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THE UNITED STATES AND CANADIAN RESPONSES TO THE FEMINIST ATTACK ON PORNOGRAPHY: A PERSPECTIVE FROM THE HISTORY OF OBSCENITY

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In April 1984, the city of Indianapolis enacted an ordinance prohibiting the distribution of pornography.[1] The ordinance, following the theories of Catharine MacKinnon and Andrea Dworkin, went beyond addressing materials considered legally obscene. The ordinance targeted matter that combined sexually explicit images with depictions of women as enjoying pain, assault, humiliation or certain other forms of degradation.

The ordinance had a rather short life. The Association of American Booksellers, the Association of American Publishers, a local video rental store, a resident of Indianapolis, and other plaintiffs challenged its constitutionality. In November 1984, the federal district court held it unconstitutional.[2] This position was affirmed by the United States Court of Appeals for the Seventh Circuit in August 1985 in a case titled *American Booksellers Association v. Hudnut*.[3] The Supreme Court of the United States affirmed without issuing an opinion.[4]

While the ordinance may have been short-lived, the scholarly controversy it engendered has had a much longer life. There have been articles in a feminist-legal-theory vein supporting efforts similar to those in Indianapolis,[5] and there has been work using a feminist perspective to argue against such ordinances.[6] There has been scholarship employing First Amendment theory to criticize the MacKinnon-Dworkin approach.[7] There

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1. For a discussion of the ordinance, see *infra* notes 18-53 and accompanying text. In addition to distribution, the ordinance prohibited coercing anyone into a pornographic performance and forcing pornography on a person. A cause of action for injuries resulting from pornography was also included.

2. *See* American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

3. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

4. 475 U.S. 1001 (1986).

5. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Patricia G. Barnes, *A Pragmatic Compromise in the Pornography Debate*, 1 TEMP. POL. & CIV. RTS. L. REV. 117 (1992). *See also infra* notes 28-36 and accompanying text.

6. *See infra* notes 37-41 and accompanying text.

7. *See, e.g.*, C. Edwin Baker, *Of Course, More than Words*, 61 U. CHI. L. REV. 1181 (1994) (reviewing CATHARINE A. MACKINNON, ONLY WORDS (1993)); Dan Greenberg & Thomas H. Tobiason, *The New Legal Puritanism of Catharine MacKinnon*, 54 OHIO ST. L.J. 1375 (1993); Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2

has also been an effort to show that other constitutional provisions justify the infringement of free speech involved in the ordinance.[8] There has even been scholarship that uses First Amendment theory, although different from the approach to be taken here, to support ordinances similar to those in Indianapolis.[9]

Canada also sought to limit the distribution of pornographic material similar to that addressed in Indianapolis, but Canada's attempt met with a different fate in the Canadian courts. The Canadian act addressed material that unduly exploited sex or combined sex with violence, crime, horror or cruelty. That statute was challenged in *The Queen v. Butler,*[10] where its reception was more positive than that which faced the Indianapolis ordinance. The Supreme Court of Canada held that the statute passed the tests of the Canadian Charter of Rights and Freedoms. *Butler* has engendered some scholarly notice as well.[11]

While analyses under the United States Constitution and the Canadian Charter of Rights and Freedoms would proceed along different paths and might well lead to different conclusions, both inquiries may rest on the nature of obscenity.[12] This article will suggest an understanding of obscenity which will reveal that the Canadian approach has a superior historical foundation. With regard to the Indianapolis ordinance, at least some of its aspects (or a similar ordinance addressing some of the goals of the original ordinance and employing different language) ought to be constitutional. The

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WM. & MARY BILL RTS. J. 471 (1993). *See also infra* notes 42-53 and accompanying text.

8. Feminist theory, such as that cited in *supra* note 5, argues that pornography, by devaluing women, denies women a voice in contravention of the ideals of the Equal Protection Clause. This approach has also been taken with respect to speech that affects the ability of minorities to contribute to the political debate. *See generally* MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Robert W. Gordon & Margaret Jane Radin eds.,1993).

9. *See, e.g.*, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986) (arguing that pornography is low-value speech and can be regulated consistent with the First Amendment); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992) (arguing that "abhorrent" speech is not political and is not protected because the influence it exerts is "illegitimate").

10. [1992] 89 D.L.R. 4th 449 (Can.).

11. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1510-11, 1530 (1996); Jeffrey Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 690 (1995); Michael K. Curtis, *"Free Speech" and its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 441-43 (1996).

12. The Canadian statute, by its terms, addressed obscene materials as defined in the statute. *See infra* notes 54-56 and accompanying text. The Indianapolis ordinance addressed pornographic material, which it defined in a manner differing from the United States Supreme Court's definition of obscenity. *See infra* notes 18-25 and accompanying text. It is the major thesis of this article, however, that the material at issue in *Hudnut* comes within the scope of the concept of obscenity.

"ought" used is not used in the sense some feminists might use it in arguing that the Constitution should not be allowed to stand in the way of equality.[13] Instead, the concept of obscenity, properly understood, should provide partial support for the feminists' efforts.

This article begins by examining the Indianapolis ordinance and the legal reaction to it.[14] The Canadian statute is then similarly treated.[15] Attention then turns to a discussion on the concept of obscenity and its legal definition. This article argues that the hallmark distinguishing obscene pornography from nonobscene pornography is the degrading nature of the images involved, particularly as they speak to the position of humanity between the divine and the animal world.[16] The history of pornography and of its legal treatment are best explained by changes in the views of humanity's position rather than by the common suggestion that the changes result from technological growth, the invention of the printing press or the invention of the paperback book. With this reexamined definition of obscenity, the statute and ordinance also may be reexamined, and suggestions are made as to how an Indianapolis-like ordinance could be written to pass constitutional muster.[17]

I. THE INDIANAPOLIS ORDINANCE AND *HUDNUT*

The Indianapolis ordinance at issue in *Hudnut* defined "pornography" as:

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
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> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
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> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or
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> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions

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13. *See* sources cited *supra* note 5.
14. *See infra* notes 18-53 and accompanying text.
15. *See infra* notes 53-82 and accompanying text.
16. *See infra* notes 83-254 and accompanying text.
17. *See infra* notes 255-260 and accompanying text.

sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[18]

While the original ordinance provided a definition of "sexually explicit" as "actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus,"[19] a later amendment left the ordinance with no definition of that phrase.[20]

There were a variety of prohibitions contained in the ordinance. The ordinance declared it illegal to traffic in pornography, to coerce others to perform in pornographic works, or to force pornography on anyone.[21] The ordinance also prohibited assault on or injury to any person "in a way that is directly caused by specific pornography."[22] Furthermore, "anyone injured by someone who . . . saw or read pornography" was provided a cause of action against the producer or distributor of that pornographic work.[23] Any woman aggrieved by trafficking in pornography was granted the right to file a complaint with the Indianapolis equal opportunity office "as a woman acting against the subordination of women."[24] Men who could "prove injury in the same way that a woman is injured" could do the same.[25]

It is clear that the ordinance went beyond addressing only obscene material. Under the test adopted in *Miller v. California*,[26] a finding of obscenity depends on

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[27]

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18. INDIANAPOLIS, IND., CODE § 16-3(q) (1984).

19. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

20. *See id.*

21. *See id.* at 325.

22. INDIANAPOLIS, IND., CODE § 16-3(g)(7) (1984).

23. *Hudnut*, 771 F.2d at 325.

24. INDIANAPOLIS, IND., CODE § 16-17(b) (1984).

25. *Id.*

26. 413 U.S. 15 (1973), *reh'g denied*, 414 U.S. 881 (1973).

27. *Id.* at 24 (quoting Roth v. United States, 304 U.S. 476, 489 (1957)) (citations omitted).

The ordinance made no reference to prurient interests or community standards and addressed particular depictions rather than judging the work as a whole and protecting it if it had serious value. These factors appear not to have been simply overlooked. Supporters of the ordinance maintained that "pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness."[28] Catharine MacKinnon, one of the principal drafters of the ordinance, also argued "if a woman is subjected, why should it matter that the work has other value?"[29]

The feminist attack on pornography, at least as presented in the ordinance, is not directed at the repression of sexual knowledge or sexual freedom. The concern is over the effect certain depictions of sexuality may have on the lives of women.[30] This focus leads to a delineation of the sort of material under attack which differs from that in *Miller*. Feminists are concerned with materials that cause harm to women, and their definition of pornography singles out material that makes the domination or submission of women erotic or degrades women by treating them as objects to be sexually exploited. Thus, under this feminist view, sexual explicitness is not central; a portrayal maintaining the dignity of all the participants is not pornographic, even if it is sexually explicit.[31] For the feminist, it is not sex or the human body that offends; it is the degrading depiction of women.

The concern over pornography is not simply moral or aesthetic. Pornography is seen as causing harm to women.[32] It is both a symptom of sexual inequality and patriarchy, and it is a cause of both. This effect is seen as so pervasive that it defines reality. "[Pornography] institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female . . . . Men treat women as who they see women as being. Pornography constructs who that is."[33]

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28. *Hudnut*, 771 F.2d at 325.

29. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985).

30. *See* Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 23 (1984). *See also* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 9 (1985) ("The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women, *is* what sex is taken to be." (emphasis in original)).

31. *See* Jacobs, *supra* note 30, at 24.

32. *See* Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?,"* 53 OHIO ST. L.J. 1037, 1045 (1992).

33. *Hudnut*, 771 F.2d at 328 n.1 (quoting Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 17 (1985)).

Given this view of pornography's effects on the construction of reality, feminists do not see pornography as solely a moral issue. Rather, feminists see it as a civil rights issue affecting all aspects of women's lives by perpetuating patterns of discrimination. Pornography is seen as trivializing the contributions of women in the workplace and encouraging sexual harassment.[34] The asserted effects go beyond the workplace and affect all aspects of women's lives, suggesting "that women are a lower form of human life defined by their availability for sexual use."[35] Professor MacKinnon concludes that pornography decreases inhibitions on, and increases acceptance of, aggression against women, reduces the desire of both males and females to have female children, and fosters a belief in male domination.[36]

Not all feminists share this view of pornography. Professor Nadine Strossen has offered counter-arguments to those presented by MacKinnon and others.[37] Her arguments are not solely based on First Amendment grounds, but also include arguments she sees as grounded in the principles and concerns of feminism.[38] It is clear that she considers herself a feminist, and she objects to what she calls the "widespread misperception that if you are a feminist — or a woman — you must view 'pornography' as misogynistic and 'detrimental' to women. And you must favor censoring it."[39]

Strossen is not alone in feminist opposition to the MacKinnon-Dworkin thesis. The Feminists Anti-Censorship Taskforce and Feminists for Free Expression have both opposed legislative efforts to enact the sort of censorship advocated in feminist attacks on pornography.[40] Strossen's feminist arguments against censoring pornography include concerns that censorship would affect works that are important to women, particularly to feminists and lesbians and that it would perpetuate stereotypes of women as victims for whom sex is necessarily bad, harming women's efforts to develop their sexuality and strengthening patriarchy.[41] Certainly, MacKinnon has not missed these arguments, but she comes to a different conclusion because of what she sees as the overwhelmingly negative effect of pornography on women.

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34. *See* Jacobs, *supra* note 30, at 19.

35. MacKinnon, *supra* note 5, at 802.

36. *See id.* at 800.

37. *See generally* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993).

38. *See* Strossen, *supra* note 37, at 1103.

39. *Id.* at 1107 (footnotes omitted).

40. *See id.* at 1109-10.

41. *See id.* at 1111-12.

The purpose of this article is not to join the feminist debate over the impact of pornography on the lives of women. Rather, the focus is on the First Amendment and its impact on legislation such as that at issue in *Hudnut*. A good starting point for that issue is the opinion of the *Hudnut* court.

The Seventh Circuit found fault with the Indianapolis ordinance in that the ordinance discriminated on the basis of the content of speech.

> Speech treating women in the approved way — in sexual encounters 'premised on equality' . . . is lawful no matter how sexually explicit. Speech treating women in the disapproved way — as submissive in matters sexual or as enjoying humiliation — is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole.[42]

The unconstitutional flaw the court saw was that of viewpoint discrimination. As the court noted, just as the First Amendment protects speech by Nazis and the Ku Klux Klan, it protects the use of nonobscene sexual images in expressing a view contrary to that of feminists.[43]

The ordinance was seen as being other than content neutral. It defined the banned sexually explicit materials based on the perspective presented in the materials. If the material depicted women as enjoying pain, humiliation, or rape, or simply in a position of servility or submission, it was pornographic and restricted. On the other hand, material portraying women as equals was unrestricted, regardless of the material's graphic sexual content.[44] As the court said: "This is thought control. It establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not."[45]

With regard to the argument that pornography changes people and contributes to the subordination of women, the court said:

> [T]his simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw

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42. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) *aff'd*, 475 U.S. 1001 (1986) (citation omitted).

43. *See id.* at 328.

44. If the material was sufficiently graphic and offensive and otherwise met the definition of "obscene," it could, of course, be addressed under a separate obscenity statute.

45. *Hudnut*, 771 F.2d at 328.

> Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches.[46]

The court also addressed the argument that, because pornography is "unanswerable," the "marketplace of ideas" metaphor does not apply, and First Amendment protection is lost.[47] The court responded that the likelihood of truth winning out is not a necessary condition for First Amendment protection. In fact,

> [a] power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity."[48]

The state cannot have this power. According to the court, the state must not be allowed to determine the truth and suppress the expression of those who disagree, even for speech that is "effectively unanswerable."[49]

The last argument the court addressed was that pornography is "low-value" speech and thus is sufficiently similar to obscenity to be prohibited. While recognizing a distinction between the political speech at the core of the First Amendment and speech of lesser value, the court noted that no cases have sustained viewpoint discrimination.[50] According to *Hudnut,* the topic determines the position of speech as core speech or as removed from the core; the position expressed on the topic is irrelevant.[51] Even more telling, the court noted that pornography, as defined by the ordinance, is not low-value speech.[52] As such, the city's motivation in restricting pornography was the influence such material has on political and social relations. The court saw that influence as indicative of core speech rather than low-value

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46. *Id.* at 329.

47. *See id.* at 330.

48. *Id.* at 330-31.

49. *Id.* at 331. The court offered several United States Supreme Court opinions in support of this proposition. It took the Court's determination in *Buckley v. Valeo,* 424 U.S. 1 (1976), making it unconstitutional to limit campaign expenditures, even though the rules were designed to make it easier for candidates to answer each other's speech, as such a case. *See Hudnut,* 771 F.2d at 331. Similarly, the court noted that *Mills v. Alabama,* 384 U.S. 214 (1966), held unconstitutional a statute prohibiting election day editorials, even though the statute was designed to prevent speech that was printed so late as to be unanswerable. *See Hudnut,* 771 F.2d at 331.

50. *See Hudnut,* 771 F.2d at 331.

51. *See id.* at 331-32.

52. *See id.*

speech.[53]

The court was clear in its belief that the ordinance violated the First Amendment and seemed unconvinced that feminist concerns could override the protections afforded by that amendment. It may be, however, that at least some of the ordinance can be saved. To understand which portions may be constitutional, it is necessary to examine the obscenity exception. The ordinance can survive to the degree that it fits within that exception. However, before delving into the obscenity exception, the Canadian statute and its legal reception will be discussed.

II. THE CANADIAN STATUTE AND *BUTLER*

The Canadian statute at issue in *The Queen v. Butler*[54] provides: "Every one commits an offence who, (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever . . . ."[55] The provision defines "obscene" as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."[56] As the *Butler* Court explained the statutory provisions, the determination of whether the exploitation of sex is undue turns on the application of the "community standard of tolerance" test, a test "concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate *other* Canadians being exposed to."[57] The Court pointed to a growing recognition that the exploitation of sex in a manner that degrades or dehumanizes will fail the community standards test, by "plac[ing] women (and sometimes men) in positions of subordination, servile submission or humiliation . . . [a]gainst the principles of equality and dignity of all human beings."[58]

An additional aspect of the Canadian test for obscenity is the "internal

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53. The court also briefly considered the possibility that the materials affected by the ordinance could be considered group libel. While *Beauharnais* allowed proscription of group libel, the court concluded that later cases had so weakened *Beauharnais* that it could no longer be considered authoritative. *See Hudnut*, 771 F.2d at 332 n.3. The court also said that, even if *Beauharnais* is still authoritative, it was not clear that the materials addressed by the ordinance constituted group libel. *See id.* "Work must be an insult or slur for its own sake to come within the ambit of *Beauharnais,* and a work need not be scurrilous at all to be 'pornography' under the ordinance." *Id.* (emphasis added).

54. [1992] 89 D.L.R. 4th 449.

55. Criminal Code, R.S.C., ch. C-46, § 163(1) (1985) (Can.).

56. *Id.* § 163(8).

57. *Butler*, 89 D.L.R. 4th at 465-66 (emphasis in original).

58. *Id.* at 466.

necessities" test, also known as the "artistic defence." That test asks "whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent 'dirt for dirt's sake' but has a legitimate role when measured by the internal necessities of the work itself."[59] When material passes the "internal necessities" defense, the question becomes one of whether the sexually explicit material, in context, would be tolerated by the community, with any doubt resolved in favor of the freedom of expression.[60]

The Court saw the measure of community tolerance as based on an assessment of the harm that would flow from the exposure of the community to the materials at issue, the harm being the predisposing of people to act in an antisocial manner. With regard to the application of the test to what it saw as the three varieties of pornographic material, the Court concluded:

> [T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.[61]

It is tempting to explain the ability of Canadian law to address degradation and dehumanization in a way United States law cannot on the existence of the First Amendment to the United States Constitution. However, the Canadian Charter of Rights and Freedoms contains a provision very similar to the First Amendment. Section 2 of the Charter provides: "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 of communication; (c) freedom of peaceful assembly; and (d) freedom of association."[62] Indeed, the *Butler* Court addressed the issue raised by section 2 and concluded that the purpose and effect of the obscenity statute was the limiting of certain expression based on its content, thereby infringing section 2(b).[63]

As with United States constitutional law, the holding that a protection

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59. *Id.* at 469.

60. *See id.* at 471.

61. *Id.* The opinion of Justice Gonthier, joined by Justice L'Heureux-Dubé, while agreeing in large part with the majority opinion of Justice Sopinka, questioned the protected status of material in the third category. *See id.* at 489-99.

62. Constitution Act, 1982, Canadian Charter of Rights and Freedoms § 2, sched. B, 1980-1983 S.C. 5 (Can.).

63. *See Butler*, 89 D.L.R. 4th at 473.

was infringed demanded justification. The Canadian Charter of Rights and Freedoms provides the test for justifying such infringements in its first section. "The Canadian Charter of Rights and Freedoms 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."[64]

While the language of section 1 may seem less stringent than the strict scrutiny of United States constitutional law, the test, as applied by the *Butler* Court, is actually quite similar. The Court first had to identify a "pressing and substantial objective."[65] The Court did not rule out the power of Parliament "to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[66] Nonetheless, the Court instead identified the overriding objective of the obscenity statute as the avoidance of harm. The Court described the harm as follows:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[67]

The Court then went on to hold that the objective of preventing the evils described was pressing and substantial.[68]

The second part of the Canadian test is a "proportionality" requirement, which is similar to the narrow tailoring requirement of United States constitutional law. The proportionality requirement has three factors: "(1) the existence of a rational connection between the impugned measures

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64. Constitution Act, 1982, Canadian Charter of Rights and Freedoms § 1, sched. B, 1980-1983 S.C. 5 (Can.).

65. *Butler*, 89 D.L.R. 4th at 475. Actually, the court first dismissed a challenge based on vagueness. The court said that terms such as "undue," while they may not be subject to precise definition, are inevitably a part of the law, and prior interpretations of section 163 of the Criminal Code provide an "intelligible standard." *Id.* at 475.

66. *Id.* at 476.

67. *Id.* at 477 (quoting STANDING COMM. ON JUSTICE AND AFFAIRS, REPORT ON PORNOGRAPHY 18:4 (1978)).

68. *See id.* at 478-80.

and the objective; (2) minimal impairment of the right or freedom[;] and (3) a proper balance between the effects of the limiting measures and the legislative objective."[69]

With regard to the rationality of the measure, the Court concluded that it was rational to believe that exposure to the images addressed by the statute could cause changes in attitudes and beliefs that would be harmful to society.[70] The Court admitted that it was difficult, if not impossible, to establish a direct causal link but believed that "Parliament was entitled to have a 'reasoned apprehension of harm' resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations."[71]

Minimal impairment, the second factor, does not require a perfect fit between the measure and the problem addressed, but the measure must be "appropriately tailored in the context of the infringed right."[72] The Court pointed to several factors that established minimal impairment.[73] First, sexually explicit material that is not violent or dehumanizing is not restricted.[74] Second, material with scientific, artistic or literary value remains protected.[75] Third, Parliament's earlier unsuccessful efforts to develop a more specific definition indicate that the statutory definition is as precise as can be offered.[76] And fourth, the statute did not reach the private possession and use of obscene materials but addressed only public exhibition and distribution.[77] The Court also concluded that any suggested alternatives would be less effective.[78]

Turning finally to the balancing aspect of the proportionality test, the Court stated the test as "whether the effects of the law so severely trench on a protected right that the legislative objective is outweighed by the infringement."[79] The material affected was seen as "far from the core of the guarantee of freedom of expression . . . [and] appeal[ing] only to the most base aspect of individual fulfilment."[80] On the other hand, the statute's objective, the avoidance of harm and fostering of respect for all members of society, was seen to be of fundamental importance.

If *Butler* had been an opinion by a United States court, it would

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69. *Id.* at 481.
70. *See id.* at 483.
71. *Id.* at 484.
72. *Id.* at 485.
73. *See id.* at 485-87.
74. *See id.* at 485.
75. *See id.*
76. *See id.*
77. *See id.* at 486.
78. *See id.*
79. *Id.* at 487-88.
80. *Id.* at 488.

probably be interpreted as holding that restricting violent or dehumanizing pornography passes strict scrutiny and can be justified in spite of the infringement of freedom of expression. That is the conclusion which *Hudnut* refused to reach; as such, *Butler* conflicts with *Hudnut*. However, there is also language in *Butler* indicating that the material at issue merits less protection than other expression. The values supporting the Canadian guarantee of freedom of expression were said to "relate to the search for truth, participation in the political process, and individual self-fulfilment."[81] Of those values, only individual self-fulfilment was implicated, and even then the Court said only in one of its most base aspects. The material at issue was seen as even having less value than "good pornography," which may question traditional ideas of sexuality or may celebrate human sexuality. In the Court's view, the material at issue "does not stand on equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values."[82]

The position that violent, degrading, or dehumanizing pornography merits less protection than other expression would seem more analogous to a claim that such material comes within an exception to the freedom of expression. If that approach is to be carried over to United States law, the best fit would be a theory that violence, degradation, or dehumanization are factors that can serve to place sexually explicit material within that class of pornography considered obscene and unprotected by the First Amendment. Establishing such a claim will require an examination of the obscenity exception and the variety of materials that have traditionally been considered obscene. It is to that examination which this article now turns.

III. REEXAMINING THE OBSCENITY EXCEPTION TO THE UNITED STATES CONSTITUTION

As established in *Roth v. United States*,[83] material is not protected by the First Amendment if the material is obscene. *Miller v. California*[84] provides a three-factor test for measuring the limits of that exception. The third prong, which asks whether the work has serious value when taken as a whole, provides the greatest difficulty for the Indianapolis ordinance. Despite Professor MacKinnon's assertion that it should not matter that the material has serious value if women are harmed, it does matter for purposes of First Amendment law. Clearly, to use the obscenity exception to justify the ordinance, the ordinance would have to be modified to provide protection

81. *Id.* at 481.
82. *Id.* at 482.
83. 354 U.S. 476 (1957).
84. 413 U.S. 15 (1972), *reh'g denied*, 414 U.S. 881 (1973).

for material with "serious literary, artistic, political, or scientific value."[85]

The second prong, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,"[86] can be met through another modification. While the intent of the ordinance was to focus on the extra-erotic aspects of the depiction, the ordinance could be modified to specify the types of sexual conduct addressed. This modification may no longer include some erotic material that degrades women, but it is a trade-off which appears necessary. MacKinnon and Dworkin appeared willing to allow such a trade-off in hope of constitutionality. Their ordinance addressed only erotic material rather than all material presenting negative images of women. Without this concession, it would be difficult to attach the pornography label to the targeted material or to tie the ordinance, however loosely, to a recognized First Amendment exception. Requiring that the second prong of the *Miller* test be met would seem a minor additional concession to avoid vagueness.

The real obstacle appears to be in the first prong's requirement that under community standards the material, taken as a whole, appeal to the prurient interest. However, if "prurient" were seen to have a meaning that matched the concerns behind the ordinance, the ordinance, again at least in part, might be saved.

A. *Prurience and Degradation*

It was the *Roth* Court which introduced the "appeal-to-the-prurient-interest" requirement into the constitutional test of obscenity. The Court also defined material appealing to the prurient interest as "material having a tendency to excite lustful thoughts"[87] and defined prurient as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd."[88] The resulting formulation, the Court said, did not differ significantly from the Model Penal Code approach that material is obscene "if, considered as a whole, its predominant appeal is to the prurient interest, i.e., *a shameful or morbid interest* in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."[89] While the definition includes the propensity to excite lustful thoughts, it appears that more is required. All erotic material has a

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85. *Id.*

86. *Id.*

87. *Roth*, 354 U.S. at 487 n.20.

88. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabridged 2d ed. 1949)).

89. *Id.* (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)) (emphasis added).

propensity to excite lustful thoughts, but not all erotic material is obscene. What is additionally required is that the interest have a shameful or morbid quality to it.

This combination of attraction and shame may seem puzzling. Professor Cass Sunstein suggests that the dual reactions require a strange psychological state.[90] The combination may not be as psychologically odd as Sunstein indicates. However, in order to understand this combination, it is necessary to examine the nature of sexual response to visual stimuli.

According to psychology's James-Lange theory,[91] stimuli that produce emotions do so without the initial input of the more evolved portions of the brain.[92] Visual images that lead to sexual stimulation do involve the optic regions of the brain in processing the optic nerve input. The route to stimulation, however, is through the limbic regions, particularly the amygdala. In any such emotional reaction, the limbic system sets off a series of physiological responses, including muscular, nervous system and hormonal reactions. The responses occur at a level below the conscious.[93] The individual so stimulated recognizes the stimulation through feedback from the systems engaged in the physiological responses.[94] The brain recognizes an increased heart rate and a surge in sex hormones.[95] The James-Lange theory holds that it is the brain's experience of the physiological responses that constitutes our feelings of emotions.[96] The experience at the conscious level is secondary and occurs only as the chain of events set off by the stimulation passes through the brain for the second time.[97]

The James-Lange theory explains how an individual can be both excited and feel shame as a result of the excitement. The excitement is the result of processes that are below the level of consciousness. The higher order brain recognizes the excitement and is ashamed of it. What remains, however, is the question of why the excitement should be shameful. It would seem that a psychologically healthy person would not consider all feelings of sexual excitement morbid or shameful. The fact that the feelings resulted from visual stimulation alone would not seem to add any shame. What, then, is it that makes the excitement we experience from some images shameful, while sexual excitement brought on by other stimuli feels healthy

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90. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

91. *See, e.g.*, NEIL R. CARLSON, PHYSIOLOGY OF BEHAVIOR 350-51 (5th ed. 1994).

92. *See id.* at 350.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

and normal?

That question is, of course, one of the major difficulties in applying the obscenity test. While there may be questions over whether a work has serious value and statutory prohibitions may be vague, the issue of what sort of images appeal to the prurient interest has been the most vexing. Society may not have progressed beyond Justice Stewart's test of "I know it when I see it."[98] While Justice Stewart was speaking of the *Roth* test requirement that the material at issue go "substantially beyond customary limits of candor,"[99] the issue of shamefulness of sexual excitement has received no better definition.

Perhaps the best explanation of this requirement of shame is that offered in the extra-legal analysis of the concept of obscenity provided by Professor Harry Clor. He asserts that obscenity consists of "a degradation of the human dimensions of life to a sub-human or merely physical level."[100] For Clor, "[o]bscene literature may be defined as that literature which presents, graphically and in detail, a degrading picture of human life and invites the reader or viewer, not to contemplate that picture, but to wallow in it."[101]

Clor's analysis explains the distinction between the depiction of romance and the depiction of sex. It is the depiction of the human spirit that distinguishes a romantic film, even a romantic film depicting explicit sex, from the explicit sex that might make another film obscene. In the sexually obscene film, the participants are reduced to the subhuman, merely physical level. It is not the sexual act, but rather the focus solely on the physical aspects of that act to the exclusion of the human spirit that degrades the individuals depicted and makes it obscene.

This idea of degradation as central to the extra-legal concept of obscenity also finds an interesting basis in the history of obscenity law. When the *Roth* Court looked for historical support for the obscenity

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98. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

99. *Roth*, 354 U.S. at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft 1957)). For an explanation of this difficulty see, 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 97-126 (1984). He finds the non-legal concept of obscenity to extend far beyond sex to reach all things sufficiently offensive as to produce disgust, shock or repugnance, things that "send shudders up our spines and set our teeth on edge." *Id.* at 112. He also suggests a plausible psychological origin for such a reaction in the parental implantation in infants of what he calls the "Yuk reaction." *Id.* at 112-15. Infants are very willing to place anything that fits into their mouths. When a parent reacts with "No!," "Dirty!," "Nasty!" or "Yuk!," the infant learns that this is unacceptable behavior in a sense that differs from the morally or aesthetically unacceptable. *Id.* at 113. This suggested early implantation of the concept explains the visceral nature of ascriptions of obscenity.

100. HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 225 (1969).

101. *Id.* at 234.

exception, it turned to statutes and cases demonstrating that "[a]t the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."[102] The earliest of the cases cited, dating from 1808, is *Knowles v. State*.[103] Knowles was convicted of violating Connecticut's restrictions on plays and public performances by displaying a "horrid and unnatural *monster*."[104] The description offered of the monster in question indicates that the concept of obscenity in the Bill of Rights era went beyond sex. The description of the monster was as follows:

> And the head of said *monster*, represented by said picture, resembles that of an *African*, but the features of the face are indistinct: there are apertures for eyes, but no eyes; his chin projects considerably, and the ears are placed unnaturally back, on or near the neck; its fore legs, by said picture, are here represented to lie on its breast, nearly in the manner of human arms; its skin is smooth, without hair, and of a dark, tawny, or copper color.[105]

The presentation of the "monster" was said to be "highly indecent" and the showing contrary to the State's statutory law.[106]

Knowles' conviction was affirmed at the first appellate stage but was reversed by the Connecticut Supreme Court, with the court holding that his exhibition was not within the scope of the statute.[107] The only cited statute prohibited "any games, tricks, plays, shows, tumbling, rope-dancing, puppet-shows, or feats of uncommon dexterity or agility of body."[108] Only the prohibition against shows could apply to Knowles, and "shows" had no technical meaning and could not be extended to the simple exhibition of art, natural curiosities or museum collections.[109] When the court turned to a consideration of the common law, it did accept the proposition that "[e]very public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law."[110] However, even under the common law, the conviction could not stand, because the information did not "particularly state the circumstances in which the

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102. *Roth*, 354 U.S. at 483.
103. 3 Day 103 (Conn. 1808).
104. *Id.* (emphasis added).
105. *Id.* (emphasis added).
106. *Id.* at 104.
107. *See id.* at 107.
108. *Id.*
109. *See id.*
110. *Id.* at 107-08.

indecency, barbarity or immorality, consists."[111]

What should be clear from *Knowles* is that the concept of obscenity in that era was not limited to sex. The display at issue was not sexual but was one in which a human being was treated as, or degraded to, something less than human. The discussion returns to the tie between obscenity and degradation after examining the relationship between obscenity and religion and the development of sexual obscenity law. It will be suggested that degradation, religion, and sex tie together to provide an explanation for the development of sexual obscenity law.

B. *Religion and Obscenity*

An examination of the history of obscenity further strengthens the tie to degradation. This history also has an interesting focus on religion. In fact, it is generally agreed that the early focus on obscenity law was the protection of religion. Professor Schauer notes that "the origins of obscenity regulation are religious. In ancient times, sexual explicitness in the drama or in written works was fully tolerated . . . [; h]owever, blasphemy and heresy were both strongly condemned."[112] Schauer cites Athenian prosecutions for blasphemy and the execution of Socrates in the Greek era as proof of this contention.[113] He notes the religiously motivated destruction of the *Analects of Confucius* in ancient China and compares the "virtually unlimited freedom in dealing with sexual matters" in Rome with contemporaneous religious censorship.[114]

Schauer finds the Roman advent of Christianity in the fourth century as the point at which religious censorship began a gradual one-thousand year increase.[115] This effort was said to have been given increased impetus by the invention of the printing press in 1428.[116] Since printing made books available to all classes, the Church saw a need to increase control over blasphemous and heretical works.[117]

English obscenity law retained its tie to religion until the late seventeenth century. The 1663 case of *The King v. Sir Charles Sedley* is generally regarded as the first pure obscenity case.[118] Even in that case,

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111. *Id.* at 108.

112. FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 1-2 (1976).

113. *See id.* at 1-2.

114. *Id.* at 2.

115. *See id.* at 2-3.

116. *See id.*

117. *See id.*

118. The King v. Sir Charles Sedley, 83 Eng. Rep. 1146 (K.B. 1663). *See, e.g.*, SCHAUER, *supra* note 112, at 4; Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 40-41 (1938).

however, the divorce from the religious basis of censorship in *Sedley* may be less than complete. Leonard Levy includes the case in his work on blasphemy and notes that while the reporters did not use the word "blasphemy," Sedley was said to have, along with other actions having a more modern obscenity caste, preached blasphemy, abused the scriptures, and preached a Montebank sermon.[119]

Sedley is, nonetheless, closer to modern obscenity law than its predecessors.[120] Sedley, who was drunk, went out on the balcony of a London inn. He stripped naked, assumed a variety of immodest poses, urinated in bottles and then poured the bottles down on the crowd that had gathered below the balcony. That act caused a small riot. While Professor Schauer describes the case as the first in which "offensiveness to decency, apart from religious or political heresy, was an element of an offense against the state,"[121] the combination of sexual indecency, blasphemy and causing a breach of the peace make the basis for the conviction and the definition of obscenity open to debate.[122]

According to Schauer, the 1727 case of *Dominus Rex v. Curl*[123] finally established obscene libel as a common law crime.[124] The conviction was for publishing the book *Venus in the Cloister, or the Nun in Her Smock*. While the book's dialogue on lesbian love was sexual, the setting was in a convent. Thus, it could also be viewed as an attack on religion. Schauer suggests that, because the anti-religious elements were anti-Catholic rather than anti-Church of England, they may be regarded as insignificant.[125] On the other hand, Professor Alpert interprets the case as sustaining the indictment because of its attack on religion and, therefore, being triable in the common law courts.[126]

In American law, the early focus on the protection of religion is also apparent. When the *Roth* Court went in search of pre-Bill of Rights limitations on speech, it found blasphemy and heresy statutes.[127] When the scope of obscenity law broadened in the post-Bill of Rights era, it still did not

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119. *See* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 214 (1993).

120. Accounts of the acts leading up to the case may be found in Alpert, *supra* note 118, at 41-42; SCHAUER, *supra* note 112, at 4; LEVY, *supra* note 119, at 214.

121. SCHAUER, *supra* note 112, at 4.

122. It is clear that it was not Sedley's nakedness and sexual poses alone that led to his conviction. His conviction was "for shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contrà pacem and to the scandal of the Government." *Sedley*, 83 Eng. Rep. at 1146-47.

123. 93 Eng. Rep. 849 (K.B. 1727).

124. *See* SCHAUER, *supra* note 112, at 6.

125. *See id.* at 5.

126. *See* Alpert, *supra* note 118, at 44.

127. *See* Roth v. United States, 354 U.S. 476, 482-83 (1957).

focus solely on sex. Schauer finds it finally clear only with the decision of *Swearingen v. United States*[128] in 1896 that obscenity and sex were necessarily tied together.[129]

What was it that led to the transformation of obscenity law from a body of law aimed at protecting religion to one focused on the prohibition of sexual representations? The usual explanations are found in the invention of the printing press, the increase in literacy among common people and the production of paperback books. Indeed, it does appear that increases in the censorship of pornographic works coincide with those technical and societal developments. Boccaccio's *The Decameron*, published in 1371, was one of the first printed books and has been called the "first work of modern pornography."[130] The new technology made books available to those who would not have been able to afford or obtain manuscript works. This new audience, less educated, and perhaps more corruptible, may have increased concern over the potential negative effects of some books.

The Decameron was placed on the Roman Catholic Church's index of forbidden books in the middle of the sixteenth century when that list was established as a reaction to the Reformation.[131] The Church's concern was not solely over the sexual content of the book. Instead, it was due to the fact that the characters involved in the sexual stories were Catholic clerics. When the work was revised by changing monks to conjurors, nuns to noble women, an abbess to a countess and the Archangel Gabriel to a Fairy King, the book was removed from the forbidden list.[132] The sexual content remained, and if there was concern over the widespread effects emanating from the printing press, the concern was aimed at weakening the faith of the common people rather than exposing them to pornography.

While works that combined pornography with unflattering portrayals of clerics or religion continued to be subject to prosecution, legal attacks on purely sexual material were of later vintage. The founding of the Society for the Suppression of Vice in England in 1802, and the attacks on pornography

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128. 161 U.S. 446 (1896).

129. *See* SCHAUER, *supra* note 112, at 19.

130. H. MONTGOMERY HYDE, A HISTORY OF PORNOGRAPHY 65 (1964). It is interesting that the quick adoption of newer technologies by producers and distributors of sexual material is not purely a modern phenomenon limited to videotapes and the Internet. Even in technological advances preceding the printing press, such as the development of pottery, sexual images were among the first portrayed. *See infra* notes 141-43 and accompanying text.

131. *See id.* at 71, 153. The development of moveable type printing dates from the middle of the fifteenth century and may have increased concern over the cheaper availability of books. Thus, the time lapse between the publication of *The Decameron* and its placement on the forbidden list may not be so great as to make the invention of printing a plausible cause of concern. Nonetheless, the focus was on protection of the Church rather than on concerns over depictions of sexual activity.

132. *See id.* *See also* DAVID LOTH, THE EROTIC IN LITERATURE 65-66 (1961).

in the early nineteenth century, followed the Industrial Revolution's development of a new and literate middle class (another group that might prove more corruptible than the learned and noble).[133] Similarly, the development of cheaper paperback books made pornographic materials available to a wider audience. While the wealthy might not have been corrupted by expensive books, cheap books were seen as troublesome.[134]

This explanation seems plausible with regard to some of the changes in societal attitudes toward, and the censorship of, sexual materials, but the explanation also seems lacking in certain respects. While the invention of the printing press may have corresponded to the Vatican's institution of its list of forbidden books, that list seems to have focused on heretical, rather than sexual, content.[135] Furthermore, while the printing press and moveable type may have made books more widely available, prints and sketches did not have to await that invention, and sexual themes in pottery were already an ancient tradition. Sexual material, which may be even more evocative in pictorial form, had long been available to the masses. What the press made accessible were the more complex religious ideas that endangered the Church itself.

The technological explanation seems to be in better accord with the later changes. As Morris Ernst has noted, the inclusion of the written word in obscenity statutes that had previously only addressed pictures may be tied to an increase in literacy rates between the 1840s and 1870.[136] It also seems plausible that the development of the paperback would have led to an increase in concerns that sexual materials may have a negative effect on the masses.

Nonetheless, the technological explanation is still unsatisfying. It explains only some of the changes in European and American societies' positions on sexual censorship. It also fails to explain the change in focus from heresy to sexuality as the target for such censorship. An explanation that ties more of the significant changes together would be an improvement. If that explanation can also bring together the themes of religion, degradation, and sex, it would seem superior to the theory previously offered.

C. *Religion, Sex and Degradation*

The early history of obscenity law and its focus on the protection of religion and the importance of degradation do indeed tie together. Religion

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133. *See* HYDE, *supra* note 130, at 165.

134. *See* Morris L. Ernst, *Introduction* to H. MONTGOMERY HYDE, A HISTORY OF PORNOGRAPHY at vii, viii (1969).

135. *See supra* notes 130-32 and accompanying text.

136. *See* Ernst, *supra* note 134, at vii.

regularly posits a special relationship between human beings and a God or the gods. Certainly, among all the religious traditions important to post-classical Europe or the Middle East, humans stand above the animals. Humans are seen as qualitatively different. Much of that difference is found in the existence of the soul. The soul is an aspect of humanity that makes us more like god than animals. Thus, an attack on religion is also an attack on the status of humans. If there is no God, humans cannot be like god and may not be inherently different from animals. An examination of the treatment of depictions of sex in various eras may also be included in the relationship between religion and degradation, thereby tying the three themes together.

1. *Classical Greece*

Greek society was very tolerant of sexual themes in the arts. As D. H. Lawrence declared, "some of Aristophanes shocks everybody today, and didn't galvanize the later Greeks at all."[137] The material spoken of is described as "bawdy blasphemy," and would not approach the sexual content of a modern "adult film."[138] However, in the not too distant past, some Greek drama would have shocked American society. Aristophanes' work is rife with sexual innuendo, prop phalluses, and some nudity.[139] Aristophanes' play *Lysistrata* was subject to customs seizure during the first thirty years of this century and, as late as 1955, was considered obscene by the United States Post Office.[140]

The painting and sculpture of classical Greece often had pornographic content. Representations of various forms of sexual intercourse are found in pottery of the era, "even . . . on the bottoms of children's drinking bowls and plates, so that they could have something amusing to look at when they were having their meals."[141] Phallic symbols were placed on street corners as places to pray for fertility,[142] and "every Athenian home had a statue of Hermes, with his penis erect, before its front door."[143]

Greek acceptance of pornographic arts and sexual themes in drama mirrored its view toward sexual activity. Except for women of the citizen

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137. DAVID TRIBE, QUESTIONS OF CENSORSHIP 32 (1973) (quoting D. H. LAWRENCE, PORNOGRAPHY AND OBSCENITY 5-6 (1929)).

138. *See id.*

139. *See, e.g.*, ARISTOPHANES, THE CLOUDS (Benjamin Bickley Rogers trans., Oxford Univ. Press 1969) (423 B.C.); ARISTOPHANES, LYSISTRATA (Douglas Parker trans., 1964).

140. *See* HYDE, *supra* note 130, at 40 (citing JAMES C.N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP 104 (1961)).

141. HYDE, *supra* note 130, at 41.

142. *See id.*

143. RICHARD A. POSNER, SEX AND REASON 41 (1992).

class,[144] "the Greeks thoroughly enjoyed sex in all its sundry manifestations and felt not the slightest sense of shame about it."[145] While female citizens may have been repressed, prostitution and concubinage, as well as the acceptance of certain homosexual relations,[146] speak to a very active sexual culture.

The sexual activities of the Greeks were matched, or exceeded, by the sexual exploits of the Greek Gods. Zeus, the mightiest of the gods, engaged in rape, adultery, and pederasty.[147] Prostitution was practiced by the priestesses at the temple of Aphrodite and was seen as religiously sanctioned.[148] The festivals of Dionysus have been described as "wild sex orgies."[149] It is said that, when Phryne of Thespiae was on trial for the capital offense of corrupting the youth of Athens, her advocate had her stand up in court and tore off her robe, exposing "her beautiful breasts and figure . . . to the public view."[150] The sight convinced the judges that the defendant had been divinely endowed by Aphrodite, and they found her not guilty.

For the Greeks, sex was not degrading. While questioning the relationship between man and the gods would not be tolerated, engaging in sex or depicting humans so engaged did not in any way weaken that relationship. The gods themselves were highly sexual, and human sexuality did not make humans more like animals than gods.

The themes of degradation, religion and sex tie together. Sex did not degrade. Sex and pornography did not have to be restricted to protect the relationship between man and the gods. Obscenity law, as a way to enjoin the degradation of humanity, could focus on direct heretical attacks on religion.

Not only did sexual appetite fail to distinguish humanity from the gods, but it also failed to raise concerns over the animal nature of humans. Sexual activity was divine, and just as human sexuality did not lead to any question of how close humans were to the gods, the animal side of divinity did not lead humans to assert their separation from the animals. Greece, with Aesop being of particular note, had a strong animal fable tradition, and "[i]t is most likely that any society that sees a close relationship between humans and animals, that sees a parallel between species, will produce fable-type stories

144. *See id.* at 39.

145. HYDE, *supra* note 130, at 41.

146. *See* POSNER, *supra* note 143, at 42-43.

147. *See id.* at 42.

148. *See* HYDE, *supra* note 130, at 36.

149. LOTH, *supra* note 132, at 48.

150. HYDE, *supra* note 130, at 34. It appears that Phryne did not participate in the nudity which was common in the public baths or at the festival of Poseidon. *See id.* at 34-35.

that explore the metaphorical relationship."[151]

2. *The Roman Era*

Roman theater treated sexual themes with at least as much toleration as had the Greeks. Professor Beacham's study of Roman drama compares the performances of Etruscan actors in Rome and the *phallica* — phallic ceremonies to assure fertility — of Greece.[152] He also notes the existence of terra cotta figures with oversized phalluses in those areas of Italy colonized by the Greeks and suggests early Roman performances of suggestive dances of a variety he characterizes as similar to modern "stag-parties."[153]

The liberal treatment of sex continued into later eras in Rome. Beacham notes that the *Floralia* festival performances were known for their license, merriment, and naked female performers.[154] In fact, he finds an outlook on sex which is even less restrained than that of the Greeks.[155] He reports the "faithful reenactment" in late Roman theater of the legend of Pasiphae concealing herself in a false cow to be mounted by a bull.[156] He further reports that in the third century A.D., Elagabalus ordered that sexual scenes in performances not be simulated but be actually performed.[157] Judge Posner makes the same point, noting the appearance on stage of nude women as actresses or dancers and the performance of sexual acts.[158] With respect to literary works, Gaius Petronius' *Satyricon* has remained a classic of pornography.[159]

The actual sexual culture of the Romans also appears to have been more permissive, with citizen women more likely to participate, than the sexual culture found in Greece.[160] Pederasty was common, as was male, female, and child prostitution, and often focused around public bathhouses. Because Roman culture was so strongly influenced by Greek culture, the similarity is not surprising. Since the Roman gods were also similar, or identified with the Greek gods, sexual activity by Romans would not have degraded the individual by separating human activity from that of the gods.

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151. JOYCE E. SALISBURY, THE BEAST WITHIN: ANIMALS IN THE MIDDLE AGES 106 (1994).

152. *See generally* RICHARD C. BEACHAM, THE ROMAN THEATRE AND ITS AUDIENCE (1991).

153. *See id.* at 4-5.

154. *See id.* at 129.

155. *See id.* at 54.

156. *See id.* at 136.

157. *See id.* at 137.

158. *See* POSNER, *supra* note 143, at 45.

159. For a description of the content of the *Satyricon*, see HYDE, *supra* note 130, at 54-58.

160. *See* POSNER, *supra* note 143, at 44.

In fact, in at least one case, sexual activity made an individual a god. When the emperor Hadrian's boy lover Aninous died, Hadrian deified him, and Aninous was widely worshiped.[161]

3. *The Early Christian Era*

The Christian era brought to European culture a profound change in view as to the nature of God. The individual gods in the panoply of Greek and Roman gods would be expected to interact with each other. Those gods had appetites, including rather healthy sexual appetites. Those who worshiped them, including priests and priestesses, would find nothing shameful in having the same appetites as, and emulating the practices of, the gods.

Judge Posner states that just as the advent of the Christian era brought a new view of God to European culture, it also brought a new view of man.[162] The Christian and Jewish belief that humans are made in the image and likeness of God implies that there is some degree of divine nature in the human spirit. That divine nature can only be corrupted by the very existence of the body.

> Man is a degenerate version of God, the degeneracy consisting not only in pride and envy and other spiritual flaws but also in the possession of a body that is prone not just to decay but to every sort of shame and indignity. The body . . . should be clothed, ideally at all times; for it is a shameful thing, a thing to be concealed, not flaunted in the manner of the Greeks and Romans. And bodily activities should be confined to those that are necessary.[163]

This change is not based solely on a different view of the nature of human beings. The Greeks could consider themselves god-like and still be sexually active because that was also the nature of the gods. As Posner notes, the Greeks may well have considered themselves more moral than the gods.[164] However, the belief in a non-corporeal god, one without sexual urges or the need to eat and to eliminate, makes the existence in those urges and needs in humanity a measure of our distance from the divine nature. They identify us with the animals.

Thus, the task of the early Christian church was to examine the status of humans, and if humans were to share in the divine nature, they would

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161. *See id.*
162. *See id.* at 45-46.
163. *Id.* at 46.
164. *See id.* at 42.

have to be distinguished from the animals. As Joyce Salisbury stated in her study of the relationship between humans and animals in the middle ages:

> When early Christian thinkers established what they believed to be clear categories that separated animals from humans, they were not only making a theological statement of humanity's dominance over the natural world, but they were actually defining what it meant to be human. And as in so many things, it was easier to define humans by what they were not — animals — than by what they were.[165]

Sex was a major concern in the relationship and differentiation between humans and animals. Unlike animals, humans were seen to have the ability to reason, but sexual activity weakened the distinction.

> Augustine as early as the late fourth century established the notion that during sexual intercourse "there is an almost total extinction of mental alertness; the intellectual sentries . . . are overwhelmed." If sexual intercourse banished reason, and if reason were the defining quality of humans, then sexual intercourse was bestial and threatened one's humanity. . . . The irrational passion implicit in the act of intercourse led Thomas Aquinas to say that "in sexual intercourse man becomes like a brute animal" and that insofar as people cannot "moderate concupiscence" with reason, they are like beasts.[166]

While not all activities engaged in by animals could be banned, the early Christian response was to confine animal-like activities to those that were necessary.[167] It is necessary to eat, but it was seen as sinful to eat excessively. Sex is necessary to the survival of the species, but sex outside of marriage and nonprocreative sex generally were regarded as driven by animal appetites, serving to deny the human spirit, and were therefore sinful. Such sexual activity, viewed against the background assumption of a quasi-divine human nature, was considered unnatural.

As Posner recognizes, sexual practice in the era was more liberal than the theory would allow.[168] Old pagan fertility rites died hard.

> In France as late as the fifteenth century the ancient rites were so

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165. SALISBURY, *supra* note 151, at 138.

166. *Id.* at 78-79 (quoting ST. AUGUSTINE, CITY OF GOD, at 577 (H. Bettenson trans., 1972) (1467); THOMAS AQUINAS, SUMMA THEOLOGICA II, Q. 98, at 493-94 (Fathers of the English Dominican trans., 1957)).

167. *See* POSNER, *supra* note 143, at 46.

168. *See id.* at 49.

> much a part of the casual popular attitude toward sex that the Church reluctantly absorbed some of them. Thus a Feast of Fools was permitted on Epiphany with masking and dancing, singing and fooling, all so Dionysian that bishops admonished the celebrants who felt called upon to copulate to please wait until they got outside the church.[169]

The Church hierarchy may not have had unrealistic expectations of its lay members. The "good faith" doctrine provided that priests should not inform followers that their sexual practices were sinful, if the followers were likely to continue the practices.[170] The assumption was that the knowledge of the practice's sinfulness would not bring it to an end, and continuing the practice in the face of that knowledge would be a mortal sin.[171]

It would appear that the Church saw a significant gulf between divine nature and the morality of the average believer. If not fully accepted, that chasm appears to have been tolerated. The clergy, however, was another matter. If the clergy was to be closer to God, its control over the animal side of human nature should be greater. Even if the clergy acted on its sexual appetites and resisted the imposition of celibacy,[172] the perception of the clergy had to be controlled to cement spiritual authority over the masses. Thus, the concern over *The Decameron*'s depiction of the sexual exploits of monks and nuns reflected less a concern with sexual depiction generally than with its bringing the clergy down from the divine to the base animal level of the ordinary man or woman. As previously explained, when the characters were changed to members of the laity, the book was removed from the forbidden list. The new possibility of widespread circulation, because of the invention of the printing press, may have been a factor in the Church's action. However, it was not a general concern over the dissemination of sexual material that raised the concern. It was, instead, the possibility of the widespread publication of material depicting the clergy as more animal than divine that motivated the action against *The Decameron*.

Minimal concern over the sexuality of the common people, as compared to the concern over the sexuality and closeness to divinity of the clergy, is in accord with the view of the nature of those common people. In Marie of France's collection of the fables of the middle ages,

> the peasants were uniformly shown as stupid. . . . [O]ne of the defining qualities of animals in the Middle Ages was their irrationality. Humans had reason, animals did not. By showing

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169. LOTH, *supra* note 132, at 66.
170. *See* POSNER, *supra* note 143, at 50.
171. *See id.*
172. *See id.*

> peasants as uniformly stupid and irrational . . . , Marie subtly, yet powerfully, reduced their status to the borders of the bestial.
>
> In addition to rationality, . . . sexuality defines an animal. From the twelfth century onward, peasant sexuality was linked more closely to that of animals than to the more cultured love of the nobility. . . . When . . . [Andrew the Chaplain] considers peasants, . . . he says that peasants cannot really love because they have sex "naturally, like a horse or a mule." Therefore, he, like Marie, reduces peasants as a whole group to a position lower than human by denying them rationality and seeing the proof of that denial in his perception of the nature of their sexuality.[173]

Given the perceived difference between the nature of the peasant and of nobles, and even more so of the clergy,[174] the Church's focus on protecting the status of the clergy as closer to the divine than the animal, while being less concerned over the description of the sexual activities of other classes, is understandable.

The concern in this era over obscenity views sexual activity as degradation and focuses on the effect of sexual activity on the question of whether man is closer to the divine or to the beast. The difference between obscenity in this era and in earlier eras is that, in the earlier era, there was not such a gulf between the gods and the beasts, at least in their sexual appetites. The depiction of human sexuality in the earlier era did not degrade because it did not separate human nature from the divine. By contrast, in the early Christian era, sexuality was seen as contrary to the divine nature. Because sexual activity was in the province of the beast, depiction of sexual activity presented a degrading view of humanity, a denial of humans sharing in any divine nature. While that might not raise any official concern when limited to the laity, any such degradation of the holiness of the clergy became a great concern.

While concern over sexual depictions may have followed the invention of the printing press, it is really the sixteenth century onset of the Reformation that brought the first official attempts at suppression. Concern over sex, per se, did not lead to that action. Rather, criticism of the Catholic Church as hypocritical, based on the difference between its official doctrine on sex and the practices of the clergy, put the Church in a defensive

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173. SALISBURY, *supra* note 151, at 153-54 (quoting ANDREAS CAPELLANUS, THE ART OF COURTLY LOVE 149 (1964)).

174. *See id.* at 171-72 (noting the saints' renunciation of sex to avoid becoming animal like).

posture.[175] The status of the clergy as being close to God demanded the suppression of material depicting the clergy as engaged in less than divine activity.

Sex was also but one aspect of concern over species ambiguity. If humans are distinguished from animals, the idea of species metamorphosis is discomforting. Tales of such changes often included sexual episodes, again establishing sex as the link between the human and animal worlds.[176] However, *any* tale of species ambiguity or metamorphosis was of concern, leading such early Christian scholars as Ambrose, Augustine and Aquinas to address such pagan tales.[177] For that reason the exhibition of a species-ambiguous being could be considered obscene, because obscenity arguably treats humanity as animal, rather than divine. That would serve as an explanation for the much later prosecution of Knowles for his exhibition of his "unnatural monster."[178] That "monster" raised the question of human nature as either animal or as sharing in divinity.

4. *The Enlightenment*

There appears to have been an increase in the publication of pornographic material in the 1740s, a period that may be taken as the beginning of the "high period of the Enlightenment."[179] That growth came on the heels of a Reformation and a change in attitudes toward sex. The reformers argued that the clergy should be allowed to marry. If the clergy should marry, then sexual activity, at least of a procreative variety within marriage, must not be shameful.[180] The Enlightenment went even further. The increase in erotic literature and art may be seen as the result of an Enlightenment change in the cultural understanding of nature: "sexual appetite was natural; repression of sexual appetite was artificial and pointless; and the passions might have a beneficial influence in making humans happy in this world. Sexual enlightenment was consequently a part of the Enlightenment itself."[181]

Whatever the cause of the increase in pornographic publications, the secular courts began to take notice. The 1663 case of *The King v. Sir*

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175. *See* POSNER, *supra* note 143, at 51. "The Reformation attacked Catholic sex theory as too severe and Catholic sex practice as too lax." *Id. See also supra* notes 130-32 and accompanying text (discussing the Church's real interest in placing *The Decameron* on the forbidden list).

176. *See* SALISBURY, *supra* note 151, at 159-60.

177. *See id.* at 160-61.

178. *See supra* notes 103-11 and accompanying text for a discussion of *Knowles*.

179. LYNN HUNT, THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800, at 33 (Lynn Hunt ed., 1993).

180. *See* POSNER, *supra* note 143, at 51.

181. HUNT, *supra* note 179, at 34.

Charles Sedley[182] is generally regarded as the first pure obscenity case.[183] While the court was secular, there was, as was noted, still at least some religious basis for the prosecution.[184] Leonard Levy includes *Sedley* in his book *Blasphemy* and notes that, while the case report did not use the word "blasphemy," Sedley was said to have preached blasphemy, abused the scriptures, and preached a Montebank sermon, as well as other actions with a more modern obscenity caste.[185]

In 1708, *The Queen v. Read*[186] was the first actual prosecution for literary obscenity in a British secular court.[187] The connection of obscenity and religion was, however, still present to the degree that the court rejected the idea of bringing indictments for obscenity. In dismissing the indictment, the court said, "[a] crime that shakes religion . . . as profaneness on the stage . . . is indictable . . . but writing an obscene book, as that intitled [sic], 'The Fifteen Plagues of a Maidenhead,' is not indictable, but punishable only in the Spiritual Court."[188]

The 1727 English case of *Dominus Rex v. Curl*[189] is said by Schauer to finally establish obscene libel as a common law crime.[190] *Curl* involved a conviction for publishing the book *Venus in the Cloister, or the Nun in Her Smock*. The content of the book was a dialogue on lesbian love, and as was common in earlier works raising the concern of the religious establishment, its setting was in a convent. While this is precisely the issue that led to earlier bannings by the Church, the fact that the anti-religious elements were anti-Catholic rather than anti-Church of England makes it questionable whether the conviction in *Curl* was based on the protection of religion or was focused on sexual depictions instead.[191]

There were not many other prosecutions for obscenity in English courts throughout the remainder of the 1700s.[192] John Wilkes was prosecuted in the 1760s for publishing his *Essay on Woman*,[193] but Wilkes' prosecution was probably politically motivated.[194] The real incentive to prosecute was

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182. 83 Eng. Rep. 1146 (K.B. 1663). For a French version of the case see, Le Roy v. Sir Charles Sidley, 82 Eng. Rep. 1036 (K.B. 1663).

183. *See, e.g.*, SCHAUER, *supra* note 112, at 4; Alpert, *supra* note 118, at 40-41.

184. *See supra* notes 118-21 and accompanying text.

185. LEVY, *supra* note 119, at 214.

186. 88 Eng. Rep. 953 (K.B. 1708), *overruled by* Dominus Rex v. Curl, 93 Eng. Rep. 849 (K.B. 1727).

187. *See* Alpert, *supra* note 118, at 43.

188. *Read*, 88 Eng. Rep. at 953.

189. 93 Eng. Rep. 849 (K.B. 1727).

190. *See* SCHAUER, *supra* note 112, at 6.

191. *See supra* notes 123-26 and accompanying text.

192. *See* SCHAUER, *supra* note 112, at 6.

193. *See* The King v. John Wilkes, 95 Eng. Rep. 737 (K.B. 1763).

194. *See* SCHAUER, *supra* note 112, at 6.

another Wilkes publication — a satire exposing corruption in the government — depicting King George III as imbecilic and suggesting that the King's mother had been involved in an illicit relationship.[195]

In American law in the 1700s, there was a similar lack of concern over pornography. When the United States Supreme Court, in *Roth*, surveyed the state of the law at the time of the Bill of Rights, it found only blasphemy and heresy statutes and some restrictions on public displays and shows of all varieties.[196] The Court did find, and quote, a Massachusetts statute making it criminal to publish "'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services."[197] Even in the statute, however, the focus was on the protection of religion, and obscenity was addressed only when used to mimic a religious service.

The increase in pornographic publications may be seen as a product of an increasing acceptance of humans as also being animals. Clearly, as seen in the heresy and blasphemy statutes, the denial of the existence of god, and its implicit rejection of any divine nature of humans, was unacceptable, but recognizing that humans also shared in the nature of the animals was less objectionable.[198] The relationship to religion was also recognized by the pornographers themselves.

> John Cleland, author of *Fanny Hill*, . . . and others like him were attracted to the religious and sexual representations of ancient Greece, Rome and India. They may have dreamed of inaugurating a new deistic, libertine religion of their own that included homoerotic rituals. A fraternity of this sort was established by Sir Francis Dashwood at Medmenham Abbey in the 1750s, although those who participated, including the notorious John Wilkes, insisted on its heterosexuality. Similar notions were taken up later in the century by Richard Payne Knight, who wrote extensively about the cult of Priapus as an alternative stamped out by the arrival of Christianity.[199]

With the exceptions noted, and those examples having a religious aspect, obscenity prosecutions were rare throughout the 1700s. *Fanny Hill,* or *Memoirs of a Woman of Pleasure,* was not prosecuted when published in

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195. *See* Alpert, *supra* note 118, at 44.

196. *See* Roth v. United States, 354 U.S. 476, 482 n.12 (1957).

197. *Id.* at 482 (quoting Acts and Laws of the Province of Mass. Bay, ch. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814)).

198. Salisbury finds the beginnings of the reacceptance of the classical relationship between humans and animals to have begun in about 1400. *See* SALISBURY, *supra* note 151, at 2. Perhaps the change occured somewhat earlier, as she notes the reemergence of human-animal transformation tales in the twelfth through the fourteenth centuries. *See id.* at 161.

199. HUNT, *supra* note 179, at 41.

England in 1748,[200] although it became the focus of many prosecutions in the succeeding centuries.[201] Pornography in that era escaped legal action, unless it had a seditious or blasphemous character.[202]

5. *The Victorian Era*

While the Victorian Era is seen as the period in which obscenity prosecutions became more common, the change in the acceptance of pornography began before the ascension of Victoria to the throne. In 1787, King George III issued a proclamation calling on the public "to suppress all loose and licentious prints, books and publications, dispensing poison to the minds of the young and unwary,"[203] and the Society for the Suppression of Vice was founded in England in 1802.[204] Even then, however, there was less than a flood of obscenity prosecutions. The Society for the Suppression of Vice brought between thirty and forty prosecutions in its first fifteen years,[205] and in England "[t]here were about three obscenity prosecutions a year . . . in the first half of the 19th century."[206]

The reasons offered for this change are varied. Judge Posner suggests that sexual attitudes in England became more conservative as a reaction to French liberalization during an era of conflict between the two nations.[207] Professor Hyde suggests that the end of the Napoleonic Wars resulted in a great increase in the amount of pornographic literature reaching England from the Continent, which led to an increased effort of suppression.[208] This early concern over French sexual attitudes and Continental pornography was only the beginning of concern about French influence on English culture and morality.

> From about 1866 onwards, the seemingly endless importation of morally questionable French literature gave rise to increasing pessimism over the drama and, in consequence, over the fate of English society. . . . During the late 1860s and early 70s there was a concerted campaign on the part of the licensing authorities

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200. *See* SCHAUER, *supra* note 112, at 6.

201. *See, e.g.*, John Cleland's Memoirs of a Women of Pleasure v. Massachusetts, 383 U.S. 413 (1966); Commonwealth v. Holmes, 17 Mass. 336 (1821).

202. *See* HYDE, *supra* note 130, at 163. Hyde also notes the execution of the author of *The Whore's Rhetorick* in France in 1644, but attributes the execution to the anticlerical character of his writing rather than to the pornographic nature of the work. *See id.* at 155.

203. *Id.* at 164.

204. *See id.* at 165.

205. *See id.*

206. SCHAUER, *supra* note 112, at 6.

207. *See* POSNER, *supra* note 143, at 52.

208. *See* HYDE, *supra* note 130, at 166.

> to ensure that as little as possible of the insidious corruption of French drama reached the London stage.[209]

Also commonly noted is the growth, as a result of the Industrial Revolution, of a literate middle class, a group that might be more susceptible to the negative effects of pornography than earlier aristocratic consumers.[210] In addition, pornography became available to the lower classes because of the decreased cost of books.[211]

Whatever the origins of the initial reaction to the growth in pornography during the Enlightenment period, the exclusive concentration of obscenity law on sexual material developed in the 1860s. Professor Schauer notes the development of obscenity law between 1800 and 1860 but concludes that there was no definition of what was obscene in that era.[212] The first definition of obscenity in English law is said to come out of the 1868 case of *The Queen v. Hicklin*.[213] While that case does provide a definition of what varieties of sexual material are obscene, it must be admitted that there are earlier works of a purely sexual nature that were prosecuted as obscene. *Hicklin* might be seen as limiting the concept of obscenity to depictions of sexual activities.

Obscenity law developed somewhat later in the United States. Because the law developed slowly throughout the 1800s, there were few prosecutions prior to the Civil War.[214] In the years following the war, the attack on obscene publications intensified. Anthony Comstock founded the New York Society for the Suppression of Vice as a committee of the Y.M.C.A. in 1872 and as an independent organization in 1873.[215] Similar organizations were established in other states, and in 1873 Comstock secured the congressional passage of a prohibition against mailing obscene material in a statute known as the Comstock Act.[216] Comstock was appointed as a special agent for the Post Office and undertook to enforce the act. "In the first year after the law's passage, Comstock claimed to have seized 200,000 pictures and photographs; 100,000 books; 5,000 packs of playing cards; and numerous contraceptive devices and allegedly aphrodisiac medicines."[217] In his career,

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209. JOHN RUSSELL STEPHENS, THE CENSORSHIP OF ENGLISH DRAMA 1824-1901, at 84-85 (1980).

210. *See, e.g.*, HYDE, *supra* note 130, at 165.

211. *See, e.g.*, POSNER, *supra* note 143, at 52.

212. *See* SCHAUER, *supra* note 112, at 7.

213. 3 L.R.-Q.B. 360 (1868).

214. *See* SCHAUER, *supra* note 112, at 12.

215. For a discussion of Comstock's role and the history of the statutes and prosecutions in which he was involved, see *id.* at 12-14.

216. An (Comstock) Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598 (1873).

217. SCHAUER, *supra* note 112, at 13.

Comstock claimed to have "convicted persons enough to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full. I have destroyed 160 tons of obscene literature."[218] In light of the minimal prosecutions in either England in the first half of the century or in the United States prior to the Civil War, the sudden post-war concern led to an incredible increase in the number of convictions, with Comstock himself being involved in the conviction of over 3,600 people.

What explains this concern with nonreligious obscenity beginning in the late 1700s and growing to a crusade in the later half of the 1800s? The availability of cheaper books and French postcards and the literacy of lower and middle classes may have been factors, but they do not seem sufficient enough to explain the difference in attitude that developed in that era. Pornography had been widely available in other eras, at least as early as Greek pottery, without causing such a strong reaction. Even in the then recent past, concerns over pornography focused on its heretical character. But in the late 1700s and the 1800s, the attack broadened to pornography with no religious content. Given the earlier concerns over religion as the basis for regulating pornography, an explanation that continued to focus on religion would seem a better explanation than one focussing on technology or literacy if something occurred in that era to renew questions over the relationships among humanity, God and the animals.

The change that might serve as such an explanation is the development of the theory of evolution. While Charles Darwin's *The Origin of Species* was not published until 1859, the theory had been developing for some time. Carl Linnaeus, working in the middle of the 1700s, had begun the study of taxonomy, the classification of all living things.[219] While Linnaeus placed the human in its own genus as the only living species in the genus *homo*, he appears to have done so for other than scientific reasons. Looking back on that decision, he later wrote:

> I demand of you, and of the whole world, that you show me a generic character . . . by which to distinguish between Man and Ape. I myself most assuredly know of none. I wish somebody would indicate one to me. But, if I had called man an ape, or vice versa, I would have fallen under the ban of all the ecclesiastics. It may be that as a naturalist I ought to have done so.[220]

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218. JAMES JACKSON KILPATRICK, THE SMUT PEDDLERS 35 (1960).

219. *See* CARL SAGAN & ANN DRUYAN, SHADOWS OF FORGOTTEN ANCESTORS 273 (1992).

220. *Id.* at 274 (quoting letter from Carl Linnaeus, to J.G. Gmelin (Feb. 14, 1747), *quoted in* GEORGE SELDES, THE GREAT THOUGHTS 247 (1985)).

While the naturalism of the Enlightenment espoused the animal side of humanity and led to an increase in pornography, taxonomy was making too much of our status as animals.

While Linnaeus limited his efforts to classification, others speculated on the genesis of species. Charles Darwin's grandfather Erasmus Darwin, in his 1794 work titled *Zoonomia, or the Laws of Organic Life*, wrote:

> [W]hen we revolve in our minds the great similarity of structure which obtains in all the warm-blooded animals as well as quadrupeds, birds, amphibious animals as in mankind, would it be too bold to imagine that all warm-blooded animals have arisen from one living filament (archetype, primitive form)?[221]

While Charles Darwin and Alfred Russell Wallace may have been the first to explain the mechanism by which species evolve, predecessors had already postulated the relationships among species. This speculation could not have gone unnoticed. Erasmus Darwin was sufficiently well known and well thought of enough to have been invited to become the physician of George III,[222] whose proclamation against pornography began the era of obscenity prosecutions.[223]

Also preceding Charles Darwin was John Baptiste Pierre Antoine de Monet de Lamarck who, beginning in the late 1700s, developed his own theory to explain the evolution of species. His theory that organisms inherited the acquired characteristics of their ancestors was the same as that of Erasmus Darwin and was treated seriously by Charles Darwin.[224] This theory, however, would eventually lose out to Charles Darwin's natural selection — survival of the fittest — theory.

In 1859, the watershed was the publication of *The Origin of Species*.[225] This book was published shortly after a reading of papers by Darwin and Wallace setting forth their parallel, independently developed theories at a meeting of the Linnaean Society. Darwin's book made the theory of evolution widely available to the reading public, as the entire first printing rapidly sold.[226] While *The Origin of Species* was somewhat circumspect with regard to the participation of humans in the evolutionary process, a subject that Darwin would address directly in the 1871 publication of *The Descent of Man*, the implications were clear. "His restraint fooled no one. . . .

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221. GERHARD WICHLER, CHARLES DARWIN: THE FOUNDER OF THE THEORY OF EVOLUTION AND NATURAL SELECTION 23 (1961).

222. *See* SAGAN & DRUYAN, *supra* note 190, at 36. Erasmus Darwin declined the offer. *See id.*

223. *See supra* notes 203-06 and accompanying text.

224. *See* SAGAN & DRUYAN, *supra* note 219, at 38.

225. CHARLES DARWIN, THE ORIGIN OF SPECIES (1859).

226. *See* SAGAN & DRUYAN, *supra* note 219, at 50.

[T]here could be no reconciling *The Origin* with a literal rendition of Genesis."[227] Moreover, it was not simply a refutation of the literal truth of a religious work; it spoke to the worth of mankind. James Rachels, the modern scholar of the philosophical implications of Darwinism, stated that the theory of evolution "undermines the traditional idea that human life has a special, unique worth."[228]

In Darwin's work, the Enlightenment's examination of science and the place of humans in the world led to conclusions that had an impact on the individual's self-perception. George Levine, who has studied the effects of evolutionary theory on novelists, notes the following:

> [Darwin] can be taken as the figure through whom the full implications of the developing authority of scientific thought began to be felt by modern nonscientific culture. Darwin's theory thrust the human into nature and time, and subjected it to the same dispassionate and material investigations hitherto reserved for rocks and stars.[229]

The loss of dichotomy between humans and animals was paralleled to a loss of the clear distinction between good and evil characters in the Victorian novel.

> All living things in Darwin's world are quite literally related, and, as he will say in a variety of ways, graduate into each other. Isolated perfection is impossible . . . . Fiction's emphasis on the ordinary and the everyday, its aversion to traditional forms of heroism and to earlier traditions of character 'types,' all reflect the tendency obvious in Darwin's world to deny permanent identities or sharply defined categories — even of good and evil. Note how rarely in Trollope or . . . in Eliot genuinely evil characters appear. Typical stories are of decline or of development . . . .[230]

The impact of Darwin on the nonscientific world resulted in the questioning of human nature. The impact on the novel was a genre in which plots were not simply struggles between good and evil characters. Instead, the subject became the presence of good and evil in the individual, which represented a struggle between the divine nature and the animal nature of the individual

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227. *Id.*

228. JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 4 (1991).

229. GEORGE LEVINE, DARWIN AND THE NOVELISTS: PATTERNS OF SCIENCE IN VICTORIAN FICTION 1 (1988).

230. *Id.* at 17.

human being.

While it should be clear that Darwin shook the religious beliefs of the era, and that there was a strong religious reaction to the developing theory of evolution, it may not be clear why that reaction would focus on sex and lead to increased prosecution of obscenity. That argument requires the examination of an additional factor. Levine noted that, after Darwin, humans became the subject of "dispassionate and material investigations hitherto reserved for rocks and stars,"[231] but the result was much worse. Humans were clearly distinct from rocks or stars, but what many had taken to be a clear distinction between people and animals was no longer so clear. In particular, the common understanding of Darwin's theory as holding that humans descended from apes would certainly raise old concerns over distinctions between humans and the other animals, especially other primates. Any insistence that, despite Darwin's theory, humans were in fact different would focus on separating our behavior from that of the apes.

The behavior of apes that seemed to most concern European culture was their sexual activity. One of the early studies of chimpanzees in the wild was that of Boston physician Thomas Savage. He noted that, while chimpanzees exhibit remarkable intelligence, "they are very filthy in their habits."[232] That judgment of "filth" was based on observations of the sexual habits of the chimpanzee.

> Chimpanzees have an obsessive, unself-conscious preoccupation with sex that seems to have been more than Savage could bear. Their zesty promiscuity may include dozens of seemingly indiscriminate heterosexual copulations a day, routine close mutual genital inspections, and what at first looks very much like rampant male homosexuality.[233]

It was, of course, not simply the activities of animals in the wild that caused such concern in Europe. Even the animals' continuation of such behavior when caged in a zoo might make viewers uncomfortable, but such observation would not lead to as strong a reaction as the suppression of obscene materials. What was important was what the observation of chimpanzee behavior said about humans. "If, say, ducks or rabbits with a penchant for sexual excess were under review, people would not have been nearly so bothered. But it's impossible to look at a monkey or ape without

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231. *Id.* at 1.

232. SAGAN & DRUYAN, *supra* note 219, at 270 (quoting Thomas N. Savage & Jeffries Wyman, *Observations on the External Characters and Habits of the Troglodytes Niger and on Its Organization*, 4 B. J. NAT. HIST. (1943-44), *quoted in* THOMAS H. HUXLEY, MAN'S PLACE IN NATURE AND OTHER ANTHROPOLOGICAL ESSAYS (1901)).

233. SAGAN & DRUYAN, *supra* note 219, at 270.

ruefully recognizing something of ourselves."[234] Any religious reaction to Darwin would have to focus on the differences between humans and monkeys or apes and would include images or descriptions of humans engaged in the copulations or genital inspections so common to the chimpanzee.

One topic remains to be tied into the argument presented here. That topic is masturbation. Since masturbation and pornography often go together, attitudes toward the two would also seem likely to be similar in various eras. Indeed, that appears to be the case. The classical era was free in its attitude toward pornography and sex generally, an acceptance that carried over to masturbation. "Masturbation, to the Greeks, was not a vice but a safety valve, and there are numerous literary references to it, especially in Attic comedy."[235] There is also no indication of negative attitudes surrounding masturbation in the Roman era.[236] The general change in attitude towards sex that came with the onset of the Christian era reached masturbation as well. While sex was necessary for the maintenance of the human species, nonprocreative sexual activities were unacceptable.[237]

In the same era in which Linneaus was developing his taxonomy, concern over masturbation moved from the realm of the religious into the medical and scientific arenas. In 1758, the Lausanne physician S.A.D. Tissot published *L'Onanisme, dissertation sur les maladies produites par la masturbation*.[238] He argued that the human body was subject to continual wasting through any loss of fluids and particularly focused on the loss of semen. While such loss was necessary for procreation, frequent intercourse and nonprocreative emission were seen as dangerous, leading to

> (1) cloudiness of ideas and sometimes even madness; (2) a decay of bodily powers, resulting in coughs, fevers, and consumption; (3) acute pains in the head, rheumatic pains, and an aching numbness; (4) pimples of the face, suppurating blisters on the

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234. *Id.* at 272.

235. REAY TANNAHILL, SEX IN HISTORY 98 (1980). *See also* VERN L. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 99 (1976). "Masturbation was regarded as a natural substitute for men lacking opportunity for sexual intercourse, considerable reference to it appearing in the extant literature." *Id.* (footnote omitted).

236. *See* VERN L. BULLOUGH & BONNIE BULLOUGH, SIN, SICKNESS, & SANITY: A HISTORY OF SEXUAL ATTITUDES 56 (1977).

237. *See supra* notes 162-66 and accompanying text. *See also* Jean-Louis Flandrin, *Sex in Married Life in the Early Middle Ages: The Church's Teaching and Behavioural Reality, in* WESTERN SEXUALITY: PRACTICE AND PRECEPT IN PAST AND PRESENT TIMES 114, 114-15 (Philippe Ariès & André Béjin eds., Anthony Forster trans., 1985); BULLOUGH, *supra* note 235, at 355.

238. *See* BULLOUGH & BULLOUGH, *supra* note 236, at 59; BULLOUGH, *supra* note 235, at 498.

> nose, breast, and thighs, and painful itchings; (5) eventual weakness of the power of generation, as indicated by impotence, premature ejaculation, gonorrhea, priapism, and tumors in the bladder; and (6) disordering of the intestines, resulting in constipation, hemorrhoids, and so forth.[239]

Women faced all the problems of men and additionally would be subject to "hysterical fits, incurable jaundice, violent cramps in the stomach, pains in the nose, ulceration of the matrix, and uterine tremors, which deprived them of decency and reason and lowered them to the level of the most lascivious, vicious brutes."[240]

In the 1800s, the list of maladies due to masturbation had grown, in the writings of the *Battle Creek Sanatorium's Jon Harvey Kellogg*, to include:

> general debility, consumption-like symptoms, premature and defective development, sudden changes in disposition, lassitude, sleeplessness, failure of mental capacity, fickleness, untrustworthiness, love of solitude, bashfulness, unnatural boldness, mock piety, being easily frightened, confusion of ideas, aversion to girls in boys but a decided liking for boys in girls, round shoulders, weak backs and stiffness of joints, paralysis of the lower extremities, unnatural gait, bad position in bed, lack of breast development in females, capricious appetite, fondness for unnatural and hurtful or irritating articles . . . , disgust of simple food, use of tobacco, unnatural paleness, acne or pimples, biting of fingernails, shifty eyes, moist cold hands, palpitation of the heart, hysteria in females, chlorosis or green sickness, epileptic fits, bed-wetting, and the use of obscene words and phrases . . . , urethral irritation, inflammation of the urethra, enlarged prostate, bladder and kidney infection, priapism, piles and prolapsus of the rectum, atrophy of the testes, varicocele, nocturnal emissions, and general exhaustion.[241]

While some of the belief in these purported results can be explained by experience with the insanity accompanying the final stages of syphilis that would be more likely in promiscuous persons,[242] it seems difficult to understand how all these, sometimes contradictory, results could be seen as due to masturbation. Nonetheless, at least with regard to the mental effects, the beliefs persisted to the point that "half of the 1959 graduates of a

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239. BULLOUGH, *supra* note 235, at 498.
240. *Id.*
241. *Id.* at 545.
242. *See* BULLOUGH & BULLOUGH, *supra* note 236, at 59.

Philadelphia medical school believed that mental illness is frequently caused by masturbation . . . [,and] one out of five *faculty* members of that school believed the same thing."[243]

What is particularly interesting here is the view that masturbation, and other sexual habits, would be passed on to offspring. Kraft-Ebing, the author of the 1886 work *Psychopathia Sexualis*, reported the case of a woman who regularly engaged in masturbation and two of her sons began the same practice at an early age.[244] More generally, there was a belief that if those who engaged in sexual perversions had children, the children would be born with similarly perverted instincts.[245] That analysis goes a step beyond sexual activity as a reminder that we are animals and even beyond a view of sexual degeneracy as signifying that the practitioner occupied a lower rung on the evolutionary ladder.[246] This belief appears to invoke the theories of Lamarck on the inheritance of acquired characteristics. Sex not only exposes our animal side and separates us from God, but sex and masturbation, both of which may result from pornography, are inherited and progressive characteristics that may increase the distance between humans and God from generation to generation. This concern over degeneration to ape-like creatures mirrors one of the results of Dr. Savage's field study of the chimpanzees. He reported the belief of the indigenous population as to the origin of those creatures.

> It is a tradition with the natives generally here, that they were once members of their own tribe: that for their depraved habits they were expelled from all human society, and, that through an obstinate indulgence of their vile propensities, they have degenerated into their present state and organisation.[247]

The tie between evolution and pornography continues into the present era. The suppression of sexually explicit material in the early to middle portions of the current century was matched by the suppression of the teaching of evolution. The prosecution of sexual depictions, even in serious

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243. EDGAR GREGERSEN, SEXUAL PRACTICES: THE STORY OF HUMAN SEXUALITY 28 (1982) (emphasis in original).

244. *See* BULLOUGH & BULLOUGH, *supra* note 236, at 63.

245. *See* BULLOUGH, *supra* note 235, at 547.

246. *See id.* at 640.

247. SAGAN & DRUYAN, *supra* note 219, at 270 (quoting Thomas N. Savage & Jeffries Wyman, *Observations on the External Characters and Habits of the Troglodytes Niger and on its Organization*, 4 B. J. OF NAT. HIST. (1943-44), *quoted in* THOMAS H. HUXLEY, MAN'S PLACE IN NATURE AND OTHER ANTHROPOLOGICAL ESSAYS (1901)).

literature such as the work of James Joyce and D.H. Lawrence,[248] matched the era in which states banned the teaching of evolution in public schools.[249] In the latter half of the present century, the toleration of sexual depictions has increased greatly, to the point where Professor Sunstein asserts that, under the constitutional test for obscenity, "most people involved in the production of sexually explicit work have little to fear."[250] At the same time, it has become clear that states cannot ban the teaching of evolution,[251] and attempts to counter the teaching of evolution with a requirement of an equal treatment of creation science have been declared unconstitutional.[252] While the changes in state obscenity prosecution and in the treatment of anti-evolution statutes might be explained by the application of the First Amendment to the states, federal law has also addressed obscenity,[253] and the increase in toleration exists in federal law as well.[254]

Society, in the later part of this century, simply has become more tolerant of pornography. At the same time, we have become more comfortable with evolution and what that theory says about our position between God and the animals. What is perhaps most telling is that the group, other than the MacKinnon-Dworkin school of feminists, which has taken the strongest stand against sexually explicit materials is also the group which has taken a strong stand against evolution. Segments of the Christian right still are concerned over what both schools of thought say about the divine nature of humankind.

The religious explanation for the availability and treatment of pornography seems superior to the technological explanation. It is consistent across the millennia. The religious explanation explains the more recent changes that occurred around the time of the invention of the paperback book or the earlier invention of the printing press. It also explains changes in the transition from the Greek and Roman eras to the Christian era and the focus of concern in these eras. Furthermore, it lacks the technological explanation's fault in relying on the form of pornography, rather than its prevalence. While printing may have made pornographic books more

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248. For a discussion of the obscenity prosecutions directed at serious works of literature, see EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992).

249. *See* Scopes v. State, 289 S.W. 363 (Tenn. 1927).

250. SUNSTEIN, *supra* note 90, at 211.

251. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

252. *See* Edwards v. Aguillard, 482 U.S. 578 (1987).

253. *Roth v. United States* contains a catalog of federal statutes addressing obscene materials. *See* Roth v. United States, 354 U.S. 476, at 481 (1957).

254. The *Miller* test applies to federal, as well as state, obscenity law and limits liability to stronger depictions than would have been obscene up until the middle of the century, when *Lysistrata* was considered obscene by the U.S. Post Office. *See supra* note 140 and accompanying text.

available, pornographic pottery was widespread in early eras. A change in the medium is simply not as good an explanation for the change in attitude toward pornography as a change in religious view and the impact of pornography on that view.

IV. RECONSIDERING THE FEMINIST ATTACK ON PORNOGRAPHY, THE INDIANAPOLIS ORDINANCE AND CANADIAN STATUTE

There are at least two possible avenues to follow from here. The history offered could be used to bolster arguments against having any obscenity exception at all. The strongest arguments against the obscenity exception have been based on the values of autonomy and self-expression.[255] While those values are very important, their nineteenth-century libertarian genesis indicates that they need not necessarily be considered of constitutional dimension. The reason that they are strengthened by the history offered here is that the development of the concept of obscenity from religious views might be used to argue that the obscenity exception is a violation of the First Amendment's Establishment Clause.

The Establishment Clause argument should not, however, serve to void the obscenity exception. Whatever the origins of the obscenity exception, this article has suggested that the current focus has evolved to consider not how divine-like humans may be, but instead to insist that we are something more than purely animal. Whether that difference is expressed in terms of a soul or a human spirit, the result will be the same and will not depend on the adoption of a particular religious view. Neither should the religious origins mean that the continued existence of the obscenity exception is an establishment of religion. The best analogy for this situation would seem to be the Sunday closing laws. They clearly had a religious origin, but they came to have other purposes. They provide a common day of rest on the day that most would choose as their day off. Even when challenged by Sabbatarians, who would be religiously required not to work on Saturday and legally required not to work on Sunday, the Supreme Court refused to find a violation of the Establishment Clause.[256] The religiously-inspired law had come to have a secular purpose. Here, too, the religious basis of recognizing the divine nature of humans has turned to a basis in human dignity which does not insist that the people have a divine nature but only that there is something that separates us from the animals.

Another avenue for analysis is to look at the MacKinnon-Dworkin ordinance struck down in *Hudnut* and the Canadian statute at issue in *Butler* in light of the preceding examination of the history of obscenity. That

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255. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

256. *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

history demonstrates that it is the degrading effect of sexual images that has been the focus of attempts to limit such depictions. In eras in which sexuality was not viewed as degrading because it did not differentiate between humans and the Gods, pornography was accepted. As sex became a difference between humanity and divinity, and placed humans on the same plane as animals, pornography came under eccliastic scrutiny. As the boundary between humans and animals blurred, legal sanctions were imposed on obscene materials. In the present era, in which we are comfortable with our place in taxonomy, we still believe that, if not of a divine nature, we are something more than animals, or at least different from the other animals.

The Canadian statute, then, seems to stand on solid historical ground. If the historical basis of obscenity law is not the protection of religion but instead the prevention of the degradation of humanity by the sexual separation of humans and god, it is degradation that is the core of the concept. The objection to pornography was founded in eras in which such depictions positioned humans as more animal than divine. Pornography was seen as degrading. In the current era, the degradation that is most objectionable may be viewed not so much as that which makes humans less than divine but as that which makes us less than human. The Canadian emphasis on degrading or dehumanizing sexual images comports with this background.[257]

The Indianapolis ordinance may also not have been too far off target. The prurience and the shamefulness of some sexual images may be best explained by the treatment of the persons involved as less than human. While less than human may once have meant less than divine, and all explicit sexual images might have been shameful, less than human now means no more than animal. It is the sexual image that treats individuals as purely physical, without regard to any aspects of human spirit, that may be seen as shameful. The MacKinnon-Dworkin ordinance focused on images that depict:

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience

257. In the Canadian Statute, violent sexual images also are obscene, degrading and dehumanizing. *See* Criminal Code, R.S.C. ch. C-46, § 163 (8) (1985) (Can.). For an argument that violence, without sex, is similarly degrading and obscene, see KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION 63-70 (1996).

> sexual pleasure in being raped; or
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
> (4) Women are presented as being penetrated by objects or animals; or
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[258]

While an obscenity statute could not bar all images, or even all sexual images that depict women in the ways indicated, an obscenity statute could accomplish some of the goals of the ordinance. In accord with *Miller*, the statute would have to define the sexual acts that may be obscene when treated in a patently offensive way. It would also have to provide that, if the work taken as a whole had serious literary, artistic, political or scientific value, it could not be held obscene. While this runs counter to the position that, if a woman is harmed, the other value of the work should not matter,[259] the concession is necessary to adapt obscenity to address the issue.

