. 42, 68-69 (H.L.) (opinion of Lord Browne-Wilkinson), the House of Lords permitted reference to *Hansard* and parliamentary material, *see infra* pp. 9-10, when (1) the legislation is "ambiguous or obscure" or the literal meaning "leads to an absurdity"; (2) the parliamentary material relied upon consists of statements "by a minister or other promoter of the Bill" which, together with other parliamentary material, are necessary to understand the statements and their effect; and (3) "the statements relied on are clear." The House of Lords used the statement of the Financial Minister to resolve in favor of the taxpayer a conflict regarding whether in-house benefits provided to a taxpayer by an employer should be valued at the marginal and not the average cost of the benefit. *Id.* at 44.

16. Lord Browne-Wilkinson's opinion in *Pepper* emphasized that parliamentary

interpreting these statutes, issued between January 1993 and June 1994, have used neither legislative materials nor interpretive techniques different than those discussed below. Therefore, the sample of cases that follows reflects an approach to interpretation severely limiting, and almost excluding, the use of legislative history. In fact, an examination of decisions interpreting these statutes between 1976 and June 1994 shows that, with the exception of a rare reference to a White Paper or an antecedent statute, the decisions do not use any of the legislative history described below.

Legislative history in England is composed of antecedents of the present statutory provision (which include repealed or modified statutes),[17] pre-parliamentary materials such as "reports of committees and commissions reviewing the existing law and recommending changes,"[18] and parliamentary materials such as texts of the bill as introduced and subsequently amended, committee deliberations, and parliamentary debates.[19] This history can roughly be divided into antecedents, pre-parliamentary materials, and parliamentary materials.

The parliamentary legislative history contains many of the materials that are thought to be part of the history of congressional deliberations in the United States; but these histories also differ from U.S. congressional

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materials should be introduced only in limited circumstances and stated, "[a]ttempts to introduce [legislative history] which does not satisfy [the conditions set out] should be met by orders for costs made against those who have improperly introduced the material." *Id.* at 67.

The author found no case of the Employment Appeal Tribunal or of the Court of Appeal between January 1993 and June 1994 that referred to *Hansard* or to other parliamentary material in interpreting the Race and Sex Discrimination Acts. One subsequent decision so narrowly construes the exception which allows the use of legislative history that resort to parliamentary materials may be rare. In R. v. London Borough of Wandsworth *ex parte* Hawthorne, CO/2122/93 (Q.B. 1994), the court noted that *Pepper* envisaged "alternative, equally plausible meanings" (a requirement that the court intimated may not have been satisfied in *Pepper* because a panel in the House of Lords had concluded, four votes to one, that the government's reading was the most plausible—but this was before an enlarged panel using the legislative history reached the rival conclusion). The court said that rival interpretations of clear wording do not create ambiguity and that the exception in *Pepper* applies only to a "pre-existing" ambiguity. The court also emphasized that the statements must be "ministerial answers, based on advice from officials" and that even ministerial statements must do more than point to an interpretation; they must "conclusively" resolve the ambiguity. The Court of Appeal has suggested that even if the new rule might permit reference to *Hansard*, reference is foreclosed by precedent that has already interpreted the statutory term at issue. Dawkins v. Department of the Env't, *sub nom.* Crown Suppliers PSA, 1993 I.R.L.R. 284, 288 (C.A.).

17. RUPERT CROSS ET AL., STATUTORY INTERPRETATION 150 (2d ed. 1987). These materials differ from statutes *in pari materia* because these statutes are part of the legislative scheme whereas "legislative history is considered in order to see how a particular provision reached its present position on the statute book." *Id.* at 150 n.20.

18. *Id.* at 150.

19. *Id.*

deliberations in some important respects. Committee deliberations consist of transcripts of a committee's discussions; a committee ordinarily issues no committee report. These deliberations take place as part of, rather than as an antecedent to, consideration of the legislation by the full legislative body. Also, hearing records, if any, are much more limited, and pre-parliamentary commissions or committees play a role very similar to that assigned to committee hearings and committee reports in the United States.

In presenting legislation on behalf of the government, those responsible for guiding the legislation through Parliament use departmentally prepared "Notes on Clauses."[20] These Notes on Clauses describe the background of the legislation and explain the purpose and effect of each clause.[21] These documents, however, are not available outside the government and appear only when they are relied upon in speeches or in answering inquiries regarding the meaning of clauses in the legislation.[22]

The differences between these materials and legislative history in the United States arise partially from the variations between a parliamentary and presidential system. Because the drafting, introduction, and consideration of legislation are in the hands of government ministries, British committee hearings, if any, and deliberations play a different role than they would in a legislative body separate from the executive.[23]

The rules regarding the use of legislative history, although the subject of debate,[24] significantly limit reliance by the courts on legislative history. No legislative history, either pre-parliamentary or parliamentary, may be used unless there is doubt as to the meaning of legislative language.[25] This form of the plain-meaning rule considerably obstructs the use of legislative history because the court is permitted to reach an interpretation based on *a* plain meaning of the statute.[26] A plain meaning assigns to the statutory words their ordinary usage; it prevails unless the resulting interpretation is

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20. Rawlinson, *supra* note 7, at 282-83.

21. *Id.* at 282 (quoting (1969) Law Com. No. 21, Scot. Law Com. No. 11 para 67).

22. *Id.*

23. S.A. DESMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 270 (3d ed. 1980) (describing the differences between congressional and parliamentary committees).

24. A sense of the debate can be found in Lord Renton, *The Interpretation of Statutes*, 9 J. LEGIS. 252, 255-58 (1982); Rawlinson, *supra* note 7, at 281-85; CROSS ET AL., *supra* note 17, at 157-58.

25. CROSS ET AL., *supra* note 17, at 152-53. This "arbitrary exclusion of part of the context . . . distinguishes the practice of the English courts with regard to statutory interpretation from that of the courts of the United States and Western Europe." *Id.* at 153.

26. *Id.* at 152. "[I]t seems more in accordance with judicial practice to extend [the plain-meaning rule] to cases where the judge is satisfied that one of two or more possible meanings of statutory words, read in a context bereft of their legislative history, best fits the purpose of the legislation." *Id.* In this sense, the plain-meaning rule becomes a type of reasonable-meaning rule.

absurd or is, depending on judicial practice, an unreasonable one, plainly at variance with the purpose of the statute as a whole.[27] If rigorously applied, this form of plain meaning permits the use of legislative history only in limited circumstances.

Even if the court turns to legislative history, the scope of legislative history is limited by the *Hansard* rule.[28] This rule prohibits a court from relying on any parliamentary materials, including parliamentary debates, committee discussions, different drafts of the legislation, and other documents generated during parliamentary deliberations.[29] This rule, reaffirmed after considerable study,[30] prevents the use of the types of legislative materials often referred to by courts in the United States.[31] In 1993, the House of Lords created a limited exception to this rule.[32]

Courts may look to legislative antecedents of the statutory provision and to pre-parliamentary materials. Even with pre-parliamentary materials, however, the implications of the *Hansard* rule restrict their use. Courts may rely on pre-parliamentary materials only to determine the mischief at which the statute is directed but may not rely on this material to determine the

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27. *Id.* at 153.

28. *Id.* at 154-58. The rule emerged in 1769 and prevailed in the House of Lords in 1892. Until 1980, at least as to proceedings in the House of Commons, parliamentary privilege prohibited reference in court to *Hansard* reports of parliamentary deliberations without leave of the House. In 1980, the House of Commons permitted use of *Hansard* without petition for a number of purposes including as an aid in the interpretation of statutes. In Pepper v. Hart, [1993] 1 All E.R. 42, 67-69 (H.L.), Lord Browne-Wilkinson concluded that reference to the clear statements of ministers would neither infringe Article 9 of the Bill of Rights of 1688 (which prevents the questioning, in any court, of freedom of speech and debate in Parliament) nor violate other constitutional provisions regarding the powers of Parliament and the courts.

29. CROSS ET AL., *supra* note 17, at 150.

30. Rawlinson, *supra* note 7, at 281-84.

31. There is a limited exception which allows for the use of portions of parliamentary debates contained in academic treatises. *Id.* at 282. Lord Denning advised academics to include crucial parliamentary debates in treatises to enable the courts to examine them. *Id.* (citing Davis v. Johnson, 1979 App. Cas. 264, 276). In the cases interpreting the race and sex discrimination statutes, the author found no case in which parliamentary debates in any form had been used by the Employment Appeal Tribunal, the Court of Appeal, or the House of Lords.

Also, there seems to be a very limited exception when proposed regulations giving effect to a decision of the Court of Justice of the European Community are not subject to any amendment by Parliament or to consideration of amendment in committee. The court may look to *Hansard* to consider how presentation of the regulations to Parliament formed the basis of its assessment that it would give full effect to the Court of Justice decision. Pickstone v. Freemans PLC, [1988] 2 All E.R. 803, 814-15 (opinion of Lord Templeman). In *Pepper*, Lord Browne-Wilkinson found little logical ground to distinguish this circumstance from those to which the *Hansard* rule applied. [1993] 1 All E.R. at 65.

32. *See supra* note 15.

meaning of specific clauses designed to remedy the mischief.[33] This distinction, difficult to draw and easily ridiculed,[34] implements the *Hansard* rule. If the courts were to rely on statements of intention in pre-parliamentary materials, the prohibition against reliance on these expressions in parliamentary debates, which are more closely related to the legislative process, would become difficult to sustain.[35]

Those who justify restricting the use of legislative history echo many of the arguments made by critics of its use in the United States.[36] In England, the principal justifications emphasize that the reliance of persons on the language enacted by Parliament requires restrictions on the use of sources outside that language.[37] These justifications also track the concerns of the American critics regarding the accessibility of,[38] and the cost of reliance on, legislative history.[39] Not until 1993 did attacks on the *Hansard* rule, that questioned whether the courts should deny themselves the most useful information regarding the meaning of a statute,[40] alter even modestly

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33. CROSS ET AL., *supra* note 17, at 159-60.

34. "Bad jokes are then made about the fact that the judges often do gaze into the prohibited areas and say that they have come to their conclusion without being influenced by what they saw there." *Id.* at 151.

In *Pepper*, Lord Browne-Wilkinson stated:

> Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate. Clear and unambiguous statements made by ministers in Parliament are as much the background to the enactment of legislation as white papers and parliamentary reports.

[1993] 1 All E.R. at 65.

35. CROSS ET AL., *supra* note 17, at 160-61 (citing Lord Reid in Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg, 1975 App. Cas. 591, 614).

36. In *Pepper*, Lord Browne-Wilkinson, in permitting reference to legislative materials in limited circumstances, stated, "[e]xperience in the United States of America, where legislative history has for many years been much more generally admissible than I am now suggesting, shows how important it is to maintain strict control over the use of such material." [1993] 1 All E.R. at 67.

37. CROSS ET AL., *supra* note 17, at 154. Giving words their ordinary meanings also assures that the statute is interpreted from the perspective of those subject to the law. Lord Browne-Wilkinson has suggested that many statutes are far from comprehensible to the ordinary person and that a risk attending the refusal to use legislative history is that the courts risk subjecting individuals to a law that Parliament never intended to enact. *Pepper*, [1993] 1 All E.R. at 66. With the Race and Sex Discrimination Acts, that risk includes denying protection to persons that Parliament intended to protect.

38. CROSS ET AL., *supra* note 17, at 155 (citing Beswick v. Beswick, 1968 App. Cas. 58, 74). Some commentators believe that, at least in some areas such as tax legislation, readily available indexes of the legislative history exist. Rawlinson, *supra* note 7, at 288-89.

39. CROSS ET AL., *supra* note 17, at 155 (citing *Beswick*, 1968 App. Cas. at 74).

40. Rawlinson, *supra* note 7, at 279 (citing Lord Denning in Davis v. Johnson, 1979

the traditional rules limiting the use of legislative history. Even suggestions that the legislative history could be relied upon only when the comments of a minister of government directly addressed the interpretive problem at issue were not acted upon until 1993.[41]

In practice, however, courts may use legislative history; and, unfortunately, such use introduces ambiguities. Judges may look to the legislative history more often than the rules permit or published decisions indicate. As to pre-parliamentary materials, some judges, particularly law lords, have participated in committees that recommended legislation.[42] These judges may find it difficult to disregard their knowledge of a statute's purpose in favor of that knowledge permitted under the rules. Ambiguity increases in those few instances in which law lords sit with the House of Lords in its legislative capacity;[43] it is conceivable that cases might come

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App. Cas. 264, 276). Lord Browne-Wilkinson's opinion in *Pepper* addresses the principal objections to the use of legislative materials and concludes that they are insufficient to preclude the use of those materials in the circumstances that he sets out. [1993] 1 All E.R. at 62-64. Although legislation consists of words, "[t]his legislation is given legal effect [upon citizens] by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be." *Id.* at 62 (quoting Lord Wilberforce in Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg, [1975] 1 All E.R. 810, 828). The need for legal certainty "demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible." *Id.* at 62 (quoting Lord Diplock in Fothergill v. Monarch Airlines Ltd., [1980] 2 All E.R. 696, 705). "Textbooks often include reference to explanations of legislation given by a minister in Parliament, as a result of which lawyers advise their clients taking account of such statements." *Id.* at 65. If only limited use is made of legislative materials, the costs of ascertaining them will be reduced. Parliamentary language of necessity can never be completely precise nor anticipate every circumstance in which the language will be applied.

41. Rawlinson, *supra* note 7, at 287-88.

42. *See, e.g.*, CROSS ET AL., *supra* note 17, at 151 (citing Lord Hailsham, *Addressing the Statute Law*, STAT. L. REV. 4, 9 (1985)).

43. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 525 (2d ed. 1994). These law lords may participate in the debate as long as the topic is not "political." JACKSON'S MACHINERY OF JUSTICE 367 (J.R. Spencer ed., 1989) [hereinafter JACKSON'S MACHINERY]. In the House of Lords debate regarding the 1976 Race Relations Act, a member of the appellate committee who had decided two cases under the 1968 Race Relations Act spoke to the House regarding those decisions. In part, he responded to criticisms that the minister had told Parliament, including the House of Lords, what the 1968 act meant. "But your Lordships' House sitting Judicially, like every other court of law, knew nothing of that." 374 PARL. DEB., H.L. (5th ser.) 548 (Sept. 29, 1976). This statement suggests that, as a convention, a law lord who knew of the debate would approach interpretation as if he or she did not. That a member of the appellate committee, therefore, lacks knowledge of the debate is not the result of being unaware, but is rather the product of the idea that "persons are entitled to guide their lives by what Parliament has said, by the meaning of what is said by Parliament, and not what a Minister says, or even what Parliament means to say." *Id.* The impact of this idea was well-illustrated on one occasion when the appellate committee's interpretation was supported by the comments of a minister in Parliament. In referring to

before these law lords which require the interpretation of statutory provisions in the enactment of which they had participated. These practices, although suggesting knowledge of the legislative history outside of the rules, seem unlikely to affect the operation of the rules.

Suggestions, however, that judges do look to the legislative history to inform their decisions, even when they do not rely on that history in their decisions, significantly challenge the rules. If this personal examination occurred frequently, legislative history would inform judicial interpretation even though the articulated basis for a decision would rest upon conventions of language. If so, any correspondence between judicial interpretation and legislative purpose would reflect, not the strengths of English limitations, but the merits of reliance on legislative history—a reliance specifically rejected by the rules. The existing evidence, however, does not support the conclusion that judges often look to legislative history. The supporting evidence consists of statements by one Lord Chancellor,[44] statements subject to varying interpretations.[45] However, a number of contradictory statements,[46] as well as the case law,[47] are inconsistent with the assumption that the rules regarding the use of legislative history are principally honored

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criticism directed toward the committee's interpretation, the above-noted appellate committee member, recognizing that some of the criticism was made by persons who were aware of the minister's comments, called such criticism "mischievous." *Id.* at 550.

44. Rawlinson, *supra* note 7, at 280-81. Rawlinson cites instances in which the Lord Chancellor, Lord Hailsham, noted the private reference to *Hansard*. Although declining to openly rely on it in a decision, Lord Hailsham rather "produced [the interpretation] as an argument of [his] own as if [he] had thought of it [himself]." *Id.* at 280. In another instance, Lord Denning openly relied on his own examination of *Hansard* in interpreting a statute. *Pepper* referred to Lord Denning's use of legislative history in Hadmor Prod. Ltd. v. Hamilton, [1983] 1 App. Cas. 191, and to opposing counsel's argument in the House of Lords that he would have drawn Lord Denning's attention to other passages if he had known Lord Denning were going to rely on the legislative history. [1993] 1 All E.R. at 66.

45. The Lord Chancellor also referred to his own service in Parliament on study commissions. Perhaps his statements should be viewed within the context of his personal experience. Although his reference to similar practices by other judges inclines against such an interpretation, these statements by the Lord Chancellor may also reflect the unique aspects of his position. The Lord Chancellor is a member of the cabinet and, as a result, participates in political life differently than do other judicial officials. JACKSON'S MACHINERY, *supra* note 43, at 365-66.

46. Rawlinson, *supra* note 7, at 280 (citing Viscount Dilhorne in his disapproval of surreptitious reference to *Hansard*); CROSS ET AL., *supra* note 17, at 158. Lord Hailsham emphasized that if a judge were taken by a "point picked up in private reading," counsel should be allowed to address the point. *Id.*

47. The literature contains instances where courts reached interpretations of statutes inconsistent with clear statements of intent by government ministers in Parliament. CROSS ET AL., *supra* note 17, at 157; Rawlinson, *supra* note 7, at 274. In this study some similar instances were found. *See infra* text accompanying notes 206-25.

in their breach.[48] Therefore, it is reasonable to conclude that in practice judges do follow the rules restricting examination of legislative history.

Despite some ambiguities introduced by practice, the rules regarding the use of legislative history in England depart substantially from those regarding the use of these materials in the United States. These rules create the world of interpretation envisioned by Justices Scalia, Kennedy, and Thomas, and other critics of the use of legislative history.

B. *The Race and Sex Discrimination Acts*

The British race and sex discrimination statutes implement parliamentary goals of social reform. These goals include the protection of women and minorities from discrimination and the alteration of attitudes and practices that engender and sustain that discrimination.

The Sex Discrimination Act of 1975[49] and the Race Relations Act of 1976[50] resulted from White Papers, i.e., governmental studies, issued by a Labour government.[51] The legislative proposals generated extensive committee consideration in Parliament and passionate, extended debate.[52] The Acts prohibit direct (disparate treatment) and indirect (disparate impact) discrimination on the basis of race or sex.[53] The two provisions are closely

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48. With judges, as with other public officials, there operates a presumption of regularity. For judges to violate the rules and then hide that violation from the litigants and the public would be both extreme and irregular conduct. That a substantial number of judges engage in such conduct is not to be lightly presumed. Because the evidence for surreptitious use of legislative history is so limited, and the opposing evidence is reasonably strong, a presumption of regularity may not be necessary, but that presumption strengthens the proposition that judges follow the rules regarding the use of legislative materials.

49. Sex Discrimination Act, 1975, ch. 65 (Eng.).

50. Race Relations Act, 1976, ch. 74 (Eng.).

51. *See* HOME OFFICE, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 124; HOME OFFICE, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 128. *See also* DESMITH, *supra* note 23, at 431-38 (describing the background of the race and sex discrimination acts); KEITH HINDELL, THE GENESIS OF THE RACE RELATIONS BILL IN POLICY-MAKING IN BRITAIN (Richard Rose ed., 1969) (discussing the 1968 Race Relations Act). *See also* Robert N. Covington, *Equal Pay Acts: A Survey of Experience Under the British and American Acts*, 21 VAND. J. TRANSNAT'L L. 649 (1988) (discussing the antecedent British Equal Pay Act).

52. *See* DESMITH, *supra* note 23, at 266-72 (description of the chronology of action taken on a typical piece of legislation). For additional discussion of the legislative history of the two Acts, see *infra* text accompanying notes 202-05.

53. *See generally* Robert N. Covington, *American and British Employment Discrimination Law: An Introductory Comparative Survey*, 10 VAND. J. TRANSNAT'L L. 359 (1977) (discussing the relationship between U.S. and British statutes). This article discusses neither subsequent legislation, such as the 1986 Sex Discrimination Act which was compelled by action of the European Community (EC), nor the role of EC directives on interpretation. For a discussion of these matters, see generally Barry Fitzpatrick, *Legislation: The Sex Discrimination Act 1986*, 50 MOD. L. REV. 934 (1987) (discussing the 1986 Sex

related, and decisions regarding one act often refer to the other.[54]

In the United States, race and sex discrimination legislation drew heavily upon similar antidiscrimination provisions. The parliamentary debates are filled with references, both favorable and unfavorable, to the similarity between the British race and sex legislation and the U.S. statutes.[55] Some comparative studies also illustrate the relationships between the British and American provisions.[56]

The Sex Discrimination Act of 1975 and the Race Relations Act of 1976 form a useful sample with which to test the effects of the English rules that govern the use of legislative history. Both are important provisions. Each features an extensive legislative history, and each has been subject to a large number of judicial interpretations issued over an extended period of time. Their similarity to antidiscrimination statutes in the United States eases analysis and comprehension. Because interpretation of civil rights statutes generated a good part of the Supreme Court's increased reference to legislative history in the 1970s,[57] the absence of similar references in the English decisions creates a notable contrast.

Because the British and American statutes address similar social problems, the character of the British decisions is less likely to have been influenced by social, political, or legal circumstances unique to England and

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Discrimination Act and the role of EC law). *See also* JACKSON'S MACHINERY, *supra* note 43, at 435.

54. *E.g.*, Tottenham Green Under Fives' Ctr. v. Marshall, 1991 I.R.L.R. 164 (E.A.T.); Greenwich Homeworkers Project v. Mavrou, E.A.T./161/89 (1990); Malik v. Post Office Counters, 1993 I.C.R. 93 (E.A.T.); Patel v. City of Bradford Metro. Council, E.A.T./543/91 (1993); Hertfordshire County Council v. Green, E.A.T./184/91 (1993). The close relationship between the two acts was important in interpreting the immunity provision of the Race Relations Act, an immunity provision that varied from that of the Sex Discrimination Act. *See infra* text accompanying notes 178-90, 214-23.

55. *E.g.*, 893 PARL. DEB., H.C. (5th ser.) 1449, 1455, 1473, 1480 (June 18, 1975) (concerned with the intrusion of the U.S. E.E.O.C. into private affairs under U.S. legislation); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A 34-35 (Apr. 27, 1976) (U.S. legislation "has probably gone too far in the direction of a crude numerical egalitarianism without relation to skills or ability"); 905 PARL. DEB., H.C. (5th ser.) 1636 (July 8, 1976) (mistake of American law was to go into "undue detail"); *id.* at 1641 (legislation "slavishly modeled" on U.S. law); *id.* at 1785 (situation in America was totally different "where the issue was whether people, who were not of the dominant European race, have the same kind of civil legal rights which we take for granted in this country."); 918 PARL. DEB., H.C. (5th ser.) 594 (Oct. 27, 1976) (legislation rests on "presumption that the American experience can be imported here"); 362 PARL. DEB., H.L. (5th ser.) 146 (July 1, 1975) (bill has the "hallmarks . . . of the earnest, well-meaning, humourless and puritanical side of the American character.").

56. Covington, *supra* note 53, app. at 429 (nicely illustrating the similarities); Gerald McGinley, *Judicial Approaches to Sex Discrimination in the United States and the United Kingdom—A Comparative Study*, 49 MOD. L. REV. 413 (1986).

57. Carro & Brann, *supra* note 4, at 285.

unknown to an American observer. Although a variety of cultural and political factors affects the decisions and interpretations, the similarity of social problems increases confidence that this study will be examining differences significantly attributable to the rules regarding the use of legislative history.

Finally, these Acts have substantial social and political implications. They raise important questions regarding the protection of women and minorities and the use of the law to implement social policy. These types of questions repeatedly confront the courts with issues which require the most sensitive application of the law in complex and difficult circumstances. Judicial interpretation directly affects the efficacy of legislative redress of social inequities.

C. *The Judicial Opinions*

The evaluation of plain-meaning interpretation relies principally on opinions of the Employment Appeal Tribunal, the Court of Appeal, and the House of Lords. The majority of decisions interpreting the Sex Discrimination Act of 1975 and the Race Relations Act of 1976 have been issued by the Employment Appeal Tribunal (E.A.T.).[58] The Employment Appeal Tribunal is treated as a court of special jurisdiction,[59] but it has the powers enjoyed by the courts of general jurisdiction.[60] The Chairman of the E.A.T. enjoys the protected tenure of a judge.[61] The E.A.T. therefore functions as a judicial body.

The composition of the E.A.T., however, differs from that of a court in that it includes laypersons.[62] This difference does not affect the judicial character of the body in light of the jurisdiction exercised by the E.A.T. In reviewing the decisions of Employment Tribunals, the E.A.T. may reverse a decision only because the law is misapplied, the relevant statute is misinterpreted, or because the tribunal's decision is one that no reasonable

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58. *See supra* note 54. The Employment Appeal Tribunal operates by panels of three to five persons. General Med. Council v. Goba, 1988 I.R.L.R. 425 (E.A.T.), describes how the E.A.T. will sit in different panels. Unlike the Court of Appeal, one panel of the E.A.T. is not bound by the decisions of another panel.

59. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 412 (1980); DESMITH, *supra* note 23, at 529-30 (describing specialist courts).

60. DESMITH, *supra* note 23, at 539. These specialized courts follow the same rules as other courts. The E.A.T. is a superior court of record. Justice Wood, *The Employment Appeal Tribunal and Industrial Tribunals: England and Wales*, 14 COMMONWEALTH L. BULL. 1479, 1483 (1988).

61. The chair of the panel will be a legally qualified judge, normally of the High Court or the Court of Appeal. Wood, *supra* note 60, at 1483.

62. The panels, depending on size, normally consist of two to four lay representatives equally divided between employers' and workers' representatives. *Id.*

tribunal could reach.[63] Therefore, its tasks involve review of legal questions, particularly interpretation of the relevant statutes.

The opinions of the E.A.T. reflect this legal emphasis. These opinions focus on questions of law and are often cited in the literature, including in opinions of the Court of Appeal and the House of Lords, that deal with interpretation of the Sex Discrimination Act of 1975 and the Race Relations Act of 1976. The judicial character of these opinions is confirmed by an examination of E.A.T. opinions which interpret the two statutes. Many of these opinions are indistinguishable from those of the Court of Appeal.[64]

D. *Use of Parliamentary Material in Evaluating the Opinions*

Two important differences between British and American legislative history might arguably affect the relevance of the British parliamentary materials to evaluation of the opinions interpreting the race and sex discrimination statutes. These differences principally implicate the predictions of how the use of parliamentary materials would have altered judicial interpretations. They suggest that parliamentary material in England is more likely to alter judicial interpretation than is legislative history in the United States. One difference is that members of Parliament understand that legislative materials will not be used by the courts; the other difference is that the statements of ministers regarding legislation are more authoritative than are similar statements by sponsors of legislation in Congress.

The conclusions regarding the influence of legislative history on judicial interpretation require assessment of what might be called "the paradox of reliance." This paradox suggests that the legislative history of the race and sex discrimination statutes may appear particularly useful and relevant precisely because the participants in the legislative process understood that parliamentary materials would not be used by the courts. If the legislature, as in the United States, knew that the courts would rely on that history, that knowledge could alter the character of the legislative history (e.g., by introducing incentives for manipulation) and reduce its value.

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63. John Bowers, *The Employment Appeal Tribunal*, NEW L.J. 1083, 1084 (1983). *See* East Berkshire Health Auth. v. Matadeen, 1992 I.R.L.R. 336, 336 (E.A.T.) (emphasizing that only rarely should E.A.T. interfere with the factual findings of an industrial tribunal). A substantial number of opinions of the E.A.T. issued before June 1994 involve the review of Industrial Tribunal decisions. Challenges to factual determinations (rarely sustained) and to the exercise of discretion by Industrial Tribunals (i.e., whether to waive time limits for filing complaints) are often at issue in review. Indeed, E.A.T. has been criticized for being too legalistic. Linda Dickens, *Justice in the Industrial Tribunal System*, 17 INDUS. L.J. 58 (1988).

64. This is the author's assessment after reading hundreds of these opinions as well as opinions of the Court of Appeal interpreting these two statutes.

Therefore, as courts rely more on legislative history, it becomes less useful.

Debatable assumptions about how legislative history is created inhere in the paradox of reliance. Even if the courts were to become an audience for legislative history, it is not clear that the fundamental character of legislative history would vary. If legislative history is the trace of a dynamic and flexible deliberative process, much of the same material would be created whether or not courts rely on it.

Moreover, the argument set forth by the "paradox" forgets that English legislative history, although not directed to courts, is created with an awareness that other audiences will examine it. Historians, academics, and lawyers advising clients can examine and use the legislative history. Perhaps an astute advocate occasionally canvasses the legislative history before making arguments which, without ever referring to that history, rest on language and purpose. The paradox of reliance is strongest if the choice is between access to the legislative history by no one, including the courts, or by everyone. Because English legislative history is created with knowledge that some persons, including legal professionals, will examine that history, the paradox of reliance suggests that judicial availability would, at best, only marginally influence the usefulness of that legislative history.

Thus, the paradox of reliance leads to an absurdity: the most useful legislative history is one which is unavailable. But the opposite is more likely true. As greater reliance is placed on certain types of legislative history, that history becomes more useful and reliable because the legislature recognizes that it will be seen as relevant by the courts.[65] Once legislative materials are used, even in a limited way, arguments resting on the paradox of reliance lose much of their force. Inquiry then must be directed toward determining how differences in the English and American legislative processes influence the conclusions to be drawn from the analysis of the use of legislative history in England.

The character of the British legislative process affects the value of the legislative history. The executive controls the legislative process in Britain. The executive evaluates legislative proposals, drafts the legislation, and directs its consideration. Therefore, the government and the majority in Parliament speak with a more unified voice than does the Congress in the United States. For this reason, the explanations of the meaning of terms by the responsible government ministers carry a weight and reliability not found

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65. Ronald Dworkin describes one type of legislative intent, "institutionalized intention," and gives as an example the uncontradicted statements, given on the floor of Congress by a prominent supporter of a bill, regarding an understanding of what the bill will do. Because Congress understands this to be a legislative convention, it is fair to take these statements as expressing a form of institutionally agreed upon understanding of the legislation. Ronald Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37-43.

in the comparable statements of any members of Congress.[66]

Not surprisingly, relaxation of the rules in England prohibiting the use of legislative material has begun by permitting reference to the clear statements of ministers or promoters of legislation that resolve an ambiguity in the statute.[67] Even assuming that these statements should carry more weight in England than in the United States, the difference in weight does not lessen the negative implications for plain-meaning interpretation. In fact, the clarity of the legislative history starkly highlights the weaknesses of plain-meaning interpretation. Examining the legislative history of the race and sex discrimination statutes also shows that as much would be gained by using other less definitive, but equally helpful, parts of the English legislative history. Therefore, despite the differences in the legislative processes in the two countries, the key lessons to be drawn apply to the advocates of plain-meaning interpretation in the United States as well as in England. These

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66. Even in Parliament the statements of ministers regarding the meaning of the legislation can create uncertainties. One uncertainty would arise from the lack of clarity of the statement itself and the ambiguities introduced in the construction of the context against which the statement must be interpreted. Another uncertainty which arises is whether the minister's statement really reflects Parliament's broader understanding of the meaning of the statute. For example, during a discussion in the House of Lords concerning an interpretation of the Court of Appeal which deviated from what the relevant minister had said was the meaning of particular statutory term, a former member of the appellate committee of the House of Lords stated, "[t]he first [great evil] is that if the House of Commons had known that the clubs were outside the 1968 Act, I am by no means certain that that House might not have wished to amend the Act in that respect." 374 PARL. DEB., H.L. (5th ser.) 550 (Sept. 29, 1976).

Professor William Jordan argues convincingly that differences in the legislative and judicial processes in England and in the United States caution against adoption in the United States of the English rules restricting the use of legislative history. William Jordan, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994). He argues that, because of these differences, the perceived benefits of the English rules might not apply in the United States. He ably details these differences and concludes: "Accordingly, to the extent that the English courts restrict the consideration of legislative history, the context in which they operate is so different from the American context that it is at best misleading to suggest that the English experience supports similar restrictions in the United States." *Id.* at 42.

His judgment, however, does not foreclose applying to the United States the conclusions of this article (i.e., conclusions regarding *Mandla* and regarding the influence of the use of legislative history on judicial decision-making and on the legislative process which have been derived from experiments with the English materials). His analysis focuses on whether the perceived benefits of the exclusion of legislative history are sufficient to adopt that rule here. Because he emphasizes the ways in which many of the differences incline toward greater correspondence between parliamentary intention and judicial decisions, his examination supports the conclusions of this article. If significant deviations between judicial decisions and parliamentary intention are created by the absence of legislative history, and if such deviations exist in a system more inclined toward correspondence between the two, then these deviations are more likely in a system, like ours, less constructed to create such correspondence.

67. *See* discussion *supra* note 15.

differences, to be sure, suggest caution in drawing sweeping conclusions about how legislative history in the United States influences the outcome of judicial decisions. Yet these differences do not reduce the significance of conclusions about how the *absence* of legislative history would influence the interpretation of these statutory provisions.

The Sex Discrimination Act of 1975 and the Race Relations Act of 1976, along with the opinions interpreting them and the relevant legislative histories, allow an assessment of how comprehensive social legislation would fare in a world in which judicial interpretation occurs without reference to legislative history. The next section uses the opinions interpreting these statutes to evaluate how the restrictions on the use of legislative history influence the character of judicial decisions.

III. JUDICIAL OPINIONS INTERPRETING THE SEX AND RACE DISCRIMINATION STATUTES

Judicial opinions interpreting the Race and Sex Discrimination Acts attest to the influence of the rules that restrict the use of legislative history. Because of the English version of the plain-meaning rule,[68] most opinions make no reference to legislative history. It is usually in references to modified or repealed statutes that legislative history appears in judicial opinions.[69] No opinion uses parliamentary material, and when the Employment Appeal Tribunal has sought to do so it has been reprimanded.[70] Given the impact of the *Hansard* rule on the use of pre-parliamentary legislative history,[71] few decisions refer to this material,[72] and some opinions decline to cite it even with respect to the evil at which the statute is directed.[73] The use of legislative history in these opinions complies with the

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68. *See supra* text accompanying notes 20-27.

69. *E.g.*, Barclays Bank v. James, 1990 I.R.L.R. 90, 92 (E.A.T.) (Equal Pay Act portions repealed by the Sex Discrimination Act of 1975); R. v. Birmingham City Council, 1988 I.R.L.R. 96 (Q.B.) (Education Act of 1944); Garland v. British Rail Engineering Ltd., [1979] 2 All E.R. 1163, 1165-68 (C.A) (background of Sex Discrimination Act).

70. Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 76 (C.A.) (calling "clearly impermissible" the attempt to rely on what happened in relation to a clause as it passed through Parliament).

71. *See supra* text accompanying notes 33-35.

72. *E.g.*, Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 513, 520 (H.L.) (referring to appellant's argument based on the White Paper on Racial Discrimination); Enderby v. Frenchay Health Auth., 1991 I.R.L.R. 44, 49 (E.A.T.) (White Paper on Racial Discrimination cited for inclusion of disparate impact discrimination in the Sex Discrimination Bill based on Griggs v. Duke Power Co.).

73. *E.g.*, General Med. Council v. Goba, 1988 I.R.L.R. 425, 429 (E.A.T.) (not necessary to quote from the White Paper on Racial Discrimination because the "purposes and intentions of the [Act] are clear and well established"). The infrequent reference to White Papers by the courts contrasts with the more frequent discussion of them in the parliamentary

pre-1993, more restrictive English rules regarding such use.

Not surprisingly, the rejection of legislative history emphasizes the meaning of individual words and phrases. The opinions stress that words are to be given their "ordinary," "usual," or "common" meaning.[74] Some opinions assert that a word cannot be given more than its ordinary meaning.[75] Because of the centrality of individual terms and phrases, some opinions decry shorthand summaries of statutory terms. These opinions fear that definitions of the shorthand summaries will emerge and that development of the statutory language will not occur.[76] Even words broadly descriptive of a body of interpretation are to be shunned in preference for the specific statutory terms.[77]

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debates. *E.g.*, 906 PARL. DEB., H.C. (5th ser.) 1547, 1551, 1560, 1566, 1606, 1632 (Mar. 4, 1976); *id.* at 1857 (July 8, 1976); *id.* at 569 (Oct. 27, 1976) (White Paper played important role in the debate.). The judicial reluctance to rely on White Papers may reflect the limitations imposed by the *Hansard* rule as well as a concern that a comparison of White Papers with the final legislation, while at the same time ignoring the legislative deliberations, could mislead courts as to the intent of Parliament. *E.g.*, *id.* at 1651 (July 8, 1976) (discussion of rejection by the White Paper on Racial Discrimination of requirement that every government contractor report its employment policies to the government); 893 PARL. DEB., H.C. (5th ser.) 1584 (June 18, 1975) (discussion of the position of the White Paper on Sex Discrimination of restrictive work rules designed to protect women workers); 906 PARL. DEB., H.C. (5th ser.) 1560 (Mar. 4, 1976) (funding of community relations left open by the White Paper); *id.* at 1566 (question of criminal liability left open).

74. *E.g.*, Leverton v. Clwyd County Council, [1989] 2 W.L.R. 47, 72 (H.L.) (opinion of Lord Bridge referring to the language of Subsection 1(6) as "clear and unambiguous"); Malik v. Post Office Counters, 1993 I.C.R. 93, 97 (E.A.T.) (words to be given their ordinary meaning); Home Office v. Holmes, 1984 I.R.L.R. 299, 301 (E.A.T.) ("It appears to us that words like 'requirement' and 'condition' are plain, clear words of wide import fully capable of including any obligation of service whether full or part time . . . .").

75. Malik v. Post Office Counters, 1993 I.C.R. 93, 97-98 (E.A.T.) (broader meaning "not there on the face of the section" and not a question of "narrowly construing the section in rejecting the argument advanced but rather of declining to read in what is suggested should be implied"); Ojutiku v. Manpower Services Comm'n, 1992 I.R.L.R. 418, 421-22 (E.A.T.) (opinion of Lord Justice Kerr); Kingston & Richmond Area Health Auth. v. Kaur, 1981 I.R.L.R. 337, 339 (E.A.T.) ("but our function is solely to administer the law").

76. *E.g.*, Ojutiku v. Manpower Services Comm'n, 1992 I.R.L.R. 418, 421 (C.A.) (opinion of Lord Justice Eveleigh):

> I am very hesitant to suggest another expression for that which is used in the statute, for fear that it will be picked up and quoted in other cases and then built upon thereafter, with the result that at the end of the day there is a danger of us all departing far from the meaning of the word in the statute.

Id.

77. *E.g.*, Strathclyde Regional Council v. Porcelli, 1986 I.R.L.R. 134, 140 (C.A.) (opinion of Lord Grieve) (Sexual harassment is a term not used in the statute and should be avoided in describing coverage of the Act.); Wadman v. Carpenter Farrer Partnership, 1993 I.R.L.R. 374, 377 (E.A.T.) ("'[S]exual harassment' is not a definitive phrase in law."). But see Bracebridge Engineering Ltd. v. Darby, 1990 I.R.L.R. 3, 4 (E.A.T.), in which the Shorter Oxford English Dictionary definition of "sexual harassment" was used in addressing

The source of the meaning of statutory terms is less clear. Many opinions derive the "ordinary" meaning of terms without reference to any source, as if the meaning were self-evident.[78] This lack of reference could reflect reliance on the judge's own view of what the words mean. Reliance on individual conceptions of words introduces elements of subjectivity that are inconsistent with many of the justifications for relying on the words alone. This subjectivity threatens the view that judges are simply translating the meaning of the words chosen by the legislature. For example, the judge's examination of the language takes place in a context in which the meaning given to the word influences the outcome of a specific dispute already framed for resolution. This context could alter the way in which the judge perceives the meaning of the words. In addition, a failure to reference any source when determining the meaning of statutory terms does not necessarily demonstrate that the judge has not consulted a source. The judge could have examined sources to determine the meaning of the word but simply not cited those sources.

Dictionaries are the most commonly cited sources for the meaning of words.[79] Opinions frequently contain references to a variety of dictionaries.

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the coverage of the sex discrimination statute.

78. *E.g.*, Francis v. British Airways Engineering Overhaul, Ltd. 1982 I.R.L.R. 10, 12 (E.A.T.) ("requirement"); The Record Production Chapel v. Turnbull, E.A.T./955/83 (1984) (transcript) ("qualifying body"); The Home Office v. Holmes, 1984 I.R.L.R. 299, 300 (E.A.T.) ("requirement" or "condition"); Jeremiah v. Ministry of Defence, 1979 I.R.L.R. 436, 437-38 (C.A.) ("detriment"); James v. Eastleigh Borough Council, [1989] 3 W.L.R. 123, 127 (C.A.) ("section of the public"); London Borough of Barking & Dagenham v. Camara, 1988 I.R.L.R. 373, 376 (E.A.T.) ("requirement" or "condition" must apply to the job and not a personal characteristic of applicant); Garland v. British Rail Engineering Ltd., [1979] 2 All E.R. 1163, 1166 (C.A.) ("provision in relation to death or retirement"); Clymo v. Wandsworth London Borough Council, 1989 I.R.L.R. 241, 246-47 (E.A.T.) ("detriment"); Lambeth London Borough Council v. Commission for Racial Equal., 1989 I.C.R. 641, 646-47 (E.A.T.) ("personal service"). The Court of Appeal decision in *Lambeth* referred to the Oxford English Dictionary to define "personal." Lambeth London Borough Council v. Commission for Racial Equal., 1990 I.C.R. 768, 775 (C.A.).

79. *E.g.*, Lambeth London Borough Council v. Commission for Racial Equal., 1990 I.C.R. 768, 775 (C.A.) ("personal" from the Oxford English Dictionary); James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 620 (H.L.) (Lord Lowry used the Oxford English Dictionary for "ground" and for the "dictionary definition" of "discriminate"); Commission for Racial Equal. v. Dutton, [1989] 2 W.L.R. 17, 22-23 (C.A.) (Chambers 20th Century Dictionary, Supplement to Oxford English Dictionary, Longman Dictionary of Contemporary English, and Oxford English Dictionary defining "gypsy"—a term used in other statutory provisions applicable to race relations act); Singh v. Rowntree Mackintosh, Ltd., 1979 I.R.L.R. 199, 200 (E.A.T.) ("justifiable" from the Shorter Oxford English Dictionary); Ojutiku v. Manpower Services Comm'n, 1982 I.R.L.R. 418, 422 (C.A.) ("justifiable" from "dictionary definitions"); Mandla v. Dowell Lee, 1983 I.R.L.R. 209, 211 (H.L.) ("ethnic" from three dictionaries); Clymo v. Wandsworth London Borough Council, 1989 I.R.L.R. 241, 248 (E.A.T.) ("can" from the Shorter Oxford English Dictionary); Greencroft Soc. Club and Inst. v. Mullen 1985 I.C.R. 796, 802 (E.A.T.) (Shorter English Oxford Dictionary indicating

In addition, judges occasionally examine the etymology of words.[80] Indeed, references to more than one dictionary in a single opinion are not unknown.[81] These references highlight that words can have several meanings and that dictionaries can disagree on the priority of these meanings. These exercises involving dictionaries also demonstrate that words have different meanings depending upon the context in which they are used.[82]

The opinion of Lord Fraser in *Mandla v. Dowell Lee*[83] illustrates many of the observations previously made. In *Mandla*, the House of Lords addressed the exclusion of a Sikh from a private school. The Sikh student was prohibited by the school from wearing a turban required by Sikh tradition.[84] As a part of his claim under the Race Relations Act of 1976, the student argued that he was a member of a "racial group" that "could not comply" with the no-turban rule. The Act defined racial group as "a group of persons defined by reference to colour, race, nationality or ethnic or national origins."[85] The Court of Appeal, relying on the definition of "ethnic" contained in the Concise Oxford English Dictionary (1934 edition), i.e., "pertaining to race," held that Sikhs were essentially a religious group who shared racial characteristics with other religious groups, including

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that the term "nil" "is part of a ratio" and denotes not being part of a whole). Although relying on the dictionary to help define the term "in pursuance of," Lord Lowry in Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 513, 518 (H.L.), expressed some reservations: "A dictionary is not by itself the most reliable guide to statutory interpretation, but it serves to remind us of the commonly accepted meaning of pursuance as pursuit, the action of following out a process or the action of proceeding in accordance with a plan, direction, or order." *Id.*

80. *E.g.*, in *Mandla*, Lord Fraser noted that the word "ethnic" is of Greek origin:

> [B]eing derived from the Greek word 'ethnos' the basic meaning of which appears to have been simply 'a group' not limited by reference to racial or other distinguishing characteristics. . . . I do not suggest that the meaning of the English word in a modern statute ought to be governed by the meaning of the Greek word from which it is derived, but the fact that the meaning of the latter was wide avoids one possible limitation on the meaning of the English word.

1983 I.R.L.R. at 212.

81. *E.g.*, *id.* at 211; Commission for Racial Equal. v. Dutton, [1989] 2 W.L.R. 17, 22-23 (C.A.).

82. *See infra* text accompanying notes 132-38 (discussing how context can alter the meaning of "can comply"); *see also Dutton*, 1989 I.R.L.R. at 13 (Same word in different statutes can have a "wholly and totally different meaning assigned to it."); R. v. Birmingham City Council, 1988 I.R.L.R. 96, 99 (Q.B.) ("Ground" should be construed in context.).

83. *Mandla*, 1983 I.R.L.R. at 210-14.

84. Mandla v. Dowell Lee, 1983 I.R.L.R. 17 (C.A.). The school believed that the wearing of the turban would accentuate religious and social distinctions in the school. The school's student body was multiracial and was predominantly Christian in faith. *Id.* at 22.

85. Race Relations Act, 1976, ch. 74, § 3(1) (Eng.).

Hindus and Muslims, living in the Punjab.[86] As such, Sikhs were not a racial group protected by the Act.

The opinion of Lord Fraser in the House of Lords discusses the definition of the word "ethnic." The definition is contained in different dictionaries: The Concise Oxford English Dictionary, mentioned above; The Oxford English Dictionary (1897 edition), which contains a definition similar to the one listed in The Concise Oxford English Dictionary; and the Oxford English Dictionary (1972 edition) which defines "ethnic" as "pertaining to or having common racial, cultural, religious, or linguistic characteristics, especially designating a racial *or other group* within a larger system."[87] Lord Fraser rejected all three definitions. In rejecting those contained in the Concise English Oxford Dictionary and in the Oxford English Dictionary (1987 edition), he noted that "it is clear Parliament must have used the word in some more popular sense."[88] The definition found in the Oxford English Dictionary (1972 edition) was also rejected because it was "too loose and vague to be accepted as it stands."[89] Yet he found in this definition, together with the Greek origin of the word "ethnic," sufficient evidence to justify a broad meaning of the word—a meaning "consistent with the experience of those who read newspapers at the present day."[90] He also relied on an opinion of the Court of Appeal of New Zealand which interpreted the same word in a statute that was designed to prohibit incitement of ill-will on ethnic grounds. Lord Fraser stated that "[i]t is important that courts in English-speaking countries should, if possible, construe the words which we are considering in the same way where they occur in the same context."[91]

After rejecting all the definitions, Lord Fraser articulated some seven factors, two of which "appear[ed] to [him] to be essential" in distinguishing one ethnic group from another.[92] In his view, the meaning of "ethnic" rests

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86. *Mandla*, 1983 I.R.L.R. at 20.

87. *Mandla*, 1983 I.R.L.R. at 211 (emphasis added).

88. *Id.* A definition tied solely to race would create considerable difficulty. Distinctive biological characteristics of a race would be difficult to establish because very few distinctions "are scientifically recognized as racial." *Id.*

89. *Id.* "But in seeking for the true meaning of 'ethnic' in the statute, we are not tied to the precise definition in any dictionary." *Id.* In a separate opinion, Lord Templeman stated, "The true construction of the expression 'ethnic origins' must be deduced from the [1976] Act." *Id.* at 214.

90. *Id.* at 211. For Lord Fraser's discussion of the word "ethnic," see *supra* note 80. In the House of Lords debate on the Race Relations Act of 1976, one member critical of the inclusion of the term "ethnic" in the legislation cited the definition contained in the Oxford English Dictionary (1972 edition) (definition cited above). 374 PARL. DEB., H.L. (5th ser.) 70 (Sept. 27, 1976). Another referred to the Greek derivation of the term to the effect that the term was unclear and added little. *Id.* at 74.

91. *Mandla*, 1983 I.R.L.R. at 212 (referring to King-Ansell v. Police, [1979] 2 N.Z.L.R. 531 (C.A.)).

92. *Mandla*, 1983 I.R.L.R. at 211. These conditions include:

on "[t]he real test . . . whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins."[93] On this basis, he concluded that Sikhs were an ethnic group under the Act.[94]

Lord Fraser's opinion not only illustrates the reliance on the definition of specific terms but also demonstrates the ambiguities and uncertainties that require appeal to sources beyond the text itself. A complicated statute of necessity contains ambiguities and raises issues that the language of the statute does not specifically address. When words have more than one meaning, when dictionaries disagree, and when the interpretation presents choices not resolved by the specific language of the statute, opinions turn to some other basis for defining statutory terms.

Some opinions choose between equally plausible "plain-meaning" interpretations by using rules of grammar or other conventions of interpretation.[95] Examples found in the opinions include such inconsistent

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> 1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; 2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance . . . . ; 3) a common geographical origin, or descent from a small number of common ancestors; 4) a common language, not necessarily peculiar to the group; 5) a common literature peculiar to the group; 6) a common religion different from that of neighbouring groups or from the general community surrounding it; 7) being a minority or being oppressed or a dominant group within a larger community.

Id. The first two conditions Lord Fraser saw as "essential," the remaining five as "relevant." *Id.* Lord Templeman articulated the considerations defining an ethnic group by stating that "[i]n my opinion, for the purposes of the [1976] Race Relations Act a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin and a group history." *Id.* at 214.

93. *Id.* at 212 (quoting Justice Richardson in King-Ansell v. Police, [1979] 2 N.Z.L.R. 531, 542).

94. Gwynedd County Council v. Jones, E.A.T. 554/85 (1986), illustrates how subsequent decisions turn on these factors. Applying these factors articulated in *Mandla*, courts have disagreed as to whether Rastafarians are an ethnic group. *See* Dawkins v. Department of the Env't, 1993 I.R.L.R. 284, 288 (C.A.) (Rastafarians held not to be a separate ethnic group).

95. *E.g., opinions relying on grammar*: Clymo v. Wandsworth London Borough Council, 1989 I.R.L.R. 241, 246 (E.A.T.) ("'[S]ubjecting' is an active verb."); James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 619 (H.L.) (Key words are "an adverbial clause modifying the transitive verb.") (opinion of Lord Lowry). *E.g., opinions relying on conventions of interpretation*: Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 79 (C.A.) (narrow construction) (opinion of Parker, L.J.); Brennan v. J.H. Dewhurst Ltd., 1983 I.R.L.R. 357, 359-60 (E.A.T.) (seeking to avoid gaps in legislation); Ojutiku v. Manpower Services Comm'n, 1982 I.R.L.R. 418, 421-22 (C.A.) (adherence to ordinary meaning of words); Lambeth London Borough Council v. Commission for Racial Equal., 1990

precepts as the following: broadly interpreting the act,[96] narrowly interpreting the act,[97] interpreting the language to avoid a gap in the coverage of the statute,[98] adhering to the ordinary meaning of the statute even if this creates a gap in the application of the statute,[99] narrowly construing exceptions,[100] not construing exceptions so narrowly that the intent of Parliament is violated,[101] reading a general term in a series as limited by other words in the series,[102] and reading a general term in a series as not necessarily limited by the more narrow terms proceeding it.[103] Sometimes reliance on such conventions is articulated; sometimes it is not. The examples, that recall a well-known article by Karl Llewellyn contrasting similarly inconsistent conventions in the United States,[104] suggest that the choice between meanings cannot be automatically resolved by invoking these conventions.

Many of the choices between competing interpretations are made by viewing the specific language in the context of the statute as a whole. This approach requires examining the relationship between the language in one section and in other sections of the Act.[105] It also requires exploring

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I.C.R. 768, 770, 777 (C.A.) (exceptions to be narrowly construed); Tottenham Greens Under Fives' Ctr. v. Marshall, 1989 I.R.L.R. 147, 149 (E.A.T.) (words not to be narrowly construed when containing expressions of wide scope); De Souza v. Auto. Ass'n, 1985 I.R.L.R. 87, 89 (E.A.T.) (*ejusdem generis*).

96. *E.g.*, Weaver v. National Ass'n of Teachers in Further and Higher Educ., 1988 I.C.R. 599, 603 (E.A.T.) ("The policy of the Acts is to take a broad approach . . . so as to encompass a wide range of cases so that sex discrimination and race discrimination can be eliminated.").

97. *E.g.*, Meer v. London Borough of Tower Hamlets, 1988 I.R.L.R. 399, 403 (C.A.) (Broad interpretation can have capricious effects.) (opinion of Staughton, L.J.). The cases discussed *supra* note 78 also opt for a narrow interpretation on the grounds that the courts cannot expand the meanings of words beyond their "ordinary" meanings.

98. *E.g.*, Brennan v. J.H. Dewhurst Ltd., 1983 I.R.L.R. 357, 359-60 (E.A.T.).

99. *E.g.*, Ojutiku v. Manpower Services Comm'n, 1982 I.R.L.R. 418, 421 (C.A.).

100. *E.g.*, Lambeth London Borough Council v. Commission for Racial Equal., 1990 I.C.R. 768, 777 (C.A.).

101. *E.g.*, Tottenham Green Under Fives' Ctr. v. Marshall, 1991 I.R.L.R. 162, 165 (E.A.T.).

102. *E.g.*, De Souza v. Auto. Ass'n, 1985 I.R.L.R. 87, 88 (E.A.T.). The Court of Appeal agreed that a racial insult may not be a "detriment" even if it caused distress. De Souza v. Auto. Ass'n, 1986 I.R.L.R. 103, 107 (C.A.).

103. *E.g.*, Jeremiah v. Ministry of Defence, 1979 I.R.L.R. 436, 438 (C.A.).

104. Karl N. Llewellyn, *Canons of Construction*, 3 VAND. L. REV. 395 (1950).

105. *E.g.*, Webb v. E.M.O. Air Cargo (U.K.) Ltd., 1993 I.R.L.R. 27, 29 (H.L.) (relationship between sections 5(3) and 2(2) of the Sex Discrimination Act); Barclays Bank PLC v. Kapur, 1989 I.R.L.R. 57, 60 (E.A.T.) (comparing sections 5 and 7 of the Race Relations Act and the relationship between sections 54, 57, and 68); General Med. Council v. Goba, 1988 I.R.L.R. 425, 427 (E.A.T.) (comparing sections 13 and 41 of the Race Relations Act of 1976); Tottenham Green Under Fives' Ctr. v. Marshall, 1989 I.R.L.R. 147, 148 (E.A.T.) (contrasting sections 4 and 5 of the Race Relations Act of 1976); James v.

implications with respect to the operation of the statute as a whole and the consequences of varying interpretations of the language.[106]

From among interpretations permitted by the language, the opinions are willing to choose those interpretations that best implement the purpose, goal, or policy of the statute.[107] Sometimes the articulations of purpose are central to the interpretation;[108] at other times, references to purpose seem extraneous to a decision already reached on other grounds.[109] Still, the opinions often refer to the purpose of either the Acts or particular portions of the Acts. As these decisions demonstrate, to the extent that it seeks to avoid reference to purpose, plain-meaning interpretation has failed.

Judges derive the purpose of the statute in a number of ways. Sometimes they find purpose in the language of the Acts, including the long titles and the preambles.[110] In addition, judges deduce the purpose or purposes to be served from the language of specific provisions.[111] The interpretations of executive agencies[112] or even U.S. precedent[113] on related

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Eastleigh Borough Council, 1989 I.R.L.R. 318, 321 (C.A.) (Interpretation of 1(1)(a) of the Sex Discrimination Act of 1975 would render 1(1)(b) superfluous.); R. v. Birmingham City Council, 1988 I.R.L.R. 96, 99 (Q.B.) (comparison of sections 1(1)(b) and 66(3)); Brennan v. J.H. Dewhurst Ltd., 1983 I.R.L.R. 357, 359 (E.A.T.) (comparison of subparts of section 6(1) of the Sex Discrimination Act of 1975).

106. *E.g.*, Timex Corp. v. Hodgson, 1981 I.R.L.R. 530, 532 (E.A.T.) (Interpretation of genuine occupational qualification would have "startling consequences" which would limit employer options, would not lead to evasion, and in case of doubt one "should lean heavily against" the interpretation.); R. v. Birmingham City Council, 1988 I.R.L.R. 96, 98 (Q.B.) (Interpretation would undercut the structure of the Sex Discrimination Act of 1975.); Wallace v. South Eastern Educ. and Library Bd., 1980 I.R.L.R. 193, 195 (N. Ir. C.A.).

107. *See* cases cited *infra* notes 108-16.

108. *E.g.*, Tottenham Green Under Fives' Ctr. v. Marshall, 1989 I.R.L.R. 147 (E.A.T.).

109. *E.g.*, General Med. Council v. Goba, 1988 I.R.L.R. 425 (E.A.T.).

110. *E.g., purpose derived from long title*: Brennan v. J.H. Dewhurst Ltd., 1983 I.R.L.R. 357, 360 (E.A.T.); Lambeth London Borough Council v. Commission for Racial Equal., 1990 I.C.R. 768, 774 (C.A.); Mandla v. Dowell Lee, 1983 I.R.L.R. 209, 210 (H.L.) (opinion of Lord Fraser); *purpose derived from preamble*: R v. Birmingham City Council, 1988 I.R.L.R. 96, 99 (Q.B.).

111. *E.g.*, Brennan v. J.H. Dewhurst Ltd., 1983 I.R.L.R. 357, 359-60 (E.A.T.) (detailed analysis of section 6 of the Sex Discrimination Act of 1975 to obtain its purpose); Barclays Bank PLC v. Kapur, 1989 I.R.L.R. 57, 61 (E.A.T.) (Section 4(2)(c) of Race Relations Act interpreted in light of language of section 4(2)(a),(b).).

112. *E.g.*, Garland v. British Rail Engineering Ltd., [1979] 2 All E.R. 1163, 1166 (opinion of Lord Denning) (Equal Opportunities Commission).

113. *E.g.*, Enderby v. Frenchay Health Auth., 1992 I.R.L.R. 15 (C.A.) (relying on Griggs v. Duke Power, 401 U.S. 424 (1971), and other precedents including Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989)). The Court of Appeal, likewise, found that the origins of indirect discrimination were in *Griggs*. Enderby v. Frenchay Health Auth., 1992 I.R.L.R. 15, 20 (C.A.); Watches of Switzerland Ltd. v. Savell, 1983 I.R.L.R. 141, 146 (E.A.T.) (looking to *Griggs* and citing Clarke v. Eley (I.M.I.) Kynoch Ltd., 1982 I.R.L.R. 482, 485 (E.A.T.); Perera v. Civil Serv. Comm'n, 1983 I.R.L.R. 166, 170 (C.A.) (origin of

provisions also allow a court to articulate the purpose of provisions. More commonly, opinions determine the purpose of the statutes without stating any basis for the determination.[114] The failure of the Employment Appeal Tribunal to support its determinations of purpose may be due in part to the Tribunal's specialized character and its familiarity with these Acts.[115] But regardless of how they are derived, many statements of statutory purpose are

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indirect discrimination in "the United States and decisions there").

Some courts have rejected U.S. precedent in determining purpose because U.S. law did not contain a provision analogous to the one being interpreted. *See, e.g.*, Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 75 (C.A.); Ojutiku v. Manpower Services Comm'n, 1982 I.R.L.R. 418, 422 (C.A.); Cox v. Kraft Foods Ltd., E.A.T./281/82 (1983) (transcript).

It is ironic that the *Griggs* decision has been criticized for misreading the legislative history of Title VII in creating recovery for discrimination resulting from adverse impact. *See* Michael Gold, Griggs' *Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 520-23 (1985).

114. *E.g.*, Clymo v. Wandsworth London Borough Council, 1989 I.R.L.R. 241, 248 (E.A.T.) (regarding limited definition of "can comply," "[s]uch a construction appears to us to be wholly out of sympathy with the spirit and intent of the Act."); Tower Hamlets London Borough Council v. Rabin, 1989 I.C.R. 693 (E.A.T.) (purpose of the Race Relations Act not to remove religious intolerance); Tottenham Green Under Fives' Ctr. v. Marshall, 1989 I.R.L.R. 147, 149 (E.A.T.) ("[T]he purpose of the Act is to eliminate discrimination" but not to prevent attempts to integrate.); Greencroft Soc. Club and Inst. v. Mullen, 1985 I.C.R. 796, 802 (E.A.T.) (The interpretation of proportion excluding nil "would, in our view, run counter to the whole spirit and purpose of the sex discrimination legislation."); Clarke v. Eley (I.M.I.) Kynoch Ltd., 1982 I.R.L.R. 482, 485 (E.A.T.) ("The purpose of . . . the legislature in introducing the concept of indirect discrimination into the 1975 [Sex Discrimination] Act and the Race Relations Act [of] 1976 was to seek to eliminate those practices which had a disproportionate impact on women or ethnic minorities and were not justifiable for other reasons."); General Med. Council v. Goba, 1988 I.R.L.R. 425, 429 (E.A.T.) (purposes and intentions of the Race Relations Act well established); R. v. Birmingham City Council, 1988 I.R.L.R. 96, 98 (Q.B.) ("I do not think that it was the intention of Parliament that those who have to consider these matters of discrimination [confront an unnecessarily complicated procedure]."); Home Office v. Holmes, 1984 I.R.L.R. 299, 301 (E.A.T.) ("The scheme of the [1975 Sex Discrimination Act] involves casting a wide net."); Adekeye v. The Post Office, 1993 I.R.L.R. 324, 325 (E.A.T.) ("[I]t seems to us that the mischief which Parliament was intending to cover by those provisions was that of a person finding himself out of a job because of racial or other discriminatory grounds.").

Statements of purpose can reflect a variety of views:

> The Sex Discrimination Act of 1975 was not, in my judgment, designed to provide a basis for capricious and empty complaints of differentiation between the sexes. Nor was it intended to operate as a statutory abolition of every instinct of chivalry and consideration on the part of men for the opposite sex.

Stoke-on-Trent Community Transport v. Cresswell, E.A.T./359/93 (1993) (transcript) (quoting Automotive Products Ltd. v. Peake, 1977 I.C.R. 968, 973).

115. *See supra* text accompanying notes 58-64.

extremely broad,[116] presenting propositions with which few persons could disagree. Reliance on purpose when interpreting statutory provisions, however, undercuts the rules that limit reference to legislative history.[117]

The actions and statements of the legislature are principal, if not controlling, in establishing purpose; and the opinions demonstrate the difficulty of relying on purpose without the use of legislative history. Such difficulty is apparent when English courts use U.S. opinions in order to determine the purpose of the British statutes. Yet English courts, in using these U.S. opinions that interpret the purpose of U.S. laws by drawing on Congressional materials, simultaneously refuse to examine any parliamentary materials directly addressing those statutory purposes. Such reliance on U.S. decisions to establish statutory purpose seems ironic, if not somewhat bizarre.

Rarely do the opinions recognize the potential conflicts between an interpretation resting on purpose and one relying on the ordinary meaning of words[118] or that purpose can suggest meanings not within the original choices presented by the language. Few opinions express a willingness to rely on purpose. Without this willingness, a court has more difficulty abandoning what, in its view, is the most common meaning of a word.[119]

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116. *E.g.*, General Med. Council v. Goba, 1988 I.R.L.R. 425, 429 (E.A.T.) (Purpose is "to give personal rights not to be discriminated against on racial grounds nor to be victimized."); Barclays Bank PLC v. Kapur, 1989 I.R.L.R. 57, 61 (E.A.T.) (purpose to eliminate discrimination on the basis of race). In James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 617, 622 (H.L.), Lord Lowry and Lord Goff agree regarding the purpose or policy of the Sex Discrimination Act of 1975, that is, active promotion of the equal treatment of men and women, but they disagree regarding the implications of recognizing this purpose. Lord Lowry emphasizes that a court must still follow the words of the statute. *Id.* at 622.

117. In Pepper v. Hart, [1993] 1 All E.R. 42, 49-51 (H.L.), the opinions of Lord Griffiths and Lord Browne-Wilkinson accept a "purposive" rather than a "literal" approach to statutory interpretation. This reliance on purpose undergirds an exception to the rule that courts may not look to *Hansard*.

118. Lord Lowry's opinion in James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 622-25 (H.L.) touches on this conflict by emphasizing that purpose must play in harmony with the words chosen rather than in opposition to them.

119. In Mandla v. Dowell Lee, [1983] 1 All E.R. 1062, 1069 (H.L.), Lord Fraser rejects a dictionary definition of "ethnic" because it is inconsistent with what Parliament must have intended. But he constructs an interpretation of the term which he seems to support in part as its most common meaning. He does reject, however, a literal meaning of "can comply" because it would deprive ethnic groups of much of the protection Parliament intended to give them. In Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 513 (H.L.), the House of Lords relies in part on policy to reach a narrow construction of an immunity in the Race Relations Act of 1975. But the broad construction need not be viewed as the more ordinary or common meaning of the provision. In the Court of Appeal, Balcombe believed that the wider construction was the more natural meaning of the words but adopted a more narrow construction based on the context of the language and policies to be served by the immunity. *See infra* notes 181-84.

The judicial practice of attaching meaning to words without reference to any source, the similar practice regarding findings of purpose, and the ability of judges to select interpretations of language suggest that reliance on the words of the statute does not reduce, but rather increases, the discretion of judges. In fact, judges' ability to defend their interpretations as pre-existing in the language of the statute allows them to choose statutory meaning while avoiding discussion of the social policies the statute seeks to implement.

It is not surprising that the discretion inherent in plain-meaning interpretation can challenge the goals and purposes of social legislation, such as race and sex discrimination statutes. Plain meaning, of necessity, draws on common meanings imposed by culture and society. These common meanings, however, can hide other meanings from view and reinforce cultural systems that encourage or permit discrimination. It is instructive that, in *Mandla v. Dowell Lee*, Lord Fraser's reference to a definition of "ethnic"—a definition "consistent with the ordinary experience of those who read newspapers at the present day"[120]—echoes the initial conceptions of the "reasonable man" in tort law: the man "who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."[121] Leslie Bender argues that these images confine the meaning of words and reinforce existing perceptions and stereotypes.[122] Denied parliamentary statements of purpose, judges are left with culturally directed plain meaning that can be strikingly at odds with the social reforms underlying a statute. For instance, although it included Sikhs in the definition of "ethnic," the House of Lords constructed a test for the term that seems inconsistent with a broader approach to interpretation advocated by Parliament.[123] The test excludes groups Parliament likely intended to include.[124]

This culturally constructed plain meaning takes on legal significance only when refracted through the prism of the judge's personal experience. In England, the judges exercising the discretion inherent in plain-meaning interpretation are a remarkably homogeneous group and an extremely small portion of English society. "[English judges] are predominantly wealthy white males of late middle age, a very large percentage of whom were

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120. Mandla v. Dowell Lee, [1983] 1 All E.R. 1062, 1066 (H.L.).

121. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort Law*, 38 J. LEGAL ED. 3, 22 (1988) (footnote omitted).

122. *Id.* at 22-25.

123. *See* discussion *infra* notes 210-11.

124. *See supra* note 94. Likewise, refusals to see discrimination against pregnant women as gender-based are "vindications of stereotyped views[,]" and similar stereotyping may be involved in the failure to recognize hostile environment cases of sexual harassment. Gerald P. McGinley, *Judicial Approaches to Sex Discrimination in the United States and the United Kingdom—A Comparative Study*, 49 MOD. L. REV. 413, 417-19, 426-27 (1986).

educated at the same two universities. . . . [These judges] tend to know each other and have a strong common legal culture since their country and profession are relatively small."[125] Without questioning their integrity, it may be said that the background and experiences of judges cannot help but influence the ways in which they read and interpret the statutory language before them. Indeed, the issue is not primarily one of judicial integrity, for, even assuming that judges act with integrity and probity, literalism and plain-meaning interpretation cannot prevent judges from introducing political and social judgments into their interpretations. Such judgments are inherent in plain-meaning interpretation, and those judgments are likely to be antagonistic to the goals and purposes of much social legislation. The absence of legislative history removes an important constraint on judicial discretion.

The general observations about the character of judicial decision-making without legislative history suggest that much social legislation would not fare well in the world envisioned by the critics of the use of legislative history. Specific examples support these general observations.

The six groupings of opinions that follow further illustrate the weaknesses of plain-meaning interpretation.[126] All six suggest that the resolution of many conflicting interpretations concerning important statutory policies is often arbitrary. The first grouping shows how the comparison required by the statute cannot be constructed simply by examining the language of the provision. The second grouping of opinions demonstrates that plain-meaning interpretation fails to account for the ways in which context can modify the meaning of terms. The third and fourth illustrate the dangers of relying on dictionary definitions and exemplify how plain-meaning interpretation can undermine the purposes and goals of a statute. The fifth grouping indicates that the interpretive techniques open to the courts in plain-meaning interpretation suffer from a lack of supporting

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125. Jordan, *supra* note 66, at 39 (citations omitted).