The remaining aspect of *Miller* is a requirement that to be obscene, the work, taken as a whole and applying contemporary community standards, must appeal to the prurient interest. But history would indicate that the shameful aspect of the prurient interest is the treatment of people as less than people, and that is the focus of the ordinance's definition of pornography. The statute could require that those factors be taken into account in determining prurience. However, not all images fitting the definition in the ordinance would be found obscene. The depiction that combined the specified sexual activities with the degradation of women would have to go beyond community standards for such depictions. While some might wish to suppress magazines such as *Playboy*, because they depict women in a "position of display," community standards seem not to be offended by such publications.

This understanding of prurience can also explain the MacKinnon-Dworkin ordinance's provision that men who could "prove injury in the same way that a women is injured" would have available the same legal remedies.[260] While it may be more common to treat women as less than full

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258. INDIANAPOLIS, IND., CODE § 16-3(q) (1984).
259. *See supra* note 29 and accompanying text.
260. INDIANAPOLIS, IND., CODE § 16-17(b) (1984).

persons in pornographic films, men might also be treated in the same way. A film that so treats males should also be viewed as appealing to the prurient interest, if the depiction of the degrading sex exceeds community standards. Furthermore, if the film also lacks serious value and depicts specifically defined acts in a patently offensive way, it could be held to be obscene.

This approach certainly does not reach all the images that the MacKinnon-Dworkin ordinance was designed to reach; however, it does provide some of what the authors sought. It does recognize that it is degrading sexual images that should be the target of regulation. It shows that the factors the ordinance used to define *pornography* are historically justified as factors defining *obscenity*. Since obscene materials already lack First Amendment protection, there is no need to convince the courts to establish a new category of unprotected speech or to accept the harm caused by pornography as sufficient to overcome First Amendment protections. The argument, as presented herein, as to the proper focus of the prurience requirement, may well be an easier battle to win.

RECENT DEVELOPMENTS IN GERMAN LABOR LAW: FREEDOM OF ASSOCIATION, INDUSTRIAL ACTION, AND COLLECTIVE BARGAINING

Gregor Thüsing*

I. INTRODUCTION

"America needs strong unions balanced by strong employers, each able, if necessary, to resist the unjust demands of the other."[1] If one agrees with this dictum attributed to Justice Brandeis, one probably would think that it also applies to Germany. A predominant feature of the structure of German labor and employment law is that it has no single format established by the government. The content of German labor and employment law, as well as working conditions, are determined not only by legislators, but also, to a large extent, by trade unions and employer organizations. As parties involved in negotiating and completing collective agreements, trade unions and employer organizations are bound by the Basic Law of the Federal Republic of Germany (Germany's written constitution) to lay down comprehensive terms and conditions of employment and to adjust these terms and conditions continually to suit prevailing economic and social developments. German trade unions and employer organizations work independent from governmental influences, but still operate within the framework of the constitution and current legislation.

The terms and conditions of employment set forth in collective agreements apply only to employers and employees who are members of the organizations concluding the agreements.[2] However, in practice, collective agreements are also largely extended to cover all other employment contracts.[3] Thus, unions and employer associations are important and

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1. *See* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 149 (1946).

2. *See* Tarifvertragsgesetz, art. 3, § 1 [Collective Agreement Act], v. 8.1969 (BGBl. I Nr. 83 S.1323) [hereinafter Tarifvertragsgesetz]. Members of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective agreement. *See id.*

3. According to German law, every employee has an employment contract. This contract may be in oral, or as in most cases, in written form. As a rule, presumably more than 90% of the time, the employment contract refers to a collective agreement. Where an oral contract is concluded, the employee whose contract is not limited to one month and

powerful organizations in Germany.

Due to its nationally-centralized format and high degree of organization, as compared to the United States,[4] the German workforce exhibits an impressive number of union members. In fact, the largest union in the world is the *Industriegewerkschaft Metall* (the German metal workers union), which has more than three million members. Collective agreements with this union determine the working conditions for an entire branch of German industry. Those involved in reaching collective agreements are primarily responsible for creating a uniform standard of terms and conditions of employment, and they, therefore, assume a particular responsibility extending beyond union relations.

The preceding summary of German labor law indicates the importance of the law of collective bargaining in Germany and the role of the law of industrial action. Both areas of law have developed mainly through judicial decisions because every effort in the past to enact statutes concerning strikes and lockouts has failed and because the Collective Agreement Act[5] regulates only the most fundamental questions, explicitly leaving many other questions open. Therefore, describing recent developments in the German law of industrial action and collective bargaining requires an examination of recent court decisions.

II. FREEDOM OF ASSOCIATION AND THE NEW INTERPRETATION OF ARTICLE 9, SECTION 3 OF THE BASIC LAW

The freedom of association in Germany is granted by the Basic Law of the Federal Republic of Germany:

> The right to form associations in order to safeguard and improve working and economic conditions shall be guaranteed to every individual and all occupations and professions. Agreements restricting or intended to hamper the exercise of this right shall

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exceeds a weekly working time of eight hours has a claim against the employer to get a document listing the main duties and rights of his employment contract. *See* Nachweisgesetz, § 1 [Act on the Notification of Conditions Governing an Employment Relationship], v. 20.7.1995 (BGBl. I S. 946). *See also* GÜNTER HALBACH ET AL., LABOUR LAW IN GERMANY: AN OVERVIEW 55-57 (5th rev. & extended ed. 1994) (providing an excellent introduction and summary of German labor and employment law).

4. Though the rate has been declining, about 30% of the German workforce belongs to a union. *See* GREGOR THÜSING, DER AUßENSEITER IM ARBEITSKAMPF 17 (1996). In the United States, union membership is about 17.7%. *See* MICHAEL HARPER & SAMUEL ESTREICHER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 113 (4th ed. 1996). About 80% to 90% of employers in Germany are members of an employer organization. *See* THÜSING, *supra* at 21.

5. *See* Tarifvertragsgesetz, art. 3, § 1.

be null and void; measures to this end shall be illegal.[6]

Although the German Constitution mentions only the right to form associations by employees or employers, the courts have recognized that such a right would be a mere formality unless the activities of these associations were also protected, at least minimally, by law. The right to join an association which is forbidden to pursue its ends is useless, as is constitutional protection of such a mere formal right. Therefore, in 1954, the Federal Constitutional Court held that article 9, section 3 of the Basic Law also protects a minimum level of union activity and ruled that employers' associations cannot be restricted by legislation without amending the Constitution.[7] This minimum area of activity was called *Kernbereich* (core area).

The *Kernbereich* included the right to conclude collective agreements, to strike, and to lock out.[8] In some of the decisions that followed, the Court held that every restriction of the *Kernbereich* of union activity was unconstitutional. However, the *Kernbereich* was still construed rather narrowly and was seen to comprise only the fundamental structures of the law of industrial action and collective agreement.[9] Numerous court decisions have stated that the activity of the unions is protected by the constitution only to the extent that must be considered as imperative for the preservation and safeguarding of the association.[10] In other decisions — and sometimes even in different parts of the same decision — the Court seemed to have a different understanding of the *Kernbereich*. A restriction on protected union activities was held unconstitutional if that restriction was not justified by the legitimate intentions of the legislation, especially if it was not appropriate, necessary, and proportional to protect other constitutional rights. Using these formulations, the Court seemed to have a broad understanding of the *Kernbereich*, not as the absolute (and thus very limited) restriction on distinct kinds of state action, but as a general requirement that any restriction of

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6. GRUNDGESETZ [Constitution] [GG] art. 9(3).

7. *See* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 4, 96. *See also* HALBACH ET AL., *supra* note 3, at 303.

8. In contrast, only a few U.S. courts have found a constitutional protection of the right to strike. *See* ARCHIBALD COX ET AL., LABOR LAW 567 (12th ed. 1996) (referring to United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971)). *See generally* Charles O. Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950); Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WISC. L. REV. 149.

9. *See* BVerfGE 17, 319 (333). *See also* BVerfGE 19, 303 (322); BVerfGE 28, 295 (304); BVerfGE 57, 220 (245).

10. *See, e.g.*, BVerfGE 17, 319 (333); BVerfGE 19, 303 (322); BVerfGE 28, 295 (304); BVerfGE 57, 220 (245).

union activities needs to be justified to be constitutional.[11] For almost forty years, the courts followed and affirmed the concept of *Kernbereich*, thereby establishing it as a solid foundation of German labor law.

Nevertheless, many uncertainties continued as a result of these two approaches to *Kernbereich*, largely due to the fact that they were very difficult to reconcile. In regard to these uncertainties, the Court's view changed in a decision in January of 1995.[12] The decision concerned the constitutionality of a statute regulating (and in fact hindering) collective agreements on ships run by German enterprises but sailing under foreign flags. Here, the Federal Constitutional Court declined to use the term *Kernbereich* and found instead that the ability to establish collective agreements is part of the protected freedom to act as a union and that this freedom was unconstitutionally restrained by some of the statute's provisions.[13]

Similarly, in a July 1995 decision, the Court continued to distance itself from the former approach.[14] A union alleged the unconstitutionality of a statute regulating the provision of unemployment insurance to employees that, while not themselves on strike, nevertheless could not work due to a particular strike's effect on the production process. Once again the Court avoided the term *Kernbereich*, stating instead that the restraint on the rights conferred by article 9, section 3 of the Basic Law was justified by the legislative aim of protecting other constitutional rights; however, an explicit rejection of the *Kernbereich* approach as the exclusive means of protection was still absent.[15]

The rejection of the exclusivity of *Kernbereich* finally came with a decision in November of 1995.[16] The case concerned the question of whether a union member had the right to distribute flyers and other

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11. *See* BVerfGE 19, 303 (321); BVerfGE 50, 290 (368); BVerfGE 57, 220 (245).

12. *See* BVerfGE 92, 26.

13. *See id.*

14. *See* BVerfGE 92, 365. The constitutional complaint concerned article 116 of the Employment Promotion Act. *See id. See also* Arbeitsförderungsgesetz, art. 11 [Employment Promotion Act], v.25.6.1969 (BGBl. I S.582), *amended by* BGBl. I S.1554 (1983), *and* BGBl. I S.637 (1986). For the history and reasoning of why the unions assumed article 116 was unconstitutional, see Manfred Weiss, *Labor Law and Industrial Relations in Germany*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS 165 (Roger Blanpain ed., 1994), and Manfred Weiss, *Recent Trends in the Development of Labor Law in the Federal Republic of Germany*, 23 LAW & SOC. REV. 759, 764 (1989) (both works were written before the decision of the Federal Constitutional Court).

15. *See* BVerfGE 92, 365.

16. *See* Wolfgang Däubler, *Tarifausstieg — Erscheinungsformen und Rechtsfolgen*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 225, 231. *See also* BVerfGE 93, 352; ENTSCHEIDUNGSSAMMLUNG ZUM ARBEITSRECHT (No. 60, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing).

informational materials during worktime in a plant or whether the employer had the right to forbid this distribution, as he in fact did. The Federal Constitutional Court stated explicitly that not only is *Kernbereich* protected by the constitutional right of article 9, section 3, but that all other conduct that serves the purpose of achieveing the goals of the union, including the safeguarding and improvement of working and economic conditions, was also protected.[17]

Based upon the Federal Constitutional Court's decision, a statute is unconstitutional when it limits this conduct, unless the statute is appropriate, necessary, and proportional to protect other constitutional rights. This concept is similar to the previously-described second approach taken by the Federal Constitutional Court in attempting to define the *Kernbereich*. Nevertheless, it is an important difference now that all union conduct is explicitly protected. This analysis conforms to the general understanding of constitutional rights, namely, that one must first determine whether a certain type of conduct is constitutionally protected and, second, whether its limitation is justified. Depending on the particular constitutional right, such justifications may be derived from other constitutional rights or from general notions of public welfare.[18] However, the Court left open the question of whether the legislature can limit the right granted by article 9, section 3 for other, non-constitutional reasons of general welfare.

In a decision in April of 1996,[19] this new approach was affirmed. The Court had to decide whether the state is allowed to enact a statute replacing the terms of a collective agreement, even if the statutory provisions give employees fewer rights than they previously enjoyed under the collective agreement. More specifically, the issue was whether a statute could limit, after a distinct period of time, the extension of temporary employment to university employees working on their doctoral theses or habilitations, where the collective agreements in force at the time allowed such extensions.[20] The Court held that the creation of a collective agreement is part of the protected freedom of union activities; therefore, a statute that regulates areas that could also be regulated by collective agreements must be justified.[21] The more a distinct area is regulated by collective agreements, the more onerous the

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17. *See* GG art. 9(3).

18. *See* Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 45 (Ulrich Karpen ed., 1988); E. STEIN, STAATSRECHT 180 (13th ed. 1991).

19. *See* BVerfGE 94, 268; ENTSCHEIDUNGSSAMMLUNG ZUM ARBEITSRECHT (No. 61, concerning art. 9 of the Basic Law, with a comment by Thomas Müller & Gregor Thüsing).

20. *See* Gesetz über befristete Arbeitsverträge mit wissenschaftlichem Personal an Hochschulen und Forschungseinrichtungen [Act on Temporary Employment with Scientific Employees at Universities and Research Institutes], v. 14.6.1985 (BGBl. I S. 1065)

21. *See* BVerfGE 94, 268.

burden of establishing a justification for its infringement. The burden is certainly present when the statute seeks to preclude the union from enacting certain kinds of collective agreements in the future. Furthermore, the burden is especially onerous if the statute is enacted to replace a collective agreement already in existence.

The rationale supporting the infringement of a collective agreement follows from the belief that the legislators have a legitimate goal in protecting the freedom of employment of the younger academics.[22] In essence, the Court found that the younger students should be given the opportunity to secure one of the limited employment positions at the university during their work on dissertations or habilitations. Moreover, the Court held that the objective of safeguarding the functionality of the university in teaching science to the next generation, which the Court considered to form a part of the freedom of science and research, was also a compelling justification for this statute.[23] These interests were held to prevail over the limitation of the union's right. However, the Court again left open the question whether legislation can limit the right granted by article 9, section 3 to not only protect other constitutional rights, but also to protect common aspects of general welfare.

III. RECENT DECISIONS CONCERNING THE LAW OF INDUSTRIAL ACTION

Three recent decisions in the field of industrial action are presented in this section. The first decision concerns whether an employer has the right to close a plant during a strike even though some employees want to continue working and to maintain a claim to be paid for any work completed. The second decision concerns whether a union can strike against an employer who is a member of an employer association, not to achieve a collective agreement with the association as a whole, but to enter into a collective agreement with the employer. The final case concerns whether it is permissible for an employer, at the conclusion of a strike, to lock out only those employees who participated in the strike.

1. *The Right of an Employer to Close a Plant During a Strike*

When employees take part in a strike, they lose pay for the time not worked, including the time they are locked out. In such a situation, the employment contract continues, but the legal strike and lockout suspend the

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22. *See id.*

23. *See id.* Article 5(3) of the Basic Law states: "Art and scholarship, research and teaching, shall be free. Freedom of teaching shall not absolve anybody from loyalty to the constitution." GG art. 5(3).

employment contract for those who take part in the strike or who are locked out. In addition, employees who do not take part in a strike and who are not locked out lose their right to remuneration if, as a result of industrial action, it has become impossible for them to work or because their continued employment is no longer economically prudent. The latter scenario might arise with respect to employers indirectly affected by an industrial action. An example of this occurs when an automobile factory cannot produce because a supplier, against whom a union has struck, cannot deliver parts. An example of an employer directly affected by an industrial action occurs when only part of the employees are on strike, but the entire production process ceases.[24]

The rationale for lost remuneration is explained with what has been called the "sphere-theory." The sphere-theory provides that, because the employees gain the advantages of the strike, they should also bear the disadvantages.[25] Additionally, German courts have more recently justified their position on the rationale that payment of remuneration in these types of cases endangers the parity of bargaining power between the parties embroiled in an industrial conflict.[26]

Thus, for more than seventy years, the prevailing view has been that employees could lose their right to remuneration only because of (1) taking part in a strike, (2) being locked out, or (3) due to employment becoming impossible because of an industrial action.[27] The German Federal Labor Court later affirmed this doctrine explicitly in a case decided in December of 1994.[28] However, three months later, the Court explicitly overruled the December 1994 decision and created a new doctrine where the employer's duty to pay remuneration to employees who do not participate in a strike can be suspended.[29] The Court decided that in the case of a strike, an employer against whom the union strikes can close the entire plant even though only a minority of the employees in the plant take part in the strike. A lockout of the remaining employees is not necessary in order to suspend the employment contract for all employees. This is an important shift in the balance of power between the union and the employer because the right to

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24. *See* Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶¶ 428, 437; HALBACH ET AL., *supra* note 3, at 336.

25. This was the main argument in the leading case, the *Kieler Straßenbahn-Entscheidung*, decided by the Reichsgericht (Federal Supreme Court during the Republic of Weimar) in 1923. *See* Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 106, 273.

26. *See* Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 202.

27. This view was similar to the view taken in some foreign countries, such as Switzerland. *See* MANFRED REHBINDER, SCHWEIZERISCHES ARBEITSRECHT 84 (12th ed. 1995).

28. *See* 1994 DER BETRIEB 632.

29. *See* 1995 DER BETRIEB 100. Since the last decision, two of the three professional judges in the senate have changed.

lock out is limited in German law by the principle of appropriateness of means,[30] and it is sometimes difficult to prove that it would not have been possible to employ parts of the workforce in the face of the strike.

The American reader may recognize parallels here to *Betts Cadillac Olds, Inc.*, where the National Labor Relations Board (NLRB) stated that an employer may take "reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike."[31] It is precisely this restriction which the German Federal Labor Court no longer requires. The decision has been heavily criticized by German labor writers. These writers are of the opinion that if employers do not want to pay their employees, employers should use the lockout to suspend the duties of the employment contract even though the employees want to work and it would be possible to employ them.[32] Despite this criticism, the Court has affirmed its holding in several decisions, and there is no indication the Court will return to the former doctrine.[33]

2. *Striking for a Single-Employer Collective Agreement against an Employer who is a Member of an Employer Association*

According to article 2 of the German Act of Collective Agreements,[34] unions may arrange collective agreements either with a single employer or with an employer association. In contrast to America where less than fifty percent of employees are covered by multi-employer agreements, most German employers are members of an employer association. The majority of collective agreements are arranged between employer associations and the unions. The employer associations can conclude collective agreements that impact all of their members, a part of their members, or a single member. Usually an agreement covers all members of an industry in a certain region,

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30. *See* Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 421.

31. Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 286 (1951).

32. *See* Heinz-Jürgen Kalb, *Arbeitskampfrisiko und Regelungsbetroffenheit*, *in* ARBEITSGESETZGEBUNG UND ARBEITSRECHTSPRECHUNG: FESTSCHRIFT ZUM 70. GEBURTSTAG VON EUGEN STAHLHACKE 213 (Farthmann et al. eds., 1995); Manfred Löwisch, *"Suspendierende" Stillegung als Arbeitskampfmaßnahme*, *in* FESTSCHRIFT FÜR WOLFGANG GITTER 533 (Meinhard Heinze & Jochem Schmitt eds., 1995); M. LEIB, SAMMLUNG ARBEITSGERICHTLICHER ENTSCHEIDUNGEN 257 (1995); M. RÜTHERS & M. FISCHER, ENTSCHEIDUNGEN ZUM ARBEITSRECHT (No. 115, concerning art. 9 of the Basic Law); ENTSCHEIDUNGEN ZUM ARBEITSRECHT (No. 119, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing); Gregor Thüsing, 1995 DER BETRIEB 2607.

33. *See, e.g.*, 1995 DER BETRIEB 1409; 1995 DER BETRIEB 1469; 1995 DER BETRIEB 1817.

34. "The parties to collective agreements shall be unions, individual employers or associations of employers." Tarifvertragsgesetz, art. 2, § 1.

or for some industries, an agreement can cover the entire territory of the Federal Republic.[35] It is clear that an employer is still able to execute a separate collective agreement when he has joined an employer association,[36] and it is also clear that a union can strike for a collective agreement with an employer association that concerns only one member of the association.[37] The doubtful case occurs when a union strikes against an employer who is a member of an employer association, not to achieve a collective agreement with the association, but to achieve a collective agreement with the employer.

Last year the Labor Court of Appeals of Cologne found that a strike in the above-described "doubtful case" is illegal if a union is bound by a peace obligation of a collective agreement when the peace obligation also covers the employer against whom the union strikes.[38] The court referred to the prevailing view that the peace obligation of a collective agreement covering several or all members of the employer association protects all employers who are bound by that agreement.[39] Furthermore, a collective agreement protects employers against a strike based upon a separate agreement with the employer that is intended to replace the multi-employer agreement in the plant. The separate agreement need not be mentioned in the collective agreement, because the peace obligation generally does not need to be explicitly mentioned, but rather is assumed to be a necessary part of every collective agreement. The reason for this common view is that, otherwise, the settlement that has led to the conclusion of the collective agreement would afterwards be called into question.[40]

But what is the law if no collective agreement exists or if the union strikes against a single employer to achieve a collective agreement that concerns areas that are not regulated by the collective agreement with the employer association? It is an established view that a union can lawfully

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35. *See* Weiss, *Recent Trends in the Development of Labor Law in the Federal Republic of Germany*, *supra* note 14, at 766. *See also* HALBACH ET AL., *supra* note 3, at 309. In 1994, there were 41,700 collective agreements in force, and 12,800 of them were company agreements. *See id.* However, in the territory of the former German Democratic Republic (East Germany), the organization rate of employers is very low, 30-40%, and even less in some branches of the industry, and plants are often not covered by any collective agreement. *See id.* at 309.

36. *See* HALBACH ET AL., *supra* note 3, at 333; *see also* MANFRED LÖWISCH & VOLKER RIEBLE, TARIFVERTRAGSGESETZ, § 2, ¶ 52 (1992).

37. *See* Gregor Thüsing, *Die Erstreikbarkeit von Firmentarifvertragen verbandsangehoriger Arbeitgber*, 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 294, 295.

38. *See* 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327. *See also* Thüsing, *supra* note 37, at 295.

39. *See* 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327.

40. *See* HERBERT WIEDEMANN & HERMANN STUMPF, TARIFVERTRAGSGESETZ, § 1, ¶ 323(ff) (5th ed. 1977). The 6th edition will be published in the Spring of 1999.

strike against *the employer association*; however, the question of whether the union can strike against *the single employer* is uncertain, as the German Federal Labor Court has not decided this issue.

Additionally, the Labor Court of Appeals has held that where a union is not bound by a collective agreement with the employer association, it is free to strike against a single employer.[41] "The achievement of a collective agreement with a single employer through industrial action is not unlawful just because the employer is a member of an employer association."[42] Though many German lawyers are of the opposite opinion,[43] the court held that the undoubted capability of the employer to conclude a collective agreement has as its consequence that a union must be allowed to carry a strike through to its conclusion; the capability to execute collective agreements includes the capability to be the target of a strike or lockout. Although there is disagreement within the legal community as to the wisdom of the court's decision, the decision is, for present purposes, final. As the employer only sued for temporary relief, the Labor Court of Appeals was the last venue, and thus, the decision cannot be appealed to the Federal Labor Court.

3. *Locking Out Only the Employees Who Took Part in a Strike*

The last decision in the area of industrial action to be discussed is also one decided by the Labor Court of Appeals. The Labor Court of Appeals of Düsseldorf held that an employer is allowed to limit a lockout to those employees who took part in a strike on the previous day.[44] The court further held that this limitation did not violate the freedom of association of the locked-out employees because the lockout did not distinguish between union members and non-organized employees. The lockout only distinguished employees who took part in the strike from employees who did not.[45] Thus, the employer did not discriminate because of membership in a union, and therefore, the lockout was lawful.

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41. *See* 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327.

42. *See id.*

43. *See* Herbert Buchner, 1970 DER BETRIEB 2029; P. HANAU & K. ADOMEIT, ARBEITSRECHT 87 (11th ed. 1994); Ulrich Krichel, 1986 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 731; Dieter Reuter, 1990 ZEITSCHRIFT FÜR ARBEITSRECHT 535; Thüsing, *supra* note 37, at 294.

44. *See* ENTSCHEIDUNGEN DER LANDESARBEITSGERICHTE [LAG] (No. 95 to art. 9 of the Basic Law, with a comment by Gregor Thüsing).

45. This lockout method was held to be unlawful by the Federal Supreme Court in a decision on June 10, 1980. *See* ENTSCHEIDUNGEN ZUM ARBEITSRECHT (No. 37, concerning art. 9 of the Basic Law). Nevertheless, there are many German commentators who think this type of lockout should be allowed. *See* Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 423; THÜSING, *supra* note 4, at 74.

It is very doubtful, however, whether the Labor Court of Appeal's decision is sound. As noted above, the ability to take part in a strike is an element of freedom of association; thus, to distinguish between strikers and non-strikers is precisely to distinguish between those employees who exercise their right granted by article 9, section 3 of the Basic Law, and those employees who do not. The contrary view to that taken by the court might be more persuasive because agreements "restricting or intended to hamper the exercise of this right shall be null and void; measures to this end shall be illegal."[46] Nevertheless, a report of recent developments in the law of industrial action should mention this decision in view of the uncertainty and discussion in American law concerning "partial lockout;"[47] the decision of the Supreme Court in *American Shipbuilding Co. v. NLRB*[48] does not make the distinction between these two kinds of partial lockouts.

IV. RECENT DECISIONS CONCERNING THE LAW OF COLLECTIVE BARGAINING

To understand recent developments in the law of collective bargaining, it is helpful to consider that over the last few years union membership in Germany has continuously declined. Furthermore, increasing numbers of employers have discontinued membership in employer associations. One reason for this movement on the employee's side may be the continuous process of individualization in modern industrial society. Other mediating bodies and institutions have also declined in importance (*e.g.*, churches and political parties), and one can see this phenomenon not only in Germany but also in other European countries.[49] However, at least on the employer's side, there is another important reason for the movement.

As stated above, most collective agreements cover a specific region of an industry, or even the entire territory of the Federal Republic for certain industries. Thus, the assigned conditions cannot take account of particular circumstances within individual companies. At the moment, there is extensive discussion in Germany as to how to create a more flexible system of collective agreements, and whether it should be possible for an employer covered by a collective agreement to alter the conditions concerning his plant

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46. GG art. 9(3).

47. *See* WALTER OBERER ET AL., LABOR LAW 539 (4th ed. 1994); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 361 (1976).

48. 380 U.S. 300 (1965).

49. For example, in other countries of the European Union (*e.g.*, France, Italy, and the Netherlands) the organization rate of the workforce has fallen. *See* H.L. BAKELS, SHETS VAN HET NEDERLANDS ARBEIDSRECHT 155 (8th ed. 1987).

by agreements with the Works Council.[50] Last year, the Labor and Employment Law of the *Deutscher Juristentag* section, a biennial meeting of German lawyers that makes proposals for amending the law, discussed this phenomenon and ways to react to it. It decided inter alia:

> A change in the relationship between the parties of collective agreements and the Works Council concerning the competence to regulate is not recommended; rather the parties of the collective agreements should use their competence to regulate . . . in such a manner that different situations in different establishments can be better taken into account.[51]

Despite this declared belief in the associations and the law of collective bargaining, courts must, on a daily basis, solve the juridical problems that derive from the movement away from collective agreements. A discussion of two of these decisions follows.

1. *Membership in an Employer Association Without Being Bound by Collective Agreements*

Under American law, mere membership in an employer association does not necessarily mean that the association can conclude collective agreements covering a particular employer's plant. The association member must affirmatively manifest an intention to be represented by the association in a multi-employer group during collective bargaining in order to be bound by that bargaining unit.[52] Things are different in Germany. Article 3, section 1 of the Collective Agreements Act reads: "Members of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective agreement."[53]

Thus, under German law, unless the collective agreement limits the plants it covers, every employer who is a member of the organization entering the agreement is bound by it, and authorization of the employer associations is not necessary. Beginning in the late 1980s, employer associations began to create a special kind of membership, the *Mitgliedschaft ohne Tarifbindung*, under which members are not bound by collective

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50. *See also* Weiss, *Labor Law and Industrial Relations in Germany, supra* note 14, ¶ 350.

51. 2 VERHANDLUNGEN DES EINUNDSECHZIGSTEN DEUTSCHEN JURISTENTAGES 1, at K 193 (Ständige Deputation des Deutschen Juristentages ed., 1996).

52. *See* Rock Springs Retail Merchants Ass'n, 188 N.L.R.B. 261 (1971); Alvin L. Goldman, *Labor Law and Industrial Relations in the United States, in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS, ¶ 544 (R. Blampain ed., 1994).

53. Tarifvertragsgesetz, art. 3, § 1.

agreements entered into by the organization. In addition to this feature, employers with this kind of membership still enjoy all of the advantages of membership in an employer association.[54] This favorable treatment was intended as a measure against the declining number of members. In fact, there are some employer associations, especially in the territory of the former East Germany, where most of the employers who joined an association chose this kind of membership.

It is doubtful, however, whether this form of membership is lawful, and the ongoing controversy serves as an excellent example of how different interpretations of a statute in German law leads to different results. Some writers are of the opinion that the explicit wording of article 3, section 1 of the Collective Agreement Act does not allow for the *Mitgliedschaft ohne Tarifbindung*.[55] If the "members of the parties to a collective agreement . . . shall be bound by the collective agreement," then there cannot be such a thing as unbound membership.[56] Legal scholars further argue that the advantages of membership should also carry the disadvantages. Finally, jurists refer to the principle of the equality of bargaining power. An undesirable shift in power to the employer could threaten the functionality of the system of collective bargaining if, in the case of an industrial action, the employer association was supported by all of its members; in contrast, the union could strike successfully only in plants covered by the collective agreement. As in other plants, it would be very difficult to mobilize employees for a strike from which they would not benefit. Thus, the allowance of memberships without being bound — which never before existed in the history of German collective bargaining — weakens the unions' ability to strike in a manner that the Collective Agreement Act does not contemplate.

Many other commentators disagree with this point of view and consider the *Mitgliedschaft ohne Tarifbindung* permissible.[57] They argue that article

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54. Probably the most important advantage is that the association provides legal counsel at no cost and may hold a briefing for the benefit of employers as well as the unions, Manfred Weiss presumes that this "for many employees is the main reason to join a trade union. Hence the trade union somehow is functioning as a sort of insurance in case of disputes." Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 298.

55. *See* Wolfgang Däubler, *Tarifausstieg — Erscheinungsformen und Rechtsfolgen*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 225; Günter Schaub, *Aktuelle Streitfragen zur Kostensenkung bei der Arbeitsvergütung*, 1994 BETRIEBS-BERATER 2006, 2007; Johannes Röckl, *Zulässigkeit einer Mitgliedschaft in Arbeitgeberverbänden ohne Tarifbindung?*, 1993 DER BETRIEB 2382.

56. Tarifvertragsgesetz, art. 3, § 1.

57. *See* Herbert Buchner, *Mitgliedschaft in Arbeitgeberverbänden ohne Tarifbindung*, 1994 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 2; Sven-Joachim Otto, *Die rechtliche Zulässigkeit einer tarifbindungsfreien Mitgliedschaft in Arbeitgeberverbänden*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 624; Dieter Reuter, *Die Mitgliedschaft ohne Tarifbindung*

3, section 1 of the Collective Agreement Act merely limits the most extreme binding effects of a collective agreement. They contend that *only* members of the parties to a collective agreement shall be bound by the collective agreement.[58] The reason for this limitation is that by joining the union or employer association, the members — and *only* the members — have authorized the parties to enter an agreement that binds them. Consequently, it is clear that the parties may enter a collective agreement only for a portion of their members, namely those in a distinct part of an industrial branch or in a distinct region. Thus, limiting the area of application of a collective agreement by a new kind of membership in an association should be allowed; according to the terminology and the policy of article 3, section 1 of the Collective Agreement Act, there is no difference between *Mitgliedschaft ohne Tarifbindung* and being a party to a collective agreement.

The Labor Court of Appeals of Baden-Württemberg was the first appellate court to decide whether a difference exists between *Mitgliedschaft ohne Tarifbindung* and being a party to a collective agreement.[59] A union member sued his employer for the remuneration granted by the collective agreement. The employer had chosen this new kind of membership. The court considered the *Mitgliedschaft ohne Tarifbindung* to be effective, explaining its decision mainly on the basis of the goal of article 3, section 1 of the Collective Agreement Act. Thus, the employer was held not to be bound by the collective agreement, and the suit was dismissed.[60] On October 10, 1996, the Federal Labor Court reversed this decision because of a procedural error and remitted the case to the court of first instance.[61] Thus, the case must again proceed through the judicial channels leading back to the Federal Labor Court, and a decision is not expected before the end of 1998. Until then, the question remains open.

2. *The Relationship Between Collective Agreements and Agreements with the Works Council*

Perhaps the most famous case in the recent development of the law of collective bargaining is the *Viessmann* case.[62] The Viessmann company produces heating systems and was a member of an employer association.

(OT-Mitgliedschaft) im Arbeitgeberverband, 1996 RECHT DER ARBEIT 201; Gregor Thüsing, *Die Mitgliedschaft ohne Tarifbindung in Arbeitgeberverbänden*, 1996 ZEITSCHRIFT FÜR TARIFRECHT 481.

58. *See* sources cited *supra* note 57. *See also* Tarifvertragsgesetz, art. 3, § 1.

59. *See* ENTSCHEIDUNGEN DER LANDESARBEITSGERICHTE (No. 10, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing).

60. *See id.*

61. *See* 1996 DER BETRIEB 2232.

62. *See* 1996 DER BETRIEB 1925.

Therefore, Viessmann was bound by the collective agreement concluded by the association. Nevertheless, in 1996, the Works Council agreed with the company's decision to increase its employee's workweek from 35 to 38 hours without increasing wages. In exchange, Viessmann promised not to shift the manufacturing of a new product to the Czech Republic and not to dismiss any employees for the next three years for purely economic reasons.[63] More than ninety-six percent of the workforce consented to this agreement.[64]

Though approval by almost the entire workforce indicates the usefulness and the fairness of this agreement, under the law in force, it was invalid for two reasons. The first reason is that an organized employee who is protected by a collective agreement cannot agree to a contractual provision that places him in a worse position.[65] The second reason lies in the law of the "Works Constitution." Article 77, section 3 of the Works Constitution Act declares: "Remuneration and other conditions of employment governed or normally governed by a collective agreement shall not be the subject of work agreements. This shall not apply if a collective agreement explicitly authorizes the conclusion of supplementary work agreements."[66]

Although the law is unambiguous and nullifies the work agreement made by Viessmann and the Works Council, the agreement was in fact effective, as no employee sued Viessmann for additional wages for the additional working time. The District Labor Court of Marburg decided that the union could not enforce the collective agreement against the will of the employees, especially to compel the dismissal of the Works Council or to enforce a fine against Viessmann.[67] If no one complains, no one will judge;

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63. For another example of how companies influence employee support of unions, see *Eldorado Tool, Div. of Quamco, Inc.*, 325 N.L.R.B. 1236 (1997). By creating a "UAW WALL OF SHAME" on which shut-down plants were depicted and by sending its employees "factually accurate" letters referring to plant closings and job loss, an employer unlawfully conveyed the message that its plant would close and jobs would be lost if the union won a representation election. *Id.* at 1245.

64. *See* 1996 DER BETRIEB 1925

65. *See* Tarifvertragsgesetz, art. 4, § 3 [Collective Agreements Act] art. 4, § 3. "Arrangements which depart from the foregoing shall be permissible only if they are authorized by the collective agreement or if the departure is to the employees' advantage." *Id.*

66. Betriebsverfassungsgesetz, art. 77, § 3 [Works Constitution Act], v.15.1.1972 [hereinafter Betriebsverfassungsgesetz].

67. *See* 1996 DER BETRIEB 1925, 1929. The union claimed that article 77, section 3 of the Works Constitution Act created a duty not to conclude agreements that are incompatible with the Act, and that the Works Council and the employer neglected this duty. *See id.* The union referred to article 23, section 3 of the Works Constitution Act. Article 23, section 3 of the Works Constitution Act reads as follows:

> One quarter or more of the employees with voting rights or the employer or the trade union represented in the establishment may apply to a labor court

the practice finds its own solutions.

V. CONCLUSION

The recent developments discussed throughout this article raise problems and uncertainties in an important part of German law. In fact, the increasing rate of unemployment in Germany is often considered a result of the country's labor and employment law.[68] A comparison with the situation in the United States indicates that some aspects of United States law may be preferable, but at the same time, this article presents some advantages and strengths of the German system. For example, in Germany, the unions and employer organizations think of themselves as *Sozialpartner* (social partners), and because of this, partnership strikes in Germany are less frequent than in most other counties of the European Community or the United States.[69] The German government has never had to fix a minimum wage, which it is empowered to do under the provisions of the Work Constituion Act of 1952.[70] However, setting a minimum wage has not been necessary because most employment contracts continue to refer to a collective agreement and because there are collective agreements for almost every branch of industry.

Considering these facts, one may agree with the opinion of American Professor Thomas Kohler, who spoke to the *Deutscher Juristentag* two years

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> for the removal of a member of the Works Council on the grounds of serious dereliction of statutory duties. A Works Council may also apply for the removal of one of its members.

Id. The Act further declares the following:

> If an employer seriously neglects his duties under this Act, the Works Council or the union represented in the establishment may petition a labor court to order the employer to desist from an act, to permit an act to be performed or to perform an act. If the employer fails to comply with a final judicial decision requiring him to desist from an act, to permit an act to be performed or to perform an act, the labor court shall, on application and after warning, fine him for each offence. If the employer fails to perform an act required of him by a final judicial decision, the labor court shall, on application, accept that he is to be caused to perform the act by a coercive fine. The Works Council or a union represented in the establishment shall be entitled to make an application to a labor court. Fines shall not exceed 20,000 DM.

Id.

68. *See* Wolfgang Zöllner, *Vorsorgende Flexibilisierung durch Vertragsklauseln,* 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 127 (discussing recent issues on this topic).

69. On average, between 1989 and 1993 there were only 18 days of striking per year, per 1000 employees. In Greece there were 586 days of striking per year per 1000 employees, 420 in Spain, 223 in Italy, 70 in the United Kingdom, 66 in the United States and 39 in France. *See* BUNDESARBEITSBLATT 5 (1995).

70. *See generally* Betriebsverfassungsgesetz § 87.

ago.[71] Professor Kohler noted an important observation that, during the discussion part of the meeting, "the question was often asked, whether and to what extent [the American] legal system might be and should be an example to Germany."[72] He later mentioned some of the advantages of American law, beginning with its great flexibility. But he also mentioned some advantages of the German system. The advantages of the German system noted by Professor Kohler were that the strong and centrally-organized unions are important mediating bodies, and that the existence of such bodies, is important, perhaps essential, to the functioning of democracy. Thus, he closed, as does this article, by stating: "The German system has many possibilities, which are lacking in our system. In other words: Perhaps Germany might, to some extent, also be an example for us."[73]

71. *See* VERHANDLUNGEN DES EINUNDSECHZIGSTEN DEUTSCHEN JURISTENTAGES, *supra* note 51, at K 172-74.

72. *Id.* (translation by the author).

73. *Id.* (translation by the author).

SOVEREIGNTY OF ABORIGINAL PEOPLES

Julie Cassidy*

It is for the people to determine the destiny of the territory and not the territory the destiny of the people.[1]

I. INTRODUCTION

The relevance of establishing Aboriginal sovereignty is not confined to the practical exercise of sovereign powers within a given jurisdiction. It is also relevant to the judicial enforcement of rights. If, as suggested by traditional theory, international law only pertains to the actions of sovereign[2]

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1. Western Sahara, 1975 I.C.J. 12, 122 (Oct. 16) (separate opinion of Judge Dillard).

2. Sovereignty has been defined as "the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign State or to foreign law other than public international law." 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 408 (1987). While often used interchangeably with the notion of self-government, sovereignty is technically different. While self-determination may give indigenous peoples many of the powers akin to sovereignty, it does not necessarily ensure access to particular rights, such as independence. *See* U.N. CHARTER art. 1, ¶ 2; International Covenant on Civil and Political Rights, Sept. 8, 1992, art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 1, U.N. Doc. A/6316 (1967); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); Discrimination Against Indiginous Peoples: First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989). *Cf.* G. Nettheim, *Sovereignty and Aboriginal Peoples*, 53 ABORIGINAL L. BULL. 4, 6 (1991) (noting that self-determination "is a process" which allows peoples to make a choice between a vast variety of relationships with the "occupying" state ranging from total integration to full independence). *See also* Gudmundur Alfredsson, *The Right to Self-Determination and Its Many Manifestations, in* THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION 53 (R. Thompson ed., 1987); Ian Brownlie, *The Rights of Peoples in Modern International Law, in* THE RIGHTS OF PEOPLES 5-6 (J. Crawford ed., 1988); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 201-02 (1991); John H. Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669 (1978); L. Kelly, *Reconciliation and the Implications for a Sovereign Aboriginal Nation*, 61 ABORIGINAL L. BULL. 10, 11 (1993). *See generally* Russell Barsh, *Indigenous Peoples and the Right to Self-Determination in International Law, in* INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS (Barbara Hocking ed., 1988); Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV. 361 (1991).

states[3] and, perhaps as a corollary, only sovereign states are capable of enforcing international law,[4] establishing Aboriginal sovereignty will be a necessary prerequisite to enforcing international legal rights. According to the traditional view, international responsibility is owed to the state of which the individual is a national, not the individual itself.[5] As it is the state's right, and not the individual's, which has been infringed by a breach of international law, only the state may enforce that right in the international courts. The theorists supporting this proposition reason that the individual is only an "object," not a "subject," of international law.[6] As a corollary, according to the traditional theory, individuals have no international rights and lack the necessary procedural capacity to enforce rights in an international court of justice. Some jurists advocating the traditional view submit that because of the lack of procedural capacity,[7] individuals and sub-state collectives cannot be the direct beneficiaries of international rights.[8]

As a consequence of these traditional restrictions, individuals and minority groups typically must rely on either the United Nations or their "occupying" state to support and enforce any claims made in an international forum for breaches of international law. Unless such groups can establish

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3. Traditionally, municipal law is said to deal with the actions of individuals and the domestic activities of sovereign states and international law with the international actions of sovereign states. *See* H. LAUTERPACHT, RÈGLES GÉNÉRALES DU DROIT DE LA PAIX 129 (1938). *See also* 2 L. OPPENHEIM, INTERNATIONAL LAW 344 (1st ed. 1905), the chief exponent of the traditional theory who asserts that an "individual human being . . . is never directly a subject of International Law . . . . But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations." It is submitted, however, that this view is slowly being discarded as state practice increasingly recognizes that individuals and groups of individuals may be the direct beneficiaries of international rights, enforceable by either the individual or other states. *See also* Philip C. Jessup, *Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383, 403 (1947). A detailed discussion of the arguments for extending international law to individuals cannot be considered within the scope of this article. *See* Julie Cassidy, Customary International Law's Protection of Aboriginal Title in Post-Colonial Nations, ch. 20 (1993) (unpublished Ph.D. dissertation, Bond University, Queensland, Australia) (on file with author).

4. The traditional view is reflected in the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶ 1 (Oct. 24, 1945), which provides "[o]nly States may be parties in cases before the Court."

5. Except in rare cases where, for example, a treaty can be construed as giving rights directly to individuals, or in cases of humanitarian intervention, other states have no interest in the breach and consequently cannot enforce these rights on behalf of aggrieved individuals or sub-state collectives. *See* Advisory Opinion No. 15, Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Transferred to the Polish Service), P.C.I.J. (ser. B) No. 15, at 17-21 [hereinafter Danzig]; 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, chs. 8 & 25 (Francis Kelsey trans., Carnegie ed. 1925) (1646).

6. *See generally* OPPENHEIM, *supra* note 3.

7. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶¶ 1-3 (Oct. 24, 1945).

8. *See generally* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (Robert W. Tucker ed., 2d ed. 1966).

that they have retained their sovereign rights and can be recognized as a state,[9] they have no standing in, for example, the International Court of Justice,[10] and must turn to municipal courts[11] for relief.

The latter avenue of relief is not without risks. Unless the subject of international law is a nonderogable rule of *jus cogens*,[12] judicial practice[13]

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9. Even if Aboriginal sovereignty is accepted in accordance with the analysis of international law contained in this article, the requirement of state recognition may nevertheless pose a considerable hurdle to the exercise of those sovereign rights. In a similar context, Bryant notes, "political recognition will no doubt turn on whether the State, exercising sovereignty over a particular indigenous group, first recognizes their self-determination status." Michael J. Bryant, *Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law*, 56 SASK. L. REV. 267, 269 (1992). *Cf.* S.A. Williams, *International Legal Effects of Secession by Quebec, in* YORK UNIVERSITY CENTRE FOR PUBLIC LAW AND PUBLIC POLICY, FINAL REPORT OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT, STUDY NO. 8, at 11-12 (1992). *See also* the comments of Frank Brennan, *Mabo and Its Implications for Aborigines and Torres Strait Islanders, in* MABO: A JUDICIAL REVOLUTION 24, 26-27 (M. A. Stephenson & Suri Ratnapala eds., 1993). Given the current climate in countries such as Canada and Australia, it is unlikely that claims of Aboriginal sovereignty would be supported by the "occupying" state. This is particularly so where the claims to sovereignty are in a form that threatens the "occupying" state's territorial integrity. In this regard Bryant notes that, as a matter of political reality, as opposed to legal theory, an "occupying" "State's territorial integrity will almost always trump the wishes of a minority of citizens." Bryant, *supra*, at 268. *See generally* Kelly, *supra* note 2 (discussing the alternative ways that sovereignty may be exercised or accommodated).

10. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶ 1 (Oct. 24, 1945).

11. Note, traditionally, under the dualist view, municipal and international law are said to operate in two distinct spheres; the former dealing with the actions of individuals and the domestic activities of sovereign states and the latter with the international actions of these sovereign states. *See* 1 DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 43 (3d ed. 1928). *See also generally* HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT (1899). Under the alternative monist view, however, these bodies of law are not seen as being discrete. *See* KELSEN, *supra* note 8, at 553-88. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 5 (8th ed. 1778); 1 OPPENHEIM, *supra* note 3, ch. 4; J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW (7th ed. 1972); *supra* discussion note 3. For a discussion of how customary international law flows into domestic legal forums and may be enforced by individuals in municipal courts, see Lord Atkin's comments in *Chung Chi Cheung v. The King* [1939] App. Cas. 160, 167-68 (P.C. 1938) (appeal taken from H.K.). A detailed discussion of the arguments for applying international law in the municipal courts cannot be considered within the scope of this article. *See generally* Cassidy, *supra* note 3, ch. 21. As to the validity of the monist view, see generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

12. These are nonderogable norms reflecting principles crucial to maintaining the international legal order. *See* Antonio Cassese, *The Self-Determination of Peoples, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 111 (Louis Henkin ed., 1981). They cannot be derogated from by treaty, protest, or acquiescence. Any agreements or actions contrary to such a law are absolutely void. *See id.* Not even prescription can purge a breach of a rule of *jus cogens*. These laws can only be replaced or modified by a subsequent norm of the same peremptory character, a subsequent norm of *jus cogens*. A detailed discussion of *jus cogens* cannot be considered within the scope of this article. For a discussion of *jus cogens*, see Christopher P. Cline, *Pursuing Native American*

suggests that inconsistent domestic law can prevail over international law in the municipal arena.[14] If a legislature's intent to legislate inconsistently with international law[15] is evident from the face of municipal legislation, municipal courts are bound to give effect to that legislation.[16] As Lord Porter noted in *Theophile v. Solicitor-General*:

> [There is a presumption] that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations. On the principles already stated, however, this presumption must give way before an intention clearly expressed. . . . Statutes are to be interpreted, provided that their language admits, so as not to be inconsistent with the comity of nations. [However, if the] statutory enactments are clearly inconsistent with international law, they must be so construed, whatever the effect . . . within the jurisdiction may be.[17]

A violating state could, therefore, prevent Aboriginal claimants from enforcing international rights in its municipal courts with relative ease by

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Rights in International Law Venues: A Jus Cogens Strategy after Lyng v. Northwest Indian Cemetery Protective Association, 42 HASTINGS L.J. 591, 619-24 (1991). For the author's discussion of this matter, see Cassidy, *supra* note 3, ch. 26.

13. In contrast to judicial practice, academics give primacy to international law. *See generally* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1973); Cassidy, *supra* note 3, ch. 21.

14. According to this view, international law prevails, but only "so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." *Chung Chi Cheung* [1939] App. Cas. at 167-68.

15. There is a strong presumption against such inconsistency. Domestic legislation is to be construed to avoid conflict with international norms. As the Court declared in *Murray v. The Schooner Charming Betsy*, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. (2 Cranch) 64, 118 (1804). "In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law . . . ." The Annapolis [1861] 1 Lush. 295, 306 (Can.). *See, e.g.*, McCulloch v. Sociedad Nacional, 372 U.S. 10, 21 (1963); The Antelope, 23 U.S. (10 Wheat.) 66, 116-18 (1825); Peters v. McKay, 238 P.2d 225, 231 (Or. 1951), *reh'g denied*, 246 P.2d 535 (Or. 1952); The Queen v. Foster (1959) 104 C.L.R. 256, 307 (Austl.); Polites v. Commonwealth (1945) 70 C.L.R. 60, 68-81 (Austl.); *In re* Noble & Wolf [1948] 4 D.L.R. 123, 139 (Can.); *In re* Arrow River & Tributaries Slide & Boom Co. [1932] 2 D.L.R. 250, 259-61 (Can.); Theophile v. Solicitor-General [1950] App. Cas. 186, 195-96 (1949) (appeal taken from Eng.); Croft v. Dunphy [1933] App. Cas. 156, 162-63 (P.C. 1932) (appeal taken from Can.); *In re* Republic of Bolivia Exploration Syndicate Ltd., 1 Ch. 139 (1914) (Eng.); The Queen v. Keyn, 2 Ex. D. 63, 85 (1876) (Eng.). *Cf.* The Queen v. Carr, 10 Q.B.D. 76 (1882).

16. *See, e.g.*, *Foster*, 104 C.L.R. at 307; *Theophile*, [1950] App. Cas. at 195-96; *Keyn*, 2 Ex. D. at 85.

17. *Theophile*, [1950] App. Cas. at 195-96 (quoting 31 HALSBURY'S LAWS OF ENGLAND 508-09 (2d ed. 1938)). *See, e.g.*, *Foster*, 104 C.L.R. at 307; *Keyn*, 2 Ex. D. at 85.

enacting inconsistent domestic legislation.[18] Consequently, the existence of Aboriginal sovereignty is important not only to the enjoyment of sovereign rights, but to the enforcement of any rights founded in international law.[19]

The sovereignty of indigenous populations has long been a matter of great dispute and continues to be one of the most burning issues in domestic and international law today.[20] Contrary to popular belief, international law, both in the past and today, is not entirely eurocentric and "amoral,"[21] and historically many international jurists have been sympathetic to protecting Aboriginal sovereignty and territorial rights.[22] To this end, state practice reveals a consistent recognition of the legal incidents stemming from Aboriginal occupation of land.[23] International law generally acknowledged the sovereignty of these peoples and saw indigenous possession as preventing land from being classified as *terra nullius,* or open to acquisition by mere occupation.[24]

The international law doctrine of reversion also provides for the continuance and ultimate resurrection of these sovereign rights after purported acquisitions by European imperial forces. Under this doctrine, despite the pretense of effective occupation, the sovereign rights of Aboriginal people lie dormant awaiting reversion. It is this sovereignty[25] that

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18. A state which so acts breaches international law and may as a consequence be subject to international sanction. *See* Advisory Opinion No.10, Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 20.

19. For example, the author has suggested that customary international law recognizes and protects Aboriginal title. *See generally* Cassidy, *supra* note 3.

20. For an example of such a dispute, see the controversy that stemmed from the decision in *Alaska v. Native Village of Venetie Tribal Gov't,* 101 F.3d 1286 (9th Cir. 1996) (upholding the Venetie's sovereign rights), *rev'd,* 118 S. Ct. 948 (1998).

21. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 173 (1979).

22. Perhaps the most famous being Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones [Reflections on the Indians and on the Law of War], in* CLASSICS OF INTERNATIONAL LAW (James Scott ed., 1917) (1557). *See also* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations,* 22 HARV. C.R-C.L. L. REV. 507 (1987); G. Marks, Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartoleme de las Casas (1990) (unpublished thesis, Faculty of Law, Australian National University) (on file with author).

23. *See* Cassidy, *supra* note 3.

24. Under modern international law it is unlawful to purport to acquire sovereign and territorial rights through conquest or settlement of occupied lands. *See, e.g.*, U.N. CHARTER art. 2, ¶¶ 1-4; Western Sahara, 1975 I.C.J. 12, 123 (Oct. 16) (separate opinion of Judge Dillard); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 91 (June 21) (separate opinion of Vice-President Ammoun) [hereinafter Namibia].

25. Some authors have suggested natural law as an alternative source of sovereign rights. *See* Brian Slattery, *Aboriginal Sovereignty and Imperial Claims,* 29 OSGOODE HALL L.J. 681, 696-703 (1991).

the Aboriginal peoples call to be recognized today.[26]

This article considers international law's recognition of Aboriginal sovereignty.[27] The status of Aboriginal peoples in international law involves many difficult questions relating to the acquisition of territory and the recognition of Aboriginal sovereignty. In Part II, a number of doctrines[28] often put forward as barriers to claiming Aboriginal sovereignty are considered and it is submitted that these doctrines do not preclude claims from being successfully made. Part III examines issues that more closely pertain to international law's recognition of Aboriginal sovereignty. This includes a discussion of international law's recognition of Aboriginal occupation and sovereignty. Part IV concludes with a discussion on the

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26. For example, the Chairman of the Northern Land Council, Mr. Galarrwuy Yunupingu declared in 1987: "Aboriginal People are the indigenous sovereign owners of Australia and adjacent islands since before 1770 and as such have rights and treaty rights. Their Sovereignty has never been ceded . . . ." B. Weatherall, *Foundation of Aboriginals and Islander Research Action*, WKND. AUSTL., June 30-July 1, 1990, at 21. *See generally* STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS (AUSTL.), TWO HUNDRED YEARS LATER, ¶ 2.6 (1983) [hereinafter STANDING COMMITTEE]. The Standing Committee stated:

> We have never conceded defeat and will continue to resist this on-going attempt to subjugate us. . . . The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all Australia lies with them. . . . [W]e demand that the colonial settlers who have seized the land recognize this sovereignty and on that basis negotiate their right to be there.

Id. That the Aboriginal peoples of Australia have "neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest" was recognized by the High Court of Australia. Mabo v. Queensland (1992) 175 A.L.R. 1, 29 (Austl.). In July 1990, members of the Australian Aboriginal Community established an Aboriginal Provisional Government representing the Aboriginal peoples claims to sovereign rights. It was established in response to the need for "a new national structure which, by its very name will tell the world we are a sovereign people, fighting for our sovereign rights." Weatherall, *supra*. *See generally* Kelly, *supra* note 2; N. Pearson, *Reconciliation to Be or Not to Be*, 61 ABORIGINAL L. BULL. 14 (1993). With respect to Canadian Aboriginal peoples, see *Speaking Notes for National Chief, Ovide Mecredi, in* CONSTITUENT ASSEMBLY ON THE RENEWAL OF CANADA, IDENTITY, RIGHTS AND VALUES: SPEECH BEFORE THE ASSEMBLY OF FIRST NATIONS (1992) (calling for the recognition of their "collective rights" and respect for their "cultures, languages, governments and spirituality"). *See also* MICHAEL ASCH, HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION 29 (1984); Michael Asch, *Aboriginal Self-Government and the Construction of Canadian Constitutional Identity*, 30 ALTA. L. REV. 465, 491 (1992).

27. The following discussion will concentrate on Aboriginal sovereignty, rather than the right to self-determination. Some of the discussion will nevertheless advert to the latter doctrine. See *supra* text accompanying note 2 for a brief discussion of the meaning of sovereignty.

28. Other doctrines asserted as preventing claims of Aboriginal sovereign rights have also been introduced previously in this article. In particular, see *supra* notes 3-11 and accompanying text for a discussion of the applicability of international law to individuals and sub-state collectives. See *supra* notes 11-19 and accompanying text for a discussion of the enforceability of international law in municipal courts.

ability of Aboriginal communities to reclaim their sovereignty today.

II. DOCTRINES LIMITING CLAIMS OF SOVEREIGNTY

A. *Intertemporal Rule*

A necessary preliminary to discussing international law's recognition of Aboriginal sovereignty is an appreciation of its practical relevance today. An academic discussion of the works of legal jurists is of little value if other international law doctrines prevent Aboriginal sovereignty from being invoked. At times, the intertemporal rule[29] has been mistakenly interpreted as requiring the validity of sovereign rights to be determined in light of the law prevailing at the time of the original acquisition of land,[30] rather than the critical point[31] of any later dispute. This erroneous application of the rule has allowed "occupying" governments to attempt to validate their occupation on mistaken[32] assertions that international law, at the time of their initial settlement or conquest of Aboriginal lands, validated the acquisition of sovereign and territorial rights.

It is submitted below that, as of the date of the purported acquisition of sovereign and territorial rights over countries such as Australia, Canada, and the United States of America, international law recognized Aboriginal occupation and sovereignty in a manner that would negate the legitimacy of claims of sovereign title based on, for example, the settlement of these lands. If, however, this interpretation of international law is erroneous, it is contended that the legitimacy of these governments' sovereignty can nevertheless be questioned pursuant to the intertemporal rule.

For some reason, "occupying" governments have failed to recognize that under this rule international law at the time of the purported annexation does not provide the only source of legal authority for determining the existence of Aboriginal sovereign rights and, thus, the validity of any purported acquisition.[33] Most importantly, the intertemporal rule requires rights which are perpetually exercised to continue to conform with

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29. A comprehensive discussion of this notion is beyond the scope of this article. For a more complete discussion, see Cassidy, *supra* note 3, ch. 25.

30. *See, e.g.*, STANDING COMMITTEE, *supra* note 26, ¶ 3.36; Coe v. Commonwealth (1979) 53 A.L.J.R. 403 (Austl.); Milirrpum v. Nabalco Party Ltd. (1971) 17 F.L.R. 141 (Austl.); Cooper v. Stuart [1889] 14 App. Cas. 286 (P.C. 1889) (appeal taken from N.S.W.).

31. *See* Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, 59 (Nov. 17).

32. It is submitted below that international law at the time of the purported acquisitions recognized Aboriginal sovereignty and thus would not support claims of a valid acquisition of sovereignty.

33. It could be suggested that it is an engineered falsehood designed to discourage claims for Aboriginal sovereignty. *See also Coe*, 53 A.L.J.R. at 429 (setting forth Justice Murphy's suggestion that statements supporting the "settlement" of Australia were "made in ignorance or as a convenient falsehood to justify the taking of aborigines' land").

international law as it develops. The validity of these rights must be considered in light of international law as it stands at the "critical date" of the dispute.[34] Thus, as Arbitrator Huber noted in *Island of Palmas,* through the intertemporal rule, international legal developments can retrospectively invalidate or detract from sovereign rights, even though these rights may have been legitimately obtained according to international law at the time of the original annexation.[35]

Accordingly, as sovereign and territorial rights must be continually asserted, their legitimacy must be determined in accordance with international law as it develops, recognizing the demise of old principles of law and the evolution of new axioms acknowledging the rights of Aboriginal peoples. Consequently, even if state practice at the date of annexation did not recognize Aboriginal sovereignty, in the absence of protest by a state, and arguably even in such cases,[36] it is international law as it stands at the critical date[37] which determines the rights of the subject Aboriginal peoples. Thus, if the sovereign rights of "occupying" states were by modern standards wrongly acquired, they must not only be effectively exercised throughout the period of occupation, but also "re-acquired" in accordance with these modern international developments. This is especially so if the emerging international law recognizing Aboriginal territorial and sovereign rights is a peremptory norm of *jus cogens*,[38] which may require the restitution of those rights purportedly acquired by the "occupying" state.[39] To this end, it is important to note that under modern international law the acquisition of sovereignty in the subject countries would clearly be unlawful. Conquest is no longer a legal basis for acquiring sovereign rights, except in

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34. The critical date of a dispute is the point in time at which the merits of the parties' claims are determined. At this point the situation between the parties is said to have "crystalized" and the actions of the parties after that date cannot change the legal position between the parties. *See Minquiers and Ecrehos*, 1953 I.C.J. at 59. For example, in *Minquiers and Ecrehos*, there had been prior disagreements between the parties, but these had not been linked to the question of sovereignty. *See id.* The relevant dispute had not, therefore, "crystalized" before the special agreement of December 29, 1950. *See id.* By contrast, the critical date was much earlier in the nineteenth century, when the Treaty of Paris attempted to cede the Philippines to the United States. *See* Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the Unitded States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty Over the Island of Palmas (or Miangas) (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT'L L. 867, 872-73 (1928) [hereinafter Island of Palmas].

35. *See generally* Island of Palmas, 22 AM. J. INT'L L. 867 (1928).

36. If these principles are nonderogable principles of *jus cogens*, even protest will not undermine their effectiveness. *See* discussion *supra* note 12.

37. *See* discussion *supra* note 34.

38. These are nonderogable norms that are crucial to maintaining the international legal order. *See* discussion *supra* note 12.

39. Restitution of the purportedly acquired rights supports the reversion of sovereignty.

the case of a just war,[40] and sovereign rights to occupied lands may not be acquired by mere settlement.[41]

B. *Act of State*

1. *Common Law Courts*

As with the intertemporal rule, the act of state doctrine[42] has been used in Australia to discourage Aboriginal claims to sovereign rights. Under this doctrine, certain executive acts are declared to be questions of law, rather than fact, which are determined by the executive and thus cannot be subsequently reviewed by the judiciary.[43] Even supporters of the "Aboriginal cause," such as Frank Brennan, have asserted that a claim of Aboriginal sovereignty is "unarguable" as it "is a political claim, not a justiciable legal claim in either international or domestic courts."[44] Similarly, the High Court of Australia has held that the validity of the Australian Crown's acquisition of sovereignty is a nonjusticiable act of state.[45]

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40. *See* U.N. CHARTER art. 2, ¶ 4; D. SANDERS, THE RE-EMERGENCE OF INDIGENOUS QUESTIONS IN INTERNATIONAL LAW 26-27 (1983).

41. *See generally* Western Sahara, 1975 I.C.J. 12 (Oct. 16).

42. A comprehensive discussion of the act of state doctrine and its United States equivalent cannot be undertaken here. See Cassidy, *supra* note 3, ch. 22 for a discussion of the act of state doctrine. It has also been suggested that an independent doctrine, known as the political question doctrine, may prevent the consideration of a dispute because of its political nature. Thus, in *South Australia v. Commonwealth*, Chief Justice Dixon stated that a distinction had to be drawn between, "on the one hand, the exercise of the jurisdiction reposed in the Court and, on the other hand, an extension of the Court's true function into a domain that does not belong to it, namely, the consideration of undertakings and obligations depending entirely on political sanctions." (1962) A.L.R. 547, 548 (Austl.). In that case there was no legal standard available to the Court to determine the dispute as the dispute was based on a political agreement, rather than a legal contract. *See generally id.* Where, however, legal standards, such as international law, exist for determining the dispute, the courts can turn to these tenets to decide the case; they do not have to make a political judgment. *See* Cassidy, *supra* note 3, ch. 22. It will be seen that the sentiments underlying the political question doctrine are echoed in the United States act of state doctrine.

43. *See generally* Secretary of State v. Kamachee Boye Sahaba, 15 Eng. Rep. 9 (P.C. 1859) (appeal taken from Madras). *Cf.* S.A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 135 (2d ed. 1973).

44. *See* Brennan, *supra* note 9, at 26. *See also* Frank Brennan, *The Year of Living Harmoniously*, AUSTL., Apr. 1, 1992, at 5.

45. *See, e.g.*, Wik Peoples v. Queensland (1996) 141 A.L.R. 129, 250 (Austl.); Mabo v. Queensland (1992) 175 C.L.R. 1, 32-33, 78-79, 95, 138 (Austl.); Coe v. Commonwealth (1979) 53 A.L.J.R. 403, 408, 410-11 (Austl.); New South Wales v. Commonwealth (1975) 135 C.L.R. 337, 338 (Austl.). Thus, in *Coe*, Justice Gibbs held that the classification of the Australian continent was so "fundamental to our legal system" that a claim of Aboriginal sovereignty was not fit for consideration. *Coe*, 53 A.L.J.R. at 408. He declared "the question is not how the manner in which Australia became a British possession might appropriately be described," but how the Crown decided to classify the colony. *Id.* Justice

Thus, it is necessary to consider whether the common law act of state doctrine and its United States equivalent prevents Aboriginal claimants from asserting their sovereign rights in a judicial forum. Before the municipal application of these doctrines is considered, it is important to note that contrary to Brennan's suggestion, the act of state doctrine does not bar a matter being litigated in an international forum. *Western Sahara*[46] indicates that questions pertaining to sovereign and territorial rights[47] will be considered by the International Court of Justice.[48] Moreover, despite the

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Jacobs also asserted:

> the statement of claim . . . apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia. . . . These are not matters of municipal law but the law of nations and are not cognizable in a Court exercising jurisdiction under that sovereignty which is sought to be challenged.

Id. at 411. In *Mabo*, Justice Brennan declared that the annexation of the Murray Islands was a prerogative act "the validity of which is not justiciable in the municipal courts." *Mabo*, 175 C.L.R. at 32. Similarly, Justice Dawson asserted that the annexation "was an act of state by which the Crown in right of the Colony of Queensland exerted sovereignty over the islands. . . . [T]here can be no doubt that it was, and remains, legally effective." *Id.* at 138 (footnote omitted). For similar conclusions, see the comments in *Wik Peoples*, 141 A.L.R. at 289-90. In *Wik Peoples*, Justice Kirby stated that the subject dispute was "not . . . a matter for legal but only for political redress." *Id.* at 290 (footnote omitted). *See also Milirrpum* where Justice Blackburn held that the classification of the annexation of the Australian continent was a matter of law, not fact, and was not open to judicial review. Milirrpum v. Nabalco Party Ltd. (1971) 17 F.L.R. 141, 243 (Austl.).

46. 1975 I.C.J. 12 (Oct. 16). The question in this case was whether the Western Sahara was *terra nullius* at the time of colonization. *See id.* at 14. The lawfulness of Spain's acquisition of sovereignty over the subject territory was not considered. *See id.* at 123 (separate opinion of Judge Dillard). *Cf.* Rosalie Balkin, *International Law and Sovereign Rights of Indigenous Peoples, in* INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 19, 33 (Barbara Hocking ed., 1988).

47. These concepts include the reversion of sovereignty. See *infra* Part IV for a discussion of the reversion of sovereignty.

48. Problems pertaining to standing would, however, have to be overcome. As noted earlier, only "States may be parties in cases before the Court." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶ 1 (Oct. 24, 1945). Thus, to bring a claim in this court an Aboriginal claimant would have to establish statehood. To some degree this gives rise to what may be colloquially called a "chicken or egg" problem. While the claimant is seeking to have the existence of Aboriginal sovereignty determined by the court, to have standing the claimant needs to establish Aboriginal sovereignty. One way of avoiding this circularity is to have the International Court of Justice, at the request of the General Assembly or the Security Council of the United Nations, give an advisory opinion on the matter. *See* U.N. CHARTER art. 96, ¶ 1. *See also* U.N. CHARTER art. 65 (allowing the Economic and Social Council to furnish information to the Security Council and requiring the Economic and Social Council to assist the Security Council upon the Security Council's request). While such an opinion would not be legally binding on the "occupying" state, it would provide strong political impetus for the recognition of Aboriginal sovereignty. Note, the factual nature of such a consideration would not prevent the International Court of Justice determining the matter as long as the dispute involved mixed questions of law and fact. *See* Western Sahara, 1975 I.C.J. 12, 19 (Oct. 16). *See generally* Namibia, 1971 I.C.J. 16 (June 21).

possible ramifications in the domestic arena,[49] such a determination would be effective in the municipal legal system to the extent that international law becomes operative in that forum.

Even in the domestic context, the act of state doctrine has its limits and may not always be used by a government to prevent a judicial consideration of a particular matter. First, not all government acts are acts of state.[50] At common law, the term "act of state" connotes a variety of acts carried out in pursuance of the royal prerogative. However, not all prerogative acts are acts of state.[51] Only those acts which are "part of or necessarily incidental to a high-level policy decision (and possibly other acts expressly ratified by the Crown) will be treated as acts of state."[52] While the annexation of a country falls within this category of executive acts,[53] it has been suggested that the act of state doctrine does not prevent an examination of the state of the relevant law at the time of the purported annexation. Thus, in *Coe v. Commonwealth,* while Justice Jacobs, along with the other members of the High Court of Australia, held that the validity of the actual acquisition of Australia was not justiciable, he asserted that its quality in point of common law theory was open to consideration.[54] What the law declares on a matter is not an act of state. Thus, a court could make a finding upon, for example,

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49. However, "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. CHARTER art. 2, ¶ 7. In practice, article 2, paragragh 7 has not prevented the United Nations from taking action with respect to breaches of human rights and the furtherance of the right to self-determination within a state's "domestic" jurisdiction. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 294 (3d ed. 1979).

50. There is no concise definition of act of state. *See* DE SMITH, *supra* note 43, at 135. For example, the Court of Appeals, Civil Division was unable to reach a majority view as to the definition of act of state in *Nissan v. Att'y Gen.*, 2 All E.R. 1238 (C.A. 1967).

51. For a discussion of the distinction drawn between prerogative powers and acts of state, see *Commercial and Estates Co. of Egypt v. Board of Trade,* 1 K.B. 271, 294-97 (C.A. 1925).

52. *See* DE SMITH, *supra* note 43, at 137. In most cases these are high "exercise[s] of sovereign power." Salaman v. Secretary of State, 1 K.B. 613, 639 (C.A. 1906).

53. *See, e.g.*, Mabo v. Queensland (1992) 175 C.L.R. 1, 32-33, 78-79, 95, 138 (Austl.); *In re* Phillips (1987) 72 A.L.R. 508, 510-11 (Austl.); Coe v. Commonwealth (1979) 53 A.L.J.R. 403, 408, 410 (Austl.); New South Wales v. Commonwealth (1975) 135 C.L.R. 337, 338 (Austl.) (Gibbs, J., dissenting); Nissan v. Att'y Gen., 2 All. E.R. 1238, 1246 (H.L. 1967). *See also supra* text accompanying note 43. In *New South Wales*, Justice Gibbs stated that the "acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state." *New South Wales*, 135 C.L.R. at 338 (Gibbs, J., dissenting). Justice Gibbs repeated this view in *Coe* where he stated that the "annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged." *Coe*, 53 A.L.J.R. at 408.

54. *Coe*, 53 A.L.J.R. at 411.

the law governing the classification of land as *terra nullius*[55] or whether international law recognized the sovereign rights of Aboriginal peoples. This could in turn provide the impetus for the political recognition of Aboriginal sovereignty.

Second, a plea of act of state cannot be made against a subject or resident alien.[56] The rationale underlying the differential application of the plea rests upon the notion that those who owe allegiance to the Crown are entitled to the protection of, or from, the Crown and are not, therefore, to be barred from making legitimate claims through the plea of act of state.[57] By contrast, the plea may be made against foreigners, for they do not owe allegiance to the Crown and can look to their own government for redress.

According to the principles governing the annexation of territory, the indigenous inhabitants of lands acquired by "settlement"[58] are considered subjects of the state.[59] Consequently, if the annexation of Australia,[60] Canada,[61] New Zealand,[62] and the United States[63] is taken to be by

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55. A discussion of *terra nullius* is reserved for later portions of this article. *See* discussion *supra*, Part III(A).

56. *See Nissan,* 2 All E.R. at 1246. *See generally* Walker v. Baird, 1892 App. Cas. 491 (P.C. 1892) (appeal taken from Nfld.).

57. *See* DE SMITH, *supra* note 43, at 139.

58. Note that in In re *Phillips,* Justice Neaves held:

> [t]he question whether the colony of New South Wales was acquired by settlement or by conquest would have significance in determining whether the common law was introduced into the newly acquired territory. But, in my opinion, the distinction has no significance in determining whether, in 1987, descendants of those who in 1770 or 1788 were inhabitants of what became the colony of New South Wales . . . are subject to laws enacted by the Commonwealth Parliament in exercise of the powers conferred upon it by the Constitution.

In re Phillips (1987) 72 A.L.R. 508, 512 (Austl.).

59. *See* The Queen v. Wedge (1976) 1 N.S.W.L.R. 58 (Austl.); The King v. Murrell, (1836) Legge 72 (Austl.), *reprinted in* A SELECTION OF SUPREME COURT CASES IN NEW SOUTH WALES 72, 73 (1896). *See also In re* Phillips, 72 A.L.R. at 511-12; Coe v. Commonwealth (1979) 53 A.L.J.R. 403, 408 (Austl.). In *Coe,* Justice Gibbs asserted that "[t]he Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside." *Id.*

60. *See* Mabo v. Queensland (1992) 175 C.L.R. 1, 33, 180 (Austl.); *Coe,* 53 A.L.J.R. at 408; Milirrpum v. Nabalco Party Ltd. (1971) F.L.R. 141, 243 (Austl.); Cooper v. Stuart, 14 App. Cas. 286, 291 (P.C. 1889) (appeal taken from N.S.W.). Note in *Coe,* Justices Murphy and Jacobs held that it was open to an Aboriginal claimant to argue that Australia was acquired by conquest. Justice Murphy asserted that the plaintiff was "entitled to endeavour to prove . . . that the lands were acquired by conquest, and to rely upon the legal consequences which follow[ed]." *Coe,* 53 A.L.J.R. at 412. Similarly, Justice Jacobs held that "[t]he plaintiff should be entitled to rely on the alternative arguments [to the settled classification] when it comes to be determined whether the Aboriginal inhabitants of Australia had and have any rights in land." *Id.* at 411. *See also* In re *Phillips,* 72 A.L.R. at 511-12.

61. *See, e.g.*, Van der Peet v. The Queen [1996] 137 D.L.R. 4th 289, 330 (Can.); The Queen v. Sparrow [1990] 70 D.L.R. 385, 401 (Can.); Calder v. Att'y Gen. of British Columbia [1973] S.C.R. 313, 328-29, 383, 401-02 (Can.). *See generally* Patrick Macklem,

settlement, as the courts have largely characterized such acquisitions, the act of state doctrine may not be utilized by the Crown to prevent Aboriginal claims.

It may be thought that Aboriginal peoples' denials of any allegiance to the Crown[64] may serve to negate this principle and allow the act of state doctrine to be plead against Aboriginal claimants as if they were foreigners.[65] However, if the status of a subject is automatically accorded to the Aboriginal peoples of a "settled" country as a matter of law, this status would be unaffected by claims of non-allegiance. The latter mode of reasoning is supported by the Australian judiciary's insistence that English or Australian law applies to all subjects,[66] including Aboriginal occupants,[67] despite claims that the courts have no jurisdiction over Aboriginal persons.[68]

Even if the subject countries were acquired by conquest, the act of state doctrine still could not be plead against the traditional indigenous occupants. Aliens living within Her Majesty's dominions are said to owe local allegiance

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Normative Dimensions of an Aboriginal Right of Self-Government, 21 QUEEN'S L.J. 173 (1995).

62. It has been suggested that the North Island of New Zealand was acquired by conquest and that the South Island was acquired by settlement. In this regard, note Lieutenant-Governor Hobson's Proclamation of May 21, 1840, declaring the South Island to have been acquired by settlement, while the North Island by cession. Fears of French occupation led the British to hurriedly declare the South Island to be taken by settlement and to set up around the country "dummy" signs of occupation.

63. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

64. In *Murrell*, defense counsel Stephens questioned the court's jurisdiction over Aboriginal offenders in cases of offenses inter se. *See* The King v. Murrell, (1836) Legge 72 (Austl.). Utilizing Rousseau's social contract theory, Counsel Stephen's argued that as the defendants had not consented to the Crown's sovereignty, they were not amenable to the Crown's law. *See id.* As the Crown had failed to protect Aboriginal persons and property, consent could not be implied and, consequently, there was no legitimate basis for subjecting the defendants to the rigors of the Crown's laws. *See id.* Stephens also submitted that Australia was neither conquered, ceded nor settled; the Australian colonists just "moved" into Aboriginal society. *See id.* Consequently, the laws of England did not flow into the colony to govern the actions of all inhabitants. As the colonists moved into Aboriginal society they should be subject to Aboriginal customary law, rather than vice versa. *See id.* As noted above, the submission failed. For a more recent example of a refusal to accept that an Aboriginal person was not subject to the laws of Australia, see In re *Phillips*, 72 A.L.R. at 511-12.

65. *See generally* the discussion of this matter in Coe v. Commonwealth (1979) 53 A.L.J.R. 403 (Austl.).

66. *See In re* Phillips, 72 A.L.R. at 511-12; *Wedge*, (1976) 1 N.S.W.L.R. at 581; The King v. Murrell (1836) Legge 72, 72-73 (Austl.).

67. The inclusion of Aboriginal occupants has been confirmed in multiple governors' instructions and proclamations. *See, e.g.*, *Proclamation 28 Dec. 1836*, SOUTH AUSTRALIAN GAZETTE & COLONIAL REGISTER, June 3, 1837. *See also* Governor Macquarie's Proclamation to the Aboriginals, 13-14 (HRA ver. 1, vol. 1); Proclamations of Governor Hindmarsh, 28 December 1836, and Governor King, 592-93 (HRA ser. 1, vol. 3).

68. *See, e.g.*, The King v. Murrell, (1836) Legge 72, 72 (Austl.).

to the Crown. Even aliens[69] engaging in unfriendly conduct[70] are entitled to the Crown's protection. Consequently, act of state cannot be pleaded as a defense to actions brought by Aboriginal peoples in purportedly conquered lands. Whether a plaintiff is a subject or a resident alien, the plaintiff may not be barred from justice by the simple invocation of the act of state doctrine.[71]

It appears the common law courts also have some discretion as to whether they will apply the act of state doctrine when its prerequisites are met. It is submitted below that, when exercising its discretion, a court should conclude that it would be inappropriate for the doctrine to be invoked to bar a claim for Aboriginal sovereignty.

2. *United States Courts*

The act of state doctrine discussed above is peculiar to the common law courts. Unlike the Australian and English courts, the United States judiciary has shown a greater willingness to adjudicate matters pertaining to the legitimacy of the actions of state representatives. While these courts maintain that it would be inexpedient for them to pronounce upon certain political questions, the act of state doctrine as such has only been applied in limited circumstances.

Under the United States courts' conceptions, the act of state doctrine is seen as a principle of international law and practice designed to regulate relations between different nation-states. When applicable, it only prevents the courts of one country, for example the United States, from adjudicating a matter concerning the sovereign or state of another nation. The classic statement of this doctrine in *Underhill v. Hernandez*[72] clearly sets out the rationale underlying the doctrine and its impact on judicial review:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[73]

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69. The word "aliens" refers to enemy aliens within Her Majesty's dominions who have obtained either expressly or implicitly license to live on Crown territory. *See* DE SMITH, *supra* note 43, at 438. "[T]his appears to cover all enemy aliens except combatants." *Id.*

70. For example, in *Johnstone v. Pedlar*, the plaintiff was arrested for subversive activities in Dublin. [1921] 2 App. Cas. 262 (1921) (appeal taken from Ir.)

71. *See* Nissan v. Att'y Gen., 2 All E.R. 1238, 1243 (C.A. 1967).

72. 168 U.S. 250, 252 (1897).

73. *Id.*

The United States courts have consistently reaffirmed this statement,[74] declaring that the act of state doctrine is essentially a territorial limitation placed on the exercise of jurisdiction over foreign acts.[75] The act of state doctrine would, therefore, be inapplicable to Aboriginal claims of sovereign and territorial rights. The adjudication of a dispute between a national and the government in the domestic courts does not fall within the perameters of the above-detailed rationale.[76]

The doctrine was reworked in a series of cases concerning the Cuban expropriation of American assets, the leading case being *Banco Nacional de Cuba v. Sabbatino.*[77] In essence, these cases have formulated a three-prong test to determine whether a court will consider a dispute involving a foreign nation. First, the court must consider whether there exists a codification or established consensus upon the relevant international law to be applied in the case.[78] The greater the codification or consensus, the more likely the matter will be heard, as this will enable the court to determine the dispute through the application of law rather than making a political judgment.[79] The existence of settled legal principles with respect to Aboriginal sovereignty, delineated below, would therefore provide a strong factor in favor of a court exercising its jurisdiction over a dispute between an Aboriginal Nation and the occupying government. Second, the court must have regard for the impact the dispute may have on foreign relations.[80] The "less important the implications of an issue are for . . . foreign relations, the weaker the justification for exclusivity in the political branches."[81] This factor would also suggest that a court could adjudicate a claim for Aboriginal sovereignty, as the dispute would not impact on foreign relations with other countries.[82] Finally, the court must consider the status of the foreign government whose

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74. *See, e.g.*, Republic of Phillipines v. Marcos, 818 F.2d 1473, 1481 (9th Cir. 1987).

75. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); Schooner Exchange v. M'Faddan, 11 U.S. (7 Cranch.) 116, 130 (1812).

76. Possibly such an adjudication would be relevant to an action brought by an Aboriginal claimant against the Australian government in the United States courts pursuant to the Alien Tort Statute.

77. 376 U.S. 398 (1964). As the court explained in *Sabbatino*, there is nothing inherent in the nature of sovereign authority, nor any principle of international law compelling the courts to adhere to the act of state doctrine. *See id.* at 423. Rather, this practice rests on "constitutional underpinnings" governing the proper distribution of power among the branches of government. *Id. See also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

78. *See First Nat'l City Bank*, 376 U.S. at 428.

79. *See id.*

80. *See id.*

81. *Id.*

82. Similarly, in *First Nat'l City Bank*, three Justices in a five-Justice plural majority declined to apply the act of state doctrine, essentially because it believed that the adjudication would not interfere with the conduct of foreign relations. *See id.*

actions are being reviewed.[83] If a consideration of these factors suggests that the matter should be heard by the courts, then even the United States' narrow act of state doctrine will not prevent the matter from being heard.

In *Forti v. Suarez-Mason*, the court asserted that the nature of the breach was an additional factor to be taken into account in determining the applicability of the act of state doctrine.[84] The Court stressed that while it may be appropriate to invoke the doctrine where there had been a breach of economic rights, it should not be invoked where "fundamental human rights lying at the very heart of the individual's existence"[85] have been violated, even if the acts were "encouraged or condoned by states."[86] Thus, an encroachment upon an individual's, or sub-state collective's, human rights lies outside the protective shield the doctrine offers the government.[87] Moreover, Aboriginal claims for sovereign and territorial rights would fall into the category of claims which should not be barred by the act of state doctrine, particularly in light of international law's concern for the promotion of the decolonization of post-colonial states and the self-determination of indigenous peoples.[88]

In addition to the above-detailed limitations upon the scope of the doctrine, the party seeking to convince the court as to its applicability bears a heavy burden of proof.[89] Allegations of official conduct do not automatically trigger the availability of the act of state doctrine.[90] The defendant must satisfy a threshold requirement before the court will even consider the *Sabbatino* factors.[91] It must be established that the facts show "that an Act of State has occurred, coupled with a legal showing that no bar to the doctrine is applicable under the factual circumstances."[92] It is only then that the court will even consider applying the defense.

3. *Judicial Discretion*

Finally, it appears that United States courts have discretion in deciding whether or not to apply the act of state doctrine. An "act of state" is not an

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83. *See id.*

84. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987). *Cf.* Fernandez v. Wilkinson, 505 F. Supp. 787, 799-800 (D. Kan. 1980) (discussing the unsustainability of government action violating fundamental human rights but not specifically addressing the act of state doctrine).

85. *Forti*, 672 F. Supp. at 1546.

86. *Id.*

87. *See id.* at 1546-47.

88. *See* United Nations international instruments cited *supra* note 2.

89. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694-95 (1976); Republic of Philippines v. Marcos, 818 F.2d 1473, 1481-88 (9th Cir. 1987); *Forti*, 672 F. Supp. at 1544-47.

90. *See Forti*, 672 F. Supp. at 1546.

91. *See id.* at 1546 n.9.

92. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1534 (D.C. Cir. 1984).

absolute jurisdictional bar. It is only respected out of comity,[93] and there are many examples of courts exercising jurisdiction over a foreign sovereign despite the act of state doctrine.[94]

The court's discretion to reject the act of state doctrine would be appropriately exercised in the case of a claim for Aboriginal sovereign rights. This is supported by the court's emphasis in *Forti v. Suarez-Mason*[95] that the act of state doctrine should not be applied to cases involving "fundamental human rights lying at the very heart of the individual's existence."[96] As Aboriginal sovereignty is entwined with human rights, such as cultural, political and territorial integrity, it is contended that it would be appropriate for a court to refuse to apply the act of state doctrine to a claim for sovereign rights.

This discretion is equally applicable to courts applying the common law. To this end it has been suggested that the High Court of Australia "might consider the exercises of prerogative by which Australia was acquired for the British Crown to be judicially reviewable on broad public policy grounds."[97] In *Mabo v. Queensland*, the Court recognized that where old common law doctrines seriously offend modern values, a question becomes apparent on whether the doctrine should be sustained and applied.[98] It is submitted that applying the act of state doctrine to bar a claim to Aboriginal sovereignty would offend contemporary values which are reflected in current moves toward decolonization and self-determination[99] for indigenous peoples.[100]

The High Court of Australia also recognized that international law was a "legitimate and important influence on the development of the common law, especially when international law declares the existence of universal

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93. *See* Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). *See generally* First Nat'l City Bank v. Banco Nat'l de Cuba, 406 U.S. 75 (1972).

94. *See, e.g.*, The Lantissina Irivdad, 20 U.S. (7 Wheat.) 283, 354 (1822); Filartiga v. Peña-Irala, 630 F.2d 876, 889-90 (2d Cir. 1980); *Forti*, 672 F. Supp. at 1535; Fernandez v. Wilkinson, 505 F. Supp. 787, 799-800 (D. Kan. 1980).

95. 672 F. Supp. at 1549. *See also Fernandez*, 505 F. Supp. at 799-800.

96. *Forti*, 672 F. Supp. at 1549.

97. *See* Mitchell v. Director of Public Prosecutions [1986] L.R.C. Const. 35, 40 (Gren.). *See also* S. Gray, *Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in Mabo v. Queensland*, 2 GRIFFITH L. REV. 39, 47 (1993) (arguing that the annexation of Australia constituted a "revolution" and the common law courts have jurisdiction to adjudicate on the validity of a revolution). *See also* Madzimbamuto v. Lardner-Burke [1966] R.L.R. 756 (Rhodesia Gen. Div.); [1968] (2) SALR 284 (S. Afr.); R. W. M. Dias, *Legal Politics: Norms Behind the* Grundnorm, 26 CAMBRIDGE L.J. 233 (1968); J. W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103 (1971).

98. *See* Mabo v. Queensland (1992) 175 C.L.R. 1, 29, 30 (Austl.). Ironically, this was one of the Australian cases where the act of state doctrine was used to deny a consideration of the legitimacy of the annexation of Australia. *Cf.* discussion *supra* note 26 (describing long-standing claims of Aboriginal sovereignty).

99. *See* discussion *supra* note 2.

100. *See* Gray *supra* note 97, at 47-48.

human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[101] As submitted above, a claim for Aboriginal sovereignty involves the recognition and respect of human rights, such as Aboriginal cultural, as well as political and territorial integrity. Accordingly, if the act of state doctrine undermines these rights, then it "demands reconsideration."[102]

Particularly, when a real dispute is brought before a court,[103] it would be inappropriate for the political nature of the underlying issue to be used to bar its consideration.[104] The courts are duty-bound to pronounce upon suits brought before them by parties with the requisite standing. The courts provide an important check on the arbitrary use of governmental and executive powers, and this responsibility would not be discharged should courts refuse to entertain actions which recognize and enforce the rights of Aboriginal peoples. The courts' responsibilities should not be shirked under the guise of nonjusticiability.

Thus, the act of state doctrine will not necessarily bar a claim for Aboriginal sovereignty being litigated in the municipal courts, and certainly would not prevent claims from being made in an appropriate international forum.

C. *Acquisition of Sovereignty by Prescription*

1. *Introduction*

Prescription[105] is a dubious[106] method of acquiring territory that is said

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101. *Mabo*, (1992) 175 C.L.R. at 25, 41, 42, 58.

102. *See* Gray, *supra* note 97, at 50.

103. For example, if an Aboriginal person was charged with a criminal offense, or involved in civil action and denied the court's jurisdiction to hear the matter, as in *The King v. Murrell*, (1836) Legge 72 (Austl.), and In re *Phillips* (1987) 72 A.L.R. 508 (Austl.), the dispute would involve a consideration of the legitimacy of the "occupying" state's claims to sovereignty and the existence of any Aboriginal sovereign rights.

104. It has been suggested that compellability, rather than the political nature of the dispute, is the only criteria by which a matter must be determined. *See generally* Melbourne Corp. v. Commonwealth (1947) 74 C.L.R. 31 (Austl.). Similarly, one of the most authoritative constitutional law theorists, A. V. Dicey asserted that Parliament's sovereignty is a question of law, rather than a political issue, that is to be determined by the courts. *See* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 70-85 (1959).

105. A comprehensive discussion of this notion is beyond the scope of this article. For further discussion of prescription, see Cassidy, *supra* note 3, ch. 24.

106. There are, for example, no instances of any international tribunal conclusively supporting the doctrine of prescription. While some have suggested that the *Island of Palmas* supports its existence, acquisitive prescription was not the basis of Arbitrator Max Huber's award. *See generally* Island of Palmas, 22 AM. J. INT'L L. 867 (1928). The matter essentially involved a consideration of the respective claims of the Netherlands and the United States governments to sovereignty over the Island of Palmas. *See id.* Thus, it was a case of

to allow a de facto government to remove defects in its putative title when the prior sovereign has consented or acquiesced to the usurping of its sovereignty. As Brownlie notes, the "apology" for the notion lies in considerations of "good faith, the presumed voluntary abandonment of rights by the party losing title, and the need to preserve international order and stability."[107]

Prescription has also been used in Australia to refute the legitimacy of claims of Aboriginal sovereignty. The Senate Standing Committee on Constitutional and Legal Affairs, for example, declared that the Commonwealth government could invoke the doctrine of prescription to remedy any defect in its sovereign title.[108] The Committee asserted that a prescriptive title arises when no clear title to sovereignty could "be shown by way of occupation conquest or cession, but the territory in question had remained under the continuous and undisputed sovereignty of the claimant for so long that the position had become part of the established international order of nations."[109] It was suggested that this principle was applicable to the Australian circumstances and that with the passage of time and the implied acquiescence of the dispossessed sovereign, a prescriptive title was acquired by the "invading" sovereign.[110]

In this manner, despite the operation of the intertemporal rule,[111] it has been suggested that any possible illegality underlying the acquisition of sovereignty is irrelevant. Even if an acquisition was contrary to international law, it is suggested that through the doctrine of prescription, the "occupying" state has effectively derogated from Aboriginal sovereign and territorial rights, ultimately obtaining the legitimate title to the subject lands. Underlying this method of territorial acquisition is the belief that "a state which has slept upon its rights"[112] should not be able to revive them to defeat

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competing contemporaneous claims of sovereignty, rather than "true" prescription where the prior sovereign acquiesces. *See id.* Huber was not dealing with an imperial power seeking to legitimate its purported acquisition of Aboriginal lands. *Cf.* BROWNLIE, *supra* note 49, at 162. Further, there is nothing to suggest Huber believed either competing power had acquired full sovereign rights to the lands in dispute. He was only concerned with deciding between the rival claims and it is possible neither party satisfied the theoretical requirements for the acquisition of territory. The Netherlands government's claim to sovereignty was ultimately founded upon the country's peaceful and continuous display of state authority. Similarily, in *Legal Status of Eastern Greenland (Den. v. Nor.)*, the court held that, provided the other competing State could not make out a superior claim, Denmark had the right to the subject territory even though Denmark demonstrated "very little in the way of . . . [an actual exercise] of sovereign rights." 1933 P.C.I.J. (Ser. A/B) No. 53, at 45.

107. BROWNLIE, *supra* note 49, at 157.

108. *See* STANDING COMMITTEE, *supra* note 26, ¶ 3.37.

109. *Id.*

110. *See id.*

111. The intertemporal rule requires the validity of certain rights be determined in light of modern developments in international law, rather than the law prevailing at the time of the initial act in dispute.

112. D. W. GREIG, INTERNATIONAL LAW 163 (2d ed. 1976).

a state which has constantly exercised sovereign rights for a lengthy period.

While the doctrine of prescription may at first glance appear to be simple, it entails a number of prerequisites which those who seek to utilize the doctrine to bar claims of Aboriginal sovereignty fail to grasp. Therefore, if the doctrine is recognized under international law, these prerequisites would prevent the denial of Aboriginal sovereignty under the guise of prescription. However, as discussed earlier, even the doctrine of prescription has been highly debated.[113]

2. *Prescription under International Law*

Given that prescription has its source in the works of jurists, rather than case law or treaties, it is not surprising that there are conflicting notions of precisely what the concept entails and what the prerequisites are for creating a prescriptive title within each of these doctrines.[114] However, Brownlie[115] suggests a compilation of the conditions required for acquisitive prescription, which would appear to be correct, if the doctrine exists in international law today.

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113. A number of jurists have criticized the rule and questioned its validity in the international legal system. *See, e.g.*, HUGO GROTIUS, THE FREEDOM OF THE SEAS (MARE LIBERUM) 47 (Ralph Van Deman Magoffin ed. & trans., 1916) (1605) (condemning prescription as the "last defense of injustice"). "Prescription is a matter of municipal law; hence it cannot be applied as between kings, or as between free and independent nations." *Id.* (footnote omitted). Similarly, in *Concerning Right of Passage Over Indian Territory* (*Port. v. India*), Judge Mareno Quintaria declared acquisitive prescription to be "a private law institution which I consider finds no place in international law." 1960 I.C.J. 6, 88 (Apr. 12) (dissenting opinion of Judge Mareno Quintaria). *See also U.N. Survey of International Law in Relation to the Work of Codification of the International Law Commission: Memoranda by the Secretary-General*, U.N. International Law Commission, at 39, U.N. Doc. A/CN.4/1/Rev.1 (1949). Further, the doctrine is contrary to other established rules of international law. Mere silence, for example, has never been enough to divest a state of its title. *See generally* Concerning Sovereignty Over Certain Frontier Lands (Belg. v. Neth.), 1959 I.C.J. 209 (June 20).

114. The doctrine is regarded by jurists as having three forms:

> 1. Immemorial possession. This is understood to give title when a state of affairs exists the origin of which is uncertain and may have been legal or illegal but is presumed to be legal.
>
> 2. Prescription under conditions similar to those required for *usucapio* in Roman law: uninterrupted possession, *justus titulus* even if it were defective, good faith, and the continuance of possession for a period defined by the law.
>
> 3. *Usucapio*, modified and applying under conditions of bad faith. Thus Hall, Oppenheim, and Fauchille do not require good faith in the context of international law.

BROWNLIE, *supra* note 49, at 157-58. With respect to the first category, it is not actually a form of prescriptive title as there has been no acquiescence by the prior sovereign. As to the third category, the use of force is not an acceptable basis for conferring on an occupying state a prescriptive title.

115. *See id.* at 159-62.

First, possession must be exercised *a titre de souverain*. There must be a display of state authority and the absence of recognition of sovereignty in another state. Except in the case of contemporaneous competitive acts of sovereignty, the first condition requires acquiescence[116] by the former sovereign. In the present context, it is submitted that international law recognizes both Aboriginal occupation[117] and Aboriginal sovereignty[118] and that Aboriginal sovereignty has never been ceded to the "occupying" states.[119] The absence of any such acquiescence is evidenced by the Aboriginal resistance to "white" settlement[120] and modern day[121] displays of discontent with the "occupying" government.[122] Members of Aboriginal communities still dispute the legality of the controlling government's authority,[123] rebuking any suggestion of acquiescence to the "new" sovereign power. Hence, the first element of prescription would not be satisfied in the subject cases.

Second, possession must be peaceful and uninterrupted.[124] Once it is accepted that the sovereign rights to the countries under consideration

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116. As Brownlie noted, some writers, such as Hall, Moore, Hyde and Guggenheim suggest acquiescence is no longer required. *See generally* BROWNLIE, *supra* note 49. They argue a prescriptive title can be obtained simply with the lapse of time, supported by possession of the relevant land. *See generally id.* These opinions are neither sustained by state practice nor jurisprudence and cannot, therefore, be relied upon as authoritative. *See generally id.* Brownlie notes that these jurists seem uncertain about the matter, since their views are ambiguous and inconsistent on this point. *See generally id.*

117. The recognition of Aboriginal occupation prevents lands from legally being *terra nullius* (*i.e.*, open to acquisition by mere occupation). *See* Western Sahara, 1975 I.C.J. 12, 123 (Oct. 16) (separate opinion of Judge Dillard).

118. *See generally id.*

119. *See* discussion *supra* notes 26, 64.

120. Contrary to the traditional picture painted of the annexation of Australia, the Aboriginal occupants resisted the occupation of Australia and at times did so very effectively. *See generally* NOEL LOOS, INVASION AND RESISTANCE: ABORIGINAL-EUROPEAN RELATIONS ON THE NORTH QUEENSLAND FRONTIER,1861-1897 (1982); HENRY REYNOLDS, THE OTHER SIDE OF THE FRONTIER: ABORIGINAL RESISTANCE TO THE EUROPEAN INVASION OF AUSTRALIA (1982); Julie Cassidy, The Conquered Continent, chs. 5-6 & app. 8 (1986) (unpublished Honors thesis, University of Adelaide, Faculty of Law, Adelaide, South Australia, Australia) (on file with author) [hereinafter Cassidy, The Conquered Continent]; Julie Cassidy, Aboriginal Resistance in South Australia (unpublished research paper) (on file with author).

121. For example, in July 1990, hundreds of police officers from the *Surete du Québec*, the provincial police force, sought to disband the Mohawk Nation's blockade in Oka, Québec. *See* Daniel Lavery & Brad Morse, *The Incident at Oka: Canadian Aboriginal Issues Move to the Front Burner*, 48 ABORIGINAL L. BULL. 6 (1991).

122. In Australia, the alienation Aboriginal people feel towards the Australian government is evidenced by the Aboriginal Embassy that was set up on the lawns of the then Parliament House in Australia in 1972 and the occupation of that building as an Aboriginal embassy on January 27, 1992. As noted previously, in July 1990, members of the Australian Aboriginal community established an Aboriginal Provisional Government representing the Aboriginal peoples' claims to their sovereign rights. *See* discussion *supra* note 26.

123. *See* discussion *supra* note 64.

124. *See generally* Island of Palmas, 22 AM. J. INT'L L. 867 (1928).

originally resided in the Aboriginal occupants, the second element is refuted by an acknowledgment of the above-mentioned acts of Aboriginal resistance[125] and discontent.[126] This view is supported by the decision in the *Chamizal Arbitration*.[127] There, the United States government's claim to a tract of the Rio Grande on the basis of prescription failed because its possession had not been without challenge. If the diplomatic protests in this case sufficed to prevent a prescriptive title being acquired, Aboriginal resistance[128] would certainly prevent such a title from being acquired.[129]

Third, the possession must be public. This requirement flows from the need for acquiescence on the part of the previous sovereign.[130] The sovereign can only acquiesce to claims of which it has knowledge.

Finally, possession must persist. The most uncertain aspect of the international doctrine of prescription is the question of "how long must the possession persist?" Older authorities insisted upon immemorial possession, while other writers specified requisite fixed periods.[131] Most modern commentators, however, believe the length of time required varies depending upon the particular circumstances of each case.[132] If this is so, "time" as such is not really a special prerequisite for a prescriptive title.[133]

Some jurists, such as Oppenheim, allowed prescriptive titles to be acquired even when they originated out of force.[134] Such a suggestion

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125. *See* discussion *supra* notes 26, 64.

126. *See* discussion *supra* notes 24, 64, 122.

127. The Chamizal Arbitration Between the United States and Mexico, *reprinted in* 5 AM. J. INT'L L. 782, 805-07 (1911) [hereinafter The Chazimal Arbitration].

128. Additionally, it should be noted that modern international law prohibits the use of force to settle international disputes. *See* U.N. CHARTER art. 2, ¶¶ 3-4.

129. The failure of Aboriginal peoples in the *Chamizal Arbitration* to use the United Nations or the International Court of Justice to resolve this territorial dispute and regain their territory should not bar them from denying the acquisition of a prescriptive title to their lands to these post-colonial powers. *See* BROWNLIE, *supra* note 49, at 161. In *Minquiers and Ecrehos*, the United Kingdom argued French protests were ineffective because they should have been supported by pressure to have the matter referred to an international tribunal. *See* Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17). While this view was largely accepted by Judge Carneiro, it was required by treaty that both States were bound to have legal disputes settled by the Permanent Court of Arbitration. *See id.* at 106-08 (individual opinion of Judge Levi Corneiro).

130. Where, however, the dispute is based on contemporaneous competing state activity, knowledge is more likely to be assumed and publicity will not be as important. In such cases the question of acquiescence is only of minor relevance, for the dispute is normally decided on the relative strength of the contemporaneous claims of the competing powers.

131. *See* DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE, ¶ 52 (2d ed. 1876). Uninterupted possession of fifty years by à nation will exclude the claim of any other nation. *See id.*

132. *See* 1 PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, pt. 2, at 762 (1925); 1 OPPENHEIM, *supra* note 3, at 577-78 (1955).

133. BROWNLIE, *supra* note 49, at 161-62.

134. *See* GREIG, *supra* note 112, at 166. Oppenheim used the notion of prescription in the widest possible manner. *See, e.g.*, OPPENHEIM, *supra* note 3, at 576.

ignores the requirements that the prior sovereign acquiesce to the "new" state and that the latter's possession must be peaceful. Moreover, an illegal act of force should not be legitimated in this manner by the mere passage of time. It is inappropriate for the doctrine of prescription[135] to create rights and title out of possession based on illegal acts. In this context it is pertinent to note the comments of Vice-President Ammoun in *Namibia*:

> [W]hile the law of former times . . . tolerated conquest and annexation, of which South Africa's conduct appears to be one of the last examples, modern law . . . condemns them beyond reprieve. Annexation is nothing less than the negation of the new law of self-determination. Thus the United Nations has reiterated that acquisition of a territory may not be effected by the use or the threat of force. Nonetheless, South Africa has throughout, and even before the Court, sought to justify its continued occupation of Namibia by claiming to be there by right of conquest or by the effect of acquisitive prescription. The Court has dismissed this claim.[136]

Thus, "occupying" states cannot rely on their illegitimate acts of forceful dispossession to invoke a prescriptive title in a manner designed to deny Aboriginal sovereign claims. That people have long been displaced or oppressed does not convert a lawless act into a lawful one.[137] Pertinent to this point is the fact that while peaceful occupation might bar subsequent attempts at colonization by other European powers,[138] it has never been considered grounds for extinguishing the rights of the indigenous inhabitants.[139]

For the reasons suggested above, it is submitted that if international law recognizes acquisitive prescription,[140] the doctrine has a limited scope and, in accordance with the sentiments expressed in *Namibia* , could not be used by the subject "occupying" states to legitimize dispossessing the Aboriginal occupants.[141] An examination of the doctrine only serves to bolster the claims of the Aboriginal occupants to their sovereign and territorial rights.

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135. Greig believes that the cases to which Oppenheim refers are cases of historical consolidation, rather than prescription. *See* GREIG, *supra* note 112, at 166.

136. Namibia, 1971 I.C.J. 16, 91 (June 21) (separate opinion of Vice-President Ammoun).

137. The International Court of Justice has taken the view that self-determination superseded a state's historical claim to territorial rights. *See generally* Western Sahara, 1975 I.C.J. 12 (Oct. 16).

138. *See generally* The Chamizal Arbitration, 5 AM. J. INT'L L. 782 (1911).

139. *See* Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 38 (Apr. 12). *See generally* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

140. *See* discussion *supra* notes 103, 108.

141. Namibia, 1971 I.C.J. at 91 (separate opinion of Vice-President Ammoun).

Unlike the "occupying" states, they can prove immemorial possession. Moreover, even if the doctrine of prescription could be manipulated to support an "occupying" state's claim to sovereign title, the relevant international laws recognize that Aboriginal sovereignty and territorial rights are norms of *jus cogens*;[142] therefore, the "occupying" state's prescriptive title is irrelevant. The prescriptive title of an occupying state does not provide a defense for a failure to recognize the legal rights of Aboriginal peoples.[143] Given that the doctrine has no established legal basis,[144] it is unfortunate that "occupying" states such as Australia should seek to utilize such a dubious doctrine to mislead Aboriginal claimants as to the strength of their claims.

Provided that the bars to Aboriginal claims to sovereignty can be dismissed in the manner suggested above, it is now pertinent to consider recognition of Aboriginal sovereignty under international law.

III. ABORIGINAL SOVEREIGNTY IN INTERNATIONAL LAW

A. *Terra Nullius*

Central to the existence of Aboriginal sovereign rights today is the validity of the purported acquisition of these peoples' traditional lands by imperial and colonial powers. While historically, unoccupied territory, also known as *terra nullius*, could be acquired by discovery and effective occupation,[145] inhabited land could only be acquired by descent, conquest,[146] cession, or perhaps prescription.[147] The historical treatment of the Aboriginal peoples of Africa, Australia and North America directly relates to the erroneous classification of their lands as *terra nullius*,[148] or declared

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142. These are nonderogable norms essential to the maintenance of the international legal order, where prescription cannot validate a breach of the rule of *jus cogens*. *See id.* at 89-90.

143. *See* BROWNLIE, *supra* note 49, at 501.

144. *See* discussion *supra* notes 106, 113.

145. While it has been suggested that in the eighth century mere discovery was sufficient to establish title *terra nullius*, the inchoate title stemming from discovery had to be perfected by effective occupation. *See generally* Island of Palmas, 22 AM. J. INT'L L. 867, 872-73 (1928).

146. For a discussion of the arguments that would suggest that Australia was acquired by conquest, rather than settlement, see Cassidy, The Conquered Continent, *supra* note 120, chs. 5-6 & app. 8. This may be relevant to preserving Aboriginal rights as, at common law, in a conquered country the private rights of the original occupants continue unaffected until expressly abrogated by the conquering power. *See generally* Anonymous, 24 Eng. Rep. 646 (Ch. 1722); Blankard v. Galdy, 91 Eng. Rep. 356 (K.B. 1693). *See generally* Julie Cassidy, The Significance of the Classification of a Colonial Acquisition: The Conquered/Settled Distinction (unpublished manuscript) (on file with author).

147. *See* discussion *supra* Part II(C)(2) (discussing the dubious doctrine of prescription).

148. *See* The Queen v. Van Der Peet [1996] 137 D.L.R. 4th 289, 380 (Can.). *Cf.* Asch, *supra* note 26; Slattery, *supra* note 25, at 685-91.

open for discovery and settlement.[149] Thus, in Australia, until very recently,[150] the denial of Aboriginal sovereignty was based on the false notion that the continent was *terra nullius* and was acquired by peaceful occupation.[151] Through such classification of the continent and its occupants, the imperial authorities avoided the difficulties involved in acquiring or supplanting Aboriginal sovereignty.

It is, however, most important to be a valid occupation that the land be *terra nullius*.[152] Thus, the initial[153] and continued[154] validity of colonial acquisitions and the survival of Aboriginal sovereignty in the countries under consideration will depend upon whether Aboriginal occupation was recognized by international law as preventing land from being classified as *terra nullius*.

One of the most respected works dealing with this question is Lindley's *The Acquisition and Government of Backward Territory in International Law*.[155] Lindley reviewed the opinions of jurists over the centuries and

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149. *See Van der Peet*, 137 D.L.R. 4th at 330. *See also* Milirrpum v. Nabalco Party Ltd. (1971) 17 F.L.R. 141 (Austl.); Cooper v. Stuart, 14 App. Cas. 286, 291-94 (P.C. 1889) (appeal taken from N.S.W.). *Cf.* M. N. SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 31-38 (1986); Brad Berg, *Introduction to Aboriginal Self-government in International Law: An Overview*, 56 SASK. L. REV. 375, 382-83 (1992).

150. That Australia was *terra nullius* was finally rejected in *Mabo v. Queensland* (1992) 175 C.L.R. 1, 33, 40-42, 58, 181-82 (Austl.). However, the High Court in *Mabo* upheld the settled classification of the annexation of Australia. *See id.* at 33, 180. The court drew a distinction between whether the Crown had acquired sovereign title to Australia and whether it had acquired beneficial title to Aboriginal lands. *See id.* at 32, 44-45, 48, 180. Thus, Justice Toohey asserted that in considering the consequences of the annexation of Australia "the distinction between sovereignty and title to rights in the land is crucial." *Id.* at 180. This allowed the Court to start with the premise that the "Imperial Crown acquired sovereignty [over Queensland] on 1 August 1879" and merely considered whether "the Crown also acquired absolute beneficial ownership of the land . . . when the Crown acquired sovereignty." *Id.* at 32.

151. *See generally* Milirrpum v. Nabalco Party Ltd. (1971) 17 F.L.R. 141 (Austl.); Cooper v. Stuart, 14 App. Cas. 286 (P.C. 1889) (appeal taken from N.S.W.). The view that Canada was also acquired through discovery and settlement was recently affirmed in *Calder*. *See* Calder v. Attorney-General of British Columbia [1973] S.C.R. 313, 328-29, 383, 401-02 (Can.). *See also* The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289 (Can.); The Queen v. Sparrow [1990] 70 D.L.R. 385, 401, 404 (Can.). For a discussion of the acquisition of the United States, see generally Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

152. GROTIUS, *supra* note 113, at 13.

153. If it were established that an international custom recognizing Aboriginal sovereign and territorial rights was a rule of *jus cogens*, it may retroactively impair these colonial titles in so far as they are inconsistent with the terms of the custom.

154. The intertemporal rule requires international rights, such as sovereignty, that are perpetually exercised in conformance with international law as it develops. Thus, the validity of an acquisition of sovereign rights must comply with international law at the time of the dispute.

155. *See generally* MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (Negro Universities Press 1969) (1926).

found:

> [A] persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. . . . [W]herever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by Occupation. . . .[156]

Lindley further states:

> [I]n order that an area shall not be *territorium nullius*, it would appear . . . that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.[157]

Thus, all that international law required before Aboriginal populations could be recognized as being in occupation of land was a degree of political organization and authority sufficient for the general maintenance of order.[158]

Particularly, given Lindley's comment that "[n]o race is without organization of some kind,"[159] the Aboriginal peoples of Australia and North America satisfied these international requirements and their occupation prevented their lands from being *terra nullius*. While most of these Aboriginal Nations did not conform with eurocentric political systems,[160] each had sophisticated legal systems which had to be obeyed under the threat of sanction. Their lives were highly regulated by social rules providing "a

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156. *Id.* at 17-20.

157. *Id.* at 22-23. While the writers of the late nineteenth century applied more stringent tests, they also believed that Aboriginal sovereignty precluded land from being acquired by occupation. *See id.* at 18. Westlake, for example, wrote "an uncivilized tribe [could] grant by treaty such rights as it understands and exercises." JOHN WESTLAKE, THE COLLECTED PAPERS ON INTERNATIONAL LAW 151 (L. Oppenheim ed., 1911).

158. Note, some international law jurists believed occupation of lands by Aboriginal peoples did not prevent land being characterized as *terra nullius*. *See generally* ALPHONSE RIVIER, PRINCIPES DU DROIT DES GENS (1896). This view continues to be held by some modern scholars. *See* L. C. Green, *Claims to Territory in Colonial America, in* THE LAW OF NATIONS AND THE NEW WORLD 125-26 (L. C. Green & O. P. Dickson eds., 1989).

159. LINDLEY, *supra* note 155, at 19.

160. It is possible that certain peoples of South Australia and the Maori peoples of New Zealand would have satisfied these models. *See generally* Taplin, *The Ngarrindjeri, in* THE NATIVE TRIBES OF SOUTH AUSTRALIA (J. D. Woods, ed., 1879).

stable order of society" within the above test.[161] As Justice Blackburn declared in *Milirrpum v. Nabalco* with respect to the Aboriginal peoples of Australia, "[i]f ever a system could be called 'a government of laws, and not of men,' it is shown in the evidence before me."[162] Consequently, the Aboriginal lands purportedly acquired by colonial forces were not uninhabited *terra nullius* that were acquired by "peaceful" occupation.[163]

Lindley's analysis is supported by the International Court of Justice's advisory opinion in *Western Sahara*.[164] The court delivered an advisory opinion on two matters relating to the Spanish colonization of the Western Sahara.[165] One of the questions involved was determining whether the Western Sahara was a territory belonging to no one (*terra nullius*) in 1884 when colonized by the Spanish. The majority of the court held that as the subject lands were inhabited by nomadic tribes, they could not be classified as *terra nullius*, and stated that "[w]hatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*."[166] As Judge Gros stressed, "[T]he independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which was sufficiently recognized for there to have been no *terra nullius*."[167] Vice-President Ammoun noted in the course of his judgment:

> Mr. Bayona-Ba-Meya goes on to dismiss the materialistic concept of *terra nullius*, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or "mother nature", [sic] and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.[168]

While the word "occupation" was at times used to signify the acquisition of sovereignty from these peoples, the majority of the Court asserted that this

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161. Milirrpum v. Nabalco Party Ltd. (1971) 17 F.L.R. 141, 267 (Austl.). *See also* Kenneth Maddock, *Aboriginal Customary Law, in* ABORIGINES AND THE LAW 212 (Peter Hanks and Bryan Keon-Cohen eds., 1984).

162. 17 F.L.R. at 267.

163. For a more complete discussion of whether Australia was a *terra nullius* territory, see Cassidy, The Conquered Continent, *supra* note 120, chs. 4-5.

164. 1975 I.C.J. 12 (Oct. 16).

165. The advisory opinion was requested by the General Assembly of the United Nations. *See id.*

166. *Id.* at 39.

167. *Id.* at 75 (declaration of Judge Gros).

168. *Id.* at 85-86 (separate opinion of Vice-President Ammoun).

use of the term was technically improper.[169] An original sovereign title could only be acquired by occupation of *terra nullius*. If land was not *terra nullius*, only a derivative title could be acquired and only through agreements with local rulers. These sentiments were approved or substantially adopted by Judges Dillard, de Castro and Boni.[170]

Given the International Court of Justice's implicit refutation of the "cultivation test"[171] and the need for Aboriginal societies to comply with European-like forms of government[172] before their lands could be placed outside the category of *terra nullius,* it is again submitted that the lands of the subject Aboriginal peoples were not *terra nullius*. The required "social and political organization" existed, and, as is apparent from *Western Sahara*, the nomadic nature of some of these peoples' occupation did not prevent them from exercising sovereignty over their lands.[173] Vice-President Ammoun's comments regarding the relationship the peoples of the Western Sahara have with their land echo that of the subject Aboriginal peoples.[174] Moreover, in light of Judge Dillard's comment that "you do not protect a *terra nullius*,"[175] Aboriginal resistance to colonial expansion also appears to be important to the classification of land.[176]

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169. *See id.* at 39-40.

170. *See id.* at 124, 171, 173 (separate opinions of Judges Dillard, de Castro, and Judge ad hoc Boni).

171. It is questionable whether authorities such as Blackstone and Vattel believed the failure to cultivate land amounted to a forfeiture of the rights of possession. *See* Cassidy, The Conquered Continent, *supra* note 120, chs. 3-4. However, Australian courts and the Privy Council, until most recently, believed lands occupied by non-cultivating peoples to be *terra nullius*. *See* Cooper v. Stuart [1889] 14 App. Cas. 286, 291-94 (P.C. 1986) (appeal taken from N.S.W.S. Ct.). *See also* Coe v. Commonwealth (1979) 53 A.L.J.R. 403 (Austrl.); Milirrpum v. Nabalco Party Ltd. & the Commonwealth (1971) 17 F.L.R. 141 (Austrl.).

172. *See Coe,* 53 A.L.J.R at 407. Justice Gibbs applied an extremely eurocentric test requiring distinct legislative, executive and judicial organs before recognizing a peoples as being capable of possessing any sovereignty. He also required the judicial organs to apply law of a European type. While Justice Blackburn in *Milirrpum,* 17 F.L.R. at 161, warned against applying eurocentric notions to Aboriginal peoples and consequently held that Aboriginal society did not have to conform with European models of law making and enforcement, later in his judgment he ignored his own warning and required the claimants establish a proprietary interest in their lands.

173. *See generally* Western Sahara, 1975 I.C.J. 12 (Oct. 16).

174. *See Milirrpum,* 17 F.L.R. at 141; *In re* Kearney (1984) 52 A.L.J.R. 31 (Austrl.); *Ex parte* Japanangka (1984) 52 A.L.R. 31 (Austrl.) (discussing the Aboriginal relationship with land). *See generally* ABORIGINAL LEGAL ISSUES (McRae et al. eds., 1991).

175. Western Sahara, 1975 I.C.J. 12, 124 (Oct. 16) (emphasis added).

176. *See generally* Cassidy, The Conquered Continent, *supra* note 120.

B. *Sovereign Aboriginal Communities*

1. *Sovereign Entities*

While Aboriginal occupation prevents land from being classified as *terra nullius*, thereby undermining the validity of "white" occupation of countries such as Australia, it is still debatable whether international law recognized such occupation as giving rise to sovereign rights. A survey of international law jurists again reveals that the preponderance of thought was that "the aborigines undoubtedly had true dominion in both public and private matters."[177] They believed "neither their princes nor private persons could be despoiled of their property on the ground of them not being true owners."[178] It was not only private rights to land which international law required to be respected; the public or sovereign rights of these peoples also had to be acknowledged. Consequently, the normal method of acquisition of Aboriginal sovereignty was by cession or conquest, rather than settlement.[179]

Again, Lindley's analysis of the works of international law jurists establishes that these writers accepted certain indigenous groups to be more than mere legal occupants. They were considered full sovereign states. While some jurists required these peoples to comply with a prescribed degree of "civility,"[180] generally the only prerequisite was a degree of governmental authority sufficient enough to maintain order within the group.[181] Such sovereignty could be exercised by a local community or communities,[182] a native sovereign,[183] by many rulers across the country,[184] or small groups jointly exercising co-sovereignty.[185] To this end, many Asian peoples, such as those of the Ottoman Empire, the Maratha Empire of India,[186] Thailand (Siam),[187] Japan, and Korea were recognized as sovereign entities.[188]

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177. Vitoria, *supra* note 22, at 24.

178. *Id.*

179. *See* CRAWFORD, *supra* note 21, at 180.

180. *See* WESTLAKE, *supra* note 157, at 139-57. Westlake required a "native government capable of controlling white men or under which white civilization can exist." *Id.* at 145.

181. CRAWFORD, *supra* note 21, at 176.

182. As in Australia, Canada, the United States and New Guinea.

183. As in New Zealand, Lagos and Zimbabwe.

184. As in India.

185. For example, the tribes, confederations and emirates of the Western Sahara.

186. *See, e.g.*, Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, at 38 (Apr. 12).

187. *See, e.g.*, Concerning the Temple of Preah Vihear (Cambodia. v. Thail.), 1962 I.C.J. 6 (Judgment of June 15, 1962).

188. While these nations were not treated identically to European States, the distinction was made not on the basis of "civility" but through the application of "regional customs." *See* CRAWFORD, *supra* note 21, at 176.

Similarly, the peoples of Africa[189] and the Pacific [190] were recognized as independent states.

In light of international law's recognition of Aboriginal sovereignty in these circumstances, it is submitted that there is no reason to deny the sovereignty of the Aboriginal peoples of Australia and North America.[191] As the Court pointed out in *Western Sahara*, even nomadic peoples can exercise *de facto* sovereignty over the lands through which they roam.[192] Similarly, nomadic[193] bands of Aboriginal peoples in Australia, New Zealand, Canada and the United States could be considered to jointly exercise sovereign rights over these countries.[194]

2. *Aboriginal Treaties*

If these Aboriginal peoples legally held sovereign title to their traditional lands, as noted above, their territory could be validly acquired only after obtaining the consent of the people or their sovereign. Yet no treaties were concluded between the acquiring imperial or colonial powers and many of the subject dispossessed Aboriginal peoples.[195] Even where treaties were concluded, in countries such as Canada[196] and New

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189. *See, e.g.*, Convention between Great Britain and the Transvaal Burghers (Swaziland), Aug. 3, 1881, 72 B.F.S.P. 900, *reprinted in* 159 C.T.S. 57 (1977); Western Sahara, 1975 I.C.J. 12 (Oct. 16).

190. *See, e.g.*, Treaty of Friendship between Great Britain and Tonga, Nov. 29, 1879, 70 B.F.P.S. 9, *reprinted in* 155 C.T.S. 439 (1977). The Treaty of Friendship was based on the Treaty of Cession between Great Britain and New Zealand (Waitangi), Feb. 5-6, 1840, 29 B.F.P.S. 1111, *reprinted in* 89 C.T.S. 473 (1969).

191. *See e.g.*, Slattery, *supra* note 25, at 700.

192. *See* Western Sahara, 1975 I.C.J. 12, 122 (Oct. 16).

193. In Australia, there has been a misapprehension that all Aboriginal peoples were nomadic. This belief is not accurate. Many Aboriginal communities undertook a sedentary existence. *See generally* Cassidy, The Conquered Continent, *supra* note 120, ch. 4.

194. The sovereign rights should be viewed as exercised in conjunction with other nomadic and more settled groups.

195. *See* sources cited *supra* notes 26, 64. *See also* SENATE COMM. ON INDIAN AFFAIRS, 2 LAWS AND TREATIES 23 (Charles J. Kappler ed., 1904); J. E. Foster, *Indian-White Relations in the Prairie West During the Fur Trade Period - A Compact?, in* THE SPIRIT OF ALBERTA INDIAN TREATIES 181, 182-83 (Richard Price ed., Pica Pica Press 1987); RICHARD T. PRICE, LEGACY: INDIAN TREATY RELATIONSHIPS 20 (1991). This Includes the indigenous occupants of Australia, the South Island of New Zealand and certain parts of Canada and the United Staes. With regard to Australia, see discussion *supra* note 26.

196. *See* Asch, *supra* note 26, at 473-74 (discussing the impact of Canadian treaties). Asch also argues that the Constitution Act, § 91, 1867 (Can.), should be interpreted as a recognition of the Indian peoples' right to negotiate treaties with the Federal government. *See id.* For an explanation of the constitutionalization of Aboriginal treaty rights in Canada, see Constituiton Act, §§ 25, 35(1), 1982 (Can.). Horseman v. The Queen [1990] 1 S.C.R. 901; The Queen v. Sparrow [1990] 70 D.L.R. 4th 385, 401, 404; The Queen v. Sioui [1990] 70 D.L.R. 4th 427.

Zealand,[197] it has only been in recent years that these have been recognized as legally binding. Perhaps more importantly, the international status of such treaties has been denied.[198] Rather, they have been perceived as domestic "agreements between Crown and native subjects" in the case of Canadian agreements and "Crown and non-subjects" in the case of the Treaty of Waitangi.[199] Thus, no question of cession is said to arise out of such treaties.[200]

Given international law's recognition of the sovereign status of

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197. *See* Treaty of Waitangi Act 1975, No. 114 of 1975 (N.Z.) (confirming the binding force of the Treaty and adopting measures for its implementation). *See also* New Zealand Maori Council v. Attorney-Gen. [1987] 1 N.Z.L.R. 641, 659 (N.Z.C.A.).

198. The international status of treaties between the government and the Indian Nations of the United States have been more readily recognized by the early courts of that jurisdiction. Thus, in Worcester v. Georgia, Chief Justice Marshall asserted:

> The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied all in the same sense.

31 U.S. (6 Pet.) 515, 559-60 (1832). *See also id.* at 544-45 (Marshall, J.,); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 17, 20, 53 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Island of Palmas, 2 R.I.A.A. 829, 856 (Perm. Ct. Arb. 1928); Asch, *supra* note 26, at 481 (noting that Canadian self-government agreements have been denied constitutional status); Nettheim, *supra* note 2, at 5; Bryant, *supra* note 9, at 287; Richard Falk, *The Rights of Peoples (In Particular Indigenous People) in* THE RIGHTS OF PEOPLES 18-19 (J. Crawford ed., 1988); P. G. McHugh, *Maori Fishing Rights and the North American Indian,* 6 OTAGO L. REV. 62, 81(1985); Andrée Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law,* 23 VAND. J. TRANSNAT'L L. 703, 728 (1990). *See generally* Berg, *supra* note 149; L.C. Green, *Aboriginal Peoples, International Law and Canadian Charter of Rights and Freedoms,* 61 CAN. B. REV. 339 (1983).

199. McHugh, *supra* note 198, at 81. *See generally* Simon v. The Queen [1986] 24 D.L.R. 4th 390 (Can.); Guerin v. The Queen [1984] 13 D.L.R. 4th 321 (Can.); Pawis v. The Queen [1980] 102 D.L.R. 3d 602 (Can.); St. Catherine's Milling and Lumber Co. v. The Queen [1889] 14 App. Cas. 46 (P.C. 1888) (appeal taken from Can.). Note, however, the comment in *The Queen v. Sioui* [1990] 70 D.L.R 4th 427, 448 (Can.):

> mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

Id. Earlier in the judgment, however, the Court stated that "relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations such States had with their own citizens" *Id.* at 437. Thus the Court appears to suggest that the status of Indian peoples is *sui generis.* Strangely, the Australian Senate's Standing Committee on Constitutional and Legal Affairs believed any "Makaratta" between the Aboriginal people and the Australian government could not, and seemingly should not, be an international treaty. *See* STANDING COMMITTEE, *supra* note 26.

200. *See* The Queen v. Secretary of State [1981] 4 C.N.L.R. 86, 101 (Eng. C.A.).

Aboriginal peoples, the denial of the international nature of such agreements by scholars and the Canadian courts appears strange.[201] Logic would dictate that they be treated as international treaties. Yet, even if this was the case, the significance of any such agreements to the cession of Aboriginal sovereignty would depend upon the status of the Aboriginal signatory and the purpose and effect of the treaty. If the treaty was not concluded between the legitimate representative of the relevant Aboriginal Nation, the agreement would be no more than a private contract and could not, therefore, effectively cede sovereign rights. If, however, the Aboriginal Nation's sovereign status was legally recognized and the agreement concluded with the appropriate sovereign representative, the agreement could be regarded as an international treaty[202] evidencing the transfer of sovereign title to the subject lands.

If, however, the treaty did not cede sovereignty, but rather preserved or qualified the exercise of Aboriginal sovereignty, the "occupying" government could not rely upon it as a source of derivative title. In this context, it is important to note that the purpose of most treaties between the Crown and North American Aboriginal peoples was to preserve Aboriginal self-government[203] rather than cede sovereignty. The treaties were protective in nature, incorporating binding and effective clauses preserving Aboriginal rights in perpetuity, rather than relinquishing such rights.[204] In this context,

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201. *See* Bryant, *supra* note 9, at n.103.

202. *See* Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 91-92 (Apr. 12) (dissenting opinion of Judge Moreno Quintana).

203. *See* Bryant, *supra* note 9, at 288; *See also* Michael D. Mason, *Canadian and United States Approaches to Indian Sovereignty*, 21 OSGOODE HALL L.J. 422, 426 (1983).

204. *See* 1 EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS, at ch. xvi, 193 (M.P. Praider-Fodere ed., 1863); 2 CHRISTIAN WOLFF, JUS GENTIUM MEGHODO SCIENTIFICA PERTRACTATUM, ch. 1, 84 (Joseph H. Drake trans., Carnegie ed. 1934) (1764). While Wolff has suggested that the new sovereign might obtain a prescriptive title, the conqueror still might be bound by a fiduciary duty to guard the interests of the indigenous occupants. Canadian and U.S. courts have also recognized that the Crown has a fiduciary duty to safeguard the interests of Aboriginal occupants. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199 (1974); Seminole Nation v. United States, 316 U.S. 286 (1942); United States v. Waller, 243 U.S. 452 (1917); Jones v. Meehan, 175 U.S. 1 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Inter Tribal Council, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1995); Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont., 792 F.2d 782 (9th Cir. 1986); Gila River Pima Maricopa Indian Community v. United States, 9 Ct. Cl. 660 (1986); Navajo Tribe of Indians v. United States, 9 Ct. Cl. 227 (1985); United States v. University of New Mexico, 731 F.2d 703 (10th Cir. 1984); Pechanga Band of Mission Indians v. Kacor Realty Inc., 680 F.2d 71 (4th Cir. 1982); Am. Indian Residing on Maricopa-AK Chin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981); Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Kerr-McGee Corp. v. Farley, 915 F. Supp. 273 (D.N.M. 1995); Connecticut ex rel Blumenthal v. Babbitt, 899 F. Supp. 80 (D. Conn. 1995); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994); Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990); Little Earth of United

it is important to note that there has been considerable dispute as to the terms and interpretation of such treaties, particularly where the treaties are written in two languages. While the English version may suggest a cession of Aboriginal sovereignty, this may not be so in the Aboriginal version. In the subject countries such ambiguity is generally resolved in favor of the Aboriginal version, and thus, treaties are to be interpreted in accordance with the Aboriginal understanding of their terms.[205] Treaties are also

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Tribes, Inc. v. United States Dep't of Hous. and Urban Dev., 675 F. Supp. 497 (D. Minn. 1987); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981); Kenai Oil and Gas, Inc. v. Dep't of Interior, 522 F. Supp. 521 (D. Utah 1981).

In Canada, *see, e.g.*, Chippewas of Kettle & Stony Point v. AG (Canada) [1997] 141 D.L.R. 4th 1, 10, 12; Corbiere v. Canada [1997] 142 D.L.R. 4th 122, 154; Blueberry River Indian Band v. Canada [1996] 130 D.L.R. 4th 193; Canadian Pacific Ltd. v. Matsqui Indian Band [1996] 134 D.L.R. 555, 579; Semiahmoo Indian Band v. Canada [1996] 128 D.L.R. 4th 542; The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 301-02, 304, 338, 340, 368-69, 380, 395-97; The Queen v. Badger [1996] 133 D.L.R. 4th 324, 331, 354-55; The Queen v. Cote [1996] 138 D.L.R. 4th 385, 417; The Queen v. Adams [1996] 138 D.L.R. 4th 657, 677; The Queen v. Wolfe [1996] 129 D.L.R. 4th 58, 79-80; Delgamuukw v. British Columbia [1993] 104 D.L.R. 4th 289; The Queen v. Sparrow [1990] 70 D.L.R. 4th at 406, 408; The Queen v. Taylor [1981] 62 C.C.C. 2d 227; The Queen v. Syliboy [1929] 1 D.L.R. 307, 314. Note that Chief Justice Brennan rejected the existence of this fiduciary duty in Wik Peoples v. Queensland [1996] 141 A.L.R. 129, 161. It is submitted that he wrongly suggested the above cases were based on a protective statutory scheme, rather than a common law or international law principle.

205. In the United States there is a wealth of cases supporting this position. *See, e.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); De Coteau v. District County Court for Tenth Judicial District, 420 U.S. 425 (1975); Antoine v. Washington, 420 U.S. 194 (1975); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973); Peoria Tribe of Indians of Okla. v. United States, 390 U.S. 468 (1968); Northwestern Bands of Shoshone Indians, v. United States, 324 U.S. 335 (1945); Tulee v. Washington, 315 U.S. 681 (1942); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918); Northern Pacific Railway Co. v. United States, 227 U.S. 355 (1913); Starr v. Long Jim, 227 U.S. 613 (1913); Winters v. United States, 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905); Minnesota v. Hitchcock, 185 U.S. 373 (1902); Jones v. Meehan, 175 U.S. 1, 10-11 (1899); Choctaw Nation v. United States, 119 U.S. 1 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286, 1294 (9th Cir. 1996); Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996); Cree v. Waterbury, 78 F.3d 1400 (9th Cir. 1996); Tonkawa Tribe of Okla. v. Richards, 75 F.3d 1039 (5th Cir. 1996); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1257 (9th Cir. 1994); Lazore v. Comm'r, 11 F.3d 1180 (3d Cir. 1993); United States v. Washington, 969 F.2d 752 (9th Cir. 1992); Oneida Indian Nation v. New York, 860 F.2d 1145 (2d. Cir. 1988); United States v. Washington, 774 F.2d 1470 (9th Cir. 1985); Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983); Donovan v. Navajo Forest Product Indus., 692 F.2d 709 (10th Cir. 1982); Menominee Indian Tribe v. Thompson, 922 F. Supp. 184 (W.D. Wis. 1996); Meyers v. Bd. of Educ. of San Juan Sch. Dist., 905 F. Supp. 1544 (D. Utah 1995); Mille Lacs Band of Chippewa Indians v. Minnesota 853 F. Supp.

interpreted in light of the government's trust obligations owed to Aboriginal peoples.[206]

Crawford suggests, however, that despite the conditional and protective nature of these agreements, they have been regarded as effecting an absolute cession of sovereignty.[207] In essence, he asserts that their protective nature may be undermined by subsequent practice.[208] Crawford also suggests that these Aboriginal peoples are soon considered part of the new state.[209] Thus, Aboriginal peoples would encounter many difficulties in enforcing their "treaty" rights in either the municipal or international courts.[210]

While it is appreciated that, in accordance with Crawford's sentiments,

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1118 (D. Minn. 1994); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994); United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994); Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994); Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680 (E.D. Wis. 1992); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987); United States v. Billie, 667 F. Supp. 1485 (S.D. Fl. 1987); Yankton Sioux Tribe of Indians v. Nelson, 604 F. Supp. 1146 (S.D.S.D. 1985); Bear v. United States, 611 F. Supp. 589 (D. Neb. 1985); Babbitt Ford Inc. v. Navajo Indian Tribe, 519 F. Supp. 418 (D. Ariz. 1981).

In Canada, it has been suggested that the dispute continues to rage. *See* Foster, *supra* note 195, at 190; PRICE, *supra* note 195, at 20; Asch, *supra* note 26, at 486-87. However, case law provides that any ambiguity must be resolved in favor of the Aboriginal interpretation. *See* The Queen v. Marshall [1997] 146 D.L.R. 4th 257; The Queen v. Gladstone [1996] 137 D.L.R. 4th 648, 703; The Queen v. Wolfe [1996] 129 D.L.R. 4th 58, 75; The Queen v. Badger [1996] 133 D.L.R. 4th 324, 331, 340, 344; The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 340, 368-69; The Queen v. Horseman [1990] 1 S.C.R. 901, 907; The Queen v. Sparrow [1990] 70 D.L.R. 4th 385, 407; The Queen v. Sioui [1990] 70 D.L.R. 4th 427; Simon v. The Queen [1986] 24 D.L.R. 4th 390, 402; Nowegijick v. The Queen [1983] 144 D.L.R. 3d 193, 198-99; The Queen v. George [1966] 55 D.L.R. 2d 386; *In re* Paulette [1963] 6 W.W.R. 97.

For the New Zealand position, see New Zealand Maori Council v. Attorney-General [1987] 1 N.Z.L.R. 659.

206. *See* Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286, 1294 (9th Cir. 1996); Jones v. Meehan, 175 U.S. 1, 10-11 (1899); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); The Queen v. Badger [1996] 133 D.L.R. 4th 324, 340-41, 360; The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 301-02, 340; The Queen v. Wolfe [1996] 129 D.L.R. 4th 58, 75-76; Ontario v. Bear Island Foundation [1991] 83 D.L.R. 4th 381; The Queen v. Sparrow [1990] 70 D.L.R. 4th 385, 410; Simon v. The Queen [1986] 24 D.L.R. 4th 390, 405-06.

207. *See* CRAWFORD, *supra* note 21, at 182.

208. *See id.*

209. Crawford suggests that, at most, the community would continue to be recognized as a separate entity in the form of a "domestic dependent Nation." *Id.* (quoting Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. at 17-18).

210. *See* CRAWFORD, *supra* note 21, at 183. *See also* Milirrpum v. Nabalco Party Ltd. & the Commonwealth [1971] 17 F.L.R. 141, 183-98; Warman v. Francis [1958] 20 D.L.R. 2d 627. Difficulties would occur even if the treaty is concluded after the initial cession. *See* Cayuga Indians Claim (Gr. Brit. v. U.S.) 6 R.I.A.A. 173 (U.S.-Brit. Arb. Trib. 1926); *In re* Southern Rhodesia [1919] A.C. 211, 231-34; Ol Le Ngojo v. AG (1913) 5 KENYA L.R. 70.

Aboriginal peoples face certain hurdles in enforcing their rights in these forums, these hurdles are not insurmountable.[211] Moreover, Crawford's view is not shared by all. *The United Nations Working Group on Indigenous Populations* maintains that these treaties between states and Aboriginal peoples recognize and effectively preserve Aboriginal rights of self-government and self-determination.[212] Perhaps most importantly, even if these treaties do not in themselves effectively preserve Aboriginal sovereignty, in the absence of a formal cession, again, they would not provide a source of a derivative sovereign title.

In light of the above brief consideration of the sovereign status of dispossessed indigenous peoples, there appears to be three possible descriptions of the position of the Aboriginal peoples of Australia, North America, and other nations. If a treaty was concluded, the Aboriginal people could have been totally absorbed into the new sovereign's community or may have retained a distinct status as domestic dependent nations, exercising sovereignty jointly with the new sovereign state. Where no treaty of cession was concluded, as in the case of Australia, for example, the sovereign rights of the Aboriginal occupants could only have been assumed illegally. Therefore, that title could not have been acquired by prescription. After examining the notion of domestic dependent nations, the ability of the latter category of peoples to resurrect their sovereignty is considered.

C. *Domestic Dependent Nations: Concurrent Sovereignty*

1. *Introduction*

The resolution of disputes relating to Aboriginal sovereignty is often mistakenly perceived as only involving two possibilities: (1) acknowledgment of Aboriginal sovereignty and the consequent destruction of the "occupying" state's sovereignty; or (2) continuation of the past denial of Aboriginal sovereignty. However, it is possible for both entities to enjoy concurrent sovereignty.

2. *United States*

The Indian tribes of the United States have long been recognized as

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211. *See supra* notes 3, 11. *See also* T. Hall, *As Long as the Sun Shines and the Water Flows*, GLOBE & MAIL, July 25, 1989 (observing that in response to charges of treaty violations in Canada in 1989 the United Nations launched an investigation).

212. *See Report of the Working Group on Indigenous Populations*, U.N. Economic and Social Council, 40th Sess., ¶ 110, U.N. Doc. E/CN. 4/Sub.2/1988/24 (1988).

domestic dependent nations, exercising inherent sovereign rights over Indian Country.[213] These rights were held concurrently with the United States government's claim to sovereignty.[214] The sovereignty of Indian Nations became entrenched in the United States case law[215] as a result of a series of

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213. In essence, "Indian Country" constitutes (i) reservations, (ii) allotments, (iii) dependent Indian communities and (iv) lands to which the Aboriginal title has not been extinguished. The concept of Indian Country was originally developed in *United States v. Sandoval*, 231 U.S. 28 (1913). In this case, the Court held that the lands owned by the Pueblo Nation were Indian Country for the purposes of enforcing federal Indian liquor laws. The Court also held that the lands were Indian Country even though they were owned in fee simple from grants from the King of Spain because they were treated by the United States as a "dependent Indian community." *Id.* at 46. *Cf.* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 540 (1995); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); DeCoteau v. District County Court, 420 U.S. 425 (1975); United States v. Chavez, 290 U.S. 357 (1933); Donnelly v. United States, 228 U.S. 243 (1913); Clairmont v. United States, 225 U.S. 551 (1912); Bates v. Clark, 95 U.S. 204 (1877); Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 118 S. Ct. 948 (1998); Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995); Cardinal v. United States, 954 F.2d 359 (6th Cir. 1992); United States v. Sands, 968 F.2d 1058 (10th Cir. 1992); Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303 (10th Cir. 1989); Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971); Ute Indian Tribe v. Utah, 935 F. Supp. 1473 (D. Utah 1996); Narragansett Indian Tribe v. Narragansett Elec. Co., 878 F. Supp 349 (D.R.I. 1995); *In re* McCord, 151 F. Supp. 132 (D. Alaska 1957). Note that the other significant requirement in the exercise of Indian sovereignty is that the community be a "tribe." A community may be a tribe on the basis that it is a tribe ethnologically, such as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory," Montoya v. United States, 180 U.S. 261, 266 (1901). *See also* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). A community also includes a federally recognized tribe. *See, e.g.*, United States v. Sandoval, 231 U.S. 28 (1913); United States v. Holliday, 70 U.S. 407 (1866); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977).

214. *See* Robert G. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357, 359 (1978); DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS, 435-76 (1984). As Case notes, it should be kept in mind that the federal government's policy with respect to Aboriginal sovereignty has been far from consistent. *See id.* at 440. In particular, Aboriginal sovereignty was greatly undermined by the assimilist policy of the 1950s. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975). Note, that in addition to their inherent sovereign rights, Indian Nations can also exercise federally delegated authority over matters that would not be encompassed in inherent Indian sovereignty. *See* United States v. Mazurie, 419 U.S. 544 (1975).

215. In modern times the recognition of Aboriginal sovereignty has been supported by legislative attempts to promote Aboriginal self-determination. *See, e.g.*, Alaska Native Claims Settlement Act 1971, 43 U.S.C. §§ 1601-1628 (1994); Indian Self-Determination and Education Assistance Act 1974, 25 U.S.C. §§ 450-450n, 455-458e (1994); Indian Self-Determination Act 1975, 25 U.S.C.A. § 450 (West Supp. 1998). *See also*, Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (1996), *rev'd*, 118 S. Ct. 948 (1998); New

cases which have come to be known as the "Marshall trilogy."[216] According to the "Marshall trilogy," these Indian Nations had to be left in the undisturbed possession of their lands, the right to which was only diminished to a limited extent by the new sovereign's right of pre-emption.[217] These cases recognized Indian tribes as separate nations, entitled to govern themselves and enforce their own customary laws.[218] This sovereignty

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Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

216. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544-45, 559 (1832), *overruled by* New Mexico v. Mescalero Apache Tribe, 462 U.S. 342 (1983); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 17, 20, 53 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). It is important to note that the trilogy does not reveal the entire historical context. Indian sovereign and territorial rights were first considered by the U. S. Supreme Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). This case concerned the notorious Yazoo land scandal in Georgia. In 1795, the Georgian legislature authorized the grant and sale of vast areas of the State in the possession of the traditional Indian owners. Allegations of fraud and bribery led a subsequent Congress to revoke these grants. However, in the meantime, innocent colonists had purchased these lands in good faith. The Supreme Court was faced with the task of determining what rights, if any, these purchasers had obtained. While Chief Justice Marshall held the grants to be constitutional, Justice Johnson went further in asserting Georgia was not seised in fee. *See id.* at 95-97. Justice Johnson in his dissent stated that many Indian Nations "retain a limited sovereignty, and the absolute proprietorship of their soil." *Id.* at 102. Georgia had no more than "a right of conquest or of purchase, exclusively of all competitors, within certain defined limits." *Id.* at 103. The State's right of pre-emption only gave it the "power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell." *Id.* at 104. This, he claimed, was no more than a mere possibility of seisin. *See id.* at 102. For the political background to this case, see C. P. MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC, THE CASE OF FLETCHER V. PECK (1966); LEONARD BAKER, JOHN MARSHALL: A LIFE IN THE LAW, 566-72 (1974).

217. The right of pre-emption is the sole right against other European nations to purchase the Indian lands if they wish to sell. Chief Justice Marshall described the right of pre-emption in *Johnson v. M'Intosh*.

> This principle found that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.

21 U.S. (8 Wheat.) at 573.

218. The conclusion of the trilogy did not bring an end of the courts' recognition of the Indian Nations' sovereignty. *See, e.g.*, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Antelope, 430 U.S. 641 (1977); United States v. Mazurie, 419 U.S. 544 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959); Turner v. United States, 248 U.S. 354 (1919); United States v.

allows Indian Nations to regulate affairs within the scope of their territory, exercising authority over matters such as community membership, domestic relations between members, fish and game resources, taxation,[219] and

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Quiver, 241 U.S. 602 (1916); Jones v. Meehan, 175 U.S. 1 (1899); Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Roff v. Burney, 168 U.S. 218 (1897); United States v. Kagama, 118 U.S. 375 (1886); Elk v. Wilkins, 112 U.S. 94 (1884); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Reich v. Mashantucket Sand & Grave, 95 F.3d 174 (2nd Cir. 1996); Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir. 1996); Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908 (1st Cir. 1996); United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996); United States v. Begay, 42 F.3d 486 (9th Cir. 1994); Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993); United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); Black Hills Inst. of Geological Research v. United States Dep't of Justice, 967 F.2d 1237 (8th Cir. 1992); *In re* Greene, 980 F.2d 590 (9th Cir. 1992); Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709 (10th Cir. 1989); Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988); Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987); Queets Band of Indians v. Washington, 765 F.2d 1399 (9th Cir. 1985); Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985); Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047 (9th Cir. 1985); Kerr-McGee Corp v. Navajo Tribe of Indians, 731 F.2d 597 (9th Cir. 1984); R.J. Williams Co. v. Ft. Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983); Ashcroft v. United States Dep't of Interior, 679 F.2d 196 (9th Cir. 1982); Escondido Mutual Water Co. v. FERC, 692 F.2d 1223 (9th Cir. 1982); Donovan v. Navajo Forest Prod. Indus., 692 F.2d 709 (10th Cir. 1982); Ute Distribution Corp. v. Secretary for the Interior, 934 F. Supp. 1302 (D. Utah 1996); Romanella v. Hayward, 933 F. Supp. 163 (D. Conn. 1996); Montana v. Gilham, 932 F. Supp. 1215 (D. Mont. 1996); Pueblo of Santa Ana v. Kelly, 932 F.Supp. 1284 (D.N.M. 1996); Basil Cook Enter. Inc. v. St. Regis Mohawk Tribe, 914 F. Supp. 839 (N.D.N.Y. 1996); Lower Brule Sioux Tribe v. South Dakota, 917 F. Supp. 1434 (D.S.D. 1996); Bowen v. Doyle, 880 F. Supp 99 (W.D.N.Y. 1995); Narragansett Indian Tribe v. Narragansett Elec. Co., 878 F. Supp. 349 (D.R.I. 1995); Federico v. Capital Gaming Int'l., 888 F. Supp. 354 (D.R.I.1995); Kerr-McGee Corp v. Farley, 915 F. Supp. 273 (D.N.M. 1995); Coeur D'Alene Tribe v. State, 842 F. Supp. 1268 (D. Idaho 1994); Cameron v. Bay Mills Indian Community, 843 F. Supp. 334 (W.D. Mich. 1994); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); Veeder v. Omaha Tribe, 864 F. Supp. 889 (N.D. Iowa 1994); GNS Inc. v. Winnebago Tribe, 866 F. Supp. 1185 (N.D. Iowa 1994); Davids v. Coyhis, 869 F. Supp 1401 (E.D. Wis. 1994); *In re* United States, 825 F. Supp. 1422 (D. Minn. 1993); Cropmate Co. v. Indian Resources Int'l, 840 F. Supp. 744 (D. Mont. 1993); Babbitt Ford Inc. v. Navajo Indian Tribe, 519 F. Supp. 418 (D. Ariz. 1981); Navajo Tribe v. Bank of New Mexico, 556 F. Supp. 1 (D.N.M. 1980).

219. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Burlington N.R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991); Kerr-McGee Corp v. Navajo Tribe of Indians, 731 F.2d 597 (9th Cir. 1984); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983); Burlington N.R.R. v. Fort Peck Tribal Executive Bd., 701 F. Supp. 1493 (D. Mont. 1988); Conoco Inc. v. Shoshone & Arapahoe Tribes, 569 F. Supp. 801 (D. Wyo. 1983). *See also* Indian Reorganization Act of 1934, 48 Stat. 984, (codified as amended at 25 U.S.C.A. §§ 461-477 (1998)). The taxing sovereignty may not be used by Indian Nations to market an exemption from state taxation to persons who would

enjoying sovereign immunity from suit.

In the first case of this trilogy, *Johnson v. M'Intosh,*[220] Chief Justice Marshall declared that the Aboriginal occupants were:

> the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[221]

Thus, until sovereign and territorial title to their lands were ceded, the Aboriginal occupants enjoyed the right to govern themselves according to their own customary laws. The only limitation upon Aboriginal sovereignty was the "occupying" state's right of pre-emption.[222]

Less than ten years later the second case in the trilogy, *Cherokee Nation v. Georgia,*[223] was decided. While Chief Justice Marshall held that

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otherwise conduct their business outside Indian Country. *See Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 479-500. In addition, Indian Nations exercise authority over crime concurrently with the States. *See generally* Goldberg, *supra* note 214 (discussing Public Law 280 and *Major Crimes Act*).

220. 21 U.S. (8 Wheat.) 543 (1823). The plaintiff brought an action of ejectment against the defendant, claiming title to sue as the successor of the original title bought from the Indian owners in 1773 and 1775. The same land had, however, been later ceded to the United States. In turn, the United States patented a portion of these lands to the defendant in 1818. The Court consequently had to determine whether a grant from the holders of the Aboriginal title, without the consent of the conquering power, prevailed over a patent from the government authorities. As Chief Justice Marshall stated, the determining factor was "the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country." *Id.* at 572. Chief Justice Marshall held the transfer between the Piankeshaw Indians and the land speculators was not recognizable. *See id.* at 604-05. While the Aboriginal owners' right to their land was unquestionable, only the discovering power, in this case, Great Britain and after the American revolution, the United States, had the right of pre-emption. According to the doctrine of discovery, only these governments, not individual colonists, had the right to purchase lands from the Indians. *See id.* at 584-85, 594.

221. *Id.* at 574.

222. *See* discussion *supra* note 216.

223. 30 U.S. (5 Pet.) 1 (1831). Motivated by the wish to seize the gold rich lands of the subject Indian peoples, the State legislated to extend the application of its laws to Cherokee lands within the State's boundaries. This was in violation of certain treaties existing between the Indian Nation and the United States. The issue before the Court was whether "the Cherokees constitute[d] a foreign state in the sense of the constitution" having standing to invoke the court's original jurisdiction. *Id.* at 31. The Court held that the Indian Nation was not a foreign state giving the Court jurisdiction over the dispute. However, the dissenters held that the Cherokee community was a sovereign foreign state. *See id.* at 79-80.

the Cherokee Nation did not constitute "a foreign state,"[224] he asserted that the United States "plainly recognize[d] the Cherokee Nation as a state . . . from the settlement of our country."[225] Rather than foreign states, they were "domestic dependent nations" standing in a relationship with the United States resembling that of "a ward to his guardian."[226] The Indian Nation exercised concurrent sovereignty with the "conquering" power, thereby maintaining control within its territorial units.[227] Thus, the Cherokee Nation was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[228]

Justice Thompson went further than the majority in his recognition of Indian sovereignty noting:

> [P]rovided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power.[229]

A year later the third decision in the trilogy was determined in *Worcester v. Georgia*.[230] Again, the Court recognized that "America . . . was inhabited by a distinct people, divided into separate Nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws."[231] In the course of his judgment, Chief Justice Marshall stressed that discovery did not give the Federal or State authorities power to legislate with respect to the Indian Nations or their territory. Echoing the sentiments of *Cherokee Nation v.*

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224. *Id.* at 19. Therefore, the Cherokee Nation did not have standing to invoke the Court's original jurisdiction. *Id.* at 39.

225. *Id.* at 16.

226. *Id.* at 17.

227. *See id.* at 16-19.

228. *Id.* at 16.

229. *Id.* at 53.

230. 31 U.S. (6 Pet.) 515 (1932). The plaintiff, a missionary, had been charged under a Georgian law for "residing within the limits of the Cherokee nation" without a licence. *Id.* at 542. He argued he could not be charged under the statute as it was invalid. The Court agreed: The State could not legitimately claim dominion over the Cherokee Nation's territory or persons within such territory. *See id.* at 560-62. The Cherokee Nation was a distinct self-governing community, within which the laws of Georgia had no force. *See id.* at 561. The prosecution of the plaintiff under Georgian law was in direct conflict with the treaties guaranteeing the Cherokee Nation's territorial rights and self-government. *See id.* The earlier decision convicting Worcester was consequently reversed and annulled. *See id.* at 562.

231. *Id.* at 542.

Georgia,[232] Chief Justice Marshall declared that discovery only gave the United Kingdom and the United States the right to purchase "such lands as the natives were willing to sell"[233] as against all other European governments.[234] Thus, the Indian Nation's right of self-government remained unaffected by discovery.[235] The Court thought the suggestion "that the feeble settlements made on the sea-coast" gave the authorities "legitimate power" to govern the Indians was absurd.[236] Rather:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European poentate than the first discoverer of the coast of the particular region claimed . . . . The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and understood meaning. We have applied them to Indians as we have applied them to other nations of the earth: They are applied all in the same sense.[237]

Thus, the Court found that history furnished no evidence of attempts by the Crown to interfere with the internal affairs of the Indian Nations. To the contrary, treaties between the Cherokee Nation and the United States "recognize[d] the pre-existing power of the [Cherokee] Nation to govern itself"[238] and "their right to self-government."[239] Chief Justice Marshall believed that as domestic dependent nations, the Indians had placed

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232. 30 U.S. (5 Pet.) 1 (1831).

233. *Worcester*, 31 U.S. (6 Pet.) at 545. As Chief Justice Marshall pointed out "[t]he United States succeeded to all the claims of Great Britain, both territorial and political," but no more. *Id.* at 544. *See also id.* at 560.

234. *See id.* at 544. The principle of discovery giving right to title

> shut out the right of competition among those who had agreed to it . . . . [It could not] annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the [E]uropean discoverers, but could not affect the rights of those already in possession, either as Aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.

Id. *See also id.* at 579 (stating Justice McLean's concurring comments).

235. *Id.* at 542-45.

236. *Id.* at 544.

237. *Id.* at 559-60.

238. *Id.* at 562.

239. *Id.* at 556.

themselves under "the protection of one more powerful."[240] However, this did not take away the Indian Nations' "right of government, and [thereby] ceasing to be a state."[241] To this end, Chief Justice Marshall stressed that the notion of "domestic dependent nations" was not synonymous with the surrender of the Indian Nations' sovereign character:

> [It is a] settled doctrine of the law of nations . . . that a weaker power does not surrender its independence, its right to self-government, by associating with a stranger, and taking its protection . . . . 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent.'[242]

To imply such a surrender of self-government to "disorderly and licentious intruders" was illegitimate.[243] Chief Justice Marshall asserted that to construe trade treaties as effecting such a surrender would be inconsistent with the spirit of this and of all subsequent treaties. Therefore, "it would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed."[244]

The Crown could not, therefore, legitimately claim dominion over this Indian Nation's territory or persons within such territory. The Court consequently held that the Cherokee Nation was a distinct self-governing community, within which the subject laws of Georgia had no force.[245] Justice McLean agreed, stressing that in so far as this Georgian law purported to abolish the territorial and internal political rights of this Indian Nation, it was repugnant to the terms of treaties with the Cherokee Indians.[246]

As Foster notes, these cases have, however, been subsequently treated as recognizing that federal statutes and treaties guaranteeing Aboriginal sovereignty, rather than Aboriginal sovereignty itself, ousted the application of the subject Georgian laws.[247] Thus, the cases are said to involve an implicit recognition that Congress had jurisdiction *over* Indians, as opposed

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240. *Id.* at 555.
241. *Id.* at 561.
242. *Id.* at 561.
243. *Id.* at 554.
244. *Id.* at 554.
245. *Id.* at 561-62.
246. *Id.* at 578-79. Georgia's subsequent defiance of the Court's mandate led to Congressional intervention; President, Andrew Jackson, pronounced that "John Marshall has given his judgement. Now let him enforce it." Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 41 (1947) (quoting 1 HORACE GREDEY, AMERICAN CONFLICT 106 (1864)).
247. *See* Foster, *supra* note 195, at 181-85.

to merely jurisdiction to enter treaties with them.[248] This meant that if Congress could acknowledge and guarantee tribal sovereignty, it could also restrict or extinguish it; and it has done so on many occasions.[249] As the United States is said to have ultimate sovereignty over the whole nation, including Indian Country,[250] Indian law making powers may be limited by

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248. Congress has jurisdiction over Indians, as opposed to the states, unless the tribe consents or Congress cedes its authority to the state. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Rice v. Rehner, 463 U.S. 713 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo Sch. Bd. Inc., v. Bureau of Revenue, 458 U.S. 832 (1982); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996); Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994); United States v. Sands, 968 F.2d (10th Cir. 1992); Gila River Pima-Maricopa Indian Community v. Waddell, 967 F.2d 1404 (9th Cir. 1992); Gila River Pima-Maricopa Indian Community v. United States, 877 F.2d 961 (Fed. Cir. 1989); United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989); Washington Dept. of Ecology v. United States EPA, 752 F.2d 1465 (9th Cir. 1985); Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); United States v. Daye, 696 F.2d 1305 (11th Cir. 1983); United States v. Chase, 701 F.2d 800 (9th Cir. 1983); Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Lower Brule Sioux Tribe v. South Dakota, 917 F. Supp. 1434 (D.S.D. 1996); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996); Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y.1995); Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024 (D. Ariz. 1993); Crow Tribe of Indians v. United States, 657 F. Supp. 573 (D. Mont. 1985); United States v. Dakota, 666 F. Supp. 989 (W.D. Mich. 1985); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

Generally, state laws may operate concurrently with Indian laws within Indian Country, but only in so far as they do not interfere with reservation self-government, i.e., in matters which it is considered that the Indian Nation has an overriding cultural, economic or social interest. *See, e.g.*, Rice v. Rehner, 463 U.S. 713 (1983); Montana v. United States, 450 U.S. 544 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kake v. Egan, 369 U.S. 60 (1962); Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987); Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996); Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 878 F. Supp. 349 (D.R.I. 1995). Note that the suggestion that Public Law 280 empowered the states to regulate, as opposed to adjudicate, matters within Indian Country was rejected in *Bryan v. Itasca County*, 426 U.S. 373 (1976).

249. Note, however, that the legality of the imposition of such restrictions has not gone unquestioned. *See* Clinebell & Thomson, *supra* note 2, at 683-700. Clinebell and Thomson correctly question the legality of these limitations upon Aboriginal sovereignty.

250. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Cherokee Nation v. Southern Kansas R.R. Co., 135 U.S. 641 (1890).

the Constitution, federal legislation,[251] or by implication as a result of their incorporation within the United States.[252] While out of respect for Indian sovereignty, the courts will not lightly presume that Congress intended to oust tribal jurisdiction;[253] ultimately the authority of the Indian Nations is not absolute.[254]

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251. *See, e.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978); United States v. Sandoval, 231 U.S. 28 (1913); *Ex parte* Webb, 225 U.S. 663 (1912); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Thomas v. Gay, 169 U.S. 264 (1898); Roff v. Burney, 168 U.S. 218 (1897); United States v. Kagama, 118 U.S. 375 (1886); Utah v. Babbitt, 53 F.3d 1145 (10th Cir. 1995); United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); Navajo Tribe v. Bank of New Mexico, 700 F.2d 1285 (10th Cir. 1983); Donovan v. Navajo Forest Prod. Indus., 692 F.2d 709 (10th Cir. 1982); Wilson v. Marchington, 934 F. Supp. 1176 (D. Mont. 1995); Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990); United States v. Burns, 725 F. Supp. 116 (N.D.N.Y. 1989); Rice v. Rehner, 463 U.S. 713 (D. Conn. 1983); Mohegan Tribe v. Connecticut, 528 F. Supp. 1359 (D. Neb. 1982); Nebraska Public Power Dist. v. 100.95 Acres of Land, 540 F. Supp. 592 (D. Neb. 1982); Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F. Supp. 418 (D. Ariz. 1981).

252. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); United States v. Wheeler, 435 U.S. 313 (1978); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); Inupiat Community of Artic Slope v. United States, 548 F. Supp. 182 (1982). In *United States v. Wheeler*, 435 U.S. 313 (1973), the Court held that areas that had been implicitly affected in this manner included the Indian Nations' ability to (i) alienate their lands to non-Indians, (ii) enter into relations with foreign Nations and (iii) litigate against non-members in tribal courts. *Id.* at 326. In Inupiat Community of Artic Slope v. United States, 548 F. Supp. 182 (1982), *aff'd*, 746 F.2d 570, *cert. denied*, 474 U.S. 820, *reh'g denied*, 485 U.S. 972, the Court held that Indian authority was implicitly revoked also in areas that impacted the security of the United States and its relations with foreign nations.

253. *See, e.g.*, Oklahama Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); Oglala Sioux Tribe v. South Dakota, 770 F.2d 730 (8th Cir. 1985); Babbitt Ford Inc. v. Navajo Indian Tribe, 519 F. Supp. 418 (D. Ariz. 1981). For a recent discussion of whether federal legislation, namely Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629a (1994)), extinguished Aboriginal sovereignty in Alaska, see Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (1996), *rev'd*, 118 S. Ct. 948 (1998). The Court stressed that Aboriginal self-government could only be extinguished by clear and plain language. *See id.* at 1295.

254. *See* Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84-86 (1977). Note that this would appear contrary to international law as there has been no legally effective cessation of Indian sovereignty. *See* Clinebell & Thomson, *supra* note 2, at 683-700.

Nevertheless, the "Marshall trilogy" continues to be cited[255] in support of the proposition that Aboriginal "sovereignty continues to the extent that it has not been specifically abolished by Congress. Although vulnerable, it is nonetheless inherent, and does not depend upon a grant from Congress or any other source."[256]

3. *Canada*

The sovereignty of Indian Nations within Indian lands has similarly been recognized in Canada[257] through legislative enactments, executive instruments and judicial determinations.[258] Thus, in *The Queen v. Van der Peet*,[259] the Court agreed with Slattery that the Marshall Court decisions are as relevant to Canada as the United States.[260] These cases were also adopted in *The Queen v. Sioui*[261] where the Court asserted that relations between the colonial powers and the Indian Nations were "very close to those maintained

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255. For example, *Worcester v Georgia*, 31 U.S. (6 Pet.) 515 (1832) has been cited more often than "all pre-Civil War Supreme Court opinions save three." Charles F. Wilkinson, *Indian Tribes and the American Constitution*, *in* INDIANS IN AMERICAN HISTORY 117, 118 (Frederick E. Hoxie ed., 1988).

256. *Id.* at 358-59 (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) and DAVID H. GETCHES & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 269 (2d ed. 1986)). *See generally* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

257. *See, e.g.*, Osoyoos Indian Band v. Oliver [1997] 145 D.L.R. 4th 552, 557-58; St. Mary's Indian Band v. Cranbrook [1996] 126 D.L.R. 4th 539; Canadian Pacific Ltd. v. Matsqui Indian Band [1996] 134 D.L.R. 4th 555.

258. With respect to legislative enactments, see, e.g., Indian Act, Act of June 28, 1985, ch. 27, 1985, S.C. 749 (Can.); Seschelt Indian Band Self-Government Act, Act of June 17, 1986, ch. 27, 1986, S.C. 941 (Can.); Indian Self-Government Enabling Act, 1990, ch. 52, S.B.C. (B.C.). *See also* Adams Lake Indian Band v. Dist. of Salmon Arm [1996] 137 D.L.R. 4th 89, 96; Canadian Pacific Ltd v. Matsqui Indian Band [1995] 122 D.L.R. 4th 129, 140, 169. The Indian Act of 1985 was introduced to facilitate self-government through the exercise of the "inherently governmental power of taxation on their reserves." *Adams Lake Indian Band*, 137 D.L.R. 4th at 96. For a discussion of legislative and executive recognition of Indian sovereignty, see ROYAL COMM'N ON ABORIGINAL PEOPLES, PARTNERS IN CONFEDERATION: ABORIGINAL PEOPLES, SELF-GOVERNMENT, AND THE CONSTITUTION (Ottawa, 1993).

259. [1996] 137 D.L.R. 4th 289. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823). Numerous authorities have discussed the merits of *Johnson v. M'Intosh* and *Worcester v. Georgia* decisions. *See, e.g.*, The Queen v. Sioui [1990] 70 D.L.R. 4th 427; Connoly v. Woolrich [1867] Rapports Judiciares Revises de la Quebec 75; ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 258.

260. *See* Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 739 (1987).

261. [1990] 70 D.L.R. 4th 427. *See also* Mitchell v. Peguis Indian Band [1990] 71 D.L.R. 4th 193, 209; Canadian Pacific Ltd. v. Paul [1988] 53 D.L.R 4th 487.

between sovereign nations."[262] The Court continued by noting:

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.[263]

The Court noted that the Crown allowed these nations to retain autonomy in their internal affairs, ultimately concluding that the Indian Nations' sovereignty was *sui generis* in a manner similar to the United States' domestic dependent nations. "[R]elations with Indian tribes fell somewhere between the kind of relations conducted between sovereign States and the relations such States had with their own citizens."[264]

Similarly, in *The Queen v. Van der Peet* the Court noted:

> [Indian] people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of Northern America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.[265]

The Court also asserted that the Aboriginal rights protected by the Constitution Act of 1982 can be best understood as:

> [F]irst, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.[266]

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262. *The Queen v. Sioui*, 70 D.L.R. 4th at 448.

263. *Id.* at 448.

264. *Id.* at 437.

265. The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 329-30.

266. *Id.* at 309-10. This language was repeatedly approved in subsequent cases. *See, e.g.*, Corbiere v. Canada [1997] 142 D.L.R. 4th 122, 131; The Queen v. Gladstone [1997] 137 D.L.R. 4th 648, 681; The Queen v. Cote [1996] 138 D.L.R. 4th 385, 406. *See also* The Queen v. Adams [1996] 138 D.L.R. 4th 657, 666, 679; The Queen v. Van der Peet [1996] 137 D.L.R 4th 289, 303-09, 330-32, 334, 372; Calder v. Attorney-General of British

In *Corbiere v. Canada,*[267] the Court echoed these sentiments, suggesting that the protection afforded by the Constitution "may be particularly important to traditional forms of Aboriginal government which do not necessarily fall into the current western understanding of 'democratic,'"[268] such as those which rely on "hereditary chiefs or government based on consensus."[269]

It would be thought from these statements and from the judiciary's insistence that Aboriginal rights are categorized as such because "they constitute or have constituted an integral part of the distinctive culture of the particular Indians,"[270] that Aboriginal sovereignty would be viewed as an inherent right in Canada which could be affected only through consensual agreement.[271] This view has not, however, been accepted by all members of the judiciary. The Court in *The Queen v. Sioui*[272] asserted that Aboriginal sovereign rights could not be unilaterally extinguished. "[T]he very definition of a treaty . . . makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."[273] In *The Queen v. Van der Peet*,[274] the Court quoted with approval Asch's and Macklem's statement that Aboriginal rights "inhere in the very meaning of Aboriginality."[275] Generally, however, it is nevertheless

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Columbia [1973] S.C.R. 313, 328, 390. The *Van der Peet* Court also recognized that these Aboriginal societies had "a prior legal regime giving rise to Aboriginal rights which persist, absent extinguishment." 137 D.L.R. 4th at 368. According to the doctrine of continuity, the *lex loci* of these Aboriginal societies continued despite British claims of sovereignty. *See id.* at 348.

267. [1996] 142 D.L. R. 4th 122.

268. *Corbiere*, 142 D.L.R. 4th at 136 (quoting THOMAS ISSAC, ABORIGINAL LAW: CASES, MATERIALS AND COMMENTARY 305 (1995)).

269. *Id.*

270. Delgamuukw v. British Columbia [1993] 104 D.L.R. 4th 470, 681. *See also* The Queen v. Paul [1997] 145 D.L.R. 4th 472, 477; Corbiere v. Canada [1997] 142 D.L.R. 4th 122, 131-32; The Queen v. Marshall [1997] 146 D.L.R. 4th 257, 263; [1996] The Queen v. Cote 138 D.L.R. 4th 385, 406-07; The Queen v. Adams [1996] 138 D.L.R. 4th 657, 667-70; The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 310.

271. Obviously, Indian Nations assert that their sovereignty is inherent and thus cannot be unilaterally abrogated. For example, examine the evidence presented by a representative of the Canadian Indian Lawyers' Association, Ms. Judy Sayers, before the Special House of Commons Committee on Indian Self-Government. *See* CANADA HOUSE OF COMMONS SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT IN CANADA: REPORT OF THE SPECIAL COMMITTEE 44 (Ottawa: Queen's Printer, 1983) (the *Penner Report*). *See also* Asch, *supra* note 26, at 480-81. This view was accepted by the Royal Commission on Aboriginal Peoples. *See generally* ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 258.

272. [1990] 70 D.L.R. 4th 427.

273. *Id.* at 435.

274. [1996] 137 D.L.R. 4th 289.

275. *Id.* at 300 (quoting Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R v. Sparrow*, 29 ALTA. L. REV. 498, 502 (1991)).

accepted that Aboriginal rights, including Aboriginal self-government, may be unilaterally regulated[276] by the federal government[277] if it is able to justify the infringement within the tests espoused in *The Queen v. Sparrow*.[278]

The Canadian government views Aboriginal self-government agreements to be based "either on the principle of 'delegated authority'. . . or through a form of 'legislative authority'. . . which can be unilaterally changed or withdrawn by the Federal Parliament."[279] The governmental position is that Canadian state sovereignty extinguished Aboriginal sovereignty, and thus, the latter sovereignty is treated as being dependent upon legislative acknowledgment, rather than inherent sovereignty.[280] These governments have insisted that sovereignty operates within the terms and confines of that legislation.[281] As with the United States' position, under this view, Aboriginal sovereignty is subject to the direction of the Federal

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276. If it is accepted that Aboriginal sovereignty is an existing Aboriginal right that had not been extinguished prior to 1982, as a result of, *inter alia*, Constitution Act, § 35(1), 1982 (Can.), the Federal government may not extinguish Aboriginal sovereignty. *See, e.g.*, The Queen v. Paul [1997] 145 D.L.R. 4th 472, 482; The Queen v. Van der Peet [1996] 137 D.L.R. 4th 289, 303; The Queen v. Sparrow [1990] 70 D.L.R. 4th 385, 400-01. *See also* ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 258.

277. *See, e.g.*, The Queen v. Sikyea [1964] 43 D.L.R. 2d 150, 154; The Queen v. Derriksan [1976] 71 D.L.R. 3d 159; Kruger v. The Queen [1978] 75 D.L.R. 3d 434; Moosehunter v. The Queen [1981] 123 D.L.R. 3d 95, 104; Horseman v. The Queen [1990] 1 S.C.R. 901.

278. [1990] 70 D.L.R. 4th 385. *See also* The Queen v. Badger [1996] 133 D.L.R. 4th 324, 354-55; The Queen v. Van der Peet 137 D.L.R. 4th 289, 302-03, 337-39; The Queen v. Gladstone [1996] 137 D.L.R. 4th 648, 682; The Queen v. Cote [1996] 138 D.L.R. 4th 385, 406. *See generally* Asch & Macklem, *supra* note 275 (discussing Aboriginal rights in relation to the decision of *The Queen v. Sparrow*).

279. Asch, *supra* note 26, at 480 (footnotes omited). Note, however, that Premier Rae of Ontario recently suggested that Aboriginal sovereignty was inherent. *See id.* at 481. Aboriginal rights of self-government cannot be extinguished by provincial legislation. *See, e.g.*, The Queen v. Paul [1997] 145 D.L.R. 4th 472, 477-78, 480, 492; Delgamuukw v. British Columbia [1993] 104 D.L.R. 4th 289, 537, 539, 681. As in the United States, general provincial legislation may regulate activities within Indian lands, but only to the extent that it is not inconsistent with any treaty. *See, e.g.*, The Queen v. Paul [1997] 145 D.L.R. 4th 472, 480-81, 88; Delgamuukw v. British Columbia [1993] 104 D.L.R. at 539; The Queen v. Sioui [1990] 70 D.L.R. 4th 427; Simon v. The Queen [1985] 24 D.L.R. 4th 390. This limitation is also subject to the Constitution Act, § 35(1), 1982 (Can.). *See Delgamuukw*, 104 D.L.R. 4th at 492; *Sparrow*, 70 D.L.R. 4th at 686. Moreover, provincial legislation will be taken to affect Indian lands only where the Aboriginal use of the land or resource is incompatible with the purpose underlying the legislation. *Paul*, 145 D.L.R. 4th at 492.

280. *See* Asch, *supra* note 26, at 481.

281. *See id.* at 480-81 (discussing a letter from P. H. Cadieux, Minister of Indian Affairs and Northern Development, to W. Erasmus, President, Dene Nation, Feb. 6, 1990).

government.[282]

Thus, while there is some dispute as to the source of Aboriginal sovereignty, it appears that the co-existence of Aboriginal rights of self-government with the Canadian government's sovereignty is accepted by all arms of government.

4. *Australia*

While even today many of the Aboriginal communities in Australia are geographically isolated from the general Australian community, their status as domestic dependent nations has only been given rare recognition. The strongest assertion of the status of these communities as domestic dependent nations can be found in Justice Willis' judgment in *The Trial of Bonjon*.[283]

Justice Willis believed the New South Wales colony stood "on a different footing from some others, for it was neither an occupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties."[284] The Aboriginal peoples of the country were "dependent allies, still retaining their own laws and usages, subject only to such restraints and qualified control as the safety of the colonists and the protection of the aborigines required."[285] The "Aborigines . . . remained unconquered and free, but dependent tribes, dependent on the colonists as their superiors for protection."[286] Such dependency did not, however, amount to a surrender of Aboriginal sovereignty.[287] Relying on the United States' case law, Justice

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282. *See, e.g.*, Berg, *supra* note 149, at 387; Mason, *supra* note 203, at 423-24, 437-39; Bryant, *supra* note 9, at 291; Philip J. Smith, *Indian Sovereignty and Self-Determination: Is a Moral Economy Possible?*, 36 S.D. L. REV. 299, 300 (1991); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 143 (1991).

283. Bonjon was charged with the murder of James Weir at Geelong on September 2, 1841. The judgment is set out in THE PORT PHILLIP GAZETTE (1841), *in* Papers Relative to South Australia, Vol. 8, IUP (filed in the Rare Books Collection, University of Adelaide Library, Australia) [hereinafter *Bonjon*]. Ultimately the learned judge was considered too radical for the small town and was removed from the bench. *See also, e.g.*, Statements of Justice Cooper, Supreme Court, May 15, 1851, *in Register*, May 16 & 20, 1851; Address to Grand Jury, Supreme Court, Nov. 3, 1840, *in Adelaide Chronicle*, Nov. 4, 1840; Jury's Statement, The Trial of Tukkum, Nyalta Wikkannin and Kanger Warli, Supreme Court, May 15, 1851, *in Register*, May 16 & 20, 1851.

284. *Bonjon* at 152. Justice Willis declared New South Wales could not have been acquired by discovery, for New South Wales was not unoccupied when it was taken by the colonists. The country was not unoccupied; he noted, when the first settlers landed a body of Aborigines appeared on the shore, armed with spears, which they threw down as soon as they found the strangers had no hostile intention. *See id.* at 150.

285. *Id.*

286. *Id.*

287. *Id.*

Willis held the Aboriginal people were not reduced to the status of Crown subjects, but retained their traditional rights even in the face of British sovereignty.[288] Justice Willis, therefore, concluded "the Aborigines [are] a distinct though dependent people, and entitled to be regarded as self governing communities."[289]

In accordance with this finding, Justice Willis held that disputes between Aboriginal persons *inter se* should be governed by "their own rude laws and customs," refusing to exercise jurisdiction over the matter before him.[290] He believed it would be wrong to extend English law to such persons "[f]or in Australia it is the colonists and not the Aborigines [who] are the foreigners; the former are exotris, the latter indigenous; the latter the native sovereigns of the soil, the former uninvited intruders."[291] The mere introduction of the common law did not serve to extinguish such Aboriginal customary law which continued to govern the rights of these peoples in their communities. It would be highly unjust, he declared, if Aboriginal sovereignty could be so easily abrogated by the introduction of white society:

> Indeed as Monsieur de Vattel very justly says, 'whoever agrees that robbery is a crime and that we are not allowed to take forcible possession of our neighbours property, will acknowledge, without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.'[292]

Justice Willis consequently concluded that Aboriginal sovereignty had not been legitimately extinguished through colonial settlement and could continue to be exercised, at least concurrently with the Crown. British settlement of Australia was an unlawful act in defiance of Aboriginal sovereignty, and until that sovereignty was ceded or abrogated in some other manner, it continued to be exercised by Aboriginal peoples as domestic dependent nations.

Justice Willis' approach was not, however, accepted by subsequent courts.[293] Aboriginal peoples were treated as being amenable to colonial

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288. *See id.*

289. *Id.*

290. Justice Willis pointed to Jamaica and St. Vincent as examples of colonies where English law prevails, while the Aboriginal people maintain self-government as dependent allies. Ultimately, the authorities did not proceed with the charge. Unable to produce certain crucial pieces of evidence, the Crown Prosecutor entered a *nolle prosequi.*

291. *Id.* at 152.