126. These groupings have been chosen for their illustrative value and because they address significant issues under the Race and Sex Discrimination Acts. Other groupings of opinions which interpret words and phrases in the statutes reflect many of the same problems of interpretation under the English rules regarding the use of legislative history. For opinions addressing "victimization," particularly the necessary relationship between the alleged retaliatory act and the race or sex discrimination statutes, see Aziz v. Trinity St. Taxis Ltd., [1988] 3 W.L.R. 79, 87 (E.A.T.); Subasinghe-Sharpe v. London Borough of Brent, E.A.T./583/89 (1992) (transcript); Cornelius v. University College of Swansea, 1987 I.R.L.R. 141, 142 (C.A.). For opinions addressing "in relation to death or retirement," see Finnegan v. Clowney Youth Training Program Ltd., [1990] 2 All E.R. 546, 548 (H.L.); Duke v. Reliance Systems Ltd., [1987] 2 All E.R. 858, 859 (C.A.); Roberts v. Cleveland Area Health Auth., 1979 I.R.L.R. 244, 246 (C.A.). For opinions addressing "a deliberate omission" or "act extending over a period," see Barclays Bank plc v. Kapur, [1991] 1 All E.R. 646, 649 (H.L.); Sougrin v. Haringey Health Auth., 1992 I.R.L.R. 416, 417 (C.A.).

legislative history. The final grouping emphasizes that, absent the legislative history, no plain-meaning interpretation can rationally resolve the issue in dispute.

The first grouping of opinions addresses whether dismissal for pregnancy constitutes unlawful discrimination under the Sex Discrimination Act of 1975. In its opinion in *Turley v. Allders Department Stores Ltd.*,[127] the Employment Appeal Tribunal found that a dismissal on the grounds of pregnancy was not discrimination under the Act. It rested its decision on the indirect discrimination provision of the Act that required the comparison of a person of one sex with a similarly situated person of the other sex.[128] Because no man could become pregnant, the Act's indirect discrimination provisions could not apply. Likewise, direct discrimination could not be found because not all women are or become pregnant; therefore, any resulting discrimination did not turn on gender.

Subsequently, in *Hayes v. Malleable Man's Club and Inst.*,[129] the E.A.T. limited the application of *Turley*. The E.A.T. found no difficulty "in visualising cases—for example, that of a sick male employee and a pregnant woman employee, where the circumstances, although they could never in strictness be called the same, could nevertheless be properly regarded as lacking any material difference."[130] In many circumstances, dismissal resting on pregnancy would be covered by the Act. The House of Lords resolved this conflict by permitting comparison between the treatment of a pregnant woman and that of a hypothetical ill man whose illness would confront the employer with circumstances not materially different than those regarding a pregnant woman.[131]

These opinions, in attempting to define a similarly situated person for purposes of comparison, expose the central issue in the prohibition against gender discrimination: what is to be compared with what? The construction of the appropriate comparison requires an understanding of the purpose of the statute; indeed, it requires a philosophy of gender equality and discrimination. But the language cannot provide this philosophy. This philosophy can be formed either with the aid of the legislative history or by the predilections and perspectives of judges alone.

The opinions in *Mandla v. Dowell Lee*[132] and in *Raval v. Department*

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127. 1980 I.R.L.R. 4, 5-6 (E.A.T.).

128. *Id.* at 5. The Employment Appeal Tribunal also noted that the Act did not expressly prohibit discrimination on the basis of pregnancy. *Id.*

129. 1985 I.R.L.R. 367 (E.A.T.).

130. *Id.* at 370. *Turley* was distinguished as a decision on a narrow point, purely hypothetical, and too-lacking in "factual content to be applied by analogy to the circumstances of any other case." *Id.* at 369.

131. Webb v. E.M.O. Air Cargo (U.K.) Ltd., 1993 I.R.L.R. 27, 30 (H.L.).

132. [1983] 1 All E.R. 1062 (H.L.).

of Health and Soc. Sec.[133] illustrate a different problem. Both opinions address a requirement for establishing indirect discrimination: that the defendant imposes upon a member of a racial group a requirement or condition of such a character that a smaller proportion of that racial group "can comply" with the condition than can members of other groups. In *Mandla*, Lord Fraser rejected a literal interpretation of "can comply" on grounds that an emphasis on actual ability to comply would violate the intent of Parliament in prohibiting ethnic discrimination.[134] Therefore, "can comply" included customs, beliefs, and practices that prevented a Sikh from following a requirement within his physical ability to perform—not wearing a turban.[135]

In *Raval*, an industrial tribunal, relying on *Mandla*, found that Asians had the same ability to comply with criteria regarding English competency as any other group having the same intelligence and ability.[136] The E.A.T. disagreed, reasoning that "can comply" referred to the ability to produce evidence of previous satisfaction of the requirement and not to the ability to acquire such proficiency in the future.[137] The Tribunal's interpretation of "can comply" as "can comply in practice," although reasonable in the context, seems in tension with parliamentary policy that supported the definition in *Mandla*,[138] a policy that stresses other aspects of the term beyond practical compliance.

These opinions disclose how context can modify the meaning of terms. Indeed, separation of the definition adopted in *Mandla* from its context illustrates that the meaning of a statutory term can never be completely fixed either by reference to a dictionary or by judicial adoption of a definition. Purpose and context continue to influence meaning.

This ambiguity of meaning reflects general aspects of language—"every word has a different character in different contexts."[139]

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133. 1985 I.R.L.R. 370 (E.A.T.).

134. [1983] 1 All E.R. at 1069. A literal definition would deprive members of groups defined by reference to ethnic origins "of much of the protection which Parliament evidently intended the 1976 Act to afford them" because "they 'can' comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules." *Id.*

135. *Id.* The opinion approved the meaning given to "can comply" by the Employment Appeal Tribunal in Price v. Civil Serv. Comm'n, [1978] 1 All E.R. 1228, 1230 (E.A.T.).

136. Raval v. Department of Health and Soc. Sec., 1985 I.R.L.R. 370, 374 (E.A.T.). Promotion in the Civil Service clerical grades required an "O" level in an English language examination. *Id.*

137. *Id.*

138. *Id.* The Employment Appeal Tribunal believed that the definition of "can comply" as "can comply in practice[,]" "if anything, [rules out] the broad approach favoured by the Industrial Tribunal in this case." *Id.*

139. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 181e (G.E.M. Anscombe trans., 1958).

The meaning of a word or of a sentence derives from its reference, its purpose.[140] These general aspects of language pose special difficulties for plain-meaning interpretation, which seeks to fix a single "plain meaning" and simultaneously deny the most significant statements of purpose.

Other groupings of opinions emphasize the danger of relying on dictionary definitions of statutory terms. Persons claiming that they have been subjected to indirect discrimination prohibited by the Sex and Race Discrimination Acts must establish that they have been subjected to a "requirement or condition" that has a disproportionate impact on others of their gender or racial group. Opinions in *Perera v. Civil Serv. Comm'n*[141] and in *Meer v. London Borough of Tower Hamlets*[142] confronted criteria for appointment to a government position that were not absolute but which were weighed with others in the employment decision.[143] Without expressly so stating, the Court of Appeal in *Perera* seemed to rely on the ordinary meanings of "requirement" and "condition" and held that, to fall under the Race Relations Act, criteria for appointment must be absolute; that is, an applicant who did not meet the criteria would not even be considered for employment.[144] Therefore, even if one or more of the criteria for selection adversely affected the applicant, no claim of discrimination could be lodged. Employers, therefore, could include criteria difficult for women or minorities to meet without violating the Act.

One of the opinions in *Meer* stated that this definition of "requirement or condition" "may not be consistent with the object of the Act."[145] The opinion, although noting extensive criticism of *Perera* by civil rights groups, acknowledged that "Perera [as precedent of the Court of Appeal] is binding on us."[146]

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140. *Id.* at 188e.

141. 1983 I.R.L.R. 166 (C.A.).

142. 1988 I.R.L.R. 399 (C.A.).

143. In *Perera*, the applicant had applied for a civil service position, selection for which was based on four factors: experience in the United Kingdom, good command of the English language, British nationality or an intention to apply for it, and age. 1983 I.R.L.R. at 167. In *Meer*, the applicant applied for a position as a solicitor with local government, selection for which was based on ten factors: age, date of admission as solicitor, present post, current salary, local government experience, London government experience, Inner London government experience, senior management experience, length in present post, and Tower Hamlets experience. 1988 I.R.L.R. at 400.

144. 1983 I.R.L.R. at 169. The court suggested that a number of factors taken together might produce a requirement or condition "if the evidence had established that the combined lack of a number of those factors constituted an absolute bar to selection." *Id.*

145. 1988 I.R.L.R. at 403. In this instance, it seemed unlikely that any Indian solicitor would have any experience in the Tower Hamlets. *Id.* at 400.

146. *Id.* at 403. Court of Appeal decisions of one panel are binding on other panels of the Court of Appeal. Duke v. Reliance Systems Ltd., 1987 I.R.L.R. 139, 140-41 (C.A.) (reaffirming the rule). In *Meer*, Balcombe, L.J., referred to an article that stated, "Perera was

The dictionary definition of "requirement or condition" can render the statute ineffective in altering practices or procedures that perpetuate discrimination. A 1994 decision[147] illustrates the detrimental effects of the definition and the continuing viability of *Perera*. A black applicant for a position with a unit of local government was rejected in favor of a white person temporarily holding the job. One "desirable" criterion for appointment was service in the type of program in which the in-house candidate was employed. The agency had no black employees (it seems it had never had any black employees) able to acquire this experience. The Employment Appeal Tribunal, finding that *Perera* could not be distinguished on the ground that it involved multiple factors to be considered while this case included only one, concluded, "[w]e are aware there has been criticism in high quarters of the Perera decision. . . . We [are] unable in the hierarchy of judicial precedent, to entertain an argument that a decision of the Court of Appeal is wrong."[148] The legislative history suggests a much broader meaning of the terms.

A similar dispute surrounded the interpretation of the term "justifiable." In both the Sex and Race Discrimination Acts, a defendant who has been found to have committed an act of indirect discrimination by imposing a requirement or condition having disparate impact may argue that the requirement was justifiable. The E.A.T., relying on the goals of the Race Relations Act, had interpreted "justifiable" to mean necessary for carrying on the defendant's business and to mean reasonably necessary in all the circumstances under the Sex Discrimination Act.[149]

In *Ojutiku v. Manpower Services Comm'n*,[150] the Court of Appeal rejected these interpretations. Two opinions in this case did so by relying on the dictionary definitions of "justifiable:" "to adduce adequate grounds for"[151] and "advancing good grounds,"[152] respectively. Therefore, a person who gives reasons "acceptable to right-thinking people as sound and tolerable reasons . . . has justified his conduct."[153] The broader interpretations of "justifiable" were an unneeded "gloss" because

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one of the worst decisions ever under discrimination law and many hoped it would quietly disappear." 1988 I.R.L.R. at 403.

147. Meikle v. Nottingham City Council, E.A.T./249/92 (1994) (transcript).

148. *Id.*

149. Steel v. Union of Post Office Workers, 1977 I.R.L.R. 288, 290 (E.A.T.). One test for necessity was whether other nondiscretionary methods were not available to achieve the same result. *Id.* at 291.

150. 1982 I.R.L.R. 418 (C.A.).

151. *Id.* at 421 (opinion of Eveleigh, L.J.). "But if I have to give some explanation of my understanding of that word, I would turn to a dictionary definition . . . ." *Id.*

152. *Id.* at 422 (opinion of Kerr, L.J.). "'[A]dvancing good grounds' is one of the dictionary definitions of the verb 'to justify'." *Id.*

153. *Id.* at 421. This is the position taken by Eveleigh, L.J.

"justifiable" "is a perfectly easily understandable ordinary word . . . that . . . clearly applies a lower standard than the word 'necessary'."[154]

In *Hampson v. Department of Educ. and Science*, the Court of Appeal found the meaning assigned to "justifiable" by the opinions in *Ojutiku* to be less than clear.[155] The term "justifiable," as well as the definitions given for it, involve value judgments that cannot be separated from the circumstances of each case.[156] "Justifiable" requires "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."[157] This approach rejects justification by mere convenience.[158] Subsequently, the House of Lords indicated that "justifiable" requires an "objective balance" between the discriminatory effect of the "requirement or condition" and "the reasonable needs of the party who applies the condition."[159] The result of these attempts to give a plain meaning to the term "justifiable" was the creation of a normative balancing test.

The fifth grouping of opinions demonstrates the interplay between analysis of specific terms of the statute and articulations of purpose. The opinions marshal most of the interpretive techniques available without the use of legislative history. In one case, a local council had used a neutral term, "pensionable age," as the basis for providing free access to some local services even though the differences in pensionable age for men and women meant that men from ages sixty to sixty-five would continue to pay fees while women of the same age would not. Opinions of the Court of Appeal and the House of Lords in *James v. Eastleigh Borough Council* considered, under the Sex Discrimination Act, the meaning of the requirement for recovery that the complainant be treated less favorably "on the ground of [the complainant's] sex."[160] The opinions addressed whether this requirement was objective or subjective and whether it focused on causation

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154. *Id.* at 422. This is the position taken by Kerr, L.J.

155. 1989 I.R.L.R. 69, 75 (C.A.) (opinion of Balcombe, L.J.) ("With all due respect to these two learned lords justices, I derive little help from these judgments.").

156. That a value judgment is involved "is evident from the dictionary definition cited by Lord Justice Eveleigh." *Id.*

157. *Id.* The opinion believed that this meaning of "justifiable" was supported by Rainey v. Greater Glasgow Health Bd., 1987 I.R.L.R. 26, 30-31 (H.L.) (cited in 1989 I.R.L.R. 69, 75 (C.A.)).

158. *Id.* The *Ojutiku* opinion relied on the reasoning of the Employment Appeal Tribunal which emphasized that convenience alone would be insufficient justification. *Id.* (citing Steel v. Union of Post Office Workers, 1977 I.R.L.R. 288, 291 (E.A.T.)).

159. Webb v. E.M.O. Air Cargo (U.K.) Ltd., 1993 I.R.L.R. 27, 30 (H.L.) (quoting Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 75 (C.A.)). "This test must now be regarded as the appropriate one and as superseding that of Eveleigh LJ in Ojutiku." *Id.*

160. [1989] 3 W.L.R. 123, 127 (C.A.); [1990] 2 All E.R. 607, 607 (H.L.).

or on state of mind. The Court of Appeal, concerned with what an objective reading of "on the ground of [the complainant's] sex" would mean for the structure of the Act,[161] held that the term looked to whether "the defendant has [subjectively] treated the plaintiff less favourably because of his or her sex."[162] Crucial to this subjective test were the "reasons that I am seeking to give, not my intention or desire to administer the law correctly."[163]

The opinions in the House of Lords illustrate the variety of interpretive approaches discussed earlier. Lord Lowry's dissenting opinion rejected a purely causative "but-for" test for the terms, that is, a test which asks whether the complainant would have received the same treatment from the defendant but for his or her sex.[164] This rejection rested in good part on the phrases of the appropriate sentence in the statute. "These words ['on the ground of the complainant's sex, the defendant treats the complainant less favourably than he treats or would treat a person of the opposite sex'] . . . constitute an adverbial phrase modifying the transitive verb 'treats' in a clause of which the discriminator is the subject and the victim is the object."[165] Moreover, the dictionary definition of "ground" "invites consideration of the mental processes of the decision-maker."[166] The

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161. James v. Eastleigh Borough Council, [1989] 3 W.L.R. 123, 128 (C.A.). The opinion stated that an interpretation focusing on whether there was a "substantial causative link between the defendant's treatment and the detriment suffered by the plaintiff as the result of [the plaintiff's] sex" would leave "no room for the operation" of the provision of the Act which concerned indirect discrimination. *Id.* at 129.

> In every case in which a sexually neutral condition in fact operates differentially and detrimentally to one sex as opposed to the other, the imposition of such condition would be a substantial cause of detriment to the plaintiff by reason of his or her sex, i.e., it would fall within . . . [the] causation test and therefore constitute direct discrimination . . . .

Id.

162. *Id.* at 128. This position was supported in part by the Act's emphasis on the activities of the alleged discriminator and suggests that the courts should look "to the reason why the defendant treated the plaintiff less favourably." *Id.*

163. *Id.* at 129. This interpretation addresses the concern that imposition of an intent requirement would make proof of discrimination more difficult and invite evasion and manipulation.

164. James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 619 (H.L.) (opinion of Lord Lowry). Lord Goff articulated this as the question that would resolve most cases concerning direct discrimination. *Id.* at 617.

165. *Id.* at 619. The grammatical construction of the sentence directs that "the ground on which the alleged discriminator treats the victim less favourably is inescapably linked to the subject and the verb; it is the reason which has caused him to act." *Id.*

166. *Id.* at 620. Lord Lowry relies on the definition of "ground" in the Oxford English Dictionary (2d ed. 1989): "a circumstance on which an opinion, inference, argument, statement or claim is founded or which has given rise to an action, procedure or mental feeling; a reason, motive. Often with additional implication: A valid reason, justifying motive, or what is alleged as such." *Id.*

subjective meaning of the term uses "ground" "in its natural meaning, whereas the causative construction suppresses the natural meaning."[167] "[T]he causative ["but-for"] test is too wide and is grammatically unsound, because it necessarily disregards the fact that the less favourable treatment is meted out to the victim *on the ground of* the victim's sex."[168] The policy of the Act, to discourage discrimination and promote equality, is insufficient to support a meaning not carried by the words of the statute.[169] As a result, "[t]he phrase 'on the ground of his sex' does not . . . constitute an exception to the policy and therefore does not fall to be narrowly construed."[170] The determination, then, of whether the defendant discriminates against the complainant "on the ground of [the complainant's] sex" "involves a question of fact, the answer to which will depend on what is proved or admitted and on what may be inferred from the evidence."[171]

In his opinion, with which a majority of the panel agreed, Lord Bridge relied on precedent, adopting an objective test based on causation. In a previous decision, the House of Lords concluded that the "intention or motive of the defendant to discriminate . . . is not a necessary condition to liability" because a defendant might have no motive to discriminate but in fact do so.[172]

Lord Lowry disagreed with Lord Bridge and found the precedent less convincing because in that case, where the reason given for less-favorable treatment did rest on gender, the defendant would have lost under either construction of the language, "and no rival constructions of that provision were discussed."[173]

Lord Goff, the architect of the causative and objective test,[174] justified its application on the basis of the Act's policy of promoting equal treatment of men and women.[175] Lord Goff recognized that the test might include

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167. *Id.* at 622. "The phrase 'on the ground of' does not mean 'by reason of'; moreover, 'ground' must certainly not be confused with 'intention'." *Id.*

168. *Id.* at 623. Lord Lowry believed that the causative test not only dispensed with often irrelevant mental states, such as malice, prejudice, desire, and motive, but also "with an essential ingredient, namely the ground on which the discriminator acts." *Id.*

169. *Id.* at 622. "But the Act pursues that policy by means of the words which Parliament has used." *Id.*

170. *Id.* Rather, the words are an essential ingredient of a claim for direct discrimination. *Id.*

171. *Id.* at 625. Lord Lowry noted that merely because a defendant's action has a foreseeably discriminatory result does not necessarily indicate the grounds on which the defendant acted. Much depends on the circumstances. *Id.* at 624-25.

172. *Id.* at 612 (quoting Equal Opportunities Comm'n v. Birmingham City Council, [1989] 1 All E.R. 769, 774 (H.L.)).

173. James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 623 (H.L.).

174. Lord Goff wrote the opinion in Equal Opportunities Comm'n v. Birmingham City Council, [1989] 1 All E.R. 769, 771-76, on which Lord Bridge relied.

175. *James*, [1990] 2 All E.R. at 617. Consistent with this policy, "on the ground of [the

intention, that is, an intention to perform "the relevant act of less favourable treatment"; yet he believed that in the majority of cases, it was unnecessary to consider either intention or the motive underlying it.[176]

These various opinions illustrate the range of interpretive approaches open to courts in the absence of legislative history. In particular, these opinions show that interpretations relying on purpose or policy suffer from the lack of supporting legislative history that might give clearer direction to the statutory analysis.

The final grouping of opinions emphasizes that any plain-meaning interpretation fails to rationally resolve the issue in dispute. These opinions address a technical issue, namely, how to interpret the exception which states that the prohibitions in the Race Relations Act against indirect discrimination, among others, "shall [not] render unlawful any act of discrimination done . . . in pursuance of any instrument made under any enactment by a Minister of the Crown."[177]

When the Secretary of State for Education, under the Education Act of 1980, issued regulations establishing the equivalency of foreign training for purposes of certifying teachers, these regulations had a disparate impact on the ability of some foreign-trained teachers to become certified.[178] The Court of Appeal in *Hampson*, considering whether the exception just quoted gave the Secretary of State immunity, in one opinion applied the terms of the statute, finding that they fit the circumstances of the case.[179] Moreover, the

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plaintiff's] sex" not only refers to the reason for the defendant's actions but also embraces "cases in which a gender-based criterion is the basis on which the complainant has been selected for the relevant treatment." *Id.*

176. *Id.* at 618. The causative test made it unnecessary for industrial tribunals to struggle with the elusive concepts of intention and motive in the daily administration of the law. *Id.*

177. Race Relations Act, 1976, ch. 74, § 41(1) (Eng.). As these opinions which interpret the Race Relations Act demonstrate, without the legislative history, no rational plain meaning can be said to exist. *See* discussion *infra* notes 214-19.

178. Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 72 (C.A.).

179. *Id.* at 73. One interpretation, the wider one, granted immunity when the minister was exercising any power or discretion under an enactment; another, the narrower one, granted immunity only for actions taken in the necessary performance of an express obligation contained in the instrument. *Id.* Parker, L.J., adopting neither position, stated:

> It appears plain to me that when the Secretary of State made the Regulations he was acting in pursuance of an enactment with the meaning [of the section] notwithstanding that the Act conferred a wide discretion and that there were many options open to him as to the qualifications which he might require teachers to possess.

Id. at 79. Balcombe, L.J., who adopted the narrower interpretation, believed that although "both constructions [were] possible, . . . the wide construction is the more natural meaning of the words used." *Id.* at 73. Yet he justified the narrow construction on the basis of the section's context. *Id.* Nourse, L.J., believed that the immunity applied based on "the facts of this case," and, "[l]ike Lord Justice Parker, [he] certainly regard[ed] it as being neither possible nor desirable to attempt the formulation of a universal test." *Id.* at 77.

author of the opinion believed that Parliament would not have authorized an industrial tribunal to override the judgment of the Secretary, which was required to be exercised in an Act of Parliament.[180]

The Court of Appeal in *Hampson*, in another opinion, argued for a more narrow interpretation of the exception.[181] The immunity applied only when the Secretary was implementing an obligation specifically imposed by a parliamentary enactment. The exception did not apply when the minister was exercising discretion given by an Act of Parliament. The author of this opinion relied, in part, on the conflict between a broader scope of the exception and specific provisions of the Race Relations Act,[182] as well as the policy of reconciling the Race and Sex Discrimination Acts.[183] Finally, the immunity applied when Parliament established the discriminatory condition or requirement, but it did not apply when the choice rested with a minister who should be required to show that any discriminatory condition was justifiable.[184]

The two opinions also disagreed about the significance of differences between the immunity language of the Sex Discrimination Act, which was more narrow, and that of the Race Relations Act, which was relatively broad. One opinion that was unable to summon any rational reason for the difference fell back upon the general policy that the Acts were to follow the same structure.[185] The other opinion, also presenting no reason for the

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180. *Id.* at 79.

> It is also at first sight equally difficult to suppose that it was within the intention of Parliament that, having committed to the Secretary of State the power and duty to decide upon the requirements which must be possessed by teachers, Parliament should have intended that his decisions should be subject, in effect, to being overruled by an Industrial Tribunal.

Id. This intention was made more difficult to find because of the extensive responsibility given to the minister in enforcing the Education Act. *Id.*

181. *Id.* at 72-74.

182. *Id.* at 74. The comparable immunity section of the Sex Discrimination Act of 1975 was more narrow in its scope. *Id.*

183. The opinion relied on the White Paper on Racial Discrimination and the stated intention of the government "to harmonise the powers and procedures for dealing with sex and race discrimination so as to secure genuine equality of opportunity in both fields . . . . Except for good reason, the two statutes and the procedures for their administration and enforcement will be framed in similar terms." *See* HOME OFFICE, RACIAL DISCRIMINATION, Cmnd. 6234, at 48, 50 (cited in Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 74 (C.A.)).

184. Hampson v. Department of Educ. and Science, 1989 I.R.L.R. 69, 74 (C.A.). "If what is done is not *necessary* to comply with a statutory requirement, then there can be no valid reason why it should not have to be justified before an Industrial Tribunal." *Id.*

185. *Id.* "I cannot think of any good reason for [the markedly different wording of the immunity sections of the Race and Sex Discrimination Acts]. Why should statutory authority confer a wider licence to discriminate on the grounds of race than on the grounds of sex?" *Id.* (opinion of Balcombe, L.J.).

difference in the language, assumed that Parliament intended the exception provisions in the two Acts to vary.[186]

Likewise, the House of Lords believed that the language carried two possible constructions.[187] Although the language "in pursuance of" was more limited in the context of Section 41 than were terms used to describe other immunities in the section and suggested broad construction of the immunity, the narrow construction was necessary because a more expansive construction of the immunity was "irreconcilable with the purpose and meaning of the 1976 Act."[188] The House of Lords also believed that little basis existed for a wide construction which rested on the interpretation of the immunity provisions of the Sex Discrimination Act.[189] The narrow interpretation of the immunity placed before Parliament for debate any requirement arguably leading to racial discrimination and was, therefore, an interpretation to be preferred.[190]

These opinions leave the reader with the unhappy conclusion that no opinion marshals a compelling argument for any specific interpretation. What appears, however, to be an unresolvable conundrum under plain-meaning interpretation seems more tractable in light of the legislative history.[191]

These six groupings of opinions reinforce the conclusions drawn from a more general analysis of the opinions; and along with those conclusions, they permit a judgment regarding the impact of the rejection of legislative history on judicial decision-making. These groupings emphasize that reliance on the words alone cannot only expand rather than limit judicial discretion but also obscure, even to judges, the choices that have been made.

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186. *Id.* at 79. "The difference in wording between § 51 of the 1975 Act to that used in § 41 must also in my judgment be taken to have been deliberate and intended to produce a different result." *Id.* (opinion of Parker, L.J.).

187. Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 513, 518 (H.L.) (opinion of Lord Lowry).

188. *Id.* "In view of the wide sweep of these provisions, the exceptions ought therefore, I suggest, to be narrowly rather than widely construed where the language is susceptible of more than one meaning." *Id.*

189. The difference in the two immunity sections negated the general statement of the White Paper that the Race and Sex Discrimination Acts were to be harmonized.

> But these conclusions [that no argument of value for a narrow interpretation can be founded on the immunity provision of the Race Relations Act] do not support the respondent's argument for a wide construction of the words "in pursuance of", particularly when one takes into account the wider field of exceptions created by § 41 which, if the respondent's argument were accepted, would greatly enlarge the gap between §§ 51 and 41.

Id. at 520.

190. *Id.* at 521. "There is a sound argument, based on public policy, for drawing the line in this way. I refer to the need and the opportunity for parliamentary scrutiny." *Id.*

191. *See* discussion *infra* notes 214-19.

Without any support for conclusions regarding purpose in the legislative history, many citations to purpose can represent either general propositions of little controversy, the value of which is therefore often limited, or statements of judicial preference masquerading as the intended meaning Parliament assigned to the words it chose. Even when purpose seems central, good-faith efforts to implement parliamentary purpose are handicapped by the lack of legislative materials.

Precedent magnifies the weaknesses of plain-meaning interpretation by fixing the meanings of the statutory provisions. Many decisions resolve interpretive problems by reference to previous interpretations.[192] Precedent can prevent reconsideration of interpretations about which the court harbors considerable doubt.[193] It is ironic that this reliance on precedent turns analysis toward the interpretation of the language used by *judges* in previously establishing the meaning of the statutory terms. In interpreting their own precedent regarding the race and sex discrimination legislation, the courts reject an interpretive approach, that relies on the specific words chosen, but prefer one that emphasizes broader readings of policy and purpose.[194] Legislative history would give Parliament an ability to explain decisions underlying the statutory language in a way analogous to that by which a judge explains the holding of a case.

Precedent also may significantly limit the application of legislative history to the race and sex discrimination statutes under the recently created exceptions to the *Hansard* rule. Even if reference to legislative history might be permitted under the 1993 rule changes regarding the use of legislative history, examination of that history is foreclosed by precedent that interprets

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192. It is not surprising that, as more and more precedent accumulates, many cases are resolved based on an interpretation of the precedent without analysis of the statutory terms. More recent cases illustrate this tendency. *E.g.*, Meikle v. Nottingham City Council, E.A.T./249/92 (1994) (transcript); Wadman v. Carpenter Farrer Partnership, (1993) I.R.L.R. 374, 376-77 (E.A.T.); O'Neill v. Borough Council of Wellingborough, E.A.T./214/91 (1993); Select Appointments p.l.c. v. Vandenberghe, E.A.T./587/91 (1992) (transcript).

193. *See supra* text accompanying notes 141-48.

194. In Dawkins v. Department of the Env't, *sub nom.* Crown Suppliers PSA, 1993 I.R.L.R. 284, 287 (C.A.), the plaintiff had argued that the opinions of Lord Templeman and Lord Fraser in Mandla v. Dowell Lee, 1983 I.R.L.R. 209, 211, 214 (H.L.), did not clearly establish the meaning of the term "ethnic." In *Dawkins* the court replied:

> [I]t seems to me that in making these criticisms [the counsel for plaintiff] falls into the error of equating the language used in speeches or judgments with that of a statute. In giving reasons for a decision a judge seeks to explain the basis on which he has reached his conclusion. The speech or judgment has to be read as a whole. It is very often possible to find one passage in a judgment which, because different language is used, gives a slightly different impression or has a slightly different nuance when compared with another passage.

1993 I.R.L.R. at 288.

the statutory language.[195]

Reliance on precedent without reference to legislative history can create questionable, if not erroneous and almost perverse, interpretations. The House of Lords in *Dockers' Labour Club v. Race Relations Bd.*[196] narrowly interpreted the terms "section of the public" in Section 2(I) of the 1968 Race Relations Act to exclude private clubs from coverage of the Act. The legislative history of the 1976 Race Relations Act, however, evidences parliamentary concern with the *Dockers' Labour Club* decision.[197] The adoption of Section 25 of the 1976 Act was a repudiation of the rationale of

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195. *Id.* at 287-88.

> We gave careful consideration to the submission that this was a case where it would be appropriate to refer to the statement of the Home Secretary during the passage of the Race Relations Bill in 1965. It may be that we would have been persuaded that that was a suitable course to take if guidance as to the meaning of the words "ethnic origins" had not been given in the House of Lords in *Mandla*.

Id. This position reflects similar views in the United States with respect to the importance of precedent in statutory interpretation, such as the one expressed by Edward Levi that once the terms in a statute are defined by the court, precedent should prevent reconsideration of that definition. *See generally* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); William N. Eskridge, *Overruling Statutory Precedent*, 76 GEO. L. J. 1361 (1988).

196. [1974] 3 All E.R. 592, 594-96 (H.L.). The decision excluded private clubs from the coverage of the 1968 Act on the ground that a private club did not provide services or facilities to a segment of the public. *Id.*

197. After extensive debate in committee, in the House of Lords, and in the House of Commons, Parliament adopted Section 25 of the 1976 Act, which extended antidiscrimination provisions to clubs of a certain size. During this debate, persons speaking for the government were critical of the *Dockers' Labour Club* case and emphasized that the coverage of private clubs should not rest on the distinction between public and private functions but on the importance of these clubs in the social fabric of life. To this extent, the debate rejected the holding in *Dockers' Labour Club* as well as the rationale for what services and facilities would or would not be covered by the Act. *See generally* PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 333-48 (May 18, 1976); *id.* at 353-95 (May 20, 1976); 374 PARL. DEB., H.L. (5th ser.) 538-63 (Sept. 29, 1976); 905 PARL. DEB., H.C. (5th ser.) 1554-57 (Mar. 4, 1976); 918 PARL. DEB., H.C. (5th ser.) 567-600 (Oct. 27, 1976). On several occasions, ministers rejected the rationale of the case and pointed to an application of the Act to all clubs based on the size of the club. For example:

> As a matter of policy, the Government now regard the effects of this test [adopted in the *Dockers' Labour Club* case] as unacceptable, as we pointed out in the White Paper. . . . Having reached the conclusion that the dividing line which had been drawn [in that case] between clubs in the public sphere and those in the private sphere was unacceptable, we were faced with the problem of devising a more acceptable one. . . . In other words, we have adopted a criterion of size.

918 PARL. DEB., H.C. (5th ser.) 569 (Oct. 27, 1976) (ministerial statement); 905 PARL. DEB., H.C. (5th ser.) 1554, 1556 (Feb. 17, 1976) (ministerial statement); 374 PARL. DEB., H.L. (5th ser.) 558-59 (Sept. 29, 1976) (similar statement citing White Paper) (ministerial statement).

the decision.[198] Section 25 extended antidiscrimination provisions to private clubs of a certain size on the basis of the importance they played in the social fabric of the community. One of the evils of exclusion on the basis of race from these private clubs was the public humiliation suffered by members of racial minorities.[199]

Subsequently, the Court of Appeal relied heavily upon the House of Lords opinions in *Dockers' Labour Club* in narrowly construing Section 20(1) of the 1976 Act. In *Hector v. Smethwick Labour Club*,[200] a group of rugby players sought to collect for charity in a private club. White members of the group were told to seek the permission of the manager, but the black member of the group was told that he could not collect within the club even if the manager agreed that white members of the group could. The Court of Appeal, in interpreting the phrase in Section 20(1) which applied the prohibitions of the Act to "a person concerned with the provision" of the relevant facility or service to the public, narrowly required that there be a continuing interest in providing the facility to a segment of the public. Therefore, even if the white members of the group could be viewed as having been given access to a facility, the exclusion of the black member was not covered by the Act because there was not a continuing undertaking to permit the public to solicit for charity in the club.

The court looked to the ordinary meaning of "concerned with" but quoted extensively from the opinions in *Dockers' Labour Club* to the effect that, although private clubs were not covered, aspects of their services which were open to the public were covered. The opinions in the Court of Appeal emphasized the importance of discriminators holding themselves out as providing goods, services, or facilities to the public.

At the least, the legislative history demonstrates that a broader reading of Section 20(1), permitted by the language, was preferable if not required.[201] The absence of legislative history allowed reliance on precedent

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198. *See* sources cited *supra* note 197.

199. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 394 (May 20, 1976) (ministerial statement). One reason for covering private clubs under the 1976 Act was to ensure that members of ethnic minorities would not suffer the public humiliation of being turned away from private clubs. "We have all at some time suffered humiliation in our private lives, but no humiliation do we feel so keenly as public humiliation. That, if the pernicious habit of exclusion on racial grounds is not cured in clubs, is precisely what we risk." *Id.*

200. Hector v. Smethwick Labour Club, 1988 App. Cas. 467-68 (transcript).

201. Although the language of Section 25 only protects applicants, members, and associates from discrimination, an interpretation resting on the language of 20(1), which the Court of Appeal found to be not significantly different from the 1968 Act, would have to consider the purpose and goal of the Act in interpreting the terms "concerned with." The rationale of the *Dockers' Labour Club* case on which the court relied in narrowly construing the terms was undercut by the legislative history. In addition, the legislative history suggests that the type of evil which Section 25 addressed was precisely at issue in the court's

which was clearly rejected in the legislative history and which led the court to accept conduct that parliamentary deliberations identified as a principal evil to be redressed by the 1976 Act.

In summary, an analysis of judicial opinions interpreting the Race and Sex Discrimination Acts shows that the rules regarding the use of legislative history have significantly influenced judicial interpretation of the race and sex discrimination statutes. As examples of comprehensive social legislation, these statutes have not fared well in a world of judicial interpretation without legislative history.

IV. LEGISLATIVE HISTORY OF THE SEX AND RACE DISCRIMINATION STATUTES

The legislative history of these two statutes, examined in this section, consists of pre-parliamentary materials—specifically, the relevant government White Papers—and parliamentary materials, including the deliberations of the appropriate Standing Committees of the House of Commons and the debates in the House of Commons and in the House of Lords. With the exception of a rare reference to the White Papers,[202] the judicial opinions discussed above do not refer to any of this material. The pre-parliamentary and parliamentary materials permit an examination of the influence of plain-meaning interpretation on the character of judicial decisions and on the legislative process.

A. *The Influence of Legislative History on Judicial Opinions*

Judicial opinions interpreting the two statutes address a number of issues, including those discussed above. Examination of the legislative history identifies a number of judicial decisions that are inconsistent with clear and authoritative legislative history. Also, the legislative history raises doubts about other judicial opinions that are sufficient to require additional justification for them. Finally, the legislative history is helpful in confirming correct but troublesome interpretations.

Parliamentary consideration of the Race Relations Act of 1976 referred to instances under the 1968 Race Discrimination Act in which either the Court of Appeal or the House of Lords gave the words of the statute a meaning clearly in conflict with the meaning assigned to it by government ministers responsible for moving the legislation through Parliament.[203] These

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interpretation of 20(1). *See* sources cited *supra* note 197.

202. *See supra* note 72.

203. In one instance, regarding the coverage of private clubs under the Race Relations Act of 1968, the Court of Appeal in *Dockers' Labour Club* had interpreted the Act contrary to what the government minister in charge of the bill had told the House of Lords that it meant.

instances stirred, it seemed, both popular and parliamentary discontent.[204] Some members of Parliament expressed concern about these deviations from parliamentary understanding of the meaning of terms but were assured by the Lord Chancellor that they represented "isolated examples" to be responded to by better drafting. The Lord Chancellor offered both a judgment and a challenge "that the drafting of this Bill, at any rate, whatever view he may take of its merits, is in an admirable condition?"[205]

Unfortunately, the judicial opinions previously discussed present a somewhat different assessment of whether attention to drafting can avoid erroneous or limiting interpretations of the Race and Sex Discrimination Acts. Also, the legislative history demonstrates that several opinions at different levels in the judicial system reach interpretations of statutory terms clearly in conflict with the meaning assigned to the terms by government ministers responsible for moving the bill through Parliament.

Recall that the Court of Appeal reached the conclusion that Sikhs were not covered by the provisions of the Race Relations Act.[206] A variety of specific references throughout the legislative history, however, show that Parliament intended Sikhs to be covered by the Act.[207] In this instance, the

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"The right way of looking at it is that the courts [if the Court of Appeal decision had stood] would have interpreted an Act of Parliament contrary to what Parliament had been assured it meant and was intended to do." 374 PARL. DEB., H.L. (5th ser.) 549 (Sept. 29, 1976). This concern generated the suggestion that a minister's statement as to the meaning of a term "should be written into the measure itself." *Id.* at 551. Criticism of *Dockers' Labour Club* and another decision on a similar issue was also expressed in the House of Commons. 905 PARL. DEB., H.C. (5th ser.) 1554 (Mar. 4, 1976); *id.* at 1904 (July 8, 1976).

In the other instance, the House of Lords, in London Borough Council of Ealing v. Race Relations Bd., [1972] 1 All E.R. 105, 107-09 (H.L.), had interpreted the term "national origins" narrowly to include race but not nationality or citizenship. *See* HOME OFFICE, RACIAL DISCRIMINATION, 1975, Cmnd. 6324, at 56. At least some members of the House of Lords believed that *Ealing* confirmed the intention of the 1968 Act. 374 PARL. DEB., H.L. (5th ser.) 58 (Sept. 27, 1976).

204. For example, a former member of the appellate committee who was involved in the case interpreting the coverage of private clubs under the Race Relations Act of 1968 referred to the considerable criticism of the decision. 374 PARL. DEB., H.L. (5th ser.) 550 (Sept. 29, 1976).

205. *Id.* at 554-55.

206. Mandla v. Dowell Lee, 1983 I.R.L.R. 17, 20 (C.A.).

207. The White Paper, in discussing indirect discrimination, states that this prohibition would also apply to "clothing worn by employees (e.g., preventing the wearing of turbans or saris)." HOME OFFICE, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 55; 918 PARL. DEB., H.C. (5th ser.) 492 (Oct. 27, 1976) (Minister of State for the Home Office used a Sikh wearing a turban as the example of how a practice violating the Act must be shown to be justifiable.); *id.* (Minister of State for the Home Office, in giving practical examples of the basic evil of one person treating another less favorably because of some characteristic of the other person, included "Sikh."). Comments of other members of Parliament, including opponents of the legislation, support these ministerial statements and illustrate the assumption that the Act would cover Sikhs. *E.g.*, PARL. DEB., H.C., OFFICIAL REPORT, STANDING

House of Lords held that Sikhs were included in the protections granted by the Act.[208] Likewise, the legislative history easily resolves the dispute as to whether gypsies are an ethnic group and intended to be protected by the Act.[209]

The Court of Appeal relied heavily upon dictionaries to define the specific term "ethnic," and the opinions in the House of Lords began the analysis with dictionaries.[210] This approach not only allowed a definition of "ethnic" at odds with parliamentary understanding; it also ignored an approach to the interpretation of the term which was inconsistent with that of the Court of Appeal and unavailable to the House of Lords. When asked what the term "ethnic" added to attacking the evil at which the statute was directed, the government minister responded that it was difficult to give a precise and clear definition of ethnic origins. "The point is that the overall formula, 'colour, race, nationality, or ethnic or national origins,' encapsulates a wide variety of ideas—sufficiently wide to cover all the various manifestations of racial discrimination."[211] The legislative history thus espoused a meaning of the terms inconsistent with the attempt to define precisely each term. Consulting the legislative history not only could have prevented this interpretation by the Court of Appeal but also could have suggested a broader meaning to all these terms consistent with the policy of the Act to attack racial discrimination in all of its guises. The test developed by the House of Lords has been used by other courts to exclude groups which are likely included under the interpretive approach suggested by

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COMM. A, 37 (Apr. 27, 1976) (speaker denigrating the effect of the Act, "[t]he effect of it may be that a few sikhs will be able to wear turbans at work, but that will not fundamentally change the employment situation of coloured workers."); 374 PARL. DEB., H.L. (5th ser.) 45 (Sept. 27, 1976) (speaker noting that any change in practices in construction industry which now permits Sikhs to wear turbans would constitute discrimination).

One commentary criticized the courts' failure to refer to legislative history in deciding whether the 1976 Act covered Sikhs. *Current Developments, Turban or not Turban—That is the Question* (Mandla v. Dowell Lee), 1 THE LIVERPOOL LAW REVIEW 75, 86 (1983). "If the courts were permitted to investigate *Hansard*, they would have discovered that Sikhs were meant to be covered . . . thereby saving all parties the expense of appeals . . . . Therefore, use of *Hansard* will reduce problems of interpretation and reduce the number of appeals." *Id.* (footnote omitted) (citing other and additional legislative history).

208. Mandla v. Dowell Lee, 1983 I.R.L.R. 209, 213-14 (H.L.).

209. Commission for Racial Equal. v. Dutton, 1989 I.R.L.R. 8, 12 (C.A.) (disagreeing with E.A.T. decision that gypsies were not an ethnic group). PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 107 (May 4, 1976) (referring with approval to report of the Race Relations Board detailing how gypsies should be regarded as within the terms of the 1968 Race Relations Act) (ministerial statement).

210. *See supra* text accompanying notes 84-94.

211. 374 PARL. DEB., H.L. (5th ser.) 74 (Sept. 27, 1976). "To understand the formula, it may be helpful to consider the nature of the evils that this legislation is designed to tackle. It is easier to identify these practical examples than it is to define them, which . . . is what Clause 1 of the Bill is designed to do." *Id.* at 73.

Parliament.[212] It is ironic that Parliament's attempt to address broadly the manifestations of discrimination may have been in part a response to narrow judicial interpretation of the term "national origin" in the 1968 Race Discrimination Act.[213]

Other examples of the conflicts between the meaning assigned to a term by an opinion and the statements of government ministers may be less dramatic but are equally clear. As discussed above, judicial opinions suggested widely varying interpretations of the scope of immunity for acts done "in pursuance of any instrument made under any enactment by a Minister of the Crown." In one opinion was a broad interpretation of the immunity that covered all actions taken by government bodies under an enactment, and in another was a more narrow interpretation that limited the immunity when the government official exercises discretion in formulating the regulations.[214] The legislative history suggests that Parliament adopted neither a narrow interpretation nor a wide one that would have given immunity to any government body exercising authority under a statute.[215] As

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212. Applying the factors articulated in *Mandla*, the Court of Appeal held that Rastafarians are not an ethnic group. Dawkins v. Department of the Env't, 1993 I.R.L.R. 284, 288 (C.A.) (discussing opposing view but concluding that Rastafarians were not an ethnic group) (In this case the defendant admitted that the appellant was refused employment because he was a Rastafarian.).

213. *See supra* notes 196-202 and accompanying text.

214. *See supra* text accompanying notes 177-91.

215. The decision of the House of Lords in *Hampson* relied on Balcombe's dissent in the Court of Appeal. In that dissent, a central basis for his narrow interpretation of 41(1)(b) was:

> If an enactment, Order in Council or statutory instrument imposes requirements compliance with which may lead to racial discrimination, those requirements can be debated in Parliament and their justification considered there. Similarly, if a minister of the Crown imposes a condition or requirement compliance with which could lead to racial discrimination (see § 41(1)(c) of the 1976 Act) he can be made answerable in Parliament for his action. If what is done is not necessary to comply with a statutory requirement, then there can be no valid reason why it should not have to be justified before an industrial tribunal.

Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 513, 521 (H.L.) ((citing Hampson v. Department of Educ. and Science, [1990] 2 All E.R. 25, 32 (C.A.)) (quoting Balcombe dissent)). Balcombe's argument assumes that 41(1)(c) encompasses acts made necessary by an enactment for which the minister would be answerable to Parliament and contrasts this with 41(1)(b) where the minister who exercises discretion would be answerable to an industrial tribunal.

The legislative history shows that Parliament believed that 41(1)(c) was a limited provision which was meant to ensure that immigration officers, among others, would be covered by the immunity. Work permit schemes were exercised through immigration rules and instruction, "and not all of these are the sort of instruction designated as instruments under Subsection (1)(b)." 374 PARL. DEB., H.L. (5th ser.) 762 (Oct. 1, 1976) (comments of Minister of State for the Home Office). Section 41(1)(c) addressed the problem of whether courts might apply the Act to certain officials although such officials were not intended to be

to the narrow interpretation, the minister responsible for moving the Act through Parliament specifically declined to validate a suggestion that the exception be limited to ministerial actions that are subject to the approval of Parliament or to examination by an industrial tribunal.[216] As the wide interpretation, the legislative history describes *ultra vires* in terms of action under a statute that contemplates discrimination in a way that precludes the wide construction.[217] Moreover, the legislative history suggests a reason for the difference between the immunity provisions of the Race and Sex Discrimination Acts[218] and raises a point for analysis not addressed by the courts.[219]

It is ironic that this language sought to clarify rather than to confuse the meaning of the immunity. Concerned with possible judicial misinterpretation,[220] Parliament added the language at issue. In this instance,

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covered. *Id*; *see also* PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 478 (May 27, 1976) (comments of Minister of State for the Home Office) (noting the nature of (1)(c)). Section 41(1)(c) was to insure that all officers were covered by the immunity provided in 41(1)(a) and (b). The Subsection 41(1) as a whole was seeking to protect "discrimination which is required by or is in consequence of an Act of Parliament." 374 PARL. DEB., H.L. (5th ser.) 762 (Oct. 1. 1976). Therefore, principles applicable to 41(1)(c) would also apply to 41(1)(b). The discussion of (1)(c) suggests that any judicial examination of ministerial action under Subsection 41(1) was to be limited and that 41(1) covered exercises of ministerial discretion.

> There is however a protection. If Ministers go outside their powers—the doctrine of *ultra vires*—[i.e., if they impose a condition which was irrelevant to the act of Parliament] or if they exercise their powers without regard to the rules of natural justice, they are answerable in the courts. They are answerable to Parliament for actions they take within their powers.

PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 479 (May 27, 1976). In response to a question as to whether the government had considered restricting the exception in 41(1)(c) to orders which are subject to the approval of Parliament, the Minister of State for the Home Office replied that the Race Relations Commission could review whether the legislation was working and emphasized again the need for 41(1)(c) to insure that immunities attaching to actions in 41(1)(a) and (b) applied to instruments under the Immigration Act. *Id.* at 481. Although the immunities would apply to orders not subject to parliamentary approval, the statute under which the minister acted "must contemplate discrimination, otherwise the Minister's action cannot be by virtue of that enactment." *Id.* The language which explains *ultra vires* does not impose a requirement that the statute must specifically direct the discrimination. It excludes from the immunity, however, discretionary actions that are performed pursuant to statutory authority which authorizes a variety of governmental bodies.

216. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 481 (May 27, 1976).

217. *Id.* *See* discussion *supra* notes 168-69.

218. The legislative history suggests that the difference in the immunity provisions was influenced by the addition of 41(1)(c), that ensured that certain governmental officials would be protected. *Id.* at 478-79.

219. Section (1)(c) "is certainly narrower than Section 3(2) of the 1968 [Race Relations] Act which has attracted no criticism." *Id.* at 481.

220. *See supra* note 218.

without the legislative history, there is no plain-meaning interpretation.

Courts had also disagreed regarding the meaning of the term "justifiable." Some courts held that "justifiable" was linked to necessity, others to convenience, and still others to a balance of the interests involved in the specific case.[221] The legislative history demonstrates that Parliament unequivocally rejected an interpretation of "justifiable" linked to necessity.[222] The legislative history shows that "justifiable" was intended to embody an objective test which involved a weighing of interests to be "decid[ed] as a matter of fact in each particular case."[223] The legislative history thus permits a confident choice between varying interpretations of the language, a choice difficult to justify solely by definition of the specific term.

Courts also had considerable difficulty determining the appropriate measure of damages for direct discrimination.[224] The legislative history establishes that Parliament assumed that damages would be interpreted broadly. The legislative history also expresses a concern with prior law about limited damages and emphasizes that the importance of recovery for injured feelings required a broad reading of the damage requirement.[225] The

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221. *See supra* text accompanying notes 149-59.

222. 362 PARL. DEB., H.L. (5th ser.) 1014-15 (July 14, 1975). In addressing whether first in-first out might be a "justifiable" means of dealing with a layoff, the Minister of State for the Home Office stated:

> It seems to me that such a policy could well offer the fairest treatment to employees in this situation. But such a policy could be disallowed if we were to insert the word 'necessary' rather than keeping to 'justifiable.' I think that a requirement such as the Noble Baroness is putting forward could, quite unintentionally, cause a good deal of bitterness in an industrial situation where redundancies were forced upon an employer.

Id. at 1016. Commenting on an attempt to substitute "necessary" for "justifiable," a person speaking for the Government also stated:

> First, perhaps I may say that the word 'necessary' is a more subjective test than the word 'justifiable', which I hope imports the concept of a just and fair test, whereas 'necessary' could be a rather more subjective test in that it might relate to the requirements of the person who was alleged to discriminate.

PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 48-49 (Apr. 22, 1975).

223. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 39 (Apr. 27, 1976).

224. *E.g.*, Coleman v. Skyrail Oceanic Ltd., 1981 I.R.L.R. 398, 401 (C.A.) (emphasizing the need to link injured feelings to knowledge of gender discrimination).

225. The White Paper on Sex Discrimination noted that the government was considering whether the damages previously available under the Race Relations Act of 1968 were adequate and whether general damages should be permitted. HOME OFFICE, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 103. The White Paper on Racial Discrimination stated that under the 1968 Race Relations Act, damages had been limited to instances in which there were special damages or in which damage could be shown for lost opportunities. The White Paper stressed that damages for violation of the Race Relations Act should take into account injury to feelings. HOME OFFICE, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 42.

> The Government take the view as a matter of principle that a person who has

statements of the responsible minister in the legislative history, therefore, directly conflict with an otherwise available interpretation of the damage provision based solely on its language.

The large number of instances in which judicial interpretations have conflicted with the meaning given to a term by a responsible government minister suggests that the deviations from parliamentary intention which result from an inability to use the legislative history are more than "isolated examples" and that assumptions about the "admirable condition" of legislation were insufficient to prevent such interpretations. These instances also illustrate that interpretation without legislative history led to decisions at odds with the clear and authoritative statements of ministers contained in parliamentary deliberations.

In other instances, the legislative history less certainly establishes a conflict with some judicial interpretation but does cast doubt on that interpretation. The four examples which follow illustrate how the use of the legislative history might modify judicial interpretation or, at least, require some additional justification for the interpretation.

The House of Lords adopted an objective, causative test for the terms "on the ground of her sex," rejecting an interpretation resting on motive or intent.[226] During consideration of an amendment that sought to delete the quoted language, the minister responsible for the legislation stated that the terms would not prevent an industrial tribunal from inferring an intent to discriminate from the circumstances.[227] In the legislative history, this ministerial statement occurs with others which state that the section in which the terms are found was meant to address direct and "intentional" discrimination.[228] These statements, as well as their context, cast doubt on

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> suffered less favourable treatment on racial grounds should be able to obtain damages for any injury to his feelings resulting from the discrimination. We also believe that he should be able to seek such damages, irrespective of whether he has suffered any other form of damage. As I have said, we thought it necessary to put this beyond doubt in the Sex Discrimination Act and we considered that it is necessary to do so in this Bill.

374 PARL. DEB., H.L. (5th ser.) 1027 (Oct. 4, 1976).

226. *See supra* text accompanying notes 160-76.

227. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 12, 15-16 (Apr. 22, 1975) (ministerial statement).

> If one compares the treatment of one person with that of another, the inference can easily be drawn by a tribunal or a court that there was an intention to discriminate. I do not think that simply using the words "on the ground of her sex" would allow people to drive a coach and horses through the Bill.

Id. at 17. The person proposing the amendment feared that use of the term would permit employers and others to fabricate other reasons—such as physical weakness, unreliability, or emotional instability—which reflected stereotypes of women. *Id.* at 11.

228. Prior to the proposed amendment some ministerial statements stressed that Section

whether a "but-for" test for direct discrimination is consistent with this legislative history.

One court held that the prohibition against discrimination on the basis of marital status did not apply to the dismissal of an employee who announced that she was to be married.[229] The court believed that the term "marital status" would not carry a meaning that permitted protection of a person who had not yet entered into that status. The legislative history does not specifically resolve this issue. Some general statements support the contention that single persons are not protected.[230] Other statements, including one to the effect that the statute was intended to cover "any provision made in connection with marriage[,]"[231] would permit a court to conclude that discrimination against a person to be married fell under that Act. This legislative history strengthens the ability of a court to interpret the Act so as to include attempts to circumvent its protections.

In a heavily criticized opinion, the Court of Appeal held that the terms "requirement" or "condition" covered only criteria that must be satisfied to be hired, not other criteria that were weighed in determining who would be hired.[232] The legislative history would support a broader meaning of the terms. "Requirement" or "condition" was meant to respond to two aspects

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1(a), in which the term was found, applied to "direct and intentional discrimination." *Id.* at 9 (ministerial statement and reference to an earlier statement of the same nature). In the debate regarding the Race Relations Act, the minister stated that he did not disagree with the statements of an opponent who equated direct discrimination with intention. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 178 (May 6, 1976) ("Where I quarrel . . . in his frequent references to indirect discrimination is that he keeps referring to it as 'unintentional.' Indirect discrimination may be either intentional or unintentional."). The opinion of Lord Goff in the House of Lords highlighted the various meanings of "intention." *See supra* text accompanying notes 174-76. The discussion of the amendment, which would have deleted the words "on the ground of her sex," suggests that "intention" meant more than simply an intention to do the act that resulted in direct discrimination. For example, the minister referred to differences in damages which reflected the differences between intentional and accidental discrimination. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 18 (Apr. 22, 1975). During the discussion, others referred to the discriminator's intention as "nefarious." *Id.* at 19-20.

229. Bick v. Royal West of Eng. Residential Sch. for the Deaf, 1976 I.R.L.R. 326, 327 (Industrial Tribunal). This issue, representative of those that generate few, if any, appellate decisions, is one in which legislative history could help inform the decision.

230. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 54 (Apr. 22, 1975) (indirect discrimination deals with married and unmarried persons of the same sex); *id.* at 86 (Apr. 24, 1975) (not willing to subdivide that group of unmarried persons into groups such as widows, widowers, divorcees, bachelors, spinsters); *id.* at 89 (bill not covering single persons because "discrimination against single women is largely discrimination on grounds of sex and not because they are single.").

231. HOME OFFICE, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 42.

232. *See supra* text accompanying notes 141-48.

of the term "unfavourable," a term deleted from the legislation.[233] The phrase "to her detriment" replaced the term "unfavorable" and suggests a broad meaning not only for that phrase but also for "requirement or condition."[234] Moreover, examination of the legislative history pertaining to this language would have acquainted the court with statements regarding the broad scope and purpose of the law,[235] statements much stronger and more specifically directed than judicial articulations of purpose derived from the preamble or from the long title. This acquaintance would have enabled a court, relying not on its own judgment but on that of Parliament, to construct a broader meaning of the terms.

Some of the prohibitions of the Race Relations Act of 1976 applied to "facilities" and "services," terms which some commentators believed the courts had unduly narrowed by interpretation.[236] The legislative history suggests a broader meaning of these terms and provides an additional ground for advocating a broad interpretation.[237]

These instances suggest that legislative history can be useful even in circumstances where it fails specifically to resolve the meaning of a term. The use of legislative history in these instances would permit the court to anchor its choices on an informed understanding of parliamentary goals and concerns. But the bulk of the decisions, inconsistent with legislative history or made questionable by it, narrow the scope of the legislation. In this

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233. 893 PARL. DEB., H.C. (5th ser.) 1491 (June 18, 1975). Also, in the debate, an opponent of the provision used the term "criteria" interchangeably with the terms "requirement" or "condition." *Id.* at 1492-93.

234. *Id.* The focus of these terms was to avoid indirect discrimination where a much smaller number of women than men could comply with such requirements. In the initial draft, "unfavorable condition or requirement" indicated the variety of employment circumstances that could disadvantage women. *Id.*

235. In first introducing Clause 1 of which this language was part, the Minister stated:

> When we set about the preparation of this Bill we had to answer two basic questions. The first was: what kind of discrimination should be outlawed? The second question was: how should the law be enforced? . . . We decided that the net of the Bill should be wide and that the mesh of the bill should be fine. . . .
>
> . . . .
>
> It is that the unintended discrimination may be so deeply entrenched or so overwhelmingly effective that it is practically invisible and, therefore, may not give rise to any single individual complaint.

893 PARL. DEB., H.C. (5th ser.) 1429-30 (June 18, 1975).

236. *E.g.*, John Gardiner, *Section 20 of the Race Relations Act 1976: "Facilities" and "Services,"* 50 MOD. L. REV. 345 (1987) (critical of the House of Lords decisions defining these terms).

237. 374 PARL. DEB., H.L. (5th ser.) 762 (Oct. 1, 1976) (conceivable that immigration officers in exercising their function provided a service or facility while believing immunity provision Section 41(1)(c) protected them); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 478 (May 27, 1976) (comments to similar effect).

sense, plain-meaning interpretation seems likely to produce a more narrow interpretation than would an approach which uses legislative history.

It bears noting that not all judicial opinions under the Acts are rendered doubtful by an inspection of the pertinent legislative history. Consider four examples in which legislative history clarifies or confirms interpretations reached by the courts.

In applying the Sex Discrimination Act, the court in *Brennan v. J.H. Dewhurst Ltd.* struggled with the meaning of the term "arrangements."[238] In *Brennan*, the person who made arrangements for the interviewing of candidates for a butcher's position did nothing to violate the law, but the person who conducted the interviews did violate the law. The defendant confronted the court with the distinction between making arrangements, that is, establishing the guidelines and delegating authority, and carrying out the arrangements. He suggested that the first was covered by the language of the Act, but that the second was not. The court rejected this interpretation, relying on the general purpose of the legislation.[239]

The legislative history confirms the court's interpretation by addressing the issue specifically. A person speaking for the government rejected amendments that would have limited the meaning of "arrangements," emphasizing that "the word, 'arrangements,' has been deliberately used to cover a large number of situations—not all of which we can envisage at this moment, but that is why we have chosen a wide ranging word like 'arrangements.'"[240]

The opinions discussed above also reflect the need to define "can comply."[241] Although courts rejected a narrow, literal interpretation as inconsistent with the purpose of the Acts, they encountered confusion in structuring a definition that satisfied the purpose of these Acts in a variety of contexts. The broad definition, "can comply in practice," itself introduced additional ambiguities.

The legislative history supports a broad meaning of the term, but it also makes clear that the application of the term may vary in each case. The

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238. 1983 I.R.L.R. 357 (E.A.T.).

239. *Id.* at 360. The alternative interpretation would leave a gap in the Act and should be rejected when taking "into account the manifest policy of the Act as stated in the long title to the Act." *Id.*

240. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B 107 (Apr. 24, 1975).

> To summarize what I was saying, I ask the Committee to reject the Opposition amendment because in one sense it is restrictive, in that it would catch only interviewing arrangements and not all the arrangements which are made in respect of selection for jobs, and in the restrictive sense I think it is bad.

Id. at 109 (Apr. 29, 1975) (statement of Mr. John Fraser, Under-Secretary of State for Employment). The amendment was rejected. *Id.* at 110.

241. *See supra* text accompanying notes 132-38.

legislative history captures this broad, yet flexible, meaning as follows: "It will be understood by the courts and tribunals that the words 'can comply' in the Bill mean 'can reasonably be expected to comply.'"[242]

To cite another example, the Acts require, with certain exceptions, that actions regarding discrimination in employment be brought before an industrial tribunal within three months of the alleged discrimination. The courts applied the three-month provision rigidly.[243] Although one could argue that such an approach undermined the general purpose of the Acts, the legislative history would assure a court that Parliament also perceived the need to have a precise limitation period. While recognizing that too short a limitation period unjustly penalizes the employee, Parliament believed that it is necessary "to draw things fairly tightly so that recollection is not dimmed and remedy is not wrongly cut off by the passage of time."[244]

Finally, courts had little difficulty concluding that providing a mortgage subsidy for male employees of a business while denying the subsidy to female employees violated the Act.[245] The legislative history demonstrates that Parliament believed likewise. Indeed, the possibility of discrimination regarding mortgage subsidies for employees appears specifically in the legislative history.[246]

These four examples show that the legislative history is useful even when it confirms a judicial interpretation reached on other grounds. The legislative history can reduce uncertainty, eliminate further contention about an interpretation, and clarify ambiguity. This function of the legislative

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242. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 73 (Apr. 24, 1975) (statement of Mr. John Fraser, Under-Secretary of State for Employment).

243. Calder v. James Finlay Corp., 1989 I.R.L.R. 55, 56 (E.A.T.) (noting position of Industrial Tribunal). The nature of the deadlines is also illustrated by the litigation addressing at what point the alleged violation of the Acts occurred. Barclays Bank plc v. Kapur, [1991] 1 All E.R. 646, (H.L.); Sougrin v. Haringey Health Auth., 1992 I.R.L.R. 416 (C.A.) (discussing whether the violation extended over a period of time). In addition, industrial tribunals have the discretion to extend the deadline in appropriate cases. An industrial tribunal has considerable discretion in making this decision. *See supra* text accompanying note 63.

244. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 694 (June 22, 1976) (statement of Mr. Bryhmor John, Minister of State, Home Office) (indicating that a longer time limit would "hopelessly complicate matters."). Commenting on the assertion that the period would be too short, the person speaking for the government suggested that three months would be about the right balance between the complainant's ability to discover information and the protection of the interests of employers. *Id.*

245. *E.g.*, Calder v. James Finlay Corp. Ltd., 1989 I.R.L.R. 55, 56 (E.A.T.).

246. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 139-40 (Apr. 29, 1975) (statement of Mr. John Fraser, Under-Secretary of State for Employment) (noting that female employees would be discriminated against if concessionary rates of mortgages were provided to male but not female employees); 374 PARL. DEB., H.L. (5th ser.) 144 (Sept. 27, 1976) (statement of Lord Jacques, made during the debate of the Race Relations Act) (gives as an example of "other benefits" "preferential terms for mortgages").

history can vary in importance depending on the difficulty of the interpretive problem before the courts. This is precisely why the legislative history gives more significant reassurance in the first two examples than in the others: the first two were more contentious.

Of course, the legislative history does not address every issue with which the courts must deal. Some of these unresolved issues focus not necessarily upon specific terms of the statute but upon assessments of its general policies. Two examples from the Sex Discrimination Act are (1) whether the Act covers discrimination on the basis of pregnancy, and (2) whether it covers sexual harassment.[247] Neither of these issues concerns the meaning of a specific term in the statute, but each involves judgments about the underlying policies of the Act. The legislative history of the Sex Discrimination Act of 1975 fails to address either issue; the few references to pregnancy provide little assistance, and sexual harassment is not mentioned.[248]

Under the English rules, the courts have been left to resolve these issues in light of the statutory language. Although some courts have concluded that discrimination on the basis of pregnancy is not covered, others have concluded that pregnancy is covered by the Sex Discrimination Act when, consistent with the statute, a man in roughly an equivalent position can be identified.[249] Likewise, some opinions have concluded that sexual harassment is not covered by the Sex Discrimination Act; yet other opinions have disagreed, determining that sexual harassment is covered, but only to the extent that specific employment actions have been taken against the employee.[250] Still other courts have found that a single instance of harassment, if serious enough, could constitute discrimination.[251] Relying solely on the language and judicial conclusions regarding purpose, these opinions risk excluding coverage; and in parsing the legislative language,

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247. *See supra* text accompanying notes 77, 127-31.

248. *E.g.*, PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 90 (Apr. 24, 1975) (discussing the context of discrimination on the basis of marriage—comparing an unmarried woman with a child to an unmarried man with a child) (statement of Dr. Shirley Summerskill, Under-Secretary of State for the Home Department); *id.* at 234 (May 6, 1975) (In response to a question as to why special treatment to women in connection with pregnancy or childbirth did not violate provisions relating to the constabulary, Mr. John Fraser, speaking for the government, stated, "I think it is because men do not become pregnant.").

249. *See supra* text accompanying notes 127-31. *See* McGinley, *supra* note 124, at 419 (suggesting that the unwillingness of the courts to see discrimination against pregnant women as gender-based is "vindication[ ] of stereotyped views.").

250. McGinley, *supra* note 124, at 426-27 (suggesting that many English opinions fail to recognize hostile-environment cases of sexual harassment).

251. Bracebridge Engineering Ltd. v. Darby, 1990 I.R.L.R. 3, 4 (E.A.T.) (emphasizing that one instance of sexual harassment, if severe, can constitute violation of the Act but finding that employees involved in the incident were subject to disciplinary supervision).

courts limit the scope of coverage. No protection is provided for pregnant women unless a similar situation involving a man can be articulated, while with sexual harassment, many opinions seem to exclude hostile environment cases that do not involve some formal aspect of employment status.

In these instances, it is difficult to determine what the influence of legislative history might be. Of course, the legislative history would still leave the courts with the limitations of the statutory language; and the use of legislative history is no guarantee that a broader interpretation would be adopted. Yet the legislative history does contain a perspective more likely to support a broad, rather than a narrow, interpretation. In this sense, the legislative history could inform judicial analysis by educating judges regarding the values and purposes underlying the legislation.[252] Legislative history could balance the stereotypes and biases arising from plain-meaning interpretation. In fact, legislative history often shows that Parliament sought to alter those very stereotypes. The power of legislative history to educate regarding purpose is as significant as its power to direct a specific interpretation.

In short, an examination of the legislative history of the sex and race discrimination statutes demonstrates that use of the legislative history could have influenced significantly the judicial opinions that interpreted these statutes. In several important instances, use of the legislative history could have altered the interpretation of statutory terms. In other instances, the legislative history would have confirmed or clarified judicial interpretations. In still other instances, the legislative history could have changed judicial perceptions regarding approaches to interpretation and the purposes and goals of the statutes.

An examination of the legislative history also allows informed speculation regarding the influence that English rules could have on the

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252. This use of legislative history relates to what Ronald Dworkin describes as the "coherence theory" of legislation, which "supposes that a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute." Dworkin, *supra* note 65, at 41. Distinguishing between legislative purpose and legislative motive captures much the same idea. *See* Breyer, *supra* note 4.

The exclusion of legislative history causes attention to be focused on individual terms and deprives the courts of a basis for more expansive interpretation based on the purposes of the statute. One commentator, comparing the approach of the English and American courts in interpreting civil rights legislation, said of American courts:

> [T]hose courts concern themselves almost exclusively with interpretation of statute[s]. They do not see that task as one of subtle linguistic analysis, nor do they locate statutes in relation to pre-existing *legal* rules. Rather they treat major statutes as blueprints of *social* policy. . . . The legislation created a muscular skeleton, but the courts at all levels have put on the substantial flesh.

Barry Fitzpatrick, *Racial Inequality and the Limits of Law*, 49 MOD. L. REV. 68, 74-75 (1986).

legislative process. Evidence of this influence comes principally from members of Parliament.

B. *The Influence on the Legislative Process*

That relying on legislative history to interpret statutes has deleterious effects on the legislative process is among those criticisms stressed by plain-meaning advocates. Among these supposed effects is the encouragement of sloppy drafting by legislators who could rely on legislative history rather than on statutory language to convey meaning.

The legislative history of the sex and race discrimination statutes supports the conclusion that the use of legislative history may influence the legislative process. The legislative history documents an emphasis on statutory drafting. In both Standing Committees and the debates in the House of Commons and the House of Lords, members of Parliament gave detailed consideration to the language of individual clauses of the Acts.[253]

Members of the Standing Committees appear to have had access to Notes on Clauses explaining the meaning of each clause.[254] With these Notes, members addressed a number of drafting problems.[255] Moreover, ministers were seen as having a duty to respond to concerns about ambiguity or confusion existing in the draft presented to the committee or to either House.[256] This emphasis on drafting seems to have been motivated by the

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253. The legislative history of both the committee deliberations in the House of Commons and the floor debates in the House of Commons and in the House of Lords shows a careful and detailed discussion of the legislation, often clause by clause.

254. The committees had access to the Notes on Clauses. This assumption rests upon the character of the questioning regarding the meaning of the individual clauses and upon a statement in the legislative history showing access to this material during consideration of the Race Relations Act of 1976. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 321 (May 18, 1976) ("I apologise for detaining the Committee, but I am reminded of an important point by the notes on clauses which the minister has been kind enough to furnish to us.").

255. *E.g.*, PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 7-8, 21-22, 28-30, 54 (Apr. 22, 1975); *id.* at 83-87 (Apr. 24, 1975); *id.* at 146, 158-59 (Apr. 29, 1975); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 56-57, 61-63 (Apr. 29, 1976); *id.* at 138 (May 4, 1976); *id.* at 199 (May 11, 1976); *id.* at 477-81 (May 27, 1976).

256. Where a Member raises a point which appears to be obscure, or uncertain, or ambiguous, I should think if the House or Committee has the opinion that the criticism has merit, it would be the duty of the Minister in charge of the Bill to see that the matter was put right, so that the provision should be properly spelled out.

374 PARL. DEB., H.L. (5th ser.) 553-54 (Sept. 29, 1976) (statement of the Lord Chancellor). The legislative history demonstrates that ministers accept, and that members expect, this obligation. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 110 (May 4, 1976) (Minister notes obligation to look seriously at all points raised in committee.); *id.* (May 11, 1976) (Minister states that the government will make amendments based on comments of committee members.); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 12 (Apr.

need to provide clarity of language for those subject to the law and for accurate judicial interpretation.

It could be argued that the rejection of legislative history would make legislative bodies more sensitive to the language of provisions.[257] The legislative history, however, contains strains of opinion inconsistent with this argument.

The legislative history reveals a number of concerns about judicial interpretation. Such concerns range from statements regarding the inability of courts to interpret statutory provisions as Parliament intended,[258] to a reference that courts evade unpopular provisions through interpretation.[259] These concerns led to calls not only for better drafting but also for judicial access to legislative history.[260]

These anxieties regarding judicial interpretation are accompanied by criticisms directed toward the drafting of the two pieces of legislation.

22, 1975) (need for minister to respond to the concerns of committee members).

257. This attention to detail rests principally upon the performance of the legislative duties of Parliament. It is likely that such attention would be paid even if the courts used legislative history. The attention to detail, however, combined with references to the need for clarity to aid interpretation, permits the conclusion that Parliament's knowledge that the courts would not look to legislative history played some role in the legislative process. This role is not entirely a positive one. *See infra* note 263.

258. *E.g.*, 905 PARL. DEB., H.C. (5th ser.) 1551 (Mar. 4, 1976) (Previous judicial interpretation left gap in the law.); *id.* at 1556 (Parliament must act to declare what the law ought to be in light of judicial interpretation of what the law is.); 362 PARL. DEB., H.L. (5th ser.) 157 (July 1, 1975) ("But no, my Lords, we create a profession that interprets legislation in the way they want it interpreted, and very often it is not the interpretation which the Government intended in the first place."); 361 PARL. DEB., H.L. (5th ser.) 1422 (July 17, 1975) (concern about whether the courts will interpret the language of the Sex Discrimination Act reasonably); *id.* at 1179 (anxiety about leaving the interpretation to the courts); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 31 (Apr. 22, 1975) ("All we are doing is to give the judges the parameters within which to exercise their discretion. These parameters are very generous, because if they were too narrow it would be possible for more narrow-minded—more, shall I say, traditionally-minded, male judges—to interpret them rather overstrictly.").

259. *E.g.*, 905 PARL. DEB., H.C. (5th ser.) 613 (Oct. 27, 1976) (Discussing discovery provision of Race Relations Act, an opponent of the legislation stated, "[t]he clause goes far beyond anything known in the law of England. It is a disgrace. The judiciary finds it intolerable and consequently it has evaded it.").

260. Calls for judicial access to legislative history contained two suggestions. One was that the comments of ministers giving the meaning of a provision be included in the statute. 374 PARL. DEB., H.L. (5th ser.) 551 (Sept. 29, 1976). The Lord Chancellor believed this suggestion would clutter the statute with "gloss" in many instances where it was unnecessary. *Id.* at 552. The House of Lords now permits the courts to examine these statements when they would resolve an ambiguity in the language of the statute. *See supra* note 15. The other suggestion was that each clause in the legislation be accompanied by marginal notes that explained what was meant. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 138 (Apr. 29, 1975) (suggestion of the minister in charge of the legislation).

Because drafting lies primarily in the hands of civil servants of the ministry, which is responsible for the development of the legislation, these criticisms sometimes reflect that the competency of these individuals is being viewed with skepticism.[261]

Most important, the legislative history, particularly the remarks of ministers of the government, highlights the impossibility of parliamentary compliance with the standards of drafting imposed by the judicial rules of interpretation. Ministers stress that Parliament can neither address every conceivable detail nor envision all the circumstances in which the statutory language will apply. They further note Parliament's inability to catalogue every possible interplay of statutory language and terms[262] or to explain adequately the broader goals and purposes of the legislation. Plain-meaning interpretation requires a language that Parliament cannot speak; and by rejecting legislative history, courts refuse to hear a language Parliament can effectively use.

The judicial opinions examined above support the view that Parliament

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261. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 176 (May 6, 1976) ("The minister has established a sympathetic rapport with this side of the Committee by acknowledging that he sometimes finds Civil Service drafting obscure. We take the point . . . that gobbledegook is the appropriate word to apply."); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMMITTEE B, 8 (Apr. 22, 1975) (government amendments drafted in "legalese jargon" "serving only to confuse and mislead those whose job it will be at ground level to interpret it"). Of course, some of these criticisms may reflect disagreement regarding substance, as one minister has suggested. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 177 (May 6, 1976) (ministerial statement).

Others have been critical of the drafting of these civil servants. Rawlinson, *supra* note 7, at 283-84 (quoting Lord Hailsham, who described them as "very dedicated and talented" but further stated that "none of them has probably ever conducted a case at law and certainly none of them has ever tried one." Judicial criticism of the drafting of the legislation is not unknown. *E.g.*, Dr. Banai v. Canadian High Comm'n, E.A.T./65/90 (1990) (transcript) ("[S]ection 8 is not happily drafted.") (also referring to criticism of the same section in Deria v. General Counsel of British Shipping, 1985 I.C.R. 847); Tower Hamlets London Borough Council v. Qayyum, 1987 I.C.R. 729, 731 (E.A.T.) (Section 1(1)(b) "excessively and unnecessarily convoluted").

262. *E.g.*, 374 Parl. Deb., H.L. (5th ser.) 444 (Sept. 29, 1976) ("There comes a point when you have to be prepared to leave it to the courts or to the tribunal. It is quite impossible for Parliament to deal with every detail of the law.") (ministerial statement); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. A, 409 (May 25, 1976) ("As I said earlier, the language used in statutes is not one of mathematical precision and never can be. The judges have recognised that. That is why when Bills become law we rely for their effect upon judicial interpretation.") (ministerial statement); *id.* at 515 (June 8, 1976) (The discussion shows "how difficult it is to devise any form of words which may be included in a statute, as opposed to being put in a White Paper, to perform the twin tasks of being a genuine fulfillment of people's aspirations without exciting more disappointment than benefit in the result.") (ministerial statement); PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 13 (Apr. 22, 1975) (difficulty of containing a policy in precise statutory language) (statement of a committee member).

cannot remove every ambiguity. Careful drafting simply does not eliminate the need for interpretation; and perhaps it does not even significantly reduce the likelihood of judicial misunderstanding of statutory provisions. Overall, the lesson of the opinions interpreting the sex and race discrimination statutes is that even careful drafting leaves a large number of interpretive problems. Indeed, legislative anxiety about restrictive judicial interpretation motivated efforts at comprehensiveness that obscured, rather than clarified, meaning.[263]

V. CONCLUSION

To date, much of the debate regarding the use of legislative history has been both abstract and general. This debate, however, contains a variety of compelling and subtle arguments. Some of it relies on the experience or example derived from the use of legislative history in the interpretation of a number of different statutory provisions. Those who argue in favor of using legislative history point to the beneficial ways in which it has been used, while those who advocate plain-meaning interpretation cite examples of the abuse of legislative history. Both supporters and critics of the use of legislative history are left with a vision of a world in which interpretation of statutes occurs without the use of legislative history. Generally, critics envision a paradise, while supporters see a less beatific vision. These visions, however, only reflect the generalities or examples that buttress each view.

Comparative analysis permits examination of plain-meaning interpretation in ways which are difficult within our own legal system. Within a legal system, such as ours, that relies on the use of legislative history, construction of an experiment that tests the implications of statutory interpretation without legislative history poses a daunting challenge.

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263. The immunity provisions of the Race Discrimination Act illustrate that the anxiety about how the courts would interpret some subsections led to the addition of a subsection which complicated judicial interpretation of the others. *See supra* text accompanying notes 177-91. The government believed that though the allocation of work permits by the Department of Employment was not covered by the Act, the courts might apply it to such allocation and that "[i]t would be manifestly quite wrong to leave this matter to the courts to decide." 374 PARL. DEB., H.L. (5th ser.) 762 (Oct. 1, 1976). The addition of the term "ethnic" seems in part motivated by restrictive judicial interpretation of the Race Relations Act of 1968. Also, there may be instances where Parliament includes unnecessary words in the legislation in order to avoid confusing the courts. *E.g.*, 374 PARL. DEB., H.L. (5th ser.) 139-40 (Sept. 27, 1976). There are hints in the legislative history that the sex discrimination statute may have been drafted more broadly and perhaps more vaguely than necessary in order to guard against restrictive judicial interpretation. PARL. DEB., H.C., OFFICIAL REPORT, STANDING COMM. B, 31 (Apr. 22, 1975). In the United States, one commentator argues that, to the extent judicial abandonment of legislative history discourages Congress from using the regular committee, floor debate, and conference process, "the technical quality of statutory law is likely to deteriorate significantly." Breyer, *supra* note 4, at 873.

Comparative analysis, therefore, becomes necessary for achieving a thorough analysis of the implications of plain-meaning interpretation. Fortunately, the English system offers for observation the world envisioned by the critics of the use of legislative history. That world permits an empirical examination of a substantial body of decisions that interpret specific statutes. Such an examination demonstrates that comprehensive social legislation aimed at reform fares poorly in a world of plain-meaning interpretation. Although a number of caveats should always accompany comparative analysis, the evidence supporting this conclusion is nevertheless substantial and extensive.

This conclusion invites consideration of the ideological conflicts which form the background for the debate regarding the use of legislative history. The debate certainly appears to have an ideological component. Judicial advocates of plain-meaning interpretation include the most conservative justices on the United States Supreme Court—Justices Scalia, Kennedy, and Thomas.[264] Judicial defenders of practices that allow more extensive use of legislative history include more liberal appellate judges such as Patricia Wald and Abner Mikva.[265]

The initial attraction of plain-meaning interpretation rests on the ability of its advocates to link plain-meaning interpretation to judicial restraint and restrictions on the role of judges. This justification also plays the theme of popular sovereignty through the legislature. Restrictions on the courts are seen as the vindication of majoritarian democracy and appeal to a formalism that equates legality with clear standards contained within positive law.

Unfortunately, the examination of the English materials suggests that the opposite of these assertions is more likely the case. Plain-meaning interpretation can increase judicial discretion and enfeeble the legislature. Plain-meaning interpretation increases judicial discretion by freeing courts of the constraints imposed by the context that gave rise to the words used in statute. In interpreting those words, therefore, courts may roam through dictionaries, precedent, and social meanings which are attached to words but disconnected from the goals of the legislation. Plain-meaning interpretation also deprives the legislature of an essential language in explaining its meaning, a deprivation that acts to undermine the legislative process. Again, the evidence to support these conclusions is substantial and extensive.

In light of this evidence, plain-meaning interpretation is seen to obstruct legislative attempts at broad social change. Over time, plain-meaning interpretation will tend to narrow the scope of social legislation. Because plain-meaning interpretation necessarily draws on accepted or "common sense" meanings, it is inherently more conservative than

264. *See supra* note 1.

265. *See* Wald, *supra* note 2; Mikva, *supra* note 5.

legislation that seeks to alter the perspectives or practices underlying those meanings.

Because it denies the legislature a significant language that it can use to direct judicial interpretation, plain-meaning interpretation tends to limit the role of government. Extensive changes in the private sector, including the type attempted by social legislation, become more difficult; and because the implementation of policies may require modifying limitations on the scope of a statute imposed over a period of time, legislative efforts may falter short of implementing the goals of the original legislation if thwarted by plain-meaning interpretation. The ultimate failure of these legislative adjustments could arise from a variety of factors, which include insufficient political support to return to the issues, or simply changing or conflicting legislative priorities. In this sense, plain-meaning interpretation imposes a requirement for legislative majorities to be committed to specific reforms over a considerable period of time.

Plain-meaning interpretation does not neutrally and objectively implement the concepts of legislative authority and judicial restraint. Rather, it strongly reinforces the status quo, particularly as it hinders reform legislation, such as civil rights provisions. In this sense, adoption of plain-meaning interpretation involves ideological judgments, not technical questions.

Comparative analysis permits an evaluation of plain-meaning interpretation that is difficult within our own legal system. This evaluation shows that plain-meaning interpretation increases rather than limits judicial discretion, enfeebles rather than empowers the legislature, supports the status quo, and restricts legislative efforts at comprehensive social reform. Comparative analysis exposes the weaknesses of plain-meaning interpretation and reveals the close relationship between social reform, ideology, and judicial technique.

IT'S BROKE SO LET'S FIX IT: USING A QUASI-INQUISITORIAL APPROACH TO LIMIT THE IMPACT OF BIAS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

Raneta Lawson Mack[*]

Swiss justice works in terms of clock-making, you don't give a fast flywheel the benefit of the doubt or a second chance, you prize up the case, look inside and try to set it back.[1]

I. INTRODUCTION

The character and quality of any system of justice must be measured by its pragmatism and mutability in the face of shifting societal ideologies and values.[2] Long ago, the United States Supreme Court affirmed that "[o]urs is the accusatorial as opposed to the inquisitorial system."[3] That concise declaration has been a constant refrain in decisional precedent and serves as the fundamental underpinning of the United States' criminal justice system. Our accusatorial tradition is anchored by a profound loyalty and desire to protect individual rights guaranteed by our Constitution coupled with an explicit rejection of inquisitorial tactics reminiscent of Star Chamber "jurisprudence."[4] Chief among those fundamental protections is that no

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1. SYBILLE BEDFORD, THE FACES OF JUSTICE 259 (1961). In her book, Bedford recounts her travels to five European countries (France, England, Germany, Austria, and Switzerland) and documents her first hand observations of each country's justice system in operation.

2. *See id.* at 101 (describing how the law "shapes, and expresses, a country's modes of thought, its political concepts and realities, [and] its conduct."); *see also* Edward Tomlinson, *Nonadversarial Justice: The French Experience,* 42 MD. L. REV. 131 (1983) (theorizing that striking the necessary compromise between individual rights and law enforcement is a central question for a criminal justice system because such a balance ultimately affects the system's efficiency and shapes society itself).

3. Watts v. Indiana, 338 U.S. 49, 54 (1949). For other cases reaffirming that principle, see Miller v. Fenton, 474 U.S. 104, 109 (1985); Malloy v. Hogan, 378 U.S. 1, 7 (1964); Rogers v. Richmond 365 U.S. 534, 541 (1961).

4. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974) (discussing how "[t]he privilege against compulsory self-incrimination was developed by painful opposition to . . . Star Chamber proceedings . . . which placed a premium on compelling subjects of the investigation to admit guilt from their own lips . . . ."); *Watts*, 338 U.S. at 54 (describing how the Anglo-American system of justice has been characterized as accusatorial since "it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.").

The Star Chamber, which originated in the judicial branch of the 14th century King's Council, determined its procedures at its discretion and frequently used the oath *ex officio* which required suspects to swear to answer all questions put to them before they knew the nature of the interrogation. *See generally* LEONARD W. LEVY, ORIGIN OF THE FIFTH

person shall "be deprived of life, liberty, or property, without due process of law."[5] The substantive and procedural protections afforded defendants in criminal trials have evolved since our nation's founding. During the 1960s, however, the United States Supreme Court, under the leadership of Chief Justice Earl Warren, effectively revolutionized the nature and quality of the accusatorial system through proactive interpretation and application of the Due Process clause and its protections.[6] To effectuate this transformation, the Court engaged in a level of judicial activism that ultimately "force[d] major changes in the established legal and social order."[7] Thus "constitutional adjudication . . . became an instrument of reform,"[8] with the Court assuming "special judicial responsibility for values and groups not adequately represented in the political process."[9]

The Warren Court's due process ideology breathed life and substance into the notion of an accusatorial system of justice as perhaps no other Court had done in the past and no Court has done since.[10] Because this expansion of due process rights was concurrent with a period of intense social upheaval as the nation struggled with issues of race and civil rights, the jurisprudential enlargement of due process protections in the criminal context is inextricably intertwined with race and the expansion of civil rights. As a result, the legislative grant of basic civil rights and the contemporaneous judicial expansion of due process rights are often either consciously or

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AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 23-24, 101 (1968).

5. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (making the same fundamental protections applicable to the states).

6. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 179-80 (1987). Cox observes that because the "political process had become resistant to libertarian, humanitarian and egalitarian impulses," the Warren Court "came to be influenced by a conscious sense of judicial responsibility for the open and egalitarian operation of the political system." *Id.* at 179. For specific cases demonstrating the Court's proactive interpretation of the Due Process Clause, see Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States"); Gideon v. Wainwright, 372 U.S. 335 (1963) (concluding that the Sixth Amendment guarantee of counsel is fundamental and essential to a fair trial and is therefore obligatory on the states by application of the Fourteenth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule is an essential part of the Fourteenth Amendment).

7. COX, *supra* note 6, at 182.

8. *Id.*

9. *Id.*

10. For example, the Court reformulated the law of confessions, developed standards governing the admission and exclusion of evidence when obtained by means of electronic surveillance, and forced closer scrutiny of standards relating to discovery. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (establishing standards for electronic surveillance); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing standards for police interrogation); Brady v. Maryland, 373 U.S. 83 (1963) (establishing standards relating to prosecutorial suppression of evidence favorable to the accused).

subconsciously merged into a foreboding image of unprecedented rights and protections for minority criminal defendants.[11] This imagery is sustained and, in many instances, exaggerated by a media that consistently depicts the visage of crime as a person of color.[12]

The reality, of course, is that the Warren Court's constitutional doctrine expanded due process rights for all criminal defendants without regard to race. Building upon that premise, it is conceivable that any person arrested has an equal opportunity to avail himself or herself of the substantive and procedural protections afforded by our accusatorial system of justice. Consequently, although perhaps not desirable, factually guilty criminal defendants would have an equal chance to escape punishment or, alternatively, receive a reduced punishment as a direct result of an encroachment upon one or more constitutionally protected rights. Despite these expanded protections and the perception that these protections confer unwarranted benefits on minority criminal defendants, numerous studies reveal that minorities and whites are afforded differential treatment at almost every stage of the criminal justice process, beginning with arrest and culminating, in some instances, in execution.[13] Indeed, one of the more

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11. *See, e.g.*, Alexander Wohl, *Metamorphosis: The Court, The Bill, and Liberty for All*, 77 A.B.A. J., Aug. 1991, at 42 (discussing how concern for giving black citizens equal treatment and equal rights "spilled over" to fair treatment of black defendants in the criminal justice system); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW v (1978) (predicting that the Warren Court will be remembered as a period of "exaggerated activism on behalf of individuals and minorities").

12. *See, e.g.*, Robert Elias, *Race, Crime and the Media*, THE HUMANIST, Jan. 1994, at 3. Elias examined every general crime story appearing in *Time*, *Newsweek*, and *U.S. News & World Report* from 1956 to 1991 and found that each magazine most frequently described and visually depicted blacks and other non-white minorities as criminals, even though these groups do not commit the majority of crimes. In contrast, the magazines described and pictured victims as mostly white people. *See also* Frederick H. Lowe, *Group Aims to Change Portrayal of Black Men*, CHICAGO SUN-TIMES, Aug. 18, 1993, at News 12 (noting how a Northwestern University study found that 77% of television stories about black men concern crime compared with 42% for white men).

13. *See, e.g.*, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988). After comprehensively examining every component of the criminal justice system, this series of articles concludes that there is evidence that discrimination exists against African Americans at almost every stage of the criminal process. *See also* Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166-82 (1994) (concluding on the basis of empirical studies that justice is by no means guaranteed for minorities in the criminal justice system); Norval Morris, *Race and Crime: What Evidence Is There that Race Influences Results in the Criminal Justice System*, 72 JUDICATURE 113 (1988) (opining that the law and order movement is, in operation, anti-black and anti-underclass); Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982) (comparing arrest rates to rates of incarceration and concluding that a significant portion of racial disparity can be attributed to racial discrimination).

compelling statistics reveals that while three times as many blacks are arrested for crimes, there is a ratio of seven blacks to each white in prison.[14] Moreover, observers predict that if the prison population continues to rise at its current annual rate of increase, then by the year 2020, "4.5 million African-American men and 2.4 million Hispanic men will be incarcerated [yielding] *a prison population of minority men about five times as large as the prison population of all races combined today.*"[15]

Clearly, these appalling statistics and predictions reveal that the reality of "due process" for minority criminal defendants is, very simply, one of being "processed" through the system. Furthermore, a careful examination of our criminal justice system discloses that this "processing" can, in part, be attributed to the myriad levels of discretion that arise throughout various stages of the criminal justice process.[16] Discretionary decision-making inherently permits the interpolation of both subtle and overt bias and prejudice into the process. Thus, for certain categories of defendants, the expansive protections incorporated into our accusatorial system of justice ring hollow and meaningless when juxtaposed against the unfettered discretion that pervades the system.

From a scholarly perspective, it is neither unreasonable nor unprecedented to examine our criminal justice system and conclude that, in many respects, it is a microcosm of societal biases and prejudices.[17] As a

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14. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *Prisoners in 1994* 1 (1995). The statistics reveal that the incarceration rate for blacks is 1471 per 100,000 black U.S. residents as compared to 207 per 100,000 white U.S. residents.

15. THE REAL WAR ON CRIME, THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 106 (Steven R. Donziger ed., 1996) [hereinafter NCJC REPORT]. The National Criminal Justice Commission (NCJC), using the actual racial/ethnic makeup of prison and jail inmates in 1992, projected forward to the year 2020 given an average increase of eight percent per year in the total prison population. The NCJC notes, however, that this prediction is "obviously speculative." *Id.*

16. *See* Christopher Johns, *Juvenile Justice Teaches Race Lesson,* ARIZONA REPUBLIC, Dec. 3, 1995, at H3 (discussing how discretion begins at the arrest stage for minority juveniles and, once in the juvenile justice system, "one discretionary decision influences others. The effect is cumulative."); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited,* 64 U. COLO. L. REV. 743, 746 (1993) (noting how with some crimes there is more room for discretion which also offers the opportunity for the introduction of racial discrimination); *Developments in the Law: Race and the Criminal Process,* 101 HARV. L. REV. 1472, 1520 (1988) (discussing how racial bias can enter the system through a myriad of potential channels); WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984) (Bowers observes that discrimination does not occur only at the imposition of the death penalty, but as the result of a great number of discretionary decisions by prosecutors along the path of charging, indicting, and plea bargaining).

17. *See, e.g.,* Michael Tonry, *Race and the War on Drugs,* 1994 U. CHI. LEGAL F. 25, 27 (1994) (arguing that "the War on Drugs, because of its implications for black Americans, should never have been launched" and that consequently "American drug policies should be

result, many have argued for sweeping changes in various aspects of the criminal justice system in order to significantly decrease or eliminate the impact of those biases.[18] None, however, have critically examined the possibility, and potential viability, of a radical shift away from our accusatorial system of justice as a remedial response to systemic bias. To frame the issue more specifically, would the incorporation of inquisitorial elements significantly reduce the level of discretion and result in more race-neutral outcomes in our criminal justice system?[19] This Article contends that a quasi-inquisitorial system of justice, patterned after the revised Italian Code of Criminal Procedure, would provide a more fair, equitable distribution of justice while also promoting the goal of seeking truth in the criminal justice system.[20]

To develop this theory, this Article, in part II, will examine some of the fundamental distinctions between accusatorial and inquisitorial systems of justice through an examination of the ideologies and values that support each system as well as the roles and responsibilities of the primary players in each system. Then, in part III, this Article will discuss some of the more salient features of the Italian criminal justice system and, more specifically,

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radically altered"); Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor,* 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (discussing how race should be considered a mitigating factor to depart from sentencing guidelines to compensate for the impact of racism throughout the criminal justice system); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice,* 51 WASH. & LEE L. REV. 509, 515 (1994) (arguing that one response to bias and discrimination in the criminal justice system is the elimination of the exclusion of people of color from jury service through peremptory strikes); Blumstein, *supra* note 16, at 759-60 (observing that there is a high rate of intervention with blacks in the criminal justice system and concluding that our nation's stability depends upon our ability to identify why this occurs and find a means to redress the problem); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases,* 67 TUL. L. REV. 1739, 1804 (1993) (discussing how "to ameliorate the effects of racial imagery on criminal trials" and proposing either an ethical provision or a race shield statute that would forbid the use of such imagery).

18. *See* Johnson, *supra* note 17.

19. The term "inquisitorial" has significant historical baggage in that it evokes images of heresy persecutions and is surrounded "with an aura of dread and mistrust." Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* 121 U. PA. L. REV. 506, 557 (1973). In its generic sense, however, and as it is used in this Article, it connotes a procedure in which the judge is expected to take the fact-finding initiative both before and during the trial. The term "inquisitorial" thus signifies that the court performs the task of inquiring. *See, e.g.,* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 1 (1977); GERHARD O.W. MUELLER, *The Position of the Criminal Defendant in the United States of America, in* THE ACCUSED: A COMPARATIVE STUDY 87 (J.A. Coutts ed., 1966).

20. As will be explored more completely later in this Article, a quasi-inquisitorial system is one in which the basic accusatorial structure is retained and modified by the infusion of corrective inquisitorial elements. *See infra* notes 154-173 and accompanying text.

the Italian Code of Criminal Procedure as a theoretical model for transformation of our accusatorial system. Finally, in part IV, this Article will systematically analyze how the goals of impartiality and fairness might be more aptly promoted through the adoption of a quasi-inquisitorial system of justice.

II. ACCUSATORIAL V. INQUISITORIAL

A critical examination and comparison of accusatorial and inquisitorial systems of justice necessarily begins with a discussion of the ideological and value-laden belief systems that form the foundation of each system.[21] The ideological component is a crucial and particularly revealing aspect of the analysis because it contributes to the overall cohesiveness and functioning of the system.[22] While each system comprehends similar actors within the system, the role that each actor plays, and the core ideologies that underlie the allocation of responsibilities accompanying those roles, differentiate each system. This section will identify the underlying ideologies and values of each system and substantively compare and contrast five major components of each criminal justice system: the police, the prosecution, the defense, the trier of fact, and the accused.

A. *Ideology and Values*

The paradigmatic accusatorial system of justice emphasizes protection of individual rights through the mechanisms of substantive and procedural

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21. The discussion of inquisitorial systems is not meant to describe any particular country, and indeed, although inquisitorial systems provide fairly simple models of procedure, there is no single model to which all countries conform. *See* Thomas Volkmann-Schluck, *Continental European Criminal Procedure: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 10 (1981). This Article will describe some of the most common features of an inquisitorial system.

22. Since ideology constitutes the "glue" that holds the system together, piecemeal structural substitutions that are inconsistent with the ideological basis of a particular system are likely to be impracticable and ineffective. *See, e.g.*, Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1145 (1995). In his article, Moskovitz presents a dialogue between lawyers from the United States and Europe which compares their respective justice systems. At one point in the conversation, one of the characters observes:

> People often look at an isolated aspect of a system, find it attractive, and assume that it may be transferred intact to another system. This is a mistake. Both the [accusatorial] and the inquisitorial systems are integrated systems. Each piece is affected and supported by every other piece. Transfer a piece without its support system, and it will probably fail or distort some other features that you didn't intend to affect.

Id.

due process.[23] In practical terms, once a criminal investigation has centered on a particular suspect, that individual is cloaked with numerous constitutionally guaranteed safeguards that attempt to "level the playing field" between the government and the accused.[24] Ideologically, this translates into an orientation toward essential fairness throughout the criminal justice process which, in turn, engenders confidence that a just result will be obtained.[25] This essential fairness is manifested by the fact that even in instances when the defendant may have been caught "red-handed," the government must nevertheless shoulder the entire burden of gathering evidence against the accused, who may sit silently by taking full advantage of the presumption of innocence.[26] Moreover, the accused is guaranteed the right to counsel who may assist in exercising each of the constitutionally guaranteed rights by challenging, among other things, the government's collection and presentation of evidence.[27] In short, the accused is afforded maximum protection even at the expense of a factually reliable result.[28] This illustrates that the principal objective of an accusatorial system is not necessarily to seek the truth, but to ensure that the accused has been treated fairly, and that correspondingly, the system has produced a fair and just

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23. The U.S. Supreme Court has recognized that the accusatorial system distinguishes itself from the inquisitorial system because it provides protections in the form of the privilege against compelled self-incrimination, due process, and the presumption of innocence. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 109-110 (1985) (due process protection in the context of police interrogation); Miranda v. Arizona, 384 U.S. 436, 459-60 (1966) (applying Fifth Amendment privilege against compelled self-incrimination to police interrogation); Rogers v. Richmond, 365 U.S. 534, 541 (1961) (the use of coerced confessions violates due process). *See also* Moskovitz, *supra* note 22, at 1189 (describing how rules such as Miranda and the exclusionary rule are fundamental rights that protect all of us and suggesting that "[i]f they make it a little harder to find the truth . . . it's well worth the price.").

24. *See, e.g., Miranda*, 384 U.S. at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

25. *See* Moskovitz, *supra* note 22, at 1187-88 (describing how justice emerges from every actor playing his role properly in the accusatorial system); *but cf.* Rollin M. Perkins, *Absurdities in Criminal Procedure,* 11 IOWA L. REV. 297, 332-33 (1926). Perkins observes somewhat cynically that the accusatorial system allows all kinds of lawyer "tricks and schemes and surprises and concealments" assuming that the result of this combat of wits will be that right will prevail, provided only the rules of the game are carefully observed. *Id.*

26. *See, e.g.*, Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial,* 67 NOTRE DAME L. REV. 403, 483 (1992) (discussing how "[t]he failure of American defendants to testify has become so common that even the public rarely notices" when the defendant fails to take the stand).

27. *See* U.S. CONST. amend. VI; *see also* Van Kessel, *supra* note 26, at 464 ("Highly aggressive and contentious counsel who readily assert all possible objections and arguments make the trial process a long battle between semantic warriors which, though often entertaining, does little to further the trial's main objectives.").

28. Van Kessel, *supra* note 26, at 464.

result.[29]

One major irony that attends the accusatorial system and, in many instances, threatens the fairness of any outcome is the pervasiveness of discretionary decision-making.[30] While the accusatorial system emphasizes fairness and due process, it also to a large extent relies upon the discretion of the actors within the system. Although such discretion clearly has the potential for abuse, particularly at the arrest and charging stages, the accusatorial system ostensibly relies upon its inherent adversarial nature as a self-correcting mechanism to ferret out such abuses.[31]

In contrast, the foremost objective of an inquisitorial system is to seek the truth.[32] In fact, so important is a factually reliable result that the system, in practice, relies heavily upon the most likely and accurate source of that information—the accused.[33] Additionally, in furtherance of its truth seeking objective, the inquisitorial system "erects few evidentiary barriers that restrict the information the judge can consider in determining guilt."[34] Therefore, "[c]ontinental systems of criminal justice have no equivalent of the Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence."[35] Similarly, "[c]onstitutional

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29. *See* Damaška, *supra* note 19, at 525. Damaška concludes that the great barriers to conviction established by the accusatorial system reflect a "conscious sacrifice of factfinding accuracy for the sake of other values." *See also* John Thibaut & Laurens Walker, *A Theory of Procedure,* 66 CAL. L. REV. 541, 566 (1978) (observing that the accusatorial system is most effective in seeking "distributive justice"). *Cf.* Peter Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies,* 72 GEO. L.J. 185, 198 (1983) (arguing that a truth discovery label "ignores the moral content and force of substantive guilt and the resulting need for a process that evaluates the moral quality of the defendant's actions").

30. *See supra* note 16 and accompanying text.

31. *But cf.* Van Kessel, *supra* note 26, at 463 (describing how many of the formal and technical rules, while "designed to guarantee a fair contest and just result, actually tend to delay and disrupt the presentation of evidence and to distract the jury from the discovery of the facts").

32. *See, e.g.,* Moskovitz, *supra* note 22, at 1128 (the inquisitorial system is described as such because it is based upon the tribunal's duty to inquire to find the truth); Damaška, *supra* note 19, at 586 (singular importance of inquisitorial system is ascertaining the truth at trial); *but cf.* Arnella, *supra* note 29, at 196-97 (arguing that equating truth with historical fact assumes "a pure guilt or innocence model of criminal procedure").

33. *See* John H. Langbein, *The Criminal Trial Before the Lawyers,* 45 U. CHI. L. REV. 263, 283-84 (1978). Langbein, in describing why the accused is such an important testimonial resource, has concluded that, "[i]n general the accused will virtually always be the most efficient possible witness at a criminal trial. Even when he has a solid defense, the accused has usually been close to the events in question, close enough to get himself prosecuted." *Id.* at 283.

34. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation,* 17 YALE J. INT'L L. 1, 7 (1992).

35. *Id.*

exclusionary rules, such as those that have been read into the Fourth Amendment . . . are anathema."[36] Essentially then, the paradigmatic inquisitorial system reflects a singular focus on the ascertainment of truth that effectively subordinates the protection of individual rights.

One significant feature that supports the goal of a factually reliable result is the limitation on discretion within the system. Because the actors must perform certain crucial functions, the system exhibits a uniformity in the treatment and processing of offenders.[37]

In summary, an examination of each system and its accompanying ideologies and values demonstrates that portions of one system may not be successfully transported and grafted upon the other without a simultaneous reorientation of the values that underlie each system. The next sections will explore the specific actors and how their respective roles express the ideologies and values of each system.

B. *The Actors and Their Roles*

1. *The Police*

In an accusatorial system of justice, the police perform the primary investigative function.[38] They are often the first point of contact for a suspect and, in general, determine whether any given encounter will culminate in an arrest.[39] As part of their investigative role, the police may, within constitutional boundaries, detain and search a suspect and conduct searches of a suspect's home and other locations that may contain evidence of criminal activity.[40] Additionally, the police may seek to obtain statements

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36. *Id.*

37. *See, e.g., id.* at 9-10 ("The [inquisitorial system's] emphasis on uniform results manifests itself in a strong aversion to prosecutorial discretion." Similarly, "a system of plea bargaining like that existing in the United States is viewed as fundamentally inconsistent with the sacrosanct [inquisitorial] values of uniformity and truth.").

38. Contrary to popular belief, most police officers do not spend the bulk of their time fighting street crime. In fact, about 75% of police time is spent on routine patrol or administrative tasks in the police station. *See* DAVID BAYLEY, POLICE FOR THE FUTURE 15-35 (1994).

39. NCJC REPORT, *supra* note 15, at 161 (discussing how police occupy a "frontline position" in the criminal justice system and "have the power to decide how to apply the law and determine the crime-fighting agenda of a community").

40. *See id.* (noting how the police have wide discretion to decide who will be stopped and searched and which homes will be entered). With respect to constitutional limitations on police-citizen contacts, see U.S. CONST. amends. IV and V. For judicial interpretations of those limitations, see generally California v. Acevedo, 500 U.S. 565 (1991) (establishing probable cause standard for searches of vehicles); Illinois v. Gates, 462 U.S. 213 (1983) (establishing probable cause standard for searches of homes); Terry v. Ohio, 392 U.S. 1 (1968) (establishing standard for detentions and searches of suspects).

from the suspect and any witness to the crime concerning the criminal activity.[41] Typically, once enough evidence has been gathered to support a charge against the accused, the police turn the investigation over to the prosecutor's office for further proceedings.

It is at this initial stage that the effects of discretionary authority emerge. While much of the police-suspect interaction is constitutionally circumscribed,[42] no such limitations govern the decision to arrest. In fact, statistical evidence reveals—and most police officers "freely admit"—that race is used as a factor when police decide to follow, detain, search, or arrest.[43] The improper use of racial stereotypes can result in "unfounded" arrests. Unfounded arrests usually include those arrests in which the suspect was innocent, there was inadequate evidence, or there was an illegal search or seizure.[44] One empirical study of racial disparities and unfounded arrests discovered that "[f]or African Americans in California, the rate of unfounded arrests was four times greater than that of whites."[45] Additionally, in some urban areas, the rate is an alarming twelve times greater for African Americans.[46] While there are alternative explanations for some of these disparities, the sheer magnitude of the difference, coupled with the casual admission by police officers, indicates that race is nonetheless a significant contributing factor.

Traditionally, under most inquisitorial systems, the bulk of investigatory responsibility rests with the public prosecutor or examining magistrate.[47] In this capacity, the prosecutor or examining magistrate is not

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41. Officers must observe a specific set of guidelines in order to obtain constitutionally admissible evidence during an interrogation of the suspect. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."). *But cf.* Oregon v. Elstad, 470 U.S. 298 (1985) (an initial failure to give *Miranda* warning does not render inadmissible statements made after the warning is given); New York v. Quarles, 467 U.S. 649 (1984) (establishing a public safety exception to *Miranda*).

42. *See supra* notes 40-41 and accompanying text.

43. *See Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1496 (1988). Some officers believe that the use of race is a legitimate factor and point to the racial disparity in arrest patterns as supporting evidence. This argument, however, is patently circular since racial stereotypes influence police to arrest minorities, thereby creating the arrest statistics needed to justify the racial stereotype. *See* NCJC REPORT, *supra* note 15, at 109.

44. NCJC REPORT, *supra* note 15, at 109.

45. *Id.*

46. *Id.* In the city of Oakland, unfounded arrests of African Americans occurred at 12 times the rate of whites, while Los Angeles and San Diego had rates of seven and six times the rate of whites respectively. *Id.*

47. In France, the examining magistrate (*juge d'instruction*) is a judge who investigates the case before trial. In that capacity, she interviews all witnesses, writes reports, and oversees the collection of physical evidence and performance of any necessary scientific tests.

acting as an advocate, but as an impartial fact-finder for the state. The prosecutor collects evidence, interviews witnesses, and compiles this information into a comprehensive case file (the *dossier*) which is then provided to the court for a determination as to whether there is "reasonable cause" to proceed to trial.[48] It is notable that recent modifications in some inquisitorial systems permit the police to take a more active role in pretrial investigations.[49] Thus, while the prosecutor maintains a supervisory role, the police will usually conduct the actual investigation which includes interviewing and interrogating suspects and collecting physical evidence.[50] Since the determination of truth is the primary goal of the inquisitorial system, the investigatory stage is considered crucial because it allows for the initial collection of truth-producing evidence and the compilation of that evidence into a *dossier* which the judge will rely upon almost exclusively in conducting the trial and in reaching a decision.[51]

2. *The Prosecution*

In an accusatorial system of justice, the prosecutor's role, in theory, is to seek justice.[52] As representative of the people, the prosecutor is responsible for evaluating the evidence and determining whether the facts merit charging the accused with a crime.[53] It has long been recognized that

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The examining magistrate then prepares a *dossier* which she gives to the judge who will preside at trial. Moskovitz, *supra* note 22, at 1131. In Germany and Italy, the public prosecutor is in charge of the investigation. Van Kessel, *supra* note 26, at 421.

48. Judicial review of the prosecutor's decision to charge is quite common in European countries. Van Kessel, *supra* note 26, at 422 n.69. As will be discussed later, this level of review establishes a significant check on prosecutorial bias in the decision to prosecute. *See infra* notes 145-47 and accompanying text.

49. *See* LANGBEIN, *supra* note 19, at 11-12 (discussing how the police now initiate and develop investigations, including interrogation of witnesses and the accused). *See also* Pizzi & Marafioti, *supra* note 34, at 11 (observing that the Italian Code places the public prosecutor, rather than the police, in control of the investigation, although the police are at the prosecutor's disposal).

50. LANGBEIN, *supra* note 19, at 11-12.

51. The *dossier* is of such significance because it provides the "umbilical cord" that joins the investigatory and adjudicatory stages to the extent that the adjudication is often "a trial of the dossier rather than of the accused." J.A. Coutts, *The Public Interest and the Interests of the Accused in the Criminal Process, in* THE ACCUSED: A COMPARATIVE STUDY 1, 4 (J.A. Coutts ed., 1966).

52. The prosecutor is regarded as both an administrator of justice and an advocate, having a duty to seek justice, not merely to convict. *See* I ABA STANDING COMM. ON ASS'N STANDARDS FOR CRIM. JUSTICE, ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (2d ed. 1986). *See also* Berger v. United States, 295 U.S. 78, 88 (1935). In *Berger*, the Court acknowledged that while a prosecutor should prosecute with earnestness and vigor, the prosecutor's interest "is not that [he] shall win a case, but that justice shall be done." *Id.*

53. Prosecutors are governed by an ethical duty which provides that a prosecutor must

the role of prosecutor carries with it very broad discretionary authority.[54] Such discretionary control realistically makes it impossible for a prosecutor to treat every offense and offender alike. Instead, the prosecutor may make accommodations for certain mitigating or aggravating factors that impact the charging decision.[55]

Since myriad factors can affect the decision to prosecute, it is perhaps not surprising that biases and prejudices can infiltrate the decision-making process.[56] In fact, the majority of empirical studies have concluded that racial discrimination can, and often does, play a role in the prosecutorial decision.[57] For example, a study of 1017 homicide defendants in Florida found that crimes involving white victims and African American offenders were much more likely to be upgraded in severity by the prosecutor. The more serious charges often resulted in a more aggressive prosecution and lengthier sentences. The study also found that crimes involving African American victims and white offenders were more likely to be downgraded.[58]

At trial, the adversarial mechanics of the accusatorial system become apparent as the prosecutor marshals evidence against the defendant in an effort to prove the case beyond a reasonable doubt.[59] As in the pretrial stage, the prosecutor acts as agent and attorney for the people, and typically this role becomes even more pronounced and adversarial in the context of the trial when it is clear that the defendant has chosen to put the prosecution to

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not institute criminal charges "when he knows or it is obvious that the charges are not supported by probable cause." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1984); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1984).

54. The capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.2(a), at 160 (1984). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). In *Bordenkircher*, the Court acknowledged that, in our criminal justice system, the government retains broad discretion as to whom to prosecute and so long as there is probable cause to believe the accused committed the offense, "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id. Accord* United States v. Batchelder, 442 U.S. 114, 124 (1979); Oyler v. Boles, 368 U.S. 448, 456 (1962).

55. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (reasoning that factors that affect the decision to prosecute, such as strength of the case, the general deterrence value, and enforcement policies and priorities, are not readily susceptible to judicial review).

56. The Supreme Court has also recognized the likelihood that biases may affect the decision to prosecute and has concluded that, although prosecutorial discretion is broad, it is not unfettered and is subject to constitutional restraints. *See Batchelder*, 442 U.S. at 125. Specifically, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler*, 368 U.S. at 456.

57. *See Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1526 (1988).

58. *Id.*

59. For a discussion of the considerable pressure faced by prosecutors to compile impressive win-loss records, see Van Kessel, *supra* note 26, at 442.

its proof.[60] It is likely that many prosecutors would concede that, at this stage, winning the case becomes at least as important as seeking justice.[61]

With respect to the potential impact of bias at trial, the various components of the criminal trial process permit the actualization of the bias that begins with the initial decision to prosecute. Specifically, if a prosecutor elects to charge a defendant with more serious charges which carry stiffer penalties, it is likely that the prosecutor will aggressively prosecute the case in order to achieve conviction—the most favorable result.[62] Aggressive prosecution tactics could include, among other things, an unwillingness to plea bargain, maximizing peremptory and "for cause" challenges during *voir dire*, and contentious cross-examinations. Each of these trial tactics is either consciously or unconsciously driven by the bias which is initially interposed by the decision to prosecute.

The prosecutor's pretrial responsibilities in an inquisitorial system are primarily limited to investigating the crime and preparing the *dossier*.[63] However, once the formal trial process begins, the prosecutor's role in the inquisitorial system is very much diminished as compared with that of the accusatorial system. As explored more completely below, because the judge takes the lead in questioning the accused and the witnesses, the prosecutor is often relegated to "asking occasional follow-up questions or suggesting other lines of inquiry."[64] Perhaps more interestingly, the prosecutor does not have any apparent stake in the outcome of the proceedings. In her limited role, the prosecutor's responsibility is simply to "assist the tribunal in finding a just result, not to 'win.'"[65]

One critical distinction in this system, however, is that the prosecutor is "required to take action against all prosecutable offenses, to the extent there is sufficient factual basis."[66] This rule is commonly known as the rule of compulsory prosecution. Such an imperative essentially forbids the "prosecutor the discretion to refuse to prosecute in cases where adequate

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60. *See id.* (arguing that prosecutors find it difficult to stand apart from the overall contentiousness of the adversary trial process and are likely to pursue their goal with "devotion equal to that of the defense").

61. *See id.* at 441 ("By the time a prosecutor brings a serious criminal case before a jury, it is exceedingly rare that the prosecutor has not become convinced of the defendant's guilt . . . [and] reasonably believe[s] that justice means a conviction . . . .").

62. *See supra* note 58 and accompanying text.

63. *See supra* notes 47-48 and accompanying text.

64. Pizzi & Marafioti, *supra* note 34, at 7. For a discussion of the judge's responsibilities in an inquisitorial system, see *infra* notes 94-97 and accompanying text.

65. Moskovitz, *supra* note 22, at 1129. The fact that the prosecutor doesn't have any apparent stake in the outcome of the proceedings naturally reduces the level of contentiousness in the trial and results in a measure of tempered advocacy. *See* Van Kessel, *supra* note 26, at 442.

66. LANGBEIN, *supra* note 19, at 89.

incriminating evidence is at hand."[67] Additionally, and more importantly, it substantially minimizes the effect of external influences on the decision to prosecute.[68] In some countries, the rule of compulsory prosecution is supplemented by the authorization of citizen prosecutors, as well as the right to administrative and judicial review of the decision not to prosecute.[69]

3. *The Defense*

Defense attorneys bear the brunt of the most stinging criticisms directed toward the accusatorial system. This is chiefly because a defense attorney's role is to zealously represent his client, the accused.[70] The accusatorial system accepts and, in many instances, expects that such zealous representation will not always have as its focal point a search for the truth.[71] Instead, defense attorneys largely serve as the medium through which the accused exercises both substantive and procedural rights.[72] In that capacity,

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67. *Id. See also* Pizzi & Marafioti, *supra* note 34, at 9-10 (If the prosecutor believes there are reasons for not prosecuting the case, the prosecutor must still file formal charges and then seek dismissal by a judge who has the authority to review the prosecutor's decision.).

68. *See* LANGBEIN, *supra* note 19, at 91-92. Langbein describes the dual function of the rule of compulsory prosecution as follows: "The rule of compulsory prosecution appeared simultaneously, both to rid the [prosecutorial] monopoly of its dangers for the citizen and to protect the prosecutor from political intervention. . . . The rule of compulsory prosecution frees him from demands for partiality from within the executive, while opening him to demands for impartiality from without." *Id.*

69. *See generally id.* at 100-05.

70. The ABA Model Rules of Professional Conduct provide that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1984). Similarly, the Model Code of Professional Responsibility provides that a lawyer must "represent his client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1984).

71. On the role of defense counsel in the accusatorial system, Justice Byron White observed that:

> we also insist that he defend his client whether he is innocent or guilty. . . . [Further,] [d]efense counsel need present nothing, even if he knows what the truth is. . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.

United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., dissenting in part and concurring in part); *see also* William B. Enright, *The Much Maligned Criminal Lawyer and/or the Stake of the Profession in Criminal Justice*, 46 CAL. ST. B.J. 720, 723 (1971) (describing the role of defense counsel as one of a gladiator battling for victory in which guilt or innocence is irrelevant).

72. Prior to trial, a defense attorney is obligated not only to counsel the defendant, but also to "discover" the prosecutor's case against the defendant, collect evidence that supports any theory of the defense, and challenge any constitutional violations that may have occurred during the pretrial stage. This latter responsibility essentially ensures that the police and the prosecution have meticulously observed all of the constitutional protections afforded the

defense attorneys perform such an exceptionally important role in the accusatorial system that the United States Supreme Court has established that the right to counsel is one of the fundamental rights that inheres in an accusatorial system of justice.[73]

At trial, defense attorneys become a part of the "ritualized aggression" that characterizes the adversarial trial process.[74] As one commentator observed, "[f]or defense attorneys, courtroom victory usually translates into obtaining an acquittal,"[75] and "[p]ursuing acquittal of the guilty while avoiding presentation of clearly perjured testimony is admired as one of the greatest achievements of the advocate's art."[76]

In inquisitorial systems, the defendant, prior to trial, is also entitled to counsel and certain other substantive protections.[77] However, unlike the accusatorial system, the responsibility of a defense attorney is conjoined with a search for the truth. In furtherance of that goal, defense counsel generally assists the investigation by advising the accused to answer truthfully.[78] Thus, although every defendant has a right to counsel, counsel is considered an important instrumentality in the search for the truth rather than an impediment to that goal.

At the trial stage, the defense counsel's role, like that of the prosecutor, is similarly limited. Practically speaking, defense counsel's participation is required only if he believes that the tribunal has somehow overlooked or misrepresented crucial evidence. In that rare instance, defense counsel may present additional witnesses and testimony in the defendant's behalf.[79] Consistent with an emphasis on a search for the truth, defense counsel generally does not perceive the trial process as a win-lose

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accused.

73. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing that the Sixth Amendment right to counsel is fundamental to a fair trial and requires the appointment of counsel for indigent defendants); *see also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending *Gideon* to any offense for which a sentence of imprisonment is authorized).

74. Van Kessel, *supra* note 26, at 435 (quoting SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 201 (1981)).

75. *Id.*

76. *Id.* at 436.

77. *Id.* at 412 (describing how nearly all continental countries now afford the accused the right to counsel, provide a form of the right to silence, and establish a presumption of innocence); *see also* Pizzi & Marafioti, *supra* note 34, at 8 ("While the defendant has a right to refuse to answer any questions, such refusals are exceptional . . . .").

78. *See* Moskovitz, *supra* note 22, at 1138; MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 127-29 (1986) (observing that the presumption in inquisitorial systems is that the defendant should cooperate with the trial judge and answer questions completely).

79. Langbein noted that while "[d]efense counsel usually does a little more questioning of witnesses at trial [than the prosecutor does,] he too is customarily a relatively passive forensic performer." LANGBEIN, *supra* note 19, at 64 (quoting John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 448 (1974)).

proposition, and accordingly does not have any apparent stake in "winning" a particular case.[80]

4. *The Trier of Fact*

Perhaps the most striking and influential distinction between the two systems of justice lies in the role of the trier of fact. In an accusatorial system, the judge acts as an umpire or referee, guaranteeing that all participants are playing by the rules.[81] The judge must remain impartial throughout the proceedings and intercedes only to decide various evidentiary matters as they are submitted by the parties.[82] Typically, the judge does not otherwise comment on the strength or weakness of the evidence and asks questions of the witnesses only in exceptional circumstances.[83] Judges in the accusatorial system are thus passive umpires in the trial process.

In instances in which she must also act as the trier of fact, the judge weighs the evidence as presented by the parties, applies the relevant law, and renders a decision as to guilt or innocence. In theory, the judge has no stake in any particular outcome of a trial.[84]

When the defendant elects to exercise the constitutional right to trial by jury, the accusatorial system provides a mechanism whereby lay citizens are selected to participate in the decision-making process.[85] After an initial

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80. The reason that lawyers in an inquisitorial system do not share the same commitment to winning their cases as their accusatorial counterparts is that the judge typically dominates the proceeding, and the lawyers do not regard the case as theirs to win. *See* Van Kessel, *supra* note 26, at 442.

81. *Id.* at 429. For a historical perspective on the development of the passive judiciary, see generally SIR PATRICK DEVLIN, TRIAL BY JURY (1966) (observing that a lack of trust in an active judiciary can be traced to colonial times when citizens were hostile toward judges who served at the pleasure of the Crown).

82. *See* Van Kessel, *supra* note 26, at 429.

83. *See* FED. R. EVID. 614. This rule grants judges the authority to call and question witnesses. This authority, however, is rarely used and is "often discouraged by reversals." Van Kessel, *supra* note 26, at 429.

84. *But see* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights,* 61 N.Y.U. L. REV. 535, 551 (1986). Justice Brennan opines that state judges are often more immediately subject to majoritarian pressures than federal court judges and are correspondingly less independent than their federal counterparts. *Id.*

85. *See* U.S. CONST. art. III, § 2 ("The trial of all crimes except in cases of impeachment shall be by jury . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . ."); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment's guarantee.").

screening for bias or partiality, lay jurors are expected to weigh the evidence, apply the law, and return a verdict as to guilt or innocence.[86] The jurors' responsibilities mirror those of the judge in an accusatorial system. The critical difference, however, is that almost all lay jurors lack education and training in the intricacies of law.[87] Consequently, they must be "instructed" on the relevant law and its various complexities in the criminal trial process.[88] This difference is significant in the sense that it provides a basis for confusion and misapplication of legal standards as well as an opportunity to inject a multitude of societal biases and prejudices into the decision-making process.[89] Notwithstanding the greater likelihood of bias, the accusatorial system places such confidence in the jury system that, except for very limited circumstances, a jury's decision is considered sacrosanct.[90]

Once there has been a determination of guilt, the judge is responsible for determining the sentence. Using the prosecutor's sentencing recommendation as a baseline and considering any mitigating or aggravating

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86. This initial screening is accomplished through the *voir dire* process which allows prospective jurors to be questioned by the court or counsel as to any biases or prejudices that might impede the jurors' ability to weigh the evidence in an impartial manner. *But cf.* Irvin v. Dowd, 366 U.S. 717 (1961). In *Irvin*, the Court concluded that jurors were not required to be totally ignorant of the facts and issues involved. Instead, the Court reasoned that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

87. *See, e.g.*, LANGBEIN, *supra* note 19, at 119 ("In common law systems lay judges sitting as the jury formulate a verdict without the participation of legally trained persons and render the verdict without stating reasons."); *see also* Steve Bertsch, *Fair Verdict Likelier from Random Jury*, WASHINGTON TIMES, Oct. 10, 1994, at 18 (discussing how the current jury system actively eliminates the most knowledgeable and well-informed individuals because they are difficult to convince of a bad case).

88. Describing the process of instructing the jury, Judge Curtis Bok wrote, "[j]uries have the disadvantage . . . of being treated like children while the testimony is going on, but then of being doused with a kettleful of law during the charge that would make a third-year law student blanch." CURTIS BOK, I TOO, NICODEMUS 261-62 (1946).

89. Sir Patrick Devlin, in discussing the English jury, concluded that trial by jury promotes justice by a device in which a "large body of [anonymous] men . . . to whom the law means something but not everything . . . give their decision in a word and without reason." DEVLIN, *supra* note 81, at 154. Of course, the ability to do justice also grants the power to do injustice. *See also* Moskovitz, *supra* note 22, at 1180 (explaining that although it is important that the law be certain, consistent, and predictable, "the jury [system] runs counter to these objectives" in that jurors are untrained novices, unpredictable, and appear to have wide discretion).

90. It has been long settled that juries cannot be compelled to provide any rationale for their decisions. *See, e.g.*, Clark v. United States, 289 U.S. 1, 17 (1933) (acknowledging that the rule that no juror shall be questioned for any verdict rendered is based upon an ancient principle); Dunn v. United States, 284 U.S. 390, 407 (1932) ("The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned.").

evidence, the judge determines the defendant's sentence.[91] With the advent of sentencing guidelines, the judge's discretion has been curtailed in favor of mandatory sentences for certain offenses or offenders.[92] The potential for bias in the sentencing process is obvious when the judge is permitted to utilize discretion in weighing aggravating or mitigating factors. But this potential is perhaps not as apparent when sentencing occurs under the auspices of sentencing guidelines or mandatory minimum sentencing which would presumably require that like offenders be punished in a like manner. Notwithstanding the superficial appearance of fairness in guidelines and in mandatory minimum sentences, studies have shown that, because of the nature of the underlying criminal conduct that is encompassed by the sentencing guidelines, minorities often receive disproportionately longer sentences than whites who have engaged in similar criminal conduct.[93]

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91. The sentencing process is a critical stage of a criminal proceeding and is governed by Due Process requirements. Although a "defendant has no substantive right to a particular sentence. . . . [he] has a legitimate interest in the character of the procedure." Gardner v. Florida, 430 U.S. 349, 358 (1977); *see also* Williams v. New York, 337 U.S. 241, 247 (1949) (recognizing that a sentencing judge must have access to the "fullest information possible concerning the defendant's life and characteristics.").

92. The Sentencing Reform Act of 1984 provided that the United States Sentencing Commission must promulgate binding sentencing guidelines for federal offenses. The principal goals of the guidelines were to eliminate the great variation among sentences for persons similarly situated and convicted of the same offense and to eliminate the uncertainty about the length of time a person would actually spend in prison. The 98th Congress passed the Sentencing Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3581-3586 (1988 & Supp. III 1991) and 28 U.S.C. §§ 991-998 (1988 & Supp. IV 1992)).

The Sentencing Guidelines were promulgated in 1987 and establish categories of criminal conduct, specific offense characteristics, and adjustments which are applied according to a formula to determine the sentence. *See generally* UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1993).

93. Under federal law, possession of 50 grams of crack cocaine is a felony that carries a mandatory minimum sentence of ten years. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (1994) (any person convicted of possession with intent to distribute 50 grams or more of a mixture or substance which contains crack shall be sentenced to no less than 10 years in prison). A person would have to possess 5000 grams or more of powder cocaine to be given the same sentence. *See* 21 U.S.C. § 841(b)(1)(A)(ii)(II) (1994). Almost 83% of crack cocaine arrests are of African Americans while approximately 40% of arrests for powder cocaine are of whites. It is therefore not surprising that under these laws, African Americans are being sent to prison in unprecedented numbers and for longer periods of time. U.S. DEP'T OF JUST., BUREAU OF STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES 1986-90 97, 109 (1993).

It is notable that several judges have either refused to enforce the guidelines because of their discriminatory nature or resigned in protest. *See* Dennis Cauchon, *Powder Cocaine v. Crack Cocaine: Balanced Justice?*, USA TODAY, May 26, 1993 (Judge Alan Nevas remarked that the mandatory minimum sentences for crack cocaine are among "the unfairest sentences I have ever had to impose.").

Judges in an inquisitorial system of justice are proactive in developing most, if not all, of the evidence during the trial.[94] In order to facilitate this process, the presiding judge, prior to trial, gains familiarity with the case by studying the *dossier* prepared by the prosecutor or investigating magistrate.[95] At trial, the presiding judge then proceeds to develop the evidence by questioning primarily the accused based upon the contents of the *dossier*. Because the judge is not bound by evidentiary and exclusionary rules that are common in an accusatorial system, this questioning process is generally unimpeded by the objections and sidebars that characterize the accusatorial system.[96] Instead, the judge hears and develops all evidence relevant to the truth of the charge.[97] It is important to note that because the pretrial focus is on pursuit of the truth, the question of guilt is almost always resolved at the pretrial stage when the accused often supplies the best evidence of guilt—a confession.[98] Despite this pretrial determination, the trial is still a mandatory component because it is also the vehicle through which the accused can present mitigating evidence for purposes of sentencing.[99]

At the conclusion of the presentation of evidence in major cases, the presiding judge will join a mixed panel of professional judges and "lay assessors" who will apply the law, decide the defendant's guilt, and determine the appropriate sentence by a two-thirds majority.[100] Because the system combines lay and professional judges, it provides a greater degree of confidence that lay jurors are being properly instructed in the law throughout the deliberation process.[101]

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94. *See* LANGBEIN, *supra* note 19, at 62 ("The presiding judge has the primary forensic role at trial . . . he is the examiner-in-chief.").

95. *Id. See also supra* notes 47, 63 and accompanying text.

96. *See* LANGBEIN, *supra* note 19, at 68-69.

97. *Id.* at 70 ("The major constraint on the reception of evidence in a notionally unrestricted system of admissibility is the court's power to refuse to investigate irrelevant matter.").

98. *Id.* at 73.

99. *See* Moskovitz, *supra* note 22, at 1153 (discussing the fact that most inquisitorial systems do not recognize the guilty plea because it would be tantamount to permitting the parties to determine the truth which would usurp the court's authority to determine the truth of the charge and the sentence).

100. Lay assessors are citizens "selected at random from the population. The parties have no right to question them or to remove any of them, so long as they meet [the] minimal qualifications of age, citizenship, and the like." Moskovitz, *supra* note 22, at 1125. The lay assessors sit and deliberate with the professional judges as a single panel. *Id. See also* LANGBEIN, *supra* note 19, at 119-46 (providing a comprehensive overview of the interactions between lay judges and professional judges in the German system).

101. Since there are no formal jury instructions, the professional judges normally explain the law to the lay judges in simple language and will even discuss it with them informally until they understand. Moskovitz, *supra* note 22, at 1126-27. After the deliberations, the "[l]ay judges vote before [the] professional judges." LANGBEIN, *supra* note 19, at 80; Pizzi & Marafioti, *supra* note 34, at 9 (observing that a mixed panel permits "judges to benefit from

Once the verdict and sentence are determined, one of the professional judges will issue a written opinion that explains in detail the factual and legal basis for the verdict. Additionally, because an inquisitorial trial determines both guilt and sentencing, the judgment will explain the sentence and its appropriateness under the circumstances.[102] The fact that the tribunal must fully explicate its rationale for guilt and sentencing, combined with a thorough pretrial investigatory process, yields a trial result that is likely to be relatively free of discretionary whims.[103]

5. *The Accused*

In an accusatorial system of justice, the accused is cloaked with numerous constitutional rights once the investigation has focused on him as a suspect.[104] Beginning in the interrogation room and continuing throughout the appellate process, the constitution guarantees the accused the opportunity to exercise those rights. In fact, the "constitutional shield" is so strong that the accused may even elect to waive a personal appearance at the trial and still be entitled to a full-blown trial on the merits.[105] This result is entirely consistent with the fundamental notion that the defendant is not required to participate in the prosecution's case against him and that he therefore cannot be compelled to speak about his guilt or innocence.[106] Hence, without an express waiver of certain protections, neither the judge nor the prosecutor may interview or question the accused about any aspect of the crime charged.

Further, if the defendant elects to remain silent at trial, the prosecution is expressly prohibited from commenting on that fact, and the trier of fact may not draw any inference from the defendant's decision to exercise this

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the experience of laypersons while maintaining control over the development of evidence and the application of law").

102. *See* Moskovitz, *supra* note 22, at 1127.

103. The detailed opinion also facilitates the appeals process. *See* Pizzi & Marafioti, *supra* note 34, at 8 ("Forcing the fact-finder to justify its conclusions facilitates the appeals process."). The fact-finder, however, does not disclose or publish voting splits or dissenting opinions. *See* LANGBEIN, *supra* note 19, at 81.

104. *See generally* U.S. CONST. amends. IV, V, and VI; Duncan v. Louisiana, 391 U.S. 145 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

105. The Supreme Court has acknowledged that a defendant's right to appear at trial is a fundamental right. *See* Kentucky v. Stincer, 482 U.S. 730 (1987). That right may, however, be effectively waived by the defendant's voluntary absence, and the trial will continue in his absence. Taylor v. United States, 414 U.S. 17 (1973).

106. *See* U.S. CONST. amend. V; United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (discussing the impropriety of prosecutorial communications with a defendant in the absence of his counsel).

constitutional protection.[107] Thus, although the accused may be the sole party with access to, and an understanding of, the truth, the accusatorial system demands that the government seek alternative avenues to that truth. If those avenues yield less fruitful evidence, and the prosecution is therefore unable to prove the defendant's guilt beyond a reasonable doubt, then, consistent with the structure, priorities, and values of the accusatorial system, justice has been served, and the defendant must be released without regard to factual guilt or innocence.[108] Lastly, as a further safeguard of the defendant's rights post-acquittal, the government is constitutionally prohibited from appealing the final decision of the trier of fact.[109]

Although the accusatorial system appears to promote and maximize the independence and control of the defendant, such protections may, in practice, contribute to and encourage a general reluctance on the part of the defendant to assist in a search for the truth.[110] In the short term, this may seem a desirable outcome from the defendant's perspective. In the long term, however, a factually guilty defendant is precluded from accepting responsibility for his actions during the initial stages of the process and is therefore likely to be subject to the various levels of discretion that could ultimately produce a harsher outcome. For the factually innocent defendant, the failure to actively participate in a search for the truth may ironically produce a result similar to that of the factually guilty defendant. Once the wheels of the accusatorial machine begin to turn, factual guilt or innocence is relegated to the background as prosecution and defense attorneys begin to aggressively perform their prescribed roles of courtroom advocates and opponents.[111]

A defendant's cooperation and participation are actively encouraged in an inquisitorial system.[112] Therefore, in preparing the *dossier*, the prosecutor is permitted to communicate directly with the accused concerning the events

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107. Griffin v. California, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). The defendant may also require the court to provide an instruction that the jury must not give any evidentiary weight to her failure to testify. *See* Carter v. Kentucky, 450 U.S. 288 (1981).

108. *See* Van Kessel, *supra* note 26, at 451 (opining that "[o]ur strong attraction to the courtroom battle goes hand-in-hand with our diminished respect for the discovery of the truth").

109. *See* U.S. CONST. amend. V; Benton v. Maryland, 395 U.S. 784 (1969) (fundamental nature of the double jeopardy prohibition can hardly be doubted).

110. *See* Van Kessel, *supra* note 26, at 479-80 (observing that, "[a]t times, the accused may appear set apart or even isolated from the trial process . . . [which] serves to both shield [him] from the proceedings and discourage him from participating in his defense.").

111. *Id.*

112. *See* Moskovitz, *supra* note 22, at 1138 (discussing how lawyers almost always encourage the pretrial cooperation of defendants because a refusal to answer could affect whether or not the defendant is detained pretrial as well as the ultimate nature of his sentence).

surrounding the crime charged. This aspect of an inquisitorial system is fully consistent with a search for the truth because the accused is perceived to be the most likely person to possess information relating to the truth or falsity of the charges.[113]

While the accused is entitled to certain protections that mirror many of the protections afforded in an accusatorial system, these protections are rarely exercised in a manner that interferes with a search for the truth.[114] It is usually at this stage that the factually guilty are encouraged to confess, and the confession is made a part of the *dossier*.[115]

At trial, the defendant's participation is further encouraged. In fact, the defendant is called upon to speak first, and "[t]he accused and the court engage in a direct and continuing dialogue without the intermediation of counsel."[116] Not only may the accused be called upon to respond to and question witnesses, but he ultimately provides the last word in his defense even if his defense counsel has already spoken for him.[117] Because the question of guilt has likely been informally resolved during the pretrial investigation, the defendant's participation at trial primarily assists the tribunal in the sentencing determination.[118] Once a decision has been rendered, extraordinarily "broad rights of appeal are extended to both parties."[119] Such a process seeks to ensure that the "punishment fits the crime" and that the tribunal has reached a reliable and just result.

C. *Summary*

As outlined above, each system is premised on a unique set of values and objectives that shape the roles and interactions of its participants. Nonetheless, even a brief overview reveals the inherent structural incongruities present in each system. Specifically, while the accusatorial

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113. *Id.* (reasoning that the goal of an inquisitorial system is to find the truth and "the defendant is in a very good position to help . . . accomplish that task").

114. *See supra* notes 77-78 and accompanying text.

115. Interestingly, because the tribunal controls the trial process, the case, even after the confession, must still proceed to the trial stage. *See supra* note 99 and accompanying text.