292. *Id.* (quoting Monsieur de Vattel).

293. *See* discussion *supra* note 283.

laws,[294] and the notion of Aboriginal sovereignty, even in the form of domestic dependent nations, was rejected. Thus, in *Coe v. Commonwealth*,[295] a majority[296] of the High Court of Australia rejected the plaintiff's claim for Aboriginal sovereignty, even in the form of domestic dependent nations.

Writing for the majority, Justice Gibbs, with whom Justice Aickin agreed, believed that the claim of Aboriginal sovereignty was so outrageous and vexatious that it amounted to an abuse of process.[297] Nevertheless, he went on to consider the plaintiff's claim and the possible application of the doctrine of domestic dependent nations.[298] Unlike the North American Indians, he believed the Aboriginal peoples of Australia were not a "distinct political society" separated from the rest of the Australian people who could exercise sovereignty concurrently with the Crown.[299] Justice Gibbs developed an extremely eurocentric test for the recognition of Aboriginal sovereignty, asserting that an Aboriginal Nation had to have distinct legislative, executive and judicial organs before its sovereignty could be recognized.[300] Applying this stringent test, he declared the "contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain."[301] More recently, in

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294. *See, e.g.*, In re Phillips (1987) 72 A.L.R. 508; Coe v. Commonwealth (1979) 53 A.L.J.R. 403; The Queen v. Wedge (1976) 1 N.S.W.L.R. 581.

295. The plaintiff submitted that the Aboriginal Nation had from time immemorial enjoyed exclusive sovereignty over the Australian continent. He argued that the sovereign and territorial rights exercised by the many tribes, clans and bands living and traveling across the Australian continent formed part of the interlocking system of rights and responsibilities of the sovereign Aboriginal Nation. The claims of Captain Cook, Captain Phillip and others, on behalf of the Crown were contrary to these rights and could not, therefore, legitimately extinguish the Aboriginal sovereign title. These sovereign rights, it was suggested, were retained by the Aboriginal Nation; therefore, the Australian Commonwealth was an unlawful government, at least as far as the Aboriginal people were concerned. Coe v. Commonwealth (1979) 53 A.L.J.R. 403. As noted, in *Mabo v. Queensland* (1992) 175 C.L.R. 1, the High Court of Australia invoked the act of state doctrine as purportedly preventing it from considering the validity of the claim to sovereignty in Australia.

296. Justice Murphy asserted that he would allow a plaintiff to argue that sovereignty to Australia resided in the Aboriginal Nation. Relying on, *inter alia*, *Western Sahara*, 1975 I.C.J. 12 (Oct. 16) he suggested the traditional characterisation of the annexation of the Australian continent as one of 'occupation' could be questioned to thereby undermine the foundations of the Australian governments sovereignty. *See* Coe v. Commonwealth (1979) 53 A.L.J.R. at 412.

297. Coe v. Commonwealth (1979) 53 A.L.J.R. at 412.

298. *See id.*

299. *Id.* (quoting Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

300. *Id.* The judicial organs must also apply law of a European type. *See id.*

301. *Id.* Justice Gibbs recognized questions of sovereignty and *locus standi* to be interrelated, noting his denial of Aboriginal sovereignty meant the plaintiff had no standing to make these claims. *See id.* at 409. Justice Jacobs believed he could not consider whether

Wik Peoples v. Queensland,[302] Justice Kirby reaffirmed Justice Gibbs' conclusion by noting that the "indigenous people of Australia [did not] enjoy"[303] the status of domestic dependent nations.

IV. REVERSION OF ABORIGINAL SOVEREIGNTY

The final matter for consideration is the legal rights of Aboriginal peoples, where it is concluded that the colonial occupation of their country was an invalid invasion of their sovereign rights. In the absence of any formal surrender by these Aboriginal Nations,[304] under international law this sovereignty may be resurrected and restored. Bolstered by international movements supporting decolonization and self-determination,[305] the

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the Crown had properly obtained its sovereign rights to the continent, asserting that it was not open to a municipal court to consider claims adverse to the Crown's sovereign rights. *See id.* at 410. He did not, however, advert to the question of concurrent sovereignty. Perhaps he would have considered such a claim as this would not involve the denial of the Crown's sovereignty.

302. (1996) 141 A.L.R. 129.

303. *Id.* at 256.

304. *See supra* notes 26, 64 and accompanying text for discussion on sovereignty.

305. *See* discussion *supra* note 2. The International Court of Justice has also recognized the right to self-determination. *See* Namibia, 1971 I.C.J. 16 (June 21); Western Sahara, 1975 I.C.J. 12 (Oct. 16). Note, in practice, the right to self-determination has been confined to "people in the 'classic' colonial context of governance from a distant European power. Anything beyond that is perceived as a potential threat to the territorial integrity of established States." Nettheim, *supra* note 2, at 6. To this end, the International Court of Justice has declared the right to territorial integrity and security to be "basic conditions" of international law. *See* Certain Expenses of the United Nations (Article 17, Paragraph 12 of the Charter), 1962 I.C.J. 151, 168 (July 20). *See also* Bryant, *supra* note 9, at 267, 268, 274-75; Falk, *supra* note 198, at 26; Williams, *supra* note 9, at 18; SANDERS, *supra* note 40, at 27; Torres, *supra* note 282, at 162; Pearce, *supra* note 2, at 376-77; G. Nettheim, *'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples, in* THE RIGHTS OF PEOPLES 107, 118-19 (James Crawford, ed., 1992); Louis Henkin, *The United Nations and Human Rights, in* 19 INT'L ORG. 504, 512-13 (1965); Rudolph Ryser, *Fourth World Wars: Indigenous Nationalism and the Emerging New International Political Order, in* THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 204 (Menno Bolt & J. Anthony Long eds., 1985); HECTOR GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 13, U.N. Doc. E/CN.4/Sub.2/Rev.1 (1980). Emerson believes that the right is confined in this manner as a matter of law, not just practice. *See* RUPERT EMERSON, SELF-DETERMINATION REVISED IN THE ERA OF DECOLONIZATION 63-64 (1964). It is submitted, however, that the preferable view is that the doctrine may legally extend to peoples subjugated by a power within the same country. *See, e.g.*, Berg, *supra* note 149, at 378-79; SHAW, *supra* note 149, at 89; CRAWFORD, *supra* note 21, at 101; BROWNLIE, *supra* note 49, at 513; Bryant, *supra* note 9, at 279; ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 103-04 (1963); UMOZGRIKE OJI UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 195-96 (1972); DOV RONEN, THE QUEST FOR SELF-DETERMINATION 5, 6 (1979); AURELIU CRISTESCU, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT

principles of continuity and reversion[306] may be invoked to resurrect the sovereignty of these dispossessed peoples.

The right of an ousted sovereign to have sovereignty restored under the laws governing belligerent occupation is derived from ultimate *de jure* title or territorial sovereignty. Sovereign rights do not inure in a belligerent occupant, much less an occupant whose entry was unlawful (*ex injuria non oritur jus*). The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory[307] and even total illegal annexation. For "the acquisition of a conquered town is only consummated by the treaty of peace, or by the entire subjugation or destruction of the State to which it belongs."[308]

Monsieur Vattel believed that even if these people had been completely subjugated, as long as they "did not submit voluntarily and resistance ended merely because of a lack of power"[309] they could nevertheless retain their sovereignty. If these people continue to exist as a nation, in the absence of a treaty of surrender, their sovereignty can be resurrected. Unless consent to the rule of the conqueror can be implied with the passage of time, where people have been forcibly subjugated,[310] their sovereign title continues in abeyance and can later be restored. Even a state which has been totally extinguished can resume its sovereignty when the resurrected "new" state and the old pre-colonization state are identical.[311]

While the exact legal effects of the reversion are unclear, it appears the resurrected state resumes full sovereign title. Examples of such reversion of sovereignty include the resurrection of Portugal's sovereignty after the invasion of Philip II of Spain[312] and modern day Korea, which is seen as exercising the sovereign rights it possessed before the Japanese occupation.

ON THE BASIS OF UNITED NATIONS INSTRUMENTS 21-23 (1981), U.N. Doc. E/UN.4/Sub.2/404/Rev. 1. Perhaps most importantly, the contrary view fails to appreciate that territorial integrity does not necessarily conflict with self-determination because the doctrine is flexible and may accommodate concurrent sovereignty. *See* discussion *supra* note 2.

306. Reversion is to be distinguished from succession. In the former case, sovereignty is not surrendered and continues in abeyance awaiting revival under the notion of reversion or *post liminium*. Some comentators have suggested Israel falls into this category. *See* JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS (1981).

307. *See* CRAWFORD, *supra* note 21, at 412-13.

308. VATTEL, *supra* note 204, at 212. The reversion of Aboriginal sovereignty is possible even where lands have purportedly been acquired by conquest. As conquest necessarily involves a derivative acquisition of rights, it implies prior sovereign and territorial rights enjoyed by the original occupants who were subsequently, forcibly displaced. Even these rights, intruded upon by a conquering power, can be restored centuries later.

309. *Id.* at 213.

310. *See* CRAWFORD, *supra* note 21, at 413.

311. *See* Western Sahara, 1975 I.C.J. 12 (Oct. 16). This was, however, more correctly a case of succession, not continuity.

312. CRAWFORD, *supra* note 21, at 413.

It is also believed the steps taken by the United Nations towards the establishment of the State of Israel[313] only reinforced the legitimate claims of the Jews to their historical rights.[314] Prior to Israel's re-entry into these territories, it has been suggested the occupants (*i.e.*, Arabian and Jordanian States) were unlawful belligerents, who therefore acquired no legal title to the country, despite its annexation. In line with this suggestion, many in the international community saw Israel's return to be a legitimate assertion of the State's right to exercise full sovereignty over its kindred lands.[315]

Similarly, current governments of Australia and North America could be seen as unlawful belligerent occupants who failed to obtain legitimate title to these countries. Any acknowledgment of Aboriginal sovereignty today would, therefore, only involve a reinstatement of the historical rights of the legitimate sovereigns. Further, as noted above, the Aboriginal occupants of these countries resisted the invasion of imperial and colonial forces. To a large extent, however, this resistance ultimately weakened and subsided. It is submitted that, in accordance with Monsieur Vattel's sentiments, this was no more than an acknowledgment of the strength of their foes. There was no voluntary submission to the "conquering" powers, nor an acknowledgment of the nation as the legitimate sovereign. Moreover, in varying degrees, these Aboriginal peoples have managed to survive the invasion of their countries and maintain their identity as separate nationalities. Thus, in light of Vattel's works, it appears the decimation of these Aboriginal peoples and the seizure of their lands would not prevent the reversion of their sovereign rights.

In light of the international law outlined in this article, it would appear feasible for Aboriginal peoples to have their original sovereignty recognized and for these people to exercise these rights at least concurrently with the present governmental authority. The hurdles the "occupying" governments put forward as preventing such claims are not insurmountable and the benefits of success are high. Depending on its form, the recognition of Aboriginal sovereignty could provide many benefits.[316] The right of self-government would provide Aboriginal peoples with a say in their destiny.

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313. By a vote of 33 to 13, with 10 abstentions, the General Assembly adopted Resolution 181(II) recommending Palestine be partitioned into separate Arab and Jewish States. *See* G.A. Res. 181(II), U.N. Doc. A/64. When Israel declared itself to be an independent State, the United Nations almost immediately recognized it. *See* STONE, *supra* note 306, at 154-55.

314. *See* THE DECLARATION OF INDEPENDENCE OF THE JEWISH STATE, May 14, 1948 (Isr.), wherein it was stated these peoples were assembled by virtue of the natural and historic right of Jewish people and of the resolution of the General Assembly of the United Nations.

315. More recent examples can be found in Croatia and the Baltic States.

316. In Australia, perhaps the most realistic approach would be to provide Aboriginal communities, such as the Pitjantjatjara peoples, with concurrent sovereignty as domestic dependent Nations.

If their land is recognized as an international state,[317] it could provide them with access to the international tribunals and the consequent enforcement of international rights.

317. *See* discussion *supra* note 9.

A STUDY OF LAY KNOWLEDGE OF LAW IN CANADA

Peter Bowal*

ABSTRACT

It has been long observed that non-lawyers appear to internalize certain "myths" about law and the legal system. This study examines what Canadian undergraduate students, as lay persons, know about the law and what personal background characteristics, if any, contribute to accurate public legal information.

I. INTRODUCTION

It ain't so much ignorance that ails mankind
as it is knowing so much that ain't so.[1]

Canadians who are not formally trained in the law as lawyers are beginning to demand more understanding and control over the law and legal process that affects them. This phenomenon is manifest in ardent calls for plain-language documentation and legislation and in increased demand for public self-help seminars on various legal topics. Most non-lawyers just do not know where to turn when they suspect that they have a legal concern on their hands. They do not know how to find an appropriate lawyer, how

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1. DONALD DAY, UNCLE SAM'S UNCLE JOSH 188 (1953).

much the service will cost, or whether they are receiving effective legal representation. These difficulties have been broadly described as "access to the law" issues. Meanwhile, governments continue enacting and amending laws and creating policies and programs without accurate information on targeting or understanding these issues.

The legal profession is not inherently interested in raising the level of public legal knowledge, at least not without a fee. While general legal knowledge could be considered an important public good, policymakers are content with the existing polar model of private lawyers serving individuals and businesses by explaining the law for a fee on a case-by-case basis.[2]

Every Canadian lawyer has read media reports and sat through public sessions where myth or American law was presented as binding Canadian law. The exposition of the law to non-lawyers often follows a simplistic "recipe book" approach. It is pulled out of a black box from somewhere and broken down into manageable and easily generalized pieces. Clients, when they do finally consult lawyers, may attend upon the lawyer's office with these unarticulated assumptions about the role of law and lawyer. That initial point of contact may be the defining moment of the lawyer-client relationship.

A frightening number of businesspeople will purchase and rely upon American law books written for businesspersons, or they will engage speakers on subjects such as employment and intellectual property law, unaware that the law of the local jurisdiction in which they are operating is palpably different. These experiences provide poignant, if not embarrassing, examples of the gap between the "law in the books" and the "law in action."[3]

Recently, high-profile cases, primarily criminal, have received extensive coverage in the popular media. Most of these cases have been from American courts. Canadians have access to the main American television broadcast networks, where the cultural integration is so extensive that many Canadians are lost at times to distinguish between Canadian and American programming. It is not unexpected that Canadians would have difficulty distinguishing Canadian and American law.

Legal knowledge issues also apply to instruction of the public, whether

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2. This is to be contrasted to the health care model in Canada. "Just in time" and emergency health care is an expensive paradigm. Canadian governments, which pay for non-elective health care, enthusiastically engage in public medical education and prevention programs.

3. These terms are borrowed from sociological jurisprudence, and have since been adopted by the American Realists and Critical Legal Theorists. *See* LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 548 (Stevens & Sons Ltd. 5th ed. 1985). "[S]ociological jurists tend to be sceptical of the rules presented in the textbooks and concerned to see what really happens . . . ." *Id.*

that be business students or other lay persons. While distinctions and awards commonly exist for success in explaining science[4] and medicine in a meaningful way, no such importance is placed on the law. The role and method of the standard business law course in management education,[5] for example, have been vigorously debated over the years.[6] From the several decades of discussion and inquiry about the nature,[7] needs[8] and design[9] of legal studies in American management education, a consensus has not emerged.[10] All that may be said is that the interests of the businesspersons

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4. An example of such an award is the Royal Society of Canada McNeil Medal for the Public Awareness of Science.

5. Legal studies are now essentially taught from the "legal environment of business" perspective, instead of a black-letter perspective. This orientation is credited to ROBERT AARON GORDON & JAMES EDWIN HOWELL, HIGHER EDUCATION FOR BUSINESS 205 (1959), which suggests that the rules-oriented topics be dropped in favor of a "legal framework of business" approach.

6. *See, e.g.*, AM. BUS. LAW ASS'N, REPORT OF THE COMMITTEE ON THE STATUS OF LAW FACULTY IN BUSINESS SCHOOLS (1990); Thomas W. Dunfee et al., *The Business Law Curriculum: Recent Changes and Current Status*, 18 AM. BUS. L.J. 59 (1980); Elliot Klayman & Kathleen Nesser, *Eliminating the Disparity Between the Business Person's Needs and What is Taught in the Basic Business Law Course*, 22 AM. BUS. L.J. 41 (1984); Charles R. McGuire, *Logic and the Law Curriculum: A Proposed Conceptual Framework for "The Legal Environment of Business,"* 23 AM. BUS. L.J. 479 (1986); Gary A. Moore & Stephen E. Gillen, *Managerial Competence in Law and the Business Law Curriculum: The Corporate Counsel Perspective*, 23 AM. BUS. L.J. 351 (1985); Samuel S. Paschall, *Expanding Educational Objectives Through the Undergraduate Business Law Course*, 19 AKRON L. REV. 615 (1986); LYMAN W. PORTER & LAWRENCE E. MCKIBBIN, MANAGEMENT EDUCATION AND DEVELOPMENT: DRIFT OR THRUST INTO THE 21ST CENTURY? (1988); Reed et al., *The Role of Contracts in the Introductory and Only Law Course that Most Business Students Will Ever Take*, 9 J. LEGAL STUD. EDUC. 1 (1990); Mark Schlesinger & George Spiro, *Does Legal Education for Managers Teach Them to Think?*, 20 AM. BUS. L.J. 409 (1982); Art Wolfe, *Teaching Business Law in the 1980's: From Law as Rules to Law as a Way of Seeing*, FOCUS L. STUD., at 4, col. 1 (1987); Art Wolfe, *Business Education: The Rule of Law and Ethics*, 9 J. LEGAL STUD. EDUC. 97 (1990).

7. *See, e.g.*, Joel J. Dauten, *A Look at Business Law Education in AACSB Schools*, 2 AM. BUS. L.J. 329 (1964); Elaine D. Ingulli, *Transforming the Curriculum: What Does the Pedagogy of Inclusion Mean for Business Law?*, 28 AM. BUS. L.J. 605 (1991); Dunfee et al., *supra* note 6; Schlesinger, *supra* note 6.

8. *See, e.g.*, Klayman & Nesser, *supra* note 6; Moore & Gillen, *supra* note 6; Reed et al., *supra* note 6; John W. Yeargain & John R. Tanner, *Alumni Perspectives on the Business Law Curriculum*, 9 J. LEGAL STUD. EDUC. 37, 51 (1990).

9. *See generally* John D. Donnell, *Redesigning the Required Undergraduate Business Law Course*, 2 J. LEGAL STUD. EDUC. 1 (1984); Allison et al., *The Role of Law in the Business Curriculum*, 9 J. LEGAL STUD. EDUC. 239 (1991); Paschall, *supra* note 6; Wolfe, *Teaching Business Law in the 1980's*, *supra* note 6.

10. In April 1991, an amendment to the Curriculum Standard of the American Assembly of Collegiate Schools of Business added "legal and regulatory environment" as a required program of instruction. *See* AM. ASSEMBLY OF COLLEGIATE SCH. OF BUS., CURRICULUM STANDARD (Amend. 1991).

will be well-served by understanding the legal framework in which they operate.[11] In order to find optimal ways of educating a student, it is useful to assess what knowledge or misunderstandings the student brings to the course. What are the student's sources of that information and how does one effectively teach accurate legal information to non-law students?[12]

The purpose of this article is to describe the importance of public legal education, illustrate why the current model for public legal education in Canada is ineffective, and describe and analyze a study which clearly exemplifies that the confusion in public legal knowledge in Canada has a definitively American fragrance.

II. FRAMEWORK FOR LAY KNOWLEDGE OF LAW

A. *Professional Legal Education*

Apart from a possible elementary school,[13] junior high,[14] or high school course,[15] which can have a tendency to trivialize law as a game,[16] and some

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11. A parallel can be drawn here to sports. Knowing the laws applicable to business decisions is similar to knowing the rules of any sport. Being knowledgeable of the rules, without more, does not ensure success in business, or in sports. On the other hand, if one is not knowledgeable of the rules governing the business or sport in which one is engaged, occasionally one will be set back or penalized. Nevertheless, a good businessperson, like a good athlete, could still be successful on the strength of other native abilities. Over the last decade, however, the law has become a more coercive influence in business. One may indeed fail in business today as a result of legal consequences flowing from unenlightened planning and decisions.

12. In many of these institutions where there is a business law program, the courses are not taught by lawyers, or the law must share billing with political, social and economic environment perspectives. *See generally* AM. BUS. LAW ASS'N, *supra* note 6; Yeargain & Tanner, *supra* note 8.

13. *See, e.g.*, CALGARY BOARD OF EDUCATION, INVESTIGATING CANADIAN LAW: A UNIT FOR ELEMENTARY SCHOOLS (1980). In the United States, *see generally* DAVID T. NAYLOR, VALUES: LAW-RELATED EDUCATION AND THE ELEMENTARY SCHOOL TEACHER (1975); ABA SPECIAL COMM. ON YOUTH EDUC.FOR CITIZENSHIP, DARING TO DREAM: LAW AND THE HUMANITIES FOR ELEMENTARY SCHOOLS (Lynda Carl Falkenstein & Charlotte C. Anderson eds., 1980).

14. *See, e.g.*, CHERY MATHESON, CRIMINAL MOCK TRIAL FOR JUNIOR HIGH SCHOOL STUDENTS (1977); NEIL SMITH & STEVE L. HAMILTON, LEGAL AWARENESS COURSE: AN ALTERNATIVE SEMESTER FOR ALIENATED JUNIOR SECONDARY STUDENTS (1978).

15. For legal education in Canada, see ALTA. EDUC., LAW 20-30 CURRICULUM GUIDE (1985); TEACHER RESOURCE MANUAL (1989). For legal education in the United States, see ABA SPECIAL COMM. ON YOUTH EDUC. FOR CITIZENSHIP, BUILDING BRIDGES TO THE LAW: HOW TO MAKE LAWYERS, JUDGES, POLICE AND OTHER MEMBERS OF THE COMMUNITY A PART OF YOUR LAW-RELATED EDUCATION PROGRAM (Charles White ed., 1981).

16. *See, e.g.*, RUTH MCGEE ET AL., EXPLORING LEGAL CONCEPTS THROUGH PUPPETRY (1977); ABA SPECIAL COMM. ON YOUTH EDUC. FOR CITIZENSHIP, THE $$ GAME: A GUIDEBOOK ON THE FUNDING OF LAW-RELATED EDUCATIONAL PROGRAMS (Charles J.

university-level political science courses, the Canadian student has virtually no opportunity to study law except to do so as a full-time law student in a professional program.[17] The difficulty people in a common law jurisdiction experience in gaining knowledge of, and access to, the law has been studied and widely lamented.[18]

The prodigious growth of the legal profession is largely a result of the growing need for technical knowledge and skills. Law schools, exclusively, have been selected to house the education of these skills and knowledge.[19] The learning of law has been an "all-or-nothing" exercise. One either makes a career decision to go to law school for three years to be formally trained as a lawyer, or one stays on the outside of expertise and depends upon lawyers. The choice is whether to be a lawyer or a client. One would think the rationale for this dichotomy is that "a little bit of law" cannot be taught effectively or that one cannot be trusted to safely learn only "a little bit of law."[20] Law schools have evolved as the exclusive educational repositories of specialized legal knowledge and technical skill. With large numbers of declarations in favor of public access to the law, efforts have primarily focused upon access to lawyers instead of public legal education.

Technical skill, therefore, in the form of lawyers, is now in abundance in Canada, and the technical profession is itself now examining ways to ensure that the available pool of skill is not disproportionate to the demand. At the same time, generalized public education about the operation of the Canadian legal system and useful-to-know principles in substantive spheres

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White III, ed., 1975).

17. Two exceptions to this are the full-time non-professional legal studies program (B.A.) at Carleton University in Ottawa and the B.A. program in Law and Society at York University in Toronto.

18. *See, e.g.*, MARTIN L. FRIEDLAND, ACCESS TO THE LAW: A STUDY CONDUCTED FOR THE LAW REFORM COMMISSION OF CANADA (1975); DALE GIBSON & JANET K. BALDWIN, LAW IN A CYNICAL SOCIETY? (1985). Few academic lawyers in Canada participate in public legal education. *See* The Consultative Group on Research and Education in Law of the Social Sciences and Humanities Research Council of Canada 40 (1983) [hereinafter *Arthurs Report*].

19. The term "legal education" today is synonymous with lawyer training in Canada. *See generally* DAVID GRAHAM BELL, LEGAL EDUCATION IN NEW BRUNSWICK (1992). The *Arthurs Report* was comprehensive but did not even address the matter of public legal education. *See Arthurs Report, supra* note 18.

20. Management education has traditionally provided the opportunity for people who did not want to become lawyers to learn about the legal system and law; in other words, to learn "a little bit of law," at least as it is applied to business. A law course for business students should be similar to preventative medicine. The students would not be trained as lawyers, so teaching the minutiae of black letter rules would be a grossly misguided approach. They should be given the legal framework and principles to enable them to recognize the potential for certain legal problems and to engage counsel. Overall, they should be taught the law in a way which allows them to arrange their affairs to minimize legal liabilities and, generally, to better conduct their businesses.

of law would seem to be in critically short supply.

B. *The Case for Public Legal Education*

Modern North American society has a voracious appetite for continuing practical education, including legal education, which can be applied to one's work or personal life. Public legal information courses and workshops are highly utilized, perhaps because many people have an abiding interest in learning about the law and how it applies to their lives. The legal framework in which one operates, whether that be in business or in the community, has long been a subject of popular interest. It may also be seen as (and often has a reputation of being) an interesting or useful optional subject without the necessity of full-time study in a faculty of law.

Consider non-professional business law programming at the University of Calgary, which is typical of the experience at other Canadian universities. Business law is offered through a few courses in a credit degree or diploma structure in universities and colleges and through topical continuing education courses or seminars conducted for the public in the evenings on campuses or in schools based in the community. Rarely are there specific educational prerequisites. The introductory business law course is most often a service course open to all university or college students. Such a course in business law may be the only opportunity that the average student in Canada has to actually read constitutional texts. In any event, students take the course for a number of reasons, including gaining admission into quota programs such as schools of business or law.

Nevertheless, several studies point out the need for even greater general access to public legal information.[21] The problem would seem to arise from the "all-or-nothing" approach to the study of law in the Canadian legal system. Perhaps, society is cynical about law and legal institutions.[22]

If accurate public knowledge of law is important in modern society, there are at least seven categories of persons or constituencies who benefit from a robust level of legal knowledge. These categories and the benefits which would accrue to each are described in the following discussion.

1. *The Local Community*

Even with some 5000 lawyers actively counselling Albertans, usually on specific legal issues as they arise and usually for professional fees, lay

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21. *See, e.g.*, FRIEDLAND, *supra* note 18; STEPHEN BRICKEY & DENIS BRACKEN, PUBLIC LEGAL INFORMATION NEEDS IN CANADA: TOWARD A CONCEPTUAL FRAMEWORK (1982).

22. *See generally* GIBSON & BALDWIN, *supra* note 18.

citizens will have their overall personal and professional interests best served with an accurate understanding of the legal framework and principles in which they operate. A disproportionate degree of available legal resources are applied in the governmental and corporate commercial spheres. While there is generally considered to be a surplus of *available* lawyers in the province to serve the public need, there is (and may always be) an acute shortage of accurate information and advice provided on an affordable basis for the average citizen. Most people simply do not know where to turn with a legal problem. Would we tolerate a population being as unknowledgeable about their health, personal safety or how to raise their children as they are about the law and how it applies to them?

Even the annual "Law Day" events held in Alberta, and organized and conducted by volunteer practicing lawyers, are billed as "Fun for the Whole Family," as if they are some kind of side show. The only purpose of participating in the event is to have "fun," not to seriously learn anything useful. This conclusion is also supported by the use of costumes and animal characters with storybook plots to illuminate the legal system which operates in Alberta.

Lay persons appear to steadfastly cling to "legal myths." These myths are likely the products of social inculcation or broadcast programming which precede enrollment in non-LL.B. law courses. These myths are relinquished only reluctantly, if at all, even when accurate legal information is presented. One expects that public uncertainty and misunderstanding of the Canadian legal system contributes to both suboptimal lawyer-client relationships and poor lay decision-making when attempted without counsel.

One expected benefit of a more legally-literate population would be a better discharge of civic responsibility. This crosses over all the roles people fill in their communities as sons and daughters, parents, employers, employees, businesspersons, neighbors, landlords and tenants, motorists, educators and students, consumers and producers, property owners, creators, and electors. As the test survey suggests,[23] Albertans generally have an appalling lack of knowledge of the rules upon which their society is founded and governed. If they do not know the sources of law or constitutional fundamentals, how can one expect them to know about the current national unity dilemma, or how to inform themselves during an election or referendum, or law reform? An even stronger case may be made regarding their knowledge of the private law domain. If they actually believe that contracts are unenforceable unless they are in writing, or that any and all discrimination is illegal, or that the monetary jurisdiction in small claims court is half of what it actually is, their rights are not being vindicated, and judicial resources are not being optimally allocated.

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23. *See infra* Table 4.

2. *Students and Instructors of Public Legal Education*

One of several major objectives of non-LL.B. law courses is to simply *inform* students about the law and legal system, its sources and categories, the system of courts, the civil litigation process and other mechanisms for resolving disputes, and the institutional and constitutional frameworks.[24] A survey of selected substantive topics such as torts, contracts, property, and business organizations introduces the student to some concrete terminology, legal rules and principles.

In order to determine how to best inform the lay student, it is useful to assess what knowledge or misunderstandings the student brings to the course. What are the student's sources of that information, and what is the best method for teaching accurate legal information to non-law students?

3. *The Legal Profession*

Lawyers are interested in general knowledge levels and attitudes that their clients have of legal principle and of lawyers. This information about what the client knows (and does not know) or believes about the law and lawyers can assist the lawyer in understanding the client when that client calls the lawyer with a legal problem. This informational framework can only serve to improve the lawyer-client calculus. Lawyers may also be able to use this information to better reach out, or market, to clients.

4. *The Law Society*

The law societies of the various provincial and territorial Canadian jurisdictions have been handed the legislative mandate, to the extent there is one, for public legal education. This commission to the law societies may be a partial quid pro quo for the right of the profession to govern itself, free from micro-management by government.

A number of law society initiatives in Alberta, such as the Lawyer Referral Service[25] and Alberta Law Foundation-sponsored programs,[26] and

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24. Other objectives include writing across the curriculum, introducing the application of ethical decision-making, developing critical thinking and analysis skills, and cultivating other skills which are transferable to business. *See generally* 15 AM. BUS. L.J. 1 (1977) (dedicating an entire volume to the subject of business law education). *See generally* John W. Collins, *Creative Analysis of Judicial Decisions*, 19 AM. BUS. L.J. 360 (1981); Nancy Kubasek, *The Research Paper: A Tool for Developing Critical Thinking Skills in the Legal Environment of Business Classroom*, 9 J. LEGAL STUD. EDUC. 317 (1991); Moore & Gillen, *supra* note 6.

25. The Lawyer Referral Service is designed to provide short installments of free legal

support from university law libraries operate to serve the public. But what is their impact on the general level of public legal education?

5. *Mass Media*

If, as expected, the popular media has the greatest influence in Canadian society on what people learn and understand about the law and legal system, how should the media discharge its responsibility for balance and accuracy?

Most of the print and electronic journalists and editors do not have any specific or formal legal education. They cover the law or courthouse beat as laypersons, dependent upon expert legal commentary if they decide to seek it. Their selection of what genre of law cases (high-profile individuals and companies) and issues (mostly public law such as criminal or constitutional) to cover is predictable, given the drivers of the mass media industry. These drivers are entertainment and circulation, not education.

6. *The Consulting and Employment Training Industry*

How many times has one been at a seminar, conference, or training session led by a non-lawyer who cultivates "liability hysteria"? Examples of this misled legal instruction include creating scenarios of virtually unlimited managerial liability relating to human rights and sexual harassment in the workplace, as well as environmental impairment. Very large damage awards are spoken of in the former, and certain imprisonment for managers in the latter. In fact, only the most egregious circumstances lead to such alarming consequences.

In other instances, federal legislation is cited to support a point being made which does not apply over a provincial jurisdiction, and vice versa. Often, lay consultants rely upon imprecise or incomplete lay reports and summaries for their statements of the law. The cynic might explain this as a strategy to nourish the consulting industry in order to increase dependence on consultants. Often the law component is merely interstitial or incidental to the broader substantive objectives of the session. These objectives marginalize the law even more in relation to other issues.

7. *Government Public Policymakers*

How do policymakers effectively target their programs without an

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advice by a participating lawyer.

26. Such programs include Calgary Legal Guidance, Student Legal Services, and the Legal Resource Centre (Edmonton).

adequate profile of their target market? One often hears about the high levels of communicative (written and reading) illiteracy in Canadian society, but government standard forms (*e.g.*, tax forms and booklets) and other communications go out to the public with little guidance about what people should know about the law. The 1995 Québec Referendum presumed that all voters knew the actual text of the act upon which they were voting.

The Alberta government spends a great deal of money on post-secondary education and career development, but no one has ever asked or debated how much should be spent on legal education or how such funds should be allocated.

C. *Responsibility for Public Legal Education*

As already noted, the various provincial law societies have been given the mandate for public legal education.[27] There is, prima facie, a notional conflict of interest in conferring upon the body, which exclusively governs the entry and conduct of the profession, the mandate to serve the general legal information needs of the public.

One might argue that all of what may be considered "public information" can ultimately be contracted for privately with individual lawyers for a fee. In addition to other skills, legal information and the application of the law to any particular set of facts is precisely why lawyers are in a profit-seeking business. The law society, which today also has a mandate to promote the interests of its members, would be rationally inclined, in a marketplace where the supply of lawyers exceeds the demand for their services, to minimize its contribution to public legal information and maximize the private contracting for individualized legal information.[28] It is not surprising that the legislation does not set quality or quantity standards for the law society to follow when delivering legal information to the public. Nor does the legislation require sanctions for failure to comply.

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27. *See, e.g.*, Legal Profession Act, R.S.A., ch. L-9.1 (1980) (Can.). The Act states: "The objects of the Alberta Law Foundation are . . . to receive money and property [from interest accumulating in member lawyers' trust accounts] and to maintain and manage a fund . . . for . . . contributing to the legal education and knowledge of the people of Alberta and providing programs and facilities for those purposes." *Id.* § 116.

28. An example of this approach may be the Lawyer Referral Service, which is sponsored by several law societies. Out of a tacit recognition that lawyer advertising may be ineffective and that clients may encounter difficulty in selecting a lawyer, a prospective client can call the Service and will be given the names of three lawyers who practice in that field of interest. The lawyers, when contacted in this way, attempt to provide 30 minutes of free legal information. Many times, however, the lawyer's information amounts to little more than a "pitch" to meet at the lawyer's office and do business.

III. A STUDY OF CANADIAN LAY KNOWLEDGE OF LAW

A. *Survey Administration*

A questionnaire[29] was presented to each section of the Legal Environment of Business course in the autumn semester of September 1993. The survey was the very first item presented to the students and preceded distribution of the course outline or any discussion about the course or its content. The respondents in this survey had already registered or were contemplating registration in the course. It is estimated that about fifteen percent of the respondents would not have ultimately completed the course.

Participation in the survey was entirely voluntary. The voluntary nature of the survey was indicated in writing on the front of the instrument, and the students were advised of it orally. They were also assured that it was not an evaluation that would be used to the favor or detriment of any student. No specific identifying information was elicited, nor was any supplied. All information was treated anonymously and in aggregate form.

The survey took twenty to thirty minutes to complete and the respondents were given as much time as they required. Arrivals more than ten minutes late in the classroom were not invited to participate. Due to the circumstances of this administration, the response rate was approximately ninety-nine percent.

B. *Sample of Survey Respondents*

The respondents[30] were self-selected to a considerable degree. One might expect that these respondents, as representatives of young Canadian post-secondary students, are generally knowledgeable about the law and legal system. They might even be expected to have an interest in the subject.

All the respondents were daytime, credit-seeking university students who have met a minimum seventy percent post-secondary admission or equivalent lateral transfer standard. The course in which this survey was administered is open for enrollment to all university students, and it is eventually required for completion of the Bachelor of Commerce program. In 1993, about one-half of all students who completed this course went on to complete the Bachelor of Commerce degree.

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29. The questionnaire consists of nine pages of questions plus two instruction pages.
30. The sample size is 252.

The mode age was nineteen, as the following Table illustrates:

TABLE 1

Age	Percentage of Respondents
18	12%
19	24%
20	19%
21	15%
22	10%
Other	20%
	100%

Men comprised fifty-four percent of the respondents, and women comprised forty-six percent. This sample described itself as "primarily urban" in background. Less than one-quarter claimed a "primarily rural" background.

The respondents were placed into groups based upon the number of years of study completed. The largest group of respondents had fully completed only one year of post-secondary studies, but as Table 2 (non-cumulative) shows, many were advanced undergraduates.

TABLE 2

Number of Years of Study Completed	Percentage of Respondents
1	39%
2	26%
3	19%
4	10%
Other	6%

Almost half, forty-eight percent, had not taken a course, seminar or other formal instruction in the law and legal system at the time this survey was administered, and only ten percent described themselves as "quite" or "extremely" familiar with the legal system.

Very few respondents had direct personal experience "in a legal case as a participant, witness or juror" as the following table shows.

TABLE 3

Experience	(none) 1	2	3	4	5	6	7 (a great deal)
Percentage	61%	17%	6%	5%	5%	3%	3%

C. *Description of the Research Questions*

The first-level objective of this study is concerned only with determining the extent of accurate general legal knowledge possessed by this sample of the Canadian lay population. This knowledge will be judged on two distinct bases:

1) ability to correctly *distinguish* legal events and legal terminology and identify which are Canadian and which are American;[31] and
2) random Canadian legal *content* over a number of legal subjects in the public domain.

The second-level objective is to determine how the following personal characteristics or factors correlate with accurate general legal knowledge:

1) age;
2) gender;
3) number of years of post-secondary education completed;
4) urban versus rural background; and
5) extent of involvement (as a participant, witness or juror) in the legal system.

D. *Data Analysis Methodology*

Each question is accorded equal weight to get a total assessment of accurate knowledge. In other words, the objective is to determine how knowledgeable (correct) the respondents were as a whole.

Respondents were asked to answer all questions, but not all did. Surveys which did not contain an answer for one or more questions were not entered in the calculations with respect to that question or those questions.

31. Some of these events enjoyed higher press coverage than others, but each of them was current.

Of the 252 surveys returned, fifty had one or more questions unanswered.

All descriptive statistics in this study, such as frequencies and correlations, were obtained using SPSS for Windows. The causal correlational figures were accomplished using PLS-Graph. PLS-Graph is a Windows-based software application used to perform Partial Least Squares analyses. Partial Least Squares analysis is a sophisticated second generation multivariate statistical technique that:

1) can account for errors in measurement;
2) optimally weighs individual items to create indices or factors that the items are attempting to measure; and
3) does not require typical statistical constraints such as normality of data nor large sample size.

As a second-generation technique, Partial Least Squares subsumes many of the first-generation methods, such as multiple regression, discriminant analysis, canonical correlation, analysis of variance, and principal components analysis.

By placing constraints on some aspect of the Partial Least Squares procedure, which often are inappropriate, the analysis becomes one of the first-generation techniques. For example, if all factors are constrained to only one item (instead of multiple items) and modeled to demonstrate how one factor is affected by all the rest, the methodology becomes a multiple regression analysis.

E. *Results*

1. *Distinguishing Legal Events*

A list of attributed legal events and the scoring of the repsonses are found in Table 4. The overall correctness of responses in this part was a mean of eighty-one percent. Even taking into account the bivariate choice format, this is a positive assessment of accuracy in distinguishing between current Canadian and American legal events.

TABLE 4 — KNOWLEDGE: Distinguishing Current American and Canadian Legal Events	
SUPERB RECOGNITION: (>90%)	
(98%)	Mike Tyson rape trial *(US)*
(96%)	Woody Allan/Mia Farrow custody dispute *(US)*
(96%)	William Kennedy Smith rape trial *(US)*
(93%)	Terms of new Constitutional Proposals *(CAN)*
(91%)	Anita Hill alleges sexual harassment *(US)*
(91%)	Changes in the landlord and tenant law *(CAN)*
HIGH RECOGNITION: (>70%)	
(84%)	Leona Helmsley tax evasion charges *(US)*
(83%)	Plain language law *(CAN)*
(83%)	Gays in the military *(US)*
(80%)	Environmental Law/Statute *(CAN)*
(72%)	New bankruptcy law *(CAN)*
LOW/MODERATE RECOGNITION: (>50%)	
(69%)	Keegstra "hate" case *(CAN)*
(66%)	Lindros contract arbitration *(CAN)*
(63%)	Lawyers' disciplinary hearings open to the public *(CAN)*
INDISCERNIBLE RECOGNITION: (<50%)	
(49%)	New woman Chief Justice of Court of Appeals *(CAN)*
(44%)	Olympia/York bankruptcy problems *(CAN)*

When the responses are grouped according to accuracy in levels of "superb," "high," "low/moderate," and "indiscernible" recognition, further observations may be made. All of the American events (six) were identified with considerable accuracy, even though there were more "Canadian" events from which to choose (ten). Furthermore, most of the Canadian events were, in fact, local. It can be argued that the most highly-recognized events enjoyed the most publicity in the electronic media when compared with the other events.

2. *Distinguishing Legal Terms*

Table 5 contains the twenty-three legal terms which were presented for attribution to the United States or Canada, and also includes the corresponding indicator of accuracy of the results.

The number of total correct attributions ranged from a low of eight (one) to a high of twenty-two (one). Out of the 240 respondents answering this question, none correctly attributed all of the terms presented.

Table 5 demonstrates that Canadian undergraduate students have a conspicuously more accurate knowledge of American legal terms than they have of Canadian legal terms. Most of these terms pertain to the criminal and constitutional spheres.

TABLE 5 — KNOWLEDGE:
Distinguishing American and Canadian Legal Terms

AMERICAN		CANADIAN	
95%	State Trooper		
93%	4th Circuit		
91%	Death penalty		
91%	Uniform Commercial Code		
90%	Right to bear arms		
90%	We the People...		
89%	Fifth Amendment		
89%	Grand jury		
87%	Anti-trust	88%	Provincial Court
86%	Continuance		
86%	District Attorney		
79%	Public Defender		
78%	Felony		
74%	Misdemeanor		
71%	Due process	74%	Charter of Rights
		45%	Your Lordship
		40%	Notwithstanding clause
		29%	Peace, Order and Good Government
		27%	Preliminary Inquiry
		23%	Q.C.
		17%	Summary conviction

3. *Knowledge of General Canadian Legal Content*

In the next section of the survey, seven questions were posed to test the accuracy of the respondents' general legal knowledge. These questions draw upon basic knowledge of law or the legal system that a lay person might reasonably be expected to know.

Table 6 sets out the questions and the corresponding percentage of correct responses for each question. On the basis of these results, one concludes that Canadian lay knowledge of the law is generally deficient. The lowest level of knowledge lies in the respondents' awareness of constitutional content. Since the Canadian Charter of Rights and Freedoms[32] was enacted sixteen years ago, the Supreme Court of Canada has delivered judgment in several hundred cases. Many of these decisions struck down legislation and were prominently covered in the media. It appears that these information sources have not succeeded in conveying to the lay person the substance of a cornerstone in the Canadian legal system — the judicial review of legislation. In this and other questions, one might conclude that the lay person is not merely unknowledgeable, but is instead fundamentally and definitively misinformed.[33]

Of the 232 respondents attempting all the questions, no one correctly answered all seven. Several respondents were incorrect in all seven responses. Two of the seven questions had only two choices. The mean of correct answers was 3.1, which represents forty-four percent accuracy.

4. *Overall Knowledge*

When all three knowledge parts are combined, the total number of possible correct answers is forty-six. The aggregate across all parts ranged from twenty-four to forty, with 32.5 for the average (seventy-one percent).

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32. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

33. For a comparative study of the British system, see generally MICHAEL ZANDER, THE STATE OF KNOWLEDGE ABOUT THE ENGLISH LEGAL PROFESSION (1980).

TABLE 6 — *KNOWLEDGE:*
General Canadian Law

NOTES: The correct answer is indicated in bold italics. The percentages of correct responses are also in bold italics.

A.	***7%***	The monetary limit in small claims court is: \$1000 \$2000 ***$4000*** \$5000
B.	***35%***	Which one of the following rights is specifically in the Charter of Rights: (a.) shelter (b.) legal aid ***(c.) security of the person*** (d.) property (e.) privacy
C.	***75%***	Judges: (a.) are elected to their jobs (b.) apply for their jobs through announcements in the newspaper ***(c.) are appointed by the government*** (d.) are interviewed and confirmed by the Senate
D.	***63%***	What happens to your property if you die without a will: (a.) the government gets everything (b.) your relatives all share equally ***(c.) your immediate family gets everything*** (d.) it is auctioned and the proceeds go to charity
E.	***58%***	Most criminal trials are jury trials: True ***False***
F.	***43%***	A person charged with a criminal offence is the: (a.) defendant (b.) criminal ***(c.) accused*** (d.) suspect
G.	***21%***	Judges cannot rule that a law is invalid, but can only interpret and enforce it: True ***False***

One should be mindful, however, that forty-one of the forty-six questions offered a choice of only two possible answers. The Canada and United States distinctions upwardly skew the overall assessment of accurate knowledge.

IV. CONCLUSIONS AND IMPLICATIONS FOR FURTHER RESEARCH

Legal information throughout North America has traditionally been the exclusive preserve of law schools. Non-lawyers do not give each other the Canadian Criminal Code[34] as a gift. Restricted public access to legal information has left virtually all knowledge of the content of the law in the minds of the lawyers.

There are, however, numerous rationales for a more robust and precise general lay understanding of the primary principles of law and the contours of the legal system. For example, it is neither possible nor wise to have a lawyer superintend every single action of a businessperson, although those actions might carry legal consequences. The lay person should possess a sound sense of when and how to consult a lawyer, and when one can rely upon one's own knowledge and skills.

What is the level of accurate legal knowledge in the lay population of Canadian society? Canada may be in a special position due to the confusing influence of, inter alia, mass entertainment media from the United States. This study shows that junior undergraduate students are somewhat capable of distinguishing between Canadian and American legal events and legal terms. They are, however, markedly more familiar with the American legal genre than with the Canadian legal genre. They may be even more seriously deficient in the broad strokes of legal content which are most likely to affect them.

There are two primary sources of "information" about Canadian law and the legal system. The first is coverage by the news media. This coverage is seldom offered by a journalist trained specifically in the law. The items highlighted are invariably in the criminal or other public domain because of their public impact, or their outlandish peculiarity or titillation, such as criminal proceedings against public figures. The business law student quickly learns that there are interesting and valuable cases other than those involving, for example, professional athletes and entertainers. Many students are prone to accord criminal law a predominant place in the legal system. The topic of sanctions, for example, reflects knowledge or understanding only of the common criminal law sanctions. Other areas and realities of law are overshadowed.

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34. *See* R.S.C., ch. C-46 (1985) (Can.).

The other source of mass legal "information" is television programming, usually in the format of drama or situation comedy. A legal theme has been energetically worked into the television medium within the last five years. Such series have, despite the pretense to the contrary, very little legal content and information. Law is marginalized. Television series are entertaining take-offs of lifestyle in a law-related context, not vice versa. They are, as such, capable of conveying serious distortions of the context of law. Overall, the law and the legal system are heavily parodied by entertainment television.

Legal conclusions and legal clichés are the hallmark of news reports about legal events and even of entertainment television. Therefore, people without any legal education hold varying legal opinions prior to taking the course. Television is the only, or principal, window into the law and legal system for many people. As the broadcast media continue to intermingle news and showbusiness to a point where they are inseparable, the challenge is to combat the myth and fantasy most lay persons hold about law. Further research might show how difficult it is to dispel these myths about the law.

Backlogs in the courts show no evidence of abating. It is apparent that people place far too much faith in the mysticism and decorum of law and the legal system to resolve their manifold problems of life. An environment of information saturation does not ensure a broad base of public knowledge and understanding of a domain such as the law. With a low baseline knowledge of the law, there is a real risk that a society's citizens fail to accurately understand the implications of basic legal concepts and events.

For example, on October 30, 1995, residents of the Province of Québec were asked to vote on the text of a statute of the provincial legislature with respect to the question of their sovereignty and independence from Canada. This statute was not widely circulated and was drafted in formal legal terms. The Canadian public also reportedly expressed a popular opinion on the sufficiency of the federal Young Offenders Act,[35] and an appropriate regime of gun control, to select a few current examples. The public is continuously being polled by public opinion firms as to their attitudes about various laws. One must ask what the public really *knows* about those laws on which they comment.

The lay public may make imprudent decisions and the discharge of their civic expectations may be impaired due to their misunderstanding of the law which applies to them. Because they are unable to separate fiction from reality, or even understand fundamental legal principles and terms, they may have unrealistic expectations of lawyers and judges. With a penchant for public consultation, policymakers may now find that the quality of the lay contribution will be limited by the accuracy of the lay assumptions.

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35. *See* R.S.C., ch. Y-1 (1985) (Can.).

Goethe is quoted as stating that "[t]here is nothing more frightful than ignorance in action."[36] Canadian constitutional law itself has little respect for vagueness,[37] although citizens are mired in it. This study sought only to measure baseline knowledge in a limited respect and compare it to Canadian knowledge of American legal events and terminology. It does not consider how people *process* what they understand to be the law.

Knowledge of American legal events and terminology was markedly stronger among this sample of Canadian students than was knowledge of Canadian legal events and terminology. This phenomenon is somewhat akin to knowing the words of the national anthem of another country and not knowing those of one's home nation, and in some cases, not even knowing whose national anthem it is in the first place.

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36. Statement by Johann Wolfgang von Goethe, *quoted in* Cole's Quotables, *Quote Search* (last visited Nov. 21, 1998) <http://www.starlingtech.com/quotes/search.html>.

37. *See* DAVID P. JONES & ANNE S. DE VILLARS, PRINCIPLES OF ADMINISTRATIVE LAW 58-60 (Carswell ed., 2d ed. 1994) (discussing the "doctrine of vagueness").

LAW, CRIME, AND PUNISHMENT IN THE PEOPLE'S REPUBLIC OF CHINA: A COMPARATIVE INTRODUCTION TO THE CRIMINAL JUSTICE AND LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA

Pamella A. Seay*

I. HISTORICAL AND CULTURAL FOUNDATION OF THE CHINESE SYSTEMS

To understand the current status of criminal justice in the People's Republic of China (P.R.C.), it is necessary to become acquainted with various influences on the creation of its laws. As in any developing country, the P.R.C. has been influenced by history, culture, and contemporary ideas.

The Chinese culture has existed for over 5000 years. The great philosopher Confucius introduced the concept of the importance of society over the individual.[1] This simple idea has survived in Chinese culture and has influenced the evolution of Chinese law and criminal justice. Another legacy of Confucius is deference to ancestors, leaders, and members of the elite class. These teachings encouraged class differences, a pervasive theme throughout the Chinese imperial culture.[2]

Historically, China depended on the beneficence of its leaders in the application of law. Though laws may have been in writing, the application of them was left to the discretion of the individual leader — whether an emperor, a warlord, or a local governor. This discretionary approach became a "rule of the person," meaning that each person of authority could make a decision based on the prevailing beliefs, the most expedient choice, or the status of the person to be punished. This concept endured under Mao Zedong, despite an attempt to establish a classless or "uni-class society."[3] The result was a wide range of vastly different punishments for what were often quite similar offenses.[4]

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1. *See generally* THE ANALECTS OF CONFUCIUS (LUN YU) (Chichung Huang ed. & notes, 1997)

2. *See id.*

3. CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 253 (1995).

4. RICHARD EVANS, DENG XIAOPING AND THE MAKING OF MODERN CHINA 136 (3d ed. rev., 1997).

II. THE RULE OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA

Contemporary changes began with the Chinese Revolution in 1911. Dr. Sun Yat Sen led the transition from an imperialist and feudal state, to a nationalist state, and then later to a communist state. It was Mao Zedong who declared the creation of the P.R.C. in Tiananmen Square, Beijing, in 1949. It was also Mao Zedong who, in effect, abolished all laws in 1957.[5] Following Mao's death in 1976, it was determined that the abolition of all laws was either a mistake, or at least no longer necessary,[6] and in 1979, Deng Xiao Ping authorized the creation of a written criminal code.[7] A written constitution followed in 1982.[8] These documents and rules were slowly implemented and enforced, first in Beijing, then in other major cities, and finally in the remote provinces and villages. It is these documents and laws, this evolution to a "rule of law,"[9] which will be addressed here.

In a recent address, Chinese President Jiang Zemin emphasized the importance of the Rule of Law; he stated: "Ruling the country by law means . . . that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader."[10] With this idea in mind, the Chinese legal community has begun to work on establishing the best law and criminal justice system for the P.R.C.

To put the Chinese legal evolution into a historical context, the United States Constitution was adopted in 1789, nearly 200 years before the adoption of the Chinese constitution. The criminal codes of the various states, though constantly being reassessed and revised, have been adopted or acquired through years of research and trial and error. Many of the early states created their criminal codes by adopting the common law of England,

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5. WING-HUNG LO, *supra* note 3, at 10.

6. *See id.* at 1.

7. *See id.* at 261.

8. ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] (1982) (P.R.C.). For an electronic version of the P.R.C. Constitution, see *China - Constitution* (last visited Nov. 16, 1998) <http://www.uni-wuerzburg.de/law/ch00000_.html>.

9. The Chinese term for rule of law is *fazhi*. It should be noted that U.S. President Bill Clinton's and Chinese President Jiang Zemin's Joint Statements of 1997, as well as their joint statement made during President Clinton's state visit in June of 1998, focused on the institution and application of a rule of law. *See* The President's News Conference with President Jiang, 33 WEEKLY COMP. PRES. DOC. 1673 (Oct. 29, 1997); The President's News Conference with President Jiang in Beijing, 34 WEEKLY COMP. PRES. DOC. 1245 (June 27, 1998).

10. Jiang Zemin, *Hold High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century*, *in* SELECTED DOCUMENTS OF THE 15TH CPC NATIONAL CONGRESS 1, 32 (1997).

making the criminal codes even older than the states themselves.[11] China, with less than 20 years of experience in the enforcement and operation of its criminal laws, is likely to undergo a great deal of change as it adjusts to the practical application of the theories those laws espouse.

Citizens of the United States often take for granted the independence of their judiciary, though not all nations have followed the same path as the United States. The original Organic Law of the People's Courts of the P.R.C. read as follows: "The peoples courts shall administer justice independently, subject only to the law . . . ."[12] Recognizing the detrimental influence which individuals and groups once had on the administration of justice in the P.R.C., the National People's Congress (NPC) changed this article to more explicitly identify the restriction on influence. The new provision states: "The people's courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual."[13]

The development of China's laws now involves a socialist democracy, or what the Chinese call "socialism with Chinese characteristics."[14] In paragraph seven of the Preamble to the Chinese Constitution, as amended on March 29, 1993, are these words: "Our country is in the primary stage of socialism. The basic task before the nation is the concentration of efforts on socialist modernization construction in accordance with the theory of building socialism with Chinese characteristics."[15] Jiang Zemin, President of the P.R.C., reinforced this goal in a 1997 report by stating: "We should foster socialist ideology and ethics by basing ourselves on China's reality, carrying on the fine cultural traditions handed down from history and assimilating the advances of foreign culture."[16]

The dedication to socialism with Chinese characteristics is, as further noted in the Constitution's Preamble, subject to the leadership of the Communist Party. Paragraph ten of the preamble to the P.R.C. Constitution was revised in 1993. Paragraph ten reaffirms the predominance of the Party; it states that "[m]ulti-party cooperation and the political consultation system

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11. For example, the Florida code states the following: "The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject." FLA. STAT. ANN. § 775.01 (West 1992).

12. ORGANIC LAW OF THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA, art. 4 (1979) (P.R.C).

13. DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, 6TH NATIONAL PEOPLE'S CONG., REGARDING THE REVISION OF THE ORGANIC LAW OF THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA, art. 4 (1983) (P.R.C.).

14. *See* WING-HUNG LO, *supra* note 3, at 29-31, 258.

15. XIANFA, preamble, para. 7, *amended by* XIANFA, amend. art. 3 (1993).

16. Zemin, *supra* note 10, at 20.

under the leadership of the Communist Party of China shall continue and develop for the extended future."[17] Communism and socialism both stress the importance of the society and the government, and the diminished importance of the individual; in a way this is a reversion to the Confucian belief in the importance of society over the individual, while distinctly rebelling against the Confucian focus on class.[18]

III. STRUCTURE OF THE GOVERNMENT

In 1979, the Legislative Sub-Committee of the Standing Committee of the NPC, led by Mrs. Wang Zhu Qian, was charged with the responsibility of overseeing the creation of the first P.R.C. criminal code.[19] The resulting set of laws began the process of codification and constitutionalization of the legal system of the P.R.C. In establishing its legal system, the P.R.C. and the Communist Party created a unified system, with the NPC as the ultimate authority over all legal and governmental decision-making.[20] This structure makes the NPC the overseer of the criminal justice and legal systems in China.

The United States chose to create a national system rich with checks and balances. In addition to the U.S. Constitution and federal government, each state has its own government, autonomous in many areas. Within the national and state governments, a separation of powers exists, spreading responsibility for different functions and duties into legislative, executive, and judicial branches. This method offers U.S. citizens the greatest amount of protection from the invasiveness of government. However, not all societies and governments agree with the United States' approach. China follows the unitary form, similar to that used in the constitutional monarchy of the United Kingdom.[21] Because the P.R.C. has a unified system, it is important to have a basic understanding of all its operations, functions, and duties, particularly as they relate to criminal justice.

"The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress."[22] Each member of the NPC is elected for a term of five years, and the NPC meets once per year as convened by the Standing Committee.[23] Since the NPC is not a full-time

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17. XIANFA, preamble, para. 10, *amended by* XIANFA, amend. art. 3 (1993).

18. *See generally* THE ANALECTS OF CONFUCIUS, *supra* note 1.

19. Interview with Mrs. Wang Zhu Qian at the National People's Congress, Great Hall of the People, in Beijing, China (May 11, 1998).

20. *See* XIANFA, preamble, para. 11 & arts. 57, 58, 62 (1982).

21. *See* XIANFA, preamble, para. 11 (1982).

22. XIANFA, art. 57 (1982).

23. *See id.* arts. 60, 61.

legislature, it is the Standing Committee which conducts the daily affairs of the State throughout the year.

The Standing Committee is elected by the NPC and is composed of "the Chairman; the Vice-Chairmen; the Secretary-General; and the members."[24] The Chairman, the Vice-Chairmen, and the Secretary-General are the representatives of the Communist Party. Their election is controlled entirely by the Communist Party of China; therefore, the NPC has no authority to remove them from office.[25] The Secretary-General of the Communist Party of China is presently the same person, Jiang Zemin, who serves as President of the P.R.C. This relationship has often existed in the P.R.C., creating a cross-over of power and influence between the two entities.

The Standing Committee exercises the duties of the NPC when the NPC is not in session, and it also interprets the Constitution and supervises its enforcement as part of its regular duties.[26] The Standing Committee also has the power to annul those laws enacted by the NPC which "contravene the constitution or the statutes."[27] Interestingly, the NPC has the power to "alter or annul inappropriate decisions of the Standing Committee[,]"[28] thereby providing a small, though significant, balance of power between the two governing bodies.

From the preceding discussion, one can see a definite connection between the ruling NPC and the Chinese Communist Party. In the United States, the closest analogy might be the existence of the Democratic and Republican Parties and other minor parties. However, the extent of influence of these parties in the United States is, in a sense, advisory because there is no required connection between any party and the officials elected to serve.

IV. STRUCTURE OF THE COURT AND CRIMINAL JUSTICE SYSTEMS

The Chinese criminal justice system was created through a unitary system of government, which greatly affects its functions. One function of the NPC is "to elect the President of the Supreme People's Court,"[29] and "to elect the Procurator-General of the Supreme People's Procuratorate[,]" the prosecutorial branch of the government.[30] The Standing Committee has the

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24. *Id.* art. 65.

25. *See* CONST. OF THE COMMUNIST PARTY OF THE PEOPLE'S REPUBLIC OF CHINA , arts. 21, 22 (1982).

26. XIANFA, art. 67 (1982).

27. *Id.* art. 67, sec. 7.

28. *Id.* art. 62, sec. 11.

29. *Id.* art. 62, sec. 7.

30. *Id.* art. 62, sec. 8.

power to appoint or remove judges of the Supreme People's Court,[31] and to appoint or remove Procurators.[32] Again, a balance of power, almost a "check and balance" of its own, applies in this area of the Chinese justice system between the NPC and the Standing Committee.

"The people's courts of the People's Republic of China are the judicial organs of the state."[33] These courts are (1) the Supreme People's Court, (2) the High People's Courts of provinces, autonomous regions and municipalities, (3) the Intermediate People's Courts of prefectures, cities, leagues and autonomous prefectures, (4) the Primary People's Courts of counties, cities, banners and autonomous counties, and People's Tribunals set up by Primary People's Court, and (5) the courts of limited jurisdiction made up of (a) Maritime Courts, (b) Military Courts, and (c) Railway Courts.[34]

The Primary People's Courts are the trial courts, or what is referred to in the United States as a court of first instance. At the end of 1994, there were 3074 Primary People's Courts in China.[35] An essential difference between U.S. and P.R.C. trial courts is the lack of a jury system in Chinese courts. The Chinese approach is designed similar to a German court, with "a collegial panel composed of three judges or of judges and people's assessors totalling three."[36] In many instances, this panel will consist of a lead professional judge accompanied by two lay judges. If a case of first instance is held in a court other than the Primary People's Court, the panel may total between three and seven judges or a combination of three to seven judges and people's assessors.[37] Ordinarily, the United States relies on a jury as the finder of fact and on a judge to instruct the jury on the application of the law to the facts. However, in China it is the responsibility of the panel to find the facts and apply the law. Questioning is led by attorneys, but may also be conducted by the judges.[38]

It must be noted that the jurisdiction of the Primary People's Court, as the court of first instance, extends over ordinary criminal cases committed by citizens of the P.R.C.[39] However, crimes carrying a possible sentence of life imprisonment or the death penalty, and criminal cases in which the

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31. *See id.* art. 67, sec. 11.

32. *See id.* art. 67, sec. 12.

33. *Id.* art. 123.

34. *See* FOREIGN AFF. BUREAU OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA 29 (1995) [hereinafter FOREIGN AFF. BUREAU].

35. *See id.* at 4.

36. CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA [CRIM. PROC. L. P.R.C.] art. 147 (P.R.C.).

37. *See id.* art. 147.

38. *See* WING-HUNG LO, *supra* note 3, at 265.

39. *See* CRIM. PROC. L. P.R.C art. 19.

offenders are foreigners, are within the jurisdiction of the Intermediate People's Court.[40] Additionally, a Primary People's Court may choose to defer jurisdiction to a higher court.[41]

In the trial court, an accused may choose to be represented by counsel, may undertake self-representation, or may choose to have a family member as a representative.[42] In a country of over 1.4 billion people, finding a lawyer can be difficult and sometimes quite expensive. The attorneys fees quoted to defendants in the Chinese criminal system are equal to those of any comparable U.S. firm.[43] However, when wages are sometimes less than $1000 per year, a fee of over $100 per hour would be insurmountable without assistance. Additionally, rural areas still suffer from a lack of attorneys, resulting in the unavailability of legal assistance.[44] Indigent representation provided by the government, particularly in the urban areas, is becoming more frequent, since it is now required by law.[45]

All persons accused of a crime have a meaningful right to an interpreter or translator.[46] Within the Constitution of the P.R.C., the right to an interpreter or translator is guaranteed to "any party," whether a Chinese citizen or not.[47] In a nation of multiple languages and dialects, this right appears more of a necessity than a privilege. Therefore, the extension of this right to persons of all nationalities is very valuable. This is a critical distinction in the Chinese courts. The Constitution of the P.R.C. provides far more rights to citizens than to non-citizens. This fact is prominent throughout the constitution, where most rights are granted solely to "citizens" and not simply to "persons" or "parties."[48] When such a right is granted to non-citizens as well, it is obviously looked upon as a requirement and not merely an accommodation.

The conduct of a trial necessarily includes the evaluation of evidence presented. Part one, chapter five of the Criminal Procedure Law of the P.R.C. spells out the applicable laws of evidence to be applied in any trial. Article 42 states that, "[a]ll facts that prove the true circumstances of a case shall be evidence[,]" and where evidence is presented, it "must be verified before it can be used as the basis for deciding cases."[49] With this caveat in

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40. *See id.* art. 20.

41. *See id.* arts. 19, 23.

42. *See id* art. 32.

43. Interview with attorneys from the law firm of King & Wood in Beijing, China (May 13, 1998).

44. Currently, the P.R.C. reports an approximate ratio of one attorney for each 14,000 persons.

45. *See* CRIM. PROC. L. P.R.C. art. 34.

46. *See id.* art. 9.

47. *See* XIANFA, art. 134 (1982).

48. *See generally* XIANFA (1982).

49. CRIM. PROC. L. P.R.C. art. 42.

mind, the laws identify seven categories of admissible evidence: "(1) material evidence and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4) statements and exculpations of criminal suspects or defendants; (5) expert conclusions; (6) records of inquests and examination; and (7) audio-visual materials."[50] It is "strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means."[51] This provision is similar to the intent and interpretation of the U.S. Constitution's 4th and 5th Amendment prohibitions against unreasonable searches and seizures and self-incrimination.[52] Additionally, similar to U.S. legal doctrine, an accused in a Chinese court cannot be convicted solely on his or her own statement of confession without corroborating evidence.[53]

V. APPEALS AND PUNISHMENT

As in any system of justice, there are two possible outcomes: guilty or not guilty. Generally, in the U.S. justice system, only the accused has the right to appeal a conviction. Furthermore, in an acquittal, a prosecutor's appeal would be considered double jeopardy.[54] Upon the conclusion of a trial in China, however, both the accused and the state have the right of appeal.[55] Under Chinese law and beliefs, this concept allows for justice to be served, no matter which side originally prevailed.

If the appeal is made by the accused or his or her representative, there can be no increase in the penalty or punishment, no matter what the finding of the appellate court.[56] In the case of a protest by the procurator, there is no limitation on the imposition of sentence by the appellate court or, if remanded, by the trial court.[57] Generally, a case will be completed — from trial through appeal — in six months.[58]

Depending on the type of crime committed, and sometimes the person who allegedly committed it, a criminal trial may begin at any of the four levels of the people's courts.[59] The court which hears the appeal is based upon the court from which the appeal is made. An appeal from the Primary

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50. *Id.*
51. *Id.* art. 43.
52. *See* U.S. CONST. amends. IV, V.
53. *See* CRIM. PROC. L. P.R.C. art. 46.
54. *See* U.S. CONST. amend. V.
55. *See* CRIM. PROC. L. P.R.C. art. 180.
56. *See id.* art. 190.
57. *See id.*
58. Interview with Hon. Zhang Jun, Justice of the Supreme People's Court, in Beijing, China (May 15, 1998). *Cf.* CRIM. PROC. L. P.R.C. arts. 92, 125, 142, 207 (setting forth procedural provisions for time limits and discretion of prosecutions).
59. *See* CRIM. PROC. L. P.R.C. ch. 2.

People's Court goes to the Intermediate People's Court of the appropriate prefecture, city, league, or autonomous region. Appeals from the Intermediate People's Court go to the Higher People's Court, and any appeal from the Higher People's Court goes to the Supreme People's Court. However, there is a one-appeal limit, no matter in which court the proceedings began.[60] The time limit for an appeal of a judgment is ten days.[61] Contrary to the U.S. system of appeals, in which the appellate court ordinarily reviews only the application of law, an appellate court of the P.R.C. "shall conduct a complete review of the facts determined and the application of law in the judgment of first instance and shall not be limited by the scope of appeal or protest."[62] Similar to the decision-making authority of a U.S. appellate court, the People's Court of second instance may make its decision in any of the following manners: (1) reject the appeal and affirm the original judgment; (2) revise the judgment; or (3) rescind the original judgment and remand for retrial.[63]

Sentences in the People's Republic of China, in some respects, mirror the current forms of punishment in the United States. Restitution, probation, incarceration, and death are the primary modes of punishment assigned by Chinese courts.[64] In China, there is no plea bargaining.[65] Upon conviction, a sentence is imposed based on the "relevant provisions of the law and in light of the facts and nature of the crime, the circumstance under which the crime is committed and the degree of harmness [sic] done to the society."[66]

In a case in which the person has been found guilty of a minor offense, the person may be exempted from criminal punishment and may, "in light of the specific circumstances surrounding the case, be reprimanded or ordered to make a statement of repentance or formal apology, or to compensate for the losses incurred," while also possibly being subjected to an administrative sanction.[67] Persons convicted of crimes for which the sentence is three years or less may have their sentences suspended if "the offender has truly shown repentance and the granting of suspended sentence will do no harm to the society."[68] This method results in a kind of "sentence bargaining" upon conviction, rather than the American style of plea bargaining before a trial.

Encouraging repentance and accepting it towards a reduced sentence

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60. *See id.* art. 10.
61. *See id.* art. 183.
62. *Id.* art. 186.
63. *See id* art. 189.
64. *See, e.g., id.* arts. 51, 199.
65. Interview with Hon. Zhang Jun, *supra* note 58.
66. FOREIGN AFF. BUREAU, *supra* note 34, at 17-18.
67. *Id.* at 18.
68. *Id.*

reflects the Chinese philosophy of the importance of society over the individual. A criminal is of no use to society. A repentant criminal, one who has been reformed, can once again become a productive member of society. The primary purpose of punishment in China is reform.[69] Reform is encouraged because it strengthens the community and creates a constructive society. Preference for reform is the foundation of the Chinese system of punishment, which includes the *Lao gai* and *Lao jiao*, prisons for reform and for re-education.[70]

Death as punishment is an option for a number of different crimes which are considered the most heinous in China. A unique aspect of the death penalty involves a capital punishment review. If the immediate execution of a criminal who has been sentenced to capital punishment is not deemed necessary, a two-year suspension of execution may be rendered at the time of adjudicating the capital punishment, and the criminal in question will be subjected to reform through labor and his performance will be watched for later decision.[71] In such a situation, the death penalty is postponed for two years and an attempt at reform is made. At the conclusion of two years the criminal is re-evaluated to determine if sufficient reform has occurred. If reformation is observed, the death penalty will be set aside.[72]

Throughout this legal process, the participation of lawyers is widespread. The procurator is the Chinese representative in criminal proceedings.[73] Under the auspices of the office of the Procurator-General, the procurator may lead the investigation, authorize an arrest, and conduct the prosecution of an accused.[74] Also, the accused may choose to be represented by defense counsel. As previously noted, if the accused cannot afford a lawyer, one may be provided by the State.

VI. FUTURE OF THE LEGAL SYSTEM IN CHINA

The concept of a "lawyer" in China is quite different from that found in the United States. A lawyer in the United States will generally have a four-year baccalaureate degree, a three-year law degree, and will have passed a bar exam. In China, no comparable preparation is required. A typical lawyer must at least be a high school graduate and may have taken some college law courses, or may have even earned a baccalaureate degree.

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69. Interview with Mrs. Wang Zhu Qian, *supra* note 19. *See also* CRIM. PROC. L. P.R.C. art. 221.

70. For a brief definition of Lao gai and Lao jiao, see A GLOSSARY OF POLITICAL TERMS OF THE PEOPLE'S REPUBLIC OF CHINA 223-24 (Mary Lok trans., Kwok-sing Li 1995).

71. *See* FOREIGN AFF. BUREAU, *supra* note 34, at 15.

72. *See id.*

73. *See* CRIM. PROC. L. P.R.C. art. 8.

74. *See id.* art. 3.

The one prerequisite to the practice of law is to pass a civil service exam for the law. There are no mandated educational requirements for the practice of law. Similarly, judges need only take a civil service exam to enter the judiciary, though this exam differs from that taken by lawyers.[75] Passage of the test is no guarantee that the applicant will become a judge. To become a judge, the applicant is also required to hold a college degree in law or to have legal training, and to have at least two years of employment.[76] Final selection will still depend on the ultimate evaluation of the applicants to determine the most qualified.[77]

Most countries require some sort of specialized education before a person may practice law. As the P.R.C. has become more involved internationally, it first recognized the need for more lawyers, and second, acknowledged the possibility that its legal profession may need reform. President Jiang Zemin addressed the notion of improvement in the legal system by stating:

> The smooth progress of the undertakings of the Party and the state inevitably requires that there must be laws to go by, that the laws must be observed and strictly enforced, and that law-breakers must be prosecuted. We shall strengthen legislation, improve its quality and form a socialist legal system with Chinese characteristics by the year 2010. To safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individual nor organization shall have the privilege to overstep it. All government organs must perform their official duties according to law and guarantee the citizens' rights in real earnest by instituting a system of responsibility for law enforcement and a system of assessment and examination. We shall promote the reform of judicial affairs to ensure institutionally that the judicial organs are in a position to exercise adjudicative and procuratorial powers independently and fairly according to law, and establish a system for investigating and prosecuting anyone who is held responsible for unjust or misjudged cases. We shall improve the ranks of law-enforcing and judicial personnel. We shall educate the populace about the law to make them more aware of its importance. In particular, we shall enhance the leading cadres' awareness of the importance of the legal system and their ability

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75. Interview with Hon. Zhang Jun, *supra* note 58; interview with Wu Mingde, Deputy Director of the Department of Lawyers, P.R.C. Ministry of Justice, in Beijing, China (May 12, 1998).

76. *See* FOREIGN AFF. BUREAU, *supra* note 34, at 7.

77. *See id.*

> to perform their duties according to law. We must closely integrate the improvement of the legal system with the promotion of cultural and ethical progress and make sure that they advance synchronously.[78]

This acknowledgment has led to an examination of the role of the lawyer and a study of the preparation for the practice of law. Tsinghua University School of Law in Beijing[79] recently hosted the *China USA Conference on the Reform and Development of Legal Education*.[80] Law professors, judges, procurators, lawyers, and other interested parties met to discuss and evaluate different educational models for persons wishing to enter the legal profession. Discussions of methodology, purpose, and need dominated the conference. The dialogue which ensued is only the beginning of a thorough analysis of the legal profession and the possibility of creating a new national standard for legal education.

Exchanges, such as the legal education conference and student study tours, will continue to provide a means of exploration of new and different ideas. Whether or when reform occurs in the Chinese legal system will depend on the leaders and their commitment to improvement. Leaders such as President Jiang Zemin, Premier Zhu Rongji, and Mrs. Wang Zhu Qian have expressed their commitment to finding the best alternatives for the People's Republic of China and to working towards the implementation of these alternatives. Their keen perceptions, and those of others within the National People's Congress will be the keys to the development of Chinese justice in the new millennium.

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78. Zemin, *supra* note 10, at 34-35.

79. The internet homepage for Tsinghua University School of Law can be found at <http://www.tsinghua.edu.cn./docse/yxsz/flx/flx.htm/>.

80. Conference held May 8, 1998, at Tsinghua University School of Law, Beijing, China.

SHOULD GERMANY STOP WORRYING AND LOVE THE OCTOPUS? FREEDOM OF RELIGION AND THE CHURCH OF SCIENTOLOGY IN GERMANY AND THE UNITED STATES

Religion hides many mischiefs from suspicion.[1]

I. INTRODUCTION

Recently the City of Los Angeles dedicated one of its streets to the founder of the Church of Scientology, renaming it "L. Ron Hubbard Way."[2] Several months prior to the ceremony, the Superior Administrative Court of Münster, Germany held that Federal Minister of Labor Norbert Blüm was legally permitted to continue to refer to Scientology as a "giant octopus" and a "contemptuous cartel of oppression."[3] These incidents indicate the disparity between the way that the Church of Scientology is treated in the United States and the treatment it receives in Germany.[4] Notably, while Scientology has been recognized as a religion in the United States,[5] in Germany it has struggled for acceptance and, by its own account, equality under the law.[6] The issue of Germany's treatment of the Church of Scientology has reached the upper echelons of the United States

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1. MARLOWE, THE JEW OF MALTA, Act 1, scene 2.

2. Formerly known as Berendo Street, the street links Sunset Boulevard with Fountain Avenue in the Hollywood area. At the ceremony, the city council president praised the "humanitarian works" Hubbard has instituted that are "helping to eradicate illiteracy, drug abuse and criminality" in the city. *Los Angeles Street Named for Scientologist Founder,* DEUTSCHE PRESSE-AGENTUR, Apr. 6, 1997, *available in* LEXIS, News Library, DPA File.

3. The quoted language is translated from the German "*Riesenkrake*" and "*menschenverachtendes Kartell der Unterdrückung.*" Entscheidungen des Oberverwaltungsgerichts [OVG] [Administrative Court of Appeals] Münster, 5 B 993/95 (1996), (visited Oct. 21, 1997) <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/ovg0696.html>.

4. *See Germany, America and Scientology*, WASH. POST, Feb. 1, 1997, at A20. For general reports on the Germany-Scientology controversy, see also *All Things Considered* (NPR radio broadcast, Mar. 12, 1997), *available in* 1997 WL 12833039; Rick Atkinson, *Germany, Church of Scientology Feuding in Print and Political Arena,* WASH. POST, Jan. 30, 1995, at A11; Richard Cohen, *Germany's Odd Obsession with Scientology,* WASH. POST, Nov. 15, 1996, at A31; Alan Cowell, *The Test of German Tolerance,* N.Y. TIMES, Sept. 15, 1996, § 4, at 6; Matt Johanson, *Germany vs. Scientology*, GERMAN LIFE, Nov. 30, 1997, *available in* 1997 WL 11624340; Craig R. Whitney, *Scientology and Its German Foes: A Bitter Conflict,* N.Y.TIMES, Nov. 7, 1994, at A12.

5. The Internal Revenue Service recognized Scientology as a "charitable and religious organization" in 1993. Stephen Labaton, *Scientologists Granted Tax Exemption by the U.S.*, N.Y. TIMES, Oct. 14, 1993, at A1.

6. *See* sources cited *supra* note 4. *See also, e.g.,* Clive Freeman, *Scientologists Stage "Religious Freedom" Protest March in Berlin*, DEUTSCHE PRESSE-AGENTUR, Oct. 27, 1997, *available in* LEXIS, News Library, DPA File.

government,[7] and it has become the basis for a dispute between the two nations.[8] The controversy surrounding Germany's treatment of Scientology is perhaps best illustrated by an "open letter" to German Chancellor Helmut Kohl that appeared as a full-page advertisement in the *International Herald Tribune* on January 9, 1997.[9]

The letter compared the current treatment of Scientologists in Germany to that of the Jews in the 1930s[10] and was signed by numerous American entertainment-industry luminaries, none of whom claim to be Scientologists.[11] The advertisement condemned Germany based on a general

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7. *See* Jeffrey Ressner, *For Bill, Another Satisfied Customer*, TIME, Sept. 22, 1997, at 20 *and L. Ron Clinton*, NEW REPUBLIC, Oct. 13, 1997, at 12 (reporting on conversation President Clinton had with cinema star and noted Scientologist John Travolta about the Scientology situation in Germany). *See also* U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (Feb. 1997). For evidence of increasing State Department attention to the matter, compare GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 with U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1995 (Feb. 1996), U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1994 (Feb. 1995), and U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1993 (Feb. 1994).

8. *See U.S. Attacks German Position on Scientology*, DEUTSCHE PRESSE-AGENTUR, Jan. 27, 1997, *available in* LEXIS, News Library, DPA File; *German Minister Slams U.S. Trade Sanctions Threat*, AGENCE FR. PRESSE, Feb. 18, 1997, *available in* LEXIS, News Library, AFP File (reporting on a meeting between U.S. Secretary of State Madeline Albright and German Foreign Minister Klaus Kinkel in which they disagreed about Germany's treatment of Scientology).

9. The ad itself helped to stoke the controversy. *See, e.g.*, Alan Cowell, *Germany Says it Will Press on with Scientology Investigations*, N.Y. TIMES, Feb. 1, 1997, § 1, at 15.

10. The letter stated:

> "In the 1930s, it was the Jews . . . . Today it is the Scientologists. The issue is not whether one approves or disapproves of the teachings of Scientology. Organized governmental discrimination against any group on the basis of its beliefs is abhorrent even where the majority disagree with those beliefs."

Germany is Focus of Scientology Dispute, CHRISTIAN CENTURY, Feb. 5, 1997, at 123 (quoting the letter).

11. Hollywood lawyer Bertram Fields conceived the advertisement and wrote the letter. He has defended the comparison by pointing out that it refers to Germany in the pre-Holocaust 1930s. *See* Frank Rich, *Show Me the Money*, N.Y. TIMES, Jan. 25, 1997, § 1, at 23. Some observers have suggested ulterior motives for the letter: "[W]ere any of the letter's signatories to actually look into complaints against Scientology, they might risk forgoing business with two of the [movie] industry's most bankable stars." *Id.* (referring to Scientologists John Travolta and Tom Cruise). The comparison provoked angry responses from German and Jewish leaders, as had previous Scientology-placed advertisements that made the same comparison. *See* Abraham Foxman, National Director of the Anti-Defamation League, Letter to the Editor, N.Y. TIMES, Sept. 29, 1994, at A24; Cowell, *supra* note 9 (discussing German reactions to Scientology, the advertisements, and criticism from the U.S. government).

notion of freedom from government discrimination on the basis of belief.[12] What it ignored, however, is the controversy surrounding the Church's beliefs and tactics in the United States — despite its "official" religious status — and the fundamental differences between German and American concepts of freedom.

The Germany-Scientology controversy merits scrutiny because it illustrates the differences between German and American freedom of religion jurisprudence and the underlying concepts of liberty on which these views are based. Part II of this Note briefly examines the origins and operations of the Church of Scientology. Part III surveys German and American protections of religious liberty. Part IV discusses the degree to which each country's concept of freedom of religion has been extended to the Church of Scientology and the justifications for those policies. Part V summarizes the differences between the countries highlighted by their treatment of the Church and concludes that acknowledging those differences is a prerequisite for productive German-American debate on the controversy.

II. THE CHURCH OF SCIENTOLOGY

A. *L. Ron Hubbard and "Dianetics"*

Scientology originated in the science fiction writing of its founder, Lafayette Ronald ("L. Ron") Hubbard. Hubbard was born in Tilden, Nebraska in 1911 and died in Creston, California in 1986.[13] Beyond these facts, Hubbard's biography has been widely disputed. The official Church version, based on Hubbard's own account, describes him as a heroic and altruistic Renaissance man.[14] Hubbard's critics, however, have systematically debunked much of the myth-making surrounding his life.[15] By any

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12. *See Germany is Focus of Scientology Dispute*, *supra* note 10, at 123. Advertisements purchased by the Church began appearing in the *Washington Post* and the *New York Times* in 1994 and 1995, first touting the rise of neo-Nazi extremism in Germany and then making the direct comparison between Nazi treatment of Jews and contemporary German treatment of Scientologists. *See* Josef Joffe, *Germany vs. the Scientologists*, N.Y. REV. BOOKS, Apr. 24, 1997. For an example of an advertisement that ran in the fall of 1996, see *Practicing Religious Intolerance* (advertisement), N.Y. TIMES, Oct. 17, 1996, at A17.

13. *See* Robert Lindsey, *L. Ron Hubbard Dies of Stroke; Founder of Church of Scientology*, N.Y. TIMES, Jan. 29, 1986, at A21.

14. *See* CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 25-52 (1993). *See also*, Heber Jentzsch, *The Principles on Which Scientology is Based*, GLOBE & MAIL (Toronto), Jan. 27, 1998, at A19 (describing Hubbard's life).

15. *See* BENT CORYDON & L. RON HUBBARD, JR., L. RON HUBBARD: MESSIAH OR MADMAN? 219-29 (1987). *See also* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 89-90 (1997) (noting the disagreement about Hubbard's biography). Incidentally, the Church's

account, Hubbard was a prolific writer, and in the 1930s and 1940s much of his work appeared in the "pulp" science fiction magazines that flourished in those years. The magazine *Astounding Science Fiction* introduced Hubbard's concept of "Dianetics" to the world,[16] and Hubbard's book *Dianetics: the Modern Science of Mental Health*[17] followed soon thereafter.

Dianetics represents the quasi-scientific formulation of Hubbard's elaborate theories on the human mind, and it forms the basis for Scientology.[18] Hubbard's theory emphasizes the dual nature of the human mind — the "analytical" and the "reactive."[19] According to Hubbard, in its unimpaired or "clear" state, the analytical mind is a source of limitless power and the essence of human perfection. The reactive mind, however, is the source of all that is commonly viewed as human weakness, confusion, and folly.[20]

Hubbard believed that traumatic events leave imprints on the human psyche called "engrams." Dianetics defines an engram as a mental snapshot of all sensory perception gathered at the time of the negative experience; when later events trigger a recall of that initial experience, the engram releases pent up emotional responses that impair rational thought.[21] The way

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account of his discovery of Dianetics, as described in *What is Scientology?*, corresponds nicely with the archetypal myth of the hero as it is presented by comparative mythologist Joseph Campbell in *The Hero with a Thousand Faces*: The hero ventures forth into the world of the unknown — Hubbard the brave young adventurer goes off to war; the hero encounters seemingly insurmountable obstacles there — Hubbard is crippled and blinded in battle. The hero overcomes his limitations and is transformed — Hubbard synthesizes all he has learned about the mind, eastern spirituality, and his "experiences among men" and is able to harness the power of his unimpaired analytical mind to heal himself. The hero returns to his community and bestows on it a boon that will transform their lives by showing them how to overcome their limitations — Hubbard's article on Dianetics is published in *Astounding Science Fiction*, and he becomes the center of a new mythology for his followers. *See* CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 42-47; JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (1946).

16. Hubbard's article on Dianetics appeared in the May 1950 issue of *Astounding Science Fiction*. *See* ROY WALLIS, THE ROAD TO TOTAL FREEDOM: A SOCIOLOGICAL ANALYSIS OF SCIENTOLOGY 24 (1977).

17. L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950).

18. Hubbard described his new "science" as "a milestone for Man comparable to his discovery of fire and superior to his inventions of the wheel and the arch . . . The hidden source of all psychosomatic ills and human aberration has been discovered and skills have been developed for their invariable cure." RUSSELL MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD 155 (1987). *See generally* HUBBARD, *supra* note 17.

19. Some observers have described Dianetics as a kind of "lay psychotherapy," with the concepts of the analytical and reactive mind corresponding to the conscious and unconscious mind. *See, e.g.*, THE OXFORD DICTIONARY OF WORLD RELIGIONS 869 (John Bowker ed., 1997).

20. *See* L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1992).

21. *See id.* at 91.

to get clear — to unlock the unlimited potential of the analytical mind — is to remove the engrams.[22] The way to remove the engrams is to relive the traumatic experiences that created them in what is called an "audit."[23] In an auditing session, the subject, or "preclear" in Scientology parlance, undergoes a hypnotic confessional therapy in which the engram is eliminated by reliving the corresponding trauma.[24]

Dianetics sold quickly,[25] and Dianetics training centers began springing up around the United States.[26] Its popularity can be attributed to two related characteristics that stem from the proposed dual nature of the human mind. First, with the reactive mind concept, Dianetics provides a convenient explanation for human failure; any human error or perceived inadequacy can be attributed to the external cause of a traumatic event and the ensuing engram.[27] Second, Dianetics instills hope in the perfectibility of the individual and, by extension, of humanity, by asserting that all human beings

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22. *See* WALLIS, *supra* note 16, at 26

23. *Id.* at 28-31.

24. Sociologist Roy Wallis has noted parallels between auditing and "abreaction therapy," in which patients are guided through their own "reliving" of a traumatic memory. WALLIS, *supra* note 16, at 31-38. Heber Jentzsch, the current president of the Church of Scientology International, has likened auditing to replaying a mental "videotape" of the traumatic event in which "everything was recorded." *All Things Considered, supra* note 4. In a letter to the Toronto *Globe & Mail* responding to criticism of the Church, Jentzsch described auditing in greater detail:

> The primary means by which Scientology's basic truths are applied to the rehabilitation of the human spirit is called 'auditing.' It is the central practice of Scientology. . . .
>
> One could imagine something that has been troubling all ones' life–a feeling or attitude or experience. Then one could imagine sitting with an auditor and being asked an exact question, the right question that enables one to suddenly, instantly, see the truth of this situation, the real source of it. This is what auditing is, and the result is revelatory: tremendous relief, understanding, a sense of freedom, the ability to see everything more clearly, an increased awareness.