116. LANGBEIN, *supra* note 19, at 65. Moreover, the accused is "neither required nor permitted to be sworn, hence he never risks perjury for the conduct of his defense." *Id.*

117. *Id.*

118. While the prosecutor may recommend a particular sentence, the court makes the final determination. *Id.* at 78. Given that the prosecutor's advocacy role is limited, sentence recommendation is perhaps the most important step for a prosecutor at trial. *Id.*

119. Pizzi & Marafioti, *supra* note 34, at 9. The authors point out that both parties can appeal the judgment's factual and legal conclusions and may introduce new evidence if the appellate court deems necessary. Moreover, not even an acquittal is final because the prosecutor may appeal if he believes the trial court mistakenly reached a judgment of not guilty. *Id.*

system purports to grant the utmost protection to individual rights, the many levels of discretion inherent in the system may in fact undermine this protection for certain categories of defendants. By contrast, the inquisitorial system, with its emphasis on discovering the truth, places strict limitations on the conduct of its actors as a means of achieving that objective. Thus, while the accused may not enjoy maximum protection in an inquisitorial system, the discretionary constraints present there may indeed yield a result that is grounded in impartiality, fairness, reliability, and justice. The next section will explore the Italian Code of Criminal Procedure as a potential model for fine-tuning the American system of criminal justice.

III. THE ITALIAN CODE OF CRIMINAL PROCEDURE

A. *Introduction*

The Italian Code of Criminal Procedure (*Codice di procedura penale*)[120] provides a compelling and relatively recent example of an attempt to "fine-tune" a criminal justice system by conjoining components of the inquisitorial model with elements of the accusatorial model. As such, it furnishes an analytical framework for the potential fine-tuning of the American accusatorial system of justice. It is perhaps a bit ironic that the American system, which was founded on principles of democracy and protection of individual liberty, can be further enhanced by drawing upon a system rooted in the infamous Inquisition and later "reformed" under the fascist dictatorship of Benito Mussolini.[121] However, an overview of the Italian Code of Criminal Procedure reveals that its revisions have resulted in a process that "exhibits an accusatorial soul in a European body."[122]

B. *The Need for Change*

The Italian criminal process is strongly rooted in the civil law tradition with its fundamental emphasis on discovering the truth. In light of this tradition, it possessed most of the accoutrements of a typical inquisitorial system. Yet because the 1930 Code was formulated during a fascist regime, it manifested many of the negative characteristics associated with inquisitorial systems. For example, the former Code provided for a pretrial examination

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120. CODICE DI PROCEDURA PENALE [hereinafter C.P.P.] (Italy). Unless otherwise stated, this Article refers to sections of the new C.P.P., effective October 24, 1989.

121. The "reforms" were subsequently codified. *See* C.P.P. (1930) (Italy).

122. Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1212 (1989); *but cf.* Pizzi & Marafioti, *supra* note 34, at 3 (describing the result as a system "caught between two traditions").

phase (*istruzione formale*) during which a judge would investigate evidence against the accused.[123] The examination phase would then be followed by a trial that developed all of the acquired evidence.[124] Despite this requirement, however, the trial became a mere formality that was used to validate the conclusions drawn during the examination phase.[125]

Furthermore, the most egregious example of the true inquisitorial nature of the former Code was the fact that the examination phase was conducted in secret.[126] Consequently, the defendant was precluded from knowledgeable participation and, in the shroud of secrecy, inquisitors often relied upon considerable pressure tactics to elicit witness testimony.[127] The need to institute reform was clear under these circumstances, although initially the precise degree and direction of change required was uncertain.[128] After various interim reforms, the Italian Parliament delegated formal responsibility for drafting a new code in 1974.[129] Yet the path to reform was not straightforward, and fifteen years elapsed before the new Code of Criminal Procedure became effective.[130] The next section will explore some of the significant components of the new Code.

C. *An Accusatorial Soul in an Inquisitorial Body*

Once formulated, the new Code represented a radical departure from the previous system.[131] Although the Italian criminal process retains its European body, its soul now contains features that are distinctly accusatorial, such as preliminary hearings, cross-examinations, and plea bargaining. These new components, grafted into Italy's system in an attempt to give the parties more control over the proceedings, uncloak the previously secret pretrial proceedings and promote overall efficiency within the process.[132] It is interesting that the Italian criminal process retains one major component that is uniquely inquisitorial—the rule of compulsory prosecution.[133] As discussed previously, this rule assists in providing a crucial limitation on

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123. C.P.P. art. 389 (1930).

124. Pizzi & Marafioti, *supra* note 34, at 4.

125. *Id.*

126. *Id.*

127. *Id.*

128. Another development that served as a catalyst for reform was the adoption of a new constitution in 1947. *Id.*

129. *Id.* at 4-5.

130. The time lapse was partially attributable to "a lack of consensus on the direction reforms should take." *Id.* at 5 n.12.

131. The revised Italian Code of Criminal Procedure is quite comprehensive, comprising 11 books and 746 sections. *Id.* at 10 n.44.

132. *Id.* at 6-7.

133. *See* COSTITUZIONE [hereinafter COST.] art. 112 (Italy).

discretion notwithstanding the fact that the parties have gained a greater degree of control.[134]

Under the revised Italian Code of Criminal Procedure, the public prosecutor is responsible for pretrial investigation of a crime.[135] Although the prosecutorial role is now more "adversarial" in the sense that he will advocate on behalf of the government at trial, the Code requires that, during the pretrial investigation, the prosecutor "also [assess] the facts and circumstances favoring the person under investigation."[136]

Once suspected criminal activity is brought to the attention of the prosecutor,[137] she must conduct the investigation within specific time limitations.[138] Upon completion of the investigation, the constitutionally based rule of compulsory prosecution takes over and the prosecutor must obtain judicial approval (*decreto di archiviazione*) for the dismissal of a case.[139] Beyond that important function, the judiciary also serves as a significant check on prosecutorial discretion during much of the preliminary investigation. From a newly acquired position of neutrality, the judge supervises the preliminary investigation and ensures impartiality at all stages of the investigation.[140] Impartial judicial scrutiny of the preliminary investigation has important ramifications with regard to the independence of the prosecutorial function. Because the judge carefully monitors all critical phases of the prosecution, the potential for prosecutorial overreaching and bias is drastically minimized.

During the crucial stages of the pretrial investigation, the defendant is entitled to the assistance of counsel.[141] Such a requirement effectively

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134. *See supra* notes 66-68 and accompanying text; *see also* Amodio & Selvaggi, *supra* note 122, at 1221 ("Under the new Italian Code, . . . it is still outside the power of the parties to enter, jointly or severally, a disposal of a criminal case as if it were a private law suit.").

135. C.P.P. art. 291. However, once the prosecutor has taken over a case, the police perform investigations under the specific direction of the prosecutor. *Id.* art. 348.

136. Pizzi & Marafioti, *supra* note 34, at 11 (quoting C.P.P. art. 358).

137. C.P.P. art. 347. This section provides that, within 48 hours of a victim's report, the police must inform the public prosecutor of the crime and send him all the information they have gathered. The prosecutor must then record the crime in the crime register (*registro delle notizie di reato*). *Id.* art. 335.

138. *Id.* art. 405. The preliminary investigation must be completed within six months of the date on which the crime was entered in the crime register. *Id.*

139. *Id.* arts. 408-11. Normally this occurs if the prosecutor believes that the evidence is insufficient to prove either that a crime was committed or that it was committed by a particular defendant. Pizzi & Marafioti, *supra* note 34, at 11-12.

140. *See, e.g.*, Pizzi & Marafioti, *supra* note 34, at 12-13 (describing how the judge supervises the preliminary investigation and preserves impartiality throughout the process); Amodio & Selvaggi, *supra* note 122, at 1218 ("The judge, in a strictly impartial position, supervises the prosecution of the case at every crucial step.").

141. This right extends to police interrogation without regard to whether the suspect is in custody. C.P.P. art. 350.

assures that investigatory activities are performed in a manner that respects the rights of the accused and attempts to place the suspect on relatively equal footing with the state. Another pretrial component that reflects a desire to achieve equalization of the parties within the process is the rule that mandates pretrial discovery of the prosecution's entire case.[142] Such a broad discovery requirement represents an explicit rejection of "trial by ambush" and again demonstrates one of the Code's main purposes—to guarantee that the trial process will be dominated by a focus on developing the evidence and discovering the truth.

A version of the American plea bargaining process represents yet another manifestation of the accusatorial soul, albeit with some modifications. While the parties now have the capacity to forego trial and negotiate the sentence in the case, the judge must be satisfied that the "punishment fits the crime" in the sense that the negotiated settlement must comport with the substantive criminal law.[143] It is notable that the plea bargaining process under the Italian system is limited to sentence negotiation rather than a bargaining of the substantive charges.[144]

The preliminary hearing (*udienza preliminare*), although nominally like its accusatorial counterpart, is essentially a pretrial judicial review of documents compiled during the investigation.[145] After this *in camera* review and argument from both sides, the judge determines whether the case should proceed to trial.[146] As a practical matter, most cases are set for trial because the judge may dismiss a case only under very limited circumstances.[147]

The influence of the accusatorial system is most apparent during the trial stage. Like its accusatorial counterpart, the Italian trial begins with opening statements by the parties.[148] Similarly, during the trial, each party is responsible for developing the evidence by presenting witnesses and cross-examining other parties' witnesses.[149] The defendant may speak at any point

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142. *Id.* art. 416.

143. *Id.* art. 444. The judge may reject a sentencing agreement if it is erroneous in law or inadequate in light of the seriousness of the crime.

144. Pizzi & Marafioti, *supra* note 34, at 22.

145. *Id.* art. 416. The defendant may also participate in the preliminary hearing by requesting an examination by the judge. He may not, however, be cross-examined. *Id.* arts. 64, 65, 421.

146. *Id.* art. 422.

147. The judge may only dismiss a case if she concludes that no crime actually occurred, the events described in the charge do not constitute a crime, or the defendant clearly did not commit the crime. *Id.* art. 425.

148. The public prosecutor begins, followed by lawyers representing any civil parties, followed by defense counsel. *Id.* art. 493. The civil lawyers represent the victim, the victim's family, and other injured third parties who have an interest in the criminal case. The injured parties are allowed to protect any interest they may have by fully participating in the criminal trial. *Id.* arts. 493, 496, 498, 523.

149. Other accusatorial components include the presentation of closing statements and

during the trial to challenge witness testimony and is granted the opportunity to make the final presentation at the conclusion of the trial.[150] Although the defendant is no longer required to speak at trial and may elect to remain silent, a defendant who wishes to offer mitigating circumstances relevant to sentence determination must do so at trial.[151]

At the conclusion of the trial, the court issues a detailed written opinion that outlines its verdict and sentencing rationale (*motivazione*).[152] The detailed opinion facilitates the exercise of broad appellate rights under the Code. These rights are virtually unchanged from the previous Code in that any party may appeal the decision of the court, and even the defendant may appeal an acquittal.[153]

D. *A Lesson From the Italian Model*

The fundamental aims in restructuring Italy's criminal justice system were 1) the removal of a secretive, judicially dominated, strict inquisitorial system and 2) the creation of an open, party-controlled, quasi-accusatorial system. That Italy has retained its inquisitorial body reflects that the core values and ideology of the system remain the same, but the priorities have shifted in response to societal demands.

One lesson to learn from the Italian model is that a criminal justice system can retain its core values and ideologies while simultaneously fine-tuning its components to address shifting priorities and competing societal demands. More specifically, as the next section will explore, the accusatorial system of justice in the United States can retain its emphasis on fairness and due process while contemporaneously changing its components to address the impact of unbounded discretion which contributes to differential treatment within the system. Drawing upon the Italian model, the United States can thus adopt a quasi-inquisitorial approach as a means of addressing these concerns.

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rebuttals to those summations. *Id.* art. 523.

150. *Id.*

151. *Id.* art. 533.

152. *Id.* art. 544.

153. This anomaly results from the fact that the Italian system provides for five types of acquittals which range from a conclusion that no crime was committed to an acquittal because it was not possible to decide the case due to a procedural fault. A defendant may appeal to obtain a stronger form of acquittal. *See* Pizzi & Marafioti, *supra* note 34, at 15.

IV. THE CASE FOR A QUASI-INQUISITORIAL SYSTEM OF JUSTICE

A. *The Need For Change*

It would be idealistic to imagine that incorporating aspects of an inquisitorial system of justice would serve as a cure-all for the various ills that plague the American criminal justice system. Yet, it would be unfortunate if the difficult work of fine-tuning the system were eschewed simply because the results would be less than ideal. Without question, one of the more pressing concerns in our current justice system is the inequitable treatment of minorities throughout various stages of the criminal justice process. As articulated above, much of this unequal treatment is inherent in, and perpetuated by, a system that allows myriad levels of discretionary decision-making.[154] Through this unchecked discretion, individual biases and prejudices coalesce to create an almost intractable form of systemic bias. A remedial "fine-tuning" alternative would not only retain the core ideologies and values that form the foundation of the accusatorial system but would also simultaneously curtail the unfettered discretion that permeates the system. A quasi-inquisitorial system would therefore incorporate a system of mandatory checks and balances modeled upon the Italian Code. In addition to remaining true to the spirit of due process and respect for individual liberty, such a system would also enhance the potential for overall fairness and truth-seeking throughout the process. The next sections will describe how such a system might be effectuated.

B. *The Police Function*

Under our current system, a suspect's initial contact with the criminal justice system is at the arrest stage.[155] One method of limiting the impact of bias at this stage is to impose a mandatory reporting requirement on the police when they are made aware that a crime has been committed.[156] Reporting the events of a crime to prosecutorial authorities can have a dual effect. First, it subjects police actions and policies to a greater degree of scrutiny, thus adding a level of oversight. Second, it results in increased numbers of non-minorities brought into the system, thus increasing the levels of objectivity and fairness at the inception of the criminal justice process.[157]

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154. *See supra* note 16 and accompanying text.

155. *See supra* notes 39-41 and accompanying text.

156. An analogous example is presented in the context of domestic violence cases. Many jurisdictions have incorporated mandatory arrest and "no drop" prosecution policies in order to achieve the larger common goal of eradicating domestic violence. *See, e.g.*, Lisa Stansky, *Organizing an Anti-Violence Offensive*, 82 A.B.A. J., July 1996, at 49.

157. One explanation for the statistical disparity in arrest and incarceration rates is that

C. *The Prosecutorial Function*

Upon receiving the report of criminal activity, prosecutorial authorities should incur a reporting responsibility similar to that of the crime register requirement in the Italian Code.[158] As in the Italian system, the crime register would function as a record-keeping mechanism as well as the event which triggers certain time limitations for completion of the preliminary investigation.[159] Perhaps more importantly, prosecutorial authorities should become more involved in the investigatory process, overseeing and controlling police actions.[160] Because the prosecutor currently performs some investigatory tasks, such additional responsibility would require only a modest realignment of the prosecutorial function. Thus, commingling prosecutorial and police functions, imposing time constraints on the investigatory process, and requiring the prosecutor to probe exculpatory evidence would combine to produce a much tighter system of checks and balances, ultimately limiting opportunities by which subjective bias may be introduced into the investigatory and charging processes. With this limitation comes an assurance that similarly situated suspects will be treated in a fair, uniform manner.

As a final check on the prosecutorial function, our system should mandate compulsory prosecution. Because the current accusatorial system allows the prosecutor maximum control over the charging decision, it also permits maximum discretion.[161] The initial decision to charge, and the corresponding determination of the nature of those charges, represent the most critical decisions in the criminal justice process. These decisions are outcome determinative to the extent that they can circumscribe subsequent stages of the process, particularly from the defendant's perspective.[162] Given the considerable impact of the charging decision, it is tragically ironic that there are very few constraints on that authority. A rule of compulsory prosecution fashioned on the Italian model would remove this layer of discretion and expose the overall charging decision to judicial scrutiny. Such judicial oversight would not only insert a meaningful check on prosecutorial

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a greater percentage of non-minorities are "selected out" of the system at this stage. For a discussion of the differences in arrest and incarceration rates, see *supra* notes 14-15 and accompanying text.

158. C.P.P. art. 335; *see also supra* text accompanying note 137.

159. C.P.P. art. 405; *see also supra* text accompanying note 138.

160. *See supra* notes 135-36 and accompanying text.

161. *See supra* notes 54-58 and accompanying text.

162. For example, depending upon the initial charge, the defendant may be subject to pretrial detention, exorbitant bail requirements, increased attorney's fees, complex defense strategies, and harsher penalties.

authority, but would substantially increase the likelihood of uniformity and objectivity in the charging process.

D. *The Defense Function*

Defense counsel in a quasi-inquisitorial system would act as an additional check on police and prosecutorial authority. Consequently, counsel would perform many of the same functions as required by the current accusatorial system.[163] The role might be further expanded under a quasi-inquisitorial system to include the right to counsel whenever the police or prosecutor interrogate a suspect without regard to whether such questioning constitutes a custodial interrogation.[164] Arguably, an expanded role for defense counsel could result in more obstruction and delay in the criminal process. The expanded role, however, must be conceptualized within the context of the entire quasi-inquisitorial system. If defense counsel and the defendant evince a higher level of confidence in the process as a result of a stricter system of checks and balances on the prosecutorial and police function—as well as comprehensive defense discovery prior to trial[165]—then the need for obfuscatory tactics is significantly diminished. Accordingly, the defense obligation might be refocused to encompass proposing legal alternatives that enhance truth seeking and issue resolution. While one disadvantage may be a restraint on the zealous advocacy that typifies the current accusatorial process, such a refocus would have profound advantages in that "justice" becomes less dependent upon one's ability to retain the "hired gun" and more closely aligned with the goal of seeking the truth and separating the guilty from the innocent. This could have an enormous impact with respect to decreasing the current dispensation of "unequal justice." Because every defense attorney is guaranteed access to certain information, the level of gamesmanship is removed, and counsel is free to embrace the role of counselor which increases the likelihood that guilty defendants will accept responsibility at the earliest opportunity. Coming to terms with guilt early in the process can conceivably influence the overall outcome, particularly with respect to sentence negotiation and mitigation.

E. *The Trier of Fact*

In a quasi-inquisitorial system, the judge would adopt a more active stance during the investigatory stage. As described above, during this stage,

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163. *See supra* note 72.

164. *See supra* note 141 and accompanying text. This would require an extension of the custodial interrogation requirement established in *Miranda*. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966).

165. C.P.P. art. 416.

the judge would incur oversight responsibilities that serve as a check on prosecutorial and police authority.[166] Moreover, prior to trial, the judge would have exclusive authority to dismiss cases and approve sentence negotiation agreements.[167]

The nature of the judge's trial responsibilities would remain relatively passive as they now are under the current accusatorial system. At the conclusion of the proceedings, the judge would be required to set forth the court's decision in detail and include a rationale for the specific sentence.[168] This would serve not only as a check on arbitrary and capricious decision-making but would also provide a concrete basis for appeal.[169]

The current jury system has considerable potential to inject the biases and prejudices of the community into a criminal trial.[170] Even with the "controls" on partiality and bias in the current accusatorial process, the presence of the current jury system would nevertheless be anathema under a quasi-inquisitorial system.[171] A realistic alternative to the current jury system would be a structure that introduces a greater degree of knowledge and professionalism into the process. One solution that represents a compromise between maintaining and eliminating the jury system is the implementation of a mixed panel system composed of professional and lay jurors.[172] Under this configuration, the jury would be given concrete guidance in the law applicable to the case which will likely yield more rational and uniform decisions. As a further check on discretion, the mixed panel would also be required to issue a detailed written opinion.

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166. *See supra* note 140 and accompanying text.

167. *See supra* notes 139, 143-47 and accompanying text.

168. C.P.P. art. 544; *see also supra* text accompanying note 152.

169. A more detailed opinion from the trial court could actually decrease the number of spurious and frivolous appeals because the court's rationale would provide the only basis for appeal.

170. *See supra* notes 87-89 and accompanying text.

171. These controls include "for cause" and peremptory challenges. Even with these controls, however, some believe that peremptory challenges are an ineffective method of detecting bias. *See, e.g.*, Mark Hansen, *Peremptory-Free Zone*, 82 A.B.A. J., Aug. 1996, at 26. In his article, Hansen describes how U.S. District Court Judge Constance Baker Motley has barred the use of peremptory challenges in her courtroom because they are a "per se [violation of] equal protection . . . an unnecessary waste of time and an obvious corruption of the judicial process." *Id.*

172. Professional jurors would include those who have formal training in the law. For recent discussions of jury reform, see, for example, Beth Taylor, *What Makes Jury Tick? 12 Varied People; There's No Foolproof Formula For Picking and Persuading Jurors—Or Predicting Their Verdicts*, ORLANDO SENTINEL, Mar. 17, 1996, at G1 (discussing how professional jurors, who are trained and paid to serve full-time, might be more capable of understanding complicated cases); Andrew Blum, *Jury System Undergoes Patchwork Remodeling*, NAT'L L. J., Jan. 22, 1996, at A1 (discussing the most "radical solution" of abolishing the jury system outright and replacing lay jurors with those trained as professional arbitrators).

F. *The Accused*

Under a quasi-inquisitorial system, the accused would retain many of the fundamental substantive and procedural protections required under an accusatorial system.[173] In addition to those personal rights, the accused would also obtain the tangible and intangible benefits of a system that has in place effective checks and balances that significantly limit the effects of bias and prejudice. While such a system might not encourage every guilty defendant to make a full confession prior to trial, it would enhance the overall perception of accuracy, efficiency, fairness, and justice within the system. This overall perception could have "trickle down" effects with respect to promoting accuracy in selecting those defendants deserving punishment as well as establishing a formidable structural deterrent to those considering criminal activity.

V. CONCLUSION

The American accusatorial system of justice is in desperate need of modification. Pervasive discretionary authority has produced an intolerable level of systemic bias that demands a remedial response. Such a response must include measures that provide effective checks and balances on that discretion while simultaneously preserving the ideological basis of the accusatorial system. This Article has demonstrated how the incorporation of an inquisitorial soul into the accusatorial body of our current system, and the consequent creation of a quasi-inquisitorial system, would provide significant constraints on discretionary authority while preserving the necessary emphasis on due process and protection of individual rights. Additionally, because the quasi-inquisitorial system eliminates many of the vagaries associated with boundless discretion, it would promote a truth seeking objective that would likely produce fair, uniform results and contribute to enhanced overall confidence in the American criminal justice system.

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173. *See supra* note 104.

BOT AND PUBLIC PROCUREMENT: A CONCEPTUAL FRAMEWORK

*David A. Levy**

INTRODUCTION

The Build-Operate-Transfer (BOT) method of project financing,[1] or one of its many variants,[2] has rapidly become the financial vehicle of choice for large scale infrastructure development projects. These projects, which create a public/private sector contractual relationship for a period of years, have gained global acceptance, such BOT projects having been planned or put in place in Asia,[3] Africa,[4] Australia,[5] the Middle East[6] and Indian

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1. A BOT project is a method of project financing in which a State identifies a need for a project that a private sector company then builds, operates for a period of time sufficient to both repay the cost of the project and provide a return on the equity investment, and then returns to the host State. A major difference in BOT and conventional development projects is that the BOT project is financed without sovereign debt. Mark Augenblick & B. Scott Custer, Jr., The Build, Operate, and Transfer ("BOT") Approach to Infrastructure Projects in Developing Countries 3 (Aug. 1990) (unpublished monograph, on file with author). For elaboration on the BOT concept, see *infra* text part II.

2. Although there are a number of variations on the Build-Operate-Transfer (BOT) project financing model, this paper will use the generic term BOT to refer to the various methods, unless a particular aspect of one form is germane to the discussion. For an overview of these variations on the BOT model, see *infra* text accompanying note 50.

3. Among the many BOT projects which are underway in Asia is a concession contract awarded to a consortium headed by a United Kingdom firm to operate the water system in Ipoh, Malaysia for a period of 20 years. Peter Reina, *Turning on the Pressure*, ENGINEERING NEWS-REC., Feb. 26, 1996, at 28. BOT projects are also popular in the Philippines. *See, e.g., Philippine Projects with Power Pacts Vulnerable if Secured Without Bidding*, INDEP. POWER REP., Feb. 23, 1996, *available in* LEXIS, News Library, CURNWS File.

4. The government of the new South Africa is seeking to generate interest in BOT infrastructure projects. *South African Minister to Outline BOT Opportunities*, INT'L TRADE FIN., Sept. 9, 1994, *available in* LEXIS, World News Library, ALLWLD File.

5. A Canadian-Australian consortium recently signed a joint venture agreement to purchase and operate an electrical cogeneration plant near Adelaide, South Australia. The

subcontinent,[7] Latin America,[8] Western[9] and Eastern Europe,[10] and North America.[11] Despite the long-term nature of these partnerships, a conceptual framework which harmonizes the BOT process with sound government procurement practice has not been consistently applied.[12]

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project will be developed on a Build-Own-Operate (BOO) basis. *CU Power Nails 180-MW Australian Project, 14-MW London Airport Unit*, INDEP. POWER REP., Aug. 11, 1995, at 3, *available in* LEXIS, News Library, CURNWS File.

6. For example, in the United Arab Emirates (U.A.E.), Black & Veatch International of Kansas City is teaming with KEO International Consultants, U.A.E., to establish a BOT wastewater utility for Ajman, U.A.E. *Bioremediation Market Will Have Growth of 16% a Year*, AIR/WATER POLLUTION REPORT'S ENVTL. WK., Jan. 26, 1996, *available in* LEXIS, News Library, CURNWS File.

7. Both India and Pakistan have BOT infrastructure projects planned or underway. For example, in India, a consortium of U.S. (Raytheon), Singapore, and Indian firms recently won a BOT contract to develop a new international airport in Bangalore. *Indian State of Karnataka*, AIRPORTS, Jan. 9, 1996, at 9. In Pakistan, a Canadian Consortium signed a $500 million BOT contract for a 14 km, mostly elevated mass transit system in Karachi, Pakistan. *Pakistan Awards BOT Mass Transit Contract*, ENGINEERING NEWS-REC., Jan. 22, 1996, at 3.

8. In Chile, bidding has been underway for eight separate BOT contracts for the development of the Chilean Pan-American highway project. *Chile*, LATIN AM. L. & BUS. REP., Dec. 31, 1995, *available in* LEXIS, News Library, CURNWS File.

9. Sweden has just awarded its first BOT contract to a French-UK consortium. The 45 year concession is to build and operate a rail link between downtown Stockholm and Arlanda airport. *GEC-ALSTHOM to Supply Seven Train Sets to Sweden*, MONTHLY REP. ON EUR., July 25, 1995, *available in* LEXIS, News Library, CURNWS File. Perhaps the best known BOT project is the Channel Tunnel linking England and France. Filiberto Agusti, B.O.O. & B.O.T. Projects 8 (unpublished manuscript, on file with author).

10. For example, in Poland, the U.S. Trade & Development Agency recently provided $1,000,000 to the Polish Agency for Motorway Construction and Operation to facilitate development of BOT tollroad projects. *Poland: Plans for Introduction of $12,000,000,000 Build-Operate-Transfer (BOT) Toll-Road Development Schemes*, EXPORT SALES PROSPECTOR-REP. ON ENGINEERING CONSTRUCT & OPERATIONS IN DEVELOPING WORLD, Jan. 1, 1996, *available in* LEXIS, News Library, CURNWS File.

11. The troubled Dulles Greenway toll road project in Northern Virginia was financed and constructed as a BOT project. Peter Baker & Peter Pae, *Va. May Tap U.S. Funds to Save Dulles Greenway; Plans Had Promised No Need for Public Money*, WASH. POST, Jan. 25, 1996, at B1. The Dulles Greenway represents perhaps an extreme blurring of private and public functions, with the private investment group that owns the concession having contracted to pay the Virginia State Police about $500,000 a year for the exclusive services of eight troopers and one sergeant to patrol the toll road. The private group will also pay the costs of buying new cars, uniforms, guns, other equipment, and supplies for the troopers. *Dulles Greenway Hires State Police*, ROANOKE TIMES & WORLD NEWS, July 29, 1995, at C2. In addition, a number of highway projects in Mexico have been planned as BOT projects. *Toll Road Projects*, MEXICO TRADE & L. REP., Nov. 1, 1994, *available in* LEXIS, News Library, CURNWS File.

12. For example, the United Nations Industrial Development Organization (UNIDO) BOT Guidelines list national laws which require public bidding of BOT infrastructure projects, but note that in practice, government negotiations with BOT bidders during the evaluation

to a recognition that free markets, and a new understanding of rational government regulation of private enterprise, are essential for economic development and maximized societal benefit.[24] The creation or reform of a system of public procurement can be an element of overall governmental reform which also includes public accountability and the separation of powers.[25]

The Preamble to the UNCITRAL Model Law on Procurement of Goods, Construction and Services[26] recognizes these considerations, stating as its objectives:

> (a) maximizing economy and efficiency in procurement;
> (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
> (c) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
> (d) providing for the fair and equitable treatment of all suppliers and contractors;
> (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
> (f) achieving transparency in the procedures relating to procurement
> . . . .

Both the UNCITRAL Model Law[27] and the World Bank Guidelines[28]

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24. Don Wallace, Jr., *The Changing World of National Procurement Systems: Global Reformation*, 4 PUB. PROCUREMENT L. REV. 57, 58 (1995).

25. *Id.* at 57, *quoted in* Wittig, *supra* note 23, at 19.

26. The UNCITRAL Model Law on Procurement of Goods, Construction and Services was developed and adopted in 1993 by UNCITRAL to "serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists." *UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 1. UNCITRAL later issued a compiled revision which incorporated the procurement of services without superseding the earlier document and prepared a *Guide to Enactment* for the benefit of legislative drafters. *Id.* ¶¶ 3, 6-7.

27. In addition to conventional single stage tendering, the UNCITRAL Model Law includes procedures for alternative procurement methods, including Two-stage tendering, art. 46; Restricted tendering, art. 47; Request for proposals, art. 48; Competitive negotiation, art. 49; Request for quotations, art. 50; and where necessary, Single-source procurement, art. 51. *UNCITRAL Model Law*, *supra* note 14. The *Guide to Enactment* emphasizes that a State wishing to enact the Model Law as domestic law need not utilize all these alternative procedures. *UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 15.

28. The World Bank Guidelines are designed to promote "economy and efficiency" in projects funded by the World Bank while serving as a catalyst for the development of a transparent procurement system for the Borrowing State. WORLD BANK GUIDELINES, *supra* note 15, ¶ 1.2. While they state a preference for international competitive bidding, other

list various methods of formal procurement procedures, but have a preference for competitive techniques such as tendering.[29] In essence, tendering is a procurement process in which competing bids are sought, received, and evaluated by the procuring entity, with the contract awarded to the party submitting the bid determined to be best according to established criteria.[30] UNCITRAL characterizes tendering as "the method of procurement widely recognized as generally [the] most effective in promoting competition, economy and efficiency in procurement as well as the other objectives set forth in the Preamble [of the UNCITRAL Model Law]."[31]

Tendering is a system through which the government identifies a need, determines how that need may be satisfied, establishes objective criteria to select the goods which will meet that need, and then solicits bids.[32] In the case of services, the most common procurement method is the request for proposals (RFP).[33] In order to achieve the good-government goals of transparency and competition, the bid solicitation must be publicized, the selection criteria must be disclosed and quantifiable to the maximum extent possible, and the award of the contract must be made openly and be available as a public record.[34] Tendering may be either single stage, where the procurement is relatively straightforward (such as the purchase of a

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procurement procedures listed include: Limited International Bidding, ¶ 3.2; National Competitive Bidding, ¶ 3.3; Shopping (request for quotations), ¶ 3.5; Direct Contracting, ¶ 3.7; Force Account (construction by the borrower's own personnel), ¶ 3.8; Procurement Agents (United Nations agencies act as procurement agents), ¶ 3.9. *Id.*

29. The UNCITRAL Model Law treats tendering as the primary method of procurement of goods and construction. *UNCITRAL Model Law*, *supra* note 14, art. 18(1). The World Bank expresses a strong preference for international competitive bidding in the projects which it funds. WORLD BANK GUIDELINES, *supra* note 15, ¶ 1.3.

30. GOSTA WESTRING, INTERNATIONAL PROCUREMENT: A TRAINING MANUAL 27 (1990).

31. *UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 14.

32. *See generally UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 16 (discussing elements of tendering).

33. *See UNCITRAL Model Law*, *supra* note 14, ch. IV ("Principal Method for Procurement of Services"). Under the UNCITRAL Model Law, the RFP mechanism includes many of the procedures which promote sound procurement practices in tendering, such as "unrestricted solicitation of suppliers and contractors as the general rule, and predisclosure in the request for proposals of the criteria for evaluation of proposals and predisclosure of the selection procedure . . . ." *UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 17.

34. An additional good-government practice mandated by the UNCITRAL Model Law is the requirement that all procurement contract awards be published. This promotes transparency and public confidence in the government. *UNCITRAL Model Law*, *supra* note 14, art. 14; *see also UNCITRAL Guide to Enactment*, *supra* note 13, art. 14(1). The goal of transparency in procurement practice would support advertising even if single source procurement were utilized, such as when it is necessary to obtain spare parts for existing machinery.

commodity), or in two stages, where the initial solicitation seeks alternative responses to the perceived need while the second stage builds on the submitted proposals to present a narrower and much more quantifiable set of evaluation criteria.[35] A key to the good-government aspect of public procurement is that the bidding process must be legitimate, with no further negotiation after a bid is tendered.

Given the scale of most international projects, both the World Bank Guidelines[36] and UNCITRAL Model Law[37] allow prequalification of bidders. Prequalification of bidders seeks to establish that the bidders will be able to perform the contract if it is awarded to them and makes for better bidding by eliminating those bidders who are incapable of performing the contract satisfactorily—thereby increasing the confidence of qualified bidders that an award will not be given to an inexperienced bidder who has made an unrealistic bid.[38] The criteria used for prequalification must be objective and be related to the ability of the bidder to perform the contract.[39] For example, the World Bank Guidelines state that "[p]requalification shall be based entirely upon the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their (I) experience and past performance on similar contracts, (ii) capabilities with respect to personnel, equipment, and construction or manufacturing facilities, and (iii) financial position."[40] Prequalification also promotes economic efficiency in the overall procurement process by minimizing the cost to the host State of evaluating unqualified bids.[41]

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35. For example, in a two stage system under the UNCITRAL Model Law, the first stage seeks initial tenders without a tender price. These tenders may present "proposals relating to the technical, quality or other characteristics of the goods, construction or services as well as to contractual terms." The procuring entity then establishes a final form for the second stage "with prices with respect to a single set of specifications." *UNCITRAL Model Law*, *supra* note 14, art. 46.

36. The World Bank notes that prequalification is generally required for large scale or technical projects, or where "the high costs of preparing detailed bids could discourage competition, such as custom-designed equipment, . . . specialized services, . . . or management contracting." WORLD BANK GUIDELINES, *supra* note 15, ¶ 2.9.

37. The UNCITRAL Model Law provides that all bidders must be qualified either prior to tendering their bids or at a later stage in order to participate in the procurement process. *UNCITRAL Model Law*, *supra* note 14, art. 6(1)(b).

38. WORLD BANK, STANDARD PREQUALIFICATION DOCUMENTS: PROCUREMENT OF WORKS, Annex ¶¶ 5, 6 (1993).

39. Subject to limited exceptions (such as those regarding compliance with United Nations economic sanctions, government trading restrictions, or firms which have been involved in the planning of a project, *inter alia*), the World Bank does not permit a borrower to deny prequalification to a firm "for reasons unrelated to its capability and resources to successfully perform the contract." WORLD BANK GUIDELINES, *supra* note 15, ¶ 1.7.

40. *Id.* ¶ 2.9.

41. A possible danger of prequalification, or reliance on lists of prequalified bidders in tendering, is the risk of insularity which would limit rather than promote competition.

II. BOT (BUILD-OPERATE-TRANSFER) CONTRACTS

A. *BOT Defined*

The BOT[42] project financing mechanism is a true hybrid, representing an intermediate stage between traditional state monopolies and private enterprise.[43] BOT represents a long-term interrelationship of the government and private sector.[44] In a BOT project, either the government[45] or a private entity[46] identifies a need for a development project. The government then grants a concession[47] to a private sector enterprise to build the project and operate it for a fixed period of years after which time the project is transferred to the host State.[48] The revenue derived from the project allows the private investors to recover their costs and realize a profit over the life of the concession period.[49] Other project structures, such as Build-Operate-Own (BOOs), Build-Transfer-Operate (BTOs), Build-Lease-Transfer (BLTs), and Build-Own-Operate-Transfer (BOOTs), are variations on this theme.[50] "Conversely, Rehabilitate-Operate-Transfer projects (ROTs) relate to taking

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42. The BOT concept was first articulated by the Prime Minister of Turkey, Turgut Ozal, in the early 1980s in relation to Turkey's privatization efforts. Augenblick & Custer, *supra* note 1, at 2. For a discussion of the difficulties encountered in pursuing BOT projects in Turkey, see John Barham, *Survey of Turkey*, FIN. TIMES, June 12, 1995, at 4.

43. BOT can be conceptualized as a midpoint on the continuum between state monopolies and the pure free market, and may help to introduce free market concepts to a transitional society. The UNCITRAL Guide to Enactment states that "reform of the public procurement system is a cornerstone of the law reforms being undertaken [in transitional economies] to increase the market orientation of the economy." *UNCITRAL Guide to Enactment*, *supra* note 13, ¶ 3. For a pictorial representation of this private enterprise continuum, see *infra* Appendix.

44. The concession period in BOT projects typically ranges from 15 to 30 years for a power plant to 50 years for a major project such as the Channel Tunnel. Agusti, *supra* note 9, at 8.

45. The government will identify the need for a project and then will typically do a feasibility study to determine if the revenues from the project will support BOT project financing. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 21. These feasibility studies are often funded by bilateral and multilateral aid agencies. *Id.*

46. For example, the Hong Kong Harbour Tunnel project was in response to an unsolicited proposal from a developer. *Id.* at 121.

47. A concession is a grant of a franchise by the State to the private project company of the State's monopoly power to build and operate a project. *Id.* at 3.

48. At the end of the concession period, the host State may also choose to issue a new concession for continuing operation of the project, either to the initial private sector developer or to an entirely new group. *Id.* at 275.

49. Thomas M. Kerr, *Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing*, 8 GEO. INT'L ENVTL. L. REV. 91, 93 (1995).

50. UNIDO BOT GUIDELINES, *supra* note 12, at 3.

over of an existing asset by the private developers for rehabilitation or upgrading, followed by commercial operation."[51] The ROT form would be of particular utility in places with a deteriorating infrastructure such as Eastern Europe or the District of Columbia. BOO is a step closer to the free market ideal in that the private sector is retaining ownership rather than transferring the project back to the state. Many investors argue that BOO represents a longer-term commitment to private enterprise.[52]

Through BOT, the host State is able to gain an economic asset without government spending while maintaining a measure of regulatory control over the project.[53] BOT permits the host State to use private sector debt to fund public infrastructure development.[54] It is widely asserted that private sector developers have a stronger profit incentive to complete infrastructure projects on time and operate them more efficiently than does a traditional state-owned enterprise.[55] An additional good-government benefit of the public/private partnership is that the government has a benchmark[56] which it may observe and which it can learn effective management and operational techniques from private (and largely foreign) experts. The government can transfer the principles underlying these techniques to other sectors and future infrastructure projects.[57]

Two factors identified as crucial for the success of a BOT project are (1) "a critical need for the project" and (2) "a near-monopoly situation in the provision of a service or product."[58] Because of the ongoing relationship between the government and the private sector in a BOT project, there must be strong governmental commitment to the project.[59] Throughout the life of the BOT project, from planning to construction, operation, and oversight, the host State gains valuable regulatory experience. Ongoing supervision of the project by the host State during the construction and operation phases is essential[60] given that the State always has a vested reversionary interest in a

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51. Martin Stewart-Smith, *Private Financing and Infrastructure Provision in Emerging Markets*, 26 L. & POL'Y INT'L BUS. 987 n.19 (1995).

52. Agusti, *supra* note 9, at 4. Functionally, because in a Build-Operate-Own (BOO) project there is no obligation to transfer the project back to the host State, it may be seen as a contractual consent to a form of long-term regulation of the enterprises. *See infra* Appendix.

53. Kerr, *supra* note 49, at 99.

54. Agusti, *supra* note 9, at 3.

55. Kerr, *supra* note 49, at 101.

56. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 7.

57. Jonathan M. Pertchik, *The Build, Operate and Transfer Approach to Infrastructure Development in Mexico*, 4 PUB. PROCUREMENT L. REV. 168, 177 (1995).

58. Robert Tiong, *The Structuring of Build-Operate-Transfer Construction Projects* 4, 5 (1991) (monograph on file with author).

59. Pertchik, *supra* note 57, at 172.

60. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 247-71.

true BOT project.[61]

The continued regulation of the project is important for both the commercial success of the project and the public good because it prevents the project operators from abusing a grant of monopoly power.[62] Pricing a basic product such as electricity or clean water out of the reach of the citizenry will quickly undermine popular support for privatization in developing countries. On the other hand, the revenues must be sufficient to compensate lenders and investors who have made the project possible.[63]

Just as a BOT project requires from a host State a long-term commitment to the project and its private sector partner, the private sector partner must plan for the long term viability of the project to assure economic success and popular support for the life of the public/private partnership.[64] It is critical that the potential private sector participant compile accurate financial and economic data to determine the feasibility of the project.[65] While the compilation of such information is costly and time consuming,[66] it is essential that the data be accurate so that the support of financial institutions and investors may be gained,[67] and the cash-flow problems associated with inaccurate or overly optimistic projections may be avoided.[68]

B. *BOT and Infrastructure Development*

BOT is well suited to large scale infrastructure projects such as highway construction.[69] It benefits those governments which need highways

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61. *See* Tiong, *supra* note 58, at 16.

62. Agusti, *supra* note 9, at 4. As a practical matter, the rates for the project are established contractually and typically are either fixed or have some form of escalator clause. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 109.

63. Tiong, *supra* note 58, at 6.

64. For an interesting discussion of the mechanics of BOT project planning, see Augenblick & Custer, *supra* note 1.

65. Tiong, *supra* note 58, at 7.

66. For example, the Japanese company Kumagai Gumi is reported to have spent approximately $5 million in pre-signing costs on a Bangkok toll road BOT project. Augenblick & Custer, *supra* note 1, at 8. Kumagai later withdrew from the project after the government failed to deliver land for the right of way on a timely basis and cut user tolls. Paul Handley, *Bitterly, Kumagai Gumi Bows Out of the Bangkok Expressway*, INSTITUTIONAL INVESTOR, Apr. 1994, at 21.

67. Tiong, *supra* note 58, at 7.

68. *See, e.g.*, Peter Pae, *Drivers Put the Brake on Toll Road's Promise; Investors in Dulles Greenway Try to Steer the Failing Project Back on Course*, WASH. POST, Dec. 26, 1995, at A1 (inaccurate highway use projections based on dated traffic study and failure to properly assess demographics contributed to toll road utilization shortfall of approximately 66% and threatened financial stability of the project).

69. For an interesting discussion of the economic efficiency of BOT infrastructure

to link their markets and which cannot either afford the work or must give priority to other projects. BOT also benefits the private sector which gains the profits generated during the operating concession phase.[70] Moreover, commercial banks may be more willing to make loans to a private project company to finance the project than they would be to loan money directly to the government.[71] This may reflect the common belief that a private enterprise will have greater incentive to build and operate the project with greater efficiency, as well as to circumvent local graft and corruption.[72] Avoiding reliance on sovereign debt permits infrastructure development to occur more rapidly without creating a drain on other sectors of the economy.[73]

BOT is not confined to developing countries. In the United States, the Dulles Greenway toll road was financed by an international consortium including American insurance companies and private European banks.[74] In Europe, the Channel Tunnel linking Great Britain and France was financed and constructed as a BOT project.[75] In fact, the Intermodal Surface Transportation Efficiency Act of 1991[76] encourages state governments to use private capital and direct user payments in the form of tolls to increase investment in the U.S. highway system.[77]

The typical infrastructure project requires so much capital, expertise, and long-term commitment that there are only a limited number of companies or joint ventures which have the capability to complete a BOT project.[78] While this small number might suggest sole source procurement or limited "list" bidding,[79] a commitment to good-government argues strongly for some form of regulated procurement such as prequalified tendering or request for proposals.[80] This transparency promotes public confidence in the enterprise and minimizes charges of corruption—real or perceived—which may arise when a government enters into a long term relationship with a single private enterprise for a valuable concession.

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projects, see John B. Miller, *Using Competition to Stimulate Investment in Public Infrastructure*, 31 PROCUREMENT L. 1 (Spring 1996).

70. *Bankrolling the Roadbuilders*, WORLD HIGHWAYS/ROUTES DU MONDE 31, 32 (May/June 1994).

71. Pertchik, *supra* note 57, at 176.

72. UNIDO BOT GUIDELINES, *supra* note 12, at 6-8.

73. *Id.* at 32-33.

74. *Bankrolling the Roadbuilders*, *supra* note 70, at 31.

75. Pertchik, *supra* note 57, at 173.

76. 23 U.S.C. § 129 (1995).

77. *Bankrolling the Roadbuilders*, *supra* note 70, at 31.

78. Pertchik, *supra* note 57, at 179.

79. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 103, 111.

80. Pertchik, *supra* note 57, at 179-80.

C. *Current BOT Practice*

While BOT projects must rely on a legal framework—including well defined contractual and property rights[81]—which facilitates private investment, BOT and other privately funded infrastructure projects may not currently be subject to the procurement laws or foreign investment laws of a host State.[82] For example, the procurement regulations of Indonesia do not govern privately funded projects.[83] On the other hand, the Foreign Investment Law of Vietnam was amended in 1992 to permit BOT projects, and regulations were promulgated in 1993 to govern the BOT process.[84]

For BOT projects, the World Bank Guidelines provide for selection of the private sector participant through either international competitive bidding or what it terms "limited international bidding"—a situation in which bids are solicited from lists without advertised solicitation. These methods may include several stages to arrive at an "optimal combination" of evaluation criteria for the final solicitation. These criteria include "the cost and magnitude of the financing offered, the performance specifications of the facilities offered, the cost charged to the user or purchaser, other income generated for the borrower or purchaser by the facility, and the facility's depreciation."[85] Once the private sector participant is selected, it is free to procure the goods, services or construction required for the project as it sees fit.[86]

Currently, host States seeking BOT investment may either identify a particular development objective and in some form publicize the need for development[87] in order to seek proposals, or they may be approached by a particular international consortium which has experience in a market and proposes to enter into a BOT project.[88] The latter may appear efficient given

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81. *See* Augenblick & Custer, *supra* note 1, at 30.

82. For a foreign investment law model that addresses BOT, see DON WALLACE ET AL., MODEL FOREIGN INVESTMENT LAW ANNOTATED ch. 1.3 & cmt. 3 (1996).

83. Sullivan, *supra* note 21, at 2.

84. James S. Finch & Sesto E. Vecchi, *BOT Contracts in Vietnam: Regulations and Guidance*, E. ASIAN EXECUTIVE REP., Mar. 15, 1995, at 6. *See also* Mathilde L. Genovese, *Succeeding in Vietnam's Emerging Market Economy*, E. ASIAN EXECUTIVE REP., May 15, 1995, at 7. See the UNIDO BOT GUIDELINES for a list of laws of various governments which affect BOT projects. UNIDO BOT GUIDELINES, *supra* note 12, at 100.

85. WORLD BANK GUIDELINES, *supra* note 15, ¶ 3.13(a).

86. *Id.* ¶ 3.2.

87. For example, the Asian Development Bank posts BOT opportunities on the Internet, such as the Kabirwala Power project in Pakistan, which is to be structured as a BOO project. *See Project Profiles for Commercial Co-Financing, Asian Development Bank Business Opportunities homepage* <http://www.asiandevbank.org/adbbo/adbbo.html>.

88. *See generally* Robert Tiong, *An Interview with Gordon Wu, in The Structuring of Build-Operate-Transfer Construction Projects* 46 app. (1991) (monograph on file with author) (discussing the strategy of Hopewell Holding, a Hong-Kong based company with extensive

the limited number of bidders capable of building and operating a large BOT project (such as the construction and operation of a hydroelectric dam) and the limited experience of many host States in public procurement and BOT project negotiation. But the reliance on a single proposal from a single bidder, no matter how capable or honest the transaction might be, invites allegations of corruption and a lack of commitment to the free market.

As part of the concession package offered by the host State, the government may contractually grant a certain number of guarantees to the private sector participant. Such guarantees of profitability may include "take or pay" clauses in the concession agreements whereby the State agrees to pay for a fixed amount of the product of the BOT project, regardless of whether or not it chooses to accept actual delivery or use of the service or product.[89] Care should be taken that these guarantees are not excessive, otherwise the net result is the shifting of the commercial risk back to the public sector.[90]

Other forms of guarantees, which expose the host State to contractual contingent liability throughout the term of the concession, may include guarantees to repay loans used for financing the project in the event of default by the private sector parties and agreements regarding currency fluctuations and *force majeure*.[91] Given the long period of private/public involvement, political risk of government instability may be dealt with contractually through guarantees[92] or through investment insurance made available through the Multilateral Investment Guarantee Agency (MIGA) of the World Bank[93] or the United States Overseas Private Investment Corporation (OPIC).[94] Two essential guarantees for the private sector participant are an assurance of its ability to repatriate currency rather than to have to rely on a countertrade arrangement[95] and a dispute settlement mechanism, such as arbitration under the UNCITRAL rules[96] or the International Centre for Settlement of Investment Disputes (ICSID).[97]

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experience in initiating and participating in BOT projects in Asia).

89. Kerr, *supra* note 49, at 105-06.

90. *Id.* at 106.

91. Sullivan, *supra* note 21, at 3. For example, the $4.5 billion Bandar Khomeni petrochemical complex in Iraq was abandoned due to Iraqi air raids during the Iran-Iraq war, causing Mitsui Bank of Japan to take a $1 billion write-off in 1987. Tiong, *supra* note 58, at 29.

92. Pertchik, *supra* note 57, at 174.

93. MIGA insurance coverage includes risks associated with currency conversion and transferability, expropriation, armed conflict, politically motivated sabotage, and breach of contract by the host State. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 206.

94. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 436-38 (4th ed. 1992).

95. *See* UNCITRAL LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS, U.N. Doc. A/CN.9/Ser.B/3 (1993).

96. *Arbitration Rules of the United Nations Commission on International Trade Law.*

97. *Convention on the Settlement of Investment Disputes between States and Nationals*

Nevertheless, the more guarantees a government extends to the private sector parties in a BOT transaction, the less the project resembles the private enterprise ideal.

III. BOT WITHIN THE PROCUREMENT CONTEXT

As noted above, BOT contracts have not been consistently viewed as a component of the overall procurement process.[98] The World Bank Guidelines, although they attempt to provide a competitive format through which BOT projects are to be awarded, allow for the use of "limited international tendering"—a process which relies on established bidder lists with no bid advertisement and which substantially defeats the goal of openness and transparency that should be the driving force behind a good government's procurement practice.[99] Moreover, BOT does not fit easily into the structures proposed in the UNCITRAL Model Law.[100] Simple requests for proposals, while an improvement on a single source negotiation, may be difficult to reconcile with the desired transparency.[101]

A good-government model for the facilitation of BOT projects may be constructed which is consistent with sound procurement practices and the recognized superiority of tendering as the preferred method of procurement.[102] First, the host State should identify the necessary infrastructure project and conduct a feasibility study to determine whether the project is viable in light of the conditions which are consistent with a successful BOT project.[103] After determining the potential scope of the project, the host State should compile a project profile, advertise the potential project, and seek to pre-qualify prospective bidders.[104] The bidders should then submit proposals which offer solutions to the problem that the

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of Other States, and Accompanying Report of the Executive Directors of the International Bank for Reconstruction and Development, Doc. ICSID/2.

98. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 100-01 (listing procurement laws). For an example of an article which attempts to view BOT in the procurement context, see Pertchik, *supra* note 57, at 183.

99. *See supra* text accompanying note 85.

100. *UNCITRAL Model Law*, *supra* note 14.

101. The UNCITRAL Guide to Enactment recognizes this problem, stating that "from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption." *UNCITRAL Guide to Enactment*, *supra* note 13, at 26 cmt. 19(1).

102. The proposed method builds on the procurement strategies outlined in Chapter 6 of the UNIDO BOT GUIDELINES, *supra* note 12 and the two-stage tendering method of article 46 of the UNCITRAL Model Law, *supra* note 14.

103. Tiong, *supra* note 58, at 5.

104. For a discussion of the utility of prequalification, see UNIDO BOT GUIDELINES, *supra* note 12, at 110-12.

This paper begins by considering the public procurement process, in particular by focusing on the good-government aspects of public procurement,[13] and discusses the procurement structures proposed by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services[14] and the World Bank Guidelines for Procurement Under IBRD Loans and IDA Credits[15] as models for framing a BOT procurement. Part II will examine the BOT method of project financing, its use in large scale infrastructure development, and the role of BOT in economic development. Finally, part III will consider BOT within the context of regulated public procurement and will make a modest proposal for a conceptual framework for BOT which is consistent with the good-government practices that a modern system of public procurement seeks to further.[16]

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phase are not uncommon. UNIDO, GUIDELINES FOR THE DEVELOPMENT, NEGOTIATION AND CONTRACTING OF BUILD-OPERATE-TRANSFER (BOT) PROJECTS 100, 103, 117 (1995 Pre-Print) [hereinafter UNIDO BOT GUIDELINES]. In addition, the Guidelines endorse the concept of submission of unstructured alternative bids in order to encourage innovation by bidders. *Id.* at 116. It is arguable that, unless these alternatives are considered before a final, structured bid solicitation is made available to qualified bidders, the procuring entity within the host State will be in a discretionary position of evaluating disparate bids, which is inconsistent with sound procurement practice.

13. A sound public procurement law promotes good-government ideals by encouraging confidence that the government will act responsibly in its purchases, by seeking the optimum value for public funds in an atmosphere of accountability, and by allowing fair competition through regularized, transparent practices. *See UNCITRAL Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services*, U.N. Commission on International Trade Law, 27th Sess., ¶ 8, U.N. Doc. A/CN.9/403 (1994), [hereinafter *UNCITRAL Guide to Enactment*].

14. *UNCITRAL Model Law on Procurement of Goods, Construction and Services, Official Records of the General Assembly*, U.N. Commission on International Trade Law, 49th Sess., Supp. No. 17, Annex I, U.N. Doc. A/49/17 (1994), [hereinafter *UNCITRAL Model Law*]. UNCITRAL also drafted a guide to enactment of the Model Law to assist States in formulating a modern public procurement law. *UNCITRAL Guide to Enactment*, *supra* note 13.

15. WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS (5th ed. 1995), [hereinafter WORLD BANK GUIDELINES]. It is interesting that the World Bank is taking an increasing interest in BOT projects and is reported to be planning to have its International Finance Corp. private sector arm take equity positions in BOT projects. Frank Gray, *FT Exporter*, FINANCIAL TIMES, Jan. 31, 1995, at XX.

16. The BOT project form is a major topic of study for UNCITRAL, which is currently engaged in the drafting of a legislative guide for BOT. *See generally Build-Operate-Transfer projects (BOT): Draft materials for a legislative guide*, U.N. Doc. LA/TL/BOT/Paper (1996) (internal discussion paper prepared by the UNCITRAL Secretariat for an expert group meeting on BOT, held in Vienna, 2-4 Oct. 1996). *See also Possible Future Work: Build-Operate-Transfer Projects: Note by the Secretariat*, U.N. Committee on International Trade Law, 29th Sess., ¶¶ 1-3, U.N. Doc. A/CN.9/424 (1996); *Report of UNCITRAL on the work of its twenty-ninth session*, ¶¶ 225-30, U.N. Doc. A/51/17 (1996).

In addition, an international conference on legal aspects of BOT contracts, sponsored

I. PUBLIC PROCUREMENT: POLICY AND PRACTICE

The procurement of goods or services by a government is an important factor in the economic vitality of states and has drawn the attention of international inter-governmental organizations such as the World Bank[17] and UNCITRAL.[18] Sound procurement practice is particularly important in those developing countries and states the economies of which are in transition because of the substantial role that government purchasing plays in the entire economy.[19] In particular, procurement which strengthens a nation's infrastructure facilitates indigenous business and contributes to the social welfare of the society.[20] Thus, implementation of regularized and transparent procurement practices is important in providing goods and services to the public at a reasonable cost[21] and in promoting confidence in government by establishing a discipline which deters corruption[22] or arbitrary decisions by limiting unfettered discretion by purchasing officials. Indeed, corruption not only harms the public in that the end product or service is not necessarily the best that the market has to offer but also harms the contractor by lessening the incentive to provide a fully competitive product or service.[23]

A focus on procurement policy is particularly timely. The fall of communism in 1989 and the recent lessening of the North/South distrust—a distrust which had driven the New International Economic Order—has led

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by UNCITRAL, the International Law Institute (I.L.I.), and the Cairo Regional Centre for International Commercial Arbitration, was held in Cairo on October 21-24, 1996.

17. *See, e.g.*, WORLD BANK GUIDELINES, *supra* note 15.

18. *See UNCITRAL Model Law, supra* note 14; *UNCITRAL Guide to Enactment, supra* note 13.

19. *UNCITRAL Guide to Enactment, supra* note 13, ¶ 3.

20. Among the many benefits associated with infrastructure investment are the promotion of industrial growth through the provision of a basic service, increased employment, reduced costs to consumers, and increased land values in areas surrounding the project. *See* UNIDO BOT GUIDELINES, *supra* note 12, at 31-32.

21. Hal Sullivan, Issues Concerning Government Procurement Regulations and Public-Private Partnerships 6 (Nov. 6, 1995) (manuscript on file with author).

22. For a thorough discussion of corruption issues in Italian public procurement, see Enzo Pontarollo, *Regulatory Aspects and the Problem of Corruption in Public Procurement in Italy*, 5 PUB. PROCUREMENT L. REV. 201 (1995). For a discussion of the corruption issues generally in the People's Republic of China, see John Linarelli, *China and the GATT Agreement on Government Procurement*, 8 J. CHINESE L. 185, 212-13 (1994). For an interesting discussion of corruption issues worldwide, see *Internet Corruption Ranking, Transparency International homepage* <http://www.gwdg.de/~uwvw/icr.htm>.

23. Wayne A. Wittig, *The Essence of Public Procurement for the Post-Communist World*, CONT. MGMT., Mar. 1993, at 18, 22. For an interesting discussion of the costs of official corruption, see Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385 (1995).

project seeks to address. Elements of the proposals would be reconciled, and a final model would be developed, with a point system which assigns points for each aspect of the bid on the basis of objective, quantifiable criteria.[105] This model would then be submitted to the bidders for their use in submitting a second stage bid. The bid which is then most responsive to the solicitation—with the highest number of points—should be awarded the BOT contract.[106]

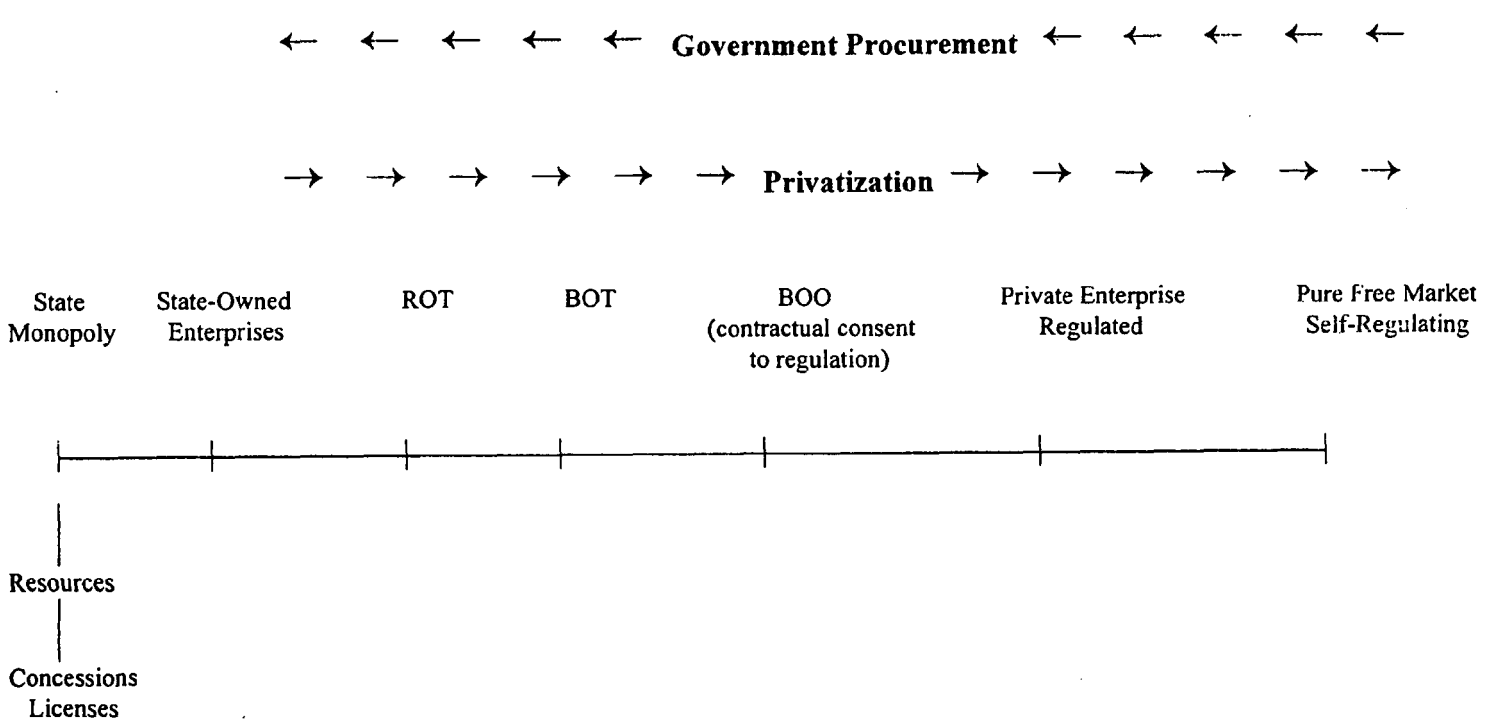
CONCLUSION

The Build-Operate-Transfer model of project financing will increasingly become the preferred instrument of infrastructure development in the free market of the 21st century. The good-government goals which are part and parcel of sound procurement practice—transparency, openness, and market access—are equally, and arguably to a greater extent, applicable in the BOT context given the long-term public/private relationship of the typical BOT infrastructure project and the public good which is served by infrastructure investment. The North/South animosity with its charges of neo-colonialism which fueled much of the developmental dialogue of the late 20th century will be less likely to attach to the BOT projects of the future which are awarded in a manner which is consistent with these good government goals and economic development will continue to benefit both the developing and developed world.

105. The use of preliminary proposals to refine a final set of bid criteria is being used by the Department of Energy in the procurement of a new particle accelerator for a project led by Los Alamos. *See Tritium Production Request Drafted*, DEF. CLEANUP, Dec. 8, 1995, *available in* LEXIS, News Library, CURNWS File.

106. *See* Pertchik, *supra* note 57, at 183.

Appendix—BOT and Public Procurement: A Conceptual Approach



TELLING THE TRUTH AND PAYING FOR IT: A COMPARISON OF TWO CASES—RESTRICTIONS ON POLITICAL SPEECH IN AUSTRALIA AND COMMERCIAL SPEECH IN THE UNITED STATES

David S. Bogen[*]

Two cases decided last year appear to provide a stark contrast in philosophy toward the basic human right of freedom of speech. In Australia, the High Court held that the Commonwealth could punish a citizen who encouraged voters to fill out the ballot in a manner that the government wished to discourage, even though the method of voting was lawful.[1] In the United States, the Supreme Court found that the State could not suppress truthful information about a product in an attempt to reduce the demand for its sale.[2] In other words, truthful statements encouraging lawful activity were protected from a regulation of commercial speech in the United States but not from a regulation of political speech in Australia.

Both countries have constitutional protections for speech. The First Amendment secures freedom of speech from abridgment in the United States.[3] In Australia, the High Court has implied freedom of political discussion from constitutional provisions for representative government.[4] An analysis of the two recent cases reveals similarities in the way each court approaches the constitutional protection of freedom of speech, but a fundamental difference in emphasis with respect to the status of the citizen.

I. *Langer v. Commonwealth*

Australia is the home of the "Australian ballot"—the secret ballot which has gained wide acceptance throughout the world. In other respects its voting system follows more controversial political theories. Australia has instituted compulsory voting and requires the voters to rank all candidates in order of preference from the most preferred to the least preferred.

A. *The Compulsory Ballot*

It is a criminal offense for a qualified voter to fail to vote in an election

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1. Langer v. Commonwealth, 134 A.L.R. 400 (1996).

2. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

3. U.S. CONST. amend. I.

4. A.C.T.V. v. Commonwealth, 108 A.L.R. 577 (1992); Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992).

for Commonwealth office in Australia without a valid and sufficient reason.[5] Citizens have a duty to participate in government. Compulsory voting assures that elected officials are the preference of a majority of the electorate, not just a majority of those who choose to vote.

The Australian system of compulsory voting could not be adopted in the United States. It violates the commonly accepted understanding of the First Amendment that government may not compel an affirmation of support. The United States Supreme Court struck down a compulsory flag salute in *West Virginia State Bd. of Educ. v. Barnette*,[6] saying, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[7] Compulsory voting appears to force the citizen to speak and act in support of political candidates in the election. This contradicts a basic premise of United States free speech doctrine. As the Court said in *Wooley v. Maynard*,[8] "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[9]

The American view runs counter to the Australian vision of appropriate protections for political choice. Although the Australian Constitution does not specifically guarantee freedom of speech, it does provide for voter choice. Members of the Commonwealth Parliament must be "directly chosen by the people."[10] Voters must have an opportunity to be informed to make that choice. Thus the Australian High Court found an implied freedom of political discussion in the Australian Constitution.[11] Even before this implied freedom was recognized, Australian citizens used the electoral provisions of the Constitution to challenge the compulsory voting laws.

Ernest Edward Judd, a Socialist Labour party member, contended that the Commonwealth could not constitutionally deny him the ability to choose not to support any candidate at all. Judd was convicted of violating the compulsory voting requirement by failing to vote in a 1925 Commonwealth senate election.[12] On appeal to the High Court he argued that the power for Parliament "to make laws prescribing the method of choosing senators"[13] did

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5. Commonwealth Electoral Act § 245 (1918).

6. 319 U.S. 624, 642 (1943).

7. *Id.*

8. 430 U.S. 705 (1977).

9. *Id.* at 714.

10. AUSTL. CONST. §§ 7 (senators), 24 (members of the House).

11. Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992); A.C.T.V. v. Commonwealth, 108 A.L.R. 577, 596-97 (1992).

12. At that time the requirement was found in Section 128A of the Commonwealth Electoral Act of 1918-1925.

13. AUSTL. CONST. § 9. The provisions for election to the House of Representatives

not extend to compulsory voting. Noting that his party did not participate in the federal election because of the costs to get its candidates on the ballot, Judd complained that all the candidates on the ballot supported capitalism. It would betray his principles and those of his party to vote for any of them. Forcing him to vote, he said, denied him his choice.

In *Judd v. McKeon*,[14] the Australian High Court upheld the compulsory voting law. As long as choice exists, a voter's dislike of the choices or how they are to be made does not matter. The joint opinion of three justices interpreted "choosing" to refer to a selection between available options. The requirement of a choice would be satisfied even if all the alternatives were undesirable.[15] Two other justices agreed. One of them, Justice Isaac Isaacs said, "[t]he compulsory performance of a public duty is entirely consistent with freedom of action in the course of performing it."[16] Justice Isaacs noted that the compulsory system would be undermined if dislike of the candidates served as an excuse for not going to the polls.[17]

The compulsory ballot does not prevent Australians like Judd from arguing against the system of compulsory voting or stating that all the candidates are abominable. The requirement prevents elections from going by default to the candidate with the most intense supporters (i.e., those motivated to come to the polls) rather than with the most supporters. It makes the vote not just a right, but also a duty which the citizen owes to the Commonwealth. As in the case of the military draft, the law exempts religious conscientious objectors, but not persons simply opposed to the current political situation.

Only Justice Henry Bournes Higgins dissented from the decision in *Judd*. He did not question the constitutional power of Parliament to require compulsory voting, but reasoned that scruples of opposition were a "valid and sufficient reason" under the provisions of the statute for refusing to vote.[18]

B. *The Voting Preference System*

Australian elections use a preference system of voting in which the voter casts a vote for all the candidates in order of preference. With respect to Commonwealth elections, Section 240 of the Commonwealth Electoral Act of 1918 provides:

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do not specifically refer to choice. *Id.* §§ 31, 51(xxxvi) (members of the House).

14. 38 C.L.R. 380 (1926).

15. *Id.* at 383 (Knox, C.J., Gavan Duffy & Starke, JJ.).

16. *Id.* at 385 (Isaacs, J.).

17. *Id.* at 386 (Isaacs, J.).

18. *Id.* at 387-89 (Higgins, J.).

> In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference,
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.[19]

The underlying rationale for this method of voting is to assure that the winning candidate is the preference of the majority of the voters. That does not always happen where voters vote for a single candidate. For example, when third party candidates run, the voting system in the United States can result in a candidate being elected with a plurality although most of the voters preferred another candidate. This might have occurred if most of those who voted for the candidate with the least votes (e.g., Independent Ross Perot) preferred a second candidate (e.g., Republican George Bush) over the candidate who received the most votes (e.g., Democrat Bill Clinton).

The Australian system avoids the plurality election problem. The winning candidate must receive a majority of the preferences of the voters. To achieve this when no single candidate has a majority of the first preferences, a process of exclusion and recalculation is used. The candidate with the fewest first place votes is excluded, and the second place candidate on those ballots is treated as the preference of the voter. This process of exclusion and ballot recalculation is continued until there are only two candidates left or one candidate has a majority.[20]

The voting preference system was the focus of Jurgen Henry Faderson's challenge to his conviction for failure to vote in a senate election. He tried a variant on the statutory route suggested by Justice Higgins in *Judd*. Faderson contended that he had a valid and sufficient reason for not voting within the meaning of the statute because he had no preference among the candidates. Unlike Judd who opposed voting for any of the candidates, Faderson argued that he not only opposed them but also that he could not distinguish among them.

The statutory argument failed in the 1971 case of *Faderson v. Bridger*.[21] The Court denied the premise that the voter could not distinguish between candidates. Chief Justice Sir Geoffrey Barwick said, "[t]o face the

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19. Commonwealth Electoral Act § 240 (1918).
20. *Id.* § 274.
21. 126 C.L.R. 271 (1971).

voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference among them does not present him with a task that he cannot perform."[22] Everyone is different. Even a candidate list that consists of Hitler, Jack the Ripper, Pol Pot, and Satan can be ranked in order of preference.[23] Relying on *Judd*, and particularly relying on Justice Isaacs' opinion in that case, Chief Justice Barwick upheld the conviction. If inability to distinguish among the candidates were accepted as grounds to refuse to vote, he contended, it would undermine the entire compulsory voting system.

Judd and *Faderson* made it clear that compulsory voting was consistent with the Australian Constitution. But the criminal law only required the voter to come to the polling place, take a ballot into the booth, and deposit it in the ballot box. "Of course there is no offense committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote."[24]

The secret ballot enabled the voter opposed to the system to turn in a blank ballot without being punished. Indeed, that is just what some government critics urged—and that set the stage for the case decided by the High Court of Australia this past term.

C. *Ballot Provisions—The Prohibition Against Encouraging Voters to Disregard Instructions*

There is no criminal penalty for failing to vote in the manner prescribed by Section 240. There couldn't be, because the ballot is secret. The primary sanction for failure to follow instructions is that the ballot will be invalid or, as it is popularly termed in Australia, "informal." Not every ballot that fails to follow Section 240 is informal. The Electoral Act enables election officials to count ballots where a voter neglected to fill in a space or mistakenly ranked two candidates alike. Under Section 268(1), a single blank space will be deemed the voter's last preference.[25] Under Section 270(2), a ballot will be counted if it identifies a candidate as the first preference and has numbers in the squares next to the other candidates or all the other candidates but one.[26]

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22. *Id.* at 273.

23. My current preferences, subject to change with further information, are: (1) Jack the Ripper, (2) Pol Pot, (3) Hitler, and (4) Satan.

24. *Faderson*, 126 C.L.R. at 272.

25. Commonwealth Electoral Act § 268(1) (1918).

26. *Id.* § 270(2). Under the Commonwealth Electoral Act:

> (2) Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:
>
> (a) has the number 1 in the square opposite to the name of a candidate;

These provisions enable voters to avoid the expression of any preference for secondary candidates by marking a "1" for the candidate of choice and "2" for all others, since a repeated number is disregarded. Although a ballot which voted for a single candidate would be invalid in an election with more than two candidates, a voter can effectively cast a ballot for one candidate and ignore all others by giving the others the same preference number.

Thus, the attempt to save the vote of the voter who made a mistake created a potential loophole for a single candidate voting procedure. In the long run, this could prevent any candidate from getting a majority of the preference votes. The Australian Electoral Commission commented on the difficulty of retaining the safety valve for people who make a genuine mistake while avoiding de facto optional preferential voting. They suggested that one method for dealing with this was to penalize individuals who induce people to fill out the ballot paper other than in accord with instructions. The Commonwealth Parliament responded in 1992 by enacting a new provision, Section 329A, which imposed a penalty of six months in prison for its violation:

> A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.[27]

(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
(c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);

then:

(d) the ballot-paper shall not be informal by virtue of that paragraph;
(e) the number 1 shall be taken to express the voter's first preference;
(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1—the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
(g) the voter shall not be taken to have expressed any other preference.

(3) In considering for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded.

Id. §§ 270(2)-270(3).

27. *Id.* § 329A(1). Section 27 of the Electoral and Referendum Amendment Act of 1992 inserted Section 329A in the Commonwealth Electoral Act of 1918.

D. *The Decision of the Australian High Court*

The constitutionality of Section 329A came before the High Court in *Langer v. Commonwealth*.[28] Albert Langer regarded the existing political system as fundamentally wrong. He acknowledged that *Judd* and *Faderson* precluded him from urging voters not to go to the polls. Instead, he urged voters to oppose the system by turning in a blank or informal ballot.

Langer argued that voters must be free to exercise their "choice" for members of the House of Representatives under Section 24 of the Constitution by turning in blank ballots to show that the voter does not choose any of the candidates. Since the voter must be free to fill out the ballot in a manner different from the instructions in Section 240, Langer argued he should be free to encourage them to do so. Therefore, he contended, Section 329A was unconstitutional.

Langer's basic argument ran contrary to the reasoning of the Court in the earlier cases. The High Court had stated in those decisions that the constitutional requirements of choice were satisfied by alternative candidates on the ballot and that voting is a civic duty that can be compelled. All the justices in *Langer* agreed that the mandatory language of Section 240 was constitutional.

Langer stressed the argument on the constitutionality of Section 240 because his underlying concern was to encourage voters to oppose the electoral system, and he realized that he had no chance of persuading the Court to strike down a law that forbade encouraging persons to violate another valid law. But Section 329A applied even if the defendant had urged something lawful. Unlike Section 240, Section 329A punished speech. That suggested the possibility that it would violate the implied freedom of political communication. The High Court had found Commonwealth laws unconstitutional where they prohibited the criticism of government bodies[29] or restricted political advertising.[30] The implied freedom even affected defamation actions brought by high public officials under the common law or state statutes.[31] Thus, while Langer did not press the implied freedom argument, it was relevant to his case.

One Justice thought that the Commonwealth could not constitutionally punish persons who encouraged voters to cast valid ballots that did not

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28. 134 A.L.R. 400 (1996). Justice Deane reserved the question of the constitutionality of Section 329A for decision by the High Court. Deane was elevated to the position of Governor-General of the Commonwealth of Australia before the decision in the case. The new justice, Michael Kirby, took his seat after argument in Langer's case. Thus, only six judges gave their opinions in this case.

29. Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992).

30. A.C.T.V. v. Commonwealth, 108 A.L.R. 577 (1992).

31. Theophanous v. Harold & Weekly Times Ltd., 124 A.L.R. 1 (1994).

follow statutory directions. Although Justice Sir Darryl Dawson had dissented in the cases which found an implied right of freedom of political discussion, he found that Section 329A violated Section 24 of the Commonwealth Constitution. He said the provision for members of the House of Representatives to be chosen by the people required that voters have a genuine choice. "[T]hose eligible to vote must have available to them the information necessary to exercise such a choice."[32]

Justice Dawson indicated that government could legitimately punish persons who encourage others to cast an informal vote "because the casting of a formal, and therefore, effective, vote is in the interests of representative government."[33] However, the savings provisions in Sections 268 and 270 made it possible to cast a valid ballot that does not conform to the directions of Section 240. Taken together, these provisions make available optional or selective preferential voting as opposed to full preferential voting.

> To prohibit communication of this fact (or at any rate communication in the form of encouragement) is to restrict the access of voters to information essential to the formation of the choice required by s 24 of the Constitution. Thus, s 329A has the intended effect of keeping from voters an alternative method of casting a formal vote which they are entitled to choose under the Act.[34]

Justice Dawson concluded that Section 329A was not reasonably and appropriately adapted to provide for members directly chosen by the people.[35]

> It is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice. It can hardly be said that a choice is an informed choice if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result.[36]

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32. Langer v. Commonwealth, 134 A.L.R. 400, 411 (1996) (Dawson, J.).

33. *Id.* at 412 (Dawson, J.). In a related case, Dawson voted to sustain a South Australian law that prohibited encouraging voters to mark their ballots in state elections other than as directed. Muldowney v. South Australia, 70 A.L.J.R. 515 (1996). "Unlike the situation in *Langer*, s 126(1) does not have the aim of discouraging electors from exercising an option which is available to them in the casting of a formal vote but is designed to ensure that electors are not encouraged to cast an ineffective vote." *Id.* at 521 (Dawson, J.).

34. *Langer*, 134 A.L.R. at 411 (Dawson, J.).

35. *Id.*

36. *Id.*

Despite the force of Dawson's arguments, the remaining five justices held the law constitutional. According to the majority, the savings provisions were designed to minimize the exclusion of ballots, not to provide an alternative method of voting. Encouraging people to fill out a ballot in a different manner undermined the operation of the preferential system. The wisdom and propriety of such a system remain open to full discussion; it is the encouragement to act in a way that impairs its desired operation that the statute forbids.

Chief Justice Sir Gerard Brennan wrote that "the savings provisions do not detract from the power to enact s 329A in order to protect what the parliament intends to be the primary method of choosing members of the House of Representatives."[37] He argued that the savings provisions did not prescribe an alternative method of voting but merely saved from invalidity some ballot papers which deviated from the prescribed method. "The restriction on freedom of speech imposed by s 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the s 240 method of voting."[38]

Justices John Toohey and Mary Gaudron recognized that the purpose of the law appeared to be to limit the possibility of voters deliberately taking advantage of the savings provisions so as to express a preference for only some of the candidates. This "assists in the maintenance of a system of full preferential voting."[39] The law, they concluded, was valid because it furthered the democratic process.

> Although the provisos operate to give effect to a ballot paper which might otherwise be informal, the democratic process is enhanced if a voter's actual intention is capable of ascertainment from the ballot paper and effect is given to that intention rather than an intention which he or she is deemed to have expressed. In relation to ballot papers which fall within the provisos to s 268(1)(c), s 329A operates to proscribe conduct which might encourage voters to fill in their ballot papers in a way that does not make their intentions manifest. Because it operates in this way, it is reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process.[40]

Justice Michael McHugh read Section 240 as giving directions to voters on how they are to discharge the statutory duty to vote, but not

37. *Id.* at 405 (Brennan, C.J.).
38. *Id.* at 406 (Brennan, C.J.).
39. *Id.* at 415 (Toohey & Gaudron, JJ.).
40. *Id.* at 419 (Toohey & Gaudron, JJ.).

imposing a legal duty on the voter to vote in that manner. Nevertheless, failure to follow those directions threatened the preferential system of voting. "The system is as effectively undermined by filling in a ballot paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal."[41] Although there were savings clauses for particular ballots, there was only one way to vote according to the legislature's direction. Promoting that method did not violate the freedom of discussion implied by Section 24 of the Constitution. "There is a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibiting advocacy that criticises or calls for the repeal of such directions."[42]

Finally, Justice William Gummow said that the savings provisions of Sections 268 and 270 were ancillary to the primary objective of the legislation "and do not evince any legislative intent to make optional or selective preferential voting available as an alternative to full preferential voting."[43] He found no violation of an implied freedom of discussion derived from the system of representative government. "Section 329A does not impose any restriction upon political discussion generally nor, more particularly, upon discussion as to the suitability or disadvantages in the voting system. Rather, it is directed at the particular processes or mechanism by which the franchise is exercised and the vote is cast."[44] He concluded that the law was valid because the primary objective of the system established by the legislation involved observance of the constitutionally proper directions of Section 240. "It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchise."[45]

In summary, a majority of the High Court held that the Commonwealth could discourage people from voting in a manner that was lawful but undesirable by punishing anyone who encouraged voters to act in that manner. The law served the legitimate purpose of supporting the system of full preference voting.

II. *44 Liquormart, Inc. v. Rhode Island*

Unlike Australia where the protection for speech is implied from the political process and limited to speech concerning political matters,[46] in the

41. *Id.* at 422 (McHugh, J.).
42. *Id.* at 423 (McHugh, J.).
43. *Id.* at 430 (Gummow, J.).
44. *Id.* at 431 (Gummow, J.).
45. *Id.* at 431-32 (Gummow, J.).
46. "[S]peech which is simply aimed at selling goods and services and enhancing profit-making activities will ordinarily fall outside the area of constitutional protection."

United States, the Supreme Court has found that the First Amendment guarantee of freedom of speech applies to commercial speech.[47] Only a few months after the Australian High Court upheld the prohibition against encouraging voters to disregard election voting instructions, the U.S. Supreme Court invalidated a state prohibition on advertising liquor prices.

A. *The Problem of Alcohol*

The immoderate consumption of alcohol creates major social problems—from drunk driving to domestic abuse to health problems. Taken in moderation, however, alcohol may have some benefits. In any event, most people want to be able to consume alcohol, and its prohibition creates significant social problems. Thus, the Eighteenth Amendment,[48] which prohibited the sale of alcohol, was repealed fourteen years later by the Twenty First Amendment.[49]

State governments have the power to ban the sale of alcohol or limit the amount which may be sold, but the former directly contradicts the desires of the political majority, and the latter imposes a costly bureaucratic scheme that the average voter would likely find intrusive. An alternative method for reducing alcohol consumption is to make it expensive—by increasing taxes or fixing prices. Higher taxes, however, are usually unpopular, and both higher taxes and fixed prices may harm a small state economically by diverting purchasers to lower priced liquor stores in neighboring states.

Rhode Island took a different route. It prohibited the publication or broadcast of any advertisements that made reference to the price of any alcoholic beverages, including advertisements for stores outside the State. The statute declared that the ban was for "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages."[50] The theory was that the advertising ban would reduce price competition and that the resulting higher prices for alcohol would reduce the purchases, and thus, the consumption.

Theophanous v. Harold & Weekly Times, 124 A.L.R. 1, 14 (1994) (Mason, C.J., Toohey & Gaudron, JJ.).

47. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1505 (1996). Although the Court has found commercial speech protected by the First Amendment, Justice Scalia said he followed precedent only because the parties failed to thoroughly brief the underlying issue of whether commercial speech is protected. *Id.* at 1515 (Scalia, J., concurring). Justice Scalia appears to be the only current Justice who questions the application of the First Amendment to commercial speech.

48. U.S. CONST. amend. XVIII.

49. U.S. CONST. amend. XXI.

50. R.I. GEN. LAWS § 3-1-5 (1987).

B. *The Legal Background for Regulation of Commercial Speech*

Despite earlier indications that commercial speech (i.e., proposals or encouragement to enter a commercial transaction) was not constitutionally protected, the Supreme Court held in 1975 that commercial speech was entitled to First Amendment protection.[51] The following year, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*,[52] the Court struck down a ban on advertising the prices for prescription drugs as abridging the freedom of speech. The Court developed a framework for analyzing the constitutionality of restrictions on commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*[53] In that case, the Court said that for commercial speech to come within the First Amendment, "it at least must concern lawful activity and not be misleading."[54] Where the commercial speech does come within the First Amendment, the Court must determine whether the asserted governmental interest is substantial.[55] If so, the court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[56]

The Court struck a deferential stance toward the decision of the legislature to regulate commercial speech in *Posadas de P.R. Associates v. Tourism Co. of P.R.*[57] There the Court upheld a prohibition on a gambling room advertising or offering such gambling facilities to the public of Puerto Rico. Puerto Rico wanted the revenues from operating casinos for tourists but feared the social costs of allowing its own residents to gamble. The Supreme Court said that the reduction of demand for casino gambling by the residents of Puerto Rico was a substantial state interest which was directly advanced by the advertising prohibition and that the legislature of Puerto Rico could determine that a restriction on advertising was more effective in reducing demand than was the "counterspeech" of anti-gambling commercials.[58] The Court suggested that the greater power to completely ban casino gambling necessarily included the lesser power to ban casino advertising:

> It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a

51. Bigelow v. Virginia, 421 U.S. 809 (1975).
52. 425 U.S. 748 (1976).
53. 447 U.S. 557 (1980).
54. *Id.* at 566.
55. *Id.*
56. *Id.*
57. 478 U.S. 328 (1986).
58. *Id.* at 344.

> product or activity, but deny to the legislature the authority to forbid the stimulation of demand . . . through advertising on behalf of those who would profit from such increased demand.[59]

Rhode Island reasoned that this case supported its ban on advertising liquor prices.

C. *The Decision of the United States Supreme Court*

Rhode Island statutes prohibiting the advertisement of liquor prices,[60] and the State's implementing regulations, were challenged in a lawsuit brought by People's Super Liquor Stores, Inc., a Massachusetts liquor retailer which sold to Rhode Island customers, and 44 Liquor Mart, Inc., a Rhode Island liquor store.[61] The District Court judge found as a fact that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island."[62] He concluded that the ban was unconstitutional because the State did not meet its burden of demonstrating a reasonable fit between its policy objectives and its chosen means.[63] The United States Court of Appeals reversed the District Court on the grounds that the State could reasonably determine that competitive price advertising would lower prices and result in more sales.[64] In *44 Liquormart, Inc. v. Rhode Island*,[65] the Supreme Court reversed the Court of Appeals decision and unanimously invalidated the Rhode Island statutes. The decision was not surprising because the ban reeked of liquor store lobbying to secure noncompetitive profit levels rather than concern for the social interest in limiting alcohol sales. But the justices went further by effectively repudiating *Posadas*. Yet within this unanimous holding, the opinions were fractured.

In holding the statute unconstitutional, Justice John Paul Stevens said, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[66] Acknowledging the propriety of protecting consumers from deceptive or misleading commercial speech, Justice Stevens nevertheless observed that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the

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59. *Id.* at 346.
60. R.I. GEN. LAWS §§ 3-8-7, 3-8-8.1 (1987).
61. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993).
62. *Id.* at 549.
63. *Id.* at 555.
64. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994).
65. 116 S. Ct. 1495 (1996).
66. *Id.* at 1508 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[67] He said that the State failed to meet its burden to show that the regulation would advance its interest in promoting temperance by significantly reducing alcohol consumption.[68] Citing alternatives such as higher taxes and direct regulation of sales as well as educational campaigns, he added that the State could not satisfy the requirement that the restriction on speech be no more extensive than necessary.[69] Stevens concluded that the State failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal "even under the less than strict standard that generally applies in commercial speech cases."[70] He then referred to "the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech."[71]

Justice Sandra Day O'Connor wrote a separate concurrence in which she was joined by Chief Justice William Rehnquist and Justices David Souter and Steven Breyer. She insisted that the Court should apply the *Central Hudson* test, implying that the reference in Justice Stevens' opinion to "the more rigorous review that the First Amendment generally demands" was inappropriate.[72] She argued that the Rhode Island law failed the fourth prong—"that is, its ban is more extensive than necessary to serve the State's interest."[73] Justice O'Connor said this element of the *Central Hudson* test required that the law be proportionate: "There must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'"[74]

Justice O'Connor's opinion elaborated on the proportionality test used for commercial speech. The fit between means and end must be narrowly tailored, and the state must reasonably target the scope of the restriction on speech to address the harm the state intends to regulate. In its regulation, the state must carefully calculate the costs and benefits associated with the burden on speech imposed by its prohibition. Less burdensome alternatives to reach the stated goal indicate that the fit between means and ends may be

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67. *Id.* at 1507 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

68. *Id.* at 1509 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

69. *Id.* at 1510 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

70. *Id.* (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

71. *Id.* (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

72. *Id.* at 1521-23 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

73. *Id.* at 1521 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

74. *Id.* (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring) (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

too imprecise. On the other hand, if alternative channels permit communication of the restrictive speech, the regulation is more likely to be considered reasonable.[75]

Justice O'Connor saw no reasonable fit between Rhode Island's goal of reduced consumption and the method of banning price advertising. The Rhode Island law totally barred communication of price information outside the store. If Rhode Island wanted to discourage consumption by higher prices, higher taxes or minimum prices would more directly accomplish this goal without burdening speech.[76]

Rhode Island relied on the deference to legislative decisions that the Court had shown in *Posadas*, but both Stevens' and O'Connor's opinions repudiated that deference. Justice Stevens, joined by Justices Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg, concluded that *Posadas* was wrong:

> The casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw. . . .
>
> . . . *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. . . .
>
> . . . .
>
> Instead, . . . we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.[77]

The Court denied that government could ban commercial speech simply because government could prohibit the underlying conduct. Where the conduct is lawful, truthful, and nonmisleading, speech encouraging that conduct is protected by the First Amendment.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, also repudiated the degree of deference in *Posadas*. She said that the Court had subsequently engaged in more searching examination of the fit between means and end: "The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in

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75. *Id.* (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).
76. *Id.* at 1521-22.
77. *Id.* at 1511 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.).

Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored."[78]

Justice Thomas wrote a separate concurring opinion in which he said that the government has no legitimate interest in keeping "users of a product or service ignorant in order to manipulate their choices in the marketplace."[79] He objected to Stevens' opinion on the grounds that the advancement of state interest test suggested that the restriction would have been upheld if the State had been more successful in keeping consumers ignorant and thus more effective in manipulating their decisions.[80] But Thomas said that the majority of the justices would effectively reach his position as a result of the way in which both the Stevens and the O'Connor opinions applied the fourth element of the *Central Hudson* test—whether the restriction of speech is more extensive than necessary to serve the government interest:

> The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.[81]

The justices seem to have wilfully blinded themselves to the economic impact of the alternatives they suggested. Either higher taxes or minimum prices could seriously impair the economic viability of Rhode Island liquor stores. Residents could easily cross the state lines of the nation's tiniest State and buy cheaper booze in Massachusetts at stores like People's. If the state cannot consider the undesirable side effects of alternative measures of reducing consumption, Thomas might be right in suggesting that the effect of this case forbids states from banning truthful nonmisleading speech in an attempt to dampen demand for lawful commercial transactions.

On the other hand, the Rhode Island law left sellers free to advertise liquor as insistently and seductively as possible to stoke demand for the

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78. *Id.* at 1522 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

79. *Id.* at 1515-16 (Thomas, J., concurring).

80. *Id.* at 1518 (Thomas, J., concurring).

81. *Id.* at 1519 (Thomas, J., concurring).

product. Banning price advertisements benefits liquor sellers that charge noncompetitive high prices, and this direct effect suggests that enhancing these sellers' profits was the law's objective. The existence of alternative means to obtain high prices may have been simply makeweights in the justices' calculations which helped them to realize that the objective of the law was private gain, not public health.

III. *Comparing the Cases*

Despite the differences in result, the courts' analyses exhibit substantial similarities. For example, both required a speech restriction to be justified by a narrowly tailored law that serves an important government interest.

The United States Supreme Court, like the Australian High Court, apparently permits speech restriction as a way to diminish the incidence of a lawful activity encouraged by that speech. The Court in *Liquormart* did not deny the legitimacy of restricting speech to discourage certain lawful activities, despite the Court's substantial skepticism about whether the restriction was necessary. Justice Thomas concurred separately to disavow the other justices' acceptance of *Central Hudson*'s proposition that reducing consumption could be an important interest that would justify speech restrictions. The state's interest, however, must be in reducing consumption and not in affecting views on whether consumption should be reduced.

Australian courts, like those of the United States, judge the validity of the statute in light of the availability of alternatives to achieve the state interest without affecting speech. The United States Supreme Court struck down the Rhode Island law because the justices found that the State could have pursued its legitimate interests with other alternatives. The prohibition of liquor price advertising was an unreasonable means of reducing overconsumption of alcohol because the State could have regulated prices or consumption directly. But *Langer* involved a policy that the state could not implement by direct regulation without violating a fundamental premise of the political system. The justices in *Langer* were careful to determine that the restriction was "not imposed with a view toward repressing freedom of political discussion,"[82] that the primary objective was to obtain observance of the voting system,[83] and that the law was "reasonably capable of being viewed as appropriate and adapted"[84] to that purpose. These comments suggest that the Australian Court might have viewed the case differently if there had existed viable alternatives with which to save the validity of ballots filled out negligently while maintaining a full preferential balloting system.

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82. Langer v. Commonwealth, 134 A.L.R. 400, 406 (1996) (Brennan, C.J.).
83. *Id.* at 432 (Gummow, J.).
84. *Id.* at 419 (Toohey & Gaudron, JJ.).

The two cases differ on the deference to be shown the legislature. The renunciation of *Posadas* demonstrated that the United States Supreme Court would reach its own decision with respect to whether the law was appropriate to accomplish a legitimate end. The Australian judges asked whether the law was "reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process,"[85] deferring to the legislative judgment that it was so appropriate and adapted.

But the different standard may be less significant than it appears. Given the remoteness of the relationship between high prices and temperance, a court could determine that the Rhode Island law was not even reasonably capable of being viewed as appropriate and adapted to the problem of overconsumption of alcohol. Similarly, even a court applying a strict standard might conclude that the Australian law was necessary to accomplish its objective, since direct regulation would violate the secret ballot.

The core difference between these cases is their view of the legitimate interests for government. The philosophical gap over the nature of citizenship is as broad as the Nullarbor Plain and as deep as the Grand Canyon. The United States begins with the individual while Australia starts with the community. Of course, U.S. citizens have duties toward their government (jury service, tax payment, military service, etc.), and Australians have individual rights (common law, statutory, and constitutional).[86] Nevertheless, the initial premises for government differ in each nation.

The U.S. Constitution bristles with individual rights that reflect a deep suspicion of abusive government power.[87] Voting is one of those rights—protected against government interference by various Constitutional provisions.[88] But politics is only one area for individual choice. Freedom

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85. *Id.* (Toohey & Gaudron, JJ.).

86. *E.g.*, AUSTL. CONST. §§ 41 (right to vote in Commonwealth election of persons having right to vote in state elections), 100 (right of state residents to reasonable use of the waters of rivers for conservation or irrigation), 117 (right of residents in states not to be discriminated against in other states by reason of residence). Several other specific prohibitions appear to confer individual rights. *E.g.*, §§ 80 (trial by jury), 92 (trade and commerce to be free), and 116 (free exercise of religion).

87. The word "right," referring to individual rights, is found throughout the document. *E.g.*, U.S. CONST. amends. I, II, IV, VI, VII, IX, XV, XIX, XXIV, and XXVI. In addition, numerous specific limitations on government power effectively confer individual rights. *E.g.*, *id.* art. I, §§ 9, 10; *id.* art. IV, § 2; *id.* amends. I, III, V, VIII, XIII, and XIV).

88. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude[,]" U.S. CONST. amend. XV, or "on account of sex[,]" *id.* amend. XIX, or "by reason of failure to pay any poll tax or other tax[,]" *id.* amend. XXIV; and "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age . . . ." *Id.* amend.

of speech is important to individual choice in all realms of life—in the market and in social relationships as well as in the political realm. *44 Liquormart* illustrates the broad scope for freedom of speech under the First Amendment's guarantee. And choice includes refusal to partake. The nation's history demonstrates that the government can operate without compelling individuals to participate in the political process, and thus compulsory voting could never be an appropriate justification for restrictions on speech in the United States.

In Australia, self-government is not an opportunity but an obligation of the citizen. There is freedom to discuss all political ideas, but every citizen has an obligation to vote. A government produced by the vote of only a fraction of the electorate cannot legitimately be the government of all. On the other hand, if every individual participates in the creation of the community, the community can be trusted to protect the rights of the individual.[89] *Langer* demonstrates the differences between the two nations' views of the citizen in the political process. The Australian High Court protects choice only as an incident of representative government, so obtaining a fully representative government has to be the highest value. Protecting a voting system so fundamental to the nation's political theory is a compelling justification for government action.

The American identity was forged in a revolution against the existing government. Internal frictions in the United States led to the suppression of antislavery speech in the South and brought about a civil war. Fears of communism led to a variety of speech-repressive measures after both World Wars that subsequently were repudiated to a large extent. Protest movements against racial discrimination and the war in Vietnam ultimately succeeded, but that success itself suggested that government had not acted before in a trustworthy manner. In short, the history and experience of the United States has reinforced a deep suspicion of the government. Politicians find it useful to run against insiders—Presidents Reagan, Carter, and Clinton all succeeded in promoting variations on this theme.

Australia enacted its Constitution through British parliamentary processes. It never broke apart in civil war. The national identity of Australia was forged in the World War I and II battles against other nations rather than in internal revolution. Although Australians differ fiercely over a variety of issues and historically had racially oppressive policies on immigration and aboriginal rights, Australia does not seem to have developed the same degree of fear of government as has the United States. The new

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XXVI.

89. "Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights." SIR ROBERT MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 54 (1967).

free speech protections reflect a recognition of the need to protect freedom within the political process, but those protections exist within a community united by a very different vision of the citizen's place.

In the end, it may be possible for Australians and Americans to discuss the principles of freedom of speech in a democracy, but, at least for now, the two countries begin their discussions from significantly different starting positions. It is hoped that, in calling attention to those differences, this article will contribute to the dialogue.

VIRTUAL ELIMINATION OF DIOXIN: EFFORTS OF THE UNITED STATES AND CANADA TO ELIMINATE DIOXIN POLLUTION AS REQUIRED BY THE GREAT LAKES WATER QUALITY AGREEMENT

INTRODUCTION

> The Great Lakes watershed is a clean, safe environment where life forms exist in harmony. People take pride in the Great Lakes. We share and live an ethic which recognizes that environmental integrity provides the foundation for a healthy economy. We are secure in the knowledge that fish and wildlife are healthy to eat and the water can be enjoyed by all. We understand our responsibility for ensuring a self-sustaining Great Lakes ecosystem. This is the example we set for the rest of the world and the legacy we leave our children.[1]

Although we wish the above statement were true, the reality is that the Great Lakes are *not* a clean, safe environment; many of the fish and wildlife are *not* safe to eat; and the legacy we leave our children could be a life of physical and mental problems associated with toxic contamination. In 1972, Canada and the United States recognized the importance of the Great Lakes and the pollution that was seriously deteriorating them by signing the Great Lakes Water Quality Agreement ("GLWQA" or "Agreement"). The original Agreement focused on nutrients and eutrophication in the Lakes. Today, however, the countries' main focus is on the problem of persistent, bioaccumulative toxic chemicals.

One persistent, bioaccumulative toxic contaminant that has spurred much controversy is dioxin. Dioxin is a by-product of chemical and industrial manufacturing processes and combustion. Dioxin has been called one of the most powerful poisons ever studied. One source of dioxin that has been the focus of many statutes and regulations is the pulp and paper industry.

In 1994, the Environmental Protection Agency ("EPA") released a Draft Reassessment of dioxin which analyzed the effects on humans of low level exposure to dioxin. The Reassessment and other studies contend that at low level doses, dioxin causes many adverse health effects such as infertility, immune system impairment, disruption of sexual development, cancer, and behavioral disorders. Other groups assert that the EPA does not

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1. INTERNATIONAL JOINT COMMISSION, SIXTH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY 46 (1992) [hereinafter SIXTH BIENNIAL REPORT]. This is the vision statement proposed by the Great Lakes Water Quality Board in 1991. *Id.*

yet have enough evidence of the harms caused by low level exposure to dioxin to warrant costly regulation of dioxin discharges. This disagreement emphasizes the fundamental differences between the weight of the evidence approach, as recommended by the International Joint Commission ("IJC"), and risk assessment approaches, as recommended by the industry groups.

In compliance with the GLWQA, the United States and Canada have each promulgated several statutes and regulations to govern discharges of dioxin by the pulp and paper industry. Some of the U.S. efforts include the Great Lakes Water Quality Initiative, the Pollution Prevention Act, and the proposed Cluster Rule. Canadian efforts include the Canada-Ontario Agreement Respecting the Great Lakes Ecosystem and the Federal Toxic Substances Management Policy. The combined efforts of the countries along with voluntary efforts by the industry have resulted in a greater than ninety percent reduction in dioxin discharges by the pulp and paper mills.

Part I of this note details the history between the United States and Canada that led to the GLWQA and discusses the provisions and purposes of this Agreement. Part II addresses the questions of what dioxin is and why the public should be concerned with it. The efforts of the United States and Canada to comply with the Agreement and the advantages and disadvantages of the efforts of each country are considered in Part III and Part IV, respectively. Lastly, Part V contains conclusions and recommendations.

I. TREATIES AND AGREEMENTS CONCERNING THE GREAT LAKES

A. *The Boundary Waters Treaty of 1909*

In order to fully understand how and why the Great Lakes Water Quality Agreement was established, the history of relations between the United States and Canada concerning the Great Lakes should be analyzed. This history begins with the Boundary Waters Treaty of 1909. The main concerns behind the formation of the Treaty were navigation, water diversion, and irrigation rights along border waters of the United States and Canada. Public pressure over concerns with the diversion of water for hydroelectric power generation and its effects on water levels and navigation spurred the two countries into action and resulted in the signing of the Boundary Waters Treaty.[2]

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2. Daniel K. DeWitt, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 305 (1993). The hydroelectric power controversies focused on proposed plans to divert water from the St. Mary's River at Sault Ste. Marie and at Niagara Falls. *Id.*

1. *Purpose and General Provisions of the Boundary Waters Treaty*

The purpose of the Boundary Waters Treaty, as stated in the preamble, was

> to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise.[3]

The Treaty applies to all "waters straddling the border," such as the Great Lakes.[4] Articles I through VI discuss the countries' respective rights in the areas of navigation, diversion, and irrigation. The principles of free navigation[5] in the Great Lakes and protection against interference with the "natural level or flow of boundary waters"[6] are the foundation of these Articles.

2. *Pollution Provision*

Article IV contains the only mention of pollution in the Treaty. The Article states that it is "agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."[7] Although the early 1900's and the Industrial Revolution marked the beginning of the Great Lakes' pollution, at the time of the treaty's signing, it was not considered an "international" problem.[8] The pollution problems at that time were mainly municipal sewage contamination and were considered "local" problems.[9]

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3. Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, 2448 [hereinafter BWT].

4. DeWitt, *supra* note 2, at 306.

5. BWT, *supra* note 3, at 2449.

6. *Id.*

7. *Id.* at 2450.

8. DeWitt, *supra* note 2, at 304-05.

9. *Id.* The discharge of sewage into the Great Lakes resulted in cities polluting their own water supplies when the same water was then used by the citizens for drinking. The contamination caused outbreaks of typhoid which killed 25,000 people in the United States by 1912. *Id.* at 304.

3. *The International Joint Commission*

The lasting legacy of the Boundary Waters Treaty has been the formation of the International Joint Commission ("IJC"). Articles VII through XII of the Treaty created the IJC, which consists of six commissioners.[10] Three commissioners are appointed by each government and have a goal of acting "as a single body seeking common solutions rather than as separate national delegates representing the positions of their Governments."[11]

The duties and responsibilities of the IJC can be divided into three separate categories: "(1) quasi-judicial determinations; (2) investigative and advisory assignments; and (3) arbitrations."[12] The quasi-judicial function of the IJC includes "deciding whether certain kinds of works or activities can be built or undertaken in rivers or lakes that flow along or across the international boundary."[13] The investigative and advisory duties typically involve examining problems submitted to the IJC and setting out conclusions and recommendations in reports.[14] However, the IJC has no authority to initiate or enforce activities.[15] The arbitration function is used only if both countries consent to the IJC resolving the issue in binding arbitration.[16] However, the IJC has never been authorized to use this function.[17]

Until the 1960's, the IJC was called upon to investigate pollution only a few times. However, in 1964, concern over eutrophication, oil spills, mercury, and polychlorinated biphenyls ("PCB's") in Lake Erie, Lake Ontario, and the St. Lawrence River resulted in the IJC performing a massive analysis of the pollution and the Lakes.[18] As a result of the research, the IJC declared that Lake Erie was "dead."[19] The IJC made many recommendations to the United States and Canada, such as emergency remedial action to control and reduce the pollution and new authority and

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10. BWT, *supra* note 3, at 2451.

11. INTERNATIONAL JOINT COMMISSION, THE INTERNATIONAL JOINT COMMISSION AND THE BOUNDARY WATERS TREATY 3-4 (1990) [hereinafter INTERNATIONAL JOINT COMMISSION AND TREATY].

12. James G. Chandler & Michael J. Vechsler, *The Great Lakes-St. Lawrence River Basin from an IJC Perspective*, 18 CAN.-U.S. L.J. 261, 263 (1992).

13. *Id.*

14. DeWitt, *supra* note 2, at 308.

15. *Id.*

16. *Id. See also* BWT, *supra* note 3, at 2453.

17. Chandler & Vechsler, *supra* note 12, at 263.

18. *Id.* at 273.

19. Sean P. Gallagher, Note, *Great Lakes Water Quality Initiative: National Standards Governing a Binational Resource. A Call for International Rulemaking*, 2 IND. J. GLOBAL LEGAL STUD. 465, 467 (1995).

powers for the IJC.[20] The IJC's recommendations led to implementation of the 1972 Great Lakes Water Quality Agreement.

B. *The Great Lakes Water Quality Agreement*

The original Great Lakes Water Quality Agreement was signed in 1972. However, changing concerns resulted in the Agreement being replaced in 1978 and amended in 1987.

1. *The Great Lakes Water Quality Agreement of 1972*

The 1972 GLWQA maintained the rights and obligations of Canada and the United States as set out under the Boundary Waters Treaty.[21] However, the countries were "[s]eriously concerned about the grave deterioration of water quality on each side of the boundary to an extent that [was] causing injury to health and property on the other side."[22] The Agreement's general objectives were to keep the waters free from: (1) substances that adversely affect aquatic life or waterfowl; (2) debris, oil, scum, or materials that produce foul color, odor, or taste; (3) toxins; and (4) nutrients.[23] The main focuses of the Agreement were phosphorus and sewage in the lakes' waters.[24]

The IJC was also given new powers in the Agreement, which included "analyzing information relating to water quality; evaluating the effectiveness of programs; giving recommendations concerning water quality objectives, legislation, and other regulatory standards; and assisting in the coordination of joint activities."[25] The Great Lakes Water Quality Board and the Research Advisory Board were established to assist the IJC in performing these new functions.[26] Lastly, the IJC was also required to submit an annual report to the governments detailing progress on the goals of the Agreement.[27]

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20. DeWitt, *supra* note 2, at 311.

21. Great Lakes Water Quality Agreement of 1972, Apr. 15, 1972, 23 U.S.T. 301, 302 [hereinafter 1972 GLWQA].

22. *Id.*

23. *Id.* at 304.

24. *Id.* at 305-06. Eutrophication results when nutrients, such as phosphorus, cause the growth of algae, weeds, and slimes. These growths exhaust the oxygen supply in the water and cause fish and other aquatic life to die from lack of oxygen. Phosphorus enters the water supplies through detergents and sewage. Chandler & Vechsler, *supra* note 12, at 274.

25. Gallagher, *supra* note 19, at 468-69.

26. 1972 GLWQA, *supra* note 21, at 309-10.

27. *Id.* at 309.

2. *The Great Lakes Water Quality Agreement of 1978*

The 1972 GLWQA was replaced in 1978 by a new and more comprehensive agreement. The purpose of the modified Agreement was "to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem."[28] This "ecosystem approach" means that the integrity of the water, land, air, wildlife, and people in the Great Lakes Basin must *all* be considered.[29] This approach also mandates a more "holistic" approach than the current "pollutant-by-pollutant approach to improvement of water quality."[30]

Another major change from the 1972 GLWQA to the 1978 GLWQA was the shift from a focus on phosphorus to a focus on toxic chemicals. The IJC used five factors to decide which pollutants were a priority for the countries. These factors include: "(1) presence and ambient concentration in the Great Lakes environment; (2) degree of toxicity; (3) persistence in the environment; (4) bioavailability; and (5) potential to bioconcentrate and bioaccumulate."[31] The countries stated that it was their policy that "[t]he discharge of toxic substances in toxic amounts be *prohibited* and the discharge of any or all persistent toxic substances be *virtually eliminated*."[32]

3. *1987 Protocol Amending the 1978 Great Lakes Water Quality Agreement*

The 1987 amendments "strengthen the programs, practices and technology described in the 1978 Agreement and . . . increase accountability

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28. Great Lakes Water Quality Agreement of 1978, Nov. 22, 1978, 30 U.S.T. 1383, 1387 [hereinafter 1978 GLWQA].

29. *The Great Lakes Ecosystem (online version)*, GREAT LAKES INFORMATION NETWORK, rev. Aug. 31, 1995, at 1, *available in* Internet, http://www.great-lakes.net:2200/ecosystem/ecosys.html.

30. Joseph F. Koonce, *Aquatic Community Health of the Great Lakes (online version)*, SOLEC Working Paper presented at State of the Lakes Ecosystem Conference, EPA 905-D-94-001a, CONSORTIUM FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK (CIESIN), Oct. 1994, at 5, *available in* Internet, http://epawww.ciesin.org/glreis/nonpo/ndata/solec/aquatic/aquatic.html.

31. Jack Manno et al., *Effects of the Great Lakes Basin Environmental Contaminants on Human Health (online version)*, SOLEC Working Paper presented at State of the Great Lakes Ecosystem Conference, EPA 905-R-95-013, CONSORTIUM FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK (CIESIN), Aug. 1995, at 8, *available in* Internet, http://epawww.ciesin.org/glreis/nonpo/ndata/solec/health/health.html.

32. 1978 GLWQA, *supra* note 28, at 1387 (emphasis added). The Agreement defines a persistent toxic substance as a toxic substance with "a half-life in water of greater than eight weeks." *Id.* at 1445. A half-life is the "time required for the concentration of a substance to diminish to one-half of its original value in a lake or water body." *Id.*

for their implementation."[33] Other major advancements created in the 1987 amendments were the use of Remedial Action Plans ("RAP's") and Lakewide Management Plans ("LaMP's"). RAP's "identify specific problems in severely degraded Great Lakes Areas of Concern (AOC) and describe methods for correcting them."[34] The 1987 Amendments "directed the two federal governments to cooperate with state and provincial governments to develop and implement [RAP's] for each [AOC]" by using the ecosystem approach.[35] LaMP's are "designed to reduce inputs of critical pollutants into the Great Lakes and to restore and maintain integrity of the Great Lakes."[36] The LaMP's also "coordinate existing regulations and programs, identify gaps in these programs, and recommend solutions to problems threatening the Great Lakes ecosystem."[37]

4. *Is the Great Lakes Water Quality Agreement Binding on the United States and Canada?*

There has been much debate over whether the GLWQA is legally binding on Canada and the United States. Some contend that when Congress promulgated the Critical Programs Act[38] in 1990 their intent was to codify the requirements of the GLWQA.[39] It has also been explained that under international law, agreements are binding as treaties.[40] However, EPA officials conclude that the language of the GLWQA sets *objectives* and *goals*, not legally binding, precise standards.[41] They also conclude that the Critical Programs Act directs the EPA to "adopt [a] guidance that 'conforms' with

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33. INTERNATIONAL JOINT COMMISSION AND TREATY, *supra* note 11, at 4.

34. *Remedial Action Plans for Great Lakes Areas of Concern (online version)*, GREAT LAKES INFORMATION NETWORK, rev. Oct. 25, 1995, at 1, *available in* Internet, http://www.great-lakes.net:2200/envt/water/watqual/manag/rap/rap.html.

35. *Id.* As of October 1995, 43 AOC's have been named. Twenty-six of these are in the United States, while 17 are in Canada. Five are joint AOC's between the United States and Canada because they are connecting river systems. *Id.*

36. *Guide to Lakewide Management Plans (LaMPs) (online version)*, CONSORTIUM FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK (CIESIN), Dec. 5, 1993, at 1, *available in* Internet, http://epaserver.ciesin.org/glreis/glnpo/prog/lamps/lamps-home.html.

37. *Id.*

38. *See infra* part III(A)(2) for a discussion of the Critical Programs Act.

39. Gallagher, *supra* note 19, at 478.

40. *Id.* at 478 n.110 (quoting *United States/Canada Great Lakes Water Quality Agreement: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 5 (1986) (statement of Hon. James L. Oberstar, Chairman Subcomm. on Investigations and Oversight)).

41. *What the U.S. EPA Says About the Great Lakes Water Quality Initiative and Complying (Partly) with the Great Lakes Water Quality Agreement (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, June 1, 1995, at 1, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/gli/sid/sid-wqa.html.

the objectives of the GLWQA," not a guidance that is the same as the GLWQA objectives.[42] Therefore, the binding ability of the GLWQA has not yet been resolved.

II. DIOXIN - PERSISTENT TOXIC SUBSTANCES

A. *What is Dioxin and What are Its Sources?*

In 1986, researchers reported that dioxin was one of the most powerful poisons ever studied.[43] Dioxin is actually a family of seventy-five chemicals in which 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD") is the most potent.[44] Several other chemicals, such as PCB's, are more widely known by the general public and are "dioxinlike," which means that they have similar effects as dioxin at different concentrations.[45]

Unlike PCB's, which were used as electrical insulators, dioxins are not intentionally created by humans.[46] Dioxins are by-products of combustion and chemical and industrial manufacturing processes which use chlorine.[47] Approximately ninety-five percent of dioxin is produced by incineration,

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42. *Id.* at 1-2.

43. Peter Montague, *Dioxin Inquisition (online version)*, RACHEL'S ENVIRONMENT & HEALTH WEEKLY #457, Aug. 31, 1995, at 1, *available in* Internet, http://www.bluemarble.net/~mitch/bull/toxics/dioxininquisit.html. This finding by U.S. EPA researchers resulted in strict limits being proposed on dioxin releases. However, before the limits could be enforced, industry leaders challenged the EPA's findings and forced the agency to perform a major reassessment of dioxin. *Id.*

44. *Putting the Lid on Dioxins: Protecting Human Health and Environment (online version)*, PHYSICIANS FOR SOCIAL RESPONSIBILITY & ENVIRONMENTAL DEFENSE FUND, Summer 1994, at 3, *available in* Internet, http://gopher.great-lakes.net:2200/0/waterairland/toxics/dioxin/dioxin.txt [hereinafter *Putting the Lid*].

45. *Id.* at 3-4.

46. *Id.* at 9. *See also* INTERNATIONAL JOINT COMMISSION GREAT LAKES WATER QUALITY BOARD, RE-EVALUATION OF DIOXIN 2 (1993)[hereinafter RE-EVALUATION OF DIOXIN].

47. D. DeVault et al., *Toxic Contaminants in the Great Lakes (online version)*, SOLEC Working Paper presented at State of the Lakes Ecosystem Conference, EPA 905-D-94-001e, CONSORTIUM FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK (CIESIN), Oct. 1994, at 19-20, *available in* Internet, http://epaserver.ciesin.org/glreis/nonpo/ndata/solec/toxic/toxic.html.

Sources of pollution are also often described as point and nonpoint sources. Examples of point sources include smoke stacks, waste outlets, and discharge pipes. Nonpoint sources include runoff and deposition from the atmosphere. *Pollution in the Great Lakes Region (online version)*, GREAT LAKES INFORMATION NETWORK, Oct. 6, 1995, at 1, *available in* Internet, http://www.great-lakes.net:2200/ecosystem/pollution/pollut.html. In relation to dioxin pollution, pulp and paper mills would be point sources because they discharge contaminants directly into water.

particularly incineration of medical and municipal waste, when chlorinated hydrocarbons, such as plastics, are burned.[48]

Another known source of dioxin is the bleaching of paper and pulp products with chlorine.[49] This note will focus on dioxin released by this source. Currently, seventy-two pulp and paper mills discharge into the Great Lakes basin.[50] Mills using chlorine in their processes produce dioxin as a by-product. The adverse impact of pulp and paper mills on water quality is evident in fifteen of forty-three Areas of Concern designated in the Great Lakes area.[51]

Lastly, there are also natural sources of dioxin, such as forest fires and volcanoes.[52] However, natural sources are not likely to be a major source of dioxin since analyses of soils show that dioxin did not appear in significant quantities until the 1920's when industries began heavy use of chlorinated organics.[53] Although many sources of dioxin are now known to scientists, much of the new input into the environment is still unknown.[54]

B. *Routes of Exposure to Dioxin*

There are several routes other than industrial accidents by which humans and wildlife are exposed to dioxin. In the Great Lakes area, the leading route of exposure is through food consumption, especially fish. Dioxin enters the food chain through bioaccumulation, which is the process by which "a substance is assimilated into an organism through eating another organism (plant or animal). Depending on the substance, it may be passed through the body fairly quickly, or it may accumulate in certain organs or tissues, thus enabling the chemical to concentrate in body tissues."[55] As one organism eats another, this process continues and dioxin becomes "increasingly concentrated or biomagnified."[56]

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48. Victor Wigotsky, *The Chlorine Issue; Environmental Effects of Chlorine-Containing Compounds*, PLASTICS ENGINEERING, Feb. 1995, at 19. *See also US EPA Dioxin Reassessment Report Intensifies International Debate*, BUSINESS & THE ENVIRONMENT, Oct. 1994.

49. RE-EVALUATION OF DIOXIN, *supra* note 46, at 2.

50. INTERNATIONAL JOINT COMMISSION, 1993-95 PRIORITIES AND PROGRESS UNDER THE GREAT LAKES WATER QUALITY AGREEMENT 35 (1995) [hereinafter 1993-95 PRIORITIES]. Eighteen of the mills are in Ontario; twenty are in Michigan; twenty are in Wisconsin; twelve are in New York; and two are in Ohio. *Id.*

51. *Id.*

52. Wigotsky, *supra* note 48, at 18.

53. *Putting the Lid*, *supra* note 44, at 9. *See also* RE-EVALUATION OF DIOXIN, *supra* note 46, at 2.

54. RE-EVALUATION OF DIOXIN, *supra* note 46, at 2.

55. Manno, *supra* note 31, at 9.

56. *Id.*

Dioxin bioaccumulates in the fatty tissues of fish and animals. As dioxin is deposited in the sediments of the lakes and rivers, scavenger fish eat the deposited dioxin, and the toxin accumulates in their fatty tissue. Predator fish then consume the scavenger fish, and the predator fish are later eaten by birds, such as eagles. This leads to increasing concentrations of the dioxin as it goes up the food chain. Thus, by a human eating a single serving of moderately contaminated fish, he or she receives the equivalent quantity of toxic chemicals as drinking several million gallons of water in which the fish lived.[57]

Consumption of drinking water is also suspected to be a route of exposure to dioxin. The EPA has estimated that everyday 12.7 million people drink water from the Great Lakes that is contaminated with some toxic pollutant.[58] Another route of exposure is inhalation of the polluted air. Lastly, skin contact with contaminated water is also now suspected to be an exposure route.[59] However, this route is the least significant path of exposure.[60]

C. *Effects of Dioxin on Humans and Wildlife*

In September 1994, the EPA released its Draft Reassessment of dioxin. The eight-volume, 2000 page report is a comprehensive review of the health risks posed by dioxin.[61] The report and many other scientific studies have discussed the effects of dioxin on wildlife, the aquatic community, and humans. At very high doses, dioxin causes death in all species that have been studied.[62] However, the EPA report also discusses the effects of dioxin at low-level exposures.[63]

1. *Effects on Wildlife and the Aquatic Community*

While data on the health effects of dioxin on humans is limited, data on the health effects on wildlife is considerable.[64] Dioxin and other

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57. *Hormone Copycats: Effects (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, Apr. 4, 1994, at 2, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/toxics/hcc2-hcc.html.

58. Manno, supra note 31, at 11.

59. *Id.*

60. This route of exposure is likely to pose a large risk only to a marathon swimmer. *Id.*

61. *Putting the Lid*, *supra* note 44, at 1.

62. RE-EVALUATION OF DIOXIN, *supra* note 46, at 3.

63. For a summary of the Draft Reassessment, see William H. Farland, *EPA's Reassessment of Dioxin*, CONGRESSIONAL TESTIMONY BY FEDERAL DOCUMENT CLEARING HOUSE, Dec. 13, 1995, *available in* Westlaw, 1995 WL 13415464.

64. SIXTH BIENNIAL REPORT, *supra* note 1, at 20.

persistent toxic chemicals have had a significant effect on wildlife in the Great Lakes area. In 1992, the IJC reported that dioxin and other similar chemicals caused thyroid dysfunction, decreased fertility, decreased hatching success, increased gross birth defects, and many other adverse health effects in wildlife.[65]

Significant evidence of dioxin's effects on wildlife have been shown in many studies. Several bird species were almost extinct in the Great Lakes Basin in the 1950's and 1960's due to decreased hatching success caused by persistent toxic chemicals.[66] In the 1980's, dioxin released by pulp and paper mills in Vancouver contaminated fish near Vancouver Island.[67] In 1987, a group of great blue heron, which ate the contaminated fish, produced no offspring.[68] None of the 179 eggs produced that year hatched.[69] Although the next year some of the eggs hatched, none of the new chicks survived more than a few weeks.[70] Studies of the egg shells showed high concentrations of dioxin.[71] Similar effects have been seen in the Great Lakes in the bald eagle and Caspian terns.[72] Other wildlife in the Great Lakes basin, such as otter and mink, has also shown reproductive difficulties and other problems associated with toxic chemicals.[73]

Many of the Great Lakes fish have also shown effects of dioxin and similar chemicals.[74] Some of the effects include serious reproductive problems, goiters, lack of secondary sexual characteristics, and severe deformities.[75] Dioxin levels have decreased in the Great Lakes over the past few years. However, fish do not get rid of dioxin once it is accumulated in their fatty tissue, and a fish that consumed dioxin-contaminated foods in the

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65. *Id.* at 18.

66. *Dioxin Risks High Enough to Take Action, EPA Scientists Say*, PESTICIDE & TOXIC CHEMICAL NEWS, Oct. 26, 1994.

67. Glenn Bohn, *Defeating the Dioxins: Just a few years after pulp and paper mills started to clean up their act, a major poison in the Fraser River ecosystem is in dramatic decline*, THE VANCOUVER SUN, May 8, 1993, at B4.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. SIXTH BIENNIAL REPORT, *supra* note 1, at 22-23.

73. *Hormone Copycats: Effects on Wildlife (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, Apr. 4, 1994, at 13, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/toxics/hcc3-wil.html.

74. *Id.* at 4. Fish in the Great Lakes affected include lake trout, lake herring, lake whitefish, and deepwater sculpin, which died out in the Great Lakes in the 1960's. Great Lakes salmon have also shown severe effects. *Id.*

75. *Id.* Examples of deformities include twisted spines, double heads, clubbed tails, and missing eyes. *Id.*

late 1980's may still be contaminated even though fewer dioxins are being dumped into the Great Lakes.[76]

2. *Effects on Humans*

The effects of dioxin on humans are much more difficult to determine than the effects on wildlife. Other than studies of people exposed to dioxin during industrial accidents, the effects must be determined by experiments on laboratory animals which are similar to humans. Some groups have criticized this by saying that results from animal experiments are not representative of the effects on humans.

However, in 1992 the IJC recommended that the United States and Canada adopt a "weight of the evidence" approach to persistent toxic chemicals.[77] This approach looks at the cumulative weight of studies to determine if a real or a strong probability of a linkage between certain substances and injury can be made.[78] The conclusion is made on "the basis of common sense, logic and experience as well as formal science."[79] The basis of the weight of the evidence approach is that "waiting for absolute assurance capable of convincing even the most sceptical [sic] scientist, may result in irreparable and irreversible damage to the ecosystem and human health."[80] This is the approach used by the EPA and many other scientists in forming conclusions on the effects of dioxin on humans.

a. *Chloracne*

Chloracne is the "hallmark" of dioxin toxicity.[81] This skin disorder, caused by exposure to dioxin, is a very severe, persistent form of cystic acne that affects people over their entire body.[82] Some people exposed to dioxin over forty years ago in industrial accidents still have active chloracne.[83]

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76. Bohn, *supra* note 67, at B4.

77. SIXTH BIENNIAL REPORT, *supra* note 1, at 22. *See also* INTERNATIONAL JOINT COMMISSION, SEVENTH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY 10 (1994) [hereinafter SEVENTH BIENNIAL REPORT].

78. SEVENTH BIENNIAL REPORT, *supra* note 77, at 10.

79. *Id.*

80. 1993-95 PRIORITIES, *supra* note 50, at 5.

81. RE-EVALUATION OF DIOXIN, *supra* note 46, at 3.

82. *Id.*

83. *Id.*

b. *Immune System*

In its Dioxin Reassessment, the EPA concluded that even at low level doses, dioxin impairs normal immune function in laboratory animals and is likely to do the same in humans. The effects could include suppression of the immune system which could lead to increased susceptibility to bacterial, viral, and parasitic diseases along with cancers. These effects have been observed in children exposed *in utero* to dioxin and other similar toxins.[84]

c. *Hormone Mimicking and Sexual Development*

Dioxin has also been shown to have disrupting effects on the reproductive systems and the endocrine system, which produces hormones responsible for regulating metabolism, responding to stress, and coordinating sexual development and reproduction processes.[85] Hormone mimicking is the process by which toxic chemicals mimic the "critical functions of human hormones."[86] When this occurs, "[t]he body mistakes [the toxins] for natural hormones and reacts to them in ways that cause deep and permanent trouble, especially when exposure occurs during the critical period[s] of development, before [birth], and immediately after birth."[87]

Scientists believe that hormone mimicking can have severe effects on human sexual development. For example, animal studies have shown that young male rats exposed to small amounts of dioxin *in utero* are often born with several defects, such as: (1) smaller sexual organs; (2) slower sexual maturation; (3) "greater willingness to assume a receptive-female posture when approached by a sexually stimulated male,"[88] and (4) reduced sperm

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84. *Putting the Lid, supra* note 44, at 7. For example, in 1979, rice oil contaminated with PCB's and polychlorinated dibenzofurans was eaten in the Yu-Cheng province of Taiwan. Children born to mothers who ate the rice oil have been involved in an extensive study. These Yu-Cheng children have had a higher rate of respiratory and ear infections and a decreased rate of successful vaccinations. *Id.* at 7, 12. These effects have also been observed in the Inuit children from Quebec who were exposed *in utero* to toxic chemicals when their mothers ate contaminated seal and whale meat. *Hormone Copycats: Effects on Humans (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, Apr. 4, 1994, at 4-5, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/toxics/hcc4-hum.html.

85. *Hormone Copycats: Effects, supra* note 57, at 2.

86. GORDON K. DURNIL, THE MAKING OF A CONSERVATIVE ENVIRONMENTALIST 79 (1995) (quoting *Hormone Copycats: New Pollution Threat to the Great Lakes Environment*, NATIONAL WILDLIFE FEDERATION, Aug. 16, 1993).

87. *Id.*

88. Montague, *supra* note 43, at 2. Similar effects have been noted in women exposed *in utero* to the drug DES during their mothers' pregnancies. Studies have shown that exposure to DES "increases the likelihood of major depressive disorders, as well as bisexual activity and interest in adult women." For example, a study of sisters indicate that 42% of the sisters

production.[89] This study is partially confirmed by a study of the Yu-Cheng children who were exposed to a dioxin-like chemical *in utero*.[90] The children are beginning to show defects in their sexual development.[91] It should also be noted that "[t]he average man today produces only half as much sperm as his grandfather did."[92] Scientists are beginning to believe that this may be partially the result of exposure to toxic chemicals, such as dioxin.[93]

Animal studies have also shown that dioxin may also be linked to endometriosis, a painful women's disease in which "bits of uterine lining . . . migrate generally to other pelvic organs and can cause infertility, internal bleeding, and other serious problems."[94] Endometriosis has been increasing in frequency in U.S. women.[95]

d. *Cancer*

The average man is "far more likely [than his grandfather] to contract certain cancers, including prostate and testicular cancer."[96] Today, the average woman is "twice as likely to contract breast cancer as her grandmother."[97] Although there is no clear evidence, many scientists believe that these statistics are associated with the increase in toxic chemicals in the environment. In laboratory studies of other mammals, dioxin causes

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who were exposed to DES *in utero* have a bisexual orientation, while only 8% of the sisters not exposed to DES have a bisexual orientation. *Hormone Copycats: Effects, supra* note 57, at 4.

89. Montague, *supra* note 43, at 2.

90. *See supra* note 84.

91. *Hormone Copycats: Effects on Humans, supra* note 84, at 2. *See also Putting the Lid, supra* note 44, at 6.

92. *Hormone Copycats: Summary (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, Apr. 4, 1994, at 3, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/toxics/hcc0-sum.html. The Danish Environmental Protection Agency recently completed a study which showed a dramatic decline in sperm counts and increased testicular cancer, undescended testis, and genital tract disorders. INTERNATIONAL JOINT COMMISSION, EIGHTH BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 10-11 (1996), *available in* Internet, http://www.great-lakes.net:2200/partners/IJC/html/8bien/repeng.html [hereinafter EIGHTH BIENNIAL REPORT].

93. *See* RE-EVALUATION OF DIOXIN, *supra* note 46, at 14. *See also* Mark Nichols, *The Sperm Scare: Pollution and Chemicals May Be Threatening Human Fertility*, MACLEAN'S, Apr. 1, 1996, *available in* Westlaw, 1996 WL 8016152.

94. *Hormone Copycats: Effects on Humans, supra* note 84, at 4. *See also* RE-EVALUATION OF DIOXIN, *supra* note 46, at 11.

95. Peter Montague, *Dioxin and Health (online version)*, RACHEL'S ENVIRONMENT & HEALTH WEEKLY #463, Oct. 12, 1995, at 3, *available in* Internet, http://www.bluemarble.net/~mitch/bull/toxics/diox-health.html.

96. *Hormone Copycats: Summary, supra* note 92, at 3.

97. *Id.*

multiple tumors and cancer.[98] Cancer studies in Seveso, Italy, where an explosion at a chemical plant released large amounts of dioxin in 1976, have shown very significant increases in tumors.[99] Also, Vietnam veterans exposed to dioxin-contaminated Agent Orange have reported a higher incidence of some cancers.[100]

e. *Behavioral Effects and Learning Disorders*

Dioxin and other similar chemicals are suspected of causing behavioral and learning disorders when children are exposed *in utero*. Yu-Cheng children who were exposed to toxic chemicals similar to dioxin *in utero* in 1978[101] have shown higher activity levels, lower adaptability, negative moods, and more intense reactions.[102] The children have more health, habit, and behavior problems and have an average IQ four to five points lower than unexposed children.[103] A recent study has also shown that toxins like dioxin affect newborn babies' habituation response.[104] The study analyzed babies born to mothers who had regularly eaten fish from the Great Lakes. The study found that the babies had a diminished ability to adjust to irritants such as lights, rattles, and bells.[105] In addition, the IJC in its Eighth Biennial Report stated that the U.S. Agency for Toxic Substances and Disease Registry is completing studies which have found behavioral abnormalities, such as the inability to "adapt to mild frustration," in children whose mothers consumed fish from the Great Lakes.[106]

D. *Controversy Surrounding the EPA's Draft Reassessment of Dioxin*

As with many other scientific studies, the EPA's Draft Reassessment of dioxin has been very controversial. While some in the chlorine and pulp

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98. RE-EVALUATION OF DIOXIN, *supra* note 46, at 9.

99. *Id.* at 10. However, the research also shows a *decrease* in the incidence of breast cancer in Seveso. Scientists believe this may be due to the hormone mimicking abilities of dioxin. *Id.*

100. *Putting the Lid*, *supra* note 44, at 3. The veterans report higher rates of genito-urinary and oropharyngeal cancers. *Id.* The U.S. Department of Veterans Affairs has also announced a relationship between exposure to Agent Orange in males and spina bifida in their children. George Claxton, *Dioxin Threat*, CHI. TRIB., July 9, 1996, § 1, at 11, *available in* Westlaw, 1996 WL 2687993.

101. *See supra* note 84.

102. *Hormone Copycats: Effects on Humans*, *supra* note 84, at 5.

103. *Id.*

104. *Great Lakes: Study Finds Toxins Affect Newborn's Behavior*, GREENWIRE, Sept. 27, 1995.

105. *Id.*

106. EIGHTH BIENNIAL REPORT, *supra* note 92, at 11.

and paper industries have taken "pioneering steps"[107] to address the perceived dioxin problems, others claim that the dioxin data is "based on half-truths, even fabrications."[108] The Science Advisory Board, chosen by the EPA to peer review its findings on dioxin, recently requested that the EPA provide better support for some of its conclusions on the risks of low-level exposure to dioxin to humans.[109] The Draft Reassessment has also attracted the attention of Congress. Conservatives have promised to investigate "whether sound science is being distorted for preconceived policy ends, and the potential economic impact of future mandates based on this reassessment."[110] Current bills under review in Congress would also require the EPA to conduct risk assessment and cost-benefit studies before undertaking actions like dioxin regulation.[111]

Industry groups insist that the dangers of organochlorines, such as dioxin, have not been scientifically substantiated by the Draft Reassessment. They emphasize that "[a]lmost forty percent of U.S. jobs and income are in some way dependent" on chlorine.[112] The elimination of chlorine would "deprive the public of a beneficial family of products and create significant negative economic effects."[113] Therefore, they contend that before substantial regulations are issued limiting or virtually eliminating the discharge of dioxin, the EPA's findings on low level exposure to dioxin should be scientifically substantiated. The industry groups also agree with Congress that a cost-benefit calculation should be used in evaluating dioxin.

However, the IJC has pointed out that cost-benefit evaluation is not the approach mandated by the GLWQA. The Agreement clearly states that "the discharge of any or all persistent toxic substances [should] be virtually eliminated."[114] Therefore, the IJC adopted a weight of the evidence approach.[115] Has the EPA's Dioxin Reassessment and other studies demonstrated that the weight of the evidence shows the danger to human health from dioxin? The IJC believes that the answer to that question is yes

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107. SEVENTH BIENNIAL REPORT, *supra* note 77, at 15.

108. Wigotsky, *supra* note 48, at 16.

109. Montague, *supra* note 43, at 2. *See also* Kathryn E. Kelly, *Cleaning Up EPA's Dioxin Mess*, WALL ST. J., June 29, 1995, *available in* Westlaw, 1995 WL-WSJ 8733972. For a summary of the Science Advisory Board's comments, see Kirk J. Finchem, *Science Advisory Board Questions EPA's Dioxin Assessment Methods, Findings*, PULP & PAPER, Feb. 1, 1996, *available in* Westlaw, 1996 WL 8902068.

110. Montague, *supra* note 43, at 2.

111. *See infra* part III(C).

112. Wigotsky, *supra* note 48, at 18.

113. *Id.*

114. 1978 GLWQA, *supra* note 28, at 1387.

115. *See supra* part II(C)(2).

and demonstrates this by their continued efforts to eliminate dioxin and other organochlorines from the Great Lakes.[116]

III. THE UNITED STATES' EFFORTS TO COMPLY

A. *Legislative Acts and Administrative Regulations*

Since the 1972 GLWQA was signed, many legislative acts and regulations have been promulgated which influence the level of dioxin pollution in the Great Lakes. Due to the magnitude of acts and regulations that have had some impact, only the most effective will be considered here. For simplicity, only the acts and regulations affecting the dioxin emissions of pulp and paper mills will be examined. The acts to be discussed include the Great Lakes Water Quality Initiative, the Pollution Prevention Act of 1990, and the proposed Cluster Rule. As a background for the United States' efforts, the Clean Water Act and the Great Lakes Critical Programs Act will also be discussed. An analysis of the advantages and disadvantages of the United States' efforts will then be addressed and a discussion of the effects of legislation proposed by the 104th Congress will be considered.

1. *Clean Water Act*

In 1972, Congress enacted the Clean Water Act ("CWA")[117] over a veto by President Nixon.[118] Water pollution had become such a problem in the United States that one senator remarked that "[o]ur planet is beset with a cancer which threatens our very existence."[119] The goals of the Act were "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[120] Over the past twenty years, the CWA has accomplished much in furtherance of this goal. In 1970, "only [thirty-six percent] of our rivers and lakes were safe for fishing and swimming."[121]

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116. Environmentalists contend that the scientists who continue to say that the danger from dioxin is overstated are similar to the "tobacco scientists," who still claim that there is "no compelling evidence that tobacco causes lung cancer in humans." Montague, *supra* note 43, at 2.

117. 33 U.S.C. §1251 (1994) et seq.

118. ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 1-2 (1993). President Nixon vetoed the Act on the grounds that it would result in "extreme and needless overspending." However, Congress took only one day to override the President's veto. *Id.*

119. *Id.* at 7.

120. 33 U.S.C. § 1251(a) (1994).

121. *The Clean Water Act: An American Success Story (online version)*, NATIONAL WILDLIFE FEDERATION, rev. June 13, 1995, at 1, *available in* Internet, http://www.igc.apc.org/nwf/pol/actionpg/issues/cwa1.html.

However, approximately sixty-six percent of the rivers and lakes are safe for fishing and swimming today.[122]

Additional goals of the Act which affected the Great Lakes and dioxin were to eliminate the discharge of pollutants into navigable waters by 1985 and to prohibit the discharge of "toxic pollutants in toxic amounts."[123] However, the goal of zero discharge of pollutants has been an elusive target. While there has been considerable progress in reducing pollution from point sources, zero discharge of dioxin and other toxic pollutants has not yet been attained.[124]

2. *Great Lakes Critical Programs Act of 1990*

The Council of Great Lakes Governors signed the Great Lakes Toxic Substances Control Agreement in 1986.[125] The purpose of this agreement was to "establish a framework for coordinated regional action in controlling toxic pollutants entering the Great Lakes system."[126] In 1989, the U.S. EPA began working with the Great Lakes states to develop a regional approach to water pollution control in the Great Lakes.[127] Congress noted the work of the states and the EPA and codified their work by amending the CWA in 1990 with the Great Lakes Critical Programs Act ("Critical Programs Act").[128] The amendments required the EPA to issue a proposed and final Great Lakes Water Quality Initiative ("Initiative") and required the Initiative to contain numeric water quality criteria, implementation procedures, and antidegradation policies.[129] The Critical Programs Act also required the states to adopt water pollution policies consistent with the Initiative within two years of publication of the final Initiative or face automatic promulgation of consistent state laws and regulations by the EPA.[130] The Critical

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122. *Id.*

123. 33 U.S.C. § 1251(a) (1994).