Jentzsch, *supra* note 14. Discussing Scientology's goal to "find the earliest engram and erase it and then proceed to erase all other engrams," Josef Joffe noted that "[d]isaffected Freudians might tell you a similar tale; it is called 'interminable analysis.'" Joffe, *supra* note 12.

25. The book was immediately popular among science-fiction fans who "were buying the book and auditing their friends, who then rushed out to buy the book so they could audit *their* friends." MILLER, *supra* note 18, at 159.

26. *See id.* at 159-60.

27. "[Dianetics] offered a rationale for failure in social mobility and in social interaction. It provided an explanation in terms of traumatic incidents in which the individual had been unwittingly involved, and thereby relieved him of responsibility for his failure." WALLIS, *supra* note 16, at 65.

possess a supercharged analytical mind.[28] When properly controlled, the mind is capable of "limitless memory,"[29] of curing "sinusitis, allergies, some heart trouble, 'bizarre' aches and pains, poor eyesight, arthritis, etc.,"[30] and of decreasing reaction time and maintaining a youthful appearance well into old age.[31]

B. *The Emergence of "Scientology"*

Hubbard made no claim that Dianetics was a religion.[32] He presented the aforementioned concepts of Dianetics as proven scientific facts,[33] underscoring the secular nature of the theory. As interest in Dianetics spread, however, Hubbard elaborated on the doctrine, renamed it "Scientology," and presented it as a new religion.[34] Hubbard began lecturing on Scientology as early as 1952, and the first Churches of Scientology were founded soon thereafter.[35] Many critics of Scientology maintain that Hubbard's decision to "go religious" was motivated by his lust for the power and financial profit to be gained from controlling the growing Dianetics movement.[36] Indeed, Hubbard is frequently quoted as having said that "[i]f a man really wanted to make a million dollars, the best way to do it would be to start his own religion."[37] Regardless of his motive, Hubbard

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28. *Id.*

> The theory of Dianetics assured its follower that his 'true self', [sic] his conception of what he believed he was really capable of achieving, was indeed as he conceived it. It reaffirmed this idealization of self and promised a means of eliminating the barriers to its fulfilment, of eradicating the gap between his 'true self' and the identity that was typically confirmed in social interaction.

Id.

29. Horwitz, *supra* note 15, at 91.

30. *Id.*

31. *See id.*

32. *See* HARRIET WHITEHEAD, RENUNCIATION AND REFORMATION: A STUDY OF CONVERSION IN AN AMERICAN SECT 45 (1987).

33. Russell Miller notes that Hubbard's theory on Dianetics was presented as a "dissertation" based on "years of diligent research and study," and that "his usual racy prose was replaced by a sober, textbook style" reflecting the approach "of an engineer seeking practical, scientific solutions to the mysteries of the human mind." MILLER, *supra* note 18, at 153.

34. *See* WHITEHEAD, *supra* note 32, at 45. For a detailed discussion of the growth of Dianetics into Scientology, see *id.* at 45-77.

35. *See* MILLER, *supra* note 18, at 220-21.

36. *Id. But see* Horwitz, *supra* note 15, at 94-95 (listing factors weighing against the notion that Hubbard's decision to form a religion was motivated by sheer lust for wealth and power).

37. MILLER, *supra* note 18, at 148. *See also* Richard Leiby, *Scientology Fiction; The Church's War Against Its Critics-and Truth*, WASH. POST, Dec. 25, 1994, at C1. (discussing the vigor with which the Church of Scientology denies Hubbard ever made the comment).

devised Scientology as a religion[38] with an intricate system of metaphysical beliefs and goals, from which outsiders can discern a few basic tenets.[39]

C. *The Tenets and Goals of Scientology*

Scientology encompasses the theory of Dianetics and incorporates its aims of clearing mankind of its engrams, thereby creating a world without crime, insanity, or war and teeming with happy and fulfilled people.[40] It holds that human beings are essentially immortal spirits called "Thetans," who, according to the Scientology story of creation, were banished to earth and implanted in giant volcanoes millions of years ago by an evil galactic overlord named Xenu.[41] After undergoing enough auditing[42] to remove his engrams,[43] the Scientologist is "clear" and enters the higher spiritual level of an "Operating Thetan."[44] At this stage, Scientologists are deemed prepared to view the most sacred of Scientology texts, including the creation story.[45] Scientologists take courses and become "auditors" as they advance

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38. For Scientology's variations on traditional religious trappings and practices, see L. RON HUBBARD, CEREMONIES OF THE FOUNDING CHURCH OF SCIENTOLOGY 9-54 (1959) and Horwitz, *supra* note 15, at 101. *See also* CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 168 (describing Scientology sermons).

39. Scientology's belief system has been described as "encyclopedic and labrinthyne," and it combines elements of various philosophical, religious, and psychological theories. *See, e.g.*, WALLIS, *supra* note 16, at 4-5. *See also* WHITEHEAD, *supra* note 32, at 168.

40. *See* OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 19.

> FOUNDED on principles of the mind and life discovered by L. Ron Hubbard, Scientology defies easy comparison or categorization. It follows a religious tradition that is at least 10,000 years old, yet what it ultimately represents is new. . . . Scientology comprises a body of knowledge that extends from certain fundamental truths. Prime among these are that man is a spiritual being; that his experience extends well beyond a single lifetime; and that his capabilities are unlimited, even if not currently realized.

Jentzsch, *supra* note 14.

41. *See* WALLIS, *supra* note 16, at 103-04; Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 1991, at 50. Regarding this aspect of Scientology, comparisons are often made with some of the "stranger" teachings of mainstream religions, such as *The Bible*'s creation story and the Eucharist. *Leaders: Religion, good and bad*, ECONOMIST, Apr. 11, 1998, at 14. *See also* Jentzsch, *supra* note 14.

42. Auditing is conducted with the aid of an "Electropsychometer" or "E-Meter," which is similar to a lie detector. When a person is being audited, he holds the E-Meter's electrodes and the auditor detects engrams based on the electric current passing through the subject's body. *See* CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 81.

43. Because each Thetan has been around for billions of years and has seen countless reincarnations into human form, the number of engrams on a given human mind (and the amount of auditing a recruit requires) is potentially limitless. *See* WALLIS, *supra* note 16, at 104.

44. CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 150-51.

45. *See id.* at 461.

toward the upper levels of Scientology spirituality. The training can be expensive, and payments for Scientology courses are regarded as donations to the church.[46] Because church members in effect purchase their spiritual advancement, many detractors of Scientology claim it is really a business and is thus undeserving of the protections the Constitution affords religions.

III. FREEDOM OF RELIGION IN THE UNITED STATES AND GERMANY

A. *Freedom of Religion in the United States*

1. *Introduction to the Religion Clauses*

Religion played a critical role in the formation of the American colonies and pervaded the lives of American colonists.[47] Generally speaking, the framers of the Constitution took for granted that religious morality and knowledge were prerequisites for a smooth-functioning, democratic republic.[48] As a result, religion's place in the Bill of Rights was hardly controversial.[49]

The First Amendment's religion clauses,[50] the Free Exercise Clause and the Establishment Clause, are interrelated and reflect two basic ideas: (1) that religion is a matter of individual choice,[51] and (2) "that both religion

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46. *See id.* at 246, 450. *See also infra* notes 243-44 and accompanying text discussing the Supreme Court's ruling in *Hernandez v. Commissioner*.

47. For a detailed discussion of the formation of the American colonies against the background of the British Reformation, see SIDNEY AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 84-134 (1972).

48. That is, for a free republic to work, the citizenry must be virtuous, and religion gives it a moral underpinning. *See* LEO PFEFFER, CHURCH STATE AND FREEDOM 3-30 (1967) [hereinafter PFEFFER, CHURCH].

49. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 16-19 (1990). For a discussion of the major influences on the drafters of the Bill of Rights, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4 (2d ed. 1988).

50. The First Amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

51. Constitutional scholar Laurence Tribe identifies this as the principle of "voluntarism":

> The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief. It prohibited not only direct compulsion but also any indirect coercion which might result from subtle discrimination; hence it was offended by any burden based specifically on one's religion. . . . The establishment clause . . . can be understood as designed in part to assure that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state.

and government function best if each remains independent of the other."[52] Thus, together the religion clauses aim to promote religious life by restricting government involvement in religion.[53] However, as the government's sphere of influence expands, conflicts with pervasive religious life are inevitable.[54] As a result, the meaning of the religion clauses has evolved, and each clause has spawned an observable system of jurisprudence in the rulings of the Supreme Court.[55]

The Establishment Clause has developed into a general prohibition on government aid to religion.[56] The Court applies a three-part test to determine

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TRIBE, *supra* note 49, § 14-3 at 1160.

52. *Id.* § 14-3, at 1161 (characterizing the quoted language as Madison's view). This, according to Tribe, exemplifies the principle of "separatism." *See also* PFEFFER, CHURCH, *supra* note 48, at 70, (noting that "[r]eligious liberty is generally most secure where church and state are most completely separated. Conversely, religious liberty suffers where the state seeks to make the church an engine to further national policy, or the church seeks to utilize the compulsive arm of the state to further religious interests.") However, Professor Tribe also notes:

> [Despite the popularity of viewing] both the free exercise clause and the establishment clause as expressions of voluntarism and separatism[,] . . . a growing body of evidence suggests that the Framers principally intended the establishment clause to perform two functions: to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions.

TRIBE, *supra* note 49, § 14-3, at 1161.

53. "Both clauses apply to state as well as federal action through the incorporation of their principles into the fourteenth amendment due process clause." TRIBE, *supra* note 49, § 14-2, at 1156. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the Free Exercise Clause applies to the states); Everson v. Board of Education, 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states).

54. *See* Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L. J. 149, 152 (1990) (noting that in the 18th and 19th centuries American social life was dominated by religion and relatively unaffected by government, whereas today those roles have been juxtaposed, with government taking on an increasingly prominent role in the lives of Americans while the role of religion has dwindled, and emphasizing the flexibility the years have drawn out of the religion clauses as America has grown from a Protestant Christian nation into a nation of plural religions).

55. Present in both streams of religion clause jurisprudence is a core notion that the state is unfit to rule on matters of religion. *See* Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 21, 25 (James E. Wood, Jr. & Derek Davis eds., 1993). Therefore, the state must remain "neutral" toward religion. This principle of neutrality requires "that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner." 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.1, at 446 (2d ed. 1992). *See also* TRIBE, *supra* note 49, § 14-7, at 1188-1201 (discussing the neutrality principle).

56. This view is countered by a strongly-held dissenting view that government encouragement of religion as a secular good is constitutionally permissible. For example, in his dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Rehnquist stated:

the constitutionality of a state action challenged under the Establishment Clause: In order for state aid to religion to be constitutional, the state action must (1) have a secular purpose, (2) have a primary secular effect, and (3) not cause excessive government entanglement in religion.[57] In recent years, Establishment Clause cases have spawned modifications of this test focusing on whether the state action *endorses* a particular religion,[58] or *coerces* participation in religious activity.[59]

In free exercise cases, the Court has developed a framework for balancing the interests of the state against the individual's liberty of religious activity: To have a colorable free exercise claim, the plaintiff must (1) have a sincerely held religious belief that (2) is burdened by a government requirement.[60] Once these elements are met, the state must show that its requirement (3) is aimed at an important government interest, the pursuit of which would (4) be hindered if the exemption were granted.[61] Whether the exemption is granted often depends on the degree of scrutiny the Court applies in ascertaining the importance of the government interest and how closely the requirement is tailored to advance that interest.[62]

> [The historical evidence shows] that the Establishment Clause . . . forbade establishment of a national religion, and forbade preference among religious sects or denominations . . . . [It] did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Id. at 106 (Rehnquist, J., dissenting).

57. The Court laid out the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

58. *See* Wallace v. Jaffree, 472 U.S. at 38 (regarding an Alabama statute authorizing a one-minute period of silence in all public schools for "meditation or voluntary prayer"); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that a display of a creche impermissibly endorsed Christianity while displaying a menorah next to a Christmas tree and a sign saluting liberty outside the city-county building did not).

59. *See* Lee v. Weisman, 505 U.S. 577 (1992) (involving the practice of public school officials inviting clergy to offer invocation and benediction prayers at graduation ceremonies).

60. *See* TRIBE, *supra* note 49, § 14-12, at 1242-51.

61. *See id.* The Court has used various formulations of this basic four-step process. *See id.* § 14-13, at 1251-75 (tracing the development of the state's required showing from 1939 to 1987).

62. Under strict scrutiny, the state must show that the interest advanced by the requirement is *compelling* and that the requirement is the *least restrictive means available* to advance that interest, while under moderate scrutiny the state need only show its interest is *substantial* and that the requirement is *rationally related* to it. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (describing standards for strict and moderate scrutiny). After *Employment Division v. Smith*, 494 U.S. 872 (1990) (declining

Thus, in contrast to Establishment Clause cases, which have typically involved challenges to government *benefits* conferred upon religious groups (or upon religion itself), free exercise claims are typically brought by individuals seeking to avoid state-imposed *burdens* on religious activity. However, the distinction between burdens and benefits is not always clear, and the Supreme Court has tried to outline a "zone of permissible accommodation" of religion where the demands of the two religion clauses seem to conflict.[63]

2. *The Supreme Court's Conception of Religion*

Because it does not define the word "religion," the Constitution[64] has

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to apply strict scrutiny in a case involving the use of peyote for religious purposes) and *Boerne v. Flores*, 521 U.S. 507 (1997) (declaring unconstitutional the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb et.seq., which would have required courts to apply strict scrutiny to claims in which generally applicable, religiously-neutral laws substantially burdened the free exercise of religion), the only free exercise claims that will receive strict scrutiny are those that (1) challenge a law that is not religiously neutral and generally applied, *see Smith*, 494 U.S. at 877-78, (2) are paired with another constitutional claim, *see id.* at 881, or (3) arise in the context of an in-place system of institutionalized religious exemptions. *See id.* at 884. For a case involving a law that is not neutral toward religion, see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 580 U.S. 520 (1993), in which the Court invalidated a law restricting animal slaughter because the law targeted practitioners of Santeria.

63. TRIBE, *supra* note 49, § 14-4, at 1166-69. The area of permissible accommodation lies between Establishment Clause-barred aid to religion and religion-based exemptions required by the Free Exercise Clause. See, for example, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), in which a provision exempting religious organizations from the federal statute prohibiting religion-based employment discrimination was upheld under a rational-basis analysis. *See also Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which a state law required that Sabbath observers be allowed to miss work "no matter what burden or inconvenience [it] impose[d] on the employer or fellow workers." *Id.* at 708-09. The court held that this law had a "primary effect that impermissibly advance[d] a particular religious practice" and thus violated the Establishment Clause. *Id.* at 710.

64. One commentator has specifically recognized the Framers' wisdom in not defining "religion" in the Constitution:

> To define the term would have placed a permanent imprimatur upon only those forms of faith and belief that conformed to their definition. The [F]ramers instead chose to leave the term undefined, thereby protecting a diversity of beliefs, not merely the traditional ones, from undue advancement or prohibition of expression by government. This guarantee of freedom of religion, the centerpiece of American liberties, has served to protect all religions, old and new, against governmental preference, intrusion, and harassment.

Derek Davis, *The Courts and the Constitutional Meaning of "Religion": A History and Critique, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 89, 90 (James E. Wood, Jr. & Derek Davis, eds. 1993). Furthermore, Davis argues that a constitutional definition of religion would be counterproductive to the aims

allowed the meaning of religion clauses to evolve with changes in society. This omission has left the courts with broad discretion in determining when First Amendment protections of religion may be invoked.[65] The evolution of the Supreme Court's concept of religion has been both a reflection of and an impetus to[66] the "radical diversity" that characterizes the current state of religion in America.[67] Early Supreme Court interpretations of the religion clauses illustrate that in late eighteenth and early nineteenth century America, "religion" essentially meant the "relationship between a person and some Supreme Being"[68] and that First Amendment protection did not extend far beyond Protestant Christianity.[69] Practices of minority religious groups that fell outside the bounds of the prevailing public morality were often denied free-exercise protection, and the Court's view of religion remained focused on the Christian god, "God."[70] The view of religion expressed in these early rulings may be characterized as a "substantive" definition of religion because it focused on the content of the beliefs.[71] The Supreme Court's shift away from a substantive view of religion came in *United States v. Ballard,*[72] in

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expressed in the religion clauses themselves, stating that "any definition would arguably have the effect of dictating to religions, past and present, what they must be, and would therefore violate the Free Exercise Clause[,]" and that "because defining religion would approve of or support religions that conform to the definition in preference to those that do not, the Establishment Clause is arguably contravened as well." *Id.* at 91.

65. *See id.* at 90-91.

66. *See id.* at 92.

67. AHLSTROM, *supra* note 47, at xiv. *See also id.* at 1091-94 (discussing developments in American religious life in the 1960s).

68. *See* Davis, *supra* note 64, at 92. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (in ruling that a Mormon's bigamy was not protected under the Free Exercise Clause, the Court considered the views of the Framers, which corresponded to the prevailing view at the time, and concluded that religion referred to man's relationship with a supreme being).

69. *See* Davis, *supra* note 64, at 93. However, as America experienced large increases in immigration from south and central Europe, it became less a Protestant nation and more a nation of plural religions that included large numbers of Roman Catholics, Jews, and Orthodox Christians. The shift in European immigration "was augmented by migrations across the Mexican-American border and by an influx of Chinese and Japanese along the Pacific Coast," which in turn added to the religious diversity of the United States. EDWIN GAUSTAD, A RELIGIOUS HISTORY OF AMERICA 178 (1990).

70. In an 1890 ruling upholding an Idaho statute prohibiting the suffrage of bigamists and polygamists, the Supreme Court clearly expressed its understanding of religion, noting that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333, 342 (1890). The Court held that the conduct of the plaintiff, unlike his beliefs, was not protected by the First Amendment, stating that "[c]rime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" *Id.* at 345.

71. *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060-63 (1978).

72. United States v. Ballard, 322 U.S. 78 (1944).

which the Court held that no inquiry could be made into the validity of an individual's religious beliefs.[73] In the *Ballard* dissenting opinion, Justice Robert H. Jackson noted that the price of the Constitution's broad protection of religious liberty "is that [Americans] must put up with, and even pay for, a good deal of rubbish."[74]

The next major shift in judicial conceptions of religion was marked by the emergence of the "functional" definition of religion, which focuses on the role of the avowed belief in the life of the individual rather than on the content of the belief itself.[75] The first indication of this shift to a functional definition of religion has been attributed to an opinion written by Judge Augustus Hand.[76] In a case involving the conscientious objector exemption to the Selective Training and Service Act of 1940, Justice Hand proclaimed:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men . . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets . . . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[77]

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73. The leader of the "I Am" movement, Guy W. Ballard, was charged with mail fraud in connection with his proselytizing for the movement through the postal system. The Supreme Court held that the district court was correct in precluding the jury from considering the credibility of Ballard's doctrines, and its opinion widened the scope of religious clause protection:

> [Freedom of religion] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Id. at 86-87.

74. *Id.* at 95 (Jackson, J., dissenting). Justice Jackson's comment illustrates that in a pluralistic society, individuals will inevitably disapprove of, or doubt the authenticity of, some religions but must tolerate them to ensure that everyone enjoys the same freedom. That is to say, determining what is a religion and what is rubbish is a personal, subjective choice, but the freedom to choose whether to practice a particular religion, free of compulsion from the state, is unequivocally guaranteed by the religion clauses.

75. *See* Note, *supra* note 71, at 1061.

76. Derek Davis described Judge Hand's opinion in *Kauten* as a "landmark" in freedom of religion jurisprudence "because it was the first to offer a functional definition of religion." Davis, *supra* note 64, at 96.

77. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

The functional view acknowledges views of human consciousness and self-awareness beyond orthodox religions and could thus include broader varieties of religious experience. *Kauten* helped pave the way for Supreme Court opinions in the ensuing decades that recognized a wide array of spiritual orientations beyond the theological boundaries of mainstream Christianity and other well-established faiths. For example, in *Torcaso v. Watkins*,[78] the Supreme Court unanimously invalidated a provision of Maryland's Constitution invoked to prevent an avowed Secular Humanist from becoming a notary public because of his refusal to take an oath declaring his belief in God.[79] The Court reasoned that the Establishment Clause prohibited government compulsion to proclaim belief or disbelief in any religion, to aid religions over nonreligious spiritual groups, or to aid particular religions over others.[80] Soon thereafter, in *United States v. Seeger*[81] and *Welsh v. United States*,[82] the Court recognized as "religious" all sincerely held beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent,"[83] and then extended this characterization by holding that a sincere petitioner for draft exemption could only be denied if his professed

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78. Torcaso v. Watkins, 367 U.S. 488 (1961).

79. *See id.* at 496.

80. *See id.* at 495.

81. United States v. Seeger, 380 U.S. 163 (1965).

82. Welsh v. United States, 398 U.S. 333 (1970).

83. *Seeger*, 380 U.S. at 176. In *Seeger*, the Court relied on the views of progressive theologian Paul Tillich and adopted his "ultimate concern" concept of religion. Tillich's thesis is:

> that the concerns of any individual can be ranked, and that if we probe deeply enough, we will discover the underlying concern which gives meaning and orientation to a person's whole life. It is of this kind of experience, Tillich tells us, that religions are made; consequently, every person has a religion . . . .
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> . . . .
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> As Tillich sees it, for some, "God" is an appropriate label for this ultimate concern; for others, the word is an obstacle. He is certain, however, that it is ultimate concern, and not the label "God," which defines religion.

Note, *supra* note 71, at 1067 & n.68.

Under the functional definition, it has been observed, even the Constitution itself could form the basis of a religion. *See* W. Tarver Roundtree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203 (1990) (The Constitution serves what sociologists have identified as the four primary functions of religion — (1) cementing the culture together, (2) providing "emotional support in the face of uncertainties about the future," (3) forming the basis for and reinforcing society's values and norms, and (4) providing channels "through which reality can be dealt with by reference to the mandates of the 'faith.'" *Id.* at 206-07. *But see* Note, *supra* note 71, at 1076 n.110 (noting that "[t]he American scheme of government contemplates that certain fundamental questions are reserved for individual decision and beyond the reach of the state" and that "[t]hus, by its own terms, a civil religion based upon American constitutionalism properly perceived can never be unconditional.").

beliefs did not "rest at all upon moral, ethical, or religious principle[s] but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency."[84]

The aforementioned rulings signaled a broadening in American society's concept of religion, paralleling the postwar boom in the "new religious movements" that have since become fixtures on the landscape of American religion.[85] The significant role of new and non-mainstream religious groups in the development of American freedom of religion jurisprudence has been widely recognized.[86] These groups are often perceived as a threat to society because of the apparent strangeness of their ways and the high degree of "internal group commitment" that characterizes "fringe" religious groups or "cults."[87]

Because the Supreme Court's functional approach to religion broadens the scope of the Constitution's protection of freedom of religion, difficulties arise when the state attempts to restrain the activities of potentially subversive groups that present themselves as "religious,"[88] and the "cloak of

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84. *Welsh*, 398 U.S. at 342-43.

85. Derek Davis has observed that the rulings in *Ballard, Kauten, Torcaso, Seeger* and *Welsh* "expanded the constitutional meaning of religion in a way that paralleled the expanding pluralism of American religion" beyond the established Judeo-Christian religious traditions contemplated by the Framers. Davis, *supra* note 64, at 100.

86. *See* David Bromley & Thomas Robbins, *The Role of Government in Regulating New and Nonconventional Religions, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 205 (James E. Wood, Jr. & Derek Davis, eds., 1983). Bromley and Robbins present two explanations for why conflicts between the state and new religious groups have "loomed so large in church-state litigation in the United States": (1) discrimination ("marginal and exotic groups have been victimized by an institutional system which tends to accommodate to the more powerful and established competitors of marginal movements") and (2) fear ("'cults' represent a sinister menace that has confronted courts and other law enforcement agencies with unique control problems"). *Id.* at 208-09.

87. Bromley and Robbins maintain that "[t]he challenge such groups pose to the fundamental assumptions on which the social order is founded and the limited investment such groups have in institutional arrangements produce the mutual rejection that is characteristic of sect-society relationships." *Id.* at 209-10. *See also* JAMES A. BECKFORD, CULT CONTROVERSIES 289 (1985) ("[F]aced with the teachings and practices of [new religious movements] which are not all compatible with liberal, utilitarian individualism, agents of the state tend to become suspicious. They are affronted by what is perceived as authoritarian, sectional, and irrational collectivism in some movements.").

88. Davis, *supra* note 64, at 101.

> As the diversity of religions benefitting from First Amendment protection has expanded, the ability of government to regulate religion on definitional grounds has correspondingly diminished. The judicial means by which this development has occurred has been the adoption of functional criteria, in replacement of substantive criteria, for defining religion.

Id.

religion" thereby becomes an effective shield from government scrutiny.[89] The experience of non-mainstream religious groups thus becomes an important indicator of the status of religious liberty in a given society, especially in comparison to state efforts to protect the social order.[90]

3. *The Government's Regulation of Religion via Taxation*

The United States has a long history of granting federal tax exemption to churches and religious organizations,[91] and this practice has withstood numerous constitutional challenges before the Supreme Court.[92] In an

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89. This also applies to the defining of unlawful or "immoral" activities as matters of "ultimate concern." For a detailed discussion of religious fraud in the post-*Ballard* era, see Marjorie Heins, *'Other People's Faiths': The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981) (maintaining that in fraud-based claims against new religions, the Court must determine the religious status of the organization and the context in which the alleged religious fraud took place, and that if the organization is a religion for constitutional purposes, and if the allegedly fraudulent representations were made in a religious context, then the claim is not justiciable).

90. *See* James E. Wood, Jr., *Government Intervention in Religious Affairs: An Introduction, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 1, 15 (James E. Wood, Jr. & Derek Davis, eds., 1983). Wood notes that "[i]n any society, the status of religious liberty is most readily discerned by the treatment accorded new and marginal religious groups." *Id.* at 15. Wood names several such groups, including the International Society for Krishna Consciousness (ISKCON, a.k.a. "the Hare Krishna movement"), the Unification Church, and the Church of Scientology, which he asserts have "experience[d] considerable disfavor as a result of their winning converts from mainline churches and the Jewish community." *Id.* at 16. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court held that a state law imposing special reporting and registration requirements of religious organizations that solicited more than half of their funds from nonmembers impermissibly targeted members of the Unification Church ("the Moonies"). *Id.* at 253-55.

91. In *Religion, State and the Burger Court*, Leo Pfeffer notes that tax exemption for churches "may be as old as taxation itself," and traces tax exemption of church-owned property back to Genesis 47:26. LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT 1 (1984) [hereinafter PFEFFER, RELIGION]. "[F]ederal tax exemption for churches has long been recognized in the United States, dating back to the early stages of federal income taxation, as set forth in the Corporation Excise Tax of 1909 [in Chapter 6, Section 38, 36 Stat. 11]." Stanley S. Weithorn & Douglas F. Allen, *Taxation and the Advocacy Role of the Churches in Public Affairs, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 51, 53 (James E. Wood, Jr. & Derek Davis, eds., 1983). Current provisions of the Internal Revenue Code continue the policy of allowing exemptions to churches, mandating that the church in question be organized and operated exclusively for religious purposes, that no part of the church's net earnings may go to the benefit of any private individual or shareholder, and that the church abstain from certain involvements in political campaigns and attempts to influence legislation. *See* I.R.C. § 501(c)(3) (West 1998), *amended by* Pub. L. No. 105-206 (West Supp. 1998).

92. *See, e.g.*, Walz v. Tax Comm'n of New York, 397 U.S. 664, 680 (1970) (holding that tax exemption for churches is beneficial for all concerned because it avoids excessive governmental entanglement with religion).

environment where few groups that claim to be religious are deprived of constitutional protection,[93] and where the United States government has been forced to explore non-judicial means to maintain a measure of control over suspect religious groups,[94] the Internal Revenue Service, by virtue of its power to decide what organizations qualify for religious exemptions from paying taxes, has become an important arm of the state in monitoring and, in some cases, suppressing the activities of religious groups that pose a threat to society.[95] Like the Supreme Court, the Internal Revenue Service has struggled to define the terms "church" and "religion" in order to determine which groups qualify for tax exemption.[96]

Many groups that have achieved legal recognition as churches or religious organizations by courts of the United States, and are thus in principle entitled to religious tax exemptions, have nonetheless been denied exemption on other grounds.[97] In addition, some groups claim to have been victims of "selective prosecution"[98] by the Internal Revenue Service because

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93. *See* Davis, *supra* note 64, at 101. As Davis notes, "Under [the Court's] content-neutral, functional approach, few of the 'new' religions are deprived of religious status." *Id.* at 102.

94. *See id.* at 101.

95. *See, e.g.*, PFEFFER, RELIGION, *supra* note 91, at 1-13, 201-34. Pfeffer maintains that the favorable result of using tax laws for the prosecution of Al Capone established revenue law as a viable means for dealing with government targets who might otherwise be difficult to control. Pfeffer notes that "[s]uccess evokes emulation, so it is not surprising that prosecutions for revenue-law violations should be resorted to as a means to destroy unpopular religions." *Id.* at 12. *See also* Weithorn & Allen, *supra* note 91, at 59-60. "Because it holds the power to revoke the tax-exempt status of churches, the Internal Revenue Service is given an opportunity to control, through intimidation, those ideas it deems socially or politically unacceptable." *Id.*

96. Weithorn and Allen decry the Internal Revenue Service's "serious problem regarding the definition of terms such as 'church' and 'religious purposes'" and maintain that the "lack of workable guidelines [in the Internal Revenue Code], especially in dealing with the marginal church," permits the Internal Revenue Service "to attack [marginal churches] as the political pressures of the majority view of society may dictate." Weithorn & Allen, *supra* note 91, at 53, 59.

97. They have been denied primarily under the limitations of I.R.C. § 503(c)(3) (West 1998).

98. Wood, *supra* note 90, at 16 (discussing the case of Reverend Sun Myung Moon, founder of the Unification Church, who was convicted of income-tax evasion "for doing essentially what many other religious leaders of mainline groups have done through the years"). The Supreme Court declined to review Moon's conviction and he went to prison. *See* Moon v. United States, 466 U.S. 971 (1984). *See also* CONSTITUTIONAL ISSUES IN THE CASE OF REV. MOON (Herbert Richardson ed., 1984). The latter source includes the complete texts of amicus curiae briefs submitted to the Court in support of Moon. The authors of those briefs include, among others, the American Civil Liberties Union, the Catholic League for Religious and Civil Rights, the Center for Judicial Studies, the Church of Jesus Christ of Latter-Day Saints, the Institute for the Study of American Religion, the National Association of Evangelicals, the National Bar Association, the National Council of the Churches of Christ,

their beliefs or activities run counter to those of more established churches and the traditional norms of society.[99] The argument that the government has targeted some new or unconventional religious groups and their leaders for selective prosecution or disproportionately harsh scrutiny by the Internal Revenue Service has received support from many commentators on freedom of religion in America.[100] However, this argument must be viewed in the context of the formidable challenge the Internal Revenue Service faces in applying tax law to self-described religious organizations. The Internal Revenue Service must avoid (1) granting so many claims for religious exemptions[101] that it limits the effectiveness of the government's taxation program and (2) casting so broad a net against fraudulent claims that sincere claims are denied — while remaining mindful of the Supreme Court's prohibition on excessive entanglement in religious affairs.[102] At the very least, the claims of "targeted" religious groups illustrate one way in which the concept of legitimate state activities[103] can be stretched to allow government-sanctioned suppression of unorthodox groups. This implies that although the United States sees itself as "the embodiment of the liberty principle,"[104] the United States government has little trouble denying

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the American Association of Christian Schools, the Southern Christian Leadership Conference, several states, and Senator Orrin G. Hatch, Chair of the Subcommittee on the Constitution of the Senate Committee on the Judiciary. *See id.* at 347, 407, 421, 449, 519, 545, 607, 681.

99. *See, e.g.*, PFEFFER, RELIGION, *supra* note 91, at 12 (discussing prosecutions for tax-law evasions of Jehovah's Witnesses in America as an example of how tax law enforcement can be subverted by "efforts primarily aimed at eliminating [unpopular groups] as an enemy of the people" rather than at the mere collection of revenue).

100. *See, e.g., id.*; Wood, *supra* note 90, at 16; Weithorn & Allen, *supra* note 91, at 56, 60.

101. Some claims for exemption may be fraudulent. Weithorn and Allen highlight both the benefits to qualifying for "church" status under the tax code and the potential incentive for opportunistic abuse those benefits create:

> An organization labeling itself a 'church' is, in contrast to the secular nonprofit organization, largely insulated from financial scrutiny by the Internal Revenue Service. These groups, many with only a marginal relationship to "mainstream" churches, initially at least, enjoy a constitutionally created freedom of organization and action that does not exist for secular, nonprofit groups — a special benefit that results in the growth of tax evasion schemes under the umbrella of the "church."

Weithorn & Allen, *supra* note 91, at 58. For cases involving fraudulent religious tax exemption, see Basic Bible Church v. Comm'r, 74 T.C. 846 (1980) and Riker v. Comm'r, 244 F.2d 220 (9th Cir. 1957).

102. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

103. Here, the legitimate state activity is the enforcement of revenue laws.

104. Herbert Winkler, *Total Liberty is the American Ideal*, DEUTSCHE PRESSE-AGENTUR, Jan. 30, 1997, *available in* LEXIS, News Library, DPA File. For a collection of essays discussing the United States government's justifications for denying First Amendment rights through various developments in American history, see SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION (Craig R. Smith ed., 1996). For a discussion of

constitutional liberties to disfavored groups.

B. *Freedom of Religion in Germany*

1. *Church and State*[105]

Germany's *Grundgesetz* or "Basic Law" states, "There shall be no state church."[106] Yet this principle of "nonestablishment" has been interpreted by Germany's Federal Constitutional Court to have a much narrower meaning than that which the Supreme Court has drawn out of the Establishment Clause of the United States Constitution.[107] Where the Supreme Court has read the Establishment Clause to prohibit aid to religion, the Federal Constitutional Court has not extended the meaning of the Basic Law's prohibition of an official state religion beyond its facial meaning (*i.e.*, that the government may not proclaim an official German church).[108] Besides, many other provisions of the Basic Law expressly provide for state support of religion. For example, article 4(3) of the Basic Law extends armed service exemption to anyone with a conscientious objection, article 7(3) of the Basic Law provides for religious instruction in state schools, article 137(6) of the Weimar Constitution entitles religious bodies to tax their members, and article 139 of the Weimar Constitution protects Sundays and holidays as "days of rest from work and of spiritual edification."[109]

Thus, a fundamental distinction can be made between the German and American church-state relations: Unlike the U.S. system of strict *separation* between church and state, Germany has developed an elaborate system of *cooperation* between church and state. Further, Germany has been identified

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the government's denial of free exercise protection to Native American religions, see Craig Smith et al., *Suppression of Native American Culture, in* SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION 81 (Craig R. Smith ed., 1996).

105. For a detailed overview of church-state relations in Germany, see Donald Kommers, *West German Constitutionalism and Church-State Relations,* 19 GERMAN POL. & SOC'Y 1 (1990).

106. The language appears in article 137 of the German Constitution of 11 August 1919 (WEIMAR CONST.), which is incorporated into the Basic Law — along with articles 136, 137, 138, 139, and 141 of the Weimar Constitution, all of which relate to the rights of religious communities — under the Basic Law's article 140. GRUNDGESETZ [Constitution] [GG] art. 140, WEIMAR CONST. art. 137.

107. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 444 (1997).

108. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 267 (1994).

109. GG arts. 4(3), 7(3), WEIMAR CONST. arts. 137(6), 139. *See also* CURRIE, *supra* note 108, at 245 (discussing these and other articles of the Basic Law). "Several questions as to the permissibility of particular state actions arguably supporting religion in Germany are expressly resolved by [the Basic Law's] provisions" *Id.*

as the "prototypical example" of a "cooperationist" regime, which according to W. Cole Durham, Jr., is characterized in part by the employment of various "patterns of aid or assistance that benefit larger denominations in particular" without official endorsement of any religion and by an official policy "affording equal treatment to all religious organizations."[110]

From an American or "separationist" perspective, the most striking example of Germany's system of church-state relations is the Basic Law's provision allowing German churches to tax their congregations.[111] The church tax is rooted in the historically close connection between Germany's mainline churches and state authority; its presence in the Basic Law is indicative of the churches' role in rebuilding postwar Germany.[112] Because of the churches' historical dependence on state authority for protection, both the Protestant and Catholic churches developed into "essentially conservative

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110. W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 1, 20-21 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). Durham presents a continuum of church-state regimes including "absolute theocracies" (which are stereotypically associated with Islamic fundamentalism), regimes with official "established churches" (a broad category which may include governments that afford equal treatment for other churches, *e.g.*, Great Britain), regimes with "endorsed churches" (typical of countries where a particular religion predominates but with constitutions guaranteeing equal protection to other faiths, *e.g.*, Spain), "cooperationist regimes" (*e.g.*, Germany), "accomodationist regimes" (which generally recognize the cultural importance of religion yet remain neutral toward religious bodies and maintain a fundamental separation between church and state), "separationist regimes" (such as the United States, where any suggestion of special treatment for religious groups is suspect and state support for religion, *e.g.*, religious indoctrination in public schools, is strictly prohibited), regimes characterized by their "inadvertent insensitivity" toward religion (which overlap with stricter forms of separation) and, finally, regimes characterized by "hostility and overt persecution" of religious groups. *Id.* at 19-23.

111. The provision, contained in Weimar article 137(6), reads: "Religious communities that are public corporations shall be entitled to levy taxes in accordance with Land law on the basis of the civil taxation lists." GG, WEIMAR CONST. art. 137(6). It is qualified by limiting those who may be taxed to current church members (not, for example, former members or spouses of current members) and by Weimar article 137(5), which provides:

> Religious communities shall remain public corporations if they have enjoyed that status hitherto. Other religious communities shall be granted like rights upon application where their constitution and the number of their members offer an assurance of their permanency. Where several such public religious communities form one organization it too shall be a public corporation.

GG, WEIMAR CONST. art. 137(5). For a list of citations to major Constitutional Court cases involving the church tax, see KOMMERS, *supra* note 107, at 587 n.57.

The current "assurance of permanency" requires a thirty-year existence and a membership comprising at least one percent of the population of the state where the church is located, which provisions effectively ensure that the church tax will remain the province of the mainline churches. As Donald Kommers notes, "The primary beneficiaries of this constitutional policy are the Catholic and Protestant (Reformed and Evangelical) churches and the relatively small Jewish religious community." KOMMERS, *supra* note 107, at 484.

112. *See infra* notes 117-20 and accompanying text.

institutions"[113] inclined to support the status quo.[114] In exchange for ecclesiastical support, the ruling monarchs gave the churches a variety of privileges, including substantial tax benefits.[115] The Protestant church, in particular, received privileged status, and in most German states Lutheranism was the de facto official religion.[116] The church tax itself was established in 1919, along with Germany's first constitutional democracy, and it was revived as part of the Basic Law in 1949, coinciding with a period in German history that "saw the German churches at their most influential [position in Germany society] since the Reformation."[117]

The postwar era in German history entrenched the mainline churches in German public life and laid the foundation for their continued influence in the Federal Republic. David Conradt noted:

> Because the churches were regarded by military occupiers as untainted by Nazism, the best way to get permission during the occupation period for opening or reopening a business or starting a newspaper or a political party was to have ample references from, or some affiliation with, one or both churches.[118]

In addition to their practical role in helping to reestablish German institutions after the war, the churches helped foster unity among a defeated and demoralized postwar German population.[119] Many Germans thus formed close bonds with their churches during the post-Nazi renewal of religious life in Germany, and few opposed the incorporation of the church tax into the Basic Law.[120] Allowing churches to tax their members [121] has also enabled the churches to benefit German society via church-run public services.[122]

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113. DAVID P. CONRADT, THE GERMAN POLITY 60 (6th ed. 1996). "Since the Reformation, the religious and regional division of the country has meant that the dominant church in any given area was dependent on existing state authority, that is, on the respective princes who acted as protectors of the faith in their territories." *Id.*

114. *See id.*

115. *See id.*

116. *See* GORDON A. CRAIG, THE GERMANS 83-103 (1991).

117. FREDERIC SPOTTS, THE CHURCHES AND POLITICS IN GERMANY at x (1973).

118. CONRADT, *supra* note 113, at 60.

119. "In the postwar era," Jürgen Moltmann has written, "the churches were certainly the strongest organizations for the unity of the German people." Jürgen Moltmann, *Religion and State in Germany: West and East,* 403 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 112-13 (1986).

120. *See id.*

121. The tax, in the form of an eight to ten percent surcharge on the taxable income of church members, is collected by the German states and then distributed to the churches, making the qualifying German churches "among the most affluent in the world[.]" CONRADT, *supra* note 113, at 60. Between 1989 and 1992, for example, approximately $35 billion was collected for the Catholic and Protestant churches. *See id.* at 74 n.18.

122. *See* KOMMERS, *supra* note 107, at 485.

The churches have ample opportunity to influence German society by other means as well, considering that both the Catholic and Protestant churches are by law represented on the boards of major radio and television broadcasting networks, have representatives sitting on various advisory commissions at federal and state levels, and maintain Bonn and Berlin offices to ensure that their views are well-represented in the government and parliament.[123]

Although state support of religion is well-established in German history[124] and is expressly provided for in the Basic Law, the Basic Law does mandate that the German government maintain a position of neutrality toward all religious groups.[125] In view of the benefits and influence accorded the Protestant and Catholic churches, this principle of neutrality has not played out in reality, considering that smaller and newer churches have little chance of achieving corporate status.[126] According to one commentator, a series of recent court rulings has exacerbated this problem and undermined Germany's official commitment to religious tolerance and pluralism.[127] The

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123. *See* CONRADT, *supra* note 113, at 146.

124. *See* Martin Heckel, *Religious Human Rights in the World Today: A Report on the 1994 Atlanta Conference: Legal Perspectives on Religious Human Rights: Religious Human Rights in Germany*, 10 EMORY INT'L L. REV. 107 (1996) (focusing on the historical relationship between church and state in Germany).

125. The German concept of neutrality is in part embodied in the provisions of article 3(3) of the Basic Law, which bans legislative classifications based on religious opinions, and article 4(1), which guarantees freedom of conscience. GG arts. 3(3), 4(1). However, as outlined by Cole Durham, German neutrality may be understood in terms of the state's "nonintervention," that is, "disentanglement from religious organizations in the interest of preserving their autonomy," and "nonidentification," the requirement that the state "refrain from taking sides in religious conflicts and from endorsing any religion or ideology[,]" regarding religious affairs, in addition to the aforementioned concept of cooperation. KOMMERS, *supra* note 107, at 466. *See also id.*, at 586 n.38 (citing Cole Durham, Religion and the Public Schools: Constitutional Analysis in Germany and the United States, 14-23 (Oct. 21, 1977) (unpublished paper presented at the First Annual Conference of the Western Association for German Studies)).

126. This seems especially true for any religious groups that pose a threat to the mainstream churches, given that the ruling Christian Democratic Union political party was formed (in the late 1940s) largely by members of the Catholic and Protestant churches who sought to "[apply their] general Christian principles to politics" and take advantage of their "ties to the churches . . . the one pre-Nazi social institution that survived the war with some authority, legitimacy, and organizational strength." CONRADT, *supra* note 113, at 119. The party played a significant role in the formation of the Federal Republic, as many of the drafters of the Basic Law were members of the newly formed party and its older and more liberal counterpart, the Social Democrats. *See* JOHN F. GOLAY, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY 18-22 (1965). *See also id.*, app. C, at 265-75 (listing brief biographies of Parliamentary Council leaders).

127. *See* Norbert Kirsch with Irving Hexham, *Religious Freedom Under Threat?* (visited Oct. 21, 1997) <http://www.acs.ucalgary.ca/~hexham/germany/NOR-1.html>. Kirsch isolates a 1988 ruling by the Mannheim Administrative Court (upheld by the Federal Administrative Court in 1993) as a turning point in the decline of religious freedom in

apparent favoritism afforded by the church tax illustrates Cole Durham's assertions of the ease with which cooperationist regimes can "slip . . . into patterns of state preference"[128] and the frequency with which cooperationist regimes raise complex "problems of equal treatment."[129] Finally, although most Germans accept the traditional cooperation between church and state as legitimate,[130] there is growing sentiment among the population that at least the church tax should be "reduced or eliminated."[131]

2. *Scope of Protection For Religious Activity*

The Basic Law contains an elaborate web of provisions protecting religious exercise that together may be seen as an analogue to the U.S. Constitution's Free Exercise Clause.[132] The focal point of these provisions is Article 4, which proclaims that freedom of "faith," "conscience" and "creed," whether religion or ideology, is "inviolable."[133] Other provisions of the Basic Law prohibit discrimination based on "faith, religion or political opinions,"[134] guarantee equal civil and political rights without regard to "religious denomination" or "non-adherence to a denomination,"[135] and

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Germany. The ruling upheld the government's duty to issue warnings on potentially dangerous religious groups, *i.e.*, those whose morals and practices appear to be at odds with conventional Christian principles and with the values embodied in the Basic Law. As a result of these government warnings, Kirsch argues, the targeted groups are ostracized from society and thus become victims of a kind of legalized discrimination. *See id.*

128. Durham, *supra* note 110, at 21.

129. *Id.* Problems which arise in cooperationist programs may be avoided in regimes that officially endorse churches or maintain a limited program of accommodation — *i.e.*, "cooperationism without the provision of any direct financial subsidies to religion or religious education." *Id.*

130. According to David Currie, in general, Germans are "less hostile to public support of religion" than Americans. CURRIE, *supra* note 108, at 247. Similarly, David Conradt maintains that "[c]riticism of state financial support [of religion] and the advocacy of a clear separation of church and state" are not widespread in Germany and notes that, in general, proponents of these views have been limited to "small groups of liberal intellectuals centered in the larger metropolitan areas" of Germany. CONRADT, *supra* note 113, at 148.

131. CONRADT, *supra* note 113, at 148. "To avoid paying the tax and to neutralize the effect of new tax increases in 1995, record numbers of members left both churches." *Id.*

132. *See* KOMMERS, *supra* note 107, at 443.

133.

> (1) Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable.
>
> (2) The undisturbed practice of religion shall be guaranteed.
>
> (3) Nobody may be forced against their conscience into military service involving armed combat. Details shall be made the subject of a federal law.

GG art. 4.

134. GG art. 3(3). Article 3(3) also includes the provision that "[n]o one may be discriminated against on account of their disability." *Id.*

135. GG art. 33(3).

prohibit obligatory disclosure of "religious convictions" and compulsory performance of "any religious act or ceremony."[136] In addition, "free exercise" rights in the Basic Law include the right of religious communities "to regulate and administer [their own] affairs."[137] Together these provisions show that the Basic Law's free exercise protections (1) encompass non-religious belief, (2) are explicitly connected to guarantees of equal rights and equal protection of the law, and (3) embody some aspects of the "separationist" requirement that the state abstain from government entanglement in religious affairs.[138]

Although the Basic Law's protections bear a passing similarity to the Supreme Court's free exercise jurisprudence, the Federal Constitutional Court[139] has been more liberal than the Supreme Court in according "special privileges" to religious individuals and organizations, most notably in permitting religion-based exemptions to generally applicable, religiously neutral laws.[140] One important case arose when a commercial rag dealer sought recourse for the loss of business he experienced when a Catholic youth organization began publicizing its charitable clothing drive from the church pulpit.[141] The rag dealer had the clothing drive enjoined under a law prohibiting unethical competition, but the Constitutional Court ruled that the clothing drive was a religious exercise and therefore deserved "special protection" from the law.[142] This ruling established the Constitutional Court's doctrine of allowing religious exemptions from generally applicable civil laws,[143] and it now illustrates how free exercise protection has been interpreted by the Constitutional Court to extend to church-related actions in

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136. GG, WEIMAR CONST. art. 136(4).

137. GG, WEIMAR CONST. art. 137(3).

138. *See supra* note 57 and accompanying text.

139. The Federal Constitutional Court (*Bundesverfassungsgericht)* is devoted exclusively to constitutional questions. Like the Supreme Court, it is the ultimate source of constitutional interpretation. *See* GG art. 93. *See also* KOMMERS, *supra* note 107, at 3-29 (discussing the role of the Federal Constitutional Court).

140. CURRIE, *supra* note 108, at 257-58. "[A]s in the United States, the religious and conscientious freedoms of the Basic Law confer no absolute exemption from generally applicable laws[,]" but various opinions of the Constitutional Court "plainly establish that in some instances religious individuals and institutions are entitled to special privileges, as the Supreme Court for a brief period acknowledged before flatly holding to the contrary in the controversial peyote case in 1990 [Employment Div. v. Smith, 494 U.S. 872 (1990)]." *Id.*

141. *See* Entscheidungen des Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] 24, 236 (1968), translated in KOMMERS, *supra* note 107, at 445-49.

142. *Id.* Discussing the case, David Currie noted that "the Constitutional Court did what the Supreme Court refused to do in the flag-salute case of *Minersville School District v. Gobitis* [310 U.S. 586 (1940)]: it carved out on the basis of religious freedom an exception from a generally applicable law assumed to be valid on its face." CURRIE, *supra* note 108, at 259.

143. *See* CURRIE, *supra* note 108, at 259.

secular contexts.

The Constitutional Court has allowed religion-based exemptions from criminal laws as well, establishing its doctrine in the *Blood Transfusion Case*.[144] In that case, the Constitutional Court held that article 4 exempted a husband, who was a member of the Association of Evangelical Brotherhood, from a conviction for criminal charges for failing to help his wife before she died.[145] The Court held that article 4(1) mandated a "relaxation of criminal law" in situations where an individual is placed in a state of "spiritual distress" by his conflicting duties to faith and to the law.[146] Although in that case the Constitutional Court stopped short of declaring "that criminal laws must *always* take second place to religious convictions[,]" it conclusively affirmed that religious liberty sometimes requires exceptions to criminal laws.[147]

Another important aspect of the Basic Law's free exercise protection is the degree of autonomy it affords religious organizations in conducting their own affairs. The relevant provision reads: "Every religious community shall regulate and administer its affairs independently within the limits of the law valid for all. It shall confer its offices without the participation of the state or the civil community."[148] This right has been interpreted to extend far beyond the apparent limitations of the Basic Law's language.[149] For example, the Constitutional Court has declared that the internal affairs of the church are beyond the reach of generally applicable laws.[150]

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144. *See* BVerfGE 32, 98 (1971), translated in KOMMERS, *supra* note 107, at 449-52.

145. *See Id.*

146. *Id.* The opinion reads:

> The duty of all public authority to respect sincere religious convictions, [as] contained in Article 4(1) of the Basic Law, must lead to a relaxation of criminal laws when an actual conflict between a generally accepted legal duty and a dictate of faith results in a spiritual crisis for the offender that, in view of the punishment labeling him a criminal, would represent an excessive social reaction violative of his human dignity.

Id. Here, the Federal Constitutional Court's consideration of "spiritual distress" is analogous to the Supreme Court's discussion in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-44 (1987), of the "cruel choice" between following one's religious beliefs and obeying the law.

147. CURRIE, *supra* note 108, at 261.

148. GG, WEIMAR CONST. art. 137(3).

149. David Currie has written, "Ironically, of all the religion clauses in the German constitution this provision [Weimar article 137(3)] appears most clearly to say precisely the opposite [of what it has been interpreted to mean]." CURRIE, *supra* note 108, at 263.

150. Summarizing the Constitutional Court's position as outlined in BVerfGE 42, 312 (333-34) (1976), Currie writes:

> The commentators all agreed, the Court declared, that the reference to general laws in Article 137(3) was not to be taken literally . . . not even a generally applicable law could validly interfere with a religious body's regulation of its

The Constitutional Court's rationale for maintaining this position is that regulations that would affect religious bodies more profoundly than secular bodies are unconstitutional as applied to religious bodies.[151] This interpretation, according to David Currie, "establish[es] a standard of de facto inequality under [article] 137(3)."[152] In 1985, the Court applied this approach in two notable cases.[153] In the first, the Court held that a general law prohibiting arbitrary dismissal of employees did not apply to a church-affiliated hospital that fired a doctor for publicly disavowing the church's prohibition on abortion. In the second, the Court ruled that a similar law did not apply to a Catholic youth home that dismissed a clerk who was no longer a member of the church.[154]

Determining whether an organization qualifies for religious status, and thereby receives the benefit of the Constitutional Court's liberal application of Weimar article 137(3), is left up to the state in which the organization is located.[155] The Constitutional Court has ruled that, in cases in which the status of an organization is disputed, the courts of the German states may use their own criteria to establish whether a group qualifies as "religious" for constitutional purposes.[156] This confers liberal discretion on the lower courts[157] and reduces the breadth of protection afforded by Weimar article 137(3) in the sense that a group's religious status may be determined independent of the group's own "self-understanding."[158]

3. *The Basic Law's Restrictions on Basic Rights*

There are two principal doctrines under which the Constitutional Court has interpreted the Basic Law to allow restrictions on basic rights:[159] the

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> own truly internal affairs, and a merely "indirect" effect on the outside world did not remove the matter from the internal sphere.

CURRIE, *supra* note 108, at 263.

151. *See id.* at 263-64 (citing BVerfGE 42 (334)).

152. *Id.* at 264 n.105. *See also* KOMMERS, *supra* note 107, at 493-95.

153. *See* BVerfGE 70, 138 (162-72) (1985). Both cases are briefly discussed in CURRIE, *supra* note 108, at 266 nn.113-14.

154. Compare these two cases with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), in which the Supreme Court upheld a provision exempting religious organizations from the federal statute prohibiting religion-based employment discrimination.

155. *See* Kirsch, *supra* note 127, at 9-10.

156. *Id.* (citing BVerfGE 83, 353 (1991)).

157. *See id.*

158. *Id.* (citing this development as an indication that constitutional protection of freedom of religion is waning in Germany).

159. *See* KOMMERS, *supra* note 107, at 239. The first 19 articles of the Basic Law guarantee a series of basic rights and liberties arranged "to underscore the priority of individual freedom in the scale of German constitutional values." *Id.* The articles describe:

"objective order of values"[160] and the "militant democracy."[161] The Constitutional Court has viewed the order of values less as a doctrine for restricting basic rights than as a method of interpreting the constitution "as a unified structure of *substantive* values."[162] It is the means by which the Constitutional Court resolves conflicts between constitutionally protected basic rights and makes those rights binding against state encroachment and individual actions.[163] The Constitutional Court first recognized the Basic Law's order of values in a case involving freedom of expression[164] and applied it to freedom of religion in the *Tobacco Atheist Case*.[165]

In the *Tobacco Atheist Case*, the Constitutional Court invoked the Basic Law's order of values by finding that the Article 1 guarantee of human dignity was "a limitation not only on state action but also on the rights of other individuals."[166] The Court used this limitation to uphold the denial of parole to a prison inmate on the grounds that he "attempted to bribe fellow inmates by offering them tobacco to forswear their religion."[167] The Court said this was not an infringement on the would-be parolee's religious freedom. Rather, the Constitutional Court held, "[a]rticle 4 protected the right to proselytize for or against religion only to the extent consistent with the dignity of others,"[168] and "[t]o exploit the constraints of prison life by offering such inducements was morally reprehensible . . . , an abuse . . . of

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> [the principle of human dignity (article 1), the right to life and personal inviolability (article 2),] equality under law (article 3), religious liberty (article 4), freedom of expression (article 5), parental rights (article 6), educational rights (article 7), freedom of assembly (article 8) and association (article 9), privacy of posts and telecommunications (article 10), freedom of movement (article 11), occupational rights (article 12), the right to conscientious objection (article 12a), inviolability of the home (article 13), and the right to property (article 14). Articles 15, 16, 16a, and 17 deal, respectively, with public ownership, citizenship, asylum, and the right of petition. Article 18 provides for the forfeiture of certain basic rights if they are used to threaten Germany's political democracy. Article 19, finally, emphasizes the value of these guaranteed rights by declaring that "in no case may [the state] encroach upon the content of a basic right."

Id.

160. *Id.* at 47-48, 363-64.

161. *Id.* at 37-38, 217-37.

162. *Id.* at 47.

163. This is referred to as the *Drittwirkung*, or "third party effect." *See* CURRIE, *supra* note 108, at 182-87.

164. *See* BVerfGE 7, 198 (1958), translated in KOMMERS, *supra* note 107, at 361-68.

165. BVerfGE 12, 1 (1960). The case is discussed in KOMMERS, *supra* note 107, at 452-53 (quoting the opinion) and CURRIE, *supra* note 108, at 253.

166. CURRIE, *supra* note 108, at 253.

167. *Id.* *See also* KOMMERS, *supra* note 107, at 452-53 (discussing the same case).

168. CURRIE, *supra* note 108, at 253. The preeminent value in the order is human dignity. GG art. 1(1).

religious freedom, and thus not protected by Article 4."[169] In short, according to the Constitutional Court, "[o]ne who violates limitations erected by the Basic Law's general order of values cannot claim freedom of belief."[170]

Finally, the order of values doctrine is controversial among Constitutional Court justices and constitutional scholars.[171] Justice Wolfgang Zeidler, former President of the Court, maintains that the order of values is "presupposed, not substantiated."[172] Critics see it "as a kind of 'scaffold' superimposed on the structure of the [Basic Law]" that "permits interpreters to wash the structure in religious and ideological solvents of their own choosing."[173] They claim that the concept creates a standard of review for fundamental rights conflicts that is overly broad and indeterminate and thus gives judges too much discretion.[174] As a result, some critics have referred to the order of values as a "tyranny of values" that jeopardizes the Basic Law's commitment to tolerance and pluralism.[175]

In contrast to the order of values, the militant democracy doctrine has never been applied to restrict the right to religious exercise,[176] because it is essentially a political measure.[177] However, the breadth of the Basic Law's freedom of belief protections[178] and the legal position of organizations of disputed religious character[179] make an overview of the militant democracy

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169. CURRIE, *supra* note 108, at 253.

170. KOMMERS, *supra* note 107, at 452 (quoting BVerfGE 12 (4-5)).

171. *See id.* at 313.

172. *Id.*

173. *Id.*

174. *See id.* Zeidler has said that "[w]hoever controls the [meaning of the] order of values" thereby "controls the Constitution." *Id.* (quoting from an unpublished paper by Zeidler).

175. Ulrich Karpen, *The Constitution in the Face of Economic and Social Progress, in* NEW CHALLENGES TO THE GERMAN BASIC LAW 87, at 99 (Christian Starck ed., 1991). Ulrich Karpen summarizes this view in the following excerpt, which also touches on the idea of modern German constitutionalism as a kind of civil religion:

> The Constitution is no longer primarily a basic organization of the state to regulate the contest of pluralistic values in the political process, but rather a value system in itself. . . .
>
> Everybody deserves orientation, and while and because religions and consent to ethics are losing strength, modern society looks at the Constitution as a basis of consensus and a value system. This is, to a certain extent, legitimate and useful, but it embraces the danger of the "tyranny of values," which might jeopardize tolerance and pluralism.

Id. at 99.

176. Or at least it has not been acknowledged to have done so.

177. *See* CURRIE, *supra* note 108, at 213.

178. *See, e.g.*, GG art. 4(1) (including freedom of ideological creed); GG art. 3(3) (prohibiting discrimination on the basis of political opinion as well as religion).

179. *See supra* notes 155-58 and accompanying text.

relevant to a discussion of religious freedom in Germany.

The phrase "militant democracy"[180] refers to the Basic Law's authorization of restrictions on, or revocations of, the rights of groups and individuals who use their constitutionally-protected rights to subvert the constitutional democracy established by the Basic Law. The central provision is article 21(2), which provides: "Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional."[181] Additionally, article 9, which governs freedom of association, provides that "[a]ssociations whose aims or activities contravene criminal law or are directed against the constitutional order or the notion of international understanding shall be banned."[182] Article 18 provides for the forfeiture of certain basic rights[183] by those who "abuse" them "in order to undermine the free democratic basic order."[184] The Constitutional Court has the exclusive power to ban political parties under article 21, while "anti-constitutional" associations may be banned by executive order.[185]

The militant democracy provisions were incorporated into the Basic Law as a reaction to the weaknesses of the Weimar Constitution.[186] It is a

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180. The term was first used, as "*streitbare Demokratie*" or "*wehrhafte Demokratie,*" in BVerfGE 5, 85 (139) (1956) (ruling that the German Communist Party was unconstitutional). *See* KOMMERS, *supra* note 107, at 222-23.

181. GG art. 21(2).

182. GG art. 9(2).

183. It provides for the forfeiture of the rights to freedom of expression, freedom of teaching (both are covered by article 5), freedom of assembly (article 8), freedom of association (article 9), privacy of correspondence, posts and telecommunications (article 10), property (article 14), or the right of asylum (article 16a). GG art. 18. *See, e.g.*, Ferdinand Protzman, *Germany to Try to Revoke Rights of 2 Neo-Nazis*, N.Y. TIMES, Dec. 10, 1992, at A15 (discussing the German government's announcement that it would ask the Federal Constitutional Court to invoke Article 18 to stop two reputed neo-Nazi leaders from "whipping up hysteria against foreigners and Jews").

184. GG art. 18. In addition, article 5(3) provides that "[f]reedom of teaching shall not absolve anybody from loyalty to the constitution." GG art. 5(3).

185. GG art. 21. This provision was exercised by the government in 1992 in the wake of a series of violent attacks on foreigners by right-wing groups in Germany. *See* Ferdinand Protzman, *Germany Moves to Ban a Second Neo-Nazi Party*, N.Y. TIMES, Dec. 11, 1992, at A15 (discussing Germany's decision to ban the Deutsche Alternativ party for "inciting racial hatred," after having recently banned the Nationalist Front for similar activities).

186. The Weimar regime, representing Germany's first attempt at democracy, ended in catastrophe as Hitler was able to ascend to power and dissolve the republic's democratic institutions by legal means. Thus, the Weimar Constitution, and particularly its deficiencies, provided a model for establishing a postwar constitution with strong and irrevocable democratic institutions and protections of fundamental rights. As Peter Graf Kielmansegg put it,

> There is general agreement that the Basic Law first and foremost is a reactive

tool for eliminating extremist parties and associations before they can gain momentum;[187] the difficulty in using this tool is in deciding when a group poses a real threat to the constitutional order.[188] The Constitutional Court has provided guidance, ruling that "mere advocacy of overthrow" is insufficient to justify banning a party and that the issue is whether the "party has a fixed purpose constantly and resolutely to combat the free democratic basic order" and manifests this purpose "in political action according to a fixed plan."[189] The Constitutional Court stated that the purpose or plan must be discerned from the party's official declaration of its program, from statements of its leaders, and from its educational materials.[190]

Related aspects of the militant democracy that the Constitutional Court has upheld include: the interest of state agencies in issuing public reports about associations, parties, and other organizations whose members are suspected of engaging in anti-constitutional activities;[191] restrictions on article 10 rights to privacy of mail and telecommunications if the intrusions "serve to protect the free democratic basic order or the existence of the federation or a state;"[192] and the exclusion of applicants who have engaged in "anti-

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> constitution. The past that had shaped the political outlook of the founding fathers and mothers had two faces: an ill-functioning, weak, and helpless democracy on the one hand and a cruel despotism on the other. Four fundamental conclusions were drawn from these memories: a constitution which effectively protected individual rights was to be the new sovereign; parliamentary democracy was to be institutionalized in such a way that strong and effective government was possible; democracy had to be enabled to defend itself against its enemies; and . . . the future Germany had to be definitely tied to the idea of peaceful cooperation among nations.

Peter Graf Kielmansegg, *The Basic Law-Response to the Past or Design for the Future, in* FORTY YEARS OF THE GRUNDGESETZ 5, 6 (1990). *See also* the language of the Constitutional Court's opinion banning the German Communist Party, BVerfGE 5, 85 (1956): "Article 21(2) . . . expresses the conviction of the [drafters of the Basic Law], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties." KOMMERS, *supra* note 107, at 223.

187. *See* KOMMERS, *supra* note 107, at 218.

188. *Compare, e.g.*, BVerfGE 2, 1 (1952) (banning the Socialist Reich Party) *and* BVerfGE 5, 85 (1956) (banning the German Communist Party) *with* BVerfGE 40, 287 (1975) (deciding not to ban an extreme right-wing group). These cases are discussed in KOMMERS, *supra* note 107, at 218-24.

189. KOMMERS, *supra* note 107, at 223.

190. *See id.*

191. *See id.* at 224 (discussing BVerfGE 40, 287 (1975)). This interest has also been recognized in the context of potentially subversive religious organizations. *See* Kirsch, *supra* note 127.

192. KOMMERS, *supra* note 107, at 228 (discussing BVerfGE 30, 1 (1970)). The Constitutional Court stated: "Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law." *Id.* at 228 (quoting BVerfGE 30 (19-20)). The primary intruder on Article 10 privacy rights is the Office for the Protection of the Basic Law, Germany's domestic

constitutional" activities from jobs in the civil service.[193]

While the intolerant and suppressive aspects of the militant democracy doctrine would seem to be clearly unconstitutional in the United States, during times of crisis in American history, the U.S. Supreme Court has upheld measures by the United States government "strikingly similar in effect"[194] to those allowed by the Basic Law's militant democracy.[195] This underscores a contrast between the Basic Law and the U.S. Constitution: the militant democracy exemplifies the forthrightness with which the Basic Law sets out the duties attached to rights of individual autonomy — the right to self-determination is coupled with a duty to respect the constitutional order.[196] The more idealistic approach embodied in the United States Constitution — guaranteeing individual autonomy without explicit qualifications — has led to a less direct means of restricting the rights of those who abuse them, that is, Supreme Court interpretations allowing individual rights to be restricted under "competing state interest" analyses.[197] As a self-proclaimed religious group, viewed by German and American government institutions as dangerous and fraudulent, Scientology becomes an interesting focus for a comparison of the German and American systems.

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intelligence agency. *See id.* at 228-29. *See also infra* note 263 and accompanying text (noting the Office's surveillance of the Church of Scientology).

193. *See* BVerfGE 39, 334 (1975), translated in KOMMERS, *supra* note 107, at 229-32. Specifically, this ruling upheld the constitutionality of "loyalty guidelines" that federal and state governments began issuing, after a turbulent period of terrorist attacks and student uprisings, in order to exclude "enemies of democracy" from public service jobs. *Id. See also* CURRIE, *supra* note 108, at 222 (discussing the same case).

194. CURRIE, *supra* note 108, at 215.

> We like to think we are more tolerant in this country. Our Constitution contains no comparable provisions . . . . But the fact is that in periods of real or imagined danger we have tended to adopt measures strikingly similar in effect to those expressly countenanced by the Basic Law, and the Supreme Court has tended to uphold them — in the teeth of an ostensibly absolute constitutional protection.

Id.

195. *See id.* n.175 (citing Schenck v. United States, 249 U.S. 47 (1919) (involving the Espionage Act); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927) (involving state syndicalism laws); Dennis v. United States, 341 U.S. 494 (1951) (involving the Smith Act); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (involving the Subversive Activities Control Act).

196. *See* Kielmansegg, *supra* note 186, at 14 (discussing the lack of consensus in Germany as to "what kind of democratic self-defense is legitimate and against whom it is necessary").

197. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (restricting free speech that posed a "clear and present danger" to the United States). *See generally* SILENCING THE OPPOSITION, *supra* note 104; TRIBE, *supra* note 49, §§ 12-9 to 12-11, at 841-61.

IV. THE CHURCH OF SCIENTOLOGY IN THE UNITED STATES AND GERMANY

A. *The Church of Scientology in the United States — Controversy Surrounding the Church*

In the latter half of the twentieth century, as more and more people have abandoned traditional religion — either as being intellectually unsustainable or simply incompatible with modern life — the United States has seen unprecedented growth in the number and variety of new religious movements.[198] Most of these new movements, sometimes called "cults," briefly flourish and then die out, rarely outliving their founders.[199] Those that survive beyond their initial fruition may eventually be accepted as legitimate religions.[200] However, no religious group that has emerged in the last fifty years has even begun to approach a level of popularity and social acceptance akin to that of traditional mainstream religions.[201]

From its earliest stages of development, Scientology has aimed for the mainstream of American religious life,[202] and the Church's promise of

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198. *See generally* AMERICA'S ALTERNATIVE RELIGIONS (Timothy Miller ed., 1995). In his introductory essay, Miller writes,

> American religion has been going through a great diversification and decentralization in the waning years of the twentieth century. . . . [T]he largest denominations have been losing members; world religions other than Christianity and Judaism have . . . grown substantially; [and] new and previously obscure groups have found themselves front and center in the news.

Id. at 1.

199. Timothy Miller defines a "cult" as "a small, intense religious group" with little connection "to mainstream religion and culture," often espousing a system of belief with origins rooted outside of traditional mainstream religion, and frequently "under the personal direction of a single charismatic leader." *Id.*

200. Mormons and Jehovah's Witnesses are two religious groups that have outlasted the "cult" and gained social acceptance in the last fifty years. *See* Wood, *supra* note 90, at 15-16.

201. This can be attributed in part to the modern trend, especially among Americans with substantial disposable income, toward personalizing religion (in the functional sense) and seeking a more individualistic spirituality than that offered by traditional religions — a trend that overlaps with the rise of the "new age" movement and the increasing popularity of spiritual "self help" books. *See, e.g.*, J. Gordon Melton, *Whither the New Age?, in* AMERICA'S ALTERNATIVE RELIGIONS 347 (Timothy Miller ed., 1995).

202. For instance, one Scientologist organization has been placing copies of Hubbard's *The Way to Happiness* in hotel rooms for years. *See* Edwin McDowell, *Bible Now Shares Hotel Rooms With Some Other Good Books*, N.Y. TIMES, Dec. 26, 1995, A14. Not that such strategically-placed spiritual guidebooks are always used for their intended purpose — said one California hotel manager, "If I had a nickel for every time I found a condom in the Bible, . . . I would be able to retire." *Id.*

temporal and eternal success[203] has attracted people whose spiritual longings found no comfort in traditional religions.[204] Along the road to religious acceptance, however, Scientology has met diverse and emphatic opposition at every turn,[205] and controversy has surrounded the Church's activities in the United States.[206] In May 1991, *Time* magazine published a cover story by Richard Behar that pulled together most of the criticism that has been leveled at the Church.[207] Behar's article portrayed the Church as a ruthless and greedy global racket that uses its pseudo-religious nonsense to numb the minds and pick the pockets of troubled souls seeking spiritual direction.[208] Describing Scientology's business practices, for example, Behar wrote:

> Scientology doctrine warns that even adherents who are 'cleared' of engrams face grave spiritual dangers unless they are pushed to higher and more expensive levels. According to the [C]hurch's latest price list, recruits — 'raw meat,' as Hubbard called them — take auditing sessions that cost as much as $1,000

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203. This is embodied in the concept of clearing the individual of his engrams and thereby enabling him to improve his life. *See supra* Part II.

204. *See All Things Considered, supra* note 4.

205. For the most part, it is the high cost of Scientology's services that arouses suspicions that the Church is more a racket than a religion. *See* Horwitz *supra* note 15, at 101-02.

206. This has been the case internationally as well. *See, e.g, Scientology Not a Religion, Swiss Court Says*, DEUTSCHE PRESSE-AGENTUR, Feb. 13, 1997, *available in* LEXIS, News Library, DPA File; *Germany is Focus of Scientology Dispute, supra* note 10 (citing Scientology trouble in Greece); *Spanien: Scientologen unter Anklage*, DIE WOCHE, May 12, 1995, at 27 (noting Church controversy in Spain); *French Minister Says No Tax Breaks for Scientology Church*, AGENCE FR. PRESSE, July 30, 1997, *available in* LEXIS, News Library, AFP File. Noting the "strong and generally hostile reaction [Scientology has received] from most of the nations in which it operates," one commentator observed that Scientology has had the *least* trouble in the United States. Horwitz, *supra* note 15, at 102-03.

207. *See* Behar, *supra* note 41. There is no shortage of material directly criticizing the Church. It ranges from sober psychological and sociological analysis, *see* BRIAN R. WILSON, *Scientology: A Secularized Religion, in* THE SOCIAL DIMENSIONS OF SECTARIANISM: SECTS AND NEW RELIGIOUS MOVEMENTS IN CONTEMPORARY SOCIETY 267 (1990), to exposés such as Behar's, to naked ridicule, *see* Mark Ebner, *Do You Want to Buy a Bridge?*, SPY, Feb. 1996 ("For hundreds of thousands of dollars and year upon year of brainwashing, you get secrets and revelatory experience tantamount to the understanding of a bad episode of *Star Trek.*"). For another representative report on the controversy surrounding the Church, see *All Things Considered, supra* note 4.

208. *See* Behar, *supra* note 41. Behar's article became the subject of a great deal of litigation, including a $416 million libel suit brought by the Church of Scientology International against Time-Warner, Inc., *Time* magazine, and Behar himself. The suit was dismissed by a federal judge in 1996 and is currently under appeal. *See The Media Business*, N.Y. TIMES, Nov. 1, 1996 at D2. The Church brought related actions against *Reader's Digest* (for publishing a condensed version of the article) and against several sources Behar used for the article. *See* William W. Horne, *The Two Faces of Scientology*, AM. LAW., July 1992, at 74. *See also A Litany of Scientology Litigation*, NAT'L. L.J., June 14, 1993, at 38.

> an hour, or $12,500 for a 12 ½-hour 'intensive.' Psychiatrists say these sessions can produce a drugged-like, mind controlled euphoria that keeps customers coming back for more. To pay their fees, newcomers can earn commissions by recruiting new members, become auditors themselves ([current Scientology leader David] Miscavige did so at age 12), or join the [C]hurch staff and receive free counseling in exchange for what their written contracts describe as a 'billion years' of labor. 'Make sure that lots of bodies move through the shop,' implored Hubbard in one of his bulletins to officials. 'Make money. Make more money. Make others produce so as to make money. . . . However you get them in or why, just do it.'[209]

Behar's story included personal accounts of individuals who were cheated, abused and otherwise traumatized by their former association with the Church of Scientology.[210] Reports decrying the "sophisticated techniques of mind control" it employs[211] are common in the voluminous criticism devoted to the Church.[212] However, because joining the Church and following its protocol are voluntary decisions, and because of courts' inability to effectively rule on cases involving allegations of religious fraud and the government's inability to directly regulate church activities,[213]

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209. Behar, *supra* note 41. *But see* Nikos Passas & Manuel Escamilla Castillo, *Scientology and its 'Clear' Business,* 10 BEHAV. SCI. & L. 103 (1992) (arguing that the Church, when "analyzed as a successful commercial enterprise which, seeking to achieve its goals, occasionally adopts illicit means," actually "functions like an ordinary profit-making enterprise that both reflects and relies on dominant cultural values in the West and in particular in the USA").

210. *See* Behar, *supra* note 41. *But see* PFEFFER, RELIGION, *supra* note 91, at 211 (questioning the motivation for and truth behind penitent ex-cultists' "horrendous" tales of their cult experience). "[I]t is fairly certain that many [such reports] are not or at least not fully true. . . . Monetary and other tangible benefits, such as favorable news stories, can be the reward for penance and confession." *Id.*

211. Thomas Robbins, *Profit for Prophets: Legitimate and Illegitimate Economic Practices in New Religious Movements, in* MONEY AND POWER IN THE NEW RELIGIONS 78, at 105 (James T. Richardson ed., 1988). Thomas Robbins stated that at the very least, Scientology's "auditing-plus-manipulative-pressures" are "psychologically intrusive and sometimes traumatizing processes which can undermine personal autonomy and/or mental health, particularly in the case of persons who are already unstable or borderline." *Id.* For more material devoted to the "brainwashing" capabilities of religious cults, see THOMAS W. KEISER & JACQUELINE L. KEISER, THE ANATOMY OF ILLUSION: RELIGIOUS CULTS AND DESTRUCTIVE PERSUASION (1987) and ROBERT J. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM 419 (1961) (outlining eight characteristics of totalitarian control).

212. *See* James Walsh, *Tax Treatment of the Church of Scientology in the United States and the United Kingdom,* 19 SUFFOLK TRANSNAT'L L. REV. 331, 334 n.21 (1995) (listing articles criticizing the Church for brainwashing, harassment, criminal behavior, etc.).

213. *See supra* notes 88-89 and accompanying text.

disgruntled Scientologists generally have little hope for legal recourse.[214]

In addition, Behar chronicled the Church's shrewd bid for credibility, which has included establishing various "front organizations" with names like "Applied Scholastics," "Citizens Commission on Human Rights," and "Concerned Businessmen's Association of America" that allegedly support Scientology interests under false pretenses.[215] Other means by which the Church has sought respectability, or at least popularity, include recruiting high-profile entertainers by offering them the quiet and luxurious comfort of the Church's celebrity chateau and spa in southern California;[216] establishing substance-abuse treatment programs and health clinics[217] — both of which bring prospective members into the Scientology fold and associate the Church with clean and healthy living; and allegedly directing Church members and franchises to purchase massive quantities of L. Ron Hubbard's books in order to create the illusion of a respectable best-selling author.[218] Finally, critics have accused the Church of having participated in various

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214. This has not been for a lack of trying. *See, e.g.*, Marcia Chambers, *Suit Challenges Tactics of Church*, N.Y. TIMES, Apr. 27, 1986, at 1:1. In rare cases, former-Scientologist plaintiffs have been awarded damages in tort claims against the Church. *See* Horwitz, *supra* note 15, at 106-09. *See also* Horne, *supra* note 208. Most civil claims brought against the Church have been for intentional infliction of emotional distress, with unlawful imprisonment being the next most common claim. *See id.* For a discussion of other legal issues involved in claims against religious cults, see James R. P. Ogloff & Jeffrey E. Pfeifer, *Cults and the Law: A Discussion of the Legality of Alleged Cult Activites*, 10 BEHAV. SCI. & L. 117 (1992).

215. Behar, *supra* note 41. *See also All Things Considered*, *supra* note 4. In a related development, Scientology actually obtained the rights to the name of its arch foe, the Cult Awareness Network (CAN), which was "driven to financial ruin" by litigation brought by the Church and its affiliates. Frank Rich, *Who Can Stand Up?*, N.Y. TIMES, Mar. 16, 1997, § 4, at 15. *See also* Andrew Blum, *Anti-Cult Group: Foe Ruined Us*, NAT'L. L.J., July 29, 1996, at A6; Darryl Van Duch, *Anti-Cult Group's Assets Bought by Scientologist: Church Get's Foe's Name in Bankruptcy*, NAT'L. L.J., Dec. 23, 1996, at A6.

216. *See* Behar, *supra* note 41. *See also* Douglas Frantz, *Scientology's Star Roster Enhances Image*, N.Y. TIMES, Feb. 13, 1998, at A2. The Church maintains additional "Celebrity Centres" in Paris, Vienna, Hamburg, Düsseldorf, Munich, London, New York, Las Vegas, Nashville, and Washington, D.C. See CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at xix. Also, the Church allegedly uses intimate details gleaned from auditing sessions to prevent its star recruits from leaving the Church. *See* Behar, *supra* note 41. *See also*, Greg Sinclair, *Stripped Bare: Tom Cruise and the Weird Cult*, DAILY MIRROR, Apr. 13, 1994, at 19 (discussing how a well-known celebrity Scientologist was "'reminded' of his past sexual behavior when he considered quitting the [C]hurch"); Alan Hall, *How Cult led Jacko up the Aisle with Two Tin Cans and a Ball of String*, DAILY MIRROR, July 14, 1994, at 7.

217. *See All Things Considered*, *supra* note 4. *See also* Behar, *supra* note 41. Hubbard's *Dianetics* was on *The New York Times'* bestseller list, under "Advice, How-To and Miscellaneous," as recently as 1990. *Paperback Best Sellers*, N.Y. TIMES, Mar. 25, 1990, § 7, at 34.

218. *See* Behar, *supra* note 41. Additionally, this practice enabled Hubbard to receive "huge royalties" on the sale of his books. Robbins, *supra* note 211, at 89.

financial scams and its leaders of having secretly diverted millions of dollars in Church funds to foreign bank accounts for their personal use.[219]

According to critics of the Church, the intensity and persistence with which Scientology combats its "enemies" represent the Church's implementation of Hubbard's "fair game" policy, an unequivocal directive from the Church's founder authorizing Church members to employ whatever means necessary to subdue enemies of the Church.[220] According to this policy, anyone who attacks the Church may be justifiably lied to, tricked, harassed, or "destroyed."[221] As examples of fair game in action, critics typically cite systematic smear campaigns that Church organizations have launched against Scientology's detractors and competitors, who include psychiatrists and makers of antidepressants, because their therapy cuts into Scientology's market.[222] The Church's intelligence unit, "the Guardian's Office," is reportedly responsible for much of the harassment associated with fair game,[223] while the Church itself has employed private investigators to find or fabricate information to be used against foes of Scientology.[224]

Litigation is perhaps Scientology's most effective weapon against its perceived enemies.[225] The Church can afford to employ tenacious attorneys,[226] many of whom are themselves Scientologists,[227] who are "quick to battle its opponents with tough, take-no-prisoners legal tactics."[228] Hubbard himself identified harassment and annoyance as the primary purposes of litigation,[229] and Church lawyers have been criticized for using the legal system to pummel Church foes into submission.[230] The Church

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219. *See, e.g.*, Robert Lindsey, *Scientology Chief Got Millions, Ex-Aides Say*, N.Y. TIMES, July 11, 1984 at A1; Behar, *supra* note 41.

220. Hubbard wrote the doctrine in October 1967 and, the Church claims, rescinded it a year later. *See* Horne, *supra* note 208.

221. Behar, *supra* note 41 (quoting Hubbard).

222. *See id.*

223. Horne, *supra* note 208.

224. *See, e.g.*, Behar, *supra* note 41; Horne, *supra* note 208.

225. *See* Horne, *supra* note 208.

226. According to *The New York Times*, the Church recently counted assets of approximately $400 million and "appears to take in nearly $300 million a year from counseling fees, book sales, investments and other sources." Robert D. Hershey, Jr., *Scientologists Report Assets of $400 Million*, N.Y. TIMES, Oct. 22, 1993, at A12. *See also* Horne, *supra* note 208 (discussing the Church's high-priced "bulldog" attorneys).

227. *See* Horne, *supra* note 208.

228. *A Litany of Scientology Litigation, supra* note 208. For a discussion of the Church's early conflicts with the FDA regarding the purported scientific healing power of the E-meter and related religious equipment, see Horwitz, *supra* note 15, at 103-06.

229. *See* Behar, *supra* note 41.

230. *See* Horne, *supra* note 208. Tactics include "flooding dockets with motions" and filing retaliatory suits, in multiple jurisdictions, against Church opponents and their lawyers. *Id.*

employed these and other fair game tactics in the mother of all Church wars — Scientology's struggle with the IRS for religion-based tax exemption.[231]

B. *Official Recognition as a Religion*

By any account, the Church charges and receives a great deal of money from its members.[232] Based on its self-proclaimed religious character, the Church sought and received religion-based income tax exemption from the IRS in 1957.[233] In 1967, however, the IRS reversed its position and revoked the Church's exemption.[234] For the next twenty-five years, the IRS fought to maintain its position against scores of Church-filed legal challenges.[235]

The primary reason the IRS denied the exemption was not that Scientology was not a religion. In *Founding Church of Scientology vs. United States*,[236] the U.S. Court of Appeals for the District of Columbia decided that, on its face, Scientology was a religion.[237] Rather, the IRS revoked the Church's exemption based on a finding that, "even if religious in nature," the Church was operated "for the enrichment of specific private individuals."[238] Thus, the Church did not conform to the mandate of the relevant portion of the *Internal Revenue Code*, which required that it be organized and operated exclusively for religious (or charitable, etc.) purposes in order to qualify for income tax exemption.[239]

Apart from the deluge of litigation brought by its attorneys, the Church reportedly hired private investigators to harass IRS employees and smudge their reputations.[240] In return, the Church claims that the IRS had unjustifiably targeted the Church for audits (of the accounting variety) and other instances of administrative discrimination in an effort to destroy the

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231. *See* Douglas Frantz, *Taxes and Tactics: Behind an I.R.S. Reversal — A Special Report: Scientology's Puzzling Journey From Tax Rebel to Tax Exempt*, N.Y. TIMES, Mar. 9, 1997, § 1, at 1 [hereinafter Frantz, *Puzzling Journey*]; Douglas Frantz, *Taxes and Tactics: An Ultra-Aggressive Use of Investigators and the Courts*, N.Y. TIMES, Mar. 9, 1997, § 1, at 31 [hereinafter Frantz, *Taxes and Tactics*].

232. *See supra* notes 209, 226 and accompanying text.

233. *See* Frantz, *Puzzling Journey*, *supra* note 231.

234. *See id.*

235. *See id.* At several junctures in its ongoing battle for tax exemption, Scientology had more than 100 suits pending against the IRS. *See id.*

236. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir 1969).

237. The government did not contest the issue, and based on the lack of any claim to the contrary the court held Scientology was prima facie a religion. *See id.* at 1154.

238. Walsh, *supra* note 212, at 337-38.

239. *See* I.R.C. § 501(c)(3) (West 1998).

240. *See* Frantz, *Puzzling Journey*, *supra* note 231. For example, the Scientology-funded gumshoes looked for IRS employees who drank too much or may have been having affairs, and they snooped around the homes, peeked in the windows and dug through the garbage, etc., of IRS staffers. *See id.*

Church.[241]

By the end of the 1980s, the IRS had won several major legal victories and appeared firmly entrenched in its position. Notably, a total of eleven Scientologists were sentenced to prison terms in 1979 and 1980 for federal crimes arising from their attempts to steal, copy, and destroy various IRS and Justice Department documents pertaining to Church activities,[242] and in *Hernandez vs. Commissioner*,[243] the Supreme Court ruled that so-called "donations" to the Church from its members in exchange for auditing and other services were not tax deductible.[244] Hence, news of the Internal Revenue Service's 1993 decision to settle with the Church and grant the exemption came as a major shock.[245] By some accounts, Scientology's pervasive and aggressive opposition simply wore the IRS down to a point where it could no longer afford the battle.[246] However, the Church contends

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241. *See id.* Thus echoing Leo Pfeffer's comments characterizing the IRS as a tool for government suppression of unpopular religious groups. *See* PFEFFER, RELIGION, *supra* note 91, at 1.

242. In December 1979 Hubbard's wife and several upper-level Church officials were convicted of conspiracy to obstruct justice, conspiracy to burglarize government offices and steal documents, and theft of government property in connection with an attempt to steal IRS files on the Church. *See* Horwitz, *supra* note 15, at 108. In November 1980, two more high-ranking Scientologists were convicted of burglary in connection with break-ins at offices of the IRS and the Justice Department. *See 2 Scientology Aides Guilty of Burglary*, N.Y. TIMES, Nov. 27, 1980, § 1, at 17. The bungled Church program leading to the arrests was code-named "Operation Snow White." Frantz, *Puzzling Journey, supra* note 231.

243. Hernandez v. Comm'r, 490 U.S. 680 (1989).

244. *Hernandez* was a major victory for the IRS. The Court ruled 5-2 that the IRS was correct in denying the contested deductions because they were fixed payments for services rendered (an essential quid pro quo arrangement) rather than charitable contributions. *See id.* at 690-94. However, the dissenting opinion of Justices O'Connor and Scalia gave credence to Scientology's consistency argument, which asserted that there was no meaningful distinction between payment for Scientology services and payments for pew rentals and the like in established churches (which were tax deductible). *See id.* at 708-11 (O'Connor, J. and Scalia, J., dissenting).

245. "This puts an end to what has been an [sic] historic war. . . . It's like the Palestinians and the Israelis shaking hands." Labaton, *supra* note 5 (quoting Marty Rathbun, president of one of the more than 150 Scientologist corporations that received a tax exemption). Reportedly, "10,000 cheering Scientologists thronged the Los Angeles Sports Arena to celebrate the most important milestone." Frantz, *Puzzling Journey, supra* note 231.