124. ADLER, *supra* note 118, at 17.

125. *The Great Lakes Toxic Substances Control Agreement (online version)*, COUNCIL OF GREAT LAKES GOVERNORS, rev. Aug. 30, 1995, at 1, *available in* Internet, http://www.great-lakes.net:2200/partners/CGLG/gltsca.html.

126. *Id.* at 1.

127. Allegra Cangelosi, *A Major Skirmish in the Environmental Wars of the 104th Congress (online version)*, NORTHEAST-MIDWEST REVIEW, May 1995, at 1, *available in* Internet, http://gopher.great-lakes.net:2200/0/partners/NEMW/gli.txt.

128. *Id.* at 2.

129. John Knox, *The EPA's Proposed Water Quality Guidance for the Great Lakes System: A Uniform and Stringent Solution*, 4 DICK. J. ENVTL. L. & POL'Y 89, 92 (1994).

130. *Id.*

Programs Act also "adds domestic legal teeth" to some provisions of the GLWQA by mandating RAP's and LaMP's.[131]

3. *Great Lakes Water Quality Initiative*

The Great Lakes Water Quality Initiative, also known as the Final Water Quality Guidance for the Great Lakes System,[132] is the first significant step toward the United States meeting goals set out under the GLWQA. Although the Critical Programs Act required the EPA to release the final Initiative in 1992, it was not completed and signed by the EPA until March 13, 1995.[133] As specified in the Critical Programs Act, the Great Lakes states now have until March 1997 to implement the provisions of the Initiative.

The goals of the Initiative are to establish minimum water quality standards in the Great Lakes in order to make the state laws more uniform and to make implementation of the GLWQA more uniform in the region. The major principles of the Initiative include:

> (1) using the best available science to protect human health, aquatic life, and wildlife;
> (2) recognizing the unique nature of the Great Lakes Basin Ecosystem;
> (3) promoting consistency in standards and implementation procedures while allowing appropriate flexibility to states and tribes;[134]
> (4) establishing equitable strategies to control pollution sources;
> (5) promoting pollution prevention practices; and

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131. SIXTH BIENNIAL REPORT, *supra* note 1, at 9. For a description of RAP's and LaMP's, see *supra* Part I(B)(3).

132. Final Water Quality Guidance for the Great Lakes System, 60 Fed. Reg. 15,366 (1995).

133. The EPA was required under the Clean Water Act amendments to release a draft Initiative by June 30, 1991 and final Initiative by 1992. However, near the end of 1992, a draft Initiative had not yet been released. Therefore, the National Wildlife Federation filed suit against the EPA on October 20, 1992 seeking an order from the District Court to the EPA to publish the Initiative immediately. The EPA cited the "breadth and complexity of the issues" as reasons for the delay. *Conservation Group Sues U.S. EPA over Delayed Great Lakes Water Standards*, 15 Int'l Envtl. Rep. (BNA) No. 22, at 721 (Nov. 4, 1992).

134. For flexibility, the states or tribes may "choose to improve water quality by reducing air emissions or cleaning up contaminated sediments, rather than imposing additional requirements on wastewater dischargers." *EPA, States to Restore Great Lakes (online version)*, EPA PRESS RELEASE, Mar. 13, 1995, at 1, *available in* Internet, gopher://gopher.epa.gov/00/Press/PressReleases/1995/March/Day-13/pr-243.

(6) providing accurate assessment of costs and benefits.[135]

A main focus of the Initiative is on twenty-two bioaccumulative pollutants. The Initiative names dioxin as a bioaccumulative chemical of concern[136] and, therefore, sets strict limits on its discharge. For the first time, the EPA has set criteria to protect wildlife from long-term exposure to persistent toxic chemicals, such as dioxin.[137] By targeting these persistent bioaccumulative chemicals, the EPA moves closer to reaching the GLWQA's requirement of "virtual elimination" of these chemicals.[138]

4. *Pollution Prevention Act of 1990*

Another law that has had a significant effect on the reduction of dioxin in the Great Lakes is the Pollution Prevention Act of 1990.[139] Congress found that existing regulations were aimed at *controlling* pollution[140] through "end of the pipe" regulation. In legislative findings, Congress stated that "significant opportunities for industry to *reduce or prevent* pollution at the *source*" exist,[141] and that "[s]ource reduction is fundamentally different and more desirable than waste management and pollution control."[142] Therefore, Congress declared that it was the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.[143]

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135. Final Water Quality Guidance for the Great Lakes System, 60 Fed. Reg. 15,366, 15,369-72 (1995).

136. *Id.* at 15,393.

137. *U.S. EPA to Publish Great Lakes Cleanup Plan*, ECO-LOG WEEK, Apr. 7, 1995, at 2 *available in* Westlaw, 1995 WL 2406239.

138. *The Final Great Lakes Water Quality Initiative Analysis of its Merits: What Good is the GLI? (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, June 1, 1995, at 3, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/gli/analysis/good.html. The EPA estimates that the Initiative will reduce the dumping of toxic pollution into the Great Lakes by 16 to 29 percent. *Id.* at 4.

139. 42 U.S.C. § 13101-13109 (1994). For a summary of laws leading up to and resulting from the Pollution Prevention Act of 1990, see Robert F. Blomquist, *Government's Role Regarding Industrial Pollution Prevention in the United States*, 29 GA. L. REV. 349 (1995).

140. 42 U.S.C. § 13101(a) (1994) (emphasis added).

141. *Id.* (emphasis added).

142. *Id.*

143. 42 U.S.C.S. § 13101(b) (1994).

Source reduction is typically achieved through equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and in-house improvements.[144] The pulp and paper mills have developed new bleaching processes in order to reduce the sources of dioxin pollution. New bleaching techniques, using chlorine dioxide, oxygen delignification, hydrogen peroxide, and ozone, have been successful in substantially reducing or eliminating dioxin in the pulp and paper mills' effluent.[145]

5. *The Cluster Rule*

A cluster rule is a way to "efficiently and effectively incorporate all environmental-related activities of a particular industry within a common framework necessary for environmental protection."[146] The proposed pulp and paper industry Cluster Rule[147] is the EPA's first attempt to "integrate comprehensively air, water, and land pollution regulations" regarding dioxin.[148] With this regulation, the EPA hopes to virtually eliminate the discharge of dioxin into water by pulp and paper mills and substantially reduce airborne discharges.[149] Under this proposed rule, the EPA would establish minimum pollution control technology in pulp and paper mills and require mills to replace chlorine bleaching with chlorine dioxide bleaching, which would reduce dioxin discharges in wastewater by ninety-five percent.[150] A small category of mills would be required to replace chlorine bleaching with totally chlorine-free bleaching processes which would eliminate dioxin discharges.[151]

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144. John H. Sheridan, *Pollution Prevention Picks Up Steam*, INDUSTRY WK., Feb. 17, 1992, at 41, *available in* Westlaw, 1992 WL 3083339.

145. 1993-95 PRIORITIES, *supra* note 50, at 42-43.

146. 140 CONG. REC. S10,574-02, S10,596 (daily ed. Aug. 4, 1994) (statement of Sen. Bumpers).

147. Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category, 58 Fed. Reg. 66,078 (1993).

148. Daniel J. Murphy, *Regulating the Paper Industry: The Gov't's Demand for Paperwork Begets More*, INVESTOR'S BUS. DAILY, Sept. 27, 1994, *available in* Westlaw, 1994 WL 3233646.

149. *Id.*

150. *Press Advisory: EPA Releases New Data on Pulp and Paper Discharges; Considers Regulatory and Voluntary Options*, EPA, July 3, 1996, *available in* Westlaw, 1996 WL 367536.

151. 141 CONG. REC. H6104-01, H6106 (June 20, 1995) (statement of Rep. Solomon).

B. *Advantages and Disadvantages of the United States' Efforts*

The United States' efforts to reduce dioxin in pulp and paper manufacturing in compliance with the GLWQA, such as the Great Lakes Water Quality Initiative and the Cluster Rule, have been controversial. While there have been advantages, such as a more than ninety percent reduction in dioxin discharges by pulp and paper mills since 1988, there have also been significant disadvantages. The regulations have been and continue to be very costly for the pulp and paper industry.

There are many advantages to the Great Lakes Water Quality Initiative. The issuance of the regulation is the beginning of real fulfillment of GLWQA goals by the United States. The Initiative also reduces toxic pollution and helps keep clean waters clean. It promotes a consistency in state laws that was severely lacking. Of course, it also helps to protect people and wildlife in the Great Lakes basin.

While the Initiative has many advantages, some serious disadvantages have also been pointed out. The Initiative is not entirely consistent with mandates of the GLWQA for three main reasons: (1) the Initiative is not a binational approach; (2) the regulation does not manage the Great Lakes as an ecosystem; and (3) no zero discharge or virtual elimination of persistent toxic chemicals is mandated by the Initiative. Also, some groups contend that the Initiative should be voluntary. The groups argue that when Congress referred to the Initiative as a "guidance" this implied that the Initiative was voluntary. However, others contend that the term "guidance" was used simply "to allow states appropriate flexibility in adapting their programs to the regional guidelines."[152]

In response to the concerns over whether the Initiative is voluntary or a legitimate regulation, several groups filed suit against the EPA in July 1995.[153] The Great Lakes Water Quality Coalition, a group made up of cities, agricultural groups, businesses, and trade associations, filed suit claiming that the Great Lakes Initiative is actually a regulation.[154] They challenged the EPA's authority to promulgate the Initiative as a regulation and believed that the EPA has "overstepped its legal authority."[155]

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152. Cangelosi, *supra* note 127, at 4.

153. *Groups Seek Federal Appeals Court Review of Water Quality Guidance for Great Lakes*, 26 Envtl. Rep. (BNA) No. 11, at 564 (July 14, 1995).

154. *Id.* *See* Great Lakes Water Quality Coalition v. EPA, No. 95-2639 (7th Cir. filed July 11, 1995).

155. *Groups Seek Federal Appeals Court Review of Water Quality Guidance for Great Lakes*, 26 Envtl. Rep. (BNA) No. 11, at 564 (July 14, 1995). Along with the Great Lakes Water Quality Coalition, the American Iron and Steel Institute filed suit challenging the Initiative. *See id.* (citing American Iron and Steel Institute v. Browner, No. 95-1348 (D.C. Cir. filed July 10, 1995)).

Like the Initiative, the Cluster Rule has groups who support and disagree with the proposed rule. An advantage of the rule is that there is finally a goal of zero discharge of dioxin for some pulp and paper mills. Although this has been a goal of the GLWQA since 1978, the Cluster Rule is the first real step towards virtual elimination. However, some groups describe the Cluster Rule as "regulatory over-kill"[156] and "the biggest and most costly rule ever proposed by the EPA for a single industry."[157] One pulp and paper mill representative stated that the Cluster Rule had a "cost-to-benefit ratio of 10 to 1 at best, but more realistically closer to 100 to 1."[158] Industry statistics also show that the Rule would result in the closure of thirty-three mills, the loss of over 100,000 jobs, and a cost of $11.5 billion over three years.[159]

However, the United States' efforts have been very effective overall. Dioxin discharges by pulp and paper mills have decreased by more than ninety percent since 1988.[160] The pulp and paper industry now produces "less than one percent of the total dioxin generated in this country" according to industry sources.[161] A problem with existing legislation is that it is a jumble of regulations from *many* different laws. The Cluster Rule is a good beginning at solving this problem. By combining regulations to govern a certain industry, ambiguity and confusion are removed. However, this also opens the door to intense lobbying by special interest groups of the industry. If the industry is powerful enough, it could prove difficult to promulgate and enforce the regulation.

C. *Effects of Proposed Congressional Legislation*

Several bills proposed in the 104th Session of the United States Congress could have a severe effect on enforcement of the GLWQA if passed. American and Canadian environmentalists are concerned that passage of the new bills would turn back the clock to a time when water was not safe to drink and rivers caught fire due to contamination. Canadian Environment Deputy Prime Minister Sheila Copps emphasized Canada's concern by stating that "some members of Congress appear to have become

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156. Prepared Testimony of John A. Georges, Chairman and CEO International Paper Company, on Behalf of the Business Roundtable Before the Committee on Governmental Affairs of the United States Senate Re: Regulatory Reform and Irrational Regulations, FED. NEWS SERVICE WASH. PACKAGE, Feb. 8, 1995, at 2, *available in* Westlaw, 1995 WL 6621448 [hereinafter Georges].

157. 141 CONG. REC. H6104-01, H6106 (daily ed. June 20, 1995) (statement of Rep. Solomon).

158. Georges, *supra* note 156, at 2.

159. *Id.* at 7.

160. Murphy, *supra* note 148, at 3.

161. Georges, *supra* note 156, at 8.

radical anti-environmentalists."[162] However, industrial groups praise the bills as reducing unnecessary and costly regulations on businesses.

One bill that has been proposed is H.R. 961, The Clean Water Amendments Act of 1995. The main provisions of the bill which affect the Great Lakes and dioxin are as follows: (1) makes the Great Lakes Water Quality Initiative a guidance only and voluntary for the states;[163] (2) imposes extensive cost-benefit analyses and risk assessments for most Clean Water Act regulations;[164] and (3) lets regulators consider any factors when setting standards for toxic discharges rather than the previous stringent, scientifically based standards.[165] Many have called this bill the "Dirty Water Act." One Congressman stated that "H.R. 961 will actually reverse the progress we have made under current clean water law."[166]

This bill was approved by the House on May 16, 1995.[167] However, the bill stalled in the Senate committee when moderates prevented the bill from moving forward.[168] Nevertheless, to "circumvent the Senate's delay, House members simply attached key Clean Water Act revisions as riders on the EPA appropriations bill."[169] In December 1995, the EPA appropriations bill passed the House and Senate with some of the riders still attached.[170] President Clinton vetoed the bill which would have drastically cut the EPA's budget.[171]

This and many other proposed bills could have a serious effect on the Great Lakes and dioxin produced by pulp and paper mills. The trend in most of the bills seems to be a shift toward cost-benefit analysis, reduced regulation, and avoidance of taking private property without just compensation. Environmentalists claim that the risk assessment and cost-benefit provisions would create an endless bureaucratic maze. EPA Administrator Browner concluded that more than $220 million would be

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162. Anne Swardson, *Canada Protests U.S. Regulatory Bill*, WASH. POST, July 25, 1995, at A10, *available in* Westlaw, 1995 WL 9253758.

163. 141 CONG. REC. H5053-09 (May 16, 1995) (statement by Rep. Kaptur).

164. *H.R. 961 Threatens Public Health and Repeals Essential Protections (online version)*, NATIONAL WILDLIFE FEDERATION, June 15, 1995, at 1, *available in* Internet, http://www.igc.apc.org/nwf/pol/actionpg/issues/cwa961.html. *See also* H.R. REP. NO. 961, 104th Cong., 1st Sess., §323 (1995).

165. *Clean Water Background Facts - Why HR 961 Must Be Stopped*, SIERRA CLUB LEGAL DEFENSE FUND, Apr. 27, 1995, at 3.

166. 141 CONG. REC. H5053-09, H5054 (May 16, 1995) (statement of Rep. Kaptur).

167. Vicki Monks, *Capitol Games: Environmental Policies of the 104th Congress*, NATIONAL WILDLIFE, Apr. 14, 1996, *available in* Westlaw, 1996 WL 9822884.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

required to make the risk assessments.[172] Additionally, opinion polls show that "a substantial majority of voters - both Republican and Democrat - oppose rolling back environmental protections."[173] In fact, a Times-Mirror poll showed that seventy percent of Americans believe that "pollution laws have not gone far enough."[174]

IV. CANADA'S EFFORTS TO COMPLY

A. *Legislative Acts and Administrative Regulations*

Like the United States, Canada and its provinces have issued many laws and regulations in response to the GLWQA. As with the United States' efforts, this note will discuss the major legislation and regulations affecting the dioxin discharges of pulp and paper mills. These include the Canada-Ontario Agreement Respecting the Great Lakes Ecosystem and the Federal Toxic Substances Management Policy. As a background for these laws and regulations, the Canada Environmental Protection Act and Great Lakes 2000 will also be discussed.

1. *Canada Environmental Protection Act*

The Canada Environmental Protection Act ("CEPA") was enacted in 1987[175] and took effect on June 30, 1988.[176] This Act is the Canadian federal government's main environmental statute.[177] The Act superseded the existing Clean Air Act, Environmental Contaminants Act, and Ocean Dumping Act.[178] CEPA was enacted shortly after a "toxic blob" of contaminants from a Dow Chemical plant leaked into the St. Clair River and threatened drinking water in Windsor and Detroit.[179] Existing environmental legislation did not allow the Environment Minister to do anything about the "blob."[180] This incident and the realization that "existing legislation was not adequate for

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172. *Breach of Faith: How the Contract's Fine Print Undermines America's Environmental Success (online version)*, NATURAL RESOURCES DEFENSE COUNCIL, Feb. 1995, at 3, *available in* Internet, http://www.cs.cmu.edu/~jab/pol/breach.html. Administrator Browner was referring specifically to the proposed bill H.R. 9.

173. Monks, *supra* note 167.

174. *Id.*

175. G. BRUCE DOERN & THOMAS CONWAY, THE GREENING OF CANADA: FEDERAL INSTITUTIONS AND DECISIONS 14 (1994).

176. Roger Cotton & John Zimmer, *Canadian Environmental Law: An Overview*, 18 CAN.-U.S. L.J. 63, 65 (1992).

177. DOERN & CONWAY, *supra* note 175, at 14.

178. *Id.* at 21.

179. *Id.* at 221-22.

180. *Id.* at 222.

addressing the 'new' toxic contaminants" triggered pressure to enact new environmental legislation and resulted in CEPA.[181]

With respect to dioxin and other toxic substances, CEPA contains provisions for information gathering, controls on substances new to Canada, broad regulatory authority, interim orders for emergencies, clean-up of unauthorized releases, authority to direct remedial measures, and export and import controls.[182] CEPA, along with the Fisheries Act which protects fish habitats, have been used to tighten controls on pulp and paper mill discharges.[183] The Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations, promulgated under CEPA in 1991, established stringent limits on pulp and paper mill discharges of dioxins.[184] However, the original 1994 deadline was extended to December 31, 1995 for many of the pulp and paper mills.[185]

2. *Great Lakes 2000*

The Great Lakes 2000 program, announced in April, 1994, is intended to help Canada meet its obligations under the GLWQA.[186] The main objectives of the program are: (1) restoration of degraded sites; (2) prevention and control of pollution; and (3) conservation and protection of human and ecosystem health.[187] The seven-year program renews Canadian efforts to restore, protect, and sustain the Great Lakes until the year 2001.[188] One goal of the program is the virtual elimination of persistent, bioaccumulative, and toxic substances, such as dioxin.[189] Canada has invested over $37 million in nearly 200 cleanup projects in Canada's seventeen Great Lakes Areas of Concern and other priority areas.[190]

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181. *Id.* at 228. Other incidents which occurred at about the same time as the "toxic blob" and spurred concern about existing environmental legislation include the Love Canal in New York in 1978, the derailment of twenty-one railway cars carrying toxic chemicals in Ontario in late 1979, and reports of deaths of gulls and ducks in Toronto in 1979. *Id.* at 220.

182. *Id.* at 224.

183. *Summary of Environmental Law in Canada, § 9.2 Point Sources (online version)*, at 1, *available in* Internet, http://www.cec.org/english/database/law/canada/09/09-02.html.

184. *Id. See also* Roger Cotton & Cara Clairman, *The Effect of Environmental Regulation on Technological Innovation in Canada*, 21 CAN.-U.S. L.J. 239, 247 (1995).

185. *Extensions Expire: Mills Can Expect Intensive Scrutiny*, ECO-LOG WEEK, Jan. 19, 1996, at 2, *available in* Westlaw, 1996 WL 8729199.

186. *Great Lakes 2000 (online version)*, ENVIRONMENT CANADA, July 4, 1995, at 2, *available in* Internet, http://www.cciw.ca/glimr/metadata/gl2000/intro.html.

187. *Id.* at 1.

188. *Id.*

189. *Id.*

190. *Great Lakes 2000 Cleanup Fund Program Highlights - 1995 (online version)*, ENVIRONMENT CANADA, Sept. 27, 1995, at 1, *available in* Internet, http://www.cciw.ca/glimr/data/cleanup-fund-95/intro.html. The major success story of the Great Lakes 2000

3. *Canada-Ontario Agreement Respecting the Great Lakes Ecosystem*

On July 6, 1994, the governments of Canada and Ontario signed the Canada-Ontario Agreement Respecting the Great Lakes Ecosystem ("COA"). The COA "synchronize[s] the activities of the federal . . . and provincial governments and work[s] towards the achievement of the three objectives" of the Great Lakes 2000 plan.[191] The objectives of the plan include restoring degraded areas, preventing and controlling pollution, and conserving and protecting human and ecosystem health.[192] The purpose of the COA is "to renew and strengthen planning, cooperation and coordination between Canada and Ontario in implementing actions to restore and protect the ecosystem, to prevent and control pollution into the ecosystem, and to conserve species, populations and habitats in the Great Lakes Basin Ecosystem."[193] The COA is meant to substantially meet Canada's obligations under the GLWQA.[194]

Dioxin pollution is affected by the second objective of preventing and controlling pollution. The COA states that "[t]he ultimate goal . . . is to achieve the virtual elimination of persistent, bioaccumulative and toxic substances from the Great Lakes Basin Ecosystem by encouraging and implementing strategies consistent with the philosophy of zero discharge."[195] The agreement lists dioxin as one of thirteen Tier I pollutants.[196] Tier I pollutants "require immediate action to eliminate their use, generation, or release in the Great Lakes environment."[197] A ninety percent reduction in the use, generation, and release of dioxin by the year 2000 is sought.[198]

The COA has achieved the following accomplishments relating to dioxin and the pulp and paper industry:

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program has been the cleanup of Collingwood Harbour. The cleanup included "improved sewage treatment operations; new removal methods for contaminated harbour sediments; and innovative bio-engineering to rehabilitate fish and wildlife habitats and control erosion." *Id.* at 5.

191. *Great Lakes 2000*, *supra* note 186, at 2.

192. GOVERNMENT OF CANADA, ENVIRONMENT CANADA, CANADA-ONTARIO AGREEMENT RESPECTING THE GREAT LAKES BASIN ECOSYSTEM 2 (1994).

193. *Id.* at 1.

194. *Id.*

195. *Id.* at 4.

196. *Id.* at 11.

197. *Id.* at 4. Tier II pollutants, which include anthracene, cadmium, dichlorobenzene, and others, are subject to voluntary reductions only. *Id.* at 5-6.

198. *Id.* at 5. Five other Tier I pollutants, aldrin/dieldrin, chlordane, DDT, mirex, and toxaphene, which are all pesticides, are all subject to zero discharge by 1996 rather than the 90% reduction by the year 2000. *Id.* at 4-5.

(1) a ninety percent drop in dioxin found in herring gull eggs since the 1970s;
(2) conventional pollution discharges in pulp and paper mills cut by seventy-five percent since 1972;
(3) chlorinated organic compounds from bleached kraft mills down more than fifty percent since 1989; and
(4) establishment of goals of zero discharge of organochlorines from Kraft mills by 2002 in Ontario.[199]

4. *Federal Toxic Substances Management Policy*

The Federal Toxic Substances Management Policy was released by the Canadian government in June 1995.[200] The main objectives of the policy are the virtual elimination of persistent, bioaccumulative, toxic substances produced by human activity and the "management of other toxic substances and substances of concern, throughout their entire life cycles, to prevent or minimize their releases into the environment."[201] The policy stresses preventive and precautionary management for toxic substances.[202]

As part of the Toxic Substances Management Policy, chlorinated substances are managed under a five-part action plan, which includes:

(1) targeting action which focuses on critical uses and products;
(2) improving the scientific understanding of chlorine and its impacts on the environment and human health;
(3) detailing socio-economic and public health studies on the use of chlorinated substances and their alternatives;
(4) improving access to information for Canadians; and

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199. CANADA-ONTARIO GREAT LAKES PARTNERSHIPS, CANADA-ONTARIO AGREEMENT RESPECTING THE GREAT LAKES BASIN ECOSYSTEM 1994 BACKGROUNDER PROGRESS ON THE GREAT LAKES 1 (July 6, 1994). For more information regarding the COA, see *First Progress Report Under the 1994 Canada-Ontario Agreement*, PARTNERSHIPS FOR THE GREAT LAKES, Sept. 18, 1995, *available in* Internet, http://www.cciw.ca/glimr/data/coa-first-report/coa.html.

200. GOVERNMENT OF CANADA, ENVIRONMENT CANADA, TOXIC SUBSTANCES MANAGEMENT POLICY (June 1995), *available in* the Internet, http://www.doe.ca/toxics/toxic1_e.html. For more information on the Toxic Substance Management Policy, see also GOVERNMENT OF CANADA, ENVIRONMENT CANADA, TOXIC SUBSTANCES MANAGEMENT POLICY REPORT ON PUBLIC CONSULTATIONS (June 1995) and GOVERNMENT OF CANADA, ENVIRONMENT CANADA, TOXIC SUBSTANCES MANAGEMENT POLICY PERSISTENCE AND BIOACCUMULATION CRITERIA (June 1995).

201. TOXIC SUBSTANCES MANAGEMENT POLICY, *supra* note 200, at 1-2.

202. *Federal Toxics Policy Places Onus on Industry (online version)*, ENVIRONMENT CANADA, June 2, 1995, at 1, *available in* Internet, http://www.doe.ca/toxics/toxpre_e.html.

(5) promoting international efforts for global action on chlorinated substances.[203]

The principal uses of chlorine or chlorine containing compounds are polyvinyl chloride ("PVC"), pulp and paper processes, and solvents.[204] Industries which produce chlorinated substances that are persistent and toxic, such as the pulp and paper industry, will be affected the most by this policy. Although the pulp and paper industry has already decreased chlorine use by forty-five percent since 1988,[205] this policy sets a goal of totally chlorine free bleaching processes by pulp and paper mills.

B. *Advantages and Disadvantages of Canada's Efforts*

In analyzing the advantages and disadvantages of Canada's efforts to comply with the GLWQA, it is helpful to discuss the fundamental differences between the political and economic systems of the United States and Canada. In Canada, "[g]overnmental authority is divided between a national government . . . and twelve regional governments.[206] The Canadian Constitution does not assign exclusive responsibility for the environment to either the federal or provincial governments.[207] Historically, the provinces have regulated environmental problems.[208] However, over the last decade, the federal government has increased its role in protecting the environment.[209]

Several features of Canada's political system are substantially different from those in the United States. One difference is the concept of separation of powers. While in the United States separation of power is a fundamental concept between the legislative, executive, and judicial branches, in Canada, there exists no separation of powers between the legislative and executive branches.[210] This "lack of effective constraint" on the executive branch's rule-making powers leads to "autocratic decision-making."[211]

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203. *Environment Minister Outlines Approach to Deal with Chlorinated Substances*, Canada NewsWire, Oct. 25, 1994, at 1, *available in* Westlaw, CANWIRE 14:27:00 [hereinafter *Environment Minister Outlines*].

204. *Id.* at 2.

205. *Id.* at 3.

206. Cotton & Zimmer, *supra* note 176, at 63.

207. *Id.*

208. *Id.* at 65.

209. *Id.*

210. John L. Howard, *Industrial Policy and Environmental Regulation - Canada*, 19 CAN.-U.S. L.J. 315, 319 (1993).

211. *Id.*

A second fundamental difference is that there is no judicial review of the regulation-making process in Canada.[212] Since the Canadian legislature typically enacts only broad statutory standards, both the agency and the executive have wide discretion to define the broad standards. The agency's definitions of these standards are not subject to review by the courts.[213] In contrast, judicial review of agency decisions is allowed in the United States. Although judicial review prevents unelected bureaucrats from imposing regulations not within the scope of the statute, some have described the United States' system as "extraordinarily crude, costly, litigious and counterproductive."[214] Such commentators contend that the system "empower[s] the courts and counsel for the litigants in contested cases to dominate or even capture the public policy agenda."[215]

A third fundamental difference in the political systems involves the takings issue. In the United States, the Fifth Amendment prohibits the taking of private property for public use "without just compensation." This has been a significant issue in bills proposed before the 104th United States Congress.[216] However, in Canada, "a corporation is not entitled to claim any constitutional protection of its property rights, even where the effect of a statute is outright expropriation of its property."[217]

A last fundamental difference between the United States and Canada involves the extent to which pulp and paper mills affect the economy. In Canada, the forest industry is one of the largest industries and employs 239,000 workers.[218] The importance of this industry obviously makes it more difficult to promulgate and enforce strict regulations on pulp and paper mills due to lobbying strengths.

As for the effectiveness of the statutes and regulations discussed above, it is important to remember that the area of environmental law is still in its "infancy" in Canada.[219] Canadian legislators have been able to analyze the effectiveness and workability of U.S. legislation, which was implemented over a decade before CEPA. As a result, they have promulgated equally tough standards without the "endless U.S.-style litigation."[220]

The COA and the Toxic Substances Management Policy are steps in the right direction toward effectively regulating dioxin pollution. However,

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212. *Id.*

213. *Id.* at 324.

214. *Id.* at 325 (quoting Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985)).

215. *Id.*

216. *See supra* part III(C).

217. Howard, *supra* note 210, at 326.

218. Cotton & Clairman, *supra* note 184, at 246.

219. Roger Cotton & John S. Zimmer, *The Canadian Environmental Legal Regime: A Road Map for the Foreign Investor*, 28 SAN DIEGO L. REV. 745 (1991).

220. DOERN & CONWAY, *supra* note 175, at 131.

environmental groups claim that the COA fails to implement zero discharge for dioxin as recommended by IJC.[221] They claim that the Agreement is "a smoke and mirrors exercise designed to give the impression that governments have undertaken new initiatives to clean up the Great Lakes."[222] The groups also charge that the COA "targets a mere handful of toxins [for phasing out], many of which have already been withdrawn or banned."[223]

Since the Toxic Substances Management Policy was just recently initiated, it is too early to analyze its success on the virtual elimination of toxic, persistent organochlorines. In addition to the federal government's efforts, Ontario has also enacted regulations intended to achieve zero discharge of organochlorines and other chemicals in the pulp and paper industry.[224] Although virtual elimination of dioxin has not yet been achieved, through the laws discussed above, other federal and provincial pulp and paper regulations, and voluntary measures, dioxin discharges by Canadian mills have been reduced by ninety-eight percent.[225] However, this success has recently been threatened by government plans to revoke the regulation in the COA that would require pulp and paper mills to virtually eliminate dioxin by the year 2002.[226] The newly elected Ontario government has begun to "stead[ily chip] away at laws that protect the environment in the name of job creation."[227]

V. RECOMMENDATIONS AND CONCLUSIONS

Most people would agree that a ninety-eight percent reduction in the production of a pollutant by an industry would be a sufficient decrease. This is especially true if a substantial amount of capital would have to be expended to achieve a 100% reduction in the discharge. However, this philosophy cannot be applied to the discharge of dioxin. Since dioxin is bioaccumulative and persistent, the release of even minute amounts will accumulate and cause harm to humans and animals. In fact, even though discharge levels of dioxin into the Great Lakes have been substantially reduced in the last two decades, concentration levels in Great Lakes fish

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221. *Canadian Environment Groups Pan Pact to Clean Up Great Lakes Basin Ecosystem*, Int'l Env't Rep. Current Rep. (BNA), No. 15, at 647 (July 27, 1994).

222. *Id.*

223. *Id.*

224. SEVENTH BIENNIAL REPORT, *supra* note 77, at 12.

225. *Env. Minister Outlines*, *supra* note 203.

226. Brian McAndrew, *Ontario Out to Sink Pollution Law*, THE TORONTO STAR, July 26, 1996, at A5, *available in* Westlaw, 1996 WL 3378383.

227. *Environmental Damage: The Harris Government Mistakenly Believes That Job Creation Means Less Protection for the Environment*, THE OTTAWA CITIZEN, July 10, 1996, at A14, *available in* Westlaw, 1996 WL 3609705.

have not shown signs of decline.[228] Scientists believe this is due to dioxin accumulating in the Lake sediments where the dioxin is consumed by fish.[229] Even if extremely small amounts of dioxin are released, it will continue to accumulate in the Lake soils and contaminate fish.

Some groups advocate the use of risk assessments and contend that there is not enough evidence at this time of the health effects of low levels of dioxin to warrant costly regulation. Although risk assessments are useful tools, the IJC has specifically rejected their use in determining which chemicals can be discharged into the Great Lakes.[230] Risk assessments, as advocated by industry representatives, are not "necessary or justified if the primary goal is to protect public health or prevent pollution."[231] When a risk assessment is performed, the purpose is to define an acceptable level of exposure. However, this "contravenes the goal of eliminating exposures to toxic materials" as required by the Great Lakes Water Quality Agreement, and this also "assumes a degree of precision that risk assessment does not possess."[232]

The scientific uncertainty of the effects of dioxin at low level exposures is outweighed by the damage that could occur while years are spent trying to prove a "conclusive link"[233] between dioxin and harm to human and animal health. The weight of the evidence approach should be recognized and supported by both countries and other interested parties in order to prevent further harm from occurring. As Adele Hurley, former Canadian co-chair of the IJC, pointed out, the weight of the evidence approach is used every day in courts to settle disputes.[234] Hurley believes it is "an indefensible double standard" that the weight of the evidence approach is used for "settling arguments between companies but not to protect human health."[235]

Both the United States and Canada should strive for virtual elimination and zero discharge of dioxin. In order to accomplish this, the existing legislation and regulations in both countries should be extended to set a goal of mandatory zero discharge in the pulp and paper industry and other industries which produce dioxin. The United States' Cluster Rule is a good beginning to reach this goal. However, since the shift to totally chlorine free

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228. *Lake Ontario's Dioxin Level Still High and Bottom-feeder the Likely Culprit*, THE TORONTO STAR, July 13, 1996, at C6, *available in* Westlaw, 1996 WL 3375902.

229. *Id.*

230. Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 169 (1996).

231. *Id.* at 168.

232. *Id.* at 170.

233. SEVENTH BIENNIAL REPORT, *supra* note 77, at 27.

234. Cameron Smith, *Great Lakes Co-chair Has Faith in Us*, THE TORONTO STAR, June 29, 1996, at E6, *available in* Westlaw, 1996 WL 3373583.

235. *Id.*

bleaching is mandated for only certain mills, this rule needs to be modified to include all pulp and paper mills in the shift away from chlorine bleaching. The proposed Congressional bills amending the Clean Water Act and reducing the EPA's budget should also be rejected due to the tremendous environmental harm they could cause throughout the United States and especially in the Great Lakes. Canada's COA is also a good start in achieving the elimination of dioxin. However, the COA does not mandate zero discharge for dioxin. This situation could be remedied by proper implementation of the Toxic Substances Management Policy's chlorinated substances plan. In addition, the IJC recently expressed concern with "proposals to weaken regulatory frameworks that underpin pollution control and other effective programs, including reporting and compliance requirements" and the "erosion of funding and expertise for research, monitoring and enforcement, and transferred responsibilities to other levels of government without the requisite resources."[236]

In addition to legislative and regulatory changes that would strengthen the goal of zero discharge of dioxin, the support of the pulp and paper industry is also necessary. Many industry representatives have stated that the cost of achieving zero discharge outweighs the benefits to human and wildlife health. However, studies have shown that source reduction efforts in certain mills have made them more efficient and profitable. Mills which invested earlier in totally chlorine free processes have a higher income growth than mills which did not invest in the new processes.[237] In addition, another study showed that "there is no significant difference between the average cost of modifications needed to make paper without dioxin and the cost of switching to other new technologies that reduce, but don't eliminate dioxin emissions."[238]

These studies show that those in the pulp and paper industry resisting the change to totally chlorine free technology should replace "the old mindset of 'jobs vs. environment'" with a new mindset of "environment = jobs."[239] As Canada's Deputy Prime Minister and Minister of the Environment, Sheila Copps, stated, "Avoiding environmental solutions is costing the economy; addressing environmental solutions is an economic opportunity."[240] This view was also emphasized by the IJC in their Seventh Biennial Report on the Great Lakes. The IJC stated that "[i]t is important

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236. EIGHTH BIENNIAL REPORT, *supra* note 92, at 6.

237. Chad Nehrt, *Process Changes Pay Off for Mills Investing in Pollution Control*, PULP & PAPER, Sept. 1995.

238. Ken Ward Jr., *Dioxin Costs Examined*, CHARLESTON SUNDAY GAZETTE-MAIL, June 30, 1996, at 1B, *available in* Westlaw, 1996 WL 5196895.

239. SEVENTH BIENNIAL REPORT, *supra* note 77, at 20.

240. *Great Lakes 2000 Cleanup Fund Program Highlights - 1995 (online version)*, *supra* note 190, at 3.

and inevitable that the business sector act increasingly to *lead* rather than resist a broad movement towards manufacturing processes that eliminate the production and use of persistent toxic substances."[241] The support of industry and business sectors is necessary to be successful in eliminating the discharge of dioxin and other persistent toxic chemicals from our waters.

Along with government and industry support, public support is necessary to achieve success in environmental cleanup. Although dioxin has received more public attention in recent years, most people still do not realize the dangers and health effects of dioxin and similar chemicals. Additionally, most people have never heard of the Great Lakes Water Quality Agreement. Publicity is necessary to inform the public and pressure the governments and industry into making changes to protect the health of citizens. "In the end, it will be ordinary people who will change public policy regarding the array of environmental pollutants affecting their lives and the world. No one else can effectively counter the opposition of powerful interests with vested economic stakes in our current uses of [persistent, bioaccumulative] toxic chemicals."[242]

Only by cooperation between the governments of the United States and Canada, industries, and the public can the discharge of toxic pollutants, such as dioxin, into the Great Lakes be eliminated as the governments agreed to do when they signed the Great Lakes Water Quality Agreement. Although substantial steps have been made toward cleaning up the Great Lakes, there is still more work to be done. A recent report by the United States and Canada found that the loadings of persistent toxic contaminants, levels of chemical contaminants in fish and herring gulls, and concentrations in water were "mixed/improving" from the peak levels that were found.[243] More efforts are needed to reach a rating of "good/restored" for the level of toxic contaminants in the Great Lakes. The combined efforts of the governments of Canada and the United States, industries, and the citizens of both countries are necessary to completely restore the Great Lakes into a safe, healthy legacy for our children.

Christina D. Arvin[*]

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241. SEVENTH BIENNIAL REPORT, *supra* note 77, at 15.

242. *Hormone Copycats: Solutions (online version)*, GREAT LAKES NATURAL RESOURCE CENTER, NATIONAL WILDLIFE FEDERATION, Apr. 4, 1994, at 5, *available in* Internet, http://www.great-lakes.net:2200/0/partners/NWF/toxics/hcc5-sol.html.

243. *State of the Great Lakes 1995: Executive Summary (online version)*, ENVIRONMENT CANADA, Aug. 25, 1995, at 4, *available in* Internet, http://www.cciw.ca/glimr/data/sogl-final-report/intro.html.

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TO PROSECUTE OR NOT TO PROSECUTE: PROBLEMS ENCOUNTERED IN THE PROSECUTION OF FORMER COMMUNIST OFFICIALS IN GERMANY, CZECHOSLOVAKIA, AND THE CZECH REPUBLIC

INTRODUCTION

More than seven years have passed since the Berlin Wall fell in Germany and the "Velvet Revolution"[1] took place in Czechoslovakia. Since then, the governments of Czechoslovakia, the Czech Republic,[2] and a reunited Germany have struggled with their communist pasts. One of these democracies' most difficult decisions is whether to prosecute former communist officials for alleged abuses perpetrated under their regimes. It would be simpler for these governments not to prosecute and dredge up a sometimes painful past; these governments, however, have chosen to pursue their former communist leaders. Once the decision to prosecute was made, the issue to prosecute under international or domestic law remained. Germany, Czechoslovakia, and the Czech Republic have prosecuted under domestic law, but at least one German appellate decision has relied on international law to affirm the decision of the lower court. When they applied domestic law, the judges reached similar verdicts in similar cases; however, depending on the judge, a rationale based on natural law or positive law determined the outcome.

These choice-of-law decisions and certain non-legal barriers to prosecution, such as politics, have not and should not act as a deterrent to prosecution. Abuses of power were committed by government officials, and those officials should be held accountable. The governments abandoned certain prosecutions because the accused were either too old or too sick to stand trial. If the prosecutions had continued, the governments would have been accused of being as insensitive and inhumane as their predecessors. Yet, some officials escaped prosecution even though they were neither too sick nor too old to stand trial.

This article will address these issues in the context of the trials of the East German border guards and that of six former high-ranking East German communist officials. In Czechoslovakia and the Czech Republic, these issues will be examined in the context of Miroslav Stepan's trial and the

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1. "Velvet Revolution" is the term used to describe the smooth transfer of power from the Communists in Czechoslovakia to their successors.

2. Czechoslovakia remained a country until July 1992 when Slovakia peacefully seceded from the Czech Republic. Upon becoming its own country, the Czech Republic incorporated the laws of post-communist Czechoslovakia into its own laws. This article will deal strictly with the Czech Republic's attempts to prosecute former communist officials after the breakup of Czechoslovakia because Slovakia has not pursued prosecuting officials living within its boundaries as vigorously as the Czech Republic.

attempt to bring charges against other former communist officials. Bringing formal charges and appearing before a court of law is not the only way to prosecute in the Czech Republic. The Czech government has instituted an informal process of finding guilt known as lustration which will also be examined.

I. BRIEF HISTORY OF COMMUNIST RULE

A. *East Germany*

The Communists ruled the German Democratic Republic ("GDR") with an iron fist from the end of World War II until the Berlin Wall fell in 1989. The Social Unity Party in East Germany used "the mechanisms of state control" to create a single body of followers, ignoring its citizens' most basic human rights in the process.[3] The repression started after the Soviets took power in 1945; almost 100,000 people died with the assistance of former East German communist rulers and the Soviet occupiers who ruled before them.[4] Between 1950 and 1981, "hundreds of people died after torture in East German prisons and 170 were executed by guillotine or firing squad."[5] Approximately one-third of those who died were found guilty of participation in "political activity or 'treason'" as a result of defection from the *Staatssichherheitsdienst* (*Stasi*), the East German secret police; two-thirds were found guilty of war crimes or murder.[6]

In 1952, ten years before the Berlin Wall was completed, the East German repressors secured the confines of the two Germanys outside of Berlin as the East German government announced that it was "building socialism in earnest."[7] However, not all of the citizens who had been confined to the "workers' and farmers' republic" were ready to become a

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3. Colloquy, *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *in* 12 B.C. THIRD WORLD L.J. 241, 247 (1992) (remarks by Horst Gemmer).

4. Adrian Bridge, *Germany: Iron Curtain's 100,000 Dead - Communist Rulers Killed Up to 100,000*, INDEPENDENT ON SUNDAY, Oct. 27, 1991, at 11, *available in* LEXIS, World Library, TXTWE File. Approximately 65,000 died between 1945 and 1950 in or on the way to Soviet internment camps for political prisoners. Soviet army courts condemned another 756 men, women, and children to death in the first years after World War II for rebellious acts such as dispensing literature of opponents to the communist regime. *Id.*

5. *Id.*

6. *Id.* In their attempt to conceal the character of the government, the leaders of East Germany forged accounts of victims' deaths. For example, the death records characterized a woman executed for espionage in 1955 as having perished from a "collapse of the heart and circulatory system." *Id.*

7. Thomas H. Irwin, *And the Wall Came Down*, 76-APR A.B.A. J. 76, 76 (Apr. 1990).

part of "this construction project."[8] On June 17, 1953, workers went on strike in more than 270 cities in the GDR to protest the lack of "free elections."[9] During the protest twenty-seven participants were slain, and approximately 1000 East Germans went to jail for taking part in the strike.[10] The consequence of the protests was the infliction of martial law by the People's Police and the Soviet military.[11] Like the leaders of Czechoslovakia after the Prague Spring of 1968, Walter Ulbricht, the GDR's Communist Party leader, was "left to build his socialist Utopia by fiat with the backing of Warsaw Pact troops."[12]

Two of the best-known legacies of the Communists' occupation of East Germany are the infiltration of the *Stasi* into the general populace and the construction of the Berlin Wall with its armed guards standing watch over the frontier. With its army of full-time employees and numerous informers, the *Stasi* gathered data on more than thirty-three percent of the GDR's population.[13] The *Stasi* recorded every taped telephone conversation, every seized letter, and every fragment of conversation caught by its omnipresent bugging devices.[14] After the fall of the Berlin Wall in 1989, the confidences within the *Stasi* files soon started to seep out, "revealing that husbands had been spying on their wives, children on their parents and priests on their parishoners."[15] This secret has been revealed through a reconstruction of files by the German government.

The most recognized symbol of the communist government in the GDR was the Berlin Wall which was built in 1961. There were allegations of more than 4000 cases of ruthless punishment against those who tried to

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8. *Id.* Paradoxically, opposition came from the laborers, whose concerns the Communists allegedly represented "under Marxist-Leninism as the 'vanguard of the proletariat.'" *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Germany: Stasi Truths*, GUARDIAN, Aug. 20, 1993, at 20, *available in* LEXIS, World Library, TXTWE File. Before the Berlin Wall fell, numerous files were destroyed or sent to Moscow, but when 100,000 East Germans searched the main offices of the *Stasi* on January 15, 1990, they found more than 100 miles of documents still shelved. *Id.*

14. *Id.*

15. *Id.* A typical story is that of Heidi Brauer. She was a 19-year-old factory worker and member of the Protestant Church in 1953 when some pamphlets were discovered in the plant where she worked promoting a "neutral, nuclear-free Germany," ideas considered "seditious in the GDR." Brauer was a suspect because she belonged to the church, and the *Stasi* dispatched over a dozen deputies to scrutinize her every move for six months. One *Stasi* agent was stationed near her to establish "an intimate personal relationship" with her. Her *Stasi* file, 1500 pages long, names confidants and coworkers from the foundry and from her church society as *Stasi* informants. Of the people she has encountered with this knowledge, only one has expressed regret. *Id.*

escape both in Berlin and along the remainder of the border.[16] The violence was the result of a secret "shoot-to-kill" order formulated by various Communist officials and carried out by the border patrol.

Another area of concern for human rights groups involved the East German government's treatment of political prisoners. In the early 1980's, a fixed number of 4500 political captives remained in East German penitentiaries, "despite the quiet ransom" paid to obtain the release of those imprisoned.[17] Like Czechoslovakia, the number of convictions in East Germany for "instigations hostile to the state" had increased as a consequence of anxiety over liberalization in Poland.[18] Generally, prisoners freed from East German penal institutions characterized the conditions as tolerable, though their diets did not provide enough vitamins and protein.[19] They stated, however, that "prisoners' compulsory work norms [ran] up to 300 percent higher than ordinary work norms."[20]

Amnesty International also discovered a number of human rights violations in East Germany during the 1980's.[21] Legal checks on common "freedoms of opinion, expression and emigration," harassment, and court imposed penalties for those who ignored the curbs existed even when the

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16. *Trial of Former East German Border Guards Begins*, THE WEEK IN GERMANY, Sept. 6, 1991. Approximately 600 people were killed attempting to escape the former East Germany; the total number of those killed is almost twice the official number. This number included "30 West Germans, four citizens from the former Soviet Union, a Hungarian, an Italian and an Austrian who died while trying to cross the heavily fortified frontier." Erik Kirschbaum, *Germany: Nearly 600 Died Fleeing East Germany, Researchers Say*, Reuter News Service - Western Europe, Aug. 10, 1993, *available in* LEXIS, World Library, TXTNWS File. The number does not encompass "the 25 East German border guards killed, nor does it include East Germans who drowned in the Baltic Sea" or those who died in mishaps while attempting to flee. *Id.* Under the Penal Code of the GDR, an illegal frontier crossing was a criminal act, which the border guard, as a "member of the socialist society" had to stop, especially since an unlawful frontier crossing could be seen as "maligning the sovereignty of the GDR." Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271, 291 (1993).

17. Elizabeth Pond, *East Germany's Political Prisoners Raise West's Hackles*, THE CHRISTIAN SCIENCE MONITOR, June 19, 1981, at 11. The ransoms, arranged in clandestine gatherings between East and West German intermediaries, were the status quo according to officials in Bonn, West Germany. The payment for the prisoners included hard currency, gas and oil, food, and equipment. As of the late 1980's, the West German government had paid an estimated one billion dollars as a "humanitarian gesture." East Berlin officials felt the amount paid was "just compensation" for the money expended in educating the prisoners. Uli Schmetzer, *For 2 Germanys, Freedom Has Price*, CHI. TRIB., Apr. 6, 1987, at C1.

18. Pond, *supra* note 17, at 11. *See infra* note 45 and accompanying text.

19. Pond, *supra* note 17, at 11.

20. *Id.*

21. *Id.*

perpetrators did not use violence.[22] The more grievous offenses included lingering use of the death penalty, insufficient food and medical care, and the inability of prisoners to register complaints.[23] After the Berlin Wall fell in 1989 and the two Germanys reunified in 1990, Germany was left with a legacy of more than forty years of communist oppression.

B. *Czechoslovakia*

A brief review of Communist Party rule in Czechoslovakia[24] shows the tight control the government exerted over its people. Upon liberation from the Germans in May 1945, the Czechoslovak regime came back from its exile in London; however, this government was soon pushed aside by the Communists' expropriation in 1948 which attempted to quash nationalistic feeling and the power of the Church.[25] The Communists ruled from 1948 until 1968 in a tight-fisted, Stalinist fashion.

During the first six months of 1968, Communist Party leader, Alexander Dubcek, in what would become known as the "Prague Spring of 1968," tried to reform the manner in which the Communists ruled Czechoslovakia. Dubcek wanted to implement the "Action Program," which originated with the Czechoslovak Communist Party and "spelled out in considerable detail the foundations for a new political, social and economic order."[26] Constitutional freedoms such as those of association and assembly, speech, and travel were among the rights outlined by the program,[27] and they went "far beyond anything previously attempted" in the Communist Bloc.[28] The proposed reform combined with the Anti-Soviet response to it[29] was enough to send Soviet tanks rolling into Prague, Czechoslovakia, on August 21, 1968.

In 1969, the Soviets removed Dubcek from his role of leader in the Czechoslovak Communist Party[30] and replaced him with Socialist hardliner

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22. *Id.*

23. *Id.*

24. Czechoslovakia was founded in 1918 when the Treaty of Versailles excised the territory of the Czechs and Slovaks out of the Austro-Hungarian Empire. Lloyd Cutler and Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unom?*, 58 U. CHI. L. REV. 511 (1991).

25. *Id.* at 518. "The Church" is defined as the Roman Catholic Church.

26. PAUL ELLO, PH.D., CZECHOSLOVAKIA'S BLUEPRINT FOR "FREEDOM" 81 (1968).

27. *Id.* at 120, 122.

28. *Id.* at 16.

29. *Id.*

30. Michael Wise, *Dubcek Elected Chairman of Czechoslovak Parliament*, The Reuter Library Report, Dec. 28, 1989, *available in* LEXIS, World Library, TXTEE File. After leaving this position, Dubcek was selected to chair the Federal Assembly for less than a year before going to Turkey as Czechoslovakia's ambassador. He was ousted from the Communist

Gustav Husak. Under Husak, the proposed reforms died.[31] Abroad, Husak's government was well-known for its persecution of Charter 77 human rights activists,[32] its stringent regulation of the arts and audio and print media, and its "tight rein on Czechoslovakia's strong Roman Catholic Church."[33]

The first response of Husak's regime to the declaration of Charter 77 was harsh and swift:[34] the regime brutally harrassed Charter 77 members and their associates. In the late 1970's, one well-known supporter of Charter 77, former high party official Zdenek Mlynar, was allowed to travel abroad for a prolonged period. He was stripped of his citizenship when the Czechoslovak officials conjured up a "diabolical bureaucratic Catch-22" situation.[35] After granting his request to travel, the government revoked Mlynar's authorization to travel and repealed his citizenship for being out of the country without their authorization.[36] Another example of the Husak regime's cruelty occurred at the funeral of founding Charter member Jan Patocka in 1977. The government officials tormented Patocka's mourners with video cameras, helicopters flying close to the ground, and the noise of motorcycles, gathered for a "rally" at the police academy track next to where Patocka was being buried.[37]

In 1979, Charter 77 members prepared documents to be forwarded to the representatives of the thirty-five signatories of the Helsinki Accords who were meeting in Madrid, Spain, to monitor the progress of the historic

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Party in June 1970 and demoted to a forestry job in his native Bratislava, Slovakia, where he lived relatively unknown as a pensioner until 1987 when he began protesting the rule of his unyielding successors. *Id.*

31. *Husak Exits as Reforms Re-emerge*, CHI. TRIB., Dec. 18, 1987, at C9. In the early 1970's, Husak's government expelled close to half a million party members affiliated with Dubcek's goals of democratizing fixed party arrangements and relaxing control on the nationalized economy. *Id.*

32. Charter 77, a Prague creation and a remonstration of the intelligentsia, was formed to enforce the promises of human rights embraced in the Helsinki human rights accord signed in 1975 by 35 nations, including Czechoslovakia. Charles Sawyer, *The Forgotten Prisoners of Prague*, THE CHRISTIAN SCIENCE MONITOR, Nov. 6, 1980, at B18. The constitution announced that:

> Charter 77 is a free and informal and open association of persons of convictions, religions and professions, linked by the desire to work individually and collectively for respect for human and civil rights in Czechoslovakia and the world — the rights provided for in the enacted international pacts, in the Final Act of the Helsinki Conference, and in numerous other international documents.

Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 584 (1990).

33. *Husak Exits as Reforms Re-emerge, supra* note 31, at C9.

34. Sawyer, *supra* note 32, at B18.

35. *Id.*

36. *Id.*

37. *Id.*

accords.[38] The Chartists, as the advocates of Charter 77 were popularly known, intended for the documents to demonstrate that the Husak government did not follow the human rights provisions of the Helsinki Accords.[39] The government's counteraction was fast and clear.[40] Prague police removed eleven of the best-known Chartists after only two meetings of the acting group.[41]

Members of cultural groups, such as the Jazz Section,[42] found themselves hauled into court for engaging in various "illegal commercial activities." In 1984, the Husak government disbanded the Jazz Section.[43] Three years later the Jazz Section was charged with becoming "predominantly an economic body devoted to 'production, distribution and sales of publications.'"[44] After Poland's Karol Cardinal Wojtyla became Pope John Paul II in 1978, pressures on religious activity started to increase in Czechoslovakia to a degree similar to that of the Stalin era.[45] Neither Catholics nor other denominations were authorized to supply bishops for long-vacated offices despite the availability of priests to fill these positions.[46] Accordingly, the number of priests ordained decreased.[47] During the latter part of March 1988, police and riot officers armed with truncheons, night sticks, and water cannons assaulted a nonviolent crowd of 2000 to 3000 Catholics who were singing religious songs and holding candles.[48] The Catholic demonstrators sought a guarantee of basic liberties for members of

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* Two prior cabinet ministers, two former members of the party presidium, and two former members of the Central Committee of the Communist Party in Czechoslovakia were among those confined. Also imprisoned were two expelled university professors, a Charter 77 representative, and Rudolph Slansky, son of the Communist Party leader ousted in 1952 and lynched after a trial before a kangaroo court. *Id.*

42. Members of the Musicians Union created the Jazz Section in 1971 to promote jazz music. *Czech Jazz Rebels Face the Music in Court*, CHI. TRIB., Mar. 11, 1987, at C9.

43. *Id.* The director of the group, Karel Srp, questioned the government's decision to close the Musician's Union, stating that no reason had been given. According to Srp, 130 letters sent by the Jazz Section to official groups asking for the legal reinstatement of the group went unacknowledged. Srp stated that he "could not believe that . . . there could be someone who wanted to ban jazz music." *Id.*

44. *Id.*

45. Eric Bourne, *Czechoslovakia is Determined to Keep Churches in Line*, THE CHRISTIAN SCIENCE MONITOR, June 2, 1981, at 5.

46. *Id.* If replacements for the bishops were not found, the parish was erased from the record; this occurred frequently. *Id.* By 1988, the year before the end of Communist rule, there were only three bishops still alive, and all were older than 75 years old. Paula Butturini, *Czechoslovakian Primate Hits Police Violence at Protest*, CHI. TRIB., Mar. 27, 1988, at C3.

47. Bourne, *supra* note 45, at 5.

48. Butturini, *supra* note 46, at C3.

the Roman Catholic Church.[49] Roman Catholics had also demonstrated on March 6, 1988, near Bishop Tomsak's home demanding religious freedom and more bishops.[50] These calls, along with other requests for individual rights, went unheeded by the Husak regime.[51]

II. COMING TO TERMS WITH THE PAST

When the prior regimes in East Germany and the Czech Republic were toppled in 1989, the democratic governments which replaced them were left to deal with the damaged psyches of East German and Czechoslovak citizens. At the outset, these governments were faced with two means of reckoning with the past. They could either grant amnesties or pardons to those involved in the prior regimes, or they could attempt to prosecute them. Each alternative was fraught with difficulties which will be examined more closely in this section.

A. *Amnesty*

The term "amnesty" originates "from the ancient Greek word amestia, which means forgetfulness or oblivion."[52] "Perhaps implicit is the fear that battle-scarred politicians are more prone to vengeance than forgiveness . . . [and a] dose of amnesia is seen as the necessary tonic to coax them into reconciliation."[53] Amnesty, then, "wipes out all legal recollection" for many categories of transgressions.[54]

This course of action would have been particularly attractive to the Germans and, in many respects, to the Czechs in light of their recent histories. "[W]here vengeance has fed endlessly on its own destructive effects, the political allure of amnesty's sweeping promise — to bury the hostilities of the past and to move on to better times — has captured the imagination and hope of the most determined peacemakers."[55]

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49. *Id.* Dissident Catholic activist Vaclav Benda, who later became the director of the Institute for the Documentation and Investigation of Communist Crimes, said that the police action supplied tangible data that the Communist authority had "no intention of following the example of more freedom of speech and perestroika, or restructuring, set by its Soviet Allies." *Id.*

50. *Id.*

51. Gustav Husak was replaced as Chief of Czechoslovakia's Communist Party by Milos Jakes in December 1987. *Husak Exits as Reforms Re-Emerge*, *supra* note 31.

52. John J. Moore, Jr., *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L. REV. 733, 734 (1991).

53. *Id.*

54. *Id.*

55. *Id.* The East Germans have lived under some form of totalitarianism since 1933 when Adolf Hitler came to power. In 1945, the Communists took over after Hitler's defeat.

While amnesty's advice to "forget" is conceived to assist leaders in mastering their desire for retaliation, it also embraces hazardous side effects handicapping their ability to report on injustice.[56] The truth of that investigating and reporting is based in the past which amnesty would like the successor governments to disregard.[57] The combined memory of a people is never overlooked, especially when it is bitter.[58] As philosopher George Santayana noted, "Those who cannot remember the past are condemned to repeat it."[59] The consequences of not heeding this admonition have proven to be disastrous.

B. *Pardon*

Some analysts have recommended that the comparable practice of pardon, which "remits punishment for a crime" but does not ignore or repudiate a person's guilt,[60] is less offensive than an amnesty which delegates prior crimes to nothingness.[61] This claim has a certain innate appeal.[62] In Germany, Czechoslovakia, and the Czech Republic, the crimes perpetrated by the former regimes would be brought to light, and the guilt would be exposed and laid to rest on those who instigated the crimes. There would, however, be no incarceration.

It is argued, though, that the ability to pardon can decrease a government's capability to shield its citizens from harm.[63] Italian criminologist Cesare Beccaria succinctly stated, "To shew [sic] mankind, that crimes are sometimes pardoned, and that punishment is not the

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Both Hitler and the Communists were ruthless in their punishments of those who were members or affiliates of the prior regimes. Before 1918, the Czechs and Slovaks had been ruled for approximately 200 years by the Hapsburgs as part of the Austro-Hungarian Empire. They enjoyed a brief 20-year period of self rule before Adolf Hitler invaded in 1938. After World War II, the Communists ruled until the "Velvet Revolution" in 1989. The first democratically elected president of Czechoslovakia, Vaclav Havel, a former dissident who had been imprisoned by the Communists, promoted amnesty as a solution. He stated, "The ones who really worked against the Communists don't have the same need to settle accounts as those who were silent. The silent ones are now taking revenge for their own humiliation." Mary Battiata, *E. Europe Hunts For Ex-Reds; Police List Used as Tool in Purge*, WASH. POST, Dec. 28, 1991, at A1.

56. Moore, *supra* note 52, at 734.

57. *Id.*

58. *Id.*

59. JOHN BARTLETT, FAMILIAR QUOTATIONS 703 (Emily Morrison Beck et al. eds., 15th ed. 1980).

60. Moore, *supra* note 52, at 734.

61. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2604 (1991).

62. *Id.*

63. *Id.* at 2606.

necessary consequence, is to nourish the flattering hope of impunity."[64] There is a genuine concern that future government officials will feel that their lawlessness will go unpunished; the investigation into the past serves only to show that the crimes were committed, not to prevent similar activities in the future.

C. *Noncorporeal Punishment*

Perhaps a way to lessen this troublesome aspect of granting a pardon would be to levy some form of punishment other than incarceration. Although incarceration is what comes to mind when one thinks of punishment, it need not take this form.[65] Investigation and disclosure of the persons involved can serve as punishment.[66] Other examples include demotions, loss of government jobs, deprivation of pension rights, and monetary penalties.[67] The fines could be used to compensate victims or their families.[68] Allowing for punishment to take the form of something other than incarceration would bring justice to the victims. Those who are guilty would be revealed and castigated while the difficulties of a "victor's justice" would be avoided.[69]

III. CHOICE OF LAW IN PROSECUTING

If instead of granting amnesty or a pardon, the current regime decides to prosecute the former Communists, a new set of difficulty arises. For example, the question of whose law to apply is a troublesome issue which will be addressed in this section.

A. *Legacy of Nuremburg*

The issue of which law to apply must be examined in light of the trials of Nazi war criminals after World War II, the infamous Nuremburg Trials. At first, twenty-two high-ranking Nazi officials were tried, a large

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64. *Id.*

65. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 509 (1990).

66. *Id.*

67. *Id.*

68. *Id.*

69. "Victor's justice" is not justice corresponding to the rule of law, but a decision grounded on the victor's might to dictate an outcome to a defeated people. Adams, *supra* note 16, at 275-76. The rule of law, on the other hand, states the foundational principles for establishing a scheme of law. Under the rule of law, statutes must be "general and abstract, prospective, known and certain, and equally applicable to all individuals." *Id.* at 274.

number of whom were executed.[70] Although legally suspect, German legal intellectuals saw the trials as "politically and morally necessary."[71] The most disturbing element of the trials involved the ex-post facto use of foreign laws.[72] Crimes against humanity, however, could be tried before an international court because the "conduct, by its nature, offended humanity itself."[73] The offense's legitimacy was beyond the scope of provincial or federal law as it was rooted in "humanity" under natural law.[74]

Natural law, however, is not equipped with a set of transcribed laws,[75] and therein lies the difficulty in using natural law as a legal standard. The statutes are not ascertainable and certain.[76] It quickly became obvious to everyone that the Nuremburg tribunal was brought together by the conquerors who subjugated the conquered.[77] Although the acts of genocide and torture committed by the Nazis were atrocious, they were not crimes under the written German law at the time of the Third Reich. After the trials, ex-post facto laws were prohibited by Article 103 of the Basic Law of Germany.[78]

B. *Prosecution under Domestic Law*

1. *East German Law*

Because the West Germans prohibited the application of an ex-post facto legal standard in their constitution, the German courts could then use East German law as the legal basis for its decisions.[79] This avoided the problem of the ex-post facto legal standard but begat others.[80] Theoretically, there were some enticing provisions of the East German Constitution which

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70. William K. Pelosi, Colloquy, *Challenges to International Governance. Theme II - Communities in Transition: Autonomy, Self-Governance and Independence. Penalties for Prior Political Association, in* 87 AM. SOC'Y INT'L L. PROC. 174, 178 (1993) (remarks by Herman Schwartz).

71. *Id.*

72. *Id.*

73. Orentlicher, *supra* note 61, at 2556.

74. *Id.* One who perpetrated crimes against humanity was, "like the pirate, hostis humani generis, an enemy of all mankind, over whom any state could assert criminal jurisdiction." *Id.* Natural law gleans rules for moral behavior from the innate character of mankind. What that behavior is and how regulations are derived from it has been the topic of centuries-old debate. Adams, *supra* note 16, at 295.

75. *Id.*

76. *See generally id.* at 274.

77. Pelosi, *supra* note 70, at 178 (remarks by Herman Schwartz).

78. *Id.* Specifically, that article states that an act is subject to punishment only if it was a crime before the deed was perpetrated. *Id.*

79. *Id.*

80. *Id.*

allowed the German jurists to handle this subject.[81] Article 19 of the East German Constitution provided: "All state agencies, all social efforts, and each individual citizen is required to observe and protect the integrity and the freedom of the person."[82] East Germany actually had a number of personal protections against the invasion of postal privacy, telecommunications, and so forth, which had been applied when it suited the government's purposes.[83] These articles in the East German Constitution gave the German courts "a safe harbor where they [could] look to a superior law . . . and apply it at the statutory level to thousands of party functionaries."[84]

2. *Czechoslovak Law*

Like East Germany, Czechoslovakia had provisions in its constitution to protect certain individual freedoms, but these provisions had been invoked only when it was convenient for the government. The Constitution of the Czechoslovak Socialist Republic guaranteed "freedom of expression in all fields of public life, including in particular freedom of speech and of the press."[85] Section 1 continued that "[f]or the same purpose, the freedom of assembly and freedom of street marches and demonstrations are guaranteed."[86]

Article 29 suggested that "[c]itizens and organizations have the right to submit proposals, suggestions, and complaints" to governmental bodies, and that it is the duty of these bodies to take responsible and prompt action.[87] Similar to the East German Constitution, the Czechoslovak Constitution guaranteed the "inviolability of the home, the secrecy of letters, and the secrecy of other means of communication."[88] Although the communism practiced in Czechoslovakia did not espouse any form of organized religion, freedom to practice religion was guaranteed.[89] Thus, conceptually,

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. UST.ZAK.CSFR [Constitution] art. 28, § 1 (1960) (Czechoslovakia) *translated in* THE CONSTITUTIONS OF THE COMMUNIST WORLD 148-49 (William B. Simons ed., 1980).

86. *Id.* at 149. Article 28, Section 2 stated that the freedoms enumerated in Section 1 would be secured "by making available publishing houses and printing enterprises, public buildings, halls, free space, as well as broadcasting, television, and other facilities available to working people and their organizations." *Id.*

87. *Id.*

88. *Id.* art. 31.

89. Article 32, Section 1 of the Czechoslovak Constitution stated: "Freedom of confession is guaranteed. Everyone may profess any religious faith or be without religious conviction, and may perform religious acts insofar as this does not contravene the law." *Id.* In Section 2 of Article 32 the practice of religion is limited insofar as "[r]eligious faith or conviction cannot constitute a ground for anyone to refuse to perform civil duties imposed on

Czechoslovakia and the Czech Republic could turn to the prior constitution to prosecute those who violated rights such as freedom of speech, assembly, and religion.

C. *Prosecution under International Law*

1. *East Germany*

A basis for prosecution under international law could also be found in the former East German Constitution which stated that "[t]he generally recognized rules of international law which serve to promote peace and peaceful cooperation among peoples are binding on the state and its citizens."[90] There was also some inviting language in United Nations ("U.N.") agreements which as a participating U.N. member, East Germany agreed to adopt and enforce.[91]

One of the commitments which East Germany agreed to follow as a member of the United Nations is the Universal Declaration of Human Rights, the most recognized pronouncement of what constitutes human rights.[92] Article 8 of the Declaration states: "Everyone has the right to an effective remedy[93] by the competent national tribunals for acts violating the fundamental rights[94] granted him by the constitution or by law."[95] Because the East German government agreed to abide by international law via a constitutional mandate, the practical application of Article 8 would mean that an East German citizen would have the right to a remedy, presumably a trial before a court of law,[96] for an Article 19[97] violation of the East German Constitution.

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him by law." *Id.*

90. VERF [Constitution] art. 8, § 1 (1968) (German Democratic Republic) *translated in* CONSTITUTIONS OF THE COMMUNIST WORLD 167 (William B. Simmons ed., 1980).

91. The multilateral human rights agreements that countries have signed since the founding of the United Nations in 1945 clarify "the substantive rights of individuals vis-a-vis their own states." Roht-Arriaza, *supra* note 65, at 474.

92. *Id.* at 475.

93. A study of the International Covenant on Civil and Political Rights discloses that the Commission on Human Rights had safeguarding the accountability of government officials for various infractions as its primary concern; this included disallowing officials the defense of sovereign immunity. *Id.* at 476. Sovereign immunity would have denied those who suffered abuses under a particular regime any remedy let alone an effective remedy.

94. Fundamental rights presumably include "the right to life and freedom from torture and arbitrary detention." *Id.* at 475.

95. *Id.*

96. The Declaration suggests that the relief must be "individualized and adjudicatory." *Id.* Thus, simply reimbursing victims or their families without any ability to bring a civil action in cases of torture or disappearance might not satisfy Article 8. *Id.*

97. *See supra* text accompanying footnote 82.

2. *Czechoslovakia*

Like East Germany, Czechoslovakia was a member of the U.N. and had signed various international human rights agreements which supposedly signified its commitment to fundamental individual rights. Foremost among these agreements was the Helsinki Accords of 1975. One of the document's guiding principles states, "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."[98] In Czechoslovakia the human rights group Charter 77 was formed to keep abreast with the government's progress in this area[99] and to send in periodic reports. Prosecutions of violations would seem feasible under this treaty because of the meticulous documenting of such treaty violations by Charter 77.

IV. POLITICAL TRIALS

A. *East Germany*

It does not appear that East Germany or the Czech Republic/Czechoslovakia has relied extensively on international law to prosecute, and each is relying heavily on domestic law.[100] Both positive law and natural law reasoning appear in the decisions. The difficulty in applying the law and not having the sentences carried out is evident in the context of some of the more famous political trials in East Germany and Czechoslovakia/Czech Republic.

1. *Border Guard Trials*

Some of the first individuals to be tried in the reunified Germany were the East German border guards. In the first trial, four border guards were charged with manslaughter under East German law in the death of twenty-year-old waiter, Chris Gueffroy, who attempted to flee East Germany by climbing over the Berlin Wall.[101] Judge Theodor Seidel, Chief Judge of

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98. Cutler, *supra* note 32, at 583.

99. *See id.* at 584.

100. International law is created when countries enter into agreements with one another and repeat certain practices. Whether international law exists with respect to a matter depends on whether "a state follows a custom because it thinks it is obliged to do so." This obligation, enforced individually by the parties to the agreement, provides international law with its power. Adams, *supra* note 16, at 281.

101. *Germany: First Suspects Charged for Berlin Wall Shootings*, Reuter News Service, June 15, 1991, *available in* LEXIS, World Library, TXTNWS File. Gueffroy was

the Berlin Regional Court, acquitted two defendants.[102] He found another guilty of attempted manslaughter but only gave him a two-year suspended sentence.[103] The guard who fired the shots that killed Gueffroy was convicted of manslaughter and sentenced to three-and-a-half years in prison.[104]

In handing down these sentences, Judge Seidel found that shooting to kill was authorized under East German law.[105] In spite of this, he concluded that a "higher moral law" had been infringed upon, thus invoking a natural law rationale.[106] He also stated that although the defendants were "at the end of a long chain of responsibility," they had transgressed "a basic human right" by firing at someone whose only crime was attempting to leave the country.[107] The guard "did not just fire bad shots randomly[; it] was an aimed shot tantamount to an execution."[108] In the second border guard trial, the German court found two border guards guilty of manslaughter in the December 1, 1984, death of Michael-Horst Schmidt.[109] The judge sentenced one guard to twenty-one months in jail and the other to eighteen months, but these sentences were also suspended.[110]

In contrast to Judge Seidel, Judge Ingeborg Tepperwein found that East German law did not mandate that the border guards shoot unarmed escapees with the intention of killing them.[111] The guards did not have to shoot Schmidt because he did not endanger the integrity of the border; therefore, the guards failed to meet the rule for use of lethal force under the law.[112] Judge Tepperwein suspended the sentences because of "the defendants' remorse and the system in which they grew up," where mechanical, robotic conformity was rewarded and individual morals were looked down upon, if not punished.[113]

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accompanied by Christian Gaudin who was wounded but recovered. *Id.*

102. Adams, *supra* note 16, at 296.

103. *Id.*

104. *Id.*

105. *Id.* at 297.

106. *See* Adams, *supra* note 16, at 297.

107. *Id.*

108. *Id.* Ex-post facto laws were made unconstitutional by Germany after the Nuremburg Trials. Such laws deny a defendant due process because he has no notice of the existence of a law against a particular action. *See generally* part IV(A). The same can also be said when a natural law rationale is invoked. Judge Seidel, however, appears to have had no trouble in applying it to the case at bar. Seidel also "did not address the prosecution's principal assertion that the secret shoot-to-kill order was in violation" of international agreements or whether the border guards had an obligation to follow such laws. Adams, *supra* note 16, at 297.

109. *Id.*

110. *Id.*

111. *Id.* at 297-98.

112. *Id.* at 298.

113. *Id.*

The remaining border guard trials have resulted in several manslaughter convictions but very few murder convictions. Many sentences have been suspended, due to the mitigating circumstances of the border guards' upbringing as enumerated by Judge Tepperwein. The Germans soon grew impatient with the trials of those who carried out the orders and began demanding that those who gave the orders also be held accountable.

2. *Trial of Six*

Following many of the border guard trials and billed as the most spectacular trial in Germany since the Nuremburg trials of the 1940's,[114] a reunified Germany brought charges against six former high-ranking East German officials accused of causing the deaths of East Germans who tried to flee to the West.[115] From the outset, the trial's progress was plagued by a combination of political and legal problems, as well as the poor health of some of the defendants.[116] Many East Germans, although critical of their Marxist-Leninist leaders, felt it hypocritical to put Honecker on trial when just a few years ago, he was given red-carpet treatment on his trip to Bonn, West Germany.[117]

Soon after being expelled from the East German Communist Party in 1989, Erich Honecker fled to the Soviet Union with his wife, Margot. However, pressure increased to bring Honecker back to answer for his "role in the shoot-to-kill policy along the Berlin Wall."[118] The Soviet authorities did not feel compelled to extradite Honecker even though they wanted to forge a cordial relationship with the reunited Germany.[119] After Boris Yeltsin promised to send him back to Germany in December 1991, Honecker found asylum in the Chilean embassy in Moscow.[120] In August 1992, Honecker was returned to Germany.[121]

Back in Germany, Honecker and his five cohorts were charged with issuing the secret shoot-to-kill order to East German border guards that

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114. Adam LeBor, *Germany: Judge Delays Honecker Trial for Health Report*, THE TIMES (London), Nov. 13, 1992.

115. The six officials charged were Erich Honecker, successor to Communist Party leader Walter Ulbricht, who ruled until 1989; Erich Mielke, *Stasi* security police chief; Willi Stoph, prime minister; Heinz Kessler, defense minister; Fritz Streletz, Kessler's deputy; and Hans Albrecht, a local East Berlin Communist Party boss.

116. The combined ages of the six defendants was 452 at the beginning of the trial.

117. LeBor, *supra* note 114.

118. *Germany: Obituary of Erich Honecker*, DAILY TELEGRAPH (London), May 30, 1994, *available in* LEXIS, World Library, TXTNWS File.

119. *Id.*

120. *Id.* Honecker said he had obtained cyanide and that he would commit suicide if forced to go back to Germany. This proved to be an idle threat. *Id.*

121. *Id.*

resulted in more than 200 deaths. The six were brought to trial in November 1992.[122] Prior to the first day of trial, Willi Stoph was forced to drop out because of a heart attack.[123] Within a week of Stoph's heart attack, the court determined that Erich Mielke would need to be tried separately because he could only be present in court three hours a day.[124] In spite of releasing two of the defendants for reasons of apparent ill-health, Honecker's lawyers still accused the judges of forcing Honecker "into a race with death."[125]

Honecker remained silent for months regarding his trial and the pending charges.[126] When he did choose to speak, he defended the 1961 decision to build the Berlin Wall but tried to deflect responsibility to the Warsaw Pact, of which East Germany was a member.[127] Honecker indirectly defended the border shootings by saying that "East German defectors had tried to leave the communist state without permission."[128] Playing the role of victim, he stated that the urgency with which the former East German rulers were brought to justice was akin to the cruelty of Hitler's Third Reich.[129]

In January 1993, the German court announced that it was dropping all manslaughter and embezzlement charges against Honecker.[130] Bernd Seite, Prime Minister of the East German province of Mecklenberg-Vorpommern, stated that dropping the charges was a "slap in the face for all those who died at the Berlin Wall."[131] Karin Gueffroy, mother of Chris Gueffroy, one of the last to be shot while trying to cross the Berlin Wall, stated that Honecker was the recipient of "the humanity that he formerly did not grant to others."[132]

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122. LeBor, *supra* note 114.

123. Alexander Ferguson, *Honecker Trial to Continue Minus One Defendant*, Reuter News Service-Western Europe, Nov. 15, 1992, *available in* LEXIS, World Library, TXTNWS File.

124. Alexander Ferguson, *Germany: Second Defendant Drops Out of Honecker Trial*, Reuter News Service-Western Europe, Nov. 16, 1992, *available in* LEXIS, World Library, TXTNWS File.

125. *Id.* At this point Honecker had been diagnosed with terminal liver cancer.

126. Alexander Ferguson, *Germany: Honecker Breaks Silence to Defend Berlin Wall*, Reuter News Service-Western Europe, Dec. 3, 1992, *available in* LEXIS, World Library, TXTNWS File.

127. *Id.*

128. *Id.*

129. *Id.* As a young Communist agitator during the 1930's, Honecker spent time in Moabit, the prison which adjoins the court; ironically, he found himself residing there during the course of these proceedings. *Id.*

130. Adrian Bridge, *Germany: Anger and Joy as Honecker Flies to Freedom*, INDEPENDENT, Jan. 14, 1993, at 10, *available in* LEXIS, World Library, TXTNWS File.

131. *Id.*

132. *Id.*

While most Germans, both from the East and the West, felt that Honecker had eluded deserved punishment, there was a "grudging acknowledgement" that because he was terminally ill with cancer, there was no option but to let him go.[133] The sentiment was aptly put by Klaus Bolling, a former head of the West German mission in East Berlin, when he said, "In the end, we have shown that human dignity was more important than the desire to obtain a guilty verdict."[134]

After Honecker's subsequent flight to Chile, a cloud of controversy still surrounded the decision to release him. Initial tests conducted by doctors in Chile appeared to contradict reports that Honecker had only six months to live because of liver cancer.[135] Of course, this created more anger in those who did not want the trial stopped. There were calls by former political prisoners for investigations of the constitutional judges who exceeded their authority by interceding in the matter.[136] Another lawyer representing families of Berlin Wall victims wanted to bring charges against the doctors who examined Honecker.[137] The trial of the remaining three defendants continued; however, the meaning of the trial was lost after Honecker left.[138]

Former defense minister Heinz Kessler weakly defended his actions by saying that traps and mines installed on the country's border with West Germany were demanded by Moscow; he further denied that the killings of defectors by border guards were the result of a formal "shoot-to-kill" policy.[139] The traps and mines "were in no way an expression of intent to

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133. *Id.*

134. *Id.*

135. Philip Sherwell, *Germany: Honecker Judges Face Legal Action*, DAILY TELEGRAPH (London), Jan. 19, 1993, *available in* LEXIS, World Library, TXTNWS File. Honecker did not die until May 1994.

136. *Id.* Only the federal constitutional court would have had the power to intercede. *Id.*

137. *Id.*

138. *Id.* With the flight of Honecker and his wife, Margot, to Chile, some of the impetus for the investigation into Margot's alleged criminal past as Minister of Education also waned. She had been accused of taking children from dissident parents and placing them in Communist homes. *Staatlich verordneter Kinderraub* [*State-Ordered Kidnapping*], SUEDDEUTSCHE ZEITUNG, May 25, 1991, *available in* LEXIS, World Library, ZEITNG File. These charges were later dropped, allegedly for lack of evidence. *Zwangsadoptionen in der DDR Verfahren gegen Margot Honecker eingestellt* [*Charges in Connection with Forced Adoptions in East Germany Dropped against Margot Honecker*], SUEDDEUTSCHE ZEITUNG, Mar. 9, 1994, *available in* LEXIS, World Library, ZEITNG File. The charges more than likely were dropped because of the difficulty the German government had in trying to extradite Erich Honecker from the Chilean government. The German government simply did not feel it was worth the time and effort to pursue the matter when there were more "important" officials to prosecute.

139. *Germany: Ex-East German Army Chief Says Moscow to Blame for Deadly Border*, Reuter News Service-Western Europe, Oct. 22, 1991, *available in* LEXIS, World Library,

kill but rather to discourage potential border violators from approaching."[140] The judges apparently did not find the testimony credible and convicted the officials of "inspiring" border guards to shoot people attempting to cross to the West.[141] All three were permitted to serve their sentences at home on account of "their age and the fact that 'they were prisoners of Germany's postwar history and of their political convictions.'"[142] All three appealed their sentences, but the Federal Supreme Court fortified the orginal decisions by connecting them more directly to the killings.[143] The judges' panel said that East German border guards for years had violated human rights assimilated into the 1948 United Nations Charter by shooting at those attempting to escape.[144] The court also noted the apparent injustice which would result in convicting those who carried out the decision while not convicting those who gave the orders.[145]

In 1993, the bifurcated trial of Erich Mielke, the former *Stasi* chief, also resulted in a conviction for murder, but not for those resulting from the "shoot-to-kill" order. In a strange twist of events, Mielke was sentenced to six years for the 1931 murders of two policemen.[146] The court refused to apply the statute of limitations because the case had been interrupted in 1947 when German files were seized by the Soviet army in East Berlin but were later found after the fall of the GDR's regime in 1989.[147] Mielke was sent to prison because of the fear he would flee the country.[148] Although officials released him after two years on account of ill health, the court still left open the possibility that Mielke could go on trial again if his health improved.[149] However, this possibility seems unlikely considering Mielke's advanced age.

TXTNWS File.

140. *Id.*

141. Roger Boyes, *Germany: Catcalls Drown out Berlin Wall Sentencing*, THE TIMES (London), Sept. 17, 1993, *available in* LEXIS, World Library, TXTNWS File. Kessler was sentenced to seven years and six months, Streletz to five years and six months, and Albrecht to four years and six months. *Id.*

142. *Id.*

143. *Court Rejects Appeals by Ex Top East Germans over Border Deaths*, DEUTSCHE PRESSE-AGENTUR, July 26, 1994, *available in* LEXIS, World Library, ALLWLD File.

144. *Id.*

145. *Id.*

146. *Erich Mielke Sentenced to Six Years for 1931 Murders; Faces Other Charges*, THE WEEK IN GERMANY, Oct. 29, 1993.

147. *Id.* The court, in effect, elected to toll the statute of limitations.

148. *Id.*

149. *Germany: Mielke May Be Tried Again One Day*, Reuter News Service-Western Europe, Dec. 14, 1995, *available in* LEXIS, World Library, TXTNWS File.

B. *Czechoslovakia*

1. *Trial of Miroslav Stepan*

In Czechoslovakia, Miroslav Stepan, the former Prague Party leader, was the first high-ranking Communist Party leader to have legal charges levied against him.[150] The charges were brought in connection with the November 17, 1989, attack on student protestors on Narodni Trida in Prague[151] and in connection with another student protest at Wenceslas Square in Prague in 1988. The court ordered journalists to leave after the charges were announced because classifed papers were being discussed.[152] Later, the court opened proceedings to the public after being accused of "perpetuating totalitarian practices."[153] After a nine-day trial, the court sentenced Stepan to four years in prison for abuse of power by ordering the use of water canons, tear gas, dogs, and truncheons against demonstrators in October 1988 and January 1989.[154]

The authorities further investigated Stepan for inducement to similar criminal acts against student protestors in November 1989 and found that Stepan instructed police chiefs "to use all available means" to suppress the demonstration.[155] Under the Czech legal code amended on July 1, 1990, only inducement to criminal acts carrying a sentence of at least eight years was punishable, and the count on which Stepan would have been charged carried a maximum three-year penalty.[156] The court, therefore, stopped proceedings in connection with these charges.[157] On appeal, a court cut

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150. *Prague Party Boss Charged*, THE DAILY TELEGRAPH (London), May 23, 1990, International Section, at 10, *available in* LEXIS, World Library, TXTNWS File.

151. *Id.* Stepan was charged with committing an abuse of power. *Commission Report on November Police Violence*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 14, 1989, *available in* LEXIS, World Library, ALLWLD File. The students sponsored the protest to recognize the 20th anniversary of the death of Jan Palach, who immolated himself to object to the the Warsaw Pact assault of Czechoslovakia in 1968. *Czechoslovakia: First Trial of an Ex-Communist Leader Opens in Czechoslovakia*, Reuter News Service-CIS and Eastern Europe, June 25, 1990, *available in* LEXIS, World Library, TXTNWS File.

152. *Czechoslovakia: First Trial of an Ex-Communist Leader Opens in Czechoslovakia, supra* note 151.

153. *Czechoslovakia: Prague Court Opens Ex-Communist Leader's Trial to Public*, Reuter News Service-CIS and Eastern Europe, June 29, 1990, *available in* LEXIS, World Library, TXTNWS File.

154. *Czechoslovakia: Former Prague Communist Chief Sentenced to Four Years*, Reuter News Service, July 9, 1990, *available in* LEXIS, World Library, TXTNWS File.

155. *Proceedings Against Miroslav Stepan Over 17th November Events Halted*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 16, 1990, *available in* LEXIS, World Library, ALLWLD File.

156. *Id.*

157. *Id.*

law who could not be contacted.[166] The District Attorney, Karel Bruckler, then decided not to prosecute again because of irregularities in the manner in which the accused had been apprised of the charges against them.[167] According to the District Attorney, citizens could remain away from their residences for several days, and investigators would not be allowed to commence proceedings under the article.[168] The suspects had "to be abroad or in hiding," and Bruckler did not agree with the investigator's opinion that those charged had hidden or been out of the country.[169]

3. *Lustration*

While Czechoslovakia and the Czech Republic have attempted to bring several communist leaders to trial, the most controversial way the government has "prosecuted" individuals is through lustration.[170] The term "'to lustrate' means to investigate the past activities of persons who wish to hold some government office."[171] Under this scheme, persons affiliated with the Communist regime were placed into three all-encompassing classifications.[172] The first group consists of "former secret police agents and their collaborators or former members of the [C]ommunist [P]arty who held positions of authority from the district level up."[173] These individuals are guilty if their names appeared in the files of the Ministry of Internal Affairs and are not allowed to hold "certain high level administrative positions" for a five-year period.[174] The second category consists of those who have been called "conscious collaborators," and a third group, which

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166. *Id.* Former general secretary of the Communist Party of Czechoslovakia, Milos Jakes, and former trade union boss, Karel Hoffman, were charged under this provision; both denied the charges of evading prosecution and of illegally arming the People's Militia. *Czech Republic: Former Communist Leaders Deny Evading Prosecution*, BBC Monitoring Service: Eastern Europe, Jan. 5, 1995, *available in* LEXIS, World Library, ALLWLD File.

167. *Charges Against Former Heads of Communist Party and Unions Dropped*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 23, 1995, *available in* LEXIS, World Library, ALLWLD File.

168. *Id.*

169. *Id.*

170. "The word lustration comes from the Latin lustara, meaning 'to put light on, or illuminate.'" *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 244 (remarks by Vojtech Cepl). This law was passed by the Czech and Slovak National Assembly on October 4, 1991. Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 123 (1994).

171. *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 244 (remarks by Vojtech Cepl).

172. Gibney, *supra* note 170, at 123.

173. *Id.*

174. *Id.* at 123-24.

Stepan's sentence from four years to two-and-a-half years.[158] To date, he is the only former Czechoslovak Communist official to spend any time in prison.

2. *Abortive Attempts to Prosecute*

The government of the Czech Republic attempted to bring charges against Communist officials in connection with activities of the People's Militia.[159] The prosecution involved members of the former Communist Party of Czechoslovakia Central Committee who decided to arm the Militia in 1985. [160] The charges were brought because the Militia was armed and allegedly not subject to any law.[161] The Centre for the Documentation of the Illegality of the Communist Regime admitted that even though no law specifically regulated the Militia, other laws did assume its existence, and the investigation ceased.[162]

The state attorney's office reviewed the decision not to press charges and decided that the documents gathered in connection with the case had not been reviewed thoroughly.[163] Notice of accusation could not have been served on all the people whom the investigator wanted to prosecute before the statute of limitations precluded it.[164] Under the criminal law of the Czech Republic, the prosecution process can only begin after the suspect has personal knowledge of the accusation.[165] To evade the running of the statute of limitations, the investigator charged the individuals as fugitives from the

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158. *Czechoslovakia: Former Communist Chief's Sentence Cut to Two and Half Years*, The Reuter Library Report, Oct. 22, 1990, *available in* LEXIS, World Library, TXTNWS File. After his release from prison, Stepan wrote a bestseller chronicling his two-year incarceration. He is currently head of the Czechoslovak Communist Party. Although based in the Czech Republic, the party harbors the hope that the Czech Republic will once again reunite with Slovakia.

159. *Militia's Prosecution Smacks of Political Revenge - Stepan*, CTK National News Wire, Dec. 29, 1994, *available in* LEXIS, World Library, TXTNWS File. The People's Militia was the para-military wing of of Czechoslovakia's Communist Party until the collapse of the communist government in late 1989. *Id.*

160. *Id.*

161. *Investigation of Communist Officials; Interior Minister: Investigators Still Linked to Past*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 29, 1994, *available in* LEXIS, World Library, ALLWLD File.

162. *Id.*

163. *Will More Than Six People Be Prosecuted for Milita Activity?*, CTK National News Wire, Dec. 29, 1994, *available in* LEXIS, World Library, TXTNWS File.

164. *Id.*

165. *Two Leaders of Former Communist Regime Prosecuted*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 4, 1995, *available in* LEXIS, World Library, ALLWLD File.

no longer exists, included those who belonged to what was called Category C, "potential candidates for collaboration."[175]

Every national may petition a district governmental office for the outcome of his lustration, and he will receive a notice stating whether he was listed as a collaborator.[176] People holding any of the positions requiring lustration must give up their jobs if they refuse to submit a copy of the lustration results.[177] People not agreeing with the results of their lustration may appeal the decision to a court.[178]

In February 1992, the Independent Appeals Commission was established, and as one of its major objectives, the Commission was to hear appeals by those who alleged they were wrongly charged with "conscious collaboration."[179] Most of the cases before the Commission consisted of Category C cases.[180] The Commission discovered that in many of these instances, people had been "talked to" by communist officials but had declined to go along with them, yet they were named as "potential candidates for collaboration."[181] In response, the chair of the Commission filed suit before the Constitutional Court "challenging the legality of the lustration law."[182] The Court held Category C to be illegal but found the remaining sections of the lustration law constitutional.[183]

Although the courts have ruled lustration legal, the law has been highly criticized.[184] Essentially, critics do not like the screening process or the safeguards against false accusations.[185] The Constitutional Court eliminated the largest category, the Category C collaborators, but observers continue to criticize the law in theory for engendering employment discrimination and espousing the notion of collective guilt.[186] News reports indicate that the majority of those who have appealed lustration decisions in court have cleared their names.[187]

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175. *Id.* at 124.

176. *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 245 (remarks by Vojtech Cepl).

177. *Id.*

178. *Id.*

179. Gibney, *supra* note 170, at 124.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See generally id.* at 124-25.

186. *Czech Republic Human Rights Practices, 1994*, U.S. DEPARTMENT OF STATE DISPATCH, § 1994 Human Rights Report, Mar. 1995, *available in* LEXIS, World Library, ALLWLD File.

187. *Id.* In September 1994, the Government, in perhaps the most celebrated lustration case, dropped lustration charges against former parliamentarian Jan Kavan.

V. COMPARISON OF SUCCESS IN PAST PROSECUTIONS AND PLANS FOR FUTURE TRIALS

Germany, Czechoslovakia, and the Czech Republic have not been as "successful" in prosecuting their former communist leaders as some would have hoped. Germany, though, has had the most success in bringing its former communist officials to trial. This is explained, at least partially, by East Germany's reunification with West Germany and its established legal system. In Germany, those involved in the legal process of bringing the charges and trying the cases had experience in those areas. These individuals knew how to work with the procedural part of German law even though the substantive law was East German. For example, the acquittals and light sentences in the German trials did not come about because someone missed a statute of limitations deadline or neglected some other procedural matter. Many were a result of "equitable" or "ethical," rather than "legal" considerations, such as old age and poor health, as examined in the trials of Honecker, Mielke, and the rest. In the case of the border guard trials, the judges took into account the environment in which East German children were raised and also, to a certain degree, that they simply carried out the orders.

Czechoslovakia, on the other hand, did not have another country's constitution or procedural laws to use. After Czechoslovakia created a parliament, the parliament then had to draw up a constitution and related laws. This new system of laws either had never been applied or had been applied infrequently. Most of the officials involved in the trials, such as the lawyers and judges, had either not been involved in trying cases or had been involved in the legal system under the prior communist regime. Thus, there were many inexperienced people working within a newly developed legal system.

This inexperience is illustrated quite well by the attempt to prosecute those associated with the arming of the People's Militia.[188] The prosecution had the case for five years and did not investigate the allegations. In the eleventh hour, prior to the running of the statute of limitations, the prosecutor decided to bring charges. When he realized that he could not give Milos Jakes and Karel Hoffman personal service as required by law, he charged Jakes and Hoffman with being fugitives from the law although simply being away from one's home did not create a legal basis for such a conclusion. The prosecutor simply wanted to charge the men and did so in a hasty and sloppy manner.

Czechoslovakia also failed to bring charges against former Czechoslovak Communist President, Gustav Husak, who reinstituted

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188. *See supra* text accompanying notes 159-69.

Communist Party orthodoxy for twenty years and quashed many of the reform programs instituted by his predecessor, Alexander Dubcek.[189] He passed away relatively unknown in his native Slovakia in 1991, two years after the "Velvet Revolution."[190] These two examples illustrate how the inexperience of those operating the legal system can result in people being improperly charged, as with Jakes and Hoffman, or not being charged or tried at all, which happened with Husak.

These courts, in spite of the difficulty, are still attempting to deal with their Communist pasts. On January 15, 1996, Egon Krenz, Erich Honecker's successor, and five others went on trial for the deaths of refugees trying to flee East Germany.[191] This trial was to have started in November 1995 but was postponed twice.[192]

During his trial Krenz has maintained that the blame for sustaining the border lies with the former Soviet Union although he did express regret for the many deaths which occurred at the East German frontier.[193] Krenz's "defense" of placing responsibility with the former Soviet Union was dealt a severe blow when the former Soviet Ambassador to East Berlin, Pyotr Abrasimov, could not testify on account of ill-health.[194] Abrasimov's testimony was expected to support Krenz's defense.[195] Another of the six defendants, Kurt Hager, the former Communist Party ideology chief, could not stand trial due to age and illness.[196] The trial continues, however,

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189. *Czechoslovakia: Former Czechoslovak Leader Husak Headed Despised Old Order*, Reuter News Service-CIS and Western Europe, Nov. 18, 1991, *available in* LEXIS, World Library, TXTNWS File.

190. *Id.*

191. *Deutschland: Neuer Prozess in Berlin Gegen Sechs SED-Politbueromitglieder [New Proceedings in Berlin Against Six Members of the Politbureau]*, NEUE ZUERICHER ZEITUNG, Jan. 16, 1996, *available in* LEXIS, World Library, ZEITNG File.

192. The first trial was postponed because the judge, Hansgeorg Braeutigam, was found to be biased. He was the same judge who presided over Erich Honecker's trial and was reprimanded because he asked for Honecker's autograph. The trial then was postponed a second time on account of the ill health of another defendant, Guenther Kleiber, who needed a kidney operation. *Germany: Ex-East German Leaders' Manslaughter Trial Resumes*, Reuter News Service-Western Europe, Jan. 15, 1996, *available in* LEXIS, World Library, TXTNWS File.

193. *Germany: E. German Ex-Leader Says Innocent of Wall Deaths*, Reuter News Service-CIS and Eastern Europe, Feb. 19, 1996, *available in* LEXIS, World Library, TXTNWS File.

194. *Ex-Soviet Ambassador Shuns Berlin Wall Death Trial*, Reuters World Service, Mar. 28, 1996, *available in* LEXIS, World Library, TXTNWS File.

195. *Id.*

196. *Trial of East German Ideology Chief Suspended*, Reuters Limited, May 9, 1996, *available in* LEXIS, World Library, TXTNWS File.

because many view this trial as Germany's last chance to get lasting convictions of some of East Germany's top Communist officials.[197]

In the Czech Republic, investigators from the Office for the Documentation and Investigation of the Crimes of Communism have planned to bring treason charges against 10 individuals in connection with the Soviet invasion of Czechoslovakia in 1968.[198] The Office has brought treason charges against seven of the accused for undermining the Czechoslovak government in 1968 and supporting the Soviet invasion.[199] A decision on whether the remaining accused will be charged should come in the latter part of 1996.[200] None of the accused have gone to trial, but they have not been given presidential amnesties, either.[201] Like Germany, this will probably be one of the Czech Republic's last major prosecutorial efforts.

However, the question remains whether there has been any purpose served by the attempt to legally prosecute former Communist officials in Germany, Czechoslovakia, and the Czech Republic. With the exception of the Nuremburg trials, these prosecutions represent some of the first attempts by democracies during the twentieth century to prosecute officials who committed abuses under prior regimes. When a fledgling democracy undertakes such a project, there will inevitably be difficulties in deciding whether to apply domestic or international law. Problems also arise when judges are charged with interpreting the laws of another country, i.e. those of the prior regime, in whose legal system they have not been trained. It is very important that the trials are not conducted as "witch hunts," where the accused are summarily found guilty without any sort of due process right to answer their accusers. These trials do serve as an important model for other countries and international tribunals, which are attempting to prosecute abuses committed by prior governments. Legal considerations aside, the impetus for the trials must come from the people. Without public support the governments may not feel prosecuting is worth their efforts unless their only goal is to exact revenge. Criminal prosecutions are, after all, brought

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197. Any decision rendered in this case and other similar cases could still be overturned by Germany's Constitutional Court for being an illegal application of ex-post facto laws. *Germany. No Law, No Justice*, THE ECONOMIST, Mar. 9, 1996, at 51.

198. *Charges For Treason, Illegal Arming Are Prepared - UDV*, CTK National News Wire, Jan. 22, 1996, *available in* LEXIS, World Library, TXTNWS File. Seven individuals have been accused of sabotage and three with undermining the republic. *Id.*

199. *Treason Case Returns to UDV*, CTK National News Wire, July 8, 1996, *available in* LEXIS, World Library, TXTNWS File. If their guilt can be proven, possible sentences range from 12 years to life imprisonment. *Id.*

200. *Treason Charges Against 3 Apparatchiks May Be Brought Soon*, CTK National News Wire, Aug. 9, 1996, *available in* LEXIS, World Library, TXTNWS File.

201. *Justice Minister Finds No Reasons For Pardoning Traitors*, CTK National News Wire, Apr. 25, 1996, *available in* LEXIS, World Library, TXTNWS File. The amnesty is intended to apply to those too infirm or old to stand trial. *Id.*

on behalf of "the people." Inflation and unemployment problems in both Germany and the Czech Republic have begun taking the forefront in people's minds, not punishing the abuses perpetrated in the not-so-distant past.

Perhaps the fact that many of those convicted received light or suspended sentences has also played a part in the waning support for further prosecutions. Some, such as former Czechoslovak President Gustav Husak, eluded prosecution altogether. In some instances these "light" sentences could not have been avoided. It would have been been viewed as vengeful to prosecute those officials too old or sick to stand trial. This current lack of public support does not mean that the trials have been a failure. It simply means that people are ready to move forward with the business of everyday living.

VI. CONCLUSION

The trials in Germany, Czechoslovakia, and the Czech Republic have served an important purpose. In spite of the difficulties encountered, the trials brought the abuses perpetrated by these regimes into the open and, in some cases, punished those responsible. They illuminated the problems and mistakes which can occur when prosecuting officials from a prior regime. The mistakes made and lessons learned will assist those involved in the Bosnian War Crimes Trials and future tribunals in conducting prosecutions which are fair to both the accused and the accuser.

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CANADA'S "BARBIE AND KEN" MURDER CASE: THE DEATH KNELL OF PUBLICATION BANS?

INTRODUCTION

It was a fairy tale wedding. Karla Homolka was resplendent in a flowing white gown, while husband-to-be, Paul Kenneth Bernardo, wore white tie and tails. The attractive young couple left the church near Niagara Falls in a horse-drawn carriage amidst a showering of well wishes from friends and family.

Approximately twenty miles away on that same day, June 29, 1991, the police were pulling seven blocks of concrete out of the waters of a favorite local fishing spot. Encased in the concrete were the dismembered body parts of Leslie Mahaffy, a shy fourteen-year-old with long blond hair who had disappeared from a nearby town two weeks earlier. Approximately a year and a half later, Canadian authorities arrested Karla Homolka and Paul Bernardo upon suspicion for this and other killings.

This paper will begin with a brief overview of the facts surrounding this case, and the ensuing publication ban of those facts. A discussion of the Canadian judiciary's authority for issuing publication bans will follow. This paper will conclude with a discussion of the ineffectiveness of publication bans and will offer alternative measures to ensure the fair trial rights of an accused.

A. *The Story Begins*

Karla Homolka was seventeen in 1987 when she met the man she would marry, Paul Bernardo. He was a university graduate trained in accounting, and Homolka worked as a veterinary assistant. When Homolka graduated from high school, the couple moved into a pink clapboard Cape Cod on the shores of Lake Ontario in a quiet suburban neighborhood. They appeared a typical happy and well-adjusted couple.

However, appearances can be deceiving.[1] The couple embarked upon a path of deviant behavior[2] which progressed to the abduction of fourteen-

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1. It was not just that they were attractive, though the killings had quickly been dubbed the Barbie and Ken Murders. It was also their background. These were middle-class kids, achievers, straight out of the suburbs, with dreams and aspirations. Serial killers who choose to chop up a body and encase it in concrete are meant to come from broken homes. They aren't meant to be pretty and blonde and have perfect teeth. They aren't meant to live in icing-sugar pink clapboard houses down by the lake. But these ones, it seemed, did. Jay Rayner, *Karla Homolka Was A Sweet Young Girl,* MAIL ON SUNDAY, Apr. 13, 1995, at 39.

2. Around Christmas of 1990, prior to their marriage, Karla began helping Paul find young girls with whom he could have sex. According to accounts of the trial, some of these girls were friends of Karla's younger sister, Tammy. Tammy herself was to be Paul's Christmas present. On the evening of December 23, 1990, while at her parents' home, Karla

year-old Leslie Mahaffy in June 1991. Mahaffy was abducted near her home and taken to the Bernardo-Homolka residence in St. Catherine.[3] She was sexually assaulted for two days and then strangled to death by Bernardo with an electric cord.[4] The strangulation was videotaped by Homolka.[5] Bernardo then used a circular saw to dismember the corpse and proceeded to encase the body parts in concrete.[6] The concrete bricks were then heaved into Lake Gibson, where sinking tides later revealed the gruesome blocks.[7]

Ten months later, the couple, posing as lost tourists, abducted Kristen French in a church parking lot. French was kept alive in the Bernardo-Homolka home for two weeks. During this time she was subjected to varying sexual abuse at the hands of both Homolka and Bernardo.[8] Eventually, she was strangled to death by Bernardo, and her body was dumped on a side road just feet from the grave of Leslie Mahaffy.

During the time these crimes were committed, relations between Bernardo and Homolka were deteriorating.[9] Bernardo beat Homolka regularly. Following one particularly severe beating with a flashlight,[10] Homolka retreated to her parents home, called the police, and revealed information which led to the subsequent arrest of Bernardo.

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slipped a tranquilizer into Tammy's eggnog. While the young girl was unconscious, Karla and Paul took turns having sex with her. Each of them videotaped the other in the act, while Karla's parents sat in another room oblivious to what was happening.

Tammy then began to vomit. Karla and Paul called an ambulance but did not relate to police the drug she had ingested. Tammy died the next day, choking to death on her own vomit. The coroner ruled that her death was accidental. Anne Swardson, *Unspeakable Crimes This Story Can't Be Told in Canada. And So All Canada Is Talking About It . . .*, WASH. POST, Nov. 23, 1993, at b01.

3. The Paul Bernardo Teale/Karla Homolka Frequently Asked Questions List (FAQ), Version 4.0, Jan. 12, 1995, at 13 *available in* Internet, http://www.cs.indiana.edu/canada/Karla FAQ v 40 [hereinafter FAQ].

Various American universities provided the electronic home for this FAQ. It was compiled by several Canadian university students who were forbidden by school authorities to run a Bernardo page on their own school's Web site.

4. *Id.*

5. "Saying she [Leslie Mahaffy] wanted to see 'her little brother Ryan,' Paul strangled Mahaffy with an electrical cord." *Id.*

6. *Id.*

7. *Id.*

8. "After taking her back to their house, French was drugged with Halcion and kept alive in the root cellar in a semi-conscious state. However, when Bernardo tried to sexually assault her, French, a defiant young Roman Catholic, told Bernardo that there were 'some things worth dying for.'" Bernardo then used a videotape he had made of Mahaffy's strangulation to coerce French into fulfilling his sexual requests. *Id.*

9. Swardson, *supra* note 2, at b01.

10. *Id.*

On February 17, 1993, Bernardo was arrested in connection with several rapes which had occurred in the Scarborough area.[11] In May of that year, Bernardo and Homolka were charged with the deaths of Leslie Mahaffy and Kristen French.[12] Police spent the next six weeks searching the Bernardo-Homolka home, removing more than 900 pieces of evidence which were used in the subsequent trials.[13]

B. *The Publication Ban*

On July 5, 1993, Judge Francis Kovacs ordered a publication ban[14] on information surrounding the trial of Karla Homolka.[15] The ban was imposed to ensure a fair trial for Homolka's accused husband and accomplice, Bernardo, who was awaiting trial.[16] The ban read as follows:

> (1) The Canadian media on proof of accreditation to the Court Services Manager will be admitted to the trial.
> (2) For reasons given, the public will be excluded from the court room except:
> (a) The families of the victims,
> (b) The families of the accused,
> (c) Counsel for Paul Bernardo Teale who will not have standing,
> (d) The Court's Law Clerk.
> (3) For reasons given the foreign press is excluded from the court room.

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11. Nagging questions of police conduct remain unresolved in this area. Police in both Toronto and St. Catherine had several opportunities to arrest Bernardo prior to February 17, 1993. For example, in November 1990, Bernardo provided saliva, hair, and blood samples for DNA analysis after being questioned about the Scarborough assaults. However, Metro Toronto police inexplicably did not obtain the results until January 1993. This delay left a 26-month interval in which French, Mahaffy, and Tammy Homolka met their deaths. D'Arcy Jenish, *Heart Of Darkness,* MACLEAN'S, Sept. 11, 1995, at 18.

12. Bernardo was not charged with the murder of Tammy Homolka until May 1994, and Karla was never implicated in this killing. Rayner, *supra* note 1, at 39.

13. A troubling aspect of this extensive search is that police failed to find the damning videos that Bernardo had compiled. These videos revealed the horrors inflicted upon Mahaffy, French, and Tammy Homolka. Moving men later found the videos in a ceiling fixture and turned them over to Bernardo's first lawyer, Ken Murray. Murray withheld them from police for 16 months, forcing the Crown into a plea bargain with Homolka in exchange for her testimony against Bernardo. Jenish, *supra* note 11, at 18.

14. The term "publication ban" is used throughout this analysis to denote a ban on publishing in print or broadcasting on television, film, or radio.

15. R. v. Bernardo (1993), No. 2047 (Ont. C.J.) *available in* Internet http://www.cs.indiana.edu/canada/MediaBan.

16. "I believe that the considerations for a fair trial outweigh the right to freedom of the press in these exceptional circumstances." *Id.* para. 134.

> (4) There will be no publication of the circumstances of the deaths of any victims referred to during the trial and they shall not be revealed directly or indirectly to a member of the foreign press.[17]

The court held that the media could publish whether a conviction was registered in Homolka's case but could not publish the plea.[18] Further, the publication ban was temporary and would expire at the completion of Bernardo's trial.[19]

On July 6, 1993, Homolka was convicted of two counts of manslaughter and given a twelve year sentence for her involvement in the deaths of Leslie Mahaffy and Kristen French.[20] Canada's media establishment[21] and the public[22] vigorously challenged the publication ban in an effort to obtain details concerning this sensational murder case. The public was especially interested in why Homolka had received such a light sentence for her part in the crimes. Serious questions were raised concerning the court's authority to impose a publication ban on this information.

I. DERIVING AUTHORITY FOR JUDICIALLY IMPOSED PUBLICATION BANS

Sir Frederick Pollock once observed that through all the changes endured by the law over the ages, one concept remained steadfast: publicity of judicial proceedings.[23] From the "open-air meetings of the freemen"[24] to

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17. *Id.* para. 137.

18. *Id.* para. 141(3).

19. *Id.* para. 143.

20. FAQ, *supra* note 3, at 3.

21. *Thompson Newspapers Ltd., Toronto Sun Publishing Corp., Toronto Star Newspapers Ltd.*, and *the Canadian Broadcasting Corp.* appealed the decision of the court to issue a publication ban in the *Bernardo* case. R. v. Bernardo, para. 10 (1993), No. 2047 (Ont. C.J.), 10, *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan.

22. On November 23, 1993, the *Washington Post* ran a story which detailed the murders of French and Mahaffy. *See* Swardson, *supra* note 2, at b01. Canadians rushed to the U.S. border to snatch up copies of this article which contained information banned for publication in Canada. "Over the weekend, the Niagara regional police seized 187 copies of the edition [*Washington Post*] at the frontier crossing. Sixty-one drivers were arrested or spoken to before being allowed to continue into Canada." Rupert Cornwell, *In Canada, Right To Fair Trial Wins Out Over Rights Of Press,* OREGONIAN, Dec. 2, 1993, *available in* Internet, http://www.cs.indiana.edu/canada/independent.

23. Jamie Cameron, *Comment: The Constitutional Domestication of our Courts—Openness and Publicity in Judicial Proceedings under the Charter, in* THE MEDIA THE COURTS AND THE CHARTER 331 n.1 (Phillip Anisman & Allen M. Linden eds., 1986) (citing F. POLLOCK, THE EXPANSION OF THE COMMON LAW 31-32 (1904)).

24. Early Anglo-Saxon criminal proceedings consisted of such meetings which the free men of the community were obligated to attend. Pollock analogized this Anglo-Saxon method

modern court proceedings, open trials have endured through the ages. This openness, or the "soul of justice,"[25] was deeply embedded in Anglo-American legal culture.[26]

A tradition of openness does exist in Canada, but adherence to this tradition is mostly a formality.[27] There has been much talk of openness and the virtues that open legal proceedings protect, but much less commitment to their protection.[28] "When the judiciary perceives that the concept of public trial is in conflict with other interests, it typically concludes with surprising ease that openness should bow to those competing interests."[29]

"The result is that judicial proceedings [in Canada] are neither fully open nor fully publicized. When placed in competition with other interests, the principle of an open trial has consistently been devalued."[30] The primary reason for the forfeiture of publicity has been to ensure that an individual accused of a crime receives a fair trial.[31]

A. *Statutory and Common Law Authority*

The statutory and common law history of Canada curtails the openness of criminal trials in a variety of ways.[32] There are a number of statutory rules which permit judges to exclude the public from entire trials or certain phases of those trials. "Section 465(1)(j) of the Criminal Code permits a judge conducting a preliminary inquiry to exclude the public from the proceedings where it appears to him that the ends of justice will be best served by so doing."[33] Section 442(1) gives a trial judge discretion to close all or part of a trial if interests such as public morals, the maintenance of order, or the proper administration of justice would be threatened by a public trial.[34] Despite the existence of these provisions, Canadian judges have been

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of trial to "an ill-managed public meeting." *Id.* at 331 n.2.

25. *Id.* at 331 n.3 (quoting Gannett Co. v. De Pasquale, 443 U.S. 368, 422 (1978)).

26. *Id.* at 331.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Other explanations for limiting the openness of judicial proceedings include, "concerns about the sensibilities of participants in the criminal process and solicitude for the integrity of the administration of justice." *Id.*

32. The adoption of the Charter of Rights and Freedoms in 1982 has altered the common law and statutory understanding of open criminal proceedings. However, it is beneficial to examine this history to obtain an understanding of the longstanding legal principles that shaped the Charter.

33. Cameron, *supra* note 23, at 332.

34. *Id.*

reluctant to entirely close trials in the absence of extreme circumstances.[35] However, the very presence of these codes is noteworthy in light of the broad discretion granted judges to simply close off proceedings, as well as the possibility that justice could be dispensed in a shroud of secrecy. Historical experience has proven that such secrecy in the administration of justice provides the proper climate for persecution at the hands of the state.[36]

More common than closure orders are the wide variety of publication bans which can be administered by courts in order to curb the publication of information obtained throughout a criminal proceeding. The issuance of publication bans in pretrial proceedings is routine.[37] The Canadian Criminal Code requires judges to ban information obtained at bail, extradition, or preliminary inquiries upon the request of the accused or the prosecutor.[38] These bans are removed at the conclusion of trial or upon the dismissal of the accused.[39] The Code further maintains that it is an offense to publish evidence of an admission or confession obtained at a preliminary hearing.[40]

Canadian statutory law provides for restraints on information learned during the course of a trial. For example, the Criminal Code instructs courts to safeguard the identity of complainants in cases concerning certain sexual offenses.[41] This sort of ban is subject to the discretion of the judge or is mandatory upon request of either the accused or the prosecutor. Neither the accused nor the prosecutor is under any obligation to demonstrate possible prejudice as a result of publication.[42] The Young Offenders Act absolutely

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35. *Id.* at 333 n.13 (citing R. v. Warwaruk (1978), 42 C.C.C. (2d) 121 (Alta. C.A.) (allowing an appeal on the ground that the trial was improperly closed to the public); Re Vaudrin and The Queen (1982), 2 C.C.C. (3d) 214 (B.C.S.C.) (quashing a closure order under s. 442(1)); F.P. Publications (Western) Ltd. v. Connor (1980), 1 W.W.R. 504 (Man. C.A.) (quashing an order closing a portion of the trial to a named member of the press); R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270 (Ont. C.A.) (setting aside a conviction for sexual offenses where grounds for exclusion were not present and the trial was improperly closed)).

36. *Id.* at 332 n.12 (citing Max Radin, *The Right To A Public Trial,* 6 TEMPLE L.Q. 381, 388-89 (1932)).

37. *Id.* at 333.

38. *Id.* at 333 n.17 (citing § 457.2(1) (relating to bail hearings) and § 467(1) (relating to preliminary inquiries)).

39. *Id.* at 333.

40. *Id.* at 333 n.18 ("Every one who publishes in any newspaper, or broadcasts, a report that any admission or confession was tendered in evidence at a preliminary inquiry. . . is guilty of an offence punishable on summary conviction." *Id.* (quoting § 470(2) of the Canadian Criminal Code)).

41. *Id.* at 333 n.20 ("The offences are incest, gross indecency, sexual assault with a weapon or with threats to a third party causing bodily harm and aggravated sexual assault." *Id.* (citing § 246.4 of the Canadian Criminal Code)).

42. *Id.* at 334 n.21 ("Where an accused is charged with [a § 246.4] offence . . . [the judge] may, or if application is made by the complainant or prosecutor, shall, make an order that the identity of the complainant . . . shall not be published." (quoting § 442(3))).

conceals the identity of juveniles charged with offenses as well as the identities of those who will serve as witnesses.[43] Further, judges have issued publication bans by relying on their inherent jurisdiction to control judicial proceedings.[44]

The extent and scope of these bans provide a climate in which free expression is often severely restricted. Many of the bans are temporary, while others remain in place permanently.[45] Some of the bans are mandatory, while others rest within the discretion of the judge. However, in all cases the Criminal Code has categorically determined that the principle of openness must yield to other interests. As interpreted by one legal observer, "the Code thus institutes censorship by government of the work of one of its most vital branches, the judiciary."[46]

The drafters and subsequent interpreters of the Criminal Code appreciated the interests that publication bans protect. When concealing the identity of complainants in sexual offense cases, the underlying purpose is to protect the victim's privacy and ensure their cooperation in the prosecution.[47] Protection of the identity of young offenders serves to avoid

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The Canadian court recently held that § 442(3) did infringe upon freedom of expression as guaranteed in the Charter of Rights and Freedoms, but that the infringement was a reasonable limit on that freedom. Canadian Newspaper Co., v. Canada (1988), 43 C.C.C. (3d) 24.

43. Cameron, *supra* note 23, at 334 n.22. *See also* R. v. S. (1995), 98 C.C.C. (3d) 235. In this case, a newspaper reporter sought access to a tape recording of a trial which was held in youth court. On appeal, the trial judge's reasons not to grant access was dismissed as inconsistent with the principles of the Charter relating to free expression. However, under § 38 of the Young Offenders Act the name or any information tending to identify the juvenile could not be published. The court recognized the virtues of a free press and indicated these could be obtained without release of the offenders identity. The court stated: "It is only through the press that most individuals can really learn of what is transpiring in the courts. They as listeners or readers have a right to receive this information. Only then can they make an assessment of the institution." *Id.* at 246 (quoting Edmonton Journal v. Alberta (1989), 64 D.L.R. (4th) 577, 610).

44. R. v. Bernardo, para. 63 (1993), No 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan.

> This Court has inherent jurisdiction to prohibit publication and broadcast in order to protect an accused's rights to a fair trial or to protect the fairness of a trial or to protect the fairness of a trial then conducted. The exercise of that jurisdiction does not contravene s. 2(b) of the Canadian Charter of Rights and Freedoms.

Id. (quoting R. v. Barrow (1988), 48 C.C.C. (3d) 305, 308 (N.S.C.A.)).

45. Publication bans of proceedings at bail, extradition, or preliminary hearings lift upon release of the accused or disposition of the facts at trial. Bans protecting the identities of complainants, other participants, or juveniles are permanent. Cameron, *supra* note 23, at 334 n.24.

46. *Id.* at 334.

47. *Id.* at 336.

stigmatization by their peers which would undermine their socialization.[48] The judiciary has consistently upheld these provisions by rationalizing that the identity of these individuals is irrelevant to any valid interest the media may maintain in publicizing criminal proceedings.[49]

The common law also corrodes the idea of open publicity of criminal proceedings through the law of contempt.[50] The law of contempt contends that publishers can be fined or imprisoned for printing any information before or during a trial that may have a tendency to prejudice the accused's right to a fair hearing.[51] The law of contempt does not make the creation of prejudice a prerequisite for punishment.[52] This effort to prevent publication of any information that could interfere with the administration of justice places a heavy burden on the media.[53]

The statutory and common law restrictions on media coverage of criminal proceedings creates an atmosphere in which the presumption of openness is compromised. This compromise is deeply rooted in the preservation of a fair trial for the accused. The adoption of the Charter of Rights and Freedoms[54] has modified the challenge,[55] but the restrictions on openness rooted in common law and legislative history continue to be espoused in post-Charter cases.[56] The philosophy of the court in 1955 that, "whether [the publicity] reacts favorably or unfavorably on the prisoner is

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48. *Id.*

49. *Id.*

50. *Id.* at 334 n.26 (citing BORRIE AND LOWE'S LAW OF CONTEMPT (2d ed. 1983) for a general overview of the law of contempt).

51. *Id.* at 334 n.27 (citing Re R. and Carocchia (1972), 14 C.C.C. (2d) 354 (Que. Q.B.) (concluding that press releases would likely prejudice the community against the accused); Re Murphy and Southam Press (1972), 9 C.C.C. (2d) 330 (B.C. S.C.) (no contempt in absence of proof beyond a reasonable doubt that the publication might or was likely to interfere with a fair trial); and Bellitti v. C.B.C. (1983), 15 C.C.C. (2d) 300 (Ont. H.C.) (holding the prejudicial effect of a documentary on prospective jurors was largely speculative)).

52. *Id.* at 335 n.28 (citing BORRIE AND LOWE'S LAW OF CONTEMPT, *supra* note 50, at 61).

53. *Id.* at 335.

54. The Canadian Charter of Rights and Freedoms was adopted in April 1982 as a part of the newly revised Canadian constitution.

55. The Charter terminology propels the question of the right to attend and speak about criminal proceedings into the constitutional arena. Prior to the Charter enactment, it was a matter of ordinary law governed by legislative provisions and common law. The Canadian system is analogous to United States jurisprudence where challenges to freedom of expression are a constitutional question with legislative and common law dimensions. *See* DAVID LEPOFSKY, OPEN JUSTICE 179 (1985).

56. Cameron, *supra* note 23, at 335 n.30 (citing R. v. Banville (1983), 3 C.C.C. (3d) 312 (N.B. Q.B.) (dicta upholding mandatory publication bans of preliminary inquiry procedings); Re Global Communications Ltd. and A.G. Can. (1983), 5 C.C.C. (3d) 346, *affirmed*, (1984) 44 O.R. (2d) 609 (Ont. C.A.) (upholding a publication ban on proceedings at an extradition hearing)).

not the test,"[57] continues to be affirmed in post-Charter cases.[58] The concern of publicity was expressed by this post-Charter court which stated that a fair trial is "quite capable of being shattered by the kind of publicity that can attend [an extradition] hearing and, once shattered, it may, like Humpty Dumpty, be quite impossible to put back together again."[59] Another opinion states that the writers of the Charter could not have intended that "the rights of an accused person should be whittled down in the name of a general concept of freedom of expression or freedom of the press."[60]

An analysis of Canadian statutory and common law leads to the conclusion that the concept of openness and publicity are easily shattered when confronted with a fair trial challenge. Legal authorities have tended to take the position that publicity must cease when the interests of free expression potentially pervade upon the interest of the accused in a fair trial. This resolution of the free press-fair trial conflict is reflected in Canada's statutory and legislative history. However, the Charter of Rights and Freedoms specifically provides for the protection of free expression.[61] Curtailing free expression in the post-Charter age requires disregarding the explicit language of a document analogous to the United States Bill of Rights. Any limitation of this freedom is worthy of close scrutiny.

B. *The Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms (Charter) was adopted as part of the Constitution Act of 1982. The Charter § 2(b) creates a new constitutional right for Canadians to "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication."[62] For the first time in Canada's history, the freedom of

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57. *Id.* at 335 n.31 (quoting Steiner v. Toronto Star Ltd. (1955), 114 C.C.C. 117 (court held a newspaper in contempt for reporting the events surrounding a crime investigation)).

58. *Id.* at 335 n.32 (citing Re Southam Inc. and The Queen (1982), 70 C.C.C. (2d) 264 (Ont. H.C.); Re Global Communications Ltd. and A.G. Can. (1983), 5 C.C.C. (3d) 346).

59. *Id.* at 336 n.33 (quoting Re Global Communications Ltd. and A.G. Can. (1983), 5 C.C.C. (3d) 346).

60. *Id.* at 336 n.34 (quoting Re Southam Inc. and The Queen (1982), 70 C.C.C. (2d) 264, 269 (Ont. H.C.)).

61. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

62. Charter § 2, in its entirety provides:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

speech and press is a constitutional right and fundamental freedom.[63] Although Canadians have always enjoyed a significant measure of expressive freedom, it is accurate to characterize the Charter's free expression and press rights as "new."[64] Prior to the Charter's enactment, Canadians did not enjoy an enforceable legal right to free speech.[65] One could not initiate proceedings in a Canadian court arguing that their constitutional right to free expression had been abridged. This sort of claim simply did not exist preceding the enactment of the Charter. The Charter has provided Canadians with legal standing to challenge infringements of their right to free expression on constitutional grounds.[66]

It logically follows that speech about criminal proceedings is protected within the Charter's free expression guarantees. The essence of the free expression provision is "the right to think, say, write and broadcast to others, through any medium, ideas, information or beliefs they prefer to communicate, without public officials intervening with a heavy hand to put a stop to thoughts, statements, or publications deemed inappropriate."[67] Speech about criminal proceedings falls within this characterization of free expression. However, the right to free expression is not absolute and must be weighed against other competing interests. With regard to criminal proceedings, the limit is § 11(d) of the Charter which provides that: "Any person charged with an offense has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[68] Existing limitations on openness must be considered in light of both constitutional guarantees, the freedom of expression and the right to a fair hearing before an impartial tribunal. Neither right is absolute,[69] and both are subject to reasonable limits if the exercise of one right oversteps the boundaries of the other. Curtailment is

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63. Prior to the adoption of the Charter, individual rights (including freedom of expression) were not entrenched. Thus, the prior Canadian Constitution provided the courts with no legal basis to override otherwise valid governmental actions which interfered with individual rights. The enactment of the Charter changed this. The Charter, like the United States Constitution, provides textual protection for individual rights in the Canadian legal system. *See* Robert A. Sedler, *Constitutional Protection Of Individual Rights In Canada: The Impact Of The New Canadian Charter Of Rights And Freedoms,* 59 NOTRE DAME L. REV. 1191 (1984).

64. LEPOFSKY, *supra* note 55, at 215.

65. *Id.*

66. Sedler, *supra* note 63, at 1194.

67. LEPOSKY, *supra* note 55, at 214-15.

68. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d).

69. Neither freedom of expression nor the right of an accused to a fair trial are absolute rights. In considering freedom of expression, just as one does not have the freedom to shout "Fire!" in a crowded theater, one should not have the right to proclaim another's "guilt" in the arena of public opinion when this entails trampling on the fair trial rights of the accused.

valid only when it complies with § 1 of the Charter which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[70] In order to resolve the tension between free expression and the fair trial rights of the accused, it must be determined at what point the boundary between the two is crossed and what limit is reasonable.

II. TWO DIFFERING RESOLUTIONS OF THE FREE EXPRESSION VERSUS FAIR TRIAL RIGHTS CONFLICT

A. *The Bernardo Ban: Fair Trial Rights Are Paramount*

On July 5, 1993, the Ontario Court of Justice granted the Crown's [prosecution] application for a time limited publication ban on the proceedings surrounding the trial of Karla Homolka until the discharge or completion of Paul Bernardo's trial.[71] Those opposing the ban in these proceedings included *The Toronto Star, Thompson Newspapers Co. Limited, The Canadian Broadcasting Corporation*, and *The Toronto Sun*.[72] These media organizations contended that under the principles of the Charter, this limit on free expression was not reasonable. However, the Crown alleged that publication of information surrounding the trial of Karla Homolka would prejudice Paul Bernardo's opportunity for a fair trial. The interests that each opposing party sought to protect are enumerated freedoms deserving of protection under the Charter of Rights and Freedoms.[73] However, the conclusions drawn as to when the infringement of one freedom upon the other becomes unreasonable are radically different.

The *Bernardo* court relied upon the inherent jurisdiction of the court to curtail freedom of expression when it conflicted with the fair trial rights of an accused.[74] This inherent jurisdiction is derived from common law and legislated discretionary authority. In *Attorney General of Nova Scotia v. McIntyre*, the court explains when this inherent jurisdiction can be used to curtail free expression.[75] In *McIntyre*, the court stated "curtailment of public accessibility can only be justified where there is present the need to protect

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

71. R. v. Bernardo, para. 143 (1993), No 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/cananda/MediaBan.

72. *Id.* para. 10.

73. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2 and § 11(d).

74. R. v. Bernardo, paras. 63, 64 (1993), No 2047 (Ont. C.J.) *available in* Internet, http://www/cs/indiana.edu/canada/MediaBan.

75. *Id.* para. 77 (citing Attorney Gen. of Nova Scotia v. McIntyre (1982), 26 Ex. C.R. (3d) 193 (S.C.C.)).

social values of super ordinate importance. One of these is the protection of the innocent."[76] The *Bernardo* court discerned that the integrity of the court's process was a "social value of super ordinate importance."[77] Maintaining this integrity required that only admissible evidence be tendered at the trial of Bernardo.[78] It was inevitable that facts would be disclosed at the trial of Homolka which were common to the charges against Bernardo. There was a possibility that the facts presented at the trial of Homolka would be inadmissible against Bernardo. Publicizing these facts before the trial of Bernardo would endanger the integrity of the court's process.[79] In order to maintain the court's integrity, it was necessary to maintain Bernardo's presumption of innocence. Publicity of the facts disclosed at Homolka's trial could destroy this presumption of innocence and possibly endanger the integrity of the court.[80]

The *Bernardo* court considered the requirement of a fair trial a societal interest.[81] This societal interest would be endangered if Bernardo was found guilty and subsequently moved for a mistrial due to publication that violated his right to a fair trial.[82] In *Church of Scientology of Toronto v. The Queen*,[83] the court considered the right at common law to prohibit publication where several accused were charged arising from a common factual basis. The court stated that "[t]he authority [to ban publication pending trial of a co-accused] . . . is rooted in and a necessary incident of the Court's authority, indeed obligation, to see that justice is done in proceedings within its judicial cognizance."[84] The court further stated that "[w]hat the prophylactic order sought to achieve was the preservation of the rights of those co-accused later to be tried to a fair trial unpolluted or uncomplicated by any prejudicial references to their words or conduct which may emerge unchallenged from earlier proceedings."[85] Regardless of whether Bernardo

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76. Attorney Gen. of Nova Scotia v. McIntyre (1982), 26 Ex. C.R. (3d) 193, 213 (S.C.C.).

77. R. v. Bernardo, para. 80 (1993), No. 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan.

78. *Id.*

79. *Id.* ("It would seem clear that the purpose of any order prohibiting publication, of whatever length and whatever terms, is to protect the integrity of the Court's process not merely to minimize the embarrassment of those charged with or giving evidence of crime." (quoting Church of Scientology of Toronto v. The Queen (no. 6) (1986), 27 C.C.C. (3d) 193)).

80. *Id.*

81. *Id.* para. 85.

82. *Id.* para. 86.

83. Church of Scientology of Toronto v. The Queen (no. 6)(1986), 27 C.C.C. (3d) 193.

84. *Id.* at 208.

85. *Id.*

opposed the publication of the trial of Homolka, the court has the "authority, indeed the obligation, to see that justice is done."[86]

The *Bernardo* court considered several cases decided after the enactment of the Charter which held that the right to a fair and unprejudiced trial is superior to the right of free expression when the two conflict. In the case of *In re Canadian Newspapers Co. Ltd. and The Queen*, the court stated:

> I have no difficulty in saying that one of these two rights, namely the right to a fair and unprejudiced trial, must have paramountcy over the right of freedom of expression. Great harm will occur if an accused is not assured of a fair trial and an unprejudiced hearing and for a temporary period of time there must be limitations on the freedom of expression.[87]

The court expressed similar views in *In re Southam Inc. and The Queen*[88] and *R. v. Sophonow*.[89]

However, the paramounce is not absolute, and there are instances when the court must engage in a balancing process between the two rights.[90] The *Church of Scientology* case suggests factors which should be considered in this balancing process:

> factors such as the nature of the election of the remaining co-accused, the imminence or otherwise of future trial proceedings, the nature of the evidence to be disclosed upon the plea of guilty and the likelihood of its publication, the perceived adequacy or otherwise of the traditional procedural mechanisms, as for

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86. *Id.*

87. R. v. Bernardo, para. 94 (1993), No. 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan (quoting *In re* Canadian Newspapers Co. Ltd. and The Queen (1984), 16 C.C.C. (3d) 495, 500).

88. *Id.* para. 95 ("[W]hen the two interests, namely, the freedom of the press and the right of an accused person to have a fair and unprejudiced trial, competed one with the other, the second was invariably held to be paramount . . . . " *Id.* (quoting *In re* Southam Inc. and The Queen (1982), 70 C.C.C. (2d) 264, 267 (Ont. H.C.)).

89. *Id.* para. 97

> Freedom of the press and the right of an accused to a fair trial so expressed, are not difficult to reconcile if it is recognized that freedom of the press is not conferred in absolute terms but carries with it a quality of restraint, that is to say, the freedom will be exercised reasonably with due regard to the right of an accused person to a fair trial as expressed in s. 11(d) of the Charter.

Id. (quoting R. v. Sophonow (No. 2)(1983), 34 C.R. Ex. (3d) 287, 291).

90. *Id.* para. 98.

> example change of venue and challenge for cause, to ensure a fair trial, and the precise terms of the order sought.[91]

The *Bernardo* court considered each of these factors.

First, it was deemed reasonable to presume there would be a judge and jury in this case.[92] Next, the likelihood that Bernardo's trial would be held well into the future would normally minimize the effect of press coverage concerning the first trial. However, courts have noted the media tendency to refresh the public of the facts surrounding a case just prior to an interesting or sensational trial.[93] The court determined that an order allowing publication up to a certain point prior to the trial (i.e. six months as in *R. v. Lazell*) would not work here due to the already extensive coverage by the media and the extremely sensational nature of this case.[94] It was inevitable that evidence would arise in Homolka's case containing numerous references to Bernardo. Such evidence would be highly prejudicial to Bernardo, especially if held to be inadmissible against him.[95] The likelihood of publication was inevitable[96] and change of venue was an unsatisfactory solution due to extensive coverage of the case throughout the province.[97]

The effect of the United States media was considered due to the close proximity and ease with which information crosses the border. Further, there was adequate U.S. interest in the case to ensure publication.[98] A comparison of the two legal traditions in the case of *In Re Global Communications Ltd. and the Attorney General for Canada* notes the differences between the two countries respecting restraints on the media.

> The approach taken by the United States seems to be to allow for the widest possible latitude in media reporting of events transpiring prior to and during the course of the trial of an accused person . . . . This is counterbalanced in the interests of ensuring an impartial and unbiased jury, in a number of ways

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91. *Id.* para. 102 (quoting Church of Scientology of Toronto v. The Queen (No. 6) (1986), 27 C.C.C. (3d) 193, 221).

92. *Id.* para. 104.

93. *Id.* para. 105 (citing R. v. Lazell (1988), 48 C.R.R. 258 (H.C.J.) and Re Pilzmaker and Law Society of Upper Canada, (1989), 70 O.R. (2d) 126 (Ont. Div. Ct.)). In *R. v. Lazell,* the judge permitted publication until six months prior to the trial.

94. *Id.* para. 105

95. *Id.* para. 106.

96. *Id.* para. 107.

97. *Id.* para. 108.

98. On November 23, 1993, the *Washington Post* published a ban-breaking article. *See* Swardson, *supra* note 2, at b01. Also, the U.S. tabloid show "A Current Affair" covered the case in three episodes on October 26, 1993, November 9, 1993, and July 26, 1994. *See* FAQ, *supra* note 3, at 21.

> . . . by an often searching examination into the attitudes, biases and even personal and financial affairs of potential jurors and . . . by the sequestration of the members of the jury while the trial is in progress to reduce the risk of their exposure to the media and other publicity generated by it.[99]

The court then compares this openness to the Canadian situation.

> In Canada, by contrast, the process of jury selection is neither as prolonged nor as exhaustive as a general rule; indeed the kind of questioning and probing into the affairs of potential jurors that is sometimes seen in the United States would be unlikely to be permitted under our system . . . . Moreover, in Canada the sequestration of jurors throughout a trial occurs only exceptionally. The strong bias of our system is to prevent the dissemination before the conclusion of the trial of media publicity that might be prejudicial to the accused's fair trial.[100]

If the public had access to the courtroom, there would be nothing to prevent the United States media from having a first hand source of information from which to publish. In view of the United States legal tradition of openness, there would be no restraints on what the media would publish.

The Canadian court has regularly paid due deference to the ability of juries to try the case on the facts presented at trial and to disassociate from their minds what they previously heard, saw, or read about the case in the media.[101] Regardless, the Crown is entitled to assert the societal right to a fair trial where excessive publicity will possibly prejudice a jury. This restraint is accomplished through the exercise of the court's inherent jurisdiction to ban publicity. In *R. v. McGregor* the court stated:

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99. *Id.*

100. *Id.*

101. R. v. Bernardo, para. 122 (1993), No. 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan.

> Today's jurors are intelligent people, well able to put from their minds something they heard elsewhere. While engaged in a tense jury trial they will not hark back to something heard elsewhere that they have been told to disregard. I have not heard it suggested that a trial judge who has heard about a case is not competent to decide it and I do not think that his capacity to reject what he heard before is unique. Jurors, too, are able to decide upon the evidence. (quoting *R. v. Hubbert* (1977), 29 C.C.C. 279, *affirmed* (1977) 2 S.C.R. 267 (S.C.C.), in which the Ontario Court of Appeal adopted what Seaton, J.A. said in *R. v. Makow* (1974), 28 C.R.N.S. 87, 94).

Id. para. 124 ("The Court should not be heard to call into question the capacity of juries to do the job assigned to them." *Id.* (quoting R. v. Corbett (1988), 41 C.C.C. (3d) 385, 401)).

> He [referring to the expert] testified that while challenges for cause can certainly be of much assistance in ensuring a jury be impartial, there are certain particular difficulties in cases of massive pretrial publicity where emotions run high and where there is a perception of an apparent societal consensus as to the desired result.[102]

This was certainly a danger in the *Bernardo* case due to the horrific nature of the crime. The court went on to say: "In such cases it is more difficult to identify those prospective jurors who lack the required impartiality through the challenge for cause process particularly under our Canadian system of law which does not permit an in depth probe into the prospective juror's beliefs and opinions."[103] In reaching the final decision to allow the ban, the court stated:

> In considering the protection of the integrity of the trial process for the public I must keep in mind that if the accused is guilty of the multitude of serious charges he is facing it is essential he be tried and no fault be found in the court process. That, of course, applies as well if he is found innocent.[104]

In light of these factors, the court granted the Crown's application for a publication ban.