246. *See* Frantz, *Taxes and Tactics, supra* note 231. Details of the settlement have not been made public; it is rumored to have been instigated by an impromptu meeting between then IRS Commissioner Fred Goldberg, Jr. and two Scientology leaders. *See* Douglas Frantz, *Scientology Denies an Account of an Impromptu I.R.S. Meeting*, N.Y. TIMES, Mar. 19, 1997, at A18. *See also* IRS News Release, IR-97-50, Dec. 31, 1997 ("The Church of Scientology was recognized as tax exempt after establishing that it was an organization operated exclusively for religious and charitable purposes. Recognition was based upon voluminous information provided by the Church regarding its financial and other operations to the Internal Revenue Service."); *Closing Agreement Reveals Scientology Paid $12.5 Million*, EOTR WKLY., Jan. 12, 1998 (discussing the details of the settlement).

that it won on the merits of its case.[247] By virtue of its tax exempt status, Scientology is now able to claim official recognition as a religion in the United States, and the State Department regards the Church's claims of religious persecution abroad as human rights complaints.[248]

Since 1993, Scientology has remained controversial, largely for the same reasons discussed above,[249] while public awareness of the controversy surrounding the Church has increased as the war between Scientology and its critics has spilled onto the Internet.[250] Scientology's lawyers have been

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247. The Church maintains that after unprecedentedly thorough investigations the IRS realized that Scientology was a "benign nonprofit organization entitled under tax law to be underwritten by American taxpayers." Rich, *supra* note 215. *See also* Monique E. Yingling, *Scientology Won Tax Exemption on the Merits*, N.Y. TIMES, March 18, 1997, at A20. The author is a lead tax attorney for the Church; the text is from her letter to the editor disputing the paper's treating the IRS reversal as suspicious (*see* Frantz, *Puzzling Journey*, *supra* note 231).

248. The State Department first mentioned Scientologists' complaints of discrimination and harassment in Germany in its 1993 human rights report, released just four months after the IRS granted the Church's exemption. *See* Frantz, *Puzzling Journey*, *supra* note 231. *See also* sources cited *supra* note 7. In a related development, a German Scientologist "who claimed that she would be subjected to religious persecution" had she been forced to return to Germany was recently granted asylum by a federal immigration court judge in Florida. Douglas Frantz, *U.S. Immigration Court Grants Asylum to German Scientologist*, N.Y. TIMES, Nov. 8, 1997, at A1.

249. The most serious case is that of Lisa McPherson, a Florida Scientologist who died of dehydration two weeks after being released from the hospital under the care of Scientologists who objected to her undergoing psychiatric evaluation after she was discovered nude, disoriented, and crying for help following a minor traffic accident. *See All Things Considered*, *supra* note 4. *See also* Douglas Frantz, *Distrust in Clearwater: Death of a Scientologist Heightens Suspicions in a Florida Town*, N.Y. TIMES, Dec. 1, 1997, at A1. For another discussion of the McPherson case and other cases in which people drawn to Clearwater, Florida (site of a major Scientology center) by their involvement in the Church have turned up dead, allegedly under suspicious circumstances, see Lucy Morgan, *For some Scientologists, Pilgrimage has been Fatal*, ST. PETERSBURG TIMES, Dec. 7, 1997, at 1A. For a recent article discussing retaliatory tactics reportedly employed by Scientologists against a Church critic, see David O'Reilly, *Church of Scientology Hits Critics Where They Live*, SEATTLE TIMES, Dec. 28, 1997, at A18.

250. "The Church of Scientology is battling a band of on-line dissidents who have used the Internet to mail out globally its secret scriptures, for which some members must pay thousands of dollars." Mike Allen, *Dissidents Use Computer Network to Rile Scientology*, N.Y. TIMES, Aug. 14, 1995, at A12 [hereinafter Allen, *Dissidents*]. The copyrighted secret scriptures, from the seventh level of spirituality, were obtained from public court records. *See* Mike Allen, *Internet Gospel: Scientology's Expensive Wisdom Now Comes Free*, N.Y. TIMES, Aug. 20, 1995, § 4, at 2 [hereinafter Allen, *Gospel*]. The documents were posted by a former Scientologist (who described them as "the big secret at the end of the rainbow") on the newsgroup "alt.religion.scientology" and, when news spread on the Internet of the Church having obtained an order from a federal judge in Virginia for the confiscation of the man's computer ("they even took my mouse and modem," he said), civil-libertarian net-people from the world over began posting the sacred texts on public web pages as a kind of game designed to frustrate the Church. Allen, *Dissidents*, *supra*. Reading the scriptures without having

trying to keep copyrighted Church scriptures out of publicly accessible cyberspace, and the accompanying legal battles have spurred debate in intellectual property law.[251] Apart from these developments, the most noteworthy issue affecting Scientology in America has been Scientologists' treatment in Germany.[252]

C. *The Church of Scientology in the Federal Republic of Germany*

1. *The German Government's View of Scientology*

At all levels, the German government has taken a strong stance against the Church of Scientology.[253] The German government has issued reports that are essentially warnings of Scientology's anti-democratic nature and what it regards as the Church's plan to infiltrate strategic areas of German

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undergone the proper training was strictly forbidden by the Church (and purported to cause pneumonia). *See* Allen, *Gospel, supra*.

251. *See generally Speech in Electronic Space*, WASH. POST, Aug. 22, 1995, at A16 (editorial commenting on the copyright issues raised by the Scientology case); James Brooke, *Scientologists Lose a Battle on the Internet*, N.Y. TIMES, Sept. 14, 1995, at B14 (discussing a similar case in Colorado); Alison Frankel, *Making Law, Making Enemies*, AM. LAW., Mar. 1996, at 68 (commenting on the Church's victory in an Internet copyright case); Religious Technology Center v. Lerma, 908 F. Supp. 1353 (E.D. Va. 1995).

252. *See supra* Part IV(B).

253. This has continued in spite of increased pressure from the United States government to recognize Scientology as a religion, which has been applied largely through State Department Human Rights Reports (*see generally* sources cited *supra* note 7) and the actions of members of congress who have taken up the Scientologists' cause. *See* Cowell, *supra* note 9; Jan van Flocken, *Scientology: Treibjagd auf die Thetanen*, FOCUS, Aug. 19, 1996, at 26. *See also U.S. Congressional Panel Blasts Germany over Scientology*, AGENCE FR. PRESSE, Oct. 31, 1997, *available in* Westlaw at 1997 WL 13424766 (discussing the House Foreign Relations Committee's adoption of a resolution "condemning the actions and statements of Federal and State officials in Germany who have fostered an atmosphere of intolerance towards certain minority religious groups," including Scientologists). The resulting motion was rejected by the House, 318 to 101. *See U.S. Congress Rejects Motions Condemning Germany over Scientology*, AGENCE FR. PRESSE, Nov. 10, 1997, *available in* 1997 WL 13430905.

Ursula Caberta, who has been assigned by the city of Hamburg to monitor Scientology activities in Germany, said of the Church, "These people really mean business. This is a new form of political extremism and I can't help it if the U.S. doesn't realise what a danger to our society Scientology represents." *Scientology Touches Raw Nerve with its Campaign Against Germany*, DEUTSCHE PRESSE-AGENTUR, Jan. 30, 1997, *available in* LEXIS, News Library, DPA File. Estimates of the number of Scientologists in Germany range from thirty thousand to two million. *Id.* But, the most common estimate is thirty thousand. *See, e.g.*, Cowell, *supra* note 4.

industry, government, and society.[254] Evidence for such fears exists in policy letters from L. Ron Hubbard and other Scientology documents that essentially claim that democracy is foolish for tolerating its own enemies.[255] Thus, the dictates of the Church's fair game policy are an oft cited justification for opposing Scientology as an intolerant and anti-democratic organization.

Government reports and much of the German media attention has focused on what has been described as a kind of psychological control that Scientology maintains over its members in the hierarchical system by which Scientologists ascend to higher spiritual levels by taking more courses.[256] This is an extremely sensitive area for Germany because it recalls the elaborate mythology of racial superiority that was indoctrinated by the Nazis.[257] Although critics of the Church have been hesitant to explicitly

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254. *See* Norbert Blüm, *Scientology: Die Profit-Sekte*, DIE WOCHE, May 12, 1995, at 1 (Blüm is Germany's Federal Labor Minister). *See also Nolte Seeks Legal Sanctions Against Scientology Saying it Undermines Democracy*, WK. GERMANY, Jan. 19, 1996, *available in* LEXIS, News Library, WKGERM File (referring to Claudia Nolte, Federal Minister of the Family); Craig R. Whitney, *Officials in Germany Denounce Sect as a Menace to Democracy*, N.Y. TIMES, Oct. 13, 1994, at A6.

255. *See* Hans-Gerd Jaschke, *Gutachten: Auswirkungen der Anwendung scientologischen Gedankenguts auf eine pluralistische Gesellschaft oder Teile von ihr in einem freiheitlich demokratisch verfaßten Rechtsstaat* (visited Oct. 24, 1997) <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/jaschke.html> (reporting for the Interior Ministry of Nordrhein-Westfallen); Ralf B. Abel, *Gutachtliche Stellungnahme zu der Frage "Ist das Menschen- und Gesellschaftsbild der Scientology-Organisation vereinbar mit der Werte- und Rechtsordnung des Grundgesetzes?"* (visited Oct. 24, 1997) <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/abel.html> (reporting for Schleswig-Holstein).

256. *See* Abel, *supra* note 255. *See also* van Flocken, *supra* note 253. These allegations are similar to the charges of "brainwashing" that the Church has faced in the United States. *See* Horne, *supra* note 208. Commentary in the German press has been mixed with respect to the government's position on Scientology, with some observers apparently taking the government warnings to heart and others maintaining that they are excessive. *Compare Wie erkenne ich einen Scientologen?*, BUNTE, Aug. 22, 1996, at 30 (listing 13 characteristics of Scientologists to help readers "protect themselves"); Bernd Marz, *Weder Kirche noch Sekte*, DIE WOCHE, Aug. 23, 1996, at 31 (claiming Scientology is not a religion); Thomas Roell, *Sekten: Neue Strategie*, FOCUS, Sept. 1, 1997, at 31 (listing Scientologist "front groups" that are active in Germany); *and* William Horsley, *Germany's Mental Fight: National Opposition to the Church of Scientology*, NEW STATESMAN, Nov. 1, 1996, at 26 (noting that "[l]iberal opinion [in Germany] is troubled by the denunciation campaign" against Scientology and quoting Josef Joffe, foreign editor of Munich's *Suddeutsche Zeitung*, as saying that Germans "should show more self-assurance" toward their laws and government).

257. In this environment, the claim that Scientology can unlock a person's superhuman potential arguably resembles the Nazi ideology of the Aryan "superman." *See, e.g.*, CRAIG, *supra* note 116, at 33-34.

make this comparison,[258] the Church has been quick to draw parallels between Nazism and contemporary German treatment of Scientologists.[259] Ironically, the German government is being compared to the Nazis for using the very tools the Basic Law gives it to protect against a Nazi-like insurrection.[260]

2. *Anti-Scientology Measures*

Federal and state authorities in Germany have taken numerous actions against the Church of Scientology. These anti-Scientology measures range from Bavaria's requirement that state employees divulge any ties to the Church,[261] to the federal employment office keeping inventory of employers linked to the Church,[262] to the federal government placing the Church under nationwide surveillance.[263] In addition, German intelligence authorities have

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258. Critics of the Church typically refer to its "totalitarian" and "extremist" nature. *See, e.g.*, Hans-Peter Bartels, *Kampfplatz Deutschland*, DIE WOCHE, Nov. 22, 1996, at 37 (referring to the Church's aim of creating a totalitarian society).

259. This, of course, has done nothing to increase public acceptance of the Church. *See supra* text accompanying notes 10-12.

260. *See supra* notes 176-97 and accompanying discussion of the militant democracy.

261. This measure was intended to "prevent Scientologists from infiltrating public positions," and the decree also "requires private companies awarded state contracts in 'sensitive' fields to sign a statement saying they will not use [Scientology's] methods." *Bavaria Asks Disclosure of Scientology Ties*, N.Y. TIMES, Oct. 30, 1996, at A6.

262. Employees at the federal labor office reportedly "marked an 'S' on the files of any company considered to be influenced by the Church of Scientology." *Inventory Kept of Companies Linked to Scientology in Germany*, AGENCE FR. PRESSE, Mar. 17, 1997, *available in* LEXIS, News Library, AFP File.

263. This decision came despite German intelligence officials' initial reluctance to assign agents to the Church for fear that the investigators "might confront brain-washing and 'considerable psychological influences' that would lead them to becoming Scientologists themselves." *Scientologists Could Win over German Spies: Report*, AGENCE FR. PRESSE, Apr. 5, 1997, *available in* LEXIS, News Library, AFP File. The decision to place the Church under surveillance (which groups the Church with Germany's neo-Nazi and extreme leftist parties) was described as the German government's "sharpest action yet" in its battle with Scientology, because it authorized German intelligence operatives to tap the phones, intercept the mail, and pose as Scientologists in order to infiltrate the offices of the Church. Alan Cowell, *Germany Will Place Scientology Under Nationwide Surveillance*, N.Y. TIMES, June 7, 1997, § 1, at 1. Interior Minister Manfred Kanther "said the year's surveillance would establish whether the [Church] was simply an 'unpleasant group,' a criminal organization or an association with anti-constitutional aims." *Id.* At least one German state (left-leaning Schleswig-Holstein) said it would decline to implement the action because it conflicts with existing state legislation. *See German State Rules Out Monitoring of Scientologists*, AGENCE FR. PRESSE, Aug. 26, 1997, *available in* LEXIS, News Library, AFP File. (For a discussion of German federalism, see KOMMERS, *supra* note 107, at 61).

German officials have since ordered the surveillance to continue, based on a two-year investigation of the Church's activities that concluded with a determination that the

set up a hotline to "help former cult or family members find an outlet for pressure they are facing" from the Church,[264] and Chancellor Helmut Kohl's Christian Democratic Union party has banned Scientologists from joining its ranks — a policy that was upheld in court because Scientology's "internal structures" were deemed undemocratic and "their treatment of critics and former members" was incompatible with party principles.[265]

The most important court ruling concerning the Church of Scientology came in a 1995 Federal Labor Court decision holding that Scientology is a for-profit enterprise and not a religion.[266] This ruling was especially significant given that Germany confers such a high degree of autonomy to churches in governing their internal affairs,[267] while commercial organizations must register all financial activity with German authorities.[268] Although lacking the supreme constitutional authority of a Federal Constitutional Court decision, the ruling came from the next highest level in the German court system[269] and was hailed as a crushing blow to the Church.[270]

Church was "an organisation with political goals." *Scientology Threat to Democracy: German Commission*, AGENCE FR. PRESSE, June 19, 1998, *available in* 1998 WL 2305457. Church leaders strongly condemned the report. *See Scientologists call German Commission 'Medieval Inquisitors'*, AGENCE FR. PRESSE, June 22, 1998, *available in* 1998 WL 2307234.

264. *Hot Line Set up for Information about Scientology*, AGENCE FR. PRESSE, June 17, 1997, *available in* LEXIS, News Library, AFP File. Shortly after it was installed, the hotline was flooded with calls from outraged Scientologists. *See Scientologists Call Germany's New Anti-Scientology Hotline*, DEUTSCHE PRESSE-AGENTUR, July 26, 1997, *available in* LEXIS, News Library, DPA File.

265. *Court Confirms Kohl Party Ban on Scientologists*, AGENCE FR. PRESSE, July 9, 1997, *available in* LEXIS, News Library, AFP File. *See* Landgericht [LG] [Trial Court] Bonn 7 O 55.97 (1997) (visited Oct. 21, 1997) <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/lg5597.html>.

266. *See* Bundesarbeitsgericht [BAG] [Supreme Labor Court] 5, 21/94 (1995), (visited Oct. 21, 1997) <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/bag5azb.html>. The court ruled that the Hamburg branch of the Church was not a religion under article 4 of the Basic Law (granting freedom of faith, conscience, and creed), or Article 137 of the Weimar Consistitution (governing the rights of religious communities) because its activities were chiefly commercial in nature. *See id.*

267. *See* GG, WEIMAR CONST. art. 137.

268. *See Administrative Court: Scientology is a Business*, WK. GERMANY, Mar. 3, 1995, *available in* LEXIS, News Library, WKGERM File.

269. Federal courts are subject-specific in Germany and are the highest courts available for non-constitutional issues. *See* KOMMERS, *supra* note 107, at 3.

270. *See Administrative Court*, supra note 268. Since that ruling, Germany's Federal Administrative Court declined to rule on Scientology's religious status and returned the case to an administrative appeals court in Mannheim to decide whether a Scientology mission in Stuttgart is "a business or a not-for-profit organization concerned with 'spiritual advisement.'" Anne Thompson, *German Court Shies Away from Scientology Ruling*, AP, Nov. 6, 1997, *available in* 1997 WL 4891399. The court said that Scientology "would be considered a business only if it made a profit from selling educational materials to non-members." *Id.*

Although measures taken by the German government against the Church may seem extreme, or even blatantly unconstitutional by American standards, none have been struck down by German courts.[271] Further, if it is unable to invoke the Basic Law's protection as a religion, the Church is unlikely to mount a successful challenge to any action the government has taken against it.[272] In addition, such actions would likely withstand a constitutional challenge, given the Court's previous interpretations of Basic Law doctrines that have been used to preserve the constitutional order[273] and the social values it embodies.[274] They are all, at least constructively, authorized by the Basic Law's order of values doctrine. Moreover, the Church could conceivably be banned as an extremist "party" or "association" under the militant democracy doctrine given that (1) government actions against the Church focus on its "totalitarian" nature and "anti-democratic" structure and (2) German courts need not consider an organization's self-concept in determining whether it is a religion.[275]

In response to Germany's anti-Scientology activities, the Church has lodged complaints with the United Nations[276] and with the European Commission on Human Rights.[277] The Church has also recently organized a group called "Freedom for Religions in Germany,"[278] which according to a spokesman for the group, "has promised confidentiality to members of any religious minorities that had proof of harassment or intimidation by German officials."[279] In addition, the Church has recently held religious freedom

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271. This has been disputed by Scientology leaders, but a diligent search revealed no such rulings as of August 1998.

272. Thus, the Federal Labor Court ruling may have spurred the Church's decision to intensify its international publicity campaign against the German government, which has increased markedly since 1995. *See supra* notes 4-12 and accompanying text.

273. *See supra* notes 176-97 and accompanying text (discussing the militant democracy).

274. *See supra* notes 162-75 and accompanying text (discussing the Basic Law's order of values).

275. *See supra* notes 176-97 and accompanying text. This seems unlikely, however, given that the Church has apparently gained a powerful ally — one that it shares with Germany — in the U.S. government.

276. *See Scientologists Urge U.N. Probe of Alleged Discrimination in Germany*, DEUTSCHE PRESSE-AGENTUR, Aug. 14, 1996, *available in* LEXIS, News Library, DPA File. Abdelfattah Amor, special investigator for the U.N., rejected the charges, stating, "This comparison between modern Germany and Nazi Germany is so shocking as to be meaningless and puerile." *U.N. Derides Scientologists' Charges about German 'Persecution'*, N.Y. TIMES, Apr. 2, 1998, at A3.

277. *See Scientologists Lose Case Against Germany*, N.Y. TIMES, Apr. 10, 1997, at A3 (dismissed on grounds that the Church had not exhausted domestic legal channels).

278. *U.S. Group Seeks Religious Minorities Alleging Abuses in Germany*, DEUTSCHE PRESSE-AGENTUR, Apr. 16, 1997, *available in* LEXIS, News Library, DPA File.

279. *Id.*

protests in Frankfurt[280] and Berlin,[281] both of which were attended by American celebrity Scientologists.[282]

V. CONCLUSION

Scientologists are not storm troopers, and Germany is not the Fourth Reich.[283]

Norbert Blüm's characterization of the Church of Scientology as a "giant octopus"[284] aptly demonstrates the German government's attitude toward Scientology. The attitude is a mixture of hysteria and disgust, and the image of an octopus spreading its tentacles is a fine metaphor for Germany's fear of being infiltrated and suffocated by an insidious cult. The question posed in the title of this note refers to whether Germany would be better off relaxing its position on Scientology and, more generally, putting greater trust in its democratic foundations and the marketplace of ideas.[285] Thus, to "love the octopus" means to follow the United States and accept Scientology as part of the price a society must pay if it wishes to enjoy extensive rights and liberties.[286] The question is complicated by the controversy surrounding the Church. It is an organization whose religious

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280. Organizers said 500 people attended the rally. *See Scientologists Urge Religious Freedom in Frankfurt Protest*, AGENCE FR. PRESSE, July 21, 1997, *available in* LEXIS, News Library, AFP File.

281. An estimated 2,000 supporters attended the march at the Brandenburg Gate, the highlight of which was the broadcast of a taped message from John Travolta. *See* Alan Cowell, *Scientology Rally in Germany Sparsely Attended*, N.Y. TIMES, Oct. 28, 1997, at A11.

282. *See id.*

283. Joffe, *supra* note 12.

284. *See supra* note 3 and accompanying text.

285. Discussing Germany's response to American criticism of Germany's treatment of the Church of Scientology, Josef Joffe wrote:

> Invariably, Germans will argue that their history is not as happy as that of the United States, that they cannot be as sanguine about the good beating out the bad in the marketplace of ideas. Hence, goes the standard formula, freedom cannot be extended to those who would destroy it.

Joffe, *supra* note 12.

286. In Justice Jackson's terms, it is part of the "rubbish" that must be endured and even paid for in exchange for permissive liberties. *See* United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting). *See also* Joffe, *supra* note 12.

> If liberty is to have real meaning, the true test is how we treat groups we find ridiculous or repulsive. The test is hardly an easy one. It presupposes a society that believes in its institutions, and does not have to search for the enemy within in order to find faith in itself.

Id. Regarding Joffe's last comment, see generally ALBERT BERGESEN, THE SACRED AND THE SUBVERSIVE: POLITICAL WITCH-HUNTS AS NATIONAL RITUALS (1984) (discussing the reinforcing of democratic forms by targeting perceived threats to democracy).

nature has been widely disputed, and its expensive training and aggressive tactics justifiably create suspicion and skepticism.

In the United States, the Church is generally accepted as a religion, in part because the Scientologists won their battle for religion-based tax exemption. More importantly, America's system of strict separation of church and state and its broad, functional view of religion have created an environment in which groups like Scientology cause relatively little stir. In addition, with its strong tradition of democracy and liberal personal freedoms, the United States has shown that, for the most part, it can absorb a wide variety of strange and potentially dangerous groups without perceiving any as a threat to its people or institutions. In this setting, the Church of Scientology looks harmless, more like a baby squid than a menacing octopus.

Given that postwar Germany has established a government that in many ways resembles that of the United States — both are constitutional democracies with broad fundamental rights protections — from an American perspective, German fears that Scientology will topple its constitutional democracy seem absurd, and Germany's strong anti-Scientology actions seem excessive, unlawful, or both. However, concluding that Germany is simply wrong, and should be more like America, is a poor "solution" to the problem because it overlooks important differences between the two countries.

First, a general distinction can be made between traditional German and American concepts of freedom: The American view focuses on the sovereign individual, while the German view focuses on the relationship between individual and community. In German political philosophy, liberty is defined primarily in "collectivist" terms. Because the individual depends on the state or collective for his safety, his freedom is limited in the sense that it can only be realized to the extent allowed by the prevailing mores of society.[287]

Second, because Germany is relatively new to constitutional democracy, it lacks America's self-assurance regarding its democratic institutions and the functioning of the marketplace of ideas. This problem is exacerbated by Germany's historical consciousness of the Nazi experience, that is, of actually having been overtaken by a menacing cult with a

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287. The Federal Constitutional Court's interpretation of the Basic Law echoes this view:

> The image of man in the Basic Law . . . is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.

BVerfGE 4, 7 (15-16) (1954) (quoted in KOMMERS, *supra* note 107, at 305). *See generally* LEONARD KRIEGER, THE GERMAN IDEA OF FREEDOM (1972).

charismatic leader — to oversimplify the matter considerably. The result is an extremely low threshold for what appears to constitute a threat to Germany.

Third, Germany's constitutional democracy has explicit powers to protect itself.[288] The Basic Law authorizes militant democracy restrictions on fundamental rights when they are used to undermine or combat the free democratic order. In addition, the Federal Constitutional Court has been forthright in its interpretation of the normative character of the Basic Law — its objective order of values[289] — arguably to the detriment of the Basic Law's commitment to tolerance and diversity.[290]

Finally, Germany's tradition of cooperation between church and state creates pressure against extending religious protection to the Church of Scientology. With the Catholic and Protestant churches entrenched in influential positions in German public life, affording Scientology similar privileges would dilute the power and influence of these mainstream religions. Thus, there is additional tension in Germany between the desire to maintain the norms embodied in the constitution and undergirded by the values of the major religions without unduly disfavoring smaller religions with different methods and ideals.

Together these differences, and the background from which they developed, help to explain how Germany can justify its treatment of the Church of Scientology. What the Scientologists see as unconstitutional religious persecution, the German government sees as its constitutional duty to protect its people and institutions from subversive influences. To judge Germany's treatment of Scientology by American standards, independent of these considerations, is irresponsible. However, a blanket defense or rationalization of Germany's position would seem to condone the apparent hysteria fueling Scientology's most vigilant attackers. Thus, part of the problem is to avoid becoming desensitized to claims of persecution, without giving credence the sensationalist and historically inaccurate Nazi comparisons.

Despite the apparent possibility that Germany is creating more problems for itself than unchecked Scientologists could ever cause — in

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288. The provisions that make up the militant democracy "reflect the bitter experience of the Weimar Republic, in which antidemocratic forces took advantage of political freedoms to subvert the constitution itself." CURRIE, *supra* note 108, at 214-15. *See also supra* note 186 and accompanying text.

289. The drafters of the Basic Law agreed that they were creating a "normative constitution embracing values, rights and duties," obviating the sort of debate common in America as to "whether the Constitution is primarily procedural or value-oriented" and preclude the sort of precedential wrangling the Supreme Court has been forced into in times of crisis. KOMMERS, *supra* note 107, at 32.

290. *See supra* note 175 and accompanying text.

which case it *should* relax its position — an examination of the controversy shows that, at least for now, Germany is incapable of trusting its institutions and its citizens enough to love the octopus. Meanwhile, many Americans condemn Germany's stance on Scientology without first trying to understand it. To remedy the situation, Germany and America can learn from each other's experiences and their different views of freedom of religion. Comparing how the countries have received the Church of Scientology reveals the variety and complexity of the problems underlying the Germany-Scientology controversy. In turn, a greater understanding of these problems can only lead away from the extreme rhetoric that has surrounded the controversy to date and toward a more productive public debate of the issues involved.

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A STEP TOWARD GLOBALIZATION: THE MOVE FOR INTERNATIONAL ACCOUNTING STANDARDS

I. INTRODUCTION

This note addresses the difficulties faced by foreign companies who make public offerings of stock in the United States.[1] Specifically, this note addresses the problem caused by the Securities and Exchange Commission's (SEC) requirement that all issuers of foreign stock file financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP).

The United States possesses the world's largest and most prestigious capital markets.[2] Foreign companies want access to U.S. capital markets but are unwilling to incur the substantial costs of reconciling their financial statements from their "home" accounting standards to U.S. GAAP.[3] Consequently, U.S. investors are denied convenient access to foreign investment opportunities through U.S. capital markets. In order to gain access to these foreign investment opportunities, U.S. investors are forced into foreign capital markets.[4] As American capital flows into foreign markets, the dominant status of U.S. capital markets is weakened.[5] Although U.S. capital markets are not currently in jeopardy of losing their dominant status,[6] the SEC should take preemptive steps to ensure that U.S. capital markets remain the world's leaders.

The best way for the SEC to protect the dominant status of U.S. capital markets is to allow foreign companies to use international accounting standards (IAS) as a substitute for U.S. GAAP. The SEC should accept IAS as a substitute for U.S. GAAP for several reasons. First, acceptance of IAS would allow foreign companies greater access to U.S. capital markets and help ensure that the capital markets of the United States do not lose their dominant status. Second, the amount of value investors place on the value of U.S. GAAP disclosures is in doubt. Third, and most important, the SEC's acceptance of IAS would be a large step towards worldwide

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1. For a discussion of the other, more limited ways in which a foreign company can enter the U.S. markets, including private placements, see William E. Decker, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From the Issuer's Perspective*, 17 FORDHAM INT'L L.J. S10 (1994).

2. *See* Nicholas G. Demmo, *U.S. Securities Regulation: The Need for Modification to Keep Pace with Globalization*, 17 U. PA. J. INT'L ECON. L. 691 (1996).

3. Eric M. Sherbet, *Bridging the GAAP: Accounting Standards for Foreign SEC Registrants*, 29 INT'L LAW. 875, 876 (1995).

4. *See id.* at 887.

5. *See id.*

6. *See* Demmo, *supra* note 2, at 692.

harmonization of accounting standards. Worldwide harmonization of accounting standards would greatly benefit both issuers of public stock and investors.

Section II of this note provides background information on the legal issues the SEC faces with respect to cross-border offerings of stock. Section III provides a comparison of some of the major differences between U.S. GAAP and IAS. Section IV reviews the alternatives available to the SEC with respect to foreign issuers and proposes that the SEC accept IAS as a substitute for U.S. GAAP.

II. OPENING U.S. CAPITAL MARKETS TO FOREIGN COMPANIES

In response to financial crises and stock market crashes of 1929-1932, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934.[7] The 1934 Act created the SEC.[8] One of the functions of the SEC was to ensure that potential investors have information, in the form of financial statements, upon which to base intelligent investment decisions.[9] Congress gave the SEC the authority to establish the accounting standards used in financial statements by companies under its jurisdiction.[10] Accounting standards are the rules that companies use in preparing their financial statements. In 1939, the SEC delegated its authority to establish accounting procedures to the American Institute of Certified Public Accountants (AICPA), a nongovernmental entity.[11] The AICPA established the Financial Accounting Standards Board (FASB), which now has the responsibility for establishing the appropriate accounting procedures for use in financial statements by companies making public offerings of stock.[12]

Foreign companies desperately want access to large U.S. capital markets.[13] However, the SEC currently requires foreign companies making

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7. *See* KENNETH S. MOST, THE FUTURE OF THE ACCOUNTING PROFESSION: A GLOBAL PERSPECTIVE 52 (1993).

8. *See id.*

9. *See id.* at 52-53.

10. *See* JAMIE PRATT, FINANCIAL ACCOUNTING 23 (2d ed. 1994). Defining the word accounting is a difficult undertaking. One definition is "the process of identifying, measuring, and communicating economic information to permit informed judgments and decisions by users of the information." MOST, *supra* note 7, at 5 (quoting AMERICAN ACCOUNTING ASSOCIATION, A STATEMENT OF BASIC ACCOUNTING THEORY (1966)).

11. *See* PRATT, *supra* note 10, at 23.

12. *See id.* The FASB has had several predecessors. The Committee on Accounting Procedures governed from 1939-1959, and the Accounting Principles Board from 1959-1971. *See id.* The FASB was established in 1973. *See id.* For more on the FASB's standard setting process, see *infra* part III.

13. The combined volume of the New York Stock Exchange, American Stock Exchange, and the NASDAQ reaches close to $4 trillion dollars annually. *See* Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L

public offerings of stock in the United States to file financial statements[14] prepared in accordance with U.S. GAAP or to reconcile their financial statements to U.S. GAAP.[15] In order to comply with SEC regulations, a foreign company must provide audited balance sheets for the two most recent fiscal years.[16] In addition, the company must provide audited statements of income and cash flows for each of the past three fiscal years.[17] Most foreign companies prepare their financial statements in accordance with either international accounting standards or the accounting standards of the company's home country.[18] In other words, foreign companies use different rules when preparing their financial statements than do their U.S. counterparts. Thus, in order to make a public offering of stock in the United States, a foreign company must first prepare its financial statements using its "home" accounting standards. The company must then prepare the financial statements again in accordance with U.S. GAAP. U.S. GAAP tends to be more complicated and requires more disclosures than most other

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L. & BUS. 207 (1996).

14. Jamie Pratt explains the four basic financial statements as:

> (1) the balance sheet, (2) the income statement, (3) the statement of retained earnings, and (4) the statement of cash flows. The balance sheet lists the assets, liabilities, and stockholder's equity of a company at a given point in time. The income statement contains the revenues earned and expenses incurred by a company over a period of time. . . . The statement of retained earnings reconciles the retained earnings amount from one period to the next. The statement of cash flows reconciles the cash amount from one period to the next.

PRATT, *supra* note 10, at 28.

15. 17 C.F.R. § 210.4-01(a)(2) (1997). For the exact forms a foreign registrant must file, as well as other general filing requirements, see M. Elizabeth Rader, *Accounting Issues in Cross-Border Securities Offerings*, 17 FORDHAM INT'L L.J. S129 (1994).

16. 17 C.F.R. § 210.3-19(a)(1).

17. 17 C.F.R. § 210.3-19(a)(2).

18. Aside from IAS, the accounting standards for the countries of the world can be divided into four particular factions based on the similarities of their accounting practices. First, the British-American model, which includes the United Kingdom, the United States, and the Netherlands, focuses its accounting procedures on the needs of investors and creditors. *See* MUELLER ET AL., ACCOUNTING: AN INTERNATIONAL PERSPECTIVE 8, 11 (1994). Second, there is the Continental model which is used by most of Europe and Japan. *See id.* at 11. Accounting procedures in the Continental model are legalistic in nature and are designed to satisfy government imposed regulations. *See id.* The third model is the South American model. This faction, which includes nearly all of South America, is characterized by its persistent use of accounting adjustments for inflation. *See id.* The final model is the mixed-economy model. The mixed-economy model is used by many countries of the former USSR and Yugoslavia. *See id.* Countries under the mixed-economy model operate "dual accounting systems" which were formed in the wake of the political upheavals in the early 1990s. *Id.* In the mixed economy system, accounting information is used in aiding the transition from a command to a market economy. *See id.* at 11-12. For a listing of countries comprising each model, see *id.* at 9.

comprehensive sets of accounting standards.[19] This second preparation of financial statements results in additional costs and can be very time consuming.[20] In most cases, foreign companies have been unwilling to bear these additional costs.[21] Consequently, foreign companies have avoided U.S. markets.

The differences between U.S. GAAP and other foreign sets of accounting standards can result in considerable differences in a company's net income. For example, in 1993, the German company Daimler-Benz needed to make a public offering of stock in the United States in order to raise capital. Daimler was forced to reconcile its financial statements with U.S. GAAP. Under German accounting procedures, Daimler-Benz showed a profit of over 300 million U.S. dollars.[22] However, once the more stringent U.S. accounting procedures were applied, Daimler-Benz's income statement revealed a one billion U.S. dollar annual loss.[23] The company's true financial position had not changed. The difference was mere "accounting fiction." The change related specifically to the different accounting procedures applied to the exact same financial data.[24] This bottom line difference can make foreign companies hesitant to reconcile their financial statements with U.S. GAAP.[25]

As the world's economic markets move toward globalization, it will become increasingly important that foreign companies have access to U.S. capital markets. At present, the United States' capital markets are the largest and most efficient in the world.[26] However, representatives of the major U.S. stock exchanges, such as the New York Stock Exchange (NYSE), have expressed concern that if the barriers to foreign companies are not relaxed, investors will turn to other capital markets to obtain potentially fruitful

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19. *See* Rader, *supra* note 15, at S135.

20. *See* Demmo, *supra* note 2, at 703. The exact amount of these costs is difficult to estimate, and varies from company to company. *See* Todd Cohen, *The Regulation of Foreign Securities: A Proposal to Amend the Reconciliation Requirement and Increase the Strength of Domestic Markets*, 1994 ANN. SURV. AM. L. 491, 519 (1995). For domestic companies, an initial public offering can cost hundreds of thousands of dollars in legal and accounting fees. *See id.* Due to the complex nature of the GAAP reconciliation, the costs to foreign companies are even greater. *See id.* Maybe the best evidence that issuing costs are too high is that foreign companies cite them as the primary obstacle to entering U.S. capital markets. *See id.*

21. *See* Sherbet, *supra* note 3, 886.

22. *See id.* at 885.

23. *See id.*

24. A study performed by two college professors of a computer-generated hypothetical company showed a net profit of $34,600 in the United States, $260,600 in Britain and $240,600 in Australia. *See* Lee Berton, *All Accountants Soon May Speak the Same Language*, WALL ST. J., Aug. 29, 1995, at A15.

25. *See* Cohen, *supra* note 20, at 494.

26. *See* Sherbet, *supra* note 3, at 875.

foreign investment opportunities.[27] As American capital flows into other markets, the dominant position of the U.S. capital markets is weakened.[28] At present, there are approximately 200 foreign companies trading on the NYSE.[29] That number is minute when one considers that there are in excess of 2000 foreign companies that could potentially qualify for listing on the Exchange.[30] Moreover, most of the foreign companies currently listed on the NYSE come from either Western Europe or Canada.[31] U.S. investors want access to companies from growing markets, such as Eastern Europe and Asia.[32]

The SEC has expressed concern about relaxing disclosure requirements for foreign companies. The SEC is concerned that if fewer disclosures are required, investors will have less information upon which to make intelligent investment decisions.[33] A conflict exists between the SEC's priority of protecting investors and the needs of the U.S. capital markets to have foreign companies listed on their exchanges.

To address the U.S. GAAP reconciliation problem, Congress passed the Capital Markets Efficiency Act of 1996.[34] Under the Act, Congress recognized the increasing globalization of security markets[35] and the accounting difficulties foreign issuers face.[36] Congress recognized that the establishment of a high quality set of international accounting standards would greatly enhance the ability of foreign companies to make stock offerings in the United States.[37] Congress then ordered the SEC to increase its efforts toward developing a high-quality set of international accounting

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27. *See* David S. Ruder, *Reconciling U.S. Disclosure Policy with International Accounting and Disclosure Standards*, 17 NW. J. INT'L. L. & BUS. 1, 4 (1996).

28. *See id.*

29. Berton, *supra* note 24, at A15.

30. *Id. See also* James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58 (1994). One study found that only 5% of the companies on the New York or American stock exchanges were foreign. *See* MOST, *supra* note 7, at 86. By comparison, 58% of the listings on the Zurich stock exchange were foreign, 50% on Amsterdam, 28% on Paris, 27% on Frankfurt, and 22% on London. *See id.*

31. *See* Cohen, *supra* note 20, at 492.

32. *See id.*

33. *See* Michael A. Schneider, *Foreign Listings and the Preeminence of U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards* ?, 3 MINN. J. GLOBAL TRADE 301, 307 (1994). All financial statements not prepared in accordance with generally accepted accounting principles are presumed to be misleading or inaccurate. 17 C.F.R. §210.4-01(a)(1) (1997).

34. Capital Markets Efficiency Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416, 3449 [hereinafter Capital Markets Efficiency Act].

35. *See id.* § 509(2).

36. *See id.*

37. See *id.* § 509(3).

standards as soon as would be "practicable."[38] Finally, the SEC was to report back to Congress one year after enactment of the Act with an update on the progress made on a set of international accounting standards that would be acceptable for foreign companies making public offerings of stock through U.S. capital markets.[39]

To remedy this problem, the International Accounting Standards Committee (IASC)[40] is developing a new, revised set of international accounting standards due for completion in March 1998.[41] The IASC plans to submit the new standards to the SEC in hopes that the Commission will recognize the standards as a substitute for U.S. GAAP. The existing set of international accounting standards is already accepted by many foreign stock exchanges for use in cross-border listings.[42] The IASC estimates that hundreds of multinational[43] and international companies prepare their financial statements in accordance with existing international accounting standards.[44] The IASC is preparing the new set of international accounting standards with the intent that these new standards will be universally accepted for cross-border listings.[45] It is the conclusion of this note that the SEC should accept the IASC's new set of core accounting standards as a substitute for U.S. GAAP in order to facilitate cross-border offerings of stock and preserve the status of the United States as the world's dominant capital market.

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38. *Id.* § 509(4).

39. *See id.* § 509(5).

40. The IASC was founded in 1973 by accounting representatives from Australia, Canada, France, Germany, Japan, Mexico, the Netherlands, the United Kingdom, and the United States. IASC, *About IASC* (visited Nov. 1, 1997) <http://www.iasc.org.uk/frame/cen1_1.htm>. The IASC presently includes representatives from 85 countries. *Id.* The IASC has two broad objectives. The first is to develop accounting standards to be observed in the preparation of financial statements and to encourage their worldwide acceptance. *See* BARRY J. EPSTEIN & ABBAS ALI MIRZA, INTERPRETATION AND APPLICATION OF INTERNATIONAL ACCOUNTING STANDARDS 1997, at 9 (1997). The second is to work generally for the improvement and global harmonization of accounting standards. *See id.*

41. The standards were originally to be completed in mid-1999. *See* EPSTEIN & MIRZA, *supra* note 40, at 13. However, due to pressure from the international community, the completion date "was . . . accelerated to early 1998." *Id.*

42. *See* IASC, *About IASC* (visited Nov. 1, 1997) <http://www.iasc.org.uk/frame/cen1_5.htm>.

43. However, Microsoft is the only major American company to refer to International Accounting Standards in its financial statements. *See* IASC, *About IASC* (visited Nov. 1, 1997) <http://www.iasc.org.uk/frame/cen1_7.htm>.

44. *See id.*

45. *See* Sir Bryan Carsberg, *Foreword* to BARRY J. EPSTEIN & ABBAS ALI MIRZA, INTERPRETATION AND APPLICATION OF INTERNATIONAL ACCOUNTING STANDARDS 1997 (1997).

III. COMPARISON OF U.S. GAAP AND CURRENT INTERNATIONAL ACCOUNTING STANDARDS

This section begins with a comparison of the standard-setting processes of the FASB and the IASC. The remainder of this section emphasizes some of the major differences between U.S. GAAP, established by the FASB, and the current set of international accounting standards, established by the IASC. This listing is by no means all-inclusive. However, this list should help highlight some of the discrepancies the IASC hopes to resolve when it issues its new set of core standards.

A. *Comparison of Standard-setting Procedures of the IASC and the FASB*

In the United States, accounting standards are developed by the FASB.[46] The Board determines standards by way of a political process.[47] All groups with an interest in accounting standards, including Congress and government agencies, lobby before the Board.[48] The Board also holds public hearings on issues regarding the setting of accounting standards.[49] The process of issuing a new accounting standard begins with the identification of a problem area, and the appointment of a task force.[50] After input from the public, the FASB issues an exposure draft of the proposed standard.[51] The Board then allows sixty days for further discussion of the issue, at which time the Board votes on whether to adopt the new standard.[52]

The standard setting process for the IASC is similar to that of the FASB.[53] After an international financial reporting issue is placed on the board agenda, a steering committee of four representatives is appointed.[54] The steering committee receives input and comments from the IASC board.[55] Based on these comments, the steering committee writes an exposure draft, which, on approval of the board, is circulated among the public for six

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46. The FASB consists of seven full-time members who are independent from private industry. *See* PRATT, *supra* note 10, at 23. The FASB has issued in excess of 100 statements of financial accounting standards. *See id. See also* PAUL B. MILLER & RODNEY J. REDDING, THE FASB: THE PEOPLE, THE PROCESS, AND THE POLITICS (1986).

47. *See* PRATT, *supra* note 10, at 23.

48. *See id.* at 24.

49. *See id.*

50. *See* MOST, *supra* note 7, at 56.

51. *See id.*

52. *See id.* For a new standard to be adopted, a majority vote of five to two is required. *See id.*

53. *See* JAMES R. BOATSMAN ET AL., ADVANCED ACCOUNTING 644 (7th ed. 1994).

54. *See id.*

55. *See id.* at 645.

months.[56] After reviewing public comments and suggestions, the steering committee revises the draft and submits it to the IASC board for final approval.[57] If the draft is deemed acceptable, a new international accounting standard pronouncement is issued.[58] The process of issuing a new pronouncement is slow and tedious. It often takes three to four years for a new pronouncement to be issued.[59]

B. *Accounting for Research and Development*

The United States is virtually alone in its accounting treatment of research and development (R&D) costs.[60] Research and development costs are those incurred in hopes of creating future revenues through the development of new products.[61] In the United States, under U.S. GAAP, all R&D costs are simply expensed as they are incurred.[62] Thus, all R&D costs result in a direct, immediate reduction in net income.

Under international accounting standards, however, research costs are distinguished from development costs. According to international accounting standards, research is defined as "original and planned investigation undertaken with the prospect of gaining new scientific or technical knowledge and understanding."[63] Development, on the other hand, is defined as "the application of research findings or other knowledge to a plan or design for the production of new or substantially improved materials, devices, products, processes, systems or services prior to commencement of commercial production or use."[64]

Although the line between research and development seems blurred, the distinction is important because the accounting treatment is different for the two segments.[65] Research costs are treated much the same as R&D costs in the United States, expensed as incurred.[66] However, development costs

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56. *See id.*

57. *See id.*

58. *See id.* A new standard requires a vote of three-fourths of the IASC board for approval. *See id.*

59. *See* John L. Kirkpatrick, *The Role of the International Accounting Standards Committee, in* HARMONIZATION OF ACCOUNTING STANDARDS: ACHIEVEMENTS AND PROSPECTS 87, 89 (1986).

60. *See* DHIA D. ALHASHIM & JEFFREY S. ARPAN, INTERNATIONAL DIMENSIONS OF ACCOUNTING 85 (3d ed. 1992).

61. *See* PRATT, *supra* note 10, at 411. R&D costs can be a substantial outlay for companies. For example, in 1990 IBM and DuPont invested $6.5 billion and $1.4 billion respectively in R&D. *See id.*

62. *See* ALHASHIM & ARPAN, *supra* note 60, at 85.

63. EPSTEIN & MIRZA, *supra* note 40, at 247.

64. *Id.*

65. *See id.*

66. *See id.* at 248.

may be capitalized and expensed over time.[67] Consequently, foreign companies using international accounting standards recognize less expense than U.S. companies. This results in higher net income for foreign companies who use IAS.

C. *Accounting for Goodwill*

Goodwill may be recognized when one corporation purchases the assets of another. The amount of goodwill recognized by purchasing a company will equal the excess of the purchase price over the fair market value of the assets acquired.[68] In the United States, goodwill is recognized as an intangible asset and amortized over the useful life of the acquired asset in a period not exceeding forty years.[69] International accounting standards also allow for goodwill to be amortized over the useful life of the asset. However, amortization under international accounting standards is limited to a period not exceeding five years, unless a longer life can be demonstrated.[70] Under no circumstance may the amortization period exceed twenty years.[71]

This appears to be an instance where U.S. GAAP results in a more favorable bottom line than international accounting standards. Given equal amounts of goodwill, U.S. companies will recognize an amount of expense over forty years equal to the amount that foreign companies will recognize over a period not exceeding twenty years. Consequently, U.S. companies

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67. The distinction between "expensed as incurred" and "capitalization and amortization" is best demonstrated through an oversimplified example. Suppose XYZ, an American company, incurred $2000 in research and development costs over the course of one year. The accounting treatment is simple, XYZ expenses $2000 through the income statement. Suppose ABC, a foreign company using international accounting standards, also incurs $2000 in total research and development costs. Further suppose that ABC's costs can be divided into $500 for research and $1500 for development. With U.S. GAAP, the $500 is immediately expensed through the income statement. The $1500, however, is "capitalized and amortized" over the asset's useful life, say 15 years. Instead of recognizing $1500 of expense this year, ABC will recognize $100 of expense in each of the next 15 years. The net result is that this year XYZ, the American company, recognizes $2000 in R&D expense, while ABC, the foreign company, recognizes only $600 ($500 research expense plus $100 amortization of development costs).

68. *See* MUELLER ET AL., *supra* note 18, at 23.

69. Business combinations can result in extremely large amounts of goodwill. For example, in 1990, when Philip Morris acquired the assets of Kraft, Inc., it recognized $11 billion U.S. dollars in goodwill. *See* PRATT, *supra* note 10, at 342. Consequently, Philip Morris must recognize approximately $275 million in goodwill amortization expense each year. *See id.*

70. *See* EPSTEIN & MIRZA, *supra* note 40, at 330. For a comparison of accounting treatment of goodwill in various countries, see MUELLER ET AL., *supra* note 18, at 24.

71. *See* EPSTEIN & MIRZA, *supra* note 40, at 330.

recognize a lesser amount of goodwill expense on a year-by-year basis, which results in higher net income.[72]

D. *Accounting for Business Combinations*

There are also significant differences between U.S. GAAP and IAS when accounting for business combinations. When a business combination, such as a merger, takes place, it can be accounted for as either a "pooling of interests" or a "purchase."[73] Under a pooling of interests, the assets of the acquired company are not revalued at the date of acquisition.[74] The assets are simply transferred from the subsidiary's books onto the books of the parent. In a business combination treated as a pooling, no goodwill is recognized.[75] However, under a business combination accounted for as a purchase, the assets of the acquired company are revalued at their fair market values.[76] Any difference between the fair values of the assets and the purchase price is then attributed to goodwill.[77] Consequently, as the goodwill is amortized in subsequent years, the purchase method will result in lower net income for the acquiring entity.[78]

In general, managers would prefer to treat business combinations as a

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72. Although goodwill accounting under U.S. GAAP results in higher net income for accounting purposes, it has been observed that goodwill accounting harms U.S. companies with respect to tax law. *See* PRATT, *supra* note 10, at 342. Since goodwill is an intangible asset, amortization is not recognized for tax purposes. *See id.* Therefore, although Philip Morris recognizes $275 million a year in goodwill expense, it receives no corresponding tax deduction. *See id.* This runs contrary to countries, such as Japan, where a tax deduction is allowed for amortization of goodwill. *See id.* This tax disadvantage may place U.S. companies at a disadvantage when competing with foreign companies. *See id.*

73. BOATSMAN ET AL., *supra* note 53, at 8. International accounting standards use different terminology to desribe a business combination. Under IAS the business combination is called either a "uniting of interests" (instead of a pooling of interests) or an "acquisition" (instead of a purchase). EPSTEIN & MIRZA, *supra* note 40, at 309-10.

74. *See* BOATSMAN ET AL., *supra* note 53, at 9.

75. *See id.* at 9-10.

76. *See id.* at 10.

77. *See id.* at 9.

78. *See id.* at 10-11. Again, perhaps an oversimplified example would help illustrate the difference between a business combination accounted for as a pooling versus a purchase. Suppose XYZ acquires the net assets of ABC for $1 million. Further suppose that the net assets of ABC had a book value of $500,000 and a fair market value of $750,000. If the business combination is accounted for as a pooling, the net assets of ABC appear on the books of XYZ at $500,000. No goodwill will be recognized. If the business combination is accounted for as a purchase, the net assets of ABC will appear on XYZ's books at their fair market value of $750,000. The difference between the price XYZ paid for the assets and the fair market value of the assets ($250,000) is recognized as goodwill on the books of XYZ. XYZ would then have to amortize the goodwill (recognizing an expense) over a period not exceeding 40 years. *See id.* at 9-10.

pooling so that no goodwill (and the corresponding expense) will have to be recognized.[79] The distinction between IAS and U.S. GAAP comes in the criteria for determining whether a business combination is eligible to be treated as a pooling. Under U.S. GAAP, a set of twelve conditions must be met in order for the business combination to be treated as a pooling.[80] By contrast, IAS has only three criteria.[81]

The U.S. GAAP criteria for a pooling have been described as complex and difficult to apply.[82] The twelve criteria are divided into segments based on the characteristics of the entity, the nature of the exchange transaction, and post-combination transactions.[83] This is compared to the three direct, relatively simple criteria of IAS.[84] The result is that foreign companies using IAS are more often able to take advantage of pooling accounting treatment and the corresponding net income advantages.[85]

IV. PROPOSAL AND RECOMMENDATION

In order to increase foreign access to U.S. capital markets, the SEC should accept the IASC's new set of core accounting standards as a substitute for U.S. GAAP. One NYSE official has commented that foreign companies will be "knocking down our door" if the IASC's proposal is accepted as a substitute for U.S. GAAP.[86] This solution results in benefits that are two-

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79. *See id.* at 10-11.

80. *See id.* at 11-14.

81. The three tests under IAS are:

(1) The shareholders of the combining enterprises must achieve a continuing mutual sharing of the risks and benefits attaching to the combined enterprise;

(2) The basis of the transaction must be principally an exchange of voting common shares of the enterprises involved; and

(3) The whole of the net assets and operations of the combining enterprises are combined into one entity.

EPSTEIN & MIRZA, *supra* note 40, at 309-10. Each test must be met for the business combination to be considered a purchase. *See id.*

82. *See id.* at 309.

83. *See id.* at 309. *See also* BOATSMAN ET AL., *supra* note 53, at 11-13.

84. *See* EPSTEIN & MIRZA, *supra* note 40, at 309-10.

85. There are also significant accounting differences between U.S. GAAP and IAS with respect to leases, pensions and foreign currency translation. These subject areas involve complex accounting procedures which are beyond the scope of this note. For information regarding international accounting procedures in these areas, see David Mercado, *Evolving Accounting Standards in the International Markets*, *in* INTERNATIONAL SECURITIES MARKETS 1996, at 343 (PLI Corp. L. & Practice Handbook Series No. B4-7166, 1996). *See generally* EPSTEIN & MIRZA, *supra* note 40.

86. Cochrane, *supra* note 30, at S65. Mr. Cochrane has been an avid supporter of the IASC and its principles. On separate occasions, Mr. Cochrane has stated his belief that the NYSE would "blow London off the map" if the SEC were to relax its disclosure requirements for foreign companies. Berton, *supra* note 24, at A15.

fold: (1) It gives the foreign companies access to the capital they desperately want, and (2) it helps insure that the United States will remain the world's dominant capital market place.

A. *Recent Developments*

Recent developments suggest that both the SEC and the FASB are willing to take a more conciliatory stance towards IAS. As noted earlier, in October of 1996, Congress passed the Capital Markets Efficiency Act. In this Act, Congress ordered the SEC to begin developing alternatives to U.S. GAAP for foreign companies.[87] The Capital Markets Efficiency Act is a sign that Congress understands the importance of giving foreign companies easier access to our capital markets. Under the Act, the SEC is to formulate a set of suitable international accounting standards as soon as would be "practicable."[88] The IASC's proposal would seem an obvious and convenient way of satisfying the congressional demand. The SEC has already pledged its support for the IASC in a press release issued in the spring of 1996, stating:

> The Commission is pleased that the IASC has undertaken a plan to accelerate its development efforts with a view toward completion of the requisite core set of standards by March 1998. The Commission supports the IASC's objective to develop, as expeditiously as possible, accounting standards that could be used for preparing financial statements in cross-border offerings.[89]

The SEC has also taken the time to set out the criteria the new standards must meet in order to be considered a substitute for U.S. GAAP. The standards must:

> [1] include a core set of accounting pronouncements that constitutes a comprehensive, generally accepted basis of accounting;
> [2] . . . be of high quality[,] . . . result in comparability and

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87. Capital Markets Efficiency Act of 1996, Pub. L. No. 104-290, § 509 (4), 110 Stat. 3416, 3449.

88. *Id.*

89. Paul Pacter, *Evolving Accounting Standards in the International Markets: The Perspective of the International Accounting Standards Committee*, *in* INTERNATIONAL SECURITIES MARKETS 1996, at 430 (PLI Corp. L. & Practice Handbook Series No. B4-7166, 1996).

transparency, and provide for full disclosure;
[3] . . . be rigorously interpreted and applied.[90]

Although it is uncertain whether the IASC's standards will meet these criteria, the SEC's efforts at least indicate that it is willing to listen to new proposals and ideas.[91]

The FASB has also been receptive to international accounting standards. Recently, Ed Jenkins replaced Dennis Beresford as FASB chairman.[92] This change in leadership has been positively viewed by proponents of IAS.[93] Mr. Beresford was seen by some as a barrier to IAS, intent on preserving U.S. GAAP as the world's dominant set of accounting standards.[94] By contrast, Jenkins is seen as more flexible and open to IAS.[95] With Jenkins' leadership, the growing trend toward IAS can only be expected to continue.

Even before Mr. Beresford's exit, the FASB took steps to accommodate foreign issuers. In 1992, the FASB announced that it would take a more active and supportive role in the international accounting standard-setting process.[96] The FASB proclaimed that it would intensify consideration of IAS in domestic projects and collaborate with the IASC on projects of mutual interest.[97] The FASB also announced that it would consider adopting portions of IAS, or other foreign standards, that are judged superior to U.S. GAAP.[98]

More recently, in February 1997 the FASB changed the U.S. GAAP

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90. *See* Michael H. Sutton, *Developing International Accounting Standards, in* INTERNATIONAL SECURITIES MARKETS 1996, at 328 (PLI Corp. L. & Practice Handbook Series No. B4-7166, 1996). However, SEC chairman Arthur Levitt has warned that the SEC-acceptance of the IASC's new standards "should not be seen as a 'foregone conclusion'." *SEC Chief Cautions IASC on New Core Rules,* ACCT., June 1, 1997, *available in* 1997 WL 12699341. Levitt has warned that efforts to develop a comprehensive set of global accounting standards will fail if it becomes "merely a search for the lowest common denominator, or an excuse to weaken effective national standards." *Id.*

91. The SEC has already made several limited concessions to foreign companies. For a discussion of these concessions, including rule 144A, and form 20F, see Ruder, *supra* note 27, at 1, 6-9.

92. *See* James R. Peterson, *Walking the Tightrope,* ACCT., July 1, 1997, *available in* 1997 WL 12699375.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See* MOST, *supra* note 7, at 85.

97. *See id.*

98. *See id.* However, it is also important to note that the FASB affirmed its commitment to persuading the IASC and foreign countries to adopt U.S. GAAP in areas where U.S. standards are deemed superior. *See id.* Considering that the FASB set U.S. standards in the first place, one must wonder in how many instances the FASB will be willing to admit that U.S. GAAP is inferior to IASC or foreign accounting standards.

method of accounting for a significant financial statement item, earnings-per-share (EPS).[99] Previously, the U.S. GAAP method of calculating EPS differed significantly from that of other countries and IAS.[100] The new accounting method for EPS brings the United States more in line with the rest of the world.[101] The substantive content of the accounting change is unimportant. What is important is that this change in accounting standards demonstrates a new attitude on the part of the FASB to work with the international community to resolve accounting differences. Whether the FASB will be willing to alter any other of its standards to match the rest of the world remains to be seen. However, this is at least an indication that the FASB understands the international implications of its standards. This is one instance where the FASB has made good on its pledge to resolve weaknesses within the U.S. GAAP framework. In issuing the new EPS pronouncement, one FASB board member commented that in this case, "[t]he IASC standard was superior [to U.S. GAAP], so we followed their lead."[102]

All of these recent developments seem to indicate that the movement towards U.S. acceptance of international accounting standards is strengthening. Through the Capital Market Efficiency Act, Congress has recognized the importance of making accounting allowances for foreign companies. The SEC has pledged its support for IAS and even set out the criteria the new standards must meet in order to be considered a substitute for U.S. GAAP. The FASB has begun to recognize that there are flaws in U.S. GAAP and has increased its efforts to reconcile accounting discrepancies. The SEC should now take the next logical step and accept the IASC's new set of international accounting standards as a substitute for U.S. GAAP.

B. *Illusion of Comparability*

One argument that has been advanced in favor of relaxing SEC disclosure requirements is that forced reconciliation of foreign financial statements to U.S. GAAP may convey to investors "an illusion of comparability that does not exist."[103] Although U.S. GAAP is the most stringent of the world's accounting standards, there are still many gray areas where estimates must be made. For example, to avoid large fluctuations in

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99. *See* Glenn Cheney, *FASB and IASC Harmonize with New Standards on EPS*, ACCT. TODAY, Apr. 7, 1997, *available in* 1997 WL 9510261.

100. *See id.*

101. *See id.*

102. *See id.* For more information on the new EPS calculation, see Michael G. Stevens, *Earnings Per Share Made Easier, Relatively Speaking*, PRAC. ACCT., May 19, 1997, *available in* 1997 WL 8955018.

103. Cochrane, *supra* note 30, at S66. *See also* Demmo, *supra* note 2, at 714-15.

income levels, managers sometimes use permissible "creative" accounting techniques to lower net income in exceptionally good years and to raise net income in poor years. The net income of the company over time then appears to be a nice, even upward slope, instead of a jagged up-and-down line.[104] The point is that there is considerable room to maneuver, even within the confines of U.S. GAAP.[105] The financial statements of two U.S. companies may not be comparable without some close scrutiny and analysis of accounting estimates.[106]

The problem of estimation is exaggerated even further when dealing with foreign companies. It has been noted that a mechanical reconciliation to U.S. GAAP may lead investors to believe that financial statements of a U.S. and a foreign company are comparable simply because both companies use U.S. GAAP.[107] In fact, to understand the true financial picture of a company, an investor must consider the legal and regulatory environment of the company's home country in addition to the accounting procedures used in preparing the financial statements.[108] In this way, forced reconciliation to U.S. GAAP may actually mislead investors in foreign stock. If U.S. GAAP reconciliation is misleading investors, the SEC's stringent reporting requirements serve no purpose.

C. *The Value of U.S. GAAP to Investors is Questionable*

The amount of value investors place on U.S. GAAP is questionable. If investors truly valued the additional information contained within U.S. GAAP, they should be willing to pay a premium for stocks issued in conformity with U.S. GAAP. Suppose the existence of a share of stock from two identical companies. Further assume that one company uses IAS and the other uses U.S. GAAP. If investors place more value on U.S. GAAP than IAS, we would expect that the share of stock from the company using U.S. GAAP would sell at a higher price than the company using IAS. However, there is no evidence that the additional disclosures required under U.S. GAAP have any effect on the value (*i.e.*, the price) of the stock.[109] If the stock price does not increase with the additional disclosures required under U.S. GAAP, perhaps this suggests that investors do not value the additional

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104. *See* Randall Smith et al., *How General Electric Damps Fluctuations in Its Annual Earning*, WALL ST. J., Nov. 3, 1994, at A1.

105. *See* Cochrane, *supra* note 30, at S65-66.

106. *See id.*

107. *See id.* at S66. Demmo, *supra* note 2, at 714-715.

108. *See* Cochrane, *supra* note 30, at S66.

109. *See id.* at S62. *See also* Edward F. Greene et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 432 (1995).

disclosures.[110] In fact, U.S. investment analysts who follow foreign companies rely mostly on the financial statements prepared under the company's home country accounting.[111] If the investors and analysts do not value the additional disclosures, then it seems useless to require companies to reconcile with U.S. GAAP. Because investors do not value U.S. GAAP disclosures, the SEC should allow foreign companies to prepare financial statements using IAS.

U.S. investors have also demonstrated apathy towards U.S. GAAP by purchasing foreign stocks through other exchanges. In fact, Americans are turning in record numbers to foreign markets for investment opportunities.[112] During the mid-1980s, American investors purchased approximately two billion dollars of foreign securities a year.[113] By contrast, American investors now purchase in excess of two billion dollars of foreign stocks a week.[114] This suggests that Americans are willing to forgo the extra "protections" of U.S. GAAP to gain access to stocks of foreign companies.[115] Thus, the SEC's attempts to protect U.S. investors through the disclosures of U.S. GAAP can best be described as a "victory of theory over practice."[116] In this regard, the SEC's stringent reporting requirements actually harm U.S. investors. In order to gain access to foreign stocks, U.S. investors are forced into foreign markets and denied the lower transaction costs and greater liquidity of the U.S. markets.[117] Philip R. Lochner Jr., former commissioner of the SEC, has admitted that "many SEC rules are arbitrary and were written in an era when U.S. securities markets could exist in splendid isolation. . . . The fact is that U.S. citizens buy foreign stocks anyway, they just do so . . . at greater cost than if those foreign securities could be bought here."[118] If Americans are purchasing foreign stocks through overseas markets anyway, why not simply make accommodations to allow them to purchase these same stocks through U.S. markets? If the SEC fails to recognize IAS as a substitute for U.S. GAAP, American capital will continue to flow into foreign capital markets. Meanwhile, U.S. stock exchanges will be prevented from competing in a service where their competitive advantage is undisputed.[119]

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110. *See* Greene et al., *supra* note 109, at 432.

111. *See* Cochrane, *supra* note 30, at S62.

112. *See* Schneider, *supra* note 33, at 327-29.

113. *See* Cohen, *supra* note 20, at 491.

114. *See id.*

115. William C. Freund, *That Trade Obstacle*, WALL ST. J., Aug. 27, 1993, at A6, *available in* 1993 WL-WSJ681776.

116. *Id.*

117. *See id. See also* Demmo, *supra* note 2, at 713.

118. Freund, *supra* note 115, at A6 (quoting former SEC Commissioner Philip R. Lochner, Jr.).

119. *See id.*

D. *Other Alternatives*

The SEC may choose from several other alternatives to solve the cross-border offering dilemma. Aside from the adoption of the IASC's proposals, stock exchange officials have suggested another, more limited alternative which would allow foreign companies increased access to U.S. capital markets. The first of these options is to exempt special "world class" companies.[120] These companies would need to meet certain guidelines in order to be exempt from the requirement that they reconcile their financial statements to U.S. GAAP. These companies would still be required to provide an explanation of the differences between U.S. GAAP and the accounting standards used in their financial statements.[121] For example, the NYSE has proposed that companies with revenues in excess of five billion dollars be exempt from the U.S. GAAP reconciliation requirement.[122] A second alternative would be to exempt all companies with weekly trading volumes of at least one million dollars or 200,000 shares.[123]

In order to protect investors, companies that qualify for world-class status would either be listed on a separate table apart from other companies or marked with an asterisk.[124] This separate listing would alert investors that world-class companies use different accounting standards.[125] The world-class proposal would at least give some of the larger, more prestigious foreign companies easier access to U.S. capital markets.

However, the world-class proposal is too limited in scope to effectively allow foreign companies to access U.S. capital markets. Currently, only about 200 foreign companies would qualify for world-class status.[126] Even if the world-class proposal is accepted, there are still in excess of 1800 foreign companies who will continue to be denied access to U.S. capital markets. The world-class company proposal does little to allow smaller foreign companies increased access to U.S. capital markets. It would seem that smaller companies would have at least as great a need for U.S. capital in order to increase their prospects for growth.

Another alternative available to the SEC is to simply maintain the status quo and continue to force foreign issuers to reconcile their financial statements to U.S. GAAP. This viewpoint is founded, at least partially, on the notion that the allure of the U.S. capital markets is so great that foreign

120. Cochrane, *supra* note 30, at S63.
121. *See id.*
122. *See id.*
123. *See id.*
124. *See* Freund, *supra* note 115, at A6.
125. *See id.*
126. *See* Sherbet, *supra* note 3, at 888.

companies will eventually give in and comply with U.S. securities regulations.[127] This perspective seems unnecessarily rigid, as well as shortsighted.[128] It may appear that the SEC is simply playing the role of a schoolyard bully.[129] Essentially, the SEC is saying to the rest of the world, if you want to play in our capital markets, you will play by our rules.[130] In the future, the SEC may need the cooperation of foreign countries.[131] If the SEC maintains its current hard-line stance toward foreign issuers, it may come back to haunt the SEC later.[132] Although the U.S. capital markets are not currently in jeopardy of losing their dominant status, the SEC should not wait for that day to come before it acts.[133] Instead, the SEC should take steps to solidify the United States' position as the world's leader.[134]

At least one commentator has proposed that the SEC consider arranging "mutual recognition" agreements with certain foreign countries.[135] Under such an agreement, the United States would agree to recognize the accounting standards of a foreign country for use in cross-border security offerings.[136] In return, that foreign country would agree to recognize U.S. GAAP as appropriate for use on its stock exchanges.[137]

In order to qualify for mutual recognition, a foreign country would have to meet four criteria.[138] First, the country's home markets must be highly regulated in order to protect U.S. investors from potential securities fraud.[139] Second, the accounting standards of the foreign country must be similar to those of U.S. GAAP.[140] Third, the foreign country must have an established capital market, complete with sophisticated analysts to provide information to investors.[141] Finally, the candidate country would have to be historically, politically, geographically, culturally, or economically linked to the United States in some substantial way.[142]

The concept of "mutual recognition" is flawed in several ways.

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127. *See generally* Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L.J. S77 (1994).

128. *See* Cohen, *supra* note 20, at 538.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* at 538-39.

134. *See id.* at 538.

135. *Id.* at 533-34.

136. *See id.* at 526.

137. *See id.* The United States entered into one such agreement with Canada in 1991. *See id.* at 527.

138. *See id.* at 534-36.

139. *See id.* at 534.

140. *See id.*

141. *See id.*

142. *See id.*

Because U.S. GAAP is already recognized as appropriate on most major stock exchanges, this alternative would seem to hold little benefit for U.S. companies. One must also question how many foreign countries will meet the four above-stated criteria. These criteria seem to allow for mutual recognition only in situations where the country's accounting and regulatory environments are comparable to those of the United States. In this regard, mutual recognition does not appear to be much of an improvement over forced reconciliation to U.S. GAAP. Finally, mutual recognition forces investors to become familiar with the accounting rules of each country approved for mutual recognition. By contrast, if the SEC simply recognized IAS as an appropriate substitute for U.S. GAAP, investors would only have to become familiar with one new set of accounting standards.

E. *Worldwide Harmonization of Accounting Standards*

In a perfect world all foreign and domestic companies would prepare their financial statements using the same accounting principles. If all of the companies in the world used the same accounting standards, investors would only have to become familiar with one set of accounting rules. The acceptance of IAS as a substitute for U.S. GAAP would be a large step toward worldwide "harmonization" of accounting standards.[143] Until recently, worldwide harmonization of accounting principles was thought to be an "ideal" not realistically attainable.[144] Today, however, the movement towards harmonization of accounting standards is growing.[145] In the past, there were many political and social limitations that prohibited the companies of the world from using the same accounting standards.[146] Although these differences will never be fully eliminated, the main deterrent to one comprehensive set of accounting standards remains the SEC's insistence that foreign issuers prepare their financial statements in accordance with U.S. GAAP.[147] As noted earlier, the current version of IAS is already acceptable on a number of foreign stock exchanges, including London and Hong

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143. EPSTEIN & MIRZA, *supra* note 40, at 13. There are three basic concepts of harmonization. In absolute harmonization, "one set of accounting standards applies, irrespective of the circumstances leading to the production of the accounting information." BOATSMAN ET AL., *supra* note 53, at 646. In circumstantial harmonization, "the same set of accounting standards applies when the underlying conditions . . . [of respective countries] are similar." *Id.* In purposive harmonization, the same set of accounting standards is applied in situations where the purposes of the accounting information are similar. *See id.* The IASC and the FASB have primarily been working towards circumstantial harmonization. *See id.*

144. Greene et al., supra note 109, at 436.

145. *See* MUELLER ET AL., *supra* note 18, at 38.

146. *See* EPSTEIN & MIRZA, *supra* note 40, at 15.

147. *See* Cohen, *supra* note 20, at 522.

Kong.[148] The question remains, if IAS is acceptable to the rest of the world, why is it not acceptable in the United States?

Opponents of IAS argue that allowing foreign companies to use IAS in cross-border listings in the United States will place U.S. companies at a competitive disadvantage.[149] These opponents rightly point out that domestic companies would spend additional time and resources in complying with the more detailed and complicated disclosures of U.S. GAAP.[150] However, this argument against IAS may actually be an argument in favor of harmonization. If the SEC allows foreign companies to use IAS as a substitute for U.S. GAAP, U.S. companies may indeed have a legitimate complaint that they would bear unnecessary, extra costs complying with U.S. GAAP. The solution to this problem is to simply allow domestic companies to also use IAS in preparation of their financial statements. After all, if the SEC deems that IAS is not misleading to investors and is appropriate for foreign companies, why would it not be appropriate for domestic companies? If U.S. and foreign companies are both using IAS, the world would be one step closer to a single set of comprehensive accounting standards.

There are several reasons why the world's accounting bodies should pursue harmonization of accounting standards as a goal. As all companies would use the same set of standards, harmonization would increase comparability of financial statements for domestic and foreign companies.[151] This would help investors make intelligent investment decisions.

If only one set of accounting standards is used, investors will become "intimately familiar" with these standards, which will help them more easily understand financial statements.[152] Harmonization would also result in cost savings for U.S. companies. Although U.S. companies use U.S. GAAP in preparing their financial statements, these U.S. companies often own foreign subsidiaries. The financial statements of these foreign subsidiaries must be

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148. *See id.* at 510-11.

149. *See* Breeden, *supra* note 127, at S87-88. Mr. Breeden's attitude typifies hard-line "pro U.S." feelings. While admitting that U.S. GAAP has serious flaws and that the world would benefit from greater harmonization, Breeden, a former SEC commissioner, still refuses to support relaxing standards for foreign issuers. *See id.* at S87-88, S95-96. Although admitting to the benefits of harmonization, Breeden colorfully states his belief that the day the world's accountants will agree on one set of principles will be just after "all the world's lawyers get together and agree on a single tax law, a single antitrust law, and a uniform legal code for other issues." *Id.* at S96. Shortly after leaving office at the SEC, Mr. Breeden commented that "[h]ell will freeze over before the U.S. changes its [accounting disclosure] standards." Cohen, *supra* note 20, at 523. This type of attitude on the part of U.S. officials is offensive to foreign regulators and has impeded harmonization efforts. *See id.* at 522. Fortunately, current SEC chairman Arthur Levitt is seen as more flexible and open to international accounting standards. *See id.* at 523.

150. *See* Breeden, *supra* note 127, at S88.

151. *See* ALHASHIM & ARPAN, *supra* note 60, at 48-49.

152. *See* Mercado, *supra* note 85, at 348.

reconciled to U.S. GAAP for presentation in the domestic companies' consolidated financial statements.[153] These costs could be avoided if all companies simply used IAS.[154]

Harmonization would also facilitate economic activity. Harmonization makes firms easier to value and thus facilitates business combinations.[155] It has also been noted that harmonization eliminates unjustified financial statement differences, which in turn leads to more efficient markets.[156] Since a comprehensive set of accounting standards would already exist, harmonization also reduces the costs to developing countries of generating their own new set of accounting standards.[157]

The prospect of harmonization raises an interesting question. If U.S. companies begin using IAS, and the IASC becomes the world's accounting authority, does that then render the FASB obsolete?[158] In this regard, the FASB has at least some interest in ensuring that IAS does not become a complete substitute for U.S. GAAP.

One factor weighing against harmonization is that international accounting bodies have no authority to enforce their standards. For example, in the United States, the FASB draws its power from the fact that the SEC will only accept the FASB-created U.S. GAAP standards. Standard-setting bodies, such as the FASB and the IASC, have no independent power to enforce standards.[159] In this regard, a major regulatory organization, such as the SEC, may hold a "veto power" over any international accounting body. If the SEC were to disagree with the IASC standards, it could simply decide that IAS are no longer a suitable means for preparing accounting standards. Thus, efforts to harmonize accounting principles must be made by way of political agreement between nations.[160]

In the past, harmonization was thought to be an unattainable goal. However, with the passage of the Capital Markets Efficiency Act and the new conciliatory stance of the SEC, the world is moving towards the goal of accounting standard harmonization. The acceptance of the IASC's new set of core standards as a substitute for U.S. GAAP would be a large step toward achieving that goal.

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153. *See, e.g.*, ALHASHIM & ARPAN, *supra* note 60, at 49; EPSTEIN & MIRZA, *supra* note 40, at 15.

154. Other arguments in favor of harmonization include improving the allocation of resources in global financial markets, reducing the cost of capital for all enterprises, and facilitating social control over the global corporation. *See* MOST, *supra* note 7, at 79. *See also* BOATSMAN ET AL., *supra* note 53, at 646.

155. *See* BOATSMAN ET AL., *supra* note 53, at 647.

156. *See id.*

157. *See id.* at 647. *See also* EPSTEIN & MIRZA, *supra* note 40, at 18.

158. *See* Cheney, *supra* note 99, at 3.

159. *See id.*

160. *See* MUELLER ET AL., *supra* note 18, at 47.

V. CONCLUSION

The United States possesses the world's most dominant capital markets. If the SEC maintains its U.S. GAAP reconciliation requirement, foreign companies will continue to avoid U.S. markets. Consequently, Americans will be forced to seek out overseas markets to obtain foreign investment opportunities. As American capital flows into foreign markets, U.S. capital markets are weakened. The SEC should not wait until U.S. markets are in jeopardy to act, but instead, should take steps now to protect U.S. capital markets.

The IASC is developing a new set of international accounting standards that will be appropriate for all cross-border listings. When the IASC completes the new set of standards in March of 1998, the SEC should accept IAS as a substitute for U.S. GAAP. SEC acceptance of IAS is the best way to ensure that U.S. capital markets remain the world's leaders. IAS is already recognized on several foreign stock exchanges. It is time for the SEC and the United States to follow suit. IAS will give foreign companies greater access to U.S. capital markets. In turn, U.S. investors will have opportunities to invest in foreign companies without leaving U.S. markets. Perhaps, most importantly, acceptance of IAS by the SEC would be a major step toward the long-term goal of global harmonization of accounting standards.

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RICO AND THE RUSSIAN MAFIA: TOWARD A NEW UNIVERSAL PRINCIPLE UNDER INTERNATIONAL LAW

I. INTRODUCTION

In 1994, East-West Invest (EWI), an American company, entered into a joint venture with Minutka Limited (Minutka Ltd.), a Russian company, to establish Subway fast-food franchises in Russia on behalf of Subway International.[1] The joint venture was established as Subway Limited Liability Company (Subway L.L.C.), with Minutka Ltd. contributing a leasehold to a dilapidated building in a prime St. Petersburg location, and EWI supplying all the financial support necessary for a Subway franchise.[2]

In December of 1994, the Subway shop opened its doors with Americans in senior management positions and Russians in junior management and staff positions. The joint venture turned out to be quite lucrative with all going well until May 1995, when the shop's American managers, Steve and Roberta Brown, took a vacation to Turkey.[3] On June 2, Vadim Bordug, who controlled Minutka Ltd., claimed Brown had abandoned his post as manager, and Bordug took over complete control of the shop.[4] The American partners were informed of the hostile take over, and were advised, to their dismay, that Bordug was part of the Tombovsky mafia group.[5]

The Americans immediately hired bodyguards for protection. Nevertheless, the Browns' lives were threatened, and Mr. Brown was

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1. *See Subway Sandwich Franchisee Has Had His Day in Court, Now What?*, RUSSIA & COMMONWEALTH BUS. L. REP., May 7, 1997, Vol. 8, No. 3, *available in* LEXIS, Europe Library, RCBLR File [hereinafter *Subway*]. East-West Invest had acquired exclusive rights from Subway International to start Subway sandwich shops in Russia. *See id.* Subway had planned to immensely expand into Russia "starting with 30 restaurants in St. Petersburg over a five-year period." Eric Schwartz, *Stockholm Favors Subway with $1.2M Ruling*, ST. PETERSBURG TIMES, April 7-13, 1997, (visited Jan. 22, 1998) <http://www.spb.su:8100/times/251-252/stockholm.html>.

2. *See Subway*, *supra* note 1.

3. *See id.* By June of 1995, according to EWI, the St. Petersburg location was among "the top ten Subway stores in the world." *Id.*

4. *See id.* It was also at this same time that Vadim Bordug transferred $28,000 from a "Subway ruble account" into an account where he had sole control, and another $70,000 from a Subway account was transferred to a number of accounts in Ireland. Even though this money was returned to the bank from which it was taken, Subway officials claim Vadim Bordug was later able to take the funds again. *See id.*

5. *See id.* Vadim Bordug's account of the problems that have clouded the sandwich shop are much different than his American partners. He claims that the franchise agreement was never fair and that the Americans were deceptive about the entire franchise agreement. *See* Sarah Hurst, *Partner Re-opens 'Subway,'* ST. PETERSBURG PRESS (visited Jan. 22, 1998) <http://www.spb.su:8100/sppress/121/partner.html>. It was because of these conflicts that he was forced to take action. *See id.*

"beaten up" after a visit to the shop.[6] The United States Federal Bureau of Investigation (FBI) encouraged the American partners not to directly negotiate with the mafia group, and after a settlement could not be agreed upon, an arbitration award was entered on behalf of EWI by the International Arbitration Court in Stockholm for $1,200,000.[7] However, Bordug continued to operate the shop under the name of Minutka Ltd.[8]

Following his experiences, a spokesman for EWI has portrayed the Russian business climate as an environment where "[a]ll businesses in Russia are protected by one gang or another. They either pay protection money to the mafia or they hire licensed organizations staffed by former military people to keep the bad guys at bay. One way or another you pay money to people with guns."[9] Unfortunately, the story of EWI's experience with a Russian criminal group is not new to those who have tried to tap the "free markets" of Russia.

A changing world environment has increased the globalization of world markets creating greater opportunities for criminal organizations to cross borders and function on a global level.[10] It is also possible that many powerful criminal groups, including La Cosa Nostra, have joined forces with other regional crime groups "form[ing] what Italian Judge Giovanni Falcone feared was a global organized crime network."[11] The Chinese Triads,

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6. *See Subway, supra* note 1. Vadim Bordug and his associates claim that there were never any threats made. *See* Hurst, *supra* note 5. In fact, Bordug claims that it was the Americans who threatened him with hired mafia members. *See id.*

7. *See Subway*, *supra* note 1. St. Petersburg has recently created its own international arbitrations court, hopefully making way for a firmer rule of law in business. *See* Schwartz, *supra* note 1.

8. *See* Eric Schwartz, *Yakovlev Supports Subway Ruling*, ST. PETERSBURG TIMES, Apr. 28-May 4, 1978 (visited Jan. 22, 1998) <http://www.spb.ru/times/257-258/yakovlev7.html>. St. Petersburg Governor Vladimir Yakovlev supported the arbitration ruling; nevertheless, his administration's involvement in its enforcement would not influence the substance of the judge's decision. *See id.*

9. *Subway, supra* note 1. EWI added that U.S. officials had urged him to "stay on the high road," and this actually caused more problems because "[i]t eliminated our ability to deal with them [Bordug's people] in the street." *Id.*

10. *See The Threat From International Organized Crime and Global Terrorism: Hearings Before the House Comm. on Int'l Relations,* 105th Cong. 53 (1997) (statement of Louis Freeh, Director, Federal Bureau of Investigation) [hereinafter *Threat*]. *See generally* CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL (Linnea P. Raine & Frank J. Cilluffo eds., 1994) (transcriptions of speeches given at the Center for Strategic and International Studies (CSIS) conference on global organized crime held in Washington D.C., Sept. 26, 1994); UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE (Patrick J. Ryan & George E. Rush eds., 1997) (collection of articles discussing global organized crime with commentary).

11. Sara Jankiewicz, *Glasnost and the Growth of Global Organized Crime,* 18 HOUS. J. INT'L L. 215, 218 (1995). The international crime network was formed, according to Judge Falcone, "to avoid conflict, devise common strategy, and work the planet peaceably together."

Japanese Yakusa, Columbian drug cartels, Turkish mafia and La Cosa Nostra are among the many powerful groups operating beyond their own borders;[12] however, this note will examine only the Russian mafia. Specifically, this note will detail the problems criminal organizations present to governments that lack enforcement mechanisms against their reach and, most importantly, how these problems impact the world community.

Although the Russian mafia is one among many of the new criminal groups operating across borders, it has become one of the most powerful and feared regional crime groups in the world.[13] In fact, of the estimated $351 billion dollars that is annually transacted by Europe's mafia networks, "[t]he Russian mafia alone has a turnover of 200 billion dollars annually, making it . . . the dominant economic force within Europe's organised crime [networks]."[14]

The establishment of Russian organized criminal groups as one of the leading threats to free-market reform in Russia and to other world markets has caused great concern from world leaders including those in the United States.[15] Additionally, there has been increased apprehension throughout the world community caused by reports of Russian criminal groups allegedly stealing nuclear materials and selling them on the international black market to the highest bidder.[16]

Id.

12. *See id. See generally* Yiu-Kong Chu, *International Triad Movements: The Threat of Chinese Organised Crime*, CONFLICT STUD., July-Aug. 1996 (summarizing the Chinese Triads).

13. *See* Jankiewicz, *supra* note 11, at 218. *See also* 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement of James Woolsey). In a statement presented to the U.S. House of Representatives, James Woolsey, former Director of the Central Intelligence Agency, asserted that "Russian organized crime is a unique subset of international organized crime [and] that [it] requires a special focus." *Id.* at E1335. Woolsey added that the normal devices nations use for international relations such as "diplomacy, demarches, hotlines, or summits" are not a possibility with criminal groups. *Id.*

14. Peer Meinert, *Mafia Too Banks on Single European Currency and Globalisation*, Sept. 2, 1997 (visited Nov. 6, 1997) <http://www.mpchronicle.com/daily/19970902/0209304.html>. The past-reigning superpower of European organized crime, the Italian mafia, has only an estimated $50,000,000,000 in annual business transactions. *See id.*

15. *See generally Threat*, *supra* note 10; *Briefing on Crime and Corruption in Russia: Hearings Before the Senate Comm'n on Sec. and Cooperation in Eur.*, 103d Cong. (1994) (statements of Dr. Louise Shelley, Professor, American University and Stephen Handelman, Associate Fellow at the Harriman Center, Columbia University) [hereinafter *Comm'n on Security*].

16. *See generally Security of Russian Nuclear Weapons: Hearing Before the House Subcomm. on Military Research & Dev.*, 105th Cong. (1997) (statement of Rep. Curt Weldon) [hereinafter Weldon]. In his statement, Representative Weldon stated that Aleksandr Lebed, former Secretary of the Russian Security Council admitted, that terrorists may already be in possession of Russian nuclear weapons. *See id.* He also stated that Lebed had alleged that "84 suitcase-sized nuclear bombs" had been lost and that each of these could destroy

The growing problem of global organized crime may create the need for more advanced legal mechanisms to attack the possibilities of increased cooperation among transnational groups. In the United States, a powerful weapon promulgated by Congress to combat organized crime is the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).[17] RICO has developed into a popular prosecutorial tool used to fight organized crime. It may be possible, with the cooperation of the world community through international treaties, to use similar measures to provide more than a mere monitor for those who are involved in organized crime and the corruption of world markets.

This note contends that the current problem of organized crime facing Russia actually extends beyond its own borders and requires immediate global attention by the world community. This note will first examine the mafia's role in Russia and the country's own inability to limit the effect the mafia has on the Russian people and the rest of the world. This note will next examine the use and ability of RICO to combat crime in the United States, followed by a brief discussion of the international legal principle of universal jurisdiction. Finally, this note will explore the possibility of implementing RICO-type standards on a global scale via the universal principle of international law.

II. ORGANIZED CRIME IN RUSSIA AND THE COUNTRY'S EFFORTS TO CURTAIL ITS EFFECTS

A. *Crime in Russia Under Soviet Rule*

Crime and the criminal underworld are not new to Russia. However, under Soviet rule, crime existed in a different scope and context than it does now under the free-market system. The primary purpose of the legal system in the former Soviet Union, as with other socialist regimes, was for "the protection of an economic system characterized by state ownership of the land."[18] In other words, the main purpose of criminal law was first to protect the Soviet regime and its property from activities that were outside

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approximately 100,000 people. *Id.* *See also* 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement of James Woolsey).

17. 18 U.S.C. §§ 1961-1968 (1994). RICO, however, is only one part of a powerful statute enacted to combat organized crime in the United States, that statute being the Organized Crime Control Act of 1970. *See* Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970).

18. Judith L. Anderson, *Changing Conceptions of Economic Crime Under Russian Law*, 14 WHITTIER L. REV. 451, 451 (1993). Economic crimes entailed many different types of activities from "private entrepreneurship or unauthorized foreign currency transactions . . . [to] overstating a factory's fulfillment of its plan or conduct intended to cope with deficits in the supply of goods and services." *Id.* at 452 (footnote omitted).

the state-run system, and second to protect individual interests. In fact, economic crimes — those committed for personal profit — totaled approximately one third of all criminal convictions in the Soviet Union.[19]

Under Marxist and state theories, crime and law were to be eradicated in a true communist society after the role of the state withered away.[20] To socialist planners, such as Karl Marx and Frederick Engels, crime was the result of a conflict in the attainment of goods based upon class struggles.[21] So, in a true communist society, the struggle would end because society would provide for all citizens. However, the theory of communism that Marx and Engels created never developed in the Soviet Union, and the struggle for goods never ended.[22] Rather, the struggle for goods and services resurfaced in the form of a black market. This black market was operated by criminals who were typically anti-communist leaders confined in the country's prison systems and who acted in cooperation with corrupt government officials.[23]

This connection between state officials and criminals appeared early in the development of the communist system. It began even before the October Revolution of 1917, and later, after the Soviet Union's power was established, those involved in the criminal underworld became enforcers and informers against political objectors found within the nation's prison system.[24] Soviet citizens, despite evidence to the contrary, were always guaranteed by Soviet officials that organized crime could not survive in a socialist society.[25] Yet, throughout the Soviet era, crime continued without

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19. *See id.* The percentage of prisoners convicted of economic crimes remained steady throughout the Soviet era despite times of radical change. *See id.*

20. *See generally* R.W. MAKEPEACE, MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW (1980); KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (Frederick Engels ed., International Publishers 1948).

21. *See* Anderson, *supra* note 18, at 452. *See generally* W.E. BUTLER, SOVIET LAW (2d ed. 1988). Once scarcity ends and a true Communist society is attained, there is no more need for the organization of the state to control daily activities. *See id.* at 30-40.