This decision resulted in unprecedented disapproval among Canadians and those outside Canada. Many were not satisfied by the rationale offered in reaching this conclusion. The use of inherent jurisdiction by the court to control media coverage of criminal trials was considered to be in direct contradiction with the principles of free expression laid out in the Charter. Further, inherent jurisdiction was perceived by many as extremely dangerous because it rested upon common law or legislated discretionary authority rather than a ban required by statute. Discretion of this latitude is susceptible to abuse. Free expression advocates suffered a terrible blow as a result of the *Bernardo* publication ban. However, the *Dagenais* decision one year later suggested that their voices of dissent were taking hold of the judiciary.

B. *The* Dagenais *Decision: A Victory for Freedom of Expression*

In a landmark ruling handed down on December 8, 1994, the Supreme Court of Canada greatly limited situations in which a publication ban could

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102. *Id.* para. 126.
103. *Id.*
104. *Id.* para. 131.

be issued.[105] In this ruling, the trial judge granted an injunction restraining the Canadian Broadcasting Corporation from airing a fictional broadcast entitled "The Boys of St. Vincent." This four hour mini-series portrayed the sexual and physical abuse of children by Catholic brothers who operated the orphanage in which the children lived. The fictional account closely paralleled the facts of an actual criminal trial which was in progress. The accused members of the religious order objected to the broadcast of the mini-series because they felt it was potentially prejudicial to their fair trial rights.[106]

The Supreme Court of Canada overturned the decision of the lower courts and allowed the series to be aired. In a 6-3 decision the court ruled that the controversial film should not have been banned from broadcast on CBC stations.[107] In issuing this decision, the court commented on publication bans in general and issued new precedent. The court stated:

> The pre-Charter common-law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban . . . . The balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d).[108]

Though freedom of expression was considered important in previous decisions, it was rarely characterized as having equal status to the fair trial rights of the accused.

While the *Bernardo* court spoke of "balancing," this was countered with a continued reliance on traditional principles that the fair trial rights of the accused always take precedent over freedom of expression. The court went on to say:

> A hierarchal approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come in conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.[109]

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105. Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) 12 (S.C.C.).
106. *Id.*
107. *Id.*
108. *Id.* at 21.
109. *Id.*

An exciting aspect of this decision was that it explicitly invalidated a hierarchal assessment of freedoms under the Charter.

The court continued by stating that the common-law rule governing the issuance of publication bans must be altered to reflect the principles of the Charter.

> Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common-law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights.[110]

The court acknowledged the serious curtailment on free expression that publication bans entail, and established very specific instances when such drastic measures should be taken.

> A publication ban should only be ordered when: (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those effected by the ban.[111]

The balancing which the court proposed is noteworthy because it weighed in favor of free expression. Whatever balancing took place in the *Bernardo* decision certainly weighed in favor of fair trial rights. The court noted further that "while the Charter provides safeguards both against actual instances of bias and against situations that give rise to a serious risk of a jury's impartiality being tainted, [the Charter] does not require that all conceivable steps be taken to remove even the most speculative risks."[112]

The almost impossible task of enforcing publication bans in today's global village was recognized by the Court.

> It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and short wave radios.[113]

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110. *Id.* at 22.
111. *Id.*
112. *Id.* at 23.
113. *Id.* at 27.

The practical problems regarding the implementation of publication bans was evident in the *Bernardo* decision. Eighty percent of the Canadian population lives within 200 miles of the United States.[114] It would simply be impossible to deter United States media coverage from entering Canada. Cyberspace knows no boundaries. As the court stated: "[The efficacy of publication bans have] also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing."[115]

The court concluded by offering guidelines for future applications of publication bans:

> (a) At the motion for the ban, the judge should give the media standing . . . according to the rules of criminal procedure and the established common-law principles with regard to standing[;]
> (b) The judge should, wherever possible, review the publication at issue[;]
> (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation . . . . [T]he party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure[;]
> (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available[;]
> (e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and
> (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.[116]

The *Dagenais* decision tipped the balance in favor of free expression. The strictness of the *Dagenais* test is reminiscent of the *Nebraska Press* decision[117] which laid out a three part test which United States courts had to satisfy before applying a prior restraint on the media. This test required the

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114. *The Barbie-Ken Murders*, NEWSWEEK, Dec. 6, 1993, at 36.
115. Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) 12, 27 (S.C.C.).
116. *Id.* at 29-30.
117. Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

court to consider: "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[118] The rigidity of this test caused one commentator to note that the *Nebraska Press* decision acts as a virtual bar to the use of prior restraints on the media as a method of resolving the free press-fair trial conflict.[119]

Freedom of expression was once viewed as fragile and easily destroyed in the interests of preventing possible prejudice to an accused. *Dagenais* suggests this freedom is no longer a fragile entity easily destroyed at the slightest hint of possible prejudice, but is a solid presumption which must be conclusively overcome by those who seek to curtail it.

Advocates of free expression hope that *Dagenais* has established a new precedent which will be adhered to in decisions to come. This may be true, but it is in no way a certainty. In reality, the Canadian history of limiting free expression is as recent as the *Bernardo* decision. Conflicting views remain as to how Charter principles should be interpreted in resolving the free expression-fair trial conflict.

III. A PROPOSED RESOLUTION

Publication bans do not properly resolve the conflict between free expression and fair trial rights. Publication bans are an unreasonable infringement upon a vital freedom, and for the following reasons should be effectively stricken from use by the Canadian judiciary.

A. *Publication Bans Undermine The Virtues Of Open Court Proceedings*

The merits of an open judicial process are recited in these words of Jeremy Bentham: "without publicity, all other checks are insufficient."[120] By its vigilant watch of the criminal justice system, publicity checks government action. Not only is publicity of trial proceedings vital to the legitimacy of the criminal justice system, it goes to the very root of self-governance. The openness of government proceedings is crucial to the existence of democracy. This openness cannot be compromised by

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118. *Id.* at 562.

119. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 858-59 (2d ed. 1988). The court's "apparent confidence" that alternatives to prior restraints on the media would adequately deter any adverse impact of publicity in a particular trial suggests the *Nebraska Press* decision acts as "a virtual bar to prior restraints" on the press. *Id.*

120. Cameron, *supra* note 23, at 337 n.39 (citing Richmond Newspaper Inc. v. Virginia, 448 U.S. 555, 569 (1979)).

speculations of prejudice. Rather, such prejudice must be imminent and incurable before an open trial is compromised.

Historically, the openness of the trial was the only assurance an accused person had that it would be fair. In *Scott v. Scott*, the court stated:

> It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. In the darkness of secrecy sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any checks applicable to judicial injustice operate. Where there is no publicity there is no justice. It is the keenest spur to exertion and the surest of all guards against probity. It keeps the judge himself while trying under trial. The security of securities is publicity.[121]

Although an accused may now invoke a wide variety of procedural and substantive mechanisms in defense of a charge, one continues to have a fairness interest in the proceedings. Publicity surrounding the trial deters the state from engaging in unethical practices.[122] It is difficult for the prosecutor to pursue measures which appear secretive without a resulting public outcry. In an open system subject to comment, the public can protest if it seems the state has victimized a particular individual or departed from the principles of due process. The judge is also restrained from acting unfairly when judicial actions are subject to scrutiny. It is unlikely that a judge will act with undue hostility to a defendant when those actions are in full view of an inquiring public eye. "Where proceedings go awry an ever-vigilant public, having had access to all phases of the proceedings through attendance and news reporting, can lend enormous strength to a claim that the accused was denied a fair trial."[123]

The Canadian legislature and judiciary have closed off criminal proceedings to ensure a fair trial for the accused. However, in reality an open judicial process is essential to an accused's right to a fair trial. Representation by counsel is not a sufficient guarantee that the proceedings will be conducted fairly. Counsel is not present for every aspect of the process and is sometimes powerless to protect the accused from the forces of prejudice. The voice of the public can add sufficient strength to claims of unfairness and serve as an effective check against judicial trampling of the

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121. R. v. Bernardo, para. 56 (1993), No. 2047 (Ont. C.J.) *available in* Internet, http://www.cs.indiana.edu/canada/MediaBan (quoting Scott v. Scott (1913), A.C. 417 (H. of L.).

122. Nebraska Press, 427 U.S. at 587. Justice Brennan stated that the integrity of the criminal justice system is "of crucial import to citizens concerned with the administration of government." *Id.*

123. Cameron, *supra* note 23, at 338.

rights of an accused.[124] Empowered with "a duty to investigate and publicize all matters concerning the extension of abridgement of individual liberties, the press has been described as the 'staunch guardian of the public interest.'"[125] In order to fulfill this duty, the press must be allowed to keep the public informed about the functioning of the judiciary, to act as a "watchdog," and to report on prosecutorial excesses or any other infringement upon the rights of the accused.

This "watchdog" function was eliminated in the Bernardo case. Canadians were outraged when they learned of the light sentence Homolka received for her part in the horrid murders.[126] Justice was dispensed in secrecy, and there was no way for the public to adequately gauge if the punishment fit the crime. Secret judicial proceedings shake the foundations of democracy by fostering distrust and disillusionment among those who are governed. [127]

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124. *Id.*

125. Allen Linden, *Comment: Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform, in* THE MEDIA THE COURTS AND THE CHARTER 302 n.13 (quoting W.B. Affleck, *Free Press - Fair Trial*, 8 CRIM. L.Q. 163, 164 (1965)).

126. The judge sentenced Homolka to two 12-year sentences to run concurrently. She is eligible for parole in four years. He said,

> 'No sentence that I could impose could adequately reflect the revulsion of the community towards the accused.' But she had, he said, given 'significant and perhaps invaluable information to the police. There are serious unsolved crimes here and elsewhere. There can be no room for error in the prosecution of the offender, whoever that might be . . . . This accused has committed the worst crimes. However, she is not the worst offender for whom the maximum sentence is designed.'

Rayner, *supra* note 1, at 3g. Few in the courtroom doubted that what the judge was implying was that Homolka was to be the star witness at her husband's trial. However, the only part of this passed on to the public were these comments of the judge and the sentence. The public was left questioning whether justice had been obtained at Homolka's trial. *Id.*

"The ban has nothing to do with a fair trial," said Scott Brunside, a reporter with the *Toronto Sun* who covered the case from the beginning and attended Homolka's trial. "'The ban is to do with making a deal with Homolka.' In other words, if you know too much about what went on, you would think she got off too lightly in exchange for turning evidence." *Id.*

"We have somebody in prison (but) we don't know why. We don't see good triumph over evil, and that is primarily how we uphold the fairness and safety of our communities" (statement of John Cruickshank, managing editor of the *Globe and Mail*). Debby Waldman and Mary McIntosh, *Understanding Canadian Bans on Trial Coverage*, EDITOR AND PUBLISHER, May 7, 1994, at 18.

127. In November 1995, the Attorney General of Canada ordered a private judicial inquiry into whether it is possible to overturn the controversial plea bargain that led to Homolka's 12-year sentence. Thus, amidst extreme pressure, the case will be re-examined in full view of the public. *See* A Statement To The Legislature By The Honorable Charles Harnick Attorney General Of Ontario, Nov. 14, 1995, *available in* Internet, http://newswire.flexnet.com/month12/message/nov1995/c18237.htm.

Society also has an interest in an openly publicized trial. At early common law an open trial was appreciated for its societal value rather than fairness to the accused.[128] Courts recognized long ago that open publicity protects societal interests that are only incidentally linked to the fair trial rights of the accused.[129] The public has a direct interest in the effectiveness of the trial process, especially as it relates to the prosecution of crime and the trial of alleged criminals. It is difficult to persuade society that the criminal justice system is running smoothly when it is denied access to that system.

The legitimacy that publicity brings to the criminal justice system is compromised by the ready issuance of publication bans. "The commission of crime and its prosecution engage the attention of the citizenry; if the public is to feel secure and confident in its system, no part of the process by which offenders are brought to justice should be shrouded in secrecy."[130] Justice which is "done in the corner or in any dark manner"[131] is hard to reconcile as true justice because there is nothing to legitimize it.

This is especially true in highly celebrated or sensational cases. If the public is denied access, there is no assurance that true justice was rendered. Imagine the recent O.J. Simpson trial in the United States being conducted in secrecy. Whatever the outcome, criminal justice would appear arbitrary and biased. The eroding public confidence in the criminal justice system that this secrecy would cause is unimaginable.

Open trials train the citizenry in the art of effective self-government.[132] When the public is able to critique the investigatory, prosecutorial, and

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128. Cameron, *supra* note 23, at 339 n.45 ("[I]t is clear that Hale and Blackstone are scarcely thinking of the privileges of the accused, but of the effectiveness of the process at trial, which . . . means the expedition and frequency of conviction and not the facilitation of acquittal." *Id.* (quoting Radin, *supra* note 36, at 384)).

129. *Id.* at 339 n.46 (citing Gannett Co. v. DePasquale 443 U.S. 368, 442 (1978)). "[T]here is a party interest whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned . . . be made a sacrifice." *Id.*

130. *Id.* at 340.

131. *Id.* at 340 n.47 (citing Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 570 (1980)).

132. There are those who hold an opposing view of an open court system. Max Radin, the American scholar, has argued that we indulge ourselves in the illusion that the public attends criminal trials to get:

> valuable and salutary lessons from the proceedings. Rather, he states, our educational experience has taught us that neither men nor women nor children learn anything in which they are not interested, and there is not the slightest reason to suppose that the audience in a sensational trial leaves the courtroom with anything but the recollection of a thrill. In his view, the state is under no duty to provide a small selection of curious seekers for excitement with a theatrical performance. There is in the last analysis no more reason for the public trial as it is currently conceived than there is for a public execution.

Linden, *supra* note 125, at 302 n.14 (paraphrasing Radin, *supra* note 36, at 393-94).

judicial functions of the government, it is in a position to affect change in those areas. Proceedings must be open in order for the public to articulate dissatisfaction and proposals for reform.[133] Consider the open U.S. Senate hearings regarding the Supreme Court nomination of Clarence Thomas. Americans had first-hand exposure to the difficulties Anita Hill faced in challenging Thomas' nomination. This provided a forum for open debate and criticism of the Senate hearings and possible reform measures. If phases of these hearings had been closed or information censored, the public would no longer have the ability to judge the functioning of the system and call for effective change.

There are persuasive public interest arguments for allowing media coverage of judicial proceedings. Yet, a study of Canadian case law demonstrates that public interest has been of little importance in decisions restricting publicity of court proceedings. An understanding of the societal interests which publicity fosters suggests a resolution of the free expression-fair trial conflict. Societal interests tip the balance in favor of unrestrained publicity which ought not to be sacrificed unless there is an inescapable threat of prejudice which cannot be alleviated by other measures.

One exception to this concept of openness is pre-trial hearings. The evidence gained at pre-trial proceedings is often inflammatory, and dissemination of this information can prejudice potential jurors.[134] Testimony given at bail or change of venue proceedings may not be admissible at trial, yet prospective jurors may not be able to erase its damning effect from their minds.[135] Even the citizens of the United States, who staunchly and jealously guard their free expression rights, have no right to attend pre-trial hearings.[136]

B. *Publication Bans Are Contradictory To The Principles Of The Charter*

Publication bans offend the Charter principle of free expression. Constitutionally, there should be a showing of incurable prejudice to the fairness of an accused's trial before a prior restraint is imposed. In the precedent setting wake of *Dagenais,* courts must consider alternative and less restrictive measures than a publication ban to resolve the problem of fairness

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133. Cameron, *supra* note 23, at 340.

134. The United States, despite staunch protection of free expression, does not allow media reports regarding pre-trial proceedings. *See* Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

135. Cameron, *supra* note 23, at 339 n.42 (citing Terrence P. Goggin and George M. Hanover, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform*, 38 S. CAL. L. REV. 672 (1965)).

136. Gannett Co. v. DePasquale, 443 U.S. 368, 378-79 (1979).

to the accused.[137] These alternative measures can be extremely effective and are justified by Charter principles.

The *Bernardo* opinion suggests an inability on the part of the judiciary to understand sacrificing possible prejudice to the accused in favor of free expression. The *Bernardo* court relied upon common-law inherent jurisdiction of the court to impose publication bans. Three reasons were offered as rationales for invoking this inherent jurisdiction. First, the right of an accused is paramount to free expression. Second, the publication ban was a minimal infringement on free expression, and lastly, it was temporary to be lifted upon the commencement of Bernardo's trial. Each of these rationales can be eliminated in considering the proper balance of Charter principles.

The first argument is dismantled once one gains an understanding that Charter freedoms are not hierarchal.[138] Both the freedom of expression and the right to a fair trial serve important functions in a democratic society, but neither is paramount. Rather, they co-exist equally; a balance must be struck between the two when conflicts occur. The second argument seems to disregard the fact that the press has to function as "the surrogate for the public"[139] in evaluating the criminal justice system. The value of an open judiciary entails media coverage of the events as they occur. Publication bans are a form of censorship that completely disregard the value of openness. As Justice Brennan stated: "discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors . . . . Judges are not to abrogate the First Amendment rights of journalists . . . . [T]he decision of what, where and how to publish is for editors, not judges."[140] Because "a trial is a public event," what "transpires in the courtroom is public property" and "[t]hose who see and hear what transpired can report it with impunity."[141] Censorship in the form of publication bans should invite suspicion.

The third argument does not take adequate account of the damage inflicted by publication bans. Timing is critical to the public's evaluation of criminal proceedings. Providing that at some future date the public will learn of what went on at trial does little to quell the public hostility or prevent potential abuses. Publication bans fall upon speech "with a brutality

137. Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) 12 (S.C.C.).

138. *Id.* at 21.

139. Cameron, *supra* note 23, at 345 n.64 (quoting *Richmond Newspapers*, 448 U.S. at 573).

140. *Nebraska Press*, 427 U.S. at 573.

141. Cameron, *supra* note 23, at 346 n.66 (quoting Craig v. Harney, 331 U.S. 367, 371 (1947)).

and finality all their own . . . . Even if they are ultimately lifted they cause irremediable losses—a loss in the immediacy, the impact, of the speech."[142]

C. *Publication Bans Are Unenforceable*

Publication bans do not work. Whatever the merits of protecting an accused from prejudicial publicity, issuing a publication ban is not the way to achieve that end. There has been a media explosion in recent years. This explosion has been facilitated by increased use of information networks—computer and fax machines that do not recognize borders. Canadians, barred from passing pieces of paper to one another in the real world, shifted to the virtual world to learn information of the Homolka case. The police attempted in vain to shut down discussions of the case which were occurring on the Internet.[143] This proved impossible because Canadians served most of these discussions through computers in Finland or the United States.[144] A computer FAQ regarding the case read: "It's working. The public is finding out, bit by bit, the real story of the Homolka trial . . . . Whenever this FAQ is faxed, e-mailed or printed up and passed around, it demonstrates the ineffectiveness of gag orders as well as futility of enforcement."[145]

D. *Publication Bans Sensationalize A Case Beyond Reasonable Proportions*

The ban proved to generate further interest in an already sensational case.[146] By halting discussion of the case, the courts fanned the flames of conjecture. The ban facilitated rumors and encouraged people to dredge up increasingly "bizarre scenarios from their own subconscious."[147] Because it

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142. Cameron, *supra* note 23, at 346 n.68 (quoting A. BICKEL, THE MORALITY OF CONSENT 75 (1975)).

143. FAQ, *supra* note 3, at 2.

144. Rayner, *supra* note 1, at 39.

145. FAQ, supra note 3, at 2.

146. The "Barbie and Ken" murders were turned into symbols of depravity seeping out of the Canadian suburbs. Examples include a gallery in Toronto which exhibited photographs, entitled "Karla's Playpen," of the house where the murders occurred. There were also the Killer Karla Comics, which were detailed graphic representations of the alleged events of the case, sewn through with a grim strain of humor. Further, a rock group called The Banned self-released a cassette entitled "Karla and Paul." Rayner, *supra* note 1, at 39.

147. *Id.*

> Together Homolka and Bernardo have become the murderous Barbie and Ken, freakish cartoon characters who carried out crimes that are the very stuff of suburban nightmare. By trying to halt discussion of the case, the courts only managed to fan the flames of conjecture, encouraging people to dredge ever more bizarre scenarios from their own subconcious. It was an orgy of speculation . . . .

Id.

was illegal to publish details surrounding the *Bernardo* trial, fact and rumor became inseparable. People will be holding on to the truths of false rumors long after the facts of this case are revealed.

E. *Other Procedural Mechanisms Effectively Protect Fair Trial Interests*

Procedural mechanisms that exist can be invoked to guard against unfairness to the accused. These procedures are not absolute insurance that fair trial rights will be protected but are preferred because they are less intrusive upon a fundamental right. The Canadian judiciary has argued that publication bans are necessary to ensure that the accused is not "convicted" of his or her crime by the media.

However, consider the following examples from the United States judiciary. The jurors who acquitted four Los Angeles policemen did so despite the repeated television airing of a tape showing the accused officers kicking and beating a defenseless Rodney King. The massive pre-trial publicity in the cases of Lorena and John Bobbit—he for marital rape, and she for malicious wounding—did not prevent juries from letting them go. Finally, the extensive damning publicity prior to the sequestration of the Simpson jurors did not prevent them from reaching an acquittal. Employing any or a combination of the following procedures served to mitigate prejudice in these examples. No procedural mechanism is an absolute guarantee against exposure of jurors to publicity, yet these individuals were acquitted despite rampant media coverage of the accused's alleged crimes.

Postponement of a highly sensational case, such as *Bernardo*, is not an adequate solution. This mechanism encroaches upon the accused's right "to be tried within a reasonable time."[148] Further, if the case is of great interest to the public, delay may actually increase the anticipation of the actual trial.[149] In theory, it is possible to carefully question and select jurors in such a way as to remove those who have been prejudiced by publicity. This practice can be effective, but is not necessarily beneficial to the judicial process. The "absence from the jury of individuals who read daily newspapers and keep abreast of newsworthy developments is simply not the best of all possible worlds."[150] The need for sophisticated jurors is particularly crucial in complex criminal trials which require understanding of technical evidence and expert testimony.[151]

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148. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(b).

149. *See* Sheppard v. Maxwell, 384 U.S. 333, 354-55 (1966) (preliminary inquest ended in brawl; "bedlam reigned at the courthouse" three months later at trial).

150. U.S. v. Simon, 664 F.Supp. 780, 793 (S.D.N.Y. 1987).

151. *See* Ruth Marcus, *The Arduous Search for a Jury of North's Peers,* WASH. POST, Feb. 21, 1989, at A9, col. 1 (noting the difficulty in the complex Oliver North criminal trial

Conducting a voir dire on a large pool of potential jurors may be a solution in certain cases. Although, in a highly publicized criminal trial, this remedy will probably not be successful. In cases of intense public interest, a larger jury pool will result in a pool consisting of a larger number of people who have been exposed to prejudicial publicity.[152] Jury sequestration, although effective, is a drastic remedy. Sequestration forces jurors to bear the burden of compensating for the highly publicized acts of the accused. Long periods of sequestration can lead to juror resentment of the accused; therefore, causing juror bias. However, this alternative is effective in long-running trials where the opportunity for potential bias is increased with each passing day. In a highly publicized criminal case, juror instructions can be effective but should not be relied upon as the sole deterrent of possible prejudice. When the nature of the crimes committed is especially horrific, instructions advising jurors to disregard those issues may actually serve to highlight those very issues.[153]

A gag order on trial participants is an effective alternative to a publication ban on the media. This type of order would prevent trial participants from making statements to the news media which would endanger the fair trial rights of the accused. This type of order should be employed in highly sensationalized cases where there is a reasonable danger of prejudice. A gag order does not affect the free expression of the media, but it does affect the expressive rights of trial participants. Hence, it should be instituted with a degree of caution. However, this sort of order does not directly impact upon the media who are not restricted from covering courtroom events or matters of public record. Therefore, the infringement on free expression is less expansive. A gag order on trial participants would have been an effective alternative in the *Bernardo* case. The public would have been allowed access to the events of the trial through news reports based on public information. Under this sort of order, the public can rest assured that the proper balance has been struck between free expression and the right of an accused to a fair trial.

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of finding a jury that would be unbiased but also able to render a verdict).

152. *See* Mary McGrory, *Barry, Beliefs, and Biases*, WASH. POST, June 7, 1990, at A2, col. 5 (observing the difficulty of finding a jury pool in the District of Columbia consisting of persons who had not been exposed to publicity concerning the mayor of the district).

153. One commentator has remarked that this problem is similar to asking a person not to think about elephants: inevitably elephants will come to mind. P. ROTHSTEIN, EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES 31 (1986). *See also* Don Colburn, *The Jury That Knew Too Much: Jurors Are Sometimes Asked to Disregard Things They Know—But Can They?* WASH. POST, Apr. 12, 1988, at Z7, col. 1.

IV. CONCLUSION

Freedom of expression is the cornerstone of individual liberty and of a free society. Publication bans restrict that freedom in a manner that is unreasonable. Neither freedom of expression nor the fair trial rights of an accused can take precedence over the other. A balance must be struck between the two when they conflict. Publication bans are not the way to create that balance. Publication bans are tantamount to censorship and should only be employed when there is a clear and present danger that a prejudicial effect on the trial is inevitable. Free expression regarding criminal trials is beneficial to the interests of society, government, and the accused. While the right of an accused to a fair trial should not be dismissed, there are other means to obtain this objective. Freedom of expression is the lifeblood of democracy, and publication bans effectively usurp that life-giving power.

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THE CANADIAN-SPANISH FISHING DISPUTE: A TEMPLATE FOR ASSESSING THE INADEQUACIES OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND A CLARION CALL FOR RATIFICATION OF THE NEW FISH STOCK TREATY

INTRODUCTION

In March of 1995, two nations, not usually known for their belligerent activities, faced off in the icy waters of the North Atlantic. In these waters, a Canadian flagged vessel fired on a Spanish ship some 225 miles off the coast of Newfoundland. The source of the controversy was neither a rich, newly discovered petroleum reserve nor the treasure trove of a sunken Spanish galleon. Rather, it was a slimy fish known as the Greenland halibut, or turbot, which is used primarily to make frozen fish sticks.[1]

This note will examine the dispute as a template through which the 1982 United Nations Convention on the Law of the Sea[2] (UNCLOS) can be assessed. Since UNCLOS has no enforcement regime for the high seas[3] fishing rights it affirms and the new reciprocal duties it enunciates, the Canadian-Spanish fishing dispute of March 1995 can be viewed as a natural result of this inadequacy in UNCLOS. Consequently, the dispute between these two usually peaceful nations should serve as a clarion call for ratification of the new Fish Stock Treaty.[4]

The note will begin by discussing the general framework which UNCLOS provides for high seas and straddling stock fisheries.[5] Part of this discussion will trace the historical roots of the exclusive economic zones (EEZ's) established by the convention. It will then recall the critical state of the economy in the Canadian maritime provinces and argue that the depressed economy there, coupled with the shortcomings of UNCLOS, created a situation that was ripe for the eruption of the Canadian-Spanish dispute. The note will then apply and analyze UNCLOS to the unique

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1. Craig Turner, *Canada-Europe Flap Over Atlantic Fish Intensifies Environment*, L.A. TIMES, Mar. 15, 1995, *available in* WESTLAW, 1995 WL 2025121.

2. *U.N. Convention on the Law of the Sea*, Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter *UNCLOS* or the convention].

3. For purposes of this note, the terms *high sea(s)* and *international waters* should be considered synonymous.

4. *Agreement for the Implementation of the Provisions of the U. N. Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF.164/37 (1995) [hereinafter *Fish Stock Treaty*].

5. Straddling stocks refer to those species of fish that inhabit regions that transcend international boundaries—particularly the exclusive economic zones.

situation in the Grand Banks.[6] It will discuss possible Canadian and Spanish arguments that could be made under the regime and argue that neither the EEZ's established by the convention and customary international law nor the International Court of Justice's decision in the Fisheries Jurisdiction Case, *United Kingdom v. Iceland*[7] provide adequate administration for straddling stock fisheries. It will conclude with a brief overview of the Fish Stock Treaty and use the Canadian-Spanish dispute as an argument for its ratification.

I. THE FRAMEWORK ESTABLISHED BY UNCLOS

UNCLOS, in its very broadest sense, represents a shift toward increased nation state control over the high seas.[8] In fact, this debate over who, if anyone, should control the high seas has been waged for hundreds of years. Two primary schools of thought exist: those who believe the high seas should be free from the control of any state (*mare liberum*) and those who have argued for nation state control over the high seas (*mare clausum*).[9]

The idea of *mare clausum* probably dates back to the Renaissance.[10] In its various forms, it has stood for the proposition that a nation state can exercise sovereignty and assert jurisdiction over the high seas. UNCLOS incorporates this notion through the establishment of territorial seas and exclusive economic zones.[11] Through these two concepts, coastal nations enjoy sovereign rights (though admittedly limited sovereign rights in the EEZ's) up to 200 miles beyond their coastal baselines. This represents a significant increase in nation state sovereignty over the world's oceans when compared to the previous territorial sea limit of three miles.

However, UNCLOS also attempts to incorporate the idea of *mare liberum* through the recognition in Article 116 of the right of all states "to engage in fishing on the high seas."[12] This right, though, is specifically limited by reference to Article 63[13] and a duty imposed by Article 117 "to

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6. The Grand Banks of Newfoundland, once one of the world's richest fisheries, is an extension of the continental shelf that extends over 200 miles from the coast. The two portions of the Grand Bank that extend beyond the 200 miles are known as *the Nose and Tail of the Grand Bank*. The importance of this is that a habitat, capable of supporting exploitable fishing stocks, exists in international waters, though the fish may have originated within Canada's exclusive economic zone or vice versa.

7. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).

8. *See* 1 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 552-53 (I.A. Shearer ed., 1982).

9. *Id.* at 1-10.

10. *Id.* at 3.

11. *See generally, UNCLOS*, *supra* note 2, arts. 2-3 and arts. 56-58.

12. *Id.* art. 116.

13. *Id.* art. 63.

cooperate with other states . . . in the conservation of living marine resources."[14] On balance then, while UNCLOS does pay some respect to the idea of *mare liberum*, its provisions in fact lead to increased coastal state control over the high seas along with a new duty of cooperation with other states in the exploitation and conservation of marine resources. Thus, not only does UNCLOS allow for increased sovereignty in geographic terms, it also restricts freedom of fishing in those areas that are still recognized as international in nature.

In addition to these rather specific provisions, Article 300[15] imposes a general duty on all signatory states to exercise in good faith the duties, rights, and jurisdiction granted in UNCLOS. Therefore, nation states always have recourse to a good faith argument when it would appear that the black letter of the convention has been violated.

But, what are the actual effects of these provisions? In other words, what rights and duties arise under the UNCLOS provisions establishing territorial seas and EEZ's? The concept of sovereignty is one construct through which the three regimes of control over the world's oceans can be understood. Sovereignty, of course, implies control, and with it comes jurisdiction to prescribe rules of law and enforcement measures for those rules.

The first regime of control established by UNCLOS is the territorial sea,[16] a concept not new to international law. Under UNCLOS, the concept is reaffirmed and its width is extended to twelve miles.[17] UNCLOS places the territorial seas under the direct control of the coastal state and makes them subject to a similar degree of sovereignty as that exercised by the coastal state on its land areas.

Another regime also recognized by UNCLOS and not new to international law is the high seas. This area is beyond the sovereignty of any state,[18] and all nations, whether coastal or landlocked, enjoy access to them and freedom of peaceful navigation upon them.[19] It comprises the vast majority of the world's oceans, being those waters more than 200 miles from the coastal baselines. However, as alluded to above, the concept is somewhat grayed by the provisions concerning straddling stock fishing.

The final regime established by UNCLOS, however, is new to international law. While recognized by customary international law since its

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14. *Id.* art. 117.

15. *Id.* art. 300.

16. *See generally id.* arts. 2-32 (general provisions for the territorial sea and contiguous zones).

17. *Id.* art. 3.

18. *See id.* arts. 87, 89.

19. *Id.* arts. 87-88, 90.

widespread adoption in the late 1970's,[20] its rules and the parameters of sovereignty that may be exercised by a coastal state in it are codified by UNCLOS. Extending 200 miles beyond the coastal baseline, the EEZ is very much tied to the convention. The sovereignty exercised by a coastal state in the EEZ is expressed by UNCLOS as "sovereign rights for the purpose of exploring and exploiting . . . natural [marine] resources, . . . living or non-living."[21] A degree of sovereignty nonetheless exists since in regard to the natural resources, a coastal state is recognized as having jurisdiction to prescribe laws pertaining to, *inter alia*, "the protection and preservation of the marine environment."[22]

UNCLOS then has led to an immense increase in coastal state control over the world's oceans. Before UNCLOS, coastal states exercised jurisdiction three miles from their shores. Jurisdiction, albeit for limited purposes, now extends out 200 miles. Surely, this represents an erosion of the concept of *mare liberum*, especially since the extended jurisdiction is accompanied by implied coastal state control of at least part of the high seas beyond the 200 mile limit.

II. THE BACKGROUND TO THE CANADIAN-SPANISH DISPUTE

A. *Spain and the Northwest Atlantic*

> *With a blacksmith do not wed;*
> *so much washing will there be!*
> *Marry a seaman, a sailor, instead;*
> *he comes home laundered from the sea!*[23]

As this rhyme suggests, the tie between the coastal villages of Spain and the sea is strong and indeed long standing. It was, after all, from Spain that Columbus set out on the first of his voyages that has forever changed the course of history for good or for ill. And, it was the defeat of a Spanish fleet in the North Sea in 1588 that set the stage for Great Britain, and eventually the United States, to rise to the status of world powers. Spain, then, is not a stranger to maritime disputes.

But as the poem suggests, the tie between Spain and the sea is much more than a political or economic link; it is also a tie that has shaped if not

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20. O'CONNELL, *supra* note 8, at 570. Great Britain, however, argued as late as 1977 that this was not the case. *Id. See also* WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES 1 (1994).

21. UNCLOS, *supra* note 2, art. 56(1)(a).

22. *See id.* art. 56(1)(b)(iii).

23. WILLIAM W. WARNER, DISTANT WATER: THE FATE OF THE NORTH ATLANTIC FISHERMAN 112 (1983) (Spanish seafaring rhyme).

dictated a culture of Spanish coastal peoples for hundreds of years. This tie is not merely to the sea in general, but to the Grand Banks itself. Spaniards who rely on the sea (and in particular the catches from the Northwest Atlantic) are quick to point out that their ships have been fishing in the area for many more years than Canada has existed as a nation. Soon after the 1497 discovery of the Grand Banks by the English explorer John Cabot, Spanish fishermen began making the annual trek across the North Atlantic—a trek that has continued now for nearly 500 years.[24] Admittedly, this predates the Canadian Confederation by some 350 years.

It was traditionally early to mid-April when the fishermen of Northwest Spain set out from their homes for a summer of distant water fishing. Proceeding first to the North Sea for a brief season of fishing off Norway and Iceland, they arrived on the Grand Banks in mid-May or early June and stayed there some years as late as September or October.[25] There, the catch was salted on board the smaller ships or processed aboard the behemoth factory ships,[26] which could consequently return to Spain earlier. The fishing industry then has not only shaped a culture; it has also shaped a way of life—one that has nearly ceased to exist as a result of chronic overfishing.

Aside from and in addition to the strong cultural ties between Spain and the sea, there is also a strong economic interest at stake for the people of the Spanish coastal villages. Before the establishment of the Canadian EEZ, Spain regularly hauled in over 200,000 tons of fish from the Grand Banks in each year between 1961 and 1972. In fact, in 1968, Spain reported a record catch of 341,000 tons—sixteen percent of Spain's total catch for the year.[27] During the same eleven-year period, frozen-fish production in Spain rose from 4000 tons in 1961 to 500,000 tons in 1972.[28] The ship building industry, as well, experienced similar fantastic growth.[29]

Consequently, the establishment of the Canadian EEZ on January 1, 1977, and the accompanying limits on the annual catch of distant-water fleets had a noticeable impact on the economy of Spain and, particularly, on its coastal villages. For example, in the late 1970's, Canada cut Spain's annual allowable catch from the Grand Banks from 85,000 tons (already about one-fourth of its record catch) to a mere 29,000 tons (not quite one-tenth of its record catch).[30] Now, Canada has excluded all distant water fishing within

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24. Chris Wood, *Who Owns the Sea?*, MACLEAN'S, Mar. 27, 1995, at 14.

25. WARNER, *supra* note 23, at 132-33.

26. For a discussion of the impact of the large factory-like processing ships, see *infra* part II(c).

27. WARNER, *supra* note 23, at 119-20 (a significant figure for operations that took place more than 5000 miles from Spain).

28. *Id.*

29. *Id.*

30. *Id.* at 111.

its EEZ, restricting Spain's fishing rights to the area known as the nose and tail.[31] Like their counterparts in Newfoundland, the coastal villagers of Spain are seeing a culture and an economy die before their eyes.[32]

The Spanish fishermen have responded with defiance to these attempts by Canada to limit what they regard as ancient fishing rights. The Spanish government is openly upset with what it perceives as exceedingly low quotas, and Spanish fishermen have continued to fish in the areas just outside the Canadian EEZ.[33] But, every argument has two sides. Canada, too, has compelling claims to fishing rights on the Grand Banks.

B. *Canada and the Grand Banks*

> "I don't know what I'd be able to do if in five years I can't go fishing . . . . [Y]ou get in your boat, steam up the bay, see whales blowing . . . . Each day has its own beauty."[34]

The Grand Banks have historically been one of the world's richest fisheries containing large stocks of cod, flounder, halibut, herring, and the fish at issue here, turbot. Newfoundland, the Maritime province most intimately tied to the Grand Banks, has relied on them ever since its beginnings as an important economic resource. In fact, fishery related jobs accounted for nearly eighty percent of employment in the maritime provinces as of 1976, with most of these jobs related to offshore, as opposed to inland, fishing.[35] It should be readily apparent from this figure and the aforementioned quote that fishing is as ingrained in the culture of the Canadian Maritime Provinces as it is in the culture of the Spanish coastal villages.

As a consequence, Canadian fishermen are generally protectionist in their outlooks[36] and the federal government—which has primary responsibility for ocean fisheries, though each of the Maritime Provinces has its own fisheries ministry[37]—has responded to this outlook by passing two particularly protectionist measures. Namely, they are the Coastal Fisheries

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31. *Id.* at 314.

32. *See* Bruce Wallace, *Enemies—With Much in Common*, MACLEAN'S, Mar. 27, 1995, at 18.

33. Parzival Copes, *Canadian Fisheries Management Policy: International Dimensions*, *in* CANADIAN OCEANS POLICY 13 (Donald McRae & Gordon Munro eds., 1989).

34. Craig Turner, *Way of Life is Dying Along with Fish in Canada Newfoundland*, L.A. TIMES, Mar. 20, 1995, at A6 (remarks of Robert McCarthy, a Newfoundland fisherman).

35. Barbara Johnson, *Canadian Foreign Policy & Fisheries*, *in* CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 55 (Barbara Johnson & Mark W. Zacher eds., 1977).

36. *Id.* at 54.

37. *Id.*

Protection Act[38] and the Canadian Laws Offshore Application Act,[39] both of which Canada relied upon to seize the Spanish ship at issue.

The original version of the Fisheries Act prohibited fishing by foreign ships within *Canadian* fisheries waters unless authorized by treaty or regulation and authorized protection officers[40] to board any fishing vessel at any time found within Canadian waters.[41] It also gave protection officers the right to arrest offenders without warrant upon probable cause[42] and instituted fines as high as $100,000 for violating the act.[43] Although Canada was not a signatory to UNCLOS, these provisions are quite comparable to the parameters of jurisdiction set forth in the convention.

When considered in an international law context, the amended version of the Fisheries Act has much more drastic consequences.[44] In it, Canadian jurisdiction is extended to include the entire Northwest Atlantic Fisheries Organization (NAFO)[45] regulatory area. Particularly in its amended form, the Fisheries Act gives Canadian officials authority to board fishing vessels of other nations on the high seas, and the Canadian Laws Offshore Application Act reiterates similar sentiments by specifically restricting fishing on the continental shelf.[46]

But with an economy based on a single industry, this kind of an outlook is understandable. Since they were founded in the 1600's, fishing has been the mainstay of the Maritime Provinces' economies.[47] Without diversification, the collapse of the predominate industry can have disastrous effects. For example, since the government banned the fishing of cod in 1991, the unemployment rate in Newfoundland has soared to nineteen percent, leaving nearly one in five Newfoundlanders out of work with 71,600 of the 582,000 residents receiving government assistance.[48] The

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38. Fisheries Act, R.S.C., ch. C-33 (1985) amended by ch. 14, 1994 S.C. 1 (Can.) [hereinafter Fisheries Act].

39. Act of Dec. 17, 1990, ch. 44, 1990 S.C. 847 (Can.).

40. Protection officers are essentially conservation officers or, more colloquially, game wardens.

41. Fisheries Act, *supra* note 38, §§ 3, 7.

42. *Id.* § 8.

43. *Id.* § 18(1).

44. *See* discussion *infra* part IV(a).

45. NAFO is one of the regional authorities mentioned in UNCLOS. Its primary purpose is to determine catch limits for member states within its boundaries. As an international organization, it has jurisdiction for the very limited purpose of proscribing catch limits in international waters. Specifically, for the purposes of this note, the international waters in question lie within the Nose and Tail of the Grand Banks. For a description of this geographic formation, see *supra*, note 6.

46. Act of Dec. 17, 1990, ch. 44, 1990 S.C. 847, § 13 (Can.).

47. *See* Turner, *supra* note 34, at A6.

48. *Id.*

collapse of this single industry was brought about by one problem—overfishing.

C. *Overfishing: The Basis for the Dispute*

If there is a single cause for the dispute that arose between Spain and Canada, it is the problem of chronic overfishing. And so the question arises: If stocks are so depleted, why do the world's fishermen continue to harvest fish in such large numbers? One answer to the question is tied up in economics. In the current legal environment, no individual fisherman or fleet sees any benefit in practicing restraint because the rules drawn-up by the international community are themselves designed to protect the fishing industry's economic interests. For example, the Food and Agricultural Organization (FAO) estimates that the world's fishing fleets generate an estimated $54 billion *loss* per year with much of the loss being met by government subsidies.[49] The Canadian government, for example, continued to subsidize and encourage fishing throughout the 1980's, relying on gross overestimates of the actual fish population.[50] Without market forces to curtail this pillaging of marine resources, many fishing operations continue long after a truly free market would have driven them out of business.[51]

A second answer to the question lies in the sophistication of technology now available to fishermen. Simply put, nature has been unable to keep pace with human technological advances that have made it possible to catch enormous quantities of fish. The most conspicuous of these innovations is the factory trawler. With a processing plant and freezing facilities on board, some of these ships can catch and process 50,000 to 100,000 pounds of fish on a four to five day voyage.[52] In particular, the large freezing capacities allow the ships to stay at sea for an even longer amount of time pursuing stocks that would have to have been abandoned without the refrigeration available for the processed stocks.[53]

In addition to enabling ships to stay at sea for longer periods, the immense refrigeration and storage capacity of these ships also makes it profitable to catch more fish than can be sold fresh. Instead, the surplus stocks can be stored for sale when the particular species would traditionally have been "out of season."[54]

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49. *See The Economics of the Sea*, THE ECONOMIST, Mar. 18, 1995, at 48.

50. Turner, *supra* note 34, at A6.

51. Poly Ghazi et al., *The Rape of the Oceans*, THE GUARDIAN, Apr. 2, 1995, *available in* WESTLAW, 1995 WL 7592550.

52. WARNER, *supra* note 23, at vii-viii, 3.

53. ELLEN HEY, THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES 16 (1989).

54. *Id.* at 17.

Other technological advances have also led to the emergence of chronic overfishing. For example, many of today's fishing trawlers are equipped with sonar that is so sensitive that the very species of fish can be identified by the soundings.[55] Satellite hookups, as well, allow fishermen to track the migration of huge schools of fish—sometimes pinpointing locations to within 100 meters.[56]

Finally, the development of synthetic materials has made it possible to develop much more sturdy nets and artificial bait.[57] All of these developments, along with the "leaky" nature of UNCLOS, have contributed to an environment that brought Canada and Spain to the brink of naval confrontation.

III. THE DISPUTE: CANADA AND SPAIN ON THE BRINK

The dispute between Canada and Spain truly began when NAFO set the quotas for the 1995 turbot catches to 16,300 tons for Canada and 3400 tons for the entire European Union (EU), of which Spain is but one of fifteen other members.[58] While member governments continued to protest, Canadian officials estimated that EU boats had already hauled in 7000 tons by the first two weeks of 1995.[59] Accordingly, Canada, on March 3rd, called for a sixty-day moratorium on all turbot fishing while the conflict was being resolved.[60] After the request was ignored, Brian Tobin, the Canadian Fisheries Minister, announced on March 6th that Canada would seize any vessels found to be fishing for turbot off the east coast.[61] Through all of this, negotiations continued in vain.

Then, relying on the amended Fisheries Act, Tobin took decisive action. On March 7, 1995, a fisheries vessel carrying a team of Royal Canadian Mounted Police approached the Spanish trawler *Estai* just outside Canada's EEZ and attempted to board her.[62] When this first attempt failed, the Spanish ship cut its nets and attempted to flee[63] with other Spanish ships attempting to frustrate the Canadians' efforts to board the *Estai*.[64] A chase ensued as the ships dodged each other for four hours in thick fog and finally ended when the Canadian vessel fired a machine gun blast across the *Estai's*

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55. Wood, *supra* note 24, at 16.
56. *Id.*
57. HEY, *supra* note 53, at 16.
58. John DeMont et al., *Gunboat Diplomacy*, MACLEAN'S, Mar. 20, 1995, at 11.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Turner, *supra* note 1.

bow.[65] At that point, the Spanish surrendered, and the *Estai* was forced off the high seas and into St. John's Harbor in Newfoundland[66] where the captain was arrested and the ship was impounded.[67] Bail for the captain was set at $8000 and a bond was placed on the ship for $500,000.[68]

In short, the situation amounts to this: a Spanish flagged vessel was fired upon and halted by a Canadian warship[69] in international waters, boarded by Canadian officers, and forced to return to a Canadian port. Issues then arise as to whether or not this was a legal act under international law. The remainder of this note will deal with the analysis of this question and the shortcomings of UNCLOS made readily apparent by the passage of the Fisheries Act.

IV. ANALYSIS OF CANADA'S ACT IN AN INTERNATIONAL LAW CONTEXT

A. *Analysis under Canadian Law*

When viewed in the context of existing Canadian Law, the seizure of the Spanish ship was entirely legal. As discussed, the amended version of the Fisheries Act clearly gives Canadian fisheries officers the power to inspect fishing trawlers on the high seas. Specifically, Section 7 states that "[a] protection officer may . . . for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area."[70] Therefore, since the *Estai* was undoubtedly in the NAFO regulatory area, the Canadian vessel had every right under Canadian law to board and inspect her.

Moreover, Section 8.1 specifically grants the authority to disable a vessel if the fishery officers are proceeding to arrest the captain.[71] Consequently, the firing of a shot across the *Estai's* bow was also within the authority granted under the Fisheries Act.

Additionally, Sections 18.1 and 18.1(a) of the amended Fisheries Act deem any offense occurring within the NAFO Regulatory Area to have occurred in Canada if it occurs during the enforcement of the Act.[72] The

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65. DeMont, *supra* note 58, at 11.

66. *Id.*

67. *See* John Demont, *Conflicting Emotions*, MACLEAN'S, Mar. 27, 1995, at 20.

68. *Id.*

69. For a discussion as to whether fisheries vessels qualify as *warships*, see W.J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement*, 1980 CAN. Y.B. INT'L L. 113.

70. Fisheries Act, *supra* note 38, § 7.

71. *Id.* § 8.1.

72. *Id.* §§ 18.1, 18.1(a).

choice of law then—at least as far as the Canadians would be concerned—is undoubtedly Canadian law and as such, it would appear that any charge levied against the captain for resisting arrest would also be possible under this section of the Act.

Finally, Sections 18.2(1) and 18.2(1)(a) provide that, "[e]very power of arrest, entry, search or seizure or other power that could be exercised in Canada . . . may be exercised . . . on board the foreign fishing vessel."[73] In essence, the Act then gives Canada the right to exercise sovereign rights on the high seas and to seize foreign nationals on the high seas.

A question then arises as to whether the amended Fisheries Act itself is legal in an international law context. If the first duty of the sovereign is the protection of the realm and its citizens, protecting the environment would certainly be within the ambit of the sovereign's power. The problem here is that the part of the environment in question, the turbot, was not located in Her Majesty's realm of Canada. To the contrary, the turbot were located on the high seas more than 200 miles from the Canadian coast.

For international law purposes, the question is whether a sovereign can reach beyond its territories into the high seas for the purposes of protecting that sovereign's environment, or more cynically, its economy. Unfortunately, the answer to this question is quite difficult to divine from the various United Nations' Conventions on the Law of the Sea or, more particularly, from the provisions recognized as customary international law regarding the EEZ's.

B. *Analysis under UNCLOS and Previous United Nations Conventions*

Canada has never ratified UNCLOS.[74] However, the provisions set forth in UNCLOS governing EEZ's have been so widely adopted that they are now considered part of customary international law.[75] This section of the note will apply UNCLOS to the Canadian-Spanish dispute and offer the application as examples of the convention's shortcomings.

As previously noted, UNCLOS attempts to advance the cause of competing interests by both affirming and limiting freedom of fishing on the high seas while decidedly favoring increased coastal state sovereignty.[76] Article 87 is the best example in the convention of *mare liberum*; though like the rest of the convention sections dealing with high seas fisheries, it is at once emphatic and ambiguous. Specifically, Article 87 states:

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73. *Id.* §§ 18.2(1), 18.2(1)(a).
74. Wood, *supra* note 24, at 15.
75. BURKE, *supra* note 20, at 40.
76. *See generally* discussion *supra* part I.

> 1. The high seas are open to all States, whether coastal or land-locked . . . . It comprises, *inter alia*, both for coastal and land-locked states . . . (e) freedom of fishing, subject to the conditions laid down in section 2 . . . .
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of freedom of the high seas . . . .[77]

Freedom of fishing on the high seas is plainly affirmed; yet at the same time, fishing states must exercise this freedom with "due regard" to other states. A question then arises as to the meaning of due regard. To Canada, due regard means a moratorium on fishing. However, is the Canadian position one that shows due regard for the rights of Spain to exercise its right to freedom of fishing on the high seas? Here, the ambiguity of UNCLOS is quite clear since there is no accepted definition for due regard or an enforcement regime for compelling states to exercise due regard—whatever the phrase may mean.

The Canadian-Spanish dispute particularly highlights this shortcoming of Article 87 in that a question arises to the actions of both states. Was continued fishing by Spain an exercise of due regard for the rights of Canada? Was the seizure of a Spanish ship on the high seas due regard for the rights of Spain? Neither of these questions can be answered under an UNCLOS analysis.

In fact, other provisions of UNCLOS, when viewed through the Canada-Spain template, simply "muddy" the waters further. Article 89, for example, states, "[n]o state may validly purport to subject any part of the high seas to its sovereignty."[78] Certainly, firing upon and boarding a foreign flagged vessel are acts demonstrating the exercise of sovereignty over that vessel. If Article 89 is then recognized as controlling in the situation, Canada has violated this article by its seizure of the *Estai*. Thus, the same act that appears to be sanctioned by Article 87 is condemned by Article 89.

Another example of this "muddying of the waters" becomes readily apparent when Article 110 is considered. In relevant part, it states:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is

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77. UNCLOS, *supra* note 2, art. 87.
78. *Id.* art. 89.

> engaged in unauthorized broadcasting . . .; (d) the ship is without nationality; or (e) though flying a foreign flag . . . the ship is, in reality, of the same nationality as the warship.[79]

Following the maxim *expressio unius est exclusio alterius*, the laundry list of occasions permitting the boarding of a foreign flagged vessel excludes all other occasions not listed. Since none of the provisions justifying the visit of another ship on the high seas is present in the Canada-Spain dispute, an analysis of the facts in light of Article 110 would then appear to condemn Canada's action as contrary to the treaty and international law.[80]

But, if these factors seem condemnatory of Canada's action, other articles of the convention seem to mitigate the seriousness of Canada's act. For example, Article 63(2) states:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of those stocks in the adjacent area.[81]

This article then implies that the coastal state (in this case Canada) has some kind of right in the area beyond the EEZ when a fish stock exists or migrates between the EEZ and the high seas. And so, the question arises, what is the nature of this right? Is the right tantamount to a sovereign right? If not, is there a kind of geographic gray area where some kind of quasi-sovereignty exists?

At this point, it will be useful to examine more closely the concept of nation state sovereignty in the EEZ context. Since the convention became effective, the meaning of *sovereign rights* as opposed to *sovereignty* has been the subject of intense debate.[82] Traditionally, sovereignty is defined as "[t]he power to do everything in a state without accountability—to make the laws [and] to execute and to apply them."[83] In his comprehensive treatise on the law of the sea, D.P. O'Connell affirmed this traditional definition of

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79. *Id.* art. 110.

80. It should be noted here that Articles 87, 89, and 110 are not in UNCLOS provisions dealing with the exclusive economic zones. However, these provisions are substantially similar (with the exception on the limitation of free fishing on the high seas) to earlier high seas conventions to which Canada and Spain were both parties. *See, e.g.*, Convention on the High Seas, Apr. 29. 1958, arts. 2 & 22, 450 U.N.T.S. 82.

81. UNCLOS, *supra* note 2, art. 63.

82. *See generally* O'CONNELL, *supra* note 8, at 575-78.

83. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

sovereignty when he wrote: "[a] claim to exclusive rights in the sea, however framed on paper, is inherently a claim to dominion, and there is no limit to the extent of the claim short of the exercise of the faculties of sovereignty."[84] If this statement were still valid, the analysis of sovereignty in the UNCLOS context could end here as some degree or kind of sovereignty is granted to the coastal state.

However, sovereignty in the EEZ's is less expansive. Article 56 of UNCLOS provides that:

> 1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil, . . . [and] (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: . . . (iii) the protection and preservation of the marine environment.[85]

Therefore, it is generally recognized that the coastal state may exercise sovereign rights in the EEZ only for the limited purpose of preserving the natural environment.[86] It logically follows then that *sovereign rights* are somehow inferior to complete sovereignty. Thus, it is generally accepted that a coastal state has plenary powers in the EEZ regarding limits on access to and the use of living resources in the zone, and that these rights are within the exclusive prerogative of the coastal state.[87] In addition, the convention itself provides in Article 58(1) that other states enjoy freedom of navigation and other rights generally attributable to the high seas in the EEZ's.[88] Thus, the EEZ's are high seas for all purposes other than for exploring and exploiting the marine environment.

O'Connell suggests that it useful to think of this means of control as a jurisdictional grant as opposed to a grant of sovereign rights.[89] However, he also recognizes a psychological importance in limiting the analogies drawn between high seas and the EEZ since this can lead to rather thorny theoretical debates on the issue of nation state control of the oceans. Recognizing the EEZ as similar to the high seas, according to O'Connell, would mean that there is a definite limit to the jurisdiction a coastal state can exercise while recognizing the EEZ as similar to the territorial sea would mean that there is really no limit as to what jurisdiction a coastal state might

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84. O'CONNELL, *supra* note 8, at 575 (quoting Morin, 1964 CAN. Y.B. INT'L LAW 88).
85. UNCLOS, *supra* note 2, art. 56.
86. BURKE, *supra* note 20, at 39.
87. *Id.*
88. UNCLOS, *supra* note 2, art. 58.
89. O'CONNELL, *supra* note 8, at 576.

claim over the high seas in the future.[90] This all may seem like an academic argument that has no real significance or at least a question of mere semantics.

However, O'Connell makes a salient point. When the Dutch scholar Hugo Grotius first suggested that the width of the territorial sea should be roughly the same distance as that that would be within the range of a canon, the world was a much larger place than it is now. In the early 1600's, there were still vast areas of the globe that were still susceptible to the ever-growing lust for territory exhibited by European states. Africa, for example, would not fall under direct European control for another 200 years, and only small inroads had been made by the Dutch and the British into India. Now, there is little land on the earth's surface left "up for grabs." In fact, the only real area of expansion left, with the possible exception of outer-space which is well beyond the scope of this note, is the world's oceans. When this fact is coupled with the economic consequences of overfishing, it becomes painfully understandable as to why disputes such as the one between Canada and Spain would arise. There is then strong reason for classifying the EEZ as a new and unique type of jurisdiction.

At any rate, perhaps the construct suggested by O'Connell of viewing the control exercised by the coastal state in the EEZ as jurisdictional is a useful one since the use of the term sovereign rights carries with it many of the attributes of sovereignty which simply cannot be imported into the EEZ's. But, whether the control exercised by the coastal state in the EEZ is thought of in jurisdictional or sovereign terms, the control still represents an immense increase in the right of the coastal state. When the widespread recognition of the preferential rights of coastal states in the high seas over the past fifty years is considered, this shift seems entirely reasonable—particularly when the coastal state's economy is tied inextricably to the seas. To the credit of UNCLOS' drafters, the convention is explicit as to these rights. But, as alluded to earlier, such shifts in control are likely to be painful.

However, as this note has consistently noted, the problem with UNCLOS does not lie in its codification of the customary international law relating to the EEZ's or in its reiteration of the traditional rights associated with the high seas. Rather, the major shortcoming of UNCLOS is its attachment of vague duties and restrictions to high seas fishing without suggesting any parameters for these duties, let alone an enforcement regime or a list of appropriate sanctions that may be sought for violation of these duties. The principle example of this shortcoming can be seen in Article 116 which states:

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90. *Id.*

> All states have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2 . . .; and (c) the provisions of this section.[91]

Herein lies the rub, as the language at once suggests—albeit subtly—that there is some kind of right, sovereign or jurisdictional, vested in the coastal state in the high seas. The very language of the article implies such an interpretation when it states "subject to . . . the rights and duties as well as the interest of the coastal State."[92] And so the questions remain: Are the rights of the coastal states in the high seas adjacent to their EEZ's the same or similar to their rights in the EEZ's, and can a coastal state force a foreign flagged vessel off the high seas as Canada did? A hint, and only a hint, at the answer to these unresolved questions may lay in the Fisheries Jurisdiction Case.[93]

C. *Analysis under the Fisheries Jurisdiction Case*

The facts in the Fisheries Jurisdiction case are strikingly similar to those that underlie the dispute between Canada and Spain. In 1948, the Icelandic Parliament enacted a law which allowed the fisheries ministry to exert jurisdiction over Iceland's continental shelf for the limited purpose of conserving fishery stocks.[94] As a rationale for the law, the government of Iceland explained:

> It is well known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coast. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it is today, the question appeared in a different light . . . . It seems obvious, however, that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.[95]

The United Kingdom, which had enjoyed access to these previously international fishing grounds, protested this measure and entered into negotiations with Iceland culminating in the 1958 Geneva Convention on the

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91. UNCLOS, *supra* note 2, art. 116.
92. *Id.*
93. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).
94. *Id.* at 10.
95. *Id.*

Law of the Sea.[96] However, when this Convention failed to resolve the differences between the two nations, Iceland unilaterally announced the existence of a twelve mile exclusive fishery zone; the United Kingdom protested this measure and a second conference on the law of the sea was convened in 1960.[97] Meanwhile, a series of "cod wars" had occurred between the two nations involving minor skirmishes between Icelandic patrol boats, British trawlers, and the Royal Navy.[98] As a consequence, Iceland and the United Kingdom exchanged a series of notes which permitted the United Kingdom to fish in the outer six miles of this zone, at the same time subjected the U.K. to certain catch limitations, and recognized Iceland as having preferential rights in fish stocks found outside the twelve mile limit.[99] The controversy then subsided for a decade until Iceland issued a new edict in July of 1971 terminating the agreement with Great Britain and proclaiming the existence of a fifty mile exclusive fishery zone around Iceland.[100]

The United Kingdom protested this unilateral move by Iceland as being contrary to international law as it then existed[101] and submitted the case to the International Court of Justice for a final determination.[102] Iceland, however, withdrew its recognition of the court's jurisdiction in the case and took no part in any of the subsequent proceedings.[103]

While some of the issues placed before the court have become moot since the recognition by international law of exclusive economic zones, one of the issues is substantially the same as that presented by the Canada-Spain controversy, i.e., "that . . . [a nation state] is not entitled unilaterally to exclude . . . [another nation state's] fishing vessels from the area of the high seas . . . or unilaterally to impose restrictions on the activities of such vessels in that area."[104] Consequently, the dispute between Canada and Spain can be viewed as a new twist on an old problem: what rights does a coastal state have in the adjacent waters beyond its jurisdiction?

The World Court failed to give any concrete answers to this question in rendering its decision in the Fisheries Jurisdiction Case, mainly because a third international conference on the law of the sea (UNCLOS) was in its initial stages and the court wished to avoid, "anticipat[ing] the law before the legislator [had] laid it down."[105] Nevertheless, the court did state some useful

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96. *Id.* at 11.

97. *Id.* at 12-13.

98. Roger A. Briney, *The Icelandic Fisheries Dispute: A Decision is Finally Rendered*, 5 GA. J. INT'L & COMP. L. 248, 249 (1975).

99. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 13 (Judgment of July 25).

100. *Id.* at 13-14.

101. *Id.* at 15.

102. *Id.*

103. *Id.* at 8.

104. *Id.* at 7.

105. *Id.* at 23-24.

propositions in rendering what was in every respect a final judgment on the merits. Moreover, since it has been demonstrated by this note that UNCLOS fails miserably to provide concrete parameters that nation states can follow in high seas waters adjacent to EEZ's, any pronouncements that the court made on the nature of these waters and the rights of coastal and foreign states is of paramount importance in the resolution of the dispute between Canada and Spain and similar disputes.

First, the court recognized the international practice of according coastal states a preferential right in the living marine resources in the high seas adjacent to its coastal waters—especially when that nation is "in a situation of special dependence on coastal fisheries."[106] The court, however, refined this right further by declaring that

> [t]he preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources, to preserve the fish stocks in the interest of their rational and economic exploitation.[107]

The interest of the coastal state in its adjacent high seas is not then a natural extension of its rights by virtue of its geographic location. Rather, there must be some "economic" or "rational" need for the coastal state to declare the existence of a right in adjacent high seas. As such, the coastal state can make no claim that the right is inherent in its sovereignty. In other words, it arises; it is not innate.[108]

More importantly, the court held that "[t]he concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, *unilaterally and according to its own uncontrolled discretion*, to determine the extent of those rights."[109] The court then went on to hold that this was particularly true in a situation in which the foreign state had an historic interest in the fishery;[110] as a consequence, Iceland had no right under international law to exclude the United Kingdom, wholesale, from its high seas fisheries.

Like the action of Iceland unilaterally attempting to exclude British vessels from the high seas adjacent to its coastal waters, Canada's act would

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106. *Id.* at 24.

107. *Id.* at 27.

108. This raises an interesting question as to whether or not the right would be extinguished if the economic or rational need ceased to exist. However, the current ecological condition of the Grand Banks will preclude such a situation indefinitely.

109. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 27 (Judgment of July 25) (emphasis added).

110. *Id.* at 28.

be an attempt to accomplish the same ends. Canada's parliament passed the Amended Fisheries Act on its own accord and under its own "uncontrolled discretion." If the decision of the World Court has any precedential value, it must follow that Canada's unilateral act is similarly invalid.

However, the court also held that:

> Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States.[111]

The court, in essence, instituted a balancing test for disputes between coastal and distant water fishing states backsliding on the apparently absolute language enunciated earlier. From this, it can be argued that at least three factors must be considered when pronouncing judgments in these matters: 1) conservation; 2) dependence of the coastal state on the fishery; and 3) the historic interest of the distant water state.

In the dispute between Canada and Spain, the first factor, conservation, is almost a given. As previously discussed, the Grand Banks have been almost totally depleted by both Canada and distant water fishing states. The numbers of cod, for example, once one of the most prevalent of species in the Grand Banks, have dropped ninety-nine percent from previous levels with haddock catches plummeting eighty percent.[112] Clearly, there is an interest in conserving the already woefully overfished stocks of the Grand Banks.

The second factor of coastal state dependence on the fishery is less clear, however, and might be a source for concern in regard to Canada's case. Specifically, as the world's second largest nation, Canada has been blessed with far more natural resources than the volcanic island of Iceland. Granted, much of this territory is either heavily forested or arctic tundra, but the fact still exists that the Canadian prairie provinces comprise part of the earth's richest farmland. And, there is a ribbon of heavy industry that cuts across Canada's southern border from Quebec to western Ontario as well as along the southwestern coast of British Columbia. As aptly demonstrated above, the maritime provinces are certainly dependent at present on the fishing industry for their economic existence. However, with the sovereign power vested in the federal as opposed to the provincial governments for the

111. *Id.* at 31.

112. Wood, *supra* note 24, at 16.

purposes of delineating international boundaries, an important factual question exists as to the impact of distant water fishing upon the Canadian economy as a whole. There are then striking differences between the Canadian and Icelandic economies and the ramifications on them which are a result of distant water fishing.

The third factor, the historic interest of the distant water fishing state in the economy, is a bit clearer though. Spain, in this instance, has certainly demonstrated an historic interest in the Grand Banks' fisheries. And, when Spain's economic interest is considered, it is clearly safe to believe that this third factor of consideration would be met.

However, nothing in the Fisheries Jurisdiction case conclusively resolves the underlying issue in the Canadian-Spanish dispute. The inescapable conclusion of all of this is that international law has simply not evolved a mechanism or scheme of governance for the areas of the high seas adjacent to the exclusive economic zones.

V. CONCLUSION — CHANGES TO UNCLOS AND THE LAW OF THE SEA AS A RESULT OF THE FISH STOCK TREATY: A STEP TOWARDS A WORKABLE ADMINISTRATIVE REGIME

The overriding theme of this note has been that neither UNCLOS nor the Fisheries Jurisdiction Case provide an adequate framework on which governance of high seas straddling stock fisheries can be based. While speaking of reciprocal rights and duties, neither UNCLOS nor the Fisheries Jurisdiction Case adequately describe these duties let alone provide effective enforcement regimes. Canada's unilateral act was a natural result of the inadequacies of these regimes. The Canadian government simply took steps to fill a vacuum of authority.

But, regardless of the effectiveness of the Fisheries Protection Act, the fact still remains that one sovereign acted unilaterally to restrict the rights of another sovereign in an area of the world traditionally recognized as having no sovereign. As the International Court of Justice stated in an earlier fisheries case, "[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."[113] Recognizing the continued validity of this holding,[114] the world's fishing states have finally addressed this issue through amendment to UNCLOS.

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113. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 22 (Judgment of July 25) (quoting Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, 132) (holding that in certain instances a state with a heavily indented coast could draw straight coastal baselines).

114. *See Fish Stock Treaty*, *supra* note 4, art. 8(1)-(2).

Concluded in December of 1995, the Fish Stock Treaty makes significant strides in closing the gaps in the law of the sea that were created by UNCLOS. Unlike Canada's Fisheries Act where primary enforcement responsibility remains with the coastal state, primary responsibility for the preservation of straddling stock fisheries in the Fish Stock Treaty is placed on the nation state whose flag is flown by any fishing vessels that may be engaged in illegal fishing.[115] Only when a so-called "flag state" is negligent in its duty of investigating violations may a coastal state take primary responsibility for investigation.[116] However, a coastal state may board a vessel fishing in a protected straddling stock fishery for the purposes of inspection.[117] Reasonable force may also be used by a coastal state in detaining a vessel for inspection.[118] In addition, the regional fishing authority (in this case NAFO) is given increased regulatory and enforcement power under the Treaty.[119] Finally, the Fish Stock Treaty imposes a duty of cooperation and conservation on all states exploiting the straddling stock fishery.[120]

From just these few provisions, the severity of the Canadian-Spanish dispute would probably have been significantly lessened if the Fish Stock Treaty had been in force in early 1995. Rather than relying on a domestic act of Parliament, Canada could have relied on this treaty to board and inspect the *Estai*, and if Spain had proven recalcitrant in investigating the ship's activities, Canada still could have pursued the matter. In sum, this treaty could have prevented this bitter and at times hostile dispute had it been in effect at the time of the incident.

In the end, the Canadian-Spanish fishing dispute of 1995, or the Turbot War, should serve as more than an interesting side note in the annals of either state's foreign relations. Instead, it should serve as an example of how vague and incomplete international agreements can precipitate conflict in

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115. *Id.* arts. 18-19, 20(6).

116. *See id.* art. 21(8).

117. *Id.* art. 21(1).

118. *Id.* art. 22(1)(f).

119. Mark Christopherson, *Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species*, 5 MINN. J. GLOBAL TRADE 357, 373-74 (1996).

120. *Fish Stock Treaty*, *supra* note 4, art. 8.

sensitive areas. It can also serve as a clarion call for why the Fish Stock Treaty should be ratified by the nations of the world. For without it, fishing nations will be left to their own devices in the conservation of marine resources and the conflicting commands of a partly flawed convention on the law of the sea.

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* J.D. candidate, 1997, Indiana University School of Law - Indianapolis; B.S., *summa cum laude*, 1993, Indiana State University. This note is dedicated to my mother, Rosemary Shavloske, whose love and support made the note possible. I would also like to thank my partner, Joel Miller, for his perseverance and comments throughout the note's composition and editing.