22. *See* Anderson, *supra* note 18, at 452.

23. *See generally Comm'n on Security* (statement of Stephen Handelman), *supra* note 15. *See also* STEPHEN HANDELMAN, COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA 20-27 (1995). Handelman explains the power that laid behind the prison walls by stating:

> [f]or decades, the prisons of the Soviet Union had been home to the world's most extraordinary criminal society. For almost a century, it had been known as *vorovskoi mir*, the Thieves World. From their cells, crime bosses planned and organized their operations across the country. No self-respecting gang leader ever needed to soil his hands by contact with the "civilian" world.

Id. at 20.

24. *See* Shoshanah V. Asnis, *Controlling the Russian Mafia: Russian Legal Confusion and U.S. Jurisdictional Power-Play*, 11 CONN. J. INT'L L. 299, 302 (1996). Even former Soviet leader, Joseph Stalin, in his early years, considered gang leaders among his closest confidants and later placed them into positions within his secret police. *See id.*

25. *See* HANDELMAN, *supra* note 23, at 9; *supra* notes 18-22 and accompanying text.

much public discourse, and criminals were placed in Soviet prisons where they cooperated with corrupt state and prison officials allowing the black market to flourish.[26]

B. *Organized Crime in Russia Today*

1. *Crime During the End of the Soviet Empire*

By the mid-1980s, radical ideological reforms were instituted by Mikhail Gorbachev due to pressure by Western leaders, as a way of restructuring Soviet society to prepare for a new future.[27] By the end of the Soviet era, a move toward capitalism had begun, but "the major sources of capital and wealth inside Russia were . . . black market money and money owned or manipulated or administered by the communist party."[28] Therefore, the profits that flowed from illegitimate means during the Soviet era were turned overnight into legitimate businesses, making it almost impossible for new entrepreneurs to compete with the criminal groups once major privatization began in 1991 and 1992.[29] Leaders of criminal organizations, who once managed their gangs from behind prison walls, found it had become necessary and more profitable to do business out on the streets.[30]

After the fall of the Iron Curtain, the centrally-managed institutions previously installed to control crime and regulate the economy were not fully functional, and the carving up of the country's resources was left to corrupt state officials and criminal organizations who often operated cooperatively.[31] Privatization, along with a lack of regulation, specific direction, or legitimate capital, provided a static environment ripe for the taking by criminals and

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26. *See* HANDELMAN, *supra* note 23, at 20. Not only did the criminals influence the economy from their perch behind bars, but they also "altered the direction of their country's political development." *Id.* at 21. *See also* Jankiewicz, *supra* note 11, at 229.

27. *See* Jankiewicz, *supra* note 11, at 226. The reforms were stalled until 1988 due to problems associated with the Afghanistan war, and once installed, created new problems for Mikhail Gorbachev in the form of turmoil and struggles among the republics. *See id.* at 226-27.

28. *Comm'n on Security* (statement of Stephen Handelman), *supra* note 15, at 13. Just before the Soviet Union's dismantling, the wealth of the black market "was estimated at 110 billion rubles (60.5 billion dollars at 1992 rates)." HANDELMAN, *supra* note 23, at 28. *See also* Louise Shelley, *Post-Soviet Organized Crime and the Rule of Law*, 28 J. MARSHALL L. REV. 827, 830 (1995).

29. *See* Asnis, *supra* note 24, at 303. The invitation of privatization into an economy is a major catalyst for "participation by organized crime due to the need for a large influx of capital, little of which is held by ordinary citizens." Shelley, *supra* note 28, at 830.

30. *See* HANDELMAN, *supra* note 23, at 20.

31. *See Comm'n on Security* (statement of Stephen Handelman), *supra* note 15, at 9. *See also* CSIS, *supra* note 10, at 107; Jankiewicz, *supra* note 11, at 229.

corruption.[32] The criminal groups no longer needed to fear the KGB intervening in their attempts at international operations since the KGB's power was dismantled during the 1991 revolution and the new government provided little in its place.[33]

Without the proper mechanisms to control it following the 1991 revolution, crime "[became] the first post-Soviet growth industry" with Russia reporting a thirty-three percent increase in crime between the years of 1991 and 1992.[34] It took very little time for the Russian mafia to infiltrate almost every aspect of post-Soviet life, including both legal and illegal markets.[35]

2. *The Structure of Russian Organized Crime*

The traditional structure of a Russian criminal organization beginning at the time of the 1917 revolution was built upon the ideals of hierarchy and strict obedience to a "thieves" code.[36] The members of these organizations were devoutly anti-communist and, for the most part, were required to lead modest, non-materialistic lives.[37] However, as the Soviet era progressed and members of these criminal groups fell out of favor with group leaders for not abiding by the strict codes, new types of criminals and criminal organizations began to emerge that were sincerely concerned only with the accumulation of wealth and power. These individuals separated from the traditional Russian criminal groups and formed new gangs based on violence and materialism.[38] These "new" criminal organizations that cooperated with

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32. *See* Jankiewicz, *supra* note 11, at 230. "[P]rivatization was for the Russian Mafia what Prohibition was for the Sicilian Mafia in America: a get rich quick scheme." *Id.*

33. *See* HANDELMAN, *supra* note 23, at 29. With the break down of the entire federal system at hand and the disappearance of law enforcement, criminals were allowed "freedom of movement that had been denied them under the police-state system." *Id.*

34. *Id.* at 3. *See also* Louis J. Freeh, Director of the Federal Bureau of Investigation (FBI), *Speech at the Ministry of Internal Affairs Academy* (July 4, 1994) (visited Sept. 23, 1997) <http:www.konanykhine.com/checkmate/freeh_mvd.htm> [hereinafter Speech] (explaining Russia's problems with organized crime and the United States' stance regarding those problems).

35. *See* Shelley, *supra* note 28, at 828-29. Compared to other organized criminal groups, Russian organized crime has expanded quickly because "[d]evelopments that have taken decades in other societies have occurred within a few years in the former Soviet Union." *Id.*

36. HANDELMAN, *supra* note 23, at 28-34. *See* Office of Int'l Crim. Just., *Russia: Organized Crime Old and New*, 13 CRIME & JUST. INT'L, Apr. 1997 (visited Sept. 3, 1997) <http://www.acsp.uic.edu/oicj/pubs/cjintl/1303/130310e.shtml> [hereinafter Office of ICJ].

37. *See* HANDELMAN, *supra* note 23, at 37. *See id.*, at 13-43, for a more detailed account of past Soviet criminal cultures.

38. *See id. See also* Victor Yasmann, *Murder Incorporated, Russian Style*, PRISM, Aug. 11, 1995 (visited Sept. 22, 1997) <http:// www.amber.ucsf.edu/ homes/ ross/ public_html/

corrupt government officials made the black market prosper.[39]

The actual structure of current Russian mafia groups has been hotly debated. The debate centers on whether Russian criminal groups are semi-formal, hierarchial organizations,[40] or individual criminals who band together in fluid groups occasionally using each other to perform a certain crime or scam.[41] The latter conception resembles more the form of a gang culture, while the former suggests professional criminals.

Regardless of whether these are highly organized groups or bands of criminal gangs, a great distinction exists between the Russian mafia and other transnational criminal organizations: the criminal members' bond with those within the "power structure."[42] The criminal organizations operating within Russia today form an "unusual coalition of professional criminals, former members of the underground economy, [and] members of the former Party elite . . . def[ying] traditional conceptions of organized crime groups."[43] It is estimated that 8000 organized criminal groups, several hundred with international connections, existed in Russia in 1996, up from 3000 in 1992.[44]

The literature that has recently surfaced regarding the Russian mafia typically views these criminal organizations as posing the greatest threat internationally.[45] Although most mafia groups increasingly function on a

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russia_/ruscrime.txt> (detailing the waves of violence within post-Soviet Russia).

39. *See* HANDELMAN, *supra* note 23, at 42.

40. *See* Office of ICJ, *supra* note 36.

41. *See* Peter Grinenko, *Containing the New Criminal Nomenklatura*, *in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 111, 113 (Linnea P. Raine & Frank J. Cilluffo eds., 1994).

42. Shelley, *supra* note 28, at 829. Shelley states that the danger posed by these groups is substantial because "[t]hese are not individuals outside the power structure, but individuals representing a continuity from the old Communist power structure to the post-Soviet political arrangement. Once these individuals only had the use of state property. Now they have appropriated it and can send the proceeds outside the country." *Id. See also* J. Michael Waller & Victor J. Yasmann, *Russia's Great Criminal Revolution: The Role of the Security Services*, *in* UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE 187-200 (Patrick J. Ryan & George E. Rush eds., 1997). *See generally*, Joseph L. Albini et al., *Russian Organized Crime: Its History, Structure, and Function*, *in* UNDERSTANDING ORGANIZED CRIME IN GLOBAL PERSPECTIVE 153-73 (Patrick J. Ryan & George E. Rush eds., 1997).

43. Shelley, *supra* note 28, at 829-30. *See generally* 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement by James Woolsey); *Threat*, *supra* note 10; Jankiewicz, *supra* note 11, at 230-31; HANDELMAN, *supra* note 23.

44. *See* Phil Williams, *Introduction: How Serious a Threat is Russian Organized Crime*, *reprinted in* RUSSIAN ORGANIZED CRIME: THE NEW THREAT? 1, 11 (Phil Williams ed., 1997). FBI Director Louis Freeh stated in recent testimony before the House International Relations Committee that these groups included over 100,000 members. *See Threat*, *supra* note 10, at 6.

45. *See generally* Speech, *supra* note 34; 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement of James Woolsey); Weldon, *supra* note 16. The FBI, under the direction of Louis Freeh, opened its first branch office in Moscow in 1994 to help monitor the Russian

global scale, they do not have the advantages that the Russian criminal groups have, such as their former military connections in European and African countries or their distinction as experts in economic crimes.[46] The groups' ability to recruit from highly-trained, displaced military, intellegence, and security personnel also adds to the danger posed by the Russian criminal structure.[47]

3. *Current Russian Organized Crime Activity*

Like other organized crime groups throughout the world, Russian criminal groups have engaged in illegitimate businesses such as smuggling, prostitution, and other typical "rackets," while retaining a foothold in legitimate business as well. By 1995, Russian criminal organizations were believed to have "taken control [of] over 70-80% of all Russian commercial enterprises."[48] As privatization and capitalism were introduced, Russian criminal organizations, as well as foreign criminal organizations, found perfect opportunities to use their alliances with corrupt state officials to gain ownership or forge connections with legitimate businesses. It is estimated that Russian organized crime controls approximately 50,000 companies, those of which account for almost 40% of the Russian gross national product,[49] and what businesses the mafia does not own legitimately, it controls illegitimately by strong-armed tactics involving the extortion of the most profitable businesses.[50] Unlike criminal groups in other countries, the Russian mafia is essentially "inseparable from the Russian economy,"[51] and

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mafia's movements and provide assistance to Russian law enforcement. *See* Speech, *supra* note 34.

46. *See* Guy Dunn, *Major Mafia Gangs in Russia, reprinted in* RUSSIAN ORGANIZED CRIME: THE NEW THREAT? 63, 63 (Phil Williams ed., 1997). An estimated 110 Russian mafia gangs now function in more than 44 nations around the globe. *See id. See also The Threat from Russian Organized Crime: Hearing Before the House Comm. on Int'l Relations,* 104th Cong. 76 (1996) (prepared statement of Louise I. Shelley). "[S]pecialists from the security forces, military and large scale technical elite left unemployed or displaced by the collapse of the Soviet state . . . provide . . . computer and communication skills, technical expertise, and money laundering experience." *Id. See generally* HANDELMAN, *supra* note 23, at 207-23.

47. *See* HANDELMAN, *supra* note 23, at 222. *See generally* Waller & Yasmann, *supra* note 42.

48. Alexandre Konanykhine & Elena Gratcheva, *Mafiocracy in Russia* (visited Sept. 23, 1997) <http://www.konanykhine.com/mafiocracy.htm#Government>.

49. *See* Dunn, *supra* note 46, at 63.

50. *See* Konanykhine & Gratcheva, *supra* note 48. Methods of influence used by Russian criminal groups to gain power have included "kidnappings, assassinations, attacks on the family members [of enemies], [and] malicious persecution by corrupt government officials affiliated with the Mafia." *Id.*

51. Dunn, *supra* note 46, at 63. *See also* Konanykhine & Gratcheva, *supra* note 48;

it is "practically impossible for a profitable business in Russia to avoid [being under the] control of the Mafia and regular extortion."[52]

Especially troubling to the Russian economy, as well as to the world economy, is Russian organized crime's involvement in the banking industry, money laundering, and other sophisticated economic frauds.[53] Banking institutions have been overwhelmed with organized crime due to the slowly developing regulation, massive corruption, and sorely needed capital.[54] Bank officials who do not play by the mafia's rules are threatened, kidnapped, or murdered,[55] and business personnel in other industries have met similar fates.[56] The ability to establish a bank in Russia with little capital "allows many questionable individuals to establish banking institutions."[57]

Accompanying the global concern for Russia's lack of banking regulations is a growing interest in the amount of money laundering associated with Russia's corrupt banking institutions. These corrupt banks launder the money not only of Russian criminals but also of foreign criminal

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Barbara Von Der Heydt, *Corruption in Russia: No Democracy Without Morality* (visited Sept. 23, 1997) <http://www.konanykhine.com/checkmate/heritage.htm>. Professor Louise Shelley contends that "[o]rganized crime exploits the legitimate economy while simultaneously limiting development of certain legitimate forms of investment and open markets that benefit a cross-section of the population." Shelley, *supra* note 28, at 832. This causes a problem because it requires the Russian economy to depend on illegal rather than legal economic activity. *See id.*

52. Konanykhine & Gratcheva, *supra* note 48. *See also* Shelley, *supra* note 28, at 833. When a business is protected by an organized crime group, rather than by normal legal means, the business is vulnerable to extortion threats, providing a common problem for those in business who try to remain legitimate. *See id.* at 833-34.

53. *See* Shelley, *supra* note 28, at 829-31. *See generally* Stanley E. Morris, *Maintaining the Security, Integrity, and Efficiency of Our Financial System in a Global Criminal Market, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 60-70 (Linnea P. Raine & Frank J. Cilluffo eds., 1994).

54. *See* Shelley, *supra* note 28, at 830-32. It has been estimated that more than half of Russia's 1747 banks are controlled by crime syndicates, and Western intelligence services report that these syndicates now "enjoy the protection of the ruling oligarchy that consolidated its power" at the time of Russian President Boris Yeltsin's 1996 illnesses. Arnaud de Borchgrave, *Ignoring Russia's Crisis of Crime*, WASH. TIMES, July 25, 1997, at A19.

55. *See* Konanykhine & Gratcheva, *supra* note 48. The banking industry appears to be the worst hit of businesses, but it is not the only one. "[D]uring the first ten months of 1994, 2,344 people were murdered" in Moscow alone, and this high rate has been attributed to a "large number of contract killings of business personnel." Shelley, *supra* note 28, at 833-34.

56. *See* Shelley, *supra* note 28, at 833-34. The media, since the revolution in 1991, has received several threats and been involved in many acts of violence including the murders of several popular journalists. *See* Von Der Heydt, *supra* note 51. The murders were possible contract killings and the result of journalists trying to uncover corruption and crime. *See id.*

57. Shelley, *supra* note 28, at 831. A key feature to survival for the corrupt banks has been their connection "with politicians at all political levels." *Id.* This bond between the banks and politicians has severely weakened the emergence of democracy and free markets. *See id.*

organizations as well.[58] After the dirty money is laundered through the Russian banks, it is either reinvested in foreign banks or reintroduced into the economy as legitimate capital.[59] By introducing laundered money into a national economy, the economic and political security of the nation is directly threatened because the nation's financial and political future becomes dependent on the rule of criminal oligarchies.[60]

Another criminal activity that has caused growing concern in Russia and throughout the rest of the world is the threat of nuclear material theft and diversion. In 1994, Louis Freeh, Director of the FBI,[61] and R. James Woolsey, former Director of the United States Central Intelligence Agency (CIA),[62] both recognized the problem as one for the entire world to monitor.

Even given the dangerousness of the Russian criminal groups and their ability to harness the country's economy, the more disturbing aspect of Russian criminal organizations is that they are "supplanting" the role of the state.[63] Since the elimination of the Soviet Union as the key provider for society, the current governmental apparatus has been unable to provide for its citizens in many ways. Criminal groups within Russia now provide services that are typically delegated to other segments of a given society. These services include protecting businesses and employment while offering mediation in disputes between parties.[64] Law enforcement, once furnished by the state, but now lacking official authority and effectiveness, is increasingly provided by organized crime groups in the form of private security to local neighborhood and regional districts.[65]

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58. *See* Meinert, *supra* note 14. *See also* Shelley, *supra* note 28, at 831; Claire Sterling, *Containing the New Criminal Nomenklatura, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 106, 109 (Linnea P. Raine & Frank J. Cilluffo eds., 1994). Claire Sterling, in her speech to the CSIS, stated that Russia is "perhaps the fastest growing money laundering center in the world with" money coming in from all over the world. *Id.*

59. *See* Pavel Ponomarev, *Legal Measures Against Legalization of Criminal Assets as a Mean of Combatting Organized Crime*, CJ Europe Online (visited Sept. 22, 1997) <http://www.acsp.uic.edu/OICJ/PUBS/CJE/060307.htm>.

60. *See id.* Legitimate activities have actually become the second largest business branch of global organized criminal groups with both the Russian mafia and La Cosa Nostra interested in the building sector, agricultural business, big trading chains, and finance and service industries. *See* Meinert, *supra* note 14.

61. *See* Speech, *supra* note 34. Representative Weldon, in his statement before Congress, asserted that "crime, corruption, incompetence, and institutional decay are so advanced in Russia that the theft of nuclear weapons, unthinkable in the Soviet war machine of the Cold War, seems entirely plausible in the Russia of today." Weldon, *supra* note 16.

62. *See* 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement of James Woolsey).

63. Shelley, *supra* note 28, at 834. *See generally* HANDELMAN, *supra* note 23; *Comm'n on Security, supra* note 15.

64. *See* Shelley, *supra* note 28, at 834. *See also* HANDELMAN, *supra* note 23, at 20-27.

65. *See* Shelley, *supra* note 28, at 834. It is estimated that "100,000 private law enforcers presently operate without any regulation." *Id.* Alexander Gurov, director of a

Citizens now also look to criminal groups for services previously provided by the courts, such as the enforcement of private contracts, debt collection and even some social services, to name a few.[66] Russia's lack of stable democratic institutions, "[s]uch as a parliament, local government, the press, political parties, the church and labor unions," leaves the country "muscled aside by the enormous power wielded in Russia by organized crime and corruption."[67] For many Russians, nearly all aspects of their lives are influenced by organized crime.[68]

4. *Past Efforts to Control Organized Crime in Russia*

Russia has been left with an enormous problem of crime and corruption that, left unchecked, could at best lead to horrible foreign relations and at worst be the demise of the capitalist and democratic processes currently operating in Russia.[69] Russian officials, in an effort to resolve their country's overall crime problems, have implemented several strategies toward reducing crime; however, these measures have taken years to implement and have met little success. The free-market infrastructure that was needed in the early stages after the 1991 revolution was held at bay by corrupt politicians and intense lobby groups.[70] The lack of banking regulations, securities and trade market regulations, laws against money laundering, a criminal code specifically addressing organized crime, and other regulations, have only exacerbated the crime problem, leaving all who conduct business within Russian borders at the will of corruption and

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security research institute at the Ministry of Security, asserts that corruption extends from the police through the courts and that where criminals in the past "tried to influence officials with bribes . . . [they now] have their own lobby in the government and the parliament — not to mention the police and the prosecutor's office." Von Der Heydt, *supra* note 51.

66. *See* Mike Cormaney, *RICO in Russia: Effective Control of Organized Crime or Another Empty Promise?*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 261, 271-72 (1997). *See also* Shelley, *supra* note 28, at 834; *Comm'n on Security* (statement of Louise Shelley), *supra* note 15, at 3.

67. David Hoffman, *Fragile Foundation*, WASH. POST, Dec. 26, 1996, *available in* WL 15124239.

68. *See Comm'n on Security* (statement of Lousie Shelley), *supra* note 15, at 6. With a near monopoly of intimidation and coercion, the mafia provides a relatively solid framework within which both legal and illegal activities take place. *See Crime and Corruption in Russia and the New Independent States: Threats to Markets, Democracy and International Security: Before the House Int'l Affairs Comm.* 103d Cong. (1996), *available in* LEXIS, News Library, Curnws File (prepared statement of Ariel Cohen, Senior Analyst, Heritage Foundation).

69. *See generally Comm'n on Security*, *supra* note 15 (detailing statements before congress detailing the problems Russia has faced since the rise of democracy and capitalism).

70. *See* Shelley, *supra* note 28, at 835. *See also* Von Der Heydt, *supra* note 51; de Borchgrave, *supra* note 54. *See generally* Waller & Yasmann, *supra* note 42 (describing the role of security services in the post-Soviet era).

crime.[71]

In early 1994, Russian President Boris Yeltsin, before the Russian Parliament, stated that "Russian organized crime represented 'the number one problem facing Russia'. [sic]"[72] Yeltsin, in response to overwhelming public pressure to combat organized crime, issued a presidential decree in June 1994 which was specifically designed to control organized criminal groups and their spread of violence and corruption.[73] In his decree, Yeltsin expressed his deep concerns by granting wide-ranging emergency authority to prosecutors and law enforcement officials, which allowed these officials to use Russian Army troops in order to conduct searches and detain suspects for up to thirty days while evidence was gathered for their trials.[74] These measures reminded some of Joseph Stalin's oppressive police tactics and seemed to be an unconstitutional surveillance technique that would ultimately fail.[75] Neither the Senate nor the Duma had the constitutional authority to reject or approve Yeltsin's presidential decrees;[76] therefore, the decree was considered law until the enactment of the Criminal Code of the Russian Federation in January of 1997. This non-democratic move proved highly controversial, and many adamantly opposed the action. Nevertheless, the decree stood as law until 1997.[77]

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71. *See* Shelley, *supra* note 28, at 835. The country's crime problems have allowed ultra-nationalist leaders such as, Vladimir Zhirinovsky, to gain support toward launching a "campaign to toughen up Russia's official attitude toward violent criminals . . . [by] 'set[ting] up courts on the spot to shoot the leaders of criminal bands.'" Asnis, *supra* note 24, at 309.

72. Konanykhine & Gratcheva, *supra* note 48.

73. *See* Decree of the President of the Russian Federation No. 1226 of June 14, 1994, *On the Urgent Measures to Protect the Population Against Gangsterism and Other Manifestations of Organized Crime*, June 14, 1994, *available in* LEXIS, Intlaw Library, RFLAW File [hereinafter *Urgent Measures*]. *See also* Asnis, *supra* note 24, at 309.

74. *See Urgent Measures*, *supra* note 73, at 1. The Presidential Decree, "aimed at the protection of the life, health and property interests of cititzens," was to be used only until the Russian Parliament adopted new laws that could address such problems. Victor Shabalin et al., *The New Stage of the Fight Against Organized Crime in Russia*, (visited Sept. 3, 1997) <http://www.acsp.uic.edu/iasoc/newstage.htm>. In addition to the controversial searches and detention came inspections of financial activities and transactions of suspects and their family members. *See id.*

75. *See* Asnis, *supra* note 24, at 312. The decree caused great debate among lawyers, political scientists and the political elite. *See* Shabalin et al., *supra* note 74. Many thought that Russian President Boris Yeltsin's decree ran counter to the Constitution and violated the rights and liberties of Russian citizens. *See id.*

76. *See* Asnis, *supra* note 24, at 312. There are those who contest that the Decree was not a "war" against crime, but "was a war against wild democracy, wild capitalism. The actual mafiya lords, the godfathers of crime, were not touched. Particularly the Russian gangs, the Slavic gangs, who saw it as a way of getting rid of some of their rivals." *Comm'n on Security* (statement of Stephen Handelman), *supra* note 15, at 14.

77. *See* Asnis, *supra* note 24, at 312-13. Even though the Decree had its opponents, there were those who supported it and also those who did not think the Decree went far

5. *Current Efforts to Control Crime*

Prior to the passage of the 1997 Criminal Code of the Russian Federation (CCRF),[78] the controlling law on crime in Russia was the Soviet Criminal Code adopted in 1960,[79] and President Yeltsin's 1994 decree on organized crime. Unfortunately, these tools did not readily provide any sort of real attack on organized crime. In 1996, the CCRF was passed — supposedly providing the needed weapons to begin an offensive attack on Russia's crime problems. However, in reality, the CCRF may only be a source of frustration to courts and prosecutors who try to use it as a tool against organized criminal groups.

The main disadvantage of the CCRF is its inability to place any pressure on organized crime. Like most criminal codes, the CCRF's main focus is on individual crimes and the assignment of responsibility for an individual's involvement in those crimes.[80] However, unlike the United States with its additional crime-fighting tools, such as RICO, the CCRF lacks substance when dealing with the true components of organized crime by failing to provide the ability to prosecute "large and diverse organizations."[81] Without recourse to the "criminal enterprise" component contained in RICO-type statutes, Russian prosecutors have been unable to hold members "liable for the crimes of other members of the organization unless they shared a specific common goal and agreement."[82] As a result, prosecutors will be forced to adjudicate organized criminal groups by using conspiracy laws within the CCRF, and history has shown that this will likely be insufficient in dealing with organized criminal groups acting in Russia.[83]

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enough. *See* Shabalin et al., *supra* note 74. Many well-known and respected lawyers supported the Decree believing that citizen's personal safety took precedence over their abstract civil liberties. The Liberal-Democratic Party (LDP) found the Decree too moderate and demanded army participation in the form of summary executions of criminal leaders and corrupt government officials. *See id.*

78. The Criminal Code of the Russian Federation, No. 64-FZ of June 13, 1996, *available in* LEXIS, Intlaw Library, Rflaw File (hereinafter CCRF).

79. *See* HAROLD J. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE: THE.RSFSR CODES 141 (Harold J. Berman & James W. Spindler trans., 1966); Criminal Code of the RSFSR (1961) (Soviet Criminal Code). Superceded only by amendments, the basic structure of the old Soviet code was left intact until the CCRF was adopted in 1996. *See* Anderson, *supra* note 18, at 454.

80. *See* Cormaney, *supra* note 66, at 294.

81. *Id.* Even though the United States assisted Russian legislators with drafting many of the new provisions, problems will still persist due to prosecutors and law enforcement personnel lacking the needed experience of controlling crime through democratic means. *See id.* at 290, 292.

82. *Id.* at 294. *See also infra* notes 98-100 and accompanying text.

83. *See* Cormaney, *supra* note 66, at 293-94. For a RICO-type standard, a prosecutor

Even if the CCRF was a powerful tool capable of throwing a large net over the criminal groups that exist in Russia, it remains questionable whether the needed branches of law enforcement, such as the Russian police and courts, can effectively enforce and prosecute those who are active in the criminal underworld.[84] Russian law enforcement, since the breakup of the Soviet Union, "has been powerless to solve the growing organized crime problem."[85] Corruption, in the form of bribery, is commonplace in major metropolitan areas, and those officers who are honest lack the technology and the funds to be efficient.[86] The Russian court system is no better considering that the judges, prosecutors, and witnesses are frequent targets of bribes and threats.[87]

6. *Global Implications*

The result of Russia's organized crime problems is that Russia not only feels the effects of its evolving position as a safe-haven for crime and corruption. Several countries, particularly Germany and the United States, are recognizing a noticeable increase in Russian mafia activity within their borders.[88] Criminal activities by organized criminal groups in Russia and throughout the rest of the world are affecting world markets and making international business difficult because legitimate enterprises are reluctant to begin investing in markets that are infiltrated with organized crime.[89] FBI Director Louis Freeh, in his 1994 speech at the Russian Ministry of Internal Affairs Academy, warned that "[m]any businessmen are afraid of being kidnapped and held for ransom. I am afraid that, if unchecked, these organized crime groups and the terror that they generate will ultimately retard Russia's economic development and precipitate the flight of legitimate capital from your midst."[90]

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does not have to present evidence about "common agreements and intents," only "that a given person 'associated' with the group . . . [and] manifest[ed] an agreement to participate." *Id.* at 294.

84. *See generally id.* at 305-311. According to one police inspector, "the law . . . punishes only those who lack imagination," and even though corruption has always been part of the police ethic, it is now increasingly widespread. *Comm'n on Security*, *supra* note 15, at 11.

85. Jankiewicz, *supra* note 11, at 250. *See also* HANDELMAN, *supra* note 23, at 20-27.

86. *See* Jankiewicz, *supra* note 11, at 250. It is estimated "that as much as ninety-five percent of the force is on the take." *Id.* In some Russian cities, "police are forced . . . to chase their suspects by taxi or on the bus." *Comm'n on Security*, *supra* note 15, at 11.

87. *See* HANDELMAN, *supra* note 23, at 24-25.

88. *See* Peter J. Vassalo, *The New Ivan the Terrible: Problems in International Criminal Enforcement and the Specter of the Russian Mafia*, 28 CASE W. RES. J. INT'L L. 173, 178-80 (1996).

89. *See* Speech, *supra* note 34.

90. *Id.* In October of 1997, Bernard Gilman, Chairman of the House International

Another serious implication of Russian organized crime is the threatened diversion of nuclear materials and devices, along with the recruitment of Russia's elite nuclear scientists by terrorist groups.[91] The mere possibility that terrorists may have acquired, diverted or stolen Russian nuclear weapons should be a matter of grave concern for the rest of the world.[92]

III. LEGISLATIVE AND JUDICIAL RESPONSE TO ORGANIZED CRIME IN THE UNITED STATES

During the 1960s, the United States faced its own organized crime problem.[93] Congress found that organized crime was sufficiently distinguishable from individual crime and posed such a substantially greater threat to the welfare of the American economy and its citizens that it justified a categorically different legislative solution.[94] Specifically, Congress desperately needed to confront criminal organizations' infiltration of generally legitimate businesses.[95] Therefore, in order to control organized crime, Congress needed a new tool that could specifically deal with the group, or "enterprise"[96] feature of organized crime. Accordingly, RICO was enacted in 1970 to achieve those goals.

A. *Scope and Power of RICO*

1. *Overview and Features of RICO*

The general idea behind RICO is "to address the criminal organization

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Relations Committee, in his opening remarks to the committee stated: "Organized crime groups, particularly in Russia, now have an almost complete choke-hold on the country's vast natural resources as well as the banks and media. Russia has been described as a kleptocracy from top-to-bottom, a semi-criminal state." *Threat*, *supra* note 10, at 49.

91. *See* Speech, *supra* note 34. In fact, Russian General Lebed, former National Security Advisor to Russian President Boris Yeltsin, "suggested that dozens of nuclear suitcase devices are mysteriously missing from Russia's military arsenal[,] . . . [a]nd the same threat exists from weapons using biological or chemical contents." *Threat*, *supra* note 10, at 50.

92. *See generally* Weldon, *supra* note 16.

93. *See* Cormaney, *supra* note 66, at 277-79.

94. *See* GUIDE TO RICO, CORPORATE PRACTICE SERIES 4-5 (John C. Fricano ed., 1986).

95. *See id.* at 5. Even though RICO was largely ignored for the first five years of its existence, it has become widely used by prosecutors in a vast array of prosecutions for organized crime, political corruption, white collar crimes and violent groups. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION 7 n.17 (1985).

96. *See* 18 U.S.C. § 1961(4) (1994).

as a whole instead of focusing liability only on its individual members."[97] Traditional criminal statutes focus on individuals and their responsibilities — as does the CCFR. Typical criminal statutes provide prosecutors with substantial problems in convicting all, or even most, of the members who take part in a criminal organization.[98] Therefore, traditional individualized criminal statutes leave the criminal organization intact, allowing the generally untouched leaders to continue committing crimes.[99] By contrast, RICO provides prosecutors with the authorization to focus on the entire organization or "criminal enterprise" instead of just the individuals within it.[100]

However, RICO was not only designed as a tool to be used against organized crime infiltrating legitimate business; RICO was also to be used as a weapon against white collar crime and other forms of enterprise criminality.[101] In addition to providing sanctions against criminal organizations, RICO also supplies remedies that allow both private parties and the government to bring suits in civil court. According to section 1964, the Attorney General or "[a]ny person injured in his business or property by reason of a violation of [section] 1962" can seek civil sanctions in either state or federal court.[102] This important feature of RICO becomes very useful when law enforcement officials do not or cannot maintain an action against a criminal enterprise.

2. *How RICO Works*

The government in a criminal RICO action is required to prove that the defendant, "through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invested in, or maintained an interest in, or participated in, an enterprise, the activities of

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97. Cormaney, *supra* note 66, at 279.

98. *See id.* at 279-80. In 1961, the U.S. Supreme Court recognized the problems that organized criminal groups cause by stating:

> [c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

Callanan v. United States, 364 U.S. 587, 593 (1961).

99. *See* Cormaney, *supra* note 66, at 280. After the conviction of the low-level member, the untouched leaders can easily substitute another member into the convicted member's position. *Id.*

100. *Id.* The primary purpose of RICO is to "seek the eradication of organized crime in the United States . . . ." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970).

101. *See generally* GUIDE TO RICO, *supra* note 94, at 3-18.

102. 18 U.S.C. § 1964(c) (1994).

which affected interstate or foreign commerce."[103] Therefore, the government must prove each individual element: (1) the commission of two or more acts of "racketeering activity," (2) a pattern, (3) an enterprise, (4) an effect on interstate commerce, and (5) that the accused act is prohibited.[104]

First, a government indictment must assert that each act listed in the indictment is a "racketeering activity."[105] However, a RICO defendant does not need to be held responsible for each "activity" listed in section 1961. Instead, the defendant may be charged with violating one or all of the activities listed. Nevertheless, a RICO charge does require that the defendant be responsible for a minimum of two acts as set forth in section 1961 before a RICO violation is "chargeable."[106]

Second, RICO further requires that these two predicate acts constitute a pattern of racketeering activity.[107] A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last . . . occur[ing] within ten years . . . after the commission of a prior act of racketeering activity."[108] Courts have struggled with whether to interpret this element broadly or narrowly, making it one of the most controversial aspects of the RICO statute.[109] One of the leading cases which tried to clarify congressional intent on the meaning of a "pattern of racketeering activity" was *Sedima, S.P.R.L. v. Imrex Co, Inc.*[110] After examing RICO's congressional history, the Supreme Court discussed in *Sedima* that RICO, even in a civil proceeding, is designed to remedy organized crime, not isolated offenses.[111] Therefore, isolated acts do not constitute a pattern; a pattern consists of "continuity plus relationship."[112]

Third, RICO requires that a person, as defined by the statute, must

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103. Lance Bremer et al., *Racketeer Influenced and Corrupt Organizations*, 34 AM. CRIM. L. REV. 931, 935 (1997).

104. *See id.*

105. 18 U.S.C. § 1961 (1994).

106. *See id.* RICO extends the "racketeering activity" definition over a large assortment of indictable federal and state crimes. *See* 18 U.S.C. 1961(1)(A)-(E) (1994).

107. *See* Bremer et al., *supra* note 103, at 937.

108. 18 U.S.C. § 1961(5).

109. *See* Bremer et al., *supra* note 103, at 935.

110. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985).

111. *See id.* at 495-97 & n.14. It should be noted that most of the court's discussion regarding "pattern" took place as dictum in a footnote. The *Sedima* court also found that it was not necessary to establish that the defendant had a prior conviction in order to establish "racketeering activity." *Id.* at 496. Therefore, there is not a prior conviction rule for a RICO proceeding. *Id.*

112. *Id.* at 497 (quoting S.REP. NO. 91-617, at 4). Once a person commits two predicate acts that are "related" and "pose a threat of continued criminal activity," a substantial argument has been made to sustain RICO liability. *See* H.J. Inc. v. Northwestern Bell, 492 U.S. 229, 239 (1989).

"directly or indirectly acquire interests in, or administer, an 'enterprise'" which includes individuals, partnerships, corporations, associations, or other legal entities, and "any union or group of individuals associated in fact although not a legal entity."[113] The "enterprise" element has also been the subject of great controversy with courts using large amounts of discretion in their development of the law concerning "enterprise."[114]

Fourth, the "racketeering activity" must have had some effect on interstate commerce. Even though "[c]ourts initially held that the enterprise itself, and not the predicate acts, must affect interstate commerce[,] . . . many courts now exercise jurisdiction when the predicate acts form a nexus with the interstate commerce."[115] There is a nexus with interstate commerce "as long as interstate commerce is affected by either the enterprise or its 'activities.'"[116]

Finally, the last element necessary to complete an action for violation of RICO is that the activities must be prohibited pursuant to section 1962. The activities included in section 1962 are as follows: "(1) investing income from a pattern of racketeering activity; (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity; (3) conducting the affairs of an enterprise through a pattern of racketeering activity; and (4) conspiring to do any of the above."[117]

Once a conviction is obtained, RICO provides three different types of penalties for violators. Violators can be fined or imprisoned for up to twenty years, as well as subjected to mandatory asset forfeiture.[118] These sanctions give the government authority to attack the economic bases of racketeering activities. Much of the success of RICO can be directly tied to its harsh penalties, since the penalty for a RICO violation is significantly more severe than the penalty for the commission of one of its predicate offenses.[119] It is the prosecution's use of the criminal forfeiture feature that poses the greatest threat to a criminal organization.[120] Forfeiture removes the potential illegal profit from activities engaged in by organized crime groups and places the generated revenue from the forfeiture actions into a fund to further enhance law enforcement and compensate victims.[121]

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113. Bremer et al., *supra* note 103, at 942 (footnotes omitted).

114. *Id.* at 943

115. *Id.* at 949.

116. *Id.*

117. *Id.* at 950 (footnotes omitted).

118. *See* 18 U.S.C. § 1963(a) (1994).

119. *See* Cormaney, *supra* note 66, at 288-89.

120. *See id.*

121. *See id.* at 289. Criminal forfeiture actions are actually quite rare due to their controversial nature and have been attacked by defendants on constitutional grounds. Constitutional arguments have been based both on the "Eighth Amendment prohibition of cruel and unusual punishment" and arguments for Due Process rights of third parties. *Id.* at n.170.

3. *Benefits of RICO*

The success of RICO in the United States is a result of its extremely broad and flexible language and the courts' cooperative interpretations.[122] The drafters of RICO intended to define organized crime loosely in order to "deliberately cast the net of liability wide . . . to avoid open loopholes through which the minions of organized crime might crawl to freedom."[123]

In fact, Congress included within the statute a liberal construction clause that provides "the provisions of this title shall be liberally construed to effectuate its remedial purposes."[124]

In line with this liberal legislative intent has been a very broad and liberal application by U.S. courts. In *United States v. Turkette*, the Supreme Court stated that "the most reliable evidence of congressional intent is found in the language of the statute."[125] The courts' application of the broad statutory language has allowed RICO actions to be used against a number of different types of criminal enterprises rather than just the traditional members of organized crime. For example, RICO can be, and has been, used in various forms of litigation, from cases involving complex white color crime schemes and political corruption to traditional types of organized crime.[126]

However, even though courts agree that RICO is to be given very broad application, its use remains questionable in extraterritorial litigation for violations that reach beyond the borders of the United States or violations that are committed by foreign parties. As a matter of international comity and sovereignty, the conventional consensus in applying federal statutes is that they are to be limited to acts that take place within the United States.[127] However, if Congress "clearly indicates an intent to the contrary" within the statute or legislative history, a court may find that extraterritorial application

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122. *See id.* at 285-86.

123. Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984), *quoted in* Cormaney, *supra* note 66, at 285.

124. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947 (1970).

125. U.S. v. Turkette, 452 U.S. 576, 586 (1981). The U.S. Supreme Court has stated that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . . , but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 497-98 (1985) (quoting the Organized Crime Control Act of 1970).

126. *See, e.g.*, United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) (involving RICO prosecution of members of La Cosa Nostra, a criminal enterprise involved in a wide range of racketeering activities, including murder, extortion, gambling and loansharking); United States v. Mandel, 431 F. Supp. 90 (D. Md. 1977) (convicting a Maryland governor for RICO mail fraud and bribery); United States v. Tamura, 694 F.2d 591 (9th Cir. 1982) (upholding conviction of corporate representative for RICO mail and wire fraud and bribery).

127. *See* Lawrence W. Newman and Michael Burrows, *Extraterritorial Application of RICO in the Second Circuit*, N.Y. L. J., Jan. 30, 1997, at 3.

is permissible.[128] Therefore, even though RICO does not include specific language regarding its application extraterritorially to foreign defendants, this fact does not automatically preclude RICO litigation for the acts of foreigners.[129] Two federal circuits, the Second[130]and Ninth, [131] have specifically handled the extraterritorial jurisdiction question posed by RICO litigation; yet no consensus has been reached as to its extraterritorial application.[132] Even if available extraterritorially, RICO's use against international actors in U.S. courts would probably be limited to acts that form a nexus with the United States due to considerations of international comity and sovereignty.[133]

Although RICO is most often viewed from a criminal perspective, its success in controlling organized crime is not limited to criminal sanctions alone; a criminal organization can be held liable in civil actions as well. RICO states that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[134] Civil actions are available to both private citizens and the government, and since neither the states nor the federal govenment have the resources to prosecute every organized crime group, civil actions have become a very useful tool when used by prosecutors and private parties.[135]

Possibly the greatest benefit that RICO offers in combatting organized crime is the concept of "criminal enterprise." Traditionally, conspiracy law could not be used in actions against criminal organizations because in typical organized criminal groups there were several diverse types of conspiracies but "no . . . commonly shared criminal objective."[136] Thus, the group could be prosecuted only for several small conspiracies instead of one large conspiracy because the members typically lacked any kind of shared agreement.[137] RICO solved the problem by introducing the concept of "enterprise conspiracy."[138] For a RICO prosecution, it is the agreement to participate in the affairs of a criminal enterprise by committing two acts of

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128. *Id.*

129. *See id.*

130. *See* Alfadda v. Fenn, 935 F.2d 475 (2d Cir. 1991) (adopting a "conduct" test where the harmful act took place in the United States).

131. *See* Butte Mining, PLC v. Smith, 76 F.3d 287 (9th Cir. 1996).

132. *See* Newman & Burrows, *supra* note 127, at 3.

133. The ability of RICO to be used in an extraterritorial sense as a possible standard for universal jurisdiction is explained in *infra* Part V.

134. 18 U.S.C. § 1964(c) (1994).

135. *See* Cormaney, *supra* note 66, at 288-90.

136. *Id.* at 283.

137. *See id.* at 283-84.

138. *Id.* at 284.

racketeering activity to further the goals of the enterprise which forms the crime. Neither the prosecutor nor the private plaintiff need prove that the defendant knew about the activities of other members nor that there were many diverse types of criminal activity. Liability, for civil suits, or a conviction, for criminal prosecutions, will attach when it is shown "that each [defendant] 'associated' with the criminal enterprise by performing two acts of racketeering activity . . . ," thus allowing all of the members of the organization to sustain liability for the crimes of the organization.[139] This new feature "allow[s] . . . [for] criminal organization[s] to be tried as a whole, and not merely as the sum of its diverse parts."[140] Therefore, a RICO indictment is not limited to the requirements of traditional conspiracy law where a common criminal objective and an agreement is needed for each act.[141]

B. *Why RICO-Type Legislation Implemented in RUSSIA Would Currently be Futile*

The problems that confront Russia and other nations regarding organized crime could possibly be addressed by implementing several of the successful components of the United States' RICO Act.[142] The CCRF could be amended by Parliament to provide for the broader and more flexible standards of RICO. However, the largest obstacle to the effective addition of RICO-like provisions to the CCRF is not substantive law, but a lack of democratic and free-market legal traditions and the slow development of civil society. Interestingly, this development has been impeded by organized crime. These problems would overshadow the legislation to the point that organized criminal groups could be neither effectively prosecuted nor successfully sued.

1. *Organized Crime has Influenced Virtually Every Aspect of Russian Society*

By 1994, it was evident that Russian organized crime had a foothold in most institutions and industries within the country. The perception of the power of organized crime among citizens of Russia was made all too clear in a poll in March of 1994, where in response to the question "Who controls Russia?," 23% responded "the Mafia."[143]

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139. *Id.*

140. *Id.*

141. *See id.* at 283.

142. *See id.* at 290.

143. 140 CONG. REC. E1335-03, E1336 (daily ed. June 27, 1994) (statement of James Woolsey). Only 14% of those responding to the survey answered "President Yeltsin." *See id.*

Street-level criminal groups are not the only segments of Russian society that are being accused of operating as criminal organizations. In 1993, the Vice President of Russia, Alexander Rutskoy, presented a report to the Supreme Soviet that accused virtually all principal members of President Boris Yeltsin's cabinet of corruption. The Supreme Soviet responded by demanding the resignation of those officials and commanded Prosecutor General Stepankov and Minister of Security Barannikov to criminally prosecute the named members.[144] To counter the Supreme Soviet's command, Yeltsin hurriedly dismissed Vice President Rutskoy, Prosecutor General Stepankov, and Minister of Security Barannikov accusing them of corruption.[145]

In Russia today, the political reality practically excludes the possibility of non-corrupt government officials. Bribing organized criminal groups is a typical "prerequisite to all 'attractive' government appointments both on local and on national level[s]."[146] Dr. Louis Shelley, Co-Editor-in-Chief of the Journal of Post-Soviet Democratization (Demokratizatsiya) and professor at American University, has warned that:

> [t]he impact of corrupt legislators is particularly important at this crucial stage where legislation that will govern the country in subsequent decades is now being implemented. Once the basic framework is enacted, vested bureaucratic and financial interests combined with inertia will make it difficult to implement fundamental change.[147]

Organized crime is assisting the rise of regional powers in Russia, where the rise of local fiefdoms, protected by loyal armed bands, seeks political and economic control over their regions.[148] These local leaders may enjoy more power than in the Soviet period because they own, rather than control, property and because the "law enforcers" are employed by them rather than the state.[149] Therefore, even if RICO-type legislation were to be implemented, it will be substantially difficult for Russia to enforce, let alone to bring action against, powerful organized criminal groups.

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144. *See* Konanykhine & Gratcheva, *supra* note 48.

145. *See id.*

146. *Id.*

147. Shelley, *supra* note 28, at 835. Keeping in mind that an estimated 25-30% of Russian parliament members have some connection to the mafia, it is important to note that the Russian parliament has granted itself immunity through legislation, thereby creating an added incentive for criminals to form a nexus with those in power or become elected officials themselves. *See id.*

148. *See id.*

149. *See id.*

2. *Weak Commitment to Democratic and Legal Principles*

A notable Russian writer, Nobel Prize-winner Alexander Solzhenitsyn, wrote in November of 1996 that "Russia has no semblance of democracy and is far from real market reform . . . . A stable and tight oligarchy of 150-200 people is deciding the fate of the nation . . . [where] nearly criminal reforms . . . have created a new class of mafia capitalists."[150]

The lack of governmental leadership and corruption in both the past and current governmental structure has led to public frustration, disillusionment, and a lack of commitment to democratic and free-market reforms. In addition, organized crime has transformed public opinion about the new societal structure.[151] There is a disrespect and disregard for authority and the law. A government official summarized the problem by stating, "[s]ome of our people seem to understand democracy as being able to do whatever they want . . . . As a result, . . . we have wild democracy, an epidemic of seizing everything in sight, of getting rich at any cost."[152]

IV. THE UNIVERSAL PRINCIPLE OF INTERNATIONAL LAW

A. *Principles of International Law*

According to international law, a state must assess its jurisdictional authority to appropriately punish criminal acts that also affect the interests of any other state.[153] The anticipated jurisdiction of one nation must be balanced with the interests of other nations in regard to any particular criminal act.[154] International law has developed well-settled principles to determine if a state may apprehend, prosecute, and punish those acts that extend beyond domestic borders.[155] These jurisdictional principles of international law have been established in order to encourage harmony among foreign states by seeking to avoid or settle controversial assertions of jurisdictional authority.[156] Therefore, under the principles of international law, a state is forbidden from exercising its authority unless it has jurisdiction to prescribe its authority over the criminal acts in question.[157]

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150. Konanykhine & Gratcheva, *supra* note 48.

151. *See Comm'n on Security* (statement of Louise Shelley), *supra* note 15, at 2-3.

152. HANDELMAN, *supra* note 23, at 4 (quoting Aslambek Aslakhanov, former Director of Supreme Soviet Parliamentary Committee on Law and Order).

153. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 785 (1988). For the remainder of this note, the term "state" refers to a country or nation-state.

154. *See id.* at 786.

155. *See id.* at 785.

156. *See id.* at 786.

157. *See* Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal*

A state may gain criminal jurisdiction over an offense pursuant to international law in one of five ways:[158] (1) under the territorial principle — jurisdictional authority based on where the alleged crime actually was committed including "objective" territorial jurisdiction, or the "effects" doctrine. The "effects" doctrine permits countries to exercise authority over "acts committed outside territorial limits but intended to produce, and producing, detrimental effects within a nation"; (2) nationality principle — jurisdictional authority on the grounds that the accused is a citizen of the prosecuting state; (3) passive personality principle — jurisdictional authority based on the fact that the victim is a national of the prosecuting state; (4) protective principle — jurisdictional authority due to the fact that the act threatened the security, integrity or "a basic governmental function" of the prosecuting state; and (5) universality principle — jurisdictional authority for crimes recognized by the world community as so offensive that the "traditional nexus with either the crime, the alleged offender, or the victim" is not needed.[159] It is this last principle of international jurisdiction that will be the primary focus of the remainder of this note.

Universal jurisdiction allows a state to maintain extraterritorial jurisdiction over a foreigner who has been involved in an "universally condemned crime."[160] Unlike the other principles of international jurisdiction which require that there be some nexus between the prosecuting state and the act, the universality principle is based on the theory that every state has an interest in exercising its authority over acts that "threat[en] . . . the well-being of the international community."[161] Universal jurisdiction can be established solely by acquiring custody of the alleged offender within the boundaries of the prosecuting state.[162]

The basic rationale supporting the universality principle is that certain crimes "are so universally condemned that the perpetrators are the enemies of all people."[163] Since certain types of crimes can "undermine the very foundations of the enlightened international community as a whole and . . . jeopardize the security of all nations," the nexus requirement for jurisdiction is inferred and expanded to include all states.[164] Therefore, an act that is specified as universally offensive creates criminal liability for the individual

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Jurisdiction Over International Crimes, 87 COLUM. L. REV. 1515, 1518 (1987).

158. *See* Kobrick, *supra* note 157, at 1519.

159. *Id.*

160. Christina E. Sorensen, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 219 (1990).

161. Randall, *supra* note at 153, at 790 (quoting United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981)).

162. *See* Kobrick, *supra* note at 157, at 1519.

163. *Id.* at 1520 (quoting Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985)).

164. *Id.*

wherever he may go.[165]

However, not all crimes are universally condemned. In fact, there are only a limited few that have been specified as granting universal jurisdiction. These international crimes have been assigned universal jurisdiction in basically two ways: (1) through customary international law and; (2) by multilateral conventions and treaties specifying the rights and obligations of states.[166]

B. Universal Jurisdiction by Custom or by International Agreement

1. *Customary Universal Jurisdiction*

International law, through customary means, occurs "from a general and consistent practice of states followed by them from a sense of legal obligation."[167] Exactly when a practice has matured to custom has been the source of much controversy, and though a custom does not require that every state follow it, there must be general acceptance.[168] Therefore, to establish a custom, a majority of states must deem the act criminal and demonstrate this by some form of consistent practice.[169]

The initial universal crime that was established by way of custom was the criminal act of piracy.[170] Any state that seized a pirate ship, or ship taken by piracy and under piratical control, could perform the necessary arrests and seize the ship's property.[171] The state that performed these acts of arrest and seizure could impose its own penalties with regard to the offenders and the ship.[172] In the modern world, the punishment of piracy has been codified into international agreements that stipulate the rights and obligations of nations in the pursuit of pirates.[173]

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165. *See id.*

166. *See id.* at n.46. *See also* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

167. RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102(2) (Tentative Draft No. 1, 1980).

168. *See* Kobrick, *supra* note 157, at n.46.

169. *See id.* at 1529.

170. *See* Randall, *supra* note 153, at 791.

171. *See id.* at 792.

172. *See id.* at 792. The penalties imposed on the ship were, however, still "subject to the rights of third parties acting in good faith." *Id.*

173. *See, e.g.*, 1982 United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 105, *reprinted in* The Law of the Sea, U.N. Doc. A/Conf. 62/122, U.N. Sales No. E.83.V.5 (1983). The United States did not sign the 1982 Convention, but was a party to the 1958 Convention.

2. *Universal Jurisdiction by International Agreement*

The universality principle has expanded throughout history to include several other crimes. Currently, international agreements, and not custom, are the primary source of international law, creating obligations and rights for those nations that are parties to the agreements.[174] However, since several nations have implemented international agreements condemning or stating policy on certain crimes, and while the agreements gain widespread acceptance from nonparties, it is possible for these agreements to become a matter of customary law.[175] International crimes that have been given universal jurisdiction to some extent by means of custom or international agreement are as follows: piracy, crimes of war, genocide, terrorism, slave trading, hijacking and sabotage of aircraft, hostage taking, crimes against internationally protected persons, apartheid and torture.[176] However, since international law consists of "the action of governments designed to meet a change in circumstances[, i]t grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations."[177] Therefore, the world community continues to have discretion to determine that other types of behavior are within the scope of universal jurisdiction.

V. THE APPLICABILITY OF RICO AS A GLOBAL DEFENSE MECHANISM AGAINST RUSSIAN ORGANIZED CRIME AND OTHER TRANSNATIONAL ORGANIZED CRIME GROUPS

The recent threat of transnational organized crime presented to the United States, Russia, and the rest of the world is real.[178] By using diverse

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174. *See* Kobrick, *supra* note 157, at n.46.

175. *See id.*

176. *See* Randall, *supra* note 153, at 788-89.

177. Kobrick, *supra* note 157, at n.100 (quoting Jusice Jackson, chief American prosecutor at Nuremberg).

178. Chairman A. Benjamin Gilman, addressing the United States House International Relations Committee on October 1, 1997, forewarned his audience of the following:

> I will humbly suggest that what we are witnessing these days are three types of criminal activities: Drugs, terrorism and organized crime, which are like three huge geological plates, which are slowly starting to shift and grind together. They could, ultimately, produce an earthquake of unprecedented magnitude and destruction . . . . What all of this tells us is that in the interest of global business, these groups will soon cross a threshold of compartmentalization, will begin merging and are working jointly with one another. This new globalized crime wave will take advantage of the new technologies to hide their activities, and when combined with their ability to move huge sums of money instantly, actually threaten every free society's ability to assert financial control over its own economy.

groups, a criminal organization can carry out complex frauds, violent crime, and societal change without fear of reprisal for a great majority of the group's members, especially the group leaders, if the country where the crime is conducted is far removed from the country that is affected. As international commerce expands, so do organized criminal groups, among which the possiblity to control vast amounts of capital and property illegally, fueled by a lack of governmental control, provide unprecedented power which should strike a nerve in world leaders.[179] Allowing criminal groups to gain power in nations with weak infrastructures promotes wide use of "racketeering activity" as a viable social apparatus.

It is evident from the scope of Russia's organized crime problems that new, creative enforcement mechanisms must be devised to control widespread, international criminal organizations.[180] A mechanism that could be installed for combatting Russian organized crime and other transnational groups is a policy of universal jurisdiction over criminal enterprises that engage in racketeering activity, with adjudication and enforcement based on a RICO-type standard. However, granting universal jurisdiction over criminal enterprises would require official recognition by the international community similar to that of piracy and other universally condemned crimes. Therefore, it may prove useful to compare the acts performed by criminal organizations to the crime of piracy in order to determine whether criminal enterprises could be viewed as universally condemned crimes.

A. *Comparison of Piracy and Criminal Organizations*

The act of piracy was granted universal jurisdiction for several reasons, but the most accurate rationale supporting universal jurisdiction for acts of piracy is that they pose an international threat to an interest held by all states

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Threat, *supra* note 10.

179. *See id.* *See generally*, 140 CONG. REC. E1335-03 (daily ed. June 27, 1994) (statement of James Woolsey) (describing the impact of the Russian mafia on national and world security); *Threat*, *supra* note 10, at 1-3.

180. *See Threat* (statement of Chairman Bernard Gilman), *supra* note 10, at 54-55. FBI Director Louis Freeh, addressing the House International Relations Committee in 1997, remarked that the future of policing and international relations due to organized crime is in the balance. Freeh remarked that

> [b]ecause a substantial portion of FBI cases have some foreign connection, international crime has become one of the most important challenges to face the United States and the law enfocement community. We must act to develop the strategies necessary to address these challenges now and to minimize the impact of international crime on citizens, economy, and national security . . . . Our success is going to be measured by how thoroughly we prepare for what is upon us and how quickly we respond to the emergence of international crime.

Threat, *supra* note 10, at 54-55. *See also* Vassalo, *supra* note 88, at 176.

in the free-navigation of the sea.[181] The fundamental character of pirate acts was that they struck "indiscriminately against the vessels and nationals of numerous states"[182] and posed a serious threat to interstate commerce and international use of the sea "for military and scientific purposes."[183] Therefore, every nation was given jurisdiction over the acts of pirates because "[s]uch lawlessness was especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas."[184]

Another factor for granting universal jurisdiction over acts of piracy is the fact that a pirate's crime takes place on the high seas, usually outside the jurisdiction of all states.[185] This created a jurisdictional problem where, based upon traditional principles of international law at the time, no state except the nation for whom the pirate ship flew its flag could punish an act of piracy. Therefore, the jurisdictional problem was overcome by allowing all nations to punish acts of piracy.[186]

Like piracy, criminal enterprises pose a serious international threat to the welfare of the global economy, but in ways that the world has never experienced.[187] The threat of criminal groups, such as the Russian mafia, become even larger with the materialization of a global economy and the continued growth of new computer and telecommunications technologies.[188] Racketeering activities performed by criminal enterprises, like acts of piracy, create barriers that limit and threaten the existence of free-markets worldwide.

B. *The Move Toward a New International Crime Granting Universal Jurisdiction*

A proactive plan that could be instituted by the United States, Russia, and other world leaders should promote the following: (1) expanding recent American and Russian agreements to cooperate in criminal matters to provide for the prosecution, in United States courts, of criminal enterprises operating between the two countries[189] and (2) developing and implementing an international treaty among world economic powers that addresses the

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181. *See* Sorensen, *supra* note 160, at 226.
182. Randall, *supra* note 153, at 794.
183. Sorensen, *supra* note 160, at 226.
184. Randall, *supra* note 153, at 795.
185. *See id.* at 792.
186. *See* Sorensen, *supra* note 160, at 226.
187. *See Threat*, *supra* note 10, at 49-50.
188. *See* Speech, *supra* note 34.
189. *See* Agreement on Cooperation in Criminal Law Matters, June 30, 1995, U.S.-Russ., 96 U.S.T. 38, *available in* 1995 WL 831037. *See also* Speech, *supra* note 34.

racketeering activities of criminal organizations by providing universal jurisdiction to all subscribing nations pursuant to principles of international law. These types of actions would promote uncontaminated global markets for those who are involved in world trading while also sanctioning those who do not obey. Addressing the sovereign rights of nations and the foreign policy issues involved must be keenly balanced with the growing problems stemming from transnational organized crime.

C. *Expanding the Cooperation Agreement Between the United States and Russia as a Vehicle for Prosecution of Criminal Enterprises Operating in Both Countries*

In July of 1994, an accord was signed between acting Russian Prosecutor General Illyushenko and FBI Director Louis Freeh,[190] signaling the beginning of an era of joint law enforcement efforts with the ultimate goal of controlling the Russian mafia. In that same month, the FBI opened a branch office in Moscow with the intent of providing "a police-to-police bridge that will enable Russian and American criminal cases to be fully coordinated, investigated, and supported, here and there."[191] Initially, the FBI's main concern was the Russian mafia's ability to gain access to nuclear materials and divert them to hostile nations and parties.[192] However, the FBI clearly was concerned with the entire spectrum of Russian mafia activities from the outset of its involvement.[193] It is this "bridge" between Russian and American interests that provides a sufficient tool to begin implementing RICO-type investigations and prosecutions with only the need for an agreement that would allow these types of actions. That type of agreement shortly followed.

In June of 1995, an agreement, a mutual legal assistance treaty (MLAT), between the United States and Russia was signed;[194] both countries "[noted] the need to unite their efforts and strengthen cooperation between the competent authorities in both countries to prevent and fight against crime."[195] The MLAT expressed that assistance "shall be provided in connection with the investigation, criminal prosecution, and prevention of offenses described in the Annex to this Agreement, and in proceedings

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190. *See* Asnis, *supra* note 24, at 313.

191. Speech, *supra* note 34.

192. *See id.*

193. *See id.* Freeh discusses not only the monitoring of nuclear materials diversion, but also touches upon other criminal activities such as drug trafficking, complex tax and health care fraud, and money laundering, to name a few. *See id.*

194. *See* Agreement on Cooperation in Criminal Law Matters, June 30, 1995, U.S.-Russ., 96 U.S.T. 38, *available in* 1995 WL 831037.

195. *Id.*

related to such criminal matters."[196] The Annex to the MLAT describes the scope of crimes that are to be targeted.[197] Expressly addressed in provision three of the Annex is "[o]rganized criminal activity and racketeering, as defined under the laws of the United States of America and the Russian Federation, respectively."[198] This provision of the Annex could be the springboard needed to implement large-scale RICO investigations between the two countries; however, the prosecution of members of criminal enterprises is hindered by the lack of an extradition treaty.

The MLAT does not expressly provide for automatic extradition to a "requesting party" of the agreement; however, it does not forbid it. The "scope of assistance" provision of the agreement includes obtaining several types of evidence, serving documents, executing searches and seizures, locating and identifying persons, and immobilizing and forfeiting assets.[199] However, Article II also provides for "any other assistance not prohibited by the laws of the Requested Party."[200] This provision could imply the existence of extradition rights. Since "criminal prosecutions," an expressed goal of the MLAT, could require parties to be present, extradition is not a far-fetched extension of the spirit of the Agreement. If criminal prosecutions are going to be effective cooperatively, it would seem logical that members of criminal groups would be tried together.

Another option for the United States and Russia is to voluntarily permit extradition of key members of organized criminal groups. The already existing cooperative agreements between the United States and Russia provide the beginning for a movement toward global prosecution and enforcement of laws against organized crime.

D. *Implementation of an International Treaty Providing Prescriptive Jurisdiction to Subscribing Nations Pursuant to the Universal Principle of International Law*

The basic principles behind the right to assert jurisdiction under the universal principle of international law is that "certain offenses are so heinous and so widely condemned that 'any state if it captures the offender may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed.'"[201] Of course, the most controversial aspect of the universal

196. *Id.* art. 2.
197. *See id.* annex.
198. *Id.*
199. *See id.* art. 2.
200. *Id.*
201. COVEY T. OLIVER ET AL., THE INTERNATIONAL LEGAL SYSTEM, CASES AND MATERIALS 181 (4th ed. 1995) (quoting M. Bassiouini, II INTERNATIONAL CRIMINAL LAW

principle is how to classify "heinous."[202] Typically, international conventions and treaties have been the predominant factor in determining whether particular crimes are condemned by the world community and "subject to prosecution under the Universal principal [sic]."[203] Examples of offenses that have been "recognized by the community of nations as of universal concern . . . [include] piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and *perhaps certain acts of terrorism.*"[204]

Therefore, nations could implement an international treaty recognizing and condemning international criminal acts conducted by organized criminal groups in furtherance of their organization as heinous to the world community. Such a treaty should focus on a coordinated effort by the subscribing nations and should use a common set of enforcement rules such as the standards and elements necessary for a RICO conviction.[205] The treaty's focus should be on prosecuting those criminal organizations, or "enterprises," that operate across borders and in world markets, while leaving local "enterprises" to the enforcement mechanisms already in place in their home nations. This type of treaty could grant the authority to better equip nations with more technology, manpower, etc. to assist those states which lack necessary funds and training, thereby giving security to global markets and promoting freedom from racketeering and corruption.

VI. CONCLUSION

Many world leaders agree that the threat posed by transnational criminal organizations, especially the Russian mafia, which reach beyond the scope of traditional international jurisdiction, is quite substantial and if left unchecked could grow to unprecedented proportions. In fact, it may be too soon a reality that new global criminal groups could be capable of buying entire governments or possibly undermining established western markets. Therefore, the need for new enforcement mechanisms in the struggle against transnational organized crime suggests that world leaders should come together to form alliances that begin to treat racketeering, via criminal

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298 (1986)).

202. *See id.*

203. *Id.* However, it must be remembered that other means for providing evidence that a criminal offense is subject to the universal principle is by custom and tradition.

204. *Id.* at 178 (emphasis in original).

205. *See supra* Part III.

enterprises, as universally condemnable. Serving as a model of success, the United States' RICO Act demonstrates that powerful legislation, supported by aggressive enforcement, can limit criminal enterprises substantially.

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THE CHALLENGE OF FREE SPEECH: ASIAN VALUES V. UNFETTERED FREE SPEECH, AN ANALYSIS OF SINGAPORE AND MALAYSIA IN THE NEW GLOBAL ORDER

"[T]hose that develop their branches as they please, in freedom and apart from each other, grow crooked and twisted."[1]

I. INTRODUCTION

Limitations on freedom of speech in Singapore and Malaysia have been sharply criticized in the United States and abroad because unfettered speech freedom is considered essential to individual liberty and human dignity of all people regardless of their culture or history. Although Malaysia and Singapore have numerous shortcomings, the U.S. model of free speech may not be desirable for these states. In Malaysia and Singapore, an "Asian value" model has developed that espouses limitations on individual liberty in the name of public order, national security and morality in order to be free from the "Western disease" — namely crime and disorder. Allowing a wider latitude of government criticisms should certainly be encouraged in Malaysia and Singapore; however, allowing all speech unrelated to the government function to have equal protection of political speech is a value that many countries may legitimately choose not to embrace.

Critics of speech limitations are quick to point out the need for free speech in a liberal democracy; however, myriad flaws still exist in U.S. court opinions and scholars' theories which are based upon a marketplace of ideas for justifying free speech. A justification based on unfettered political debate may be, in the alternative, a more sound justification for free speech. The leaders and scholars of Malaysia and Singapore point out the flaws in the United States marketplace model, with its inherent bias and lack of ability to be realized outside the town hall meeting from which it developed, while concomitantly ignoring a democratic justification for allowing open political debate in a libertarian model. The result: both sides of the debate need to learn from one another and distinguish between political and non-political speech, the latter being subject to restrictions based on morality without restricting democratic governing ideals.[2]

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1. IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY WITH COSMOPOLITAN INTENT (1784), *reprinted in* THE PHILOSOPHY OF KANT 116, 122 (Carl J. Friedrich ed., Random House 1949) (writing on the development of a just constitution: balancing unrestricted barbaric freedom with the constraints needed in a civil society).

2. Attempting to distinguish political and non-political speech is almost an impossible task; throughout this paper attempts are made to elaborate on the theoretical positions of the United States, Malaysia, and Singapore in an effort to clearly understand the bases for regulating differing forms of speech, whether labeled political or non-political.

Malaysia and Singapore are considered to have repressive speech limitations compared to their Western counterparts.[3] Interestingly, a 1994 study exhibited that a substantial percentage of individuals from Asia believed communitarian values would lead to a higher quality of life, while their Western counterparts — especially the United States — believed individualism led to improvements.[4]

This paper will initially discuss the basis for "Asian values" as espoused by government officials and scholars of Singapore and Malaysia. Section III comprehensively analyzes limitations of free speech allowed by the constitutions of Singapore and Malaysia under the guise of limiting foreign influence, immorality, and preserving the social order and security of Malaysia and Singapore. Section IV will discuss the leading theoretical bases for the U.S. model, which include the "marketplace of ideas" concept developed by J.S. Mill and the democratic value of free speech to a legitimate government. Section V critically discusses the conflicting values

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3. Both states have been rated as "Not Free" by Freedomhouse; however, both countries were one point away from being rated "Partly Free." *See* Freedom House, *Press Freedom World Wide: 1996* (visited Sept. 29, 1997) <http://www.freedomhouse.org/Press/ratings.txt>. Out of 100 points they both received 61 whereas 60 would be a partly-free rating. *See id.* The study takes into account broadcast and print laws, regulations that influence media control, political pressures and controls on media content, economic influences over media content, and repressive actions by the state. *See id.* Interestingly, Malysia received no negative points in economic influence over media content, whereas Singapore received 17 out of 20 negative points. *See id.* This difference is probably due to the economic constricts in the Singapore Newspaper and Printing Press Act of 1984 and its amendments. The United States government has also expressed concern over the justification of limiting the press in Singapore and Malaysia. *See* U.S. Dep't of State, *Malaysia Country Report on Human Rights Practices for 1996* (Jan. 30 1997) <http://www.state.gov/www/global/human_rights/1996_hrp_report/malaysia.html> [hereinafter *Malaysia Human Rights Report 1996*]. *See* U.S. Dep't of State, *Singapore Country Report on Human Rights Practices for 1996* (Jan. 30, 1997) <http://www.state.gov/www/global/human_rights/1996_hrp_report/singapore.html> [hereinafter *Singapore Human Rights Report 1996*]. *See also* Lee Kuan Yew, *Singapore and the Foreign Press, in* PRESS SYSTEMS IN ASEAN STATES 117 (Achal Mehra ed., 1989).

4. *See* David Hitchcock, ASIAN VALUES AND THE UNITED STATES: HOW MUCH CONFLICT? (1994). *See also* Donald K. Emmerson, *Singapore and the "Asian Values" Debate*, J. DEMOCRACY, Oct. 1995, at 95, 101. However, in Singapore a recent government survey found that a large percentage of older students in Singapore felt the government lacks freedom of speech, but 70% had positive views about Singapore on issues of safety and race relations. *See Singapore Students Show Dissatisfaction,* ASIAN WALL STREET J., June 4, 1997, at 12. *See, e.g.*, Yuji Fukuda, *Can Asia Achieve a "Great Harmony"?* (visited Sept. 7, 1997) <http://www.dihs.co.jp/ACTIVITY/2FUKUDA_E.HTML>; Noordin Sopiee, *Asia and the West*, ASIA WEEK, Dec. 12, 1997 (last visited Oct. 2, 1998) <http://www.pathfinder.com/asiaweek/97/1212/cs7.html> (offering comments on David Hitchcock's study, and reasons why Asian values may lead to positive social conditions); Diane Crispell, *Core Values,* AMERICAN DEMOGRAPHICS (Nov. 1996) <http://www.marketingpower.com/Publications/AD/96_AD /9611_AD/9611a25a.htm>.

developed by Singapore and Malaysia for abridging free speech. This section will exhibit the need for these states to develop their laws to allow unfettered political speech. Section VI focuses on the problems of the U.S. model, and its undesirability for the Malaysian and Singaporean governments.

II. ASIAN VALUES — A UNIQUE WAY OF LIFE?

A debate over "Asian values"[5] has arisen in the last few years between the "Singapore School" and Western scholars. The leading advocates of this unique value system are Lee Kuan Yew[6] of Singapore and Dr. Mahathir bin Mohamad[7] of Malaysia. There are several unique Asian values which are purported to ensure the prosperity and vitality of Malaysia, Singapore, and many other countries of East and South East Asia, which include but are not limited to: strong familial connnections, sacrificing individual rights for that of the community, and maintaining a well-ordered society.[8] The central

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5. *See generally* Kishore Mahbubani, *The Dangers of Decadence—What the Rest Can Teach the West*, FOREIGN AFF., Sept.-Oct. 1992, at 1; Bilahari Kausikan, *Asia's Different Standard*, FOREIGN POL., Fall 1993, at 24; Aryeh Neier, *Asia's Unacceptable Standard*, FOREIGN POL., Fall 1993, at 42; Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFFAIRS, Mar.-Apr. 1994; Emmerson, *supra* note 4, at 95.

6. Mr. Lee Kuan Yew is the former Prime Minister of Singapore and now holds the permanent title of Senior Minister.

7. The present prime minister of Malaysia, and a very influential man since the mid 1960s. He entered the Malaysian parliament in 1964 and served until he lost his seat in 1969. *See* H.P. LEE, CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA 1 (1995). He was expelled from United Malays National Organization (UMNO) by Tunku Abdul Rahman, the "father" of the Federation of Malaysia. *See id.* Mahathir later became Prime Minister of Malaysia on 16 July 1981. *See id.*

8. *See* Tommy Koh, *The 10 Values That Undergrid East Asian Strength and Success*, INT'L HERALD TRIB., Dec. 11-12, 1993. Mr. Koh lists 10 values that support the success of Asian Nations:

> 1) East Asians do not believe in the extreme form of individualism in the West. . . . 2) East Asians believe in strong families. . . . 3) East Asians revere education. . . . 4) East Asians believe in the virtues of saving and frugality. . . . 5) East Asians consider hard work a virtue—the chief reason this region is outcompeting Europe. 6) East Asians practice national teamwork. . . . 7) There is an Asian version of a social contract between the people and the state. The government will maintain law and order, provide citizens with their basic needs for jobs, housing, education and health care. . . . 8) In some Asian countries, governments have sought to make every citizen a stakeholder in the country. . . . [W]e try to build communitarian societies. . . . 9) East Asians want their governments to mantain a morally wholesome environment in which to bring up their children. . . . 10) Good governments in East Asia want a free press but, unlike the West, they do not believe that such freedom is an absolute right. . . . [T]he press must act responsibly.

Id.

theme running through these values is the relation of the individual to the community, with the latter being the emphasis and the definition of the former.

A. *The Belief in Strong Families*

The family unit is the fundamental building block of Asian society. It not only includes the nuclear family but also revolves around extended family members where familial obligations are equally heavy.[9] Many Asians rely on their family, when in trouble they can "collapse into the arms of family members."[10] Divorce rates in East Asia are lower than in the West, and Asians care for their elderly family members in their homes instead of abandoning them.[11] Traditionally, throughout most of Asia, the individual only exists within the context of the family and not separately.[12]

B. *The Sacrifice of Individual Rights for the Community*

Many Asians believe that in conducting their activities, they must be mindful of the interests of others.[13] This is in opposition with America, where Mahbubani says a paradox occurs because "a society that places such a high premium on freedom has effectively reduced the physical freedom of most Americans, especially those who live in large cities."[14] He also states that in Asia, "the clear assumption is that the tougher the punishment, the less the likelihood of recurrence. The benefit of the doubt is given to the victim, not to the criminal."[15] Liberation to the individual comes through

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9. *See* Kishore Mahbubani, *The United States: "Go East Young Man,"* THE WASH. Q., Spring 1994, at 5, 11-12. The average U.S. household is composed of 2.6 individuals, in Malaysia the average is 4.9, and in Singapore 4.2. *See* 1995 U.N. DEMOGRAPHIC Y.B. 576-595, U.N. Doc. ST/ESA/STAT/SER.R/26. These figures obviously have separate meanings, but are a good indicator of the general size of households in the respective states.

10. *See* Mahbubani, *supra* note 9, at 12.

11. *See* Koh, *supra* note 8. The divorce rate in the United States is three times greater than that of Singapore. *See* 1995 U.N. Demographic Y.B 560-64, U.N. Doc. ST/ESA/STAT/SER.R/26.

12. *See* Zakaria, *supra* note 5, at 113; Goh Chok Tong, *Social Values, Singapore Style,* (address of Aug. 21, 1994, delivered at a National Day rally), *in* CURRENT HIST., Dec. 1994, at 417, 420, 421.

13. *See* Koh, *supra* note 8. "Unlike Western society, where an individual puts his interests above all others, in Asian society the individual tries to balance his interests with those of family and society." *Id.* *See also* Goh, *supra* note 12, at 417.

14. Mahbubani, *supra* note 9, at 7.

15. *Id. See* Goh, *supra* note 12, at 419-420. For an in depth study of Singapore penal laws, see Firouzeh Bahrampour, Note, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?*, 10 AM. U. J. INT'L L. & POL'Y 1075 (1995). *See also* Michael Steinberger, *Big and Booming: A New 'Tiger' Hopes to Lead*

increased harmony in the community rather than individual unfettered freedom as practiced in the United States.[16] Unchecked individualism is viewed as a cause of decreasing order in individualistic societies.[17]

The majority of the multifaceted religions of Singapore and Malaysia also seem to support this contention when viewed statically. Islam, via the *Qur'an*, sets out strict guidelines for living — from marital duties to criminal punishments — and any attempt to challenge these guidelines by modernity or Western materialism is sharply opposed by the majority of Muslim Malays.[18] Confucianism, as an ideology, places emphasis on proper behavior and reverence for leaders to establish order.[19] Additionally, Buddhism clearly dismisses the concept of individuality because it inherently leads to societal conflicts.[20]

C. *A Well-ordered Society*

"A well-ordered society needs to plant clear constraints on behavior in the minds of its citizens."[21] This could be deemed a social contract between the government and society in which the government provides law and order

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the Muslim World; Malaysia, MACLEAN'S, Mar. 24, 1997, at 28. Mahathir Mohamad believes toughness will guide Malaysia to success. *See id.*

16. *See* Mahbubani, *supra* note 9, at 12. *See also* Zakaria, *supra* note 5, at 111.

17. *See* Zakaria, *supra* note 5, at 111.

18. *See* Fred R. von der Mehden, *Malaysia: Islam and Multiethnic Politics, in* ISLAM IN ASIA: RELIGION, POLITICS, & SOCIETY 177, 180 (John L. Esposito ed., Oxford Univ. Press 1987). *See* John L Esposito, *Islam in Asia, in* ISLAM IN ASIA: RELIGION, POLITICS, & SOCIETY 10 (John L. Esposito ed., Oxford Univ. Press 1987). "In classical Islamic theory, therefore, law does not grow out of or develop along with an evolving society as is the case with Western systems, but is imposed from above." Noel J. Coulson, *The Concept of Progress and Islamic Law, in* READINGS ON ISLAM IN SOUTHEAST ASIA 203 (Ahmad Ibrahim et al. eds., Institute of Southeast Asian Studies 1985).

19. *See* Julia Ching, *What is Confucian Spirituality?, in* CONFUCIANISM: THE DYNAMICS OF TRADITION 63 (Irene Eber ed., Macmillan 1986). *See also* KENNETH K. S. CH'EN, THE CHINESE TRANSFORMATION OF BUDDHISM 71 (1973).

20. *See* WALPOLA RAHULA, WHAT THE BUDDHA TAUGHT 51 (2d ed. 1974).

> According to the teaching of the Buddha, the idea of self is an imaginary, false belief which has no corresponding reality, and it produces harmful thoughts of 'me' and 'mine', [sic] selfish desire, craving, attachment, hatred, ill-will, conceit, pride, egoism, and other defilements, impurities and problems. It is the source of all the troubles in the world from personal conflicts to wars between nations. In short, to this false view can be traced all the evil in the world.

Id.

21. Mahbubani, *supra* note 9, at 11. He additionally states that "American society, by permitting all forms of lifestyles to emerge — without any social pressures to conform to certain standards — may have wrecked the moral and social fabric that is needed to keep a society calm and well ordered." *Id.*

and "provide[s] citizens with their basic needs for jobs, housing, education and health care[;]" in exchange, the citizens are expected to be law-abiding and to respect authority.[22] This well-ordered society may also include the government determining the moral high ground. Koh argues that Asians want their government "to maintain a morally wholesome environment in which to bring up their children . . . [and there] is no reason Asians must adopt the Western view that pornography, obscenity, lewd language and behavior, and attacks on religion are protected by the right of free speech."[23] Individuals in societies, such as Singapore and Malaysia, may value order and fear disorder more than other societies, and in doing so, may democratically restrict personal freedoms just like a society may enlarge personal freedom because it is not as frightened of disorder.[24]

The concept of a well-ordered society also includes the belief of many Asian governments that press freedom is not an absolute right. The press must act responsibly and "has no right to instigate trouble between racial, religious or linguistic groups, or between countries."[25]

D. *Is there Justification for Asian Values?*

Two competing roles of government emerged in the 1990s: The first (Asian model or authoritarian-capitalism) promotes collective judgment manifest in institutions for the attainment of wealth (*viz.*, government regulation), and the second (U.S. model) promotes enriching the community through individual choices over control of income through institutions which promote market freedom (*viz.*, less government interaction).[26] Authoritarian-capitalism encourages free-market economic activity while providing political stability and justifies limiting individual freedoms based on high economic growth.[27] However, Asian values may only be a politically convenient

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22. Koh, *supra* note 8.

23. *Id.*

24. *See generally* Fareed Zakaria, *The Rise of Illiberal Democracy,* FOREIGN AFF. Nov.-Dec. 1997, at 22; Emmerson, *supra* note 4, at 95. Emmerson explains:

> [I]f differing societies may democratically implement differing views of the relative importance of social order versus individual rights, it follows that alongside rights-tilted or liberal democracies there could be nonliberal — or at any rate less liberal— variants of democracy that are, compared to their liberal counterparts, more order-inclined.

Id. at 96. However, it is important to note that without open political debate their citizens may not truly democratically elect anyone. *See infra* text accompanying notes 211-222.

25. Koh, *supra* note 8.

26. *See* CHRISTOPHER LINGLE, SINGAPORE'S AUTHORITARIAN CAPITALISM: ASIAN VALUES, FREE MARKET ILLUSIONS, AND POLITICAL DEPENDENCY 39 (1996).

27. *See id. See generally* WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (1993); EDWARD FRIEDMANN, THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES (1994).

means of limiting economic liberalism that would challenge the well-seated positions of Asian rulers.[28]

Singapore and Malaysia have both had astronomical gross domestic product (GDP) growth rates in the recent past that dwarf past United States' growth.[29] However, doubt has certainly plagued the economic security of many Asian nations, and any claims of economic benevolence are clearly misguided.[30] The United Nations reports that the United States has an intentional homicide rate 500% higher than Singapore's.[31] Some argue the difficulties in the West are not attributable to liberalism but rather are forced upon Western cultures by modernity and all societies are doomed to experience this problem. However, neither Japan nor Hong Kong have seemed to substantially diminish their order in the face of modernity.[32] Malaysian and Singaporean success may certainly be transitory; tightly controlled economies throughout the world will eventually encounter a downturn in the transition to a fully developed and sustainable economy.[33]

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28. *See* LINGLE, *supra* note 26, at 47. *See* Victor Mallet, *'Asian Way:' Confucius or Convenience?*, THE FIN. POST, Mar. 12, 1994, at 51.

29. In 1986, Malaysia's GDP growth was 1.1%, in 1994 it was 8.3%, and between 1988 and 1991 it never fell below 8.7%. *See* 1994 U.N. Stat. Y.B. 149-165, U.N. Doc. ST/ESA/STAT/SER.S/17. Similarly, in Singapore in 1986, the GDP growth per capita was 1.8% and in 1994 was 10.1%, varying from 11.1% to 6.0% in the years in between. *See id.* The United States in 1986 had 2.8% GDP growth with a high of 4.1% in 1994 and negative growth in 1991. *See id. See, e.g.*, Goh, *supra* note 12, at 417; David Thorpe, *Some Practical Points About Starting a Business in Singapore*, 27 CREIGHTON L. REV. 1039, 1048-1050 (1994); Steinberger, *supra* note 15.

30. *See, e.g.*, Bruce Koppel, *Fixing the Other Asia; Poverty in Asia*, FOREIGN AFF., Jan. 11, 1998, at 98; John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, FOREIGN AFF., Sept. 1, 1998, at 17; *Money on the Move*, MACLEAN'S, June 15, 1998, at 59; *Rumpus in Hong Kong*, ECONOMIST, Sept. 27, 1997, at 18; Walter F. Mondale, *Asia is Still our Future*, BROOKINGS REV., June 22, 1998, at 2; James Harding & Laura Tyson, *Another 'Tiger' Starts to Limp in the Storms*, FIN. TIMES (London), Oct. 12, 1998, at Survey 1; *Banking on Free Press to End Fiscal Crisis*, EDITOR & PUBLISHER, Oct. 17, 1998, at 18; Carolyn Hotchkiss, *The Sleeping Dog Stirs: News Signs of Life in Efforts to End Corruption in International Business*, J. PUB. POL'Y & MARKETING, Mar. 22, 1998, at 108.

31. Comparing data provided in U.N. DEP'T FOR ECON. & SOC. INFO. POL'Y ANALYSIS, WORLD STATISTICS POCKETBOOK 1996, at 168 & 196, U.N. Doc. ST/ESA/STAT/SER.V/17 (1997). In 1986, Singapore and the United States respectively had two and ten intentional homicides per 100,000 people. *See id.*

32. *See* Nathan Glazer, *Money Isn't Everything; Democracy and Capitalism in Asia; The Hard Questions*, NEW REPUBLIC, Mar. 3, 1997, at 29. *But see* LINGLE, *supra* note 26, at 51.

33. *See* sources cited *supra* note 30. Arguably an increase in wealth causes the middle class to rise, this middle class has a higher stake in the socio-economic system; rise in economy causes higher education levels which in turn are more tolerant of diversity and democracy; and economic development causes a higher rate of mass communication which enables the nurturing of democratic values. *See* STEVE CHAN, EAST ASIAN DYNAMISM: GROWTH, ORDER, AND SECURITY IN THE PACIFIC REGION 84 (2d ed. 1993). *See also* Thorpe,

Moreover, there are a myriad of cultures, languages, and religions in Asia; any attempt to call the aggregate of these characteristics "Asian values" is nearly impossible. Thus, a broad statement of Asian values encompassing all of Asia is nonsensical.[34] Similarly, the idea of one set of universally held moral codes that transcends the myriad cultures of the world is as equally flawed as the notion of Asian values transcending the East, Near East, South and Southeast Asia.[35]

The debate over Asian values may well be an idealistic struggle for the future.[36] Challenging a generalized concept of Asian values is denying leaders of states such as Singapore and Malaysia a generalized civic culture — that which unquestionably holds the diverse people of the United States together. This state-guided nation building under the guise of "Asian values" is at the core of many Asian nations' identities, which suffered during colonialism in their struggle for recognition in the "new world order."[37] However, Lim Guan Eng, Deputy Chief of the Democratic Action Party (DAP) of Malaysia,[38] has trumpeted the liberal image and the universality of human rights, which is evidence of possible reform that may support a revised "Asian value" ideology that will not restrict countless

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supra note 29, at 1049-51. *But see* MAX WEBER, THE RELIGION OF CHINA (Hans H. Gerth ed. & trans., 1964) (arguing Confucianism is not conducive to capitalism). However, the theory of Weber has recurred as an antithesis, proving successful to countries throughout Asia. A state-guided economy has proved successful in these countries although running counter to Adam Smith's economic notions. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 453-504 (photo. reprint 1981) (1976). *But see* LINGLE, *supra* note 26, at 55. Numerous countries with authoritarian regimes exhibit little or no economic success (Burma, Bangladesh, Pakistan); this is evidence that authoritarianism does not necessarily lead to economic growth. *See id.* at 56.

34. *See* Simon Tay, *Human Rights, Culture, and the Singapore Example,* 41 MCGILL L.J. 743, 758 (1996). *See also* Emmerson, *supra* note 4, at 100. The concept of Orientalism (unique Asian qualities) does not constitute a certain geographic area, but was simply a construct of the West. *See generally* EDWARD W. SAID, ORIENTALISM (1978).

35. *See* Emmerson, *supra* note 4, at 100. "These two straw men — one might also call them ultra-Orientalism and ultra-universalism — form the least plausible ends of a spectrum of possibilities." *Id.*

36. *See id.* at 104.

37. *See generally* CHANDRA MUZAFFAR, HUMAN RIGHTS AND THE NEW WORLD ORDER (1993) (arguing for the resistance of the United Nations human rights regime because it does not protect the majority of the global populace from oppression in the "new world order" of the North's elites, corporations and governments).

38. Lim Guan Eng has been met with opposition in Malaysia. He is Mahathir's opposition and was jailed under the Internal Security Act. As a member of parliament, Lim Guan Eng had charges (Sedition Act and Printing Presses and Publication Act) brought against him before the 1995 election. Lim and Amnesty International both believe these were politically motivated acts. *See Malaysia Human Rights Report 1996, supra* note 3. *See also infra* notes 286-87 and accompanying text.

freedoms that nations throughout the world enjoy.[39]

1. *Ethnic Tensions Rationalizing Asian Values*

Background on the ethnic diversity and history of conflicts in Malaysia and Singapore is important when developing an understanding of the problems of the past, which ultimately help explain the rationale of current laws regulating speech and the concept of the purported Asian value of the community over the individual.

Malaysia and Singapore both have diverse populations and a mutual, yet independent history. Malaysia is comprised of a Muslim Malay majority and a one-quarter ethnic Chinese population who practice Buddhism and Confucianism.[40] Singapore's population is comprised of over seventy-five percent ethnic Chinese who mostly practice Buddhism and Confucianism, fourteen percent Muslim Malays, seven percent Indians, and various other minority populations.[41]

In 1948, the Federation of Malaya came into existence.[42] Singapore

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39. *See generally* Steinberger, *supra* note 15. "Lim fears that rampant cronyism and corruption, coupled with endemic deal-making behind closed doors, could undermine investor confidence. The country runs on the parliamentary system, but the government controls the media, and big business often buys the bureaucrats." *Id.*

40. The Malaysian ethnic communities include 57.9% Bumiputeras (Malays are the main group but this classification includes Bajaus, Ibans, Kadazans, Melanaus, Muruts, and the Dayaks), 26.9% Chinese (Cantonese, Hokkien, and Teochew), 7.6% Indians (Malayalams, Punjabis, and Tamils), and the total population is 18.3 million. These figures are computed by the author from census data in 2 THE EUROPA WORLD YEARBOOK 1998, at 2210 (39th ed., Europa Publications Limited 1998) [hereinafter EUROPA]. Most Muslims in Malaysia are ethnic Malays. *See* Syed Arabi Idid, *Malaysia, in* PRESS SYSTEMS IN ASEAN STATES 41, 41-42 (Achal Mehra ed., 1989). Islam has been an important force in Malaysia and Singapore since the fourteenth century and many Southeast Asians now make the taxing *haj* (pilgrimage), which is evidence of their devotion to Islam. *See* FRED R. VON DER MEHDEN, TWO WORLDS OF ISLAM: INTERACTION BETWEEN SOUTHEAST ASIA AND THE MIDDLE EAST 1-2 (1993). *See also* FED. CONST. OF MALAY. art. 3 (providing that Islam is the national religion but others may be practiced freely). The religions of Malaysia include 53% Muslims, 19% Buddhists, 7% Christians, 11.6% Confucianism and Daoism practitioners, and several other smaller religious practices such as Sikhs and Animists. *See* EUROPA, *supra*, at 2220.

41. *See* EUROPA, *supra* note 40, at 2997. Total population is 2.7 million. *Id.* at 2991. In Singapore, according to the 1990 census, 68% of the population who were Chinese practiced Buddhism or Daoism, while 14% of the Chinese practiced Christianity. *Id.* at 2997. Of the Malay population in Singapore, 99.7% were Muslims; the Indian population consists of 53.2% Hindus, 26.3% Muslims, 12.8% Christians, and 6.9% Sikhs, Jains or others. *Id.* Additionally, small communities of Zoroastrians and Jews exist in Singapore. *Id.*

42. The Federation of Malaya Agreement of 1948 came into being February 1, 1948 and included nine Malay states, Penang, and Malaca; Singapore continued to be a Crown Colony. *See* LEE, *supra* note 7, at 6. Great Britain, fearing Communist insurgence and loss of Malay support, appeased the United Malays National Organization (UMNO) and Malay leaders by injecting constitutional negotiations into the process despite the Malay insistence on a strong

was not part of the federation "in deference to the fears of the Malays that they would be dominated by the Malayan Chinese if Singapore's one million Chinese acceded to Malaya."[43] These contentions are supported by the countless racially motivated incidents, which have littered the landscape of Singapore and Malaysia.[44]

Conflict was endemic to the Federation of Malaya.[45] The Alliance[46] was formed to ease apparent ethnic tensions by resolving communal issues in private to escape open public debate, which could incite violence. In early 1956, talks in London ensued between Malays and Crown officials[47] to develop the Independent Constitutional Commission[48] to liberate the Federation of Malaysia.[49] The new constitution was to include "the safeguarding of the position and prestige of the Malay Rulers[,] . . . a common nationality for the whole of the Federation . . . [and], the safeguarding of the special position of the Malays and the legitimate interest of other communities."[50] The Crown was aware of the multi-racial society; thus, they delayed granting independence to Malaya until they were certain ethnic minorities would be represented in the state structure.[51] On August 31, 1957, the Federation of Malaysia was created with the Constitution being centrally concerned "with the tortuous hammering out of acceptable terms and compromises among the various racial components of the Malaysian

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central government and communal citizenship mandates. *See* 2 THE CAMBRIDGE HISTORY OF SOUTHEAST ASIA 354 (Nicholas Tarling ed., Cambridge University Press 1992) [hereinafter CAMBRIDGE HISTORY]. The Federation "ensur[ed] British domination at the centre, securing Malay control over the separate states, and further alienating Malaya's Chinese Community." *Id.* *See also* LEE, *supra* note 7, at 6.

43. LEE, *supra* note 7, at 6.

44. *See infra* text accompanying notes 247-257.

45. In Malaysia, riots ensued in 1952 in response to liberalization of citizenship requirements in an attempt to counter the communist threats of 1948, and a state of emergency was declared from 1952-1960. *See* LEE *supra* note 7, at 7.

46. An alliance was formed between UNMO, Malays and the Malaysian Chinese Association (MCA) to contest the first municipal election in Kuala Lumpur, in which they won nine out of twelve seats contested in 1952. *See* CAMBRIDGE HISTORY, *supra* note 42, at 410.

47. This included four Malay ruler representatives, four Alliance government officials, the Colonial Secretary, the High Commissioner and the British Minister of State that met January 18 to February 6, 1956. *See* LEE, *supra* note 7, at 7.

48. The commission was called the Reid Commission. The Chairman was Lord Reid (UK); members included: Sir Ivor Jennings (UK), Sir William McKell (Australia), B. Malik (India), Justice Abdul Hamid (Pakistan). *See id.* *See also* IMITIAZ OMAR, RIGHTS, EMERGENCIES AND JUDICIAL REVIEW 16-17 (1996).

49. *See* LEE, *supra* note 7, at 7.

50. *Id.* at 8. These were not the only recommendations the commission was urged to make. They also included such things as bicameral legislature, a strong central government with federalism, and an elected head of state. *See id.* at 7-8.

51. *See* CAMBRIDGE HISTORY, *supra* note 42, at 409.

society, especially on matters of communal interests."[52]

In September of 1963, Singapore joined the Federation of Malaysia until their division in 1965, which was due to racial tensions.[53] In 1969, serious racial violence erupted in Kuala Lumpur, Malaysia;[54] the government blamed the violent actions on "inflammatory speeches by political candidates from various parties during the election campaigns, and the victory processions staged by some opposition parties."[55] The history of conflicts is manifest in the constitutional limits on individual expression in Singapore and Malaysia.

III. CONSTITUTIONALITY OF SPEECH REPRESSION

"We have freedom of speech, but not freedom after speech."[56]

This history of tensions and patent diversity played an important part in developing the constitutions of Malaysia and Singapore, which are substantively similar in respect to speech limitations. Statutory enactments by Malaysia and Singapore (many adopted by Singapore upon separation from Malaysia) have been used for the purposes of stopping foreigners from criticizing government officials, limiting the spread of immoral publications,

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52. LEE, *supra* note 7, at 4. This included the Straits Settlements, Federated Malay States and Unfederated Malay States. In 1963, Sabah, Sarawak and Singapore were added to the new Federation of Malaysia — all of which had a history of British colonial rule. *See* CAMBRIDGE HISTORY, *supra* note 42, at 409.

53. *See*, LEE *supra* note 7, at 9. Singapore wanted to join the Union to prevent Communist insurgency. *See, e.g., id.* at 8-9; HARRY E. GROVES, THE CONSTITUTION OF MALAYSIA 245 (4th ed. 1986). After repeated conflicts in the constitutional process, Malaysia came into existence September 16, 1963 with the passage of Act No. 26 of 1963 by the Malaysian Parliament. *See* LEE, *supra* note 7, at 10. In 1965, the state of Singapore was split from the federal government of Malaysia via the Malaysia (Singapore Amendment) Act of 1965 and the Constitution. *See id.* The Act allowed Singapore to become a sovereign nation and provided for the succession of international treaties and international agreements entered into before the Act. *See id* at 10-11. The split occurred because of political turmoil and "heightened racial tensions." LEE, *supra* note 7, at 10.

54. This crisis was dubbed the "May Thirteenth Crisis." LEE, *supra* note7, at 13.

55. *Id.* (footnote omitted). This resulted in a Proclamation of Emergency under Constitutional article 150. *See id.* The Parliament was not reconvened until February 20, 1971, when they passed the Constitution (Amendment) Act of 1971, which further curtailed the constitutional right to freedom of speech. *See id.* at 14. "The fundamental changes to the Constitution sought to curb public discussion of certain sensitive issues, and to redress 'the racial imbalance in certain sectors of the nation's life'.[sic]" *Id.* (quoting *Parliamentary Debates on the Constitution Amendment Bill 1971*, Kuala Lumpur: Government Printers, 1972, at 3).

56. Comments on the Malaysia Constitution in relation to free speech made by human rights activist and lawyer R. Sivarasa. *See Pulling in the Reins on Malaysia's Media*, WORLD TIMES, INC., Apr. 18, 1997, *available in* 1997 WL 9862042.

and generally to repel threats to the order and security of Malaysia and Singapore.

The constitutions of Malaysia and Singapore are very different than the U.S. Constitution in areas related to freedom of speech, so much that they are incomparable.[57] No special provision for freedom of the press is provided for in Malaysia and Singapore — the press has the same rights as any citizen.[58] In essence, the Parliaments of Singapore and Malaysia are free to pass laws limiting free speech which "it deems *necessary* or *expedient* . . . [for] *security*[,] *public order* or *morality*[,] *contempt of court*, *defamation*, or *incitement to any offence*."[59] The validity of these laws generally cannot be questioned by the courts, and have been curtailed by legislators in the past.[60]

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57. *See* Ahmad Ibrahim and M.P. Jain, *The Constitution of Malaysia and The American Constitutional Influence, in* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 507, 550-51 (Lawrence W. Beer ed., University of Washington Press 1992).

58. *See id.* at 550-52. *See* Jeyaretnam Joshua Benjamin v. Lee Kuan Yew, [1992] 2 SLR 310, 330 (Sing. 1992), 1992 SLR LEXIS 412, at *40.

59. FED. CONST. OF MALAY. art. 10, cl. 2(a), *reprinted in* 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Oceana Publications 1997) (emphasis added). For a discussion of the Malaysian Constitution see Ibrahim & Jain, *supra* note 57, at 513. Because of the Communal riots of 1969, the government of Malaysia has further limited free speech rights by restricting the questioning of sensitive issues. *See id.* at 523. The relevant portion of the Malay Constition states:

> In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) *(a)*, Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152 [citizenship], 153 [special Malay provisions, and other communities] or 181 [protecting sovereignty of the rules] otherwise than in relation to the implementation thereof as may be specified in such law.

FED. CONST. OF MALAY. art. 10, cl. 4. *See also* Ibrahim & Jain, *supra* note 57, at 551 (discussing article 10).

For the relevant parts of the Singapore Constitution, see CONST. OF THE REPUBLIC OF SING. art. 14, *reprinted in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Oceana Publications 1995). *See generally* Valentine S. Winslow, *The Constitution of the Republic of Singapore, in* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 627 (Lawrence W. Beer ed., University of Washington Press 1992) (discussing article 14 of the Singapore Constitution). Upon separation, the 1963 Malay Constitution became the Federal Constitution of Singapore. The Republic of Singapore Independence Act of 1965 (Act 9 of 1965) mandated this, but gave authority to some Malaysian constitutional provisions and laws. *See id.* at 628-629. Before it was consolidated it was composed of three different bodies of law — the Malaysian Federal Constitution, the State Constitution of Singapore of 1963 and the Republic of Singapore Independence Act. *See* Kevin Y. L. Tan, *Singapore Chronology to 1995, in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, at vii-xv. (1995).

60. *See* FED. CONST. OF MALAY. art. 10, cl. 4. *See* IMTIAZ OMAR, RIGHTS, EMERGENCIES AND JUDICIAL REVIEW 22 (1996). *See also* Ibrahim & Jain, *supra* note 57, at 528 (since the inception of the Constitution, no enactment by the legislative branch has been

When the process of framing the Constitution of Malaysia (which ultimately influenced the Singapore Constitution) was initiated by the Reid Commission, there was debate over whether or not individual liberties should be included in the Constitution.[61] The Commission thought the Constitution should be designed to allow the courts to seek review of legislation to give fundamental liberties effect.[62] Therefore, the judicial systems of Malaysia and Singapore require that the legislators strike a balance between free speech and public interest, and then the court checks this judgment of parliament.[63]

The majority of legislative acts relevant to limitations on speech freedom in Singapore and Malaysia are substantively the same and will be discussed as such. Several legislative acts were adopted by Singapore upon separation from Malaysia and for this reason are substantially the same. Examples of substantively similar legislation regulating free speech include Sedition Acts, Official Secrets Acts, Defamation, and the Internal Security Acts. However, differences arise in the structure and substance of laws directly limiting printing presses and publications, such as the Malaysia Printing Presses and Publication Act, and the Singapore Undesirable Publications Act. Each section will discuss and explain the relevant legislative acts, and case law concerning the press limitations in each nation.

Singapore and Malaysia have developed voluminous legislation and common law precedents to ensure that freedom of speech is curbed. Several laws have been effectively used to limit the influence of foreign publications, decrease the spread of immoral publications, and ensure the public order and national security of Malaysia and Singapore.

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struck down as unconstitutional). *See, e.g.*, Madhavan Nair v. Pub. Prosecutor [1975] 2 MLJ 264 (Malay. 1975); Jeyaretnam Joshua Benjamin v. Lee Kuan Yew [1992] 2 SLR 310 (Sing. 1992), 1992 SLR LEXIS 412. *But see* Chng Suan Tze v. Minister of Home Affairs & Ors [1988] 1 SLR 132 (Sing. 1988), 1988 SLR LEXIS 247 (ruling Minister must act within bounds of constitution when making decision).

61. *See* OMAR, *supra* note 60, at 17. The Commission opined that the Constitution "should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life." *Id.* The Commission later went on to calm the weary by saying: "We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this be done." *Id.* (*citing Report of The Federation of Malaya Constitutional Commission*, London, Her Majesty's Stationery Office, 1957, at 69-70).

62. *See* Michael Hor & Collin Seah, *Selected Issues in the Freedom of Speech and Expression in Singapore*, 12 SING. L. REV. 296, 299 (1991).

63. *See id.* at 300.

A. *Limiting Critical Foreign Speech*

Many publications have been banned or restricted in Singapore, namely: *Time*, *Asiaweek*, the *Asia Wall Street Journal* (AWSJ), and *Far Eastern Economic Review* (FEER).[64] Additionally, Singapore and Malaysia have restricted the foreign press by less explicit means such as deportation,[65] revoking work passes,[66] and detainment.[67]

1. *Financial Limitations*

The Singapore Newspaper and Printing Presses Act[68] limits the influence of media by restricting funds domestic media may receive. The law provides that no one may own more than three percent stock in a newspaper.[69] Additionally, all directors of a newspaper printed in Singapore must be citizens, and if the newspaper company receives unsolicited funds from a foreign source,[70] it must report the circumstances of receiving them,

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64. *See* Anjali Mohan Ramchand, *Freedom of The Press: Regulation Under the Newspaper and Printing Presses Act, 1974*, 11 SING. L. REV. 130, 144-46 (1990). The FEER was allowed to circulate 6000 copies a week, whereas previously it was 4000; the AWSJ could increase copies from 7000 to 9000, while the amount for Asiaweek remained at 15000. *See, e.g., Reporters Sans Frontieres, Asia and the Pacific-Singapore*, (visited Sept. 12, 1997) <http://www.calvacom.fr/rsf/RSF_VA/Rapp_VA/Asie_VA/ SINA.html>; *Singapore Human Rights Report 1996*, *supra* note 3.

65. *See* W.H. Ng, *Singapore Expels Reuter Reporter*, STRAITS TIMES, Mar. 25, 1986. *See also* Ramchand, *supra* note 64, at 143.

66. *See, e.g., Government Not Renewing Pass for AWSJ Journalist*, STRAITS TIMES, July 14, 1988; *Job Pass Review Bureau Chief not Extended*, STRAITS TIMES, Apr. 9, 1987; *Barring of FEER*, STRAITS TIMES, Feb. 5, 1989; Ramchand, *supra* note 64, at 149.

67. In Kuala Lumpur, Malaysia, ten journalists were arrested while covering the Second Asia and Pacific Countries' Conference on East Timor, and charged with "illegal assembly" and "refusing to disperse." *Reporters Sans Frontiers, Asia and the Pacific-Malaysia* (visited Sept. 12, 1997) <http://www.calvacom.fr/rsf/RSF_VA/Rapp_VA/Asie_VA/MALSA.html>.

68. Newspaper and Printing Presses Act, chap. 258, The Statutes of The Republic of Singapore (1974), *reprinted in* PRESS LAWS AND SYSTEMS IN ASEAN STATES 363 (Abdul Razak ed., 1985) [hereinafter Singapore NPPA 1974]. *See also* Newspaper and Printing Presses (Amendment) Act, The Statutes of The Republic of Singapore (1977), *reprinted in* PRESS LAWS AND SYSTEMS OF ASEAN STATES 359 (Abdul Razak ed., 1985) [hereinafter Newspaper and Printing Presses Amendment Act].

69. *See* Newspaper and Printing Presses (Amendment) Act, *supra* note 68, § 9. Previously, the percentage limit was left to the discretion of the minister. *See* Singapore NPPA 1974, *supra* note 68, § 9.

70. "Foreign source" includes the government agents of any country; any company, association or society incorporated outside Singapore; any non citizen of Singapore, or any anyone or thing that the minister labels foreign source by order of the Gazette. *See* Singapore NPPA 1974, *supra* note 68, §§ 9A(5)(a)(i)-(iv). *See also id.* § 9(1)(a) (stating that all directors of a newspaper must be Singaporeans).

and the minister may demand the return of the funds to the sender.[71] Singapore further showed its dedication to limiting foreign influence by passing a 1990 law which requires foreign publications reporting on Southeast Asian nations to post a bond of $141,000 and name a person in Singapore to accept judicial service.[72]

2. *Requiring Foreigner Registration*

The Malaysian Printing Presses and Publication Act (PPPA)[73] requires that, in order to have a printing press,[74] a person must first be granted a license[75] by the Minister who has "absolute discretion" to grant, refuse, or revoke a license.[76] In Singapore, the provision of the 1974 Newspaper and Printing Presses Act is substantively similar except it gives the person a right of appeal to the President.[77]

In order to import or publish a newspaper in Malaysia and Singapore, the person must receive a permit[78] from the Minister.[79] A senior authorized officer can refuse importation of anything violating the Act.[80] Additionally, any publication or recording must have the name of the printer or publisher on the document or container.[81] The acts give police officers and Ministers much power in enforcing the acts by imposing heavy presumptions[82] against

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71. *See id.* §§ 9A(3)-(4)

72. *See Singapore Human Rights Report 1996, supra* note 3.

73. Printing Presses and Publications Act, 1984 (Act 301), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES [hereinafter Malaysia PPPA 1984]. This Act repealed prior legislation to limit the press; namely the Printing Presses Act 1948 and the Control of Imported publications Act 1958. *See id.* § 27.

74. *See id.* § 3(2) (defining "printing press" as any equipment for "printing, copying or reproducing any document described in Schedule I."). Schedule I states the equipment as "Letterpress, Lithograph, Gravure, Intaglio or any other process of printing capable of printing at a rate of 1,000 impressions per hour or more." *Id.* Sched. I.

75. *Id.* § 3(1).

76. *See id.* § 3(3).

77. *See* Singapore NPPA 1974, *supra* note 68, § 3(3). *See also* Malaysia PPPA 1984, *supra* note 73, § 3(4) (imposing a maximum of three years imprisonment and/or 20,000 ringgit). In Singapore, the possible penalty is three years and/or 10000 dollars. *See* Singapore NPPA 1974, *supra* note 68, § 7(2) (stating any person without such license may suffer severe penalties).

78. *See* Malaysia PPPA 1984, *supra* note 73, § 5(1).

79. The Minister has absolute discretion to grant, revoke or suspend a permit. *See* Malaysia PPPA 1984, *supra* note §§ 6(1)-(3). In Singapore, it is in "his discretion." Singapore NPPA 1974, *supra* note 68, § 3(1).

80. *See* Malaysia PPPA 1984, *supra* note 73, § 9(1).

81. *See id.* §§ 11(1)-(3); Singapore NPPA 1974, *supra* note 68, § 5(1).

82. *See* Malaysia PPPA 1984, *supra* note 73, § 14(b) (explaining that any person with two or more copies of any publication is presumed to possess those publications for selling and distribution).

the possessor of publications, allowing packages to be opened if they "suspect" violation,[83] seizing and forfeiting of printing devices and publications,[84] permitting arrest without warrant,[85] imposing liability on corporate officers and partnerships,[86] and allowing the government to escape all liability for damaging anything while enforcing the Act.[87]

Under the Singapore Newspaper and Printing Press Act of 1986, the Minister may grant, revoke or suspend any foreign publication coming into Singapore that engages in domestic politics without being subject to review.[88] Whether or not a foreign paper is engaging in the domestic politics of Singapore is solely a question for the Minister unless the Minister "has exercised his power in bad faith [or] has acted irrationally or unreasonably."[89]

The Asian Wall Street Journal (AWSJ) published an article on 12-13 December 1986 by Stephen Duthie entitled *Singapore Exchange Puzzles Financiers*. The article described the background of a new stock exchange (SESDAQ) for small firms. The journal subsequently received a letter from the Director of the Banking and Financial Institutions Department of the Monetary Authority of Singapore accusing the paper of bias and false reporting. The AWSJ refused to publish a rebuttal. Without any notice to the applicant or the AWSJ, the Minister declared the paper to be engaging in the domestic politics of Singapore under the Newspaper and Printing

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83. *Id.* § 17. In Singapore, it is "reasonableness." Singapore NPPA 1974, *supra* note 68, §§ 24(2)-(4).

84. *See* Malaysia PPPA 1984, *supra* note 73, §§ 18-19. *See* Singapore NPPA 1974, *supra* note 64, § 24(2).

85. *See* Malaysia PPPA 1984, *supra* note 73, § 20.

86. *See id.* §§ 21-22.

87. *See id.* § 24.

88. *See* Singapore NPPA 1974, *supra* note 68, § 4 (showing that the minister has great power in determining what is published). The minister may "declare any newspaper published outside Singapore to be a newspaper engaging in the domestic politics of Singapore." *Id.* § 4(1). No person shall "distribute or import" any "declared foreign newspaper." *Id.* § 4.2. He may "refuse to grant or revoke such approval without assigning any reason." *Id.* § 4.3. He may restrict the amount of publications distributed and marked in any manner. *See id.* § 4(4). *See also id.* § 2 (defining "declared foreign newspaper"). Recent amendments provide: "(3) For the purpose of subsection (1), a newspaper shall be deemed to be published outside Singapore if its contents and editorial policy are determined outside Singapore and its sales or distribution are not intended primarily for Singapore." Re Dow Jones Publ'g Inc.'s Application [1988] 2 MLJ 414 (Sing. 1988), 1988 MLJ LEXIS 601, at *10. "Engaging in domestic politics" is given a very broad meaning in the courts: "All the multifarious and multifaceted activities with which a government is concerned is encapsulated in the phrase 'domestic politics'.[sic]" *Id.* at *14. "[T]here are appellate rights for non-foreign newspapers but no such right is given to foreign newspapers." *Id.* at *12.

89. *Re Dow Jones,* 1988 MLJ LEXIS 601, at *15. The reporter was also a defendant in Att'y Gen. v. Zimmerman [1986] 2 MLJ 89 (Sing. 1986), 1985 MLJ LEXIS 507.

Presses Act and restricted the distribution of the newspaper to 400 copies.[90] Arguably, this restriction was not for the publication of that single article but for repeated meddling in Singapore's national affairs.[91]

B. *Abridgment of Immoral Speech*

In Singapore,[92] "a citizen does not have a constitutional right to see pornographic materials."[93] In Malaysia,[94] there is a constant trend regarding pornographic materials as a serious disruption to morality and public order, especially to youths.[95]

In Malaysia and Singapore, knowledge of the obscene nature of a publication is not an element of obscenity. The fact that a publication is approved by the government does not render the defendant immune from

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90. *See* Dow Jones Publ'g Co. (Asia) Inc., v. Attorney Gen. of Singapore [1989] 3 MLJ 321 (Sing. 1989), 1989 MLJ LEXIS 485, at *8-15. *See also* Singapore NPPA 1974, *supra* note 68, § 18(1).

91. *Re Dow Jones*, 1988 MLJ LEXIS 601, at *44 (listing articles which led to the final decision of the court; however, at the end of the decision the court says the articles are not the basis for the decision by the Minister).

92. The Singapore Penal Code strictly limits freedom of speech. *See* Penal Code, chap. 224, §§ 292-294, The Statutes of The Republic of Singapore (1985 rev. ed.) (showing that anyone who sells, distributes, exhibits, makes, produces, imports or exports, advertises or receives profits from, or is in possession of obscene material may be punished with a prison term up to three months and a fine). The only exception is if the publication is for religious purposes. *See id.* § 292. If anyone sells or distributes anything under section 292 to a person under twenty years old, imprisonment may be doubled. *See id.* § 293. Additionally, anyone "who sings, recites, or utters any obscene song, ballad or words" may be punished under the penal code. *Id.* § 294. *See also* Hor & Seah, *supra* note 62, at 322.

93. Chan Hiang Leng Colin & Ors v. Minister for Information and the Arts [1996] SLR 609 (Sing. 1996), 1996 SLR LEXIS 267, at *16.

94. The Malaysian penal laws are substantively identical to the Singapore Penal Code. *Compare* Malaysia Penal Code (F.M.S. Cap 45), Malaysian Law Publishers (1986) *and* Penal Code, chap. 224, The Statutes of The Republic of Singapore (1985 rev. ed.).

95. *See Pornographic Materials: Stiffer Penalty to be Imposed*, NEW STRAITS TIMES (Malaysia), Feb. 28, 1997, at 17 (increasing monitoring of publications and working on compounding fines for pornographic material under the Printing Presses and Publications Act of 1984). "[A]rticles on sex were allowed for educational purposes but not for publications read by youths such as entertainment magazines and tabloids." *Id. See also* Petaling Jaya, *Pornographic Books, Comics Seized From Shop*, NEW STRAITS TIMES (Malaysia), Jan. 9, 1997, at 8 (Several magazines seized including Penthouse and shop owner expected to be prosecuted under Sect. 7(1) of Printing Presses and Publication Act, 1984 (Amend. 1987)). *See also Action Group on Women Launched*, NEW STRAITS TIMES (Malaysia), Aug. 10, 1997, at 13 (expressing a women's group belief that women are still exploited in Malaysian movies and advertisement and describing their proposal to increase the penalty under PPPA 1986 from 3 years to ten years and to intiate caning for offenders regardless of intent). *See generally Mandatory Jail Sentence for Porn Publishers Proposed*, NEW STRAITS TIMES PRESS (Malaysia), Dec. 1, 1995, at 8.

prosecution, and intent is irrelevant.[96] The fact that only a portion of the publication is obscene is also not a defense.[97] The test of obscenity, as laid out in *Reg. v. Hicklin*,[98] is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[99] The literary value of a book is "beside the point."[100]

The Singapore Undesirable Publications Act bans the sale, distribution and importation of undesirable publications.[101] Under Singapore's legislation, publications on issues of pornography, such as *Playboy* and *Penthouse*, are banned as morally undesirable.[102] The Malaysian PPPA also covers unlawful purposes of printing and producing documents which include materials that are obscene or against public decency.[103] When the Minister believes any publication contains anything likely to be prejudicial to morality, he may limit or prohibit the importation or distribution of the publication in his "absolute discretion."[104] The Minister may also revoke any license or permit granted under the provisions of the Act without showing cause to the license holder.[105]

Censoring films and other similar media is another method of suppressing freedom of speech. In Singapore, the Films Act requires that films be granted a certificate before public viewing.[106] In Malaysia, under similar legislation, films must be approved by a Board of Film Censors and cannot be shown unless they are approved by the Board or the Committee of

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96. *See* Mohamed Ibrahim v. Pub. Prosecutor, [1963] 1 MLJ 289 (Malay. 1962). *See* K S Roberts v. Pub. Prosecutor [1970] 2 MLJ 137 (Malay. 1970), 1970 MLJ LEXIS 79. The liability is strict under penal code section 292 and lack of knowledge may only be taken as mitigation of the sentence. *See id.* at *4. *See also* Hor & Seah, *supra* note 62, at 322-24 (showing Singapore follows same precedent established in *Ibrahim*).

97. *See K. S. Roberts*, 1970 MLJ LEXIS 79, at *3 (Malay. 1970). *See also Ibrahim* [1963] 1 MLJ 289 (Malay. 1963).

98. [1868] 3 All E.R. 360 (Eng. 1868).

99. *See Ibrahim* [1963] 1 MLJ 289 (Malay. 1962) (quoting *Hicklin* [1868] 3 All E.R. at 371 (Eng. 1868)).

100. *See id.* at 291.

101. *See* Undesirable Publications Act, chap. 338, The Statutes of The Republic of Singapore (1985 rev. ed.) [*hereinafter* Singapore UPA].

102. *See* Basskaran Nair, *Singapore, in* PRESS SYSTEMS IN ASEAN STATES 85, 90 (Achal Mehra ed., 1989).

103. *See* Malaysia PPPA 1984, *supra* note 73, § 4(1).

104. *Id.* § 7(1). The following are subject to review: "any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing . . . ."

105. *See id.* § 13(1).

106. *See* Films Act, chap. 107, §§ 14(1), 21(1), 29(1), The Statutes of The Republic of Singapore (1985 rev. ed.). *See, e.g.*, Lui Chang Soong v. Pub. Prosecutor [1992] 1 SLR 734 (Sing. 1992), 1992 SLR LEXIS 364; Seow Puay Seng v. Pub. Prosecutor [1988] 2 MLJ 160 (Sing. 1988), 1988 MLJ LEXIS 549.

Appeals whose decision is final.[107] In Malaysia and Singapore, anyone possessing an obscene film may be liable and receive up to six months imprisonment. Furthermore, the Ministers in each country may prohibit any films they broadly deem to be "contrary to public interest."[108]

In Singapore, several other legislative acts further abridge freedom of speech. The Singapore Public Entertainments Act creates a bar against providing public entertainment in an unapproved locale without a license.[109] The Indecent Advertisement Act prohibits distribution or exhibition of a picture or written matter which is "indecent or obscene."[110] Also, under the Judicial Proceedings Act, criminal punishment is available for anyone who publishes any "indecent matter" in relation to a judicial proceeding "which would be calculated to injure public morals."[111]

The function of the media in Singapore and Malaysia is to introduce cultural values. These cultural values not only include such attributes as dance and music, but also attributes that further a "cultural commitment of excellence[,] . . . social and industrial discipline . . . [and the] handing down of appropriate cultural values to future generations."[112]

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107. *See* Films (Censorship) Act, 1952 (Act 35 of 1971), §§ 5(1), 8(1), 17A(3), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES. *See also* Ahmad Ibrahim, *Communication and Law From Malaysian Viewpoint, in* PRESS LAWS AND SYSTEMS IN ASEAN STATES 62, 68 (Abdul Razak M.Sc. ed., Confederation of ASEAN Journalists 1985). In Malaysia, certain films are exempted from the act, such as those sponsored by the government and individual productions that are not obscene. *See* Films (Censorship) Act, 1952 (Act 35 of 1971), § 25, Laws of Malaysia, GOLDEN'S FEDERAL STATUTES (describing exemptions from the requirements of the Act).

108. Films Act, chap. 107, §§ 29-30, The Statutes of The Republic of Singapore (1985 rev. ed.); Films (Censorship) Act, 1952 (Act 35 of 1971), §§ 24, 26A(1), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES.

109. *See* Public Entertainments Act, chap. 257, § 3, The Statutes of The Republic of Singapore (1985 rev. ed.). "Public entertainment" includes plays, operas, exhibitions of models, reading matter, pictures, exhibition of films, play-readings, recitals, lectures, talks, debates, discussions and trade fairs. *Id.* §§ 2(a)-(o). However, the Act exempts government-sponsored entertainments, religious ceremonies and addresses, debates and discussions at public companies, and registered trade unions, registered and exempted societies. *See id.* §§ 2(i)-(iv).

110. Indecent Advertisements Act, chap. 135, § 5, The Statutes of The Republic of Singapore (1985 rev. ed.). The Act also bans the advertising of any venereal disease or treatment for any venereal disease. *See id.* §§ 3, 7.

111. Judicial Proceedings (Regulation of Reports) Act, chap. 149, § 2(a), The Statutes of The Republic of Singapore (1985 rev. ed.). Additionally, any report of names or addresses of parties or witnesses to any marital proceeding is a violation. *See id.* § 2(b).

112. Syed Arabi Idid, *Malaysia, in* PRESS SYSTEMS IN ASEAN STATES 41, 53 (Achal Mehra ed., 1989). *See also* Hor & Seah, *supra* note 62, at 319. What holds society together in diverse nations such as Singapore and Malaysia is not a common morality "but tolerance among those with different cultures and values." *Id.*

C. *Abridgment For Security and Order*

National security and public order are other methods that have repeatedly been used to limit free speech in Singapore and Malaysia. These constitutionally legitimate methods to limit free speech include contempt of court proceedings against foreign and domestic critics of the judiciary, publication content restrictions, sedition acts, internal security acts and defamation.[113]

1. *Limiting Free Speech through Contempt of Court*

The pervasiveness of contempt of court proceedings in Singapore is not limited to the domestic forum. Singapore courts have also resorted to the use of contempt of court proceedings to limit foreign criticisms of the government. Christopher Lingle was charged with contempt when he published *The Smoke Over Parts of Asia Obscures Some Profound Concerns* in the *International Herald Tribune* (IHT).[114] The article referred to an "intolerant regime in the region" that suppressed dissent by "relying upon

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113. Several statutes and codes beyond the scope of this note also limit speech. In both countries the Official Secrets Acts limit the press by imposing penalties for spying, false declarations, wrongful communications of information and a failure to give information on violators of the Act. *See* Official Secrets Act, chap. 213, The Statutes of The Republic of Singapore (1985 rev. ed.); Malaysia Official Secrets Act, Act 88 of 1972, Laws of Malaysia, GOLDEN'S FEDERAL STATUTES. Relevant penal codes that are beyond the scope of this paper include: Penal Code, chap. 224, § 298, The Statutes of the Republic of Singapore (1985 rev. ed.) (stating that anyone who, with intent to upset religious feelings of another, utters any word or makes any gesture may be punished by up to one year in prison). In Malaysia, the same substantive penal law exists. *See* Malaysia Penal Code (F.M.S. Cap 45), § 298, Malaysian Law Publishers (1986). However, Malaysian Penal Code goes even further by providing punishment for anyone who attempts or causes disharmony between religions. *See id.* § 298(a). Additionally, the substantively similar penal codes of Malaysia and Singapore provide penalties for making false documents. *Compare* Malaysia Penal Code (F.M.S. Cap 45), § 464, Malaysian Law Publishers (1986) *and* Penal Code, chap. 224, § 464, The Statutes of The Republic of Singapore (1985 rev. ed.). Both countries additionally provide for criminal punishment for insulting and intimidating speech. *Compare* Malaysia Penal Code (F.M.S. Cap 45), § 504-505, Malaysian Law Publishers (1986) *and* Penal Code, chap. 224, § 504-505, The Statutes of The Republic of Singapore (1985 rev. ed.). *See also* Miscellaneous Offences (Public Order and Nusiance) Act, chap. 184, Statutes of The Republic of Singapore (1985 rev. ed.) (stating the Minister may make rules regulating public assemblies and processions). *See generally* Hor & Seah, *supra* note 62, at 331-332 (discussing Singapore's penal code). *See, e.g.*, CONST. OF THE REPUBLIC OF SING. art. 149; Public Order (Preservation) Act, chap. 258, The Statutes of The Republic of Singapore (1985 rev. ed.); The Maintenance of Religious Harmony Act, chap. 167A, The Statutes of Republic of Singapore (rev. ed. 1991).

114. The article appeared in the *International Herald Tribune*, Oct. 7, 1994 and was published in response to Kishore Mahbuban's article in the *International Herald Tribune*, Oct. 1, 1994. *See* Att'y Gen. v. Lingle [1995] 1 SLR 696 (Sing. 1995), 1995 SLR LEXIS 421. The editor, publisher and distributor of IHT were all charged with contempt. *See id.*

a compliant judiciary to bankrupt opposition politicians."[115] Criticisms of the legal institutions are allowed so long as the discussion is fairly conducted and is honestly directed to some definite public purpose. "The right to criticize is, however, exceeded and contempt of court is committed if the publication impugns the integrity and impartiality of the court, even if it is not so intended."[116] Although the target of the article was not indicated, the court found that Lingle had directed the article toward Singapore (a necessary element of contempt).[117] The test was a common objective one: "whether an ordinary reasonable reader of the publication would reasonably conclude that the words referred to the plaintiff."[118] The court found that "the words 'relying upon a compliant judiciary to bankrupt opposition politicians' when read in the context of the article, were intended and did refer or would be easily understood to refer to Singapore."[119] The message of judicial precedent is clear: There is a right to criticize, but not if criticizing the judiciary — *i.e.*, there is no right to criticize.

In *Attorney General v. Wain & Ors,*[120] the Singapore judiciary found that the AWSJ was guilty of contempt of court for publishing an article (at this time circulation was restricted to 400 copies) that criticized a libel judgment.[121] The AWSJ article stated: "[A] Singapore court has entered a libel judgment in favour of Singapore's Prime Minister based on an article the Prime minister found personally offensive. . . . [W]e can only hope that in the long term, the Review's punishment will not, as doubtlessly intended, still honest and independent voices in Singapore."[122] The judge pointed out that it was important not to "lose sight of the local conditions."[123] Because the judges of Singapore are the determiners of the facts in such proceedings, "[s]uch accusations are harmful to public interest and are clearly calculated to undermine public confidence in the administration of justice."[124] The

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115. *Id.*

116. *Lingle*,1995 SLR LEXIS 421, at *15. Intent is not an element of the offense. *See id.* at *16.

117. *See id.* at *18.

118. *Id.* at *19.

119. *Id.* at *20. "[I]t has been the [common] practice of government politicians to sue opposition politicians for damages for defamation whenever the occasion justifies such actions." *Id.* Lingle was ordered to pay $10,000. *See id.* at *44.

120. Att'y Gen. v. Wain & Ors (No. 1) [1991] 2 MLJ 525 (Sing. 1991), 1991 MLJ LEXIS 155.

121. *See id.* at *2. The original libel judgment was awarded in *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 (Sing.1990), 1990 MLJ LEXIS 623.

122. The article appeared in the *Asia Wall Street Journal*, Dec. 1-2, 1989. It described the libel suit against FEER that the Prime Minister won. *See id.* at *29.

123. *Id.* at *30.

124. *Id.* at *31. *See also* Att'y Gen. v. Lingle & Ors [1995] 1 SLR 696, 1995 SLR LEXIS 421 (Sing. 1995). *Cf.* Att'y Gen. of Singapore v. Zimmerman & Ors [1985] 2 MLJ 89 (Sing. 1985), 1985 MLJ LEXIS 507.

court again reiterated, this time more explicitly, that one cannot criticize the courts because people will become critical and upset. Consequently, this will cause a loss of confidence in the judiciary.

In Malaysia, contempt of court[125] prosecutions are also allowed as an abridgment on freedom of speech. In *Manjeet,*[126] a member of the bar association was convicted of contempt of court for alleging that the Lord President of the Supreme Court was acting without authority and was therefore in contempt of court.[127] The Malaysian court relied on the historic English common law standard of contempt[128] which allowed prosecution of contempt when "[a]ny act done or writing published [is] calculated to bring a court or a judge of the court into contempt, or to lower his authority."[129] However, this standard is subject to an exception. "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."[130] The standard of the court is further concerned with protecting the "dignity and integrity" of the courts "in the interest of maintaining public confidence in the judiciary,"[131] and more importantly for citizens not losing site of the volatile "local conditions."[132] The rationale for stringent contempt laws is twofold: 1) the harm to the public through loss of confidence, and 2) the embarrassment to the judge.[133] While the court found the defendant guilty, it did not rely

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125. Contempt of court limitation is authorized by article 10(2)(a) and article 126 of the Constitution. *See* FED. CONST. OF MALAY. art. 10, cl. 2(a). "The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt itself." *Id.* art. 126. *Cf.* The Courts of Judicature Act 1964, § 13, Laws of Malaysia. (giving reinforcement to article 126 powers). *Accord* Att'y Gen., Malaysia v. Manjeet Singh Dhillon [1991] 1 MLJ 167 (Malay. 1990), 1990 MLJ LEXIS 257, at *30-31.

126. *Manjeet*, 1990 MLJ LEXIS 257.

127. *See id.* at *11-24.

128. *See* R. v Gray, [1900] 2 Q.B. 36 (Eng.).

129. *Manjeet*, 1990 MLJ LEXIS 257, at *32 (J. Harun Hashim, dissenting) (quoting *Gray*, [1900] 2 Q.B. at 40).

130. *Id.* at *32-3 (J.Harun Hashim, dissenting).

131. *Id.* at *34. *Accord* Attorney Gen. v. Arthur Lee Meng Kuang [1987] 1 MLJ 207 (Malay. 1987).

132. *Manjeet*, 1990 MLJ LEXIS 257, at *67. *Accord* Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. S M Idris & Anor, [1990] 1 MLJ 273 (Malay. 1990), 1989 MLJ LEXIS 595; Pub. Prosecutor v. The Straits Times [1971] 1 MLJ 69 (Malay. 1970), 1970 MLJ LEXIS 142.

133. The *Manjeet* court stated:

> [There] will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

Manjeet,1990 MLJ LEXIS 257, at *43-44 (Malay. 1990) (J. Harun Hashim, dissenting).

on a case where Prime Minister Mahathir Mohamad was charged with contempt because Mahathir Mohamad's comments were a "general criticism" of the judiciary.[134]

In *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad*,[135] Prime Minister Mahathir Mohamad was charged with contempt for his interview responses in Time Magazine. The court found the statement: "'Although you passed a law with a certain thing in mind, we think your mind is wrong, and we want to give our interpretation' — is not a correct statement because the Court does not substitute the intention of the Legislature with that of its own."[136] They found this statement non-contemptuous but merely a "dilemma" and "confusion" on the function of the separation of powers.[137] The criticism was considered a ventilation[138] while in the *Manjeet* case, the language was considered a "violent criticism."[139]

2. *Content Restrictions: Building Well-ordered Societies*

The content matter of publications is regulated in Singapore and Malaysia, but in separate press laws. The Malaysian PPPA covers unlawful purposes of printing and producing documents, which includes materials relating to obscenity, incitement to violence, legal disobedience, breach of the peace, or the promotion of the feeling of ill-will, disharmony or disunity.[140] When the Minister believes any publication contains anything[141] "likely to be prejudicial to public order, morality, security, the relationship with any foreign country or government, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest,"[142] the Minister may limit or prohibit the importation or distribution of the publication in his "absolute discretion."[143]

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134. *Id.* at *45 (J. Harun Hashim, dissenting).

135. Lim Kit Siang v. Dato Seri Dr Mahathir Mohamads [1987] 1 MLJ 383 (Malay. 1986), 1986 MLJ LEXIS 282. For a general discussion on contempt of court proceedings see Ibrahim, *supra* note 107, at 77-80.

136. *Lim Kit Siang*, 1986 MLJ LEXIS 282, at *10-11.

137. *Id.* at *13.

138. The court further drew the distinction as a "ventilat[ion], perhaps understandably, [of] the vexation of the executive in not being able to get through some desired objective or end without curial intervention." *Id.* at *19-20.

139. *Manjeet*, 1990 MLJ LEXIS 257, at *67.

140. *See* Malaysia PPPA 1984, *supra* note 73, § 4(1). *See, e.g.*, Idid, *supra* note 112, at 47; Ibrahim & Jain, *supra* note 57, at 557.

141. The term "anything" denotes "any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing." Malaysia PPPA 1984, *supra* note 73, § 7(1).

142. *Id.*

143. *Id.* §§ 7(1)-(2). *See also id.* § 13(1).

Singapore regulates the content matter of publications in the Undesirable Publications Act.[144] The Minister has discretion to "prohibit the importation, sale or circulation" of publications that are "contrary to the public interest."[145] The Act was amended to "penalize foreign publications that 'consistently interfered' in Singapore's domestic politics 'for their own ends.'"[146]

The Malaysian High Court once gave a glimpse of confidence to those hoping for greater constraints on the bureaucracy's ability to limit the publication of materials the Minister finds offensive. In *Persatuan Aliran Kesedaran Negara v. Minister of Home Affairs*,[147] the court overturned the Minister's decision to not allow the publication of materials by *Aliran*[148] under the Printing Press and Publication Act of 1984. In the *Aliran* opinion, the court held that although the Minister's discretion is "absolute it is not unfettered . . . [and] is subject to judicial review."[149] The court further considered that the "Minister's discretion is limited to protecting the public interest or national interest in respect of public order, morality and security as is shown in . . . [sections] 4 and 7 of the 1984 Act."[150] This decision was not surprising considering that Aliran's publication was aimed toward promoting "a common sense of nationhood and a genuine understanding of development in accordance with the aspirations of the *Rukunegara*."[151] Nevertheless, the Appellate Court quashed the High Court's order and set out three grounds for reversal, none of which fit within the realm of *Aliran*.[152] They found no evidence of "illegality, irrationality or procedural

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144. Undesirable Publications Act, chap. 338, The Statutes of The Republic of Singapore (1985 rev. ed.) [hereinafter Singapore UPA].

145. *Id.* § 3(1). *See also id.* § 4 (allowing a three year penalty for violation). This power is also given to lower officials; if they find publications not in the interest of Singapore, they can seize them, and appeal only lies to the minister "and shall not be called into question in any court." *Id.* §§ 6, 15.

146. *In Re Dow Jones*, [1988] 2 MLJ 414 (Sing. 1988), 1988 MLJ LEXIS 601, at *24-25. *See* Francis Seow, *Press Bill Doesn't Make Sense for Singapore*, ASIA WALL ST. J., May 27, 1986.

147. [1987] 1 MLJ 440 (Malay. 1987), 1987 MLJ LEXIS 443, *rev'd*, Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (Malay. 1990), 1990 MLJ LEXIS 6.

148. The President is Dr. Chandra Muzaffar. His views are consistent with Malaysia's purported view of decadent Western influence. *See infra* text accompanying notes 324-27.

149. *Aliran*, 1987 MLJ LEXIS 443, at *8 (Malay. 1987).

150. *Id.* at *9.

151. *Id.* at *5 (emphasis added). *See also infra* note 271 (describing the meaning of *Rukunegara).*

152. Illegality, irrationality and procedural impropriety are the three grounds for reversal. *See* Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara, 1990 MLJ LEXIS 6, at *24-25 (Malay. 1990). Illegality exists when the "authority . . . [is] purporting to exercise a power which in law it does not possess." *Id.* at 24. Irrationality exists where the authority "exercises a power in so unreasonable a manner that the exercise becomes open to review

impropriety" and reversed the quashing of the Minster's decision.[153] Although the court set out a potential limitation that would seem to co-exist with the values espoused by the state to ensure public order, national security and public interest, the Appellate Court failed to affirm the decision of the High court. The common core of Asian values, community before the individual, seems not to matter in the present case. Although *Aliran* espoused *Rukunegara* as the philosophy of the publications, the Minister refused publication. The High Court found that *Aliran* was attempting to promote values that would not disrupt public order, but the Appellate Court usurped the promotion of Asian values after setting out a review standard that would have easily allowed the decision of the High Court to be affirmed.

Recently, in the Singapore case of *Chan Hiang*, the Minister for Information and the Arts was found to have acted rationally in banning publications produced by the International Bible Studies Association (IBSA) — a denomination of Jehova's Witnesses.[154] The Court of Appeals upheld the Minister's decision by finding that Jehova's Witnesses do not partake in warfare, which threatens the national security of Singapore.[155] The *Chan Hiang* court additionally stated that issues of "national security are not justiciable."[156] But, the court is not precluded from determining whether facts exist for the decision to be made by the Minister, which they did in this case.[157]

3. *Sedition Acts: Keeping the Status Quo*

The sedition laws of Malaysia and Singapore are substantively similar.[158] The laws are based on the definition of sedition espoused by the

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upon what are called . . . Wednesbury principles." *Id.* Procedural impropriety exists when they act contrary to "'principles of natural justice' . . . [,i.e.,] a duty to act fairly." *Id.* at 25. *See also* Associated Provincial Picture Houses Ltd v. Wednesbury Corp, [1947] 2 All E.R. (Eng. 1947).

153. *Aliran*, 1990 MLJ LEXIS 6, at *28.

154. Chan Hiang Leng Colin & Ors v. Minister for the Information and the Arts [1996] 1 SLR 609 (Sing. 1996), 1996 SLR LEXIS 267, at *39 (prosecuted under the Singapore Undesirable Publications Act, § 3). *See* Singapore UPA, *supra* note 144, § 3.

155. *See Chan Hiang*, 1996 SLR LEXIS 267, at *24-26.

156. *Id.* at *25. *See also* Chng Suan Tze v. Minister of Home Affairs & Ors [1988] SLR 132 (Sing. 1988), 1988 SLR LEXIS 247. "[W]hat national security requires . . . is to be left solely to those who are responsible for national security." *Id.* at *71.

157. *See Chan Hiang*, 1996 SLR LEXIS 267, at *25.

158. *See, e.g.*, Sedition Act, chap. 290, The Statutes of The Republic of Singapore (1985 rev. ed.); Sedition Act, 1948 (Act 15 of 1969), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES [hereinafter Sedition Acts of Malaysia and Singapore]. Malaysia has further abridged freedoms by adding article 3(1)(f) to the Sedition Act, which provides that a seditious tendency includes questioning any "matter, right status, position, privilege, sovereignty or perogative" protected by part III or articles 152, 153 or 181 of the Constitution. *Id.* § 3(1)(f).

English judge Sir James Stephen.[159] Anyone who attempts, conspires or prepares to do any act which would have a "seditious tendency" or "utters any seditious words" or "prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication" or "imports any seditious publication"[160] will be guilty of a violation and face a maximum penalty of three years imprisonment and a fine.[161] A seditious tendency is broadly defined to include anything that will cause public dissatisfaction of the government or incite racial hatred within Malaysia and Singapore.[162] The intent of the person who is charged with sedition is irrelevant so long as the act had or would have a seditious tendency.[163] Additionally, the government need not show that the speech is likely to cause disorder. Only the tendency to cause disorder needs to be shown.[164] There is also no need to show that the speech was "true or false." However, evidence showing a falsehood would increase the "seditious tendency."[165] A court may, in lieu of or in addition to other penalties, prohibit the publication of the seditious thing.[166] It may also prohibit the person convicted of publishing a newspaper matter from publishing, writing or assisting the publication of any newspaper in the future.[167] The Act also gives police officers the power to arrest people for

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See Ibrahim & Jain, *supra* note 57, at 556. *See also* Idid, *supra* note 113, at 48.

159. *See* ANDREW HARDING, LAW, GOVERNMENT AND THE CONSTITUTION IN MALAYSIA 192 (1996).

160. Sedition Acts of Malaysia and Singapore, *supra* note 158, §§ 4(1)(a)-(d). A person cannot be convicted under this Act on the "uncorroborated testimony of one witness." *Id.* § 6.

161. *See id.* § 4. The second offense allows a five-year sentence to be administered. *Id.*

162. *See generally id.* In Malaysia and Singapore, seditious tendency is a tendency to "bring hatred or contempt or to excite disaffection against . . . Government." *Id.* § 3(1)(a). To attempt to bring change to the government "otherwise than by lawful means." *Id.* § 3(1)(b). "[T]o bring into hatred or contempt or to excite disaffection against the administration of justice." *Id.* § 3(1)(C). "[T]o raise discontent or disaffection amongst [citizens]." *Id.* § 3(1)(d). "[T]o promote feelings of ill-will and hostility between different races or classes of the population." *Id.* § 3(1)(e). Things that will not be deemed to be seditious will be those things which have "been misled or mistaken." *Id.* § 3(2)(a). Or, to point out errors in government or legislation with the intent to remedy the problems. *See id.* § 3(2)(b). Or to point out things that cause ill-will between people "with a view to[ward] their removal." *Id.* § 3 (2)(d).

163. *See id.* § 3(3). *See* Pub. Prosecutor v. Ooi Kee Saik & Ors [1971] 2 MLJ 108 (Malay. 1971), 1971 MLJ LEXIS 59, at *22. Disaffection — a definition in the statute as seditious tendency — in the context of section 3(3) was interpreted as "enmity and disloyalty tending to make the government insecure." *Id.* at *22. *See also* Pub. Prosecutor v. Param Cumaraswamy [1986] 1MLJ 578 (Malay. 1986), 1986 MLJ LEXIS 163.

164. *See* Pub. Prosecutor v. Oh Keng Seng [1977] 2 MLJ 206 (Malay. 1976), 1976 MLJ LEXIS 220, at *33. *See generally* Ibrahim & Jain, *supra* note 57, at 554.

165. *Oh Keng Seng*, 1976 MLJ LEXIS 220, at *34

166. *See* Sedition Acts of Malaysia and Singapore, *supra* note 158, § 9(1)(a).

167. *See id.* § 9(1)(b).

violating the Act without a warrant.[168]

The definition of sedition was broadened in Malaysia in response to the 1969 racial riots by adding section 3(1)(f) to the Sedition Act to cover speech pertaining to the "sensitive issues."[169] For example, in *Public Prosecutor v. Ooi Kee Saik,* an individual was convicted under section 3(1)(f)when he "charged the Government with providing 'comfortable shady places for one group of citizens, and hot uncomfortable places for other groups of citizens.'"[170] The court has developed this broad, all-encompasing standard, yet ironically continues to reiterate that criticism itself will not constitute sedition.[171]

In the Malaysian case of *Public Prosecutor v. Mark Koding,*[172] the court even found seditious tendencies in proposing to change article 152 of the Federal Constitution, seemingly a democratic duty, which provides for language protections.[173] The sedition laws of Malaysia do not state in section 2(b) of the Act that pointing out errors in the constitution with a view toward remedying the errors are allowed; however, the Singapore provision of the Sedition Act allows constitutional criticism in theory.[174]

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168. *See id.* § 11.

169. *See* HARDING, *supra* note 159, at 192; Ibrahim & Jain, *supra* note 57, at 553; *See also* Sedition Act, 1948 (Act 15 of 1969), § 3(1)(f), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES.

170. Pub. Prosecutor v. Ooi Kee Saik & Ors [1971] 2 MLJ 108 (Malay.1971), 1971 MLJ LEXIS 59, at *22. In effect he charged the Malays of being biased toward the Chinese. The court explained:

> [I]f the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or disaffection against the Government, then it is caught within the ban of para (a) of s 3(1) of the Act . . . . [It is a violation if the speech] is apt to produce conflict and discord amongst the people or to create race hatred, the speech transgresses para[graphs] (d) and (e) of s 3(1). Again paragraph (f) [the new amendment after the 1969 riots] of s 3(1) comes into play if the impugned speech has reference to question any of the four sensitive issues—citizenship, national language, special rights of the Malays and the sovereignty of the Rulers.

Id. See HARDING, *supra* note 159, at 194. *See also* Ibrahim & Jain, *supra* note 57, at 554-55.

171. If the court "finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe." *Ooi Kee Saik,* 1971 MLJ LEXIS 59, at *21-22. *See also* Fan Yew Teng v. Public Prosecutor [1975] 2 MLJ 235 (Malay. 1975), 1975 MLJ LEXIS 254 (holding mere criticisms themselves will not constitute sedition).

172. Pub. Prosecutor v. Mark Koding [1983] 1 MLJ 111 (Malay. 1982), 1982 MLJ LEXIS 463, at *26.

173. *See id.* at *22-29. *See also* FED. CONST. OF MALAY. art. 152.

174. *See* Sedition Acts of Singapore and Malaysia, *supra* note 158, § 3(2)(b).

4. *Internal Security & Government Insecurity*

The Singapore and Malaysia Internal Securities Acts (ISA)[175] are substantively similar in respect to limitations on freedom of speech. The Acts are designed to prevent Communist insurgency in the government and to enable preventative detention to be practiced.[176] The Internal Security Acts were also drafted to ensure internal security and to prevent subversion.[177] The Minister in charge of Printing Presses and Publications may absolutely prohibit or condition publication or distribution when he finds that the publication "counsels disobedience to the law," "contains any incitement to violence," will "promote feelings of hostility between different races or classes of the population," or is "prejudicial to the national interest, public order, or security" of the nation.[178] For example, in 1987 three national newspapers in Malaysia were shut down because they reported on racial underpinnings of a political conflict; they were allowed to reopen a

175. *See* Internal Security Act, chap. 143, The Statutes of The Republic of Singapore (1985 rev. ed.) [hereinafter Singapore ISA]; Internal Security Act, 1960 (Act 82 of 1972), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES [hereinafter Malaysia ISA].

176. *See* Ibrahim & Jain, *supra* note 57, at 522. *See generally* Idid, *supra* note 112, at 47.

177. *See* Malaysia ISA, *supra* note 175, preamble. *See also* FED. CONST. OF MALAY. art. 149.

178. Malaysia ISA, *supra* note 175, §§ 22(1)(a)-(d); Singapore ISA, *supra* note 175, §§ 20(1)(a)-(d). Any person who has in his possession a publication which violates the Act is also in violation. Malaysia ISA, § 26; Singapore ISA, § 24. Any person who imports or helps to import a document in violation of the Act without lawful excuse is subject to punishment under the Act. Malaysia ISA, § 26; Singapore ISA, § 24. It is a violation of the Act to post a placard or circular which does not conform to the Act. Malaysia ISA, § 27; Singapore ISA § 25. Spreading false news by word of mouth or by publication that will likely cause "public alarm" is also a violation. Malaysia ISA § 28; Singapore ISA § 26. Any person who possesses or has control over a subversive document, without lawful excuse shall be guilty of an offense. Subversive document is defined as a document in part or in whole, which has a tendency to do any of the following:

> to excite or organise violence[,] . . . to support, propagate or advocate any act prejudicial to the security . . . or the maintenance or restoration of public order . . . to invite, request or demand support for or on account of any collection, subscription, contribution or donation, whether in money or in kind, for the direct or indirect benefit or use of persons who intend to act or are about to act, or have acted, in a manner prejudicial to the security . . . [of the nation] or to the maintenance of public order . . . or who incite violence . . . or counsel disobedience. . . .

Malaysia ISA, § 29(3)(a)-(c); Singapore ISA § 27 (3)(a)-(c). A lawful excuse arises if the person did not know the nature of the contents of the document and had no reasonable cause to suspect it was a "subversive document." Malaysia ISA, §§ 29(4)(a)-(b); Singapore ISA, §§ 27 (4)(a)-(b). Violators of the Act are subject to a maximum of five years imprisonment and a fine. Malaysia ISA, § 29 (1); Singapore ISA, § 27(1).

year later when a change in management occurred.[179]

The Minister may additionally prohibit the importation and distribution of the specific publication and any other publication that comes from the publishing house or agency.[180] The person subject to this prohibition can seek review by the *Yang di-Pertuan Agong* (in Singapore, the President) and no court can call his decision into question.[181]

The Malaysian Act also limits entertainment and exhibitions by authorizing the Minister or anyone authorized by the Minister, to seek information concerning the entertainment or exhibition.[182] If any information requested is known to be false or incomplete, it will result in three years imprisonment and a fine.[183] In Malaysia, the Minister may also prohibit the entertainment or close the exhibition if the Minister believes that it is "likely to be in any way detrimental to the national interests."[184] There is a duty for the promoters to know what their agents are doing because the ISA imposes a respondeat superior duty,[185] and the promoter will be liable for the acts of its employees.[186]

5. *Defamation*

The defamation laws of Singapore and Malaysia are substantively identical, and will be discussed concurrently unless otherwise noted.[187] Prosecution for the crime of defamation has been used in Singapore and Malaysia to repeatedly quell the voices of government opposition. The

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179. *See* Eric Loo, *Media Tightly Prescribed*, NIEMAN REP., Fall 1996, at 79. *See also White Paper on Last October's Crackdown; Banned Newspapers Reappear*, Country Rep., ECONOMIST, June 14, 1988.

180. *See* Malaysia ISA, *supra* note 175, §§ 22(2)(a)-(b); Singapore ISA, *supra* note 175, §§ 20(2)(a)-(b).

181. *See* Malaysia ISA, *supra* note 175, § 23; Singapore ISA, *supra* note 175, § 21.

182. *See* Malaysia ISA, *supra* note 175, § 32 (1)(a)-(d). This includes the interests of promoters, the intention of use of the profits and any "such matters as the Minister may direct." *Id.*

183. *See id.* §§ 32(2) & 41. This is regulated in Singapore by the Films Act, chap. 107, The Statutes of The Republic of Singapore (1985 rev. ed.).

184. Malaysia ISA, *supra* note 175, § 35.

185. "This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

186. *See* Malaysia ISA, *supra* note 175, § 40.

187. *See, e.g.*, Defamation Act, chap. 75, The Statutes of The Republic of Singapore (1985 rev. ed.); Defamation Act, 1957 (Act 286 of 1957), Laws of Malaysia, GOLDEN'S FEDERAL STATUTES [hereinafter Defamation Acts of Singapore and Malaysia]. Both penal codes of Malaysia and Singapore, in respect to criminal defamation, are substantively the same. *Compare* Penal Code, chap. 224, §§ 499-502, The Statutes of The Republic of Singapore (1985 rev. ed.) *and* Malaysia Penal Code (F.M.S. Cap 45), §§ 499-502, Malaysian Law Publishers (1986).

Defamation Act of Singapore was created in Singapore upon separation from Malaysia.[188] The Defamation Act provides a privilege for newspapers, but no publication will be protected unless it is determined to have a public interest or public concern.[189] The Defamation Act expressly states that any person involved in or taking part in an election who publishes a defamatory statement has no privilege even if the statement "is material to a question in issue in the election."[190]

This message was reiterated in Singapore when Lee Kuan Yew's son, Deputy Prime Minister Lee Hsien Loong, won a libel judgment against the IHT for an article that insinuated that he was appointed because he was Lee's son.[191] The court awarded damages and made the IHT post an apology which was later determined not to be in good faith. Consequently, aggravated damages were awarded.

In the Singapore case of *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,[192] the court decided that the remarks[193] by Lee Kuan Yew's political adversary were defamatory because "they impute dishonourable and discreditable conduct and disparage him in his office . . . and lower him as

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188. *See* CONST. OF THE REPUBLIC OF SING. art. 162 (mandating the extension of all existing law to become part of the Constitution but can be changed to conform with the Constitution). *See* Jeyaretnam Joshua Benjamin v. Lee Kuan Yew [1992] 2 SLR 310 (Sing. 1992), 1992 SLR LEXIS 412 (holding extension of law to new Singapore republic justified the imputation of intent of Parliament on the existing rules of defamation when adopted in Singapore in the split of the Singapore from Malaysia). *See generally* Michael Hor, *The Freedom of Speech and Defamation*, 1992 SING. J. LEGAL STUD. 542, 549-551 (1992). Hor criticizes the court's reasoning of imputing intent of the Singapore parliament and the Constitution of existing defamation laws — and any other law — because the Constitution clearly gives the court power to make "modification, adaptions, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution." CONST. OF THE REPUBLIC OF SING. art. 162.

189. *See* Defamation Acts of Singapore and Malaysia, *supra* note 187, § 12(1). Both allow privileged reporting, as long as no malice is shown, which is enumerated in the Schedule for Newspaper Statements Having Qualified Privilege. *See id.* Sched. I. The Schedule's main requirement is a "fair and accurate report" of certain public events. *See id.* § 1. However, research has uncovered no exceptions allowed in the case law. "Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter . . . the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit." *Id.* § 12 (3).

190. *Id.* § 14.

191. *See Singapore Human Rights Report 1996*, *supra* note 3.

192. [1992] 2 SLR 310 (Sing. 1992), 1992 SLR LEXIS 412.

193. The pertinent remarks by the appellant dealt with the circumstances of Cheang Wan's suicide and were spoken at a political rally with 7000 people present. *See id.* at *15. Cheang Wan is the former Minister for National Development. The appelant remarked the following: "[E]verybody . . . knows you can't buy poison over the counter. . . . [W]hy hasn't the government conducted any inquiry . . . . [The decedent wrote a letter before his death to Lee Kuan Yew] saying I am very sorry; I will do as you advise. . . . Did he respond to that letter? . . . If he did respond, what was his response?" *Id.* at *17-18.

such in the estimation of right-thinking people in Singapore."[194] The court denied the defense of fair comment[195] on three grounds: 1) Freedom of speech can be abridged by laws of Parliament;[196] 2) Article 162 of the Constitution calls for the extension of all laws in force when they separated from Malaysia, including common law;[197] and 3) the Malaysian courts have reached the same result.[198] The court rationalized the decision by firmly rejecting the United States' *New York Times*[199] decision and held that public officials have the same protection as any citizen.[200] Even if there is no malice, the publisher is still responsible.[201] The court opined that honorable men would not seek office if their reputation were at stake, and it would therefore "do the public more harm than good."[202] The court further held that "the circumstances of a general election are not sufficient to give rise to an occassion of privilege even if the subject matter of the publication is material to an issue in the election."[203]

In Malaysia, the same circumstances surrounding the Lee Kuan Yew criticisms and the Minister's suicide gave rise to *Lee Kuan Yew v. Chin Vui Khen & Anor.*[204] The court denied a fair comment defense because there

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194. *Id.* at *39.

195. "[A] writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail." *Id.* at *40.

196. No prohibition, like that of the U.S. First Amendment or that of article 10 of The European Convention on Human Rights, is provided for in the Constitution of Singapore. *See id.* at 59. The Constitution of Singapore expressly allows abridgment of speech by defamation laws. *See id.* at *59-60. *See also* Hor, *supra* note 188, at 547.

197. The court saw no need to change the defamation law as codified in the Defamation Act because it was not in conflict with the Constitution, and Parliament intended that the Act be extended to Singapore via section 74 of the Malaysia Act of 1963. *See* Jeyaretnam, 1992 SLR LEXIS 412, at *62-65.

198. *See* Lee Kuan Yew v. Chin Vui Khen & Anor [1991] 3 MLJ 494. (Malay. 1989), 1989 MLJ LEXIS 700. *See Jeyaretnam*, 1992 SLR LEXIS 412, at *66.

199. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also infra* text accompanying notes 223-237.

200. *See Jeyaretnam*, 1992 SLR LEXIS 412, at *66-67. *Accord* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

201. *See Jeyaretnam*, 1992 SLR LEXIS 412, at *67.

202. *Id.* at *70. "We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good." *Id.* at *71-72 (quoting Post Publ'g Co. v. Hallam, 59 F. 530, 540 (6th Cir. 1893)).

203. *Id.* at *78. "It is not enough that the publication should be of general interest . . . in receiving the information contained in it, and there must be a correlative duty in the publisher." *Id.* at *81. The case further states that the privilege would only attach if the speaker had some "legal, moral or social duty on his part to communicate the subject matter of his speech to the audience." *Id.* at *79.

204. [1991] 3 MLJ 494 (Malay 1992), 1989 MLJ LEXIS 700.

were no facts to justify what the defendants said.[205] The court found that the defamation law was imposed by Parliament — a requirement under the Constitution — and was therefore constitutional.[206] They set out the importance of free speech in a democracy but reinforced limiting this speech in the name of public order, and security of the state.[207]

The Malaysian and Singaporean lawmakers have clearly gone to great lengths to ensure the communities of Singapore and Malaysia stay safe, moral and orderly. Conversely, the United States' focus is on the individual right of people to speak and not the community's right to safety, order and morality.

IV. UNFETTERED FREE SPEECH — THE U.S. MODEL

Scholars have recognized that the First Amendment of the U.S. Constitution does not protect all speech but rather protects freedom of speech.[208] However, the United States has failed to construct a theory of free speech that is consistently applied with its various values.[209] Two central values are used interchangeably to justify free speech in the United States: the value of reaching sound democratic decisions and the value of

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205. *See id.* at *28. The court also stated the following:

> Under such circumstances where the alleged defamatory article alludes to charges which are not specific but general in nature, a defendant who pleads justification must state some specific acts and instances of misconduct imputed to the plaintiff and follow these with the precise particulars of fact as tending to show the truth of such misconduct.

Id. at *30.

206. Although required, it is seemingly a case of circular logic with judicial passivism. The Civil Law Act of 1956, § 3(1), extended all the common law of England to Malaysia. This was later modified by the Defamation Act of 1957. Article 162 of the Constitution extends all laws to Malaysia, which includes the common law under article 160 of the Constitution. The court reinforced this decision with the fact that Congress in 1983 introduced new Criminal defamation laws. *See* Malaysia Penal Code (F.M.S. Cap. 45), § 298(a), Malaysian Law Publishers (1986).

207. The court stated:

> The right to freedom of speech and expression is undoubtedly a valuable and cherished right possessed by a citizen in our Republic . . . . Freedom to think as one likes, and to speak as one thinks are, as a rule, indispensable to the discovery and spread of truth and without free speech, discussion may well be futile. But at the same time, we can only ignore at our peril the vital importance of our social interest in, inter alia, public order as security of our State.

Lee Kuan Yew, 1989 MLJ LEXIS 700, at *43.

208. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948).

209. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970).

discovering the truth in an open market place of ideas.[210]

A. *Democracy Rationale*

In the United States, two central democratic values are inherent in allowing open discussion of political topics. The first of these is the value to the individual in contributing to democratic decision-making. This first value simultaneously ensures that speech is not suppressed and then violently released against the government. The second value hypothesizes that governments, which determine what is released to the populace, are going down the slippery slope of ultimately not allowing free speech when it threatens the status quo.[211]

Unfettered free speech has been justified as a pressure release for society. If not allowed to freely criticize the government, society would drive their hatred for the government and its policies underground and subversively destroy public order.[212] This notion has been expressed by Emerson as "achieving a more adaptable and hence a more stable community . . . [by balancing] healthy cleavage and necessary consensus."[213] The courts of the United States have also adopted this idea: "order cannot be secured merely through fear of punishment for its infraction . . . fear breeds repression . . . repression breeds hate . . . [and] hate menaces stable government . . . ."[214]

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210. Unfettered freedom of expression also ensures a third value — self-fulfillment to the individual. A person must be free to realize his self being and share in the decision-making process in society which will ultimately affect him; to deny a person this right is to "place him under arbitrary control of others." EMERSON, *supra* note 209, at 6. Redish believes that this is the only function of freedom of speech. *See* Redish, *supra* note 209, at 593. *See also* Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983). This value is two-fold: first, it allows the individual to discover his maximum potential; and secondly, it gives an individual control over his destiny by making "life-affecting decisions." Redish, *supra* note 209, at 593. *But see*, C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982) (criticizing Redish's thesis on the basis of the Supreme Court upholding freedom of speech as protecting "profit- orientated corporate political speech" as undermining people's ability to control their destiny because of corporate influence overriding the weight of individual speech).

211. For a discussion on the democratic value of free speech in the context of the United States, see Harry H. Wellington, *On Freedom Of Expression*, 88 Yale L.J. 1105 (1979). *E.g.*, William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243 (1984); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

212. *See* Whitney v. California, 274 U.S. 357, 372-380 (1927) (Brandeis, J., concurring).

213. *See* EMERSON, *supra* note 209, at 7. "[S]uppresion of discussion makes a rational judgment impossible, substituting force for reason . . . ." *Id.*

214. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). "[T]he path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ." *Id.*

"Once one accepts the premise of the Declaration of Independence — that governments derive their just powers from the consent of the governed,"[215] individuals must have freedom of expression in forming community opinions. Many commentators have emphasized this value rigidly as the only value of free speech while others have not.[216] Meiklejohn focuses on the agreement between the government and the governed, that "public issues shall be decided by universal suffrage,"[217] and that only speech which relates to the issues of public interest have the full protection against encroachment while unrelated speech has less protection.[218]

Within this democratic rationalizing model, private speech must be distinguished from public interest speech; while the former requires due process, it may also require abridgement for public interests.[219] Drawing the line between public and private speech is very difficult; indeed, some would exclude things such as obscenity from the political process and others would not.[220] Political and therefore protected speech, in Bork's view, is speech broadly concerned with government behavior.[221] This may raise concerns over protecting non-political speech, but speech that does not deal with concerns of governing may legitimately be regulated for public purposes by elected representatives with values similar to the population that elected them.[222]

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215. EMERSON, *supra* note 209, at 7.

216. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM; THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Bork, *supra* note 211; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523; Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

217. MEIKLEJOHN, *supra* note 208, at 27.

218. *See* MEIKLEJOHN, *supra* note 216, at 94.

219. *See id.* at 95.

220. *See* Wellington, *supra* note 211, at 1112-20. *See also* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262-263 (1961) (arguing obscene literature should be protected and the government cannot decide what people see or do not see). *See, e.g.*, Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16 (1960) (arguing obscene novels and books do not need the protection of free speech because they are not central to self-government); Bork, *supra* note 211, at 29 (stating "art and pornography are on a par with industry and smoke pollution").

221. *See* Bork, *supra* note 211, at 27. "[G]overnmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative . . . [and] speech about how we are governed . . . [are political; however this] does not cover scientific, educational, commercial or literary expressions . . . ." *Id.* at 27-28.

222. *See id.* at 28. "Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives." *Id.*

B. *Marketplace of Ideas Rationale*

The "marketplace of ideas"[223] is the core justification for freedom of speech in the American system[224] and is based on an inherent value of establishing truth in a democracy.[225] J. Milton, and later J.S. Mill, elaborated upon the value of freedom of speech as preventing errors through ignorance: The marketplace is needed for the competition of ideas, and suppressing any idea inherently risks elimination of the correct idea for others to identify.[226] This ideology espouses the view that truth can only be established through the incessant competition of ideas in an intellectual marketplace to ensure an effective democracy. The very nature of this model is based on the aggregate benefit to society of the free exchange of ideas.[227]

The marketplace of ideas has two inherent values: the social value of informed citizens and the individual value of citizenry having open access to the decision-making process.[228] The social value represents the benefits to society in reaching decisions from a multitude of tongues,[229] and the individual value stresses the importance of the government decision-making process being open to individual citizens[230] who have equal worth and right

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223. *See generally* JOHN STUART MILL, ON LIBERTY, *reprinted in* THE UTILITARIANS 475 (Dolphin Books 1961) (putting forth the central theory for the justification of free speech based on a marketplace of ideas).

224. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miller v. California, 413 U.S. 15 (1973), *reh'g denied*, 414 U.S. 881 (1973); New York Times Co., v. Sullivan, 376 U.S. 254 (1964); Brown v. Hartlage, 456 U.S. 45 (1982); Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Widmar v. Vincent, 454 U.S. 263 (1981); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); Time, Inc. v. Hill, 385 U.S. 374 (1967).

225. *See* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). *See also* Dennis v. United States, 341 U.S. 494, 584 (1951).

226. *See* JOHN MILTON, AREOPAGITICA (3d ed. rev. 1882).

227. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4 (1984). *See also* EMERSON, *supra* note 209, at 6-7. Mill's ideas are an attempt in explaining the merits of a marketplace of ideas. Suppressing a true opinion by censorship is in effect substituting the alleged false opinion with that of the censor's, with the latter being an "absolute certainty" and hence infallible. MILL, *supra* note 223, at 491. In censoring an opinion that is correct, the censors effectively miss the opportunity to exchange their potentially fallible opinion for the truthful one. *See id.* Additionally, if the censored opinion is true, the censors would lose the benefit of reinforcing their opinion by the obvious fallible opinion and may lose the opportunity of letting their potential truthhood be relegated to "dead dogma." *Id.* at 491, 509. The competition of opinions must be debated to form an understanding of a given opinion, whether fallible or truthful, and the merits and demerits of competing opinions whether true or false. *See id.* at 509-514, 521-524.

228. *See* Ingber, *supra* note 227, at 9-12.

229. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270; United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

230. *See* EMERSON, *supra* note 209, at 6-7.

in the participation of government.[231] This notion is a rejection of an authoritarian regulation of speech because only decisions reached through an individual's participation deserve obedience.[232]

If one believes that the purpose of free speech is to further self-government, then it is easy for government to regulate speech and only extend protection to that which is relevant to democratic decision-making.[233] However, if free speech is an ultimate quest for truth, then restrictions are not justified.[234] Once this benefit is regarded as accruing to society, speech can be regulated more easily by government under the guise of benefitting society through regulation,[235] and indeed this has happened in the United States.[236] Yet, determining the truth is an impossible task.[237] If determining truth is impossible, then by necessity, it must also be unattainable.

V. FAILURE TO ALLOW POLITICAL SPEECH IN ASIA

The numerous justifications used by scholars and judges in the United States for a liberal press system may not be as clear in the context of Singapore and Malaysia. While the marketplace rationale may be weak when applied in Malaysia and Singapore, the democracy rationale cannot be denied on the basis of national unity and public order even though there is a long history of racial animosities and conflict.

Both Singapore and Malaysia have long histories of political entrenchment. In Malaysia, the National Front coalition has held power since 1957.[238] In Singapore, the People's Action Party (PAP) has held power since 1959, through Lee Kuan Yew, former Prime Minister (1965-1990) and Goh Chok Tong, the present Prime Minister.[239] The laws of Singapore and Malaysia lead to journalist self-censorship and difficulty for opposition parties to gain prominence.[240]

Malaysia's and Singapore's constitutional histories clearly indicates that the framers prized free speech and democratic values, but with a view

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231. *See* Ingber, *supra* note 227, at 10 & nn.45-47.

232. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 991 (1978). *See also* Wellington, *supra* note 211, at 1135.

233. *See, e.g.*, Ingber, *supra* note 227, at 12; Bork, *supra* note 211, at 31.

234. *See* Ingber, *supra* note 227, at 12. *See also* MEIKLEJOHN, *supra* note 208, at 24-25.

235. *See* Ingber, *supra* note 227, at 4-5.

236. *See infra* text accompanying notes 344-362.

237. *See* Ingber, *supra* note 227, at 7-8 & nn.28-30.

238. *See Malaysia Human Rights Report 1996*, *supra* note 3.

239. *See Singapore Human Rights Report 1996*, *supra* note 3.

240. *See id. See also Malaysia Human Rights Report 1996*, *supra* note 3.

toward only protecting political speech.[241] Idid claims the press systems of Malaysia and Singapore cannot be compared to the U.S. system on a continuum from authoritarian to Western because the Western model concept is "ideological."[242] However, the ideologies of Singapore and Malaysia Constitutionalism are democratic; hence, the value of citizen involvement in government cannot be denied.[243]

Critics of Asian values have pointed out that censoring the media in Asia is self-serving because it is used by the government to cover their failings; effectively keeping the populace uninformed while propounding the government's legitimacy.[244] There can be no true debate between citizens when they are unable to espouse their views without government approval.[245] By limiting freedom of speech in Singapore and Malaysia, the government does not allow a domestic forum for debate but rather engages in a "self-righteous, paternalistic monologue where citizens are more likely to be on the receiving end of a sermon."[246]

Although limitations on free speech seem self-serving for the leadership, ethnic conflicts and social disruptions cannot be denied. The affiliations of different media sources are racially stratified between different ethnic groups within the states, and these groups' respective political parties have ownership.[247] To lessen inter-racial problems, Singapore and Malaysia have banned each other's newspapers for the past twenty years.[248] The press is viewed as having the potential to erode national cohesion by playing on racial and religious emotions of the diverse citizenry.[249]

Many racially motivated riots have occurred in Malaysia which lend support to the assertion that the press can promote social upheaval. The Maria Hertogh riots of 1950 were in response to reports of a Dutch girl being forced to practice another religion. Muslims felt this was religious injustice and the resultant violence ended in eighteen dead and 173 wounded.[250] In 1964, during Prophet Muhammad's birthday, thirty-six people were killed in riots fueled by a Malay newspaper accusing the

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241. This is demonstrated by reports of the Reid and Wee Commissions and a member of Singapore Parliament. *See* Hor & Seah, *supra* note 62, at 301-304. "Freedom of speech as an end in itself is unlikely to be very convincing in a situation where other public interests are adversely affected by speech." *Id.* at 302.

242. Idid, *supra* note 112, at 49.

243. *See supra* text accompanying notes 61-63.

244. *See* LINGLE, *supra* note 26, at 48-49.

245. *See id.* at 49.

246. *See id.* at 51.

247. *See* Idid, *supra* note 112, at 50.

248. *See* Lee Kuan Yew, *Singapore and The Foreign Press, in* PRESS SYSTEMS IN ASEAN STATES 117, 122 (1989).

249. *See* Nair, *supra* note 102, at 86.

250. *See id.* at 86-87.

Chinese minority of oppressing Malays.[251] In Malaysia, Chinese have a disproportionate amount of wealth compared to the Malay majority, and race riots ensued in response to economic discrimination during the late 1960s.[252]

In Singapore, the *Nanyang Siang Pau* glorified communism while depicting the government as anti-Chinese; the government saw this as an attempt to enhance racial and cultural stratification and detained three members of the editorial board.[253] The *Eastern Sun* was banned because it was funded by Communists through a Hong Kong organization which gave them financial backing for putting forth Communist views.[254] The *Singapore Herald*, which took an anti-government stance and was funded by foreign banks, was eventually closed down due to government pressure.[255]

The concern with Communist insurgency and racial riots seems warranted; however, Malaysia and Singapore in practice do not limit only these potentially harmful forces. They also limit opposition and good faith government criticisms. Dividing political speech from non-political speech may solve many problems in Malaysia and Singapore; however, when potential political speech has appreciable effects on social order and the democratic process,[256] the problem multiplies.[257]

In Singapore and Malaysia the press has a duty to ensure responsible reporting. However, in countless instances, Singapore and Malaysia take the duty a step beyond responsible reporting and impose a duty on the press and others to ensure a stable democracy. This duty to ensure a stable democracy is problematic because the scope of allowable comments is inconsistent, and ensuring a stable democracy has effectively meant no criticisms of government.

A. *Inexcusable Contempt Standard*

The United States clearly allows a greater latitude of comment on the

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251. *See id.* at 87.

252. *See Chinese Judge, Malaysian Judgement. Malaysia Bars Taiwan-produced TV Program 'Judge Pao' by Using Old Anti-Chinese Law*, ECONOMIST, Oct. 21, 1995, at 40.

253. *See* Anjali Mohan Ramchand, Note, *Freedom of The Press: Regulation Under The Newspaper and Printing Presses Act, 1974*, 11 SING. L. REV. 130, 130-31 (1990).

254. *See id.* at 131.

255. *See id.*

256. This could be a simple hypothetical: The press, although intending to tell the truth, receives a false report about a scandal by a prominent, omniscient leader who is well respected. The press breaks the story, the politician is not elected. Does this serve the democratic process if repeatedly tolerated?

257. *See* Wellington, *supra* note 211, at 1113-16 (discussing effects of misleading political speech in a democracy).

judiciary than do Singapore and Malaysia.[258] However, the impact of judicial decisions is sure to cause displeasure and hatred toward the administration of justice in any government, as it did after the Rodney King verdict. Given the history of social unrest in Malaysia and Singapore, open criticism of judges could arguably destroy social order. However, in contempt of court proceedings in both Malaysia and Singapore, the courts are concerned with lowering the stature of the justices in light of "local conditions" that may potentially turn hostile.[259] Although the justice's character may be diminished in the eyes of society, these criticisms may not necessarily lead to racial riots and religious animosities. Allowing criticism does not mean the judge is favoring a particular race or religion.[260] Surely, the fair administration of justice is needed for the public to have confidence in the judiciary. However, when fairness is determined by the judiciary, and whenever criticized — even in the broadest sense like the *Lingle* case — it is labeled contempt, the court is playing the wrong card in racial animosity control. Ideas will be suppressed and erupt all at once instead of being dealt with in an unbiased manner in a public forum.[261]

The standard of looking at the local conditions may be workable for change in Singapore and Malaysia contempt of court proceedings. The conditions may initially only include direct reference to racial or religious

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258. *See* Garland v. State, 325 S.E.2d 131, 134 (Ga. 1985), *aff'd*, 332 S.E.2d 45 (Ga. Ct. App. 1985) (holding that criminal contempt not supported where attorney said judge conducted "sham proceeding" outside the courtroom and violated ethical rules). In *Bridges v. California*, 314 U.S. 252 (1941), the Supreme Court determined that criticism of a judge during a proceeding outside the courtroom does not override the protection of free speech. "The likelihood . . . that a substantive evil will result [from judicial criticisms] cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial.'" *Id.* (citing Whitney v. California, 274 U.S. 351, 374 (1927) (Brandeis J., concurring)). The United States test was historically concerned with whether or not the criticism creates a "threat of clear and present danger to the impartiality and good order of the courts." *See id.* at 261-65. *See also* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (holding where newspaper satirized justice as being sympathetic to a criminal, freedom of public comment still prevails). *See also* Wood v. Georgia, 370 U.S. 375 (1962) (where police officer was protectd even though he equated the grand jury to the KKK, and issued press statements claiming judge was partaking in judicial discrimination against minorities). In *Brutkiewicz v. State*, 191 So. 2d 222 (Ala. 1966), vulgar statements by district attorney pertaining to judge uttered during recess were not contempt. *But see* State v. Gussman, 112 A.2d 565 (N.J. 1955) (upholding contempt charges when no public interest in defendants accusations). This standard is more focused on the right of the criminal in the administration of justice in not having the trial influenced by outside speech. *See also Pennekamp*, 328 U.S. at 346, 348 (holding that judge's remedy lies in defamation like all other public servants when a judge is criticized after judgment).

259. *See supra* text accompanying notes 114-139.

260. *See* Hor & Seah, *supra* note 62, at 308-310 (arguing that not allowing fair comment because it was not allowed at common law is improper).

261. *See supra* text accompanying notes 212-14.

bias as the determiner of contempt of court that lowers the authority of the justices in the public's eyes — although much more protection is needed. Public criticism should be allowed on the merits of judicial acts when there is no direct reference to race or religious bias in the judicial decision. Because of racial animosities, America has dealt with the problems in a similar way, and when they are not discussed, they only tend to become subversive.[262]

B. *An Unjust Defamation Standard*

The United States', Singapore's, and Malaysia's views on protecting public officials from potentially damaging speech are diametrically opposed. In the U.S. Supreme Court decision of *New York Times,* the Court held that the Constitution protects speech that is a defamatory falsehood relating to public conduct unless actual malice is shown.[263] Hor opines that the *New York Times* rule was rightfully rejected in *Lee Kuan Yew v. Jeyaretnam* because the U.S. rule has failed to protect the reputation of individuals because malice is so hard to prove.[264]

The defamation standards in Singapore and Malaysia put the right of public figures to their integrity on the same level as the private individual's right to integrity. The impact of this may certainly have a chilling effect on public discourse, but it may also allow people who are not as willing to put their reputation on the line a chance to govern or have public influence. But what good is this person if their integrity is that of an eggshell, not allowing

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262. This may be a misleading model because America is indeed heterogenous but is bound by a dominant race and largely dominant language, whereas Singapore and Malaysia are not. *See* S. Jayakumar, *The Singapore Constitution and the United States Constitution, in* CONSTITUTIONALISM IN ASIA 181, 185 (Lawrence W. Beer ed., 1979).

263. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (involving accusations on a public official for mistreating black students in Georgia). The United States has a "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. Factual error does not remove the shield of constitutional protection. *See id.* at 273. The protection of this sort of speech is only lost when made with "'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. *See, e.g.,* Henry v. Collins, 380 U.S. 356 (1965); Rosenblatt v. Baer, 383 U.S. 75 (1966); St. Amant v. Thompson, 390 U.S. 727 (1968).

264. *See* Hor & Seah, *supra* note 62, at 316. In *Garrison v. Louisiana,* 379 U.S. 64 (1964), the court stated that "false statements made with reckless disregard of the truth do not enjoy constitutional protection." *Id.* at 76. This was refined to require that "reckless disregard" must include "serious doubts as to the truth of . . . publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). This must be proved with "convincing clarity," a standard higher than preponderance of the evidence. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 331-32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967).

criticism? This is certainly an ideal that countries may view differently, but in a democracy, the government in its governing capacity must be checked and criticized to ensure the legitimacy of governmental actions.[265]

A rule that protects the integrity of public officials may be desirable in theory, and arguably the United States has gone overboard in protecting comments on government officials by requiring convincing clarity of malice, but at the opposite end of the spectrum, the courts of Malaysia and Singapore do not consider the intent of the person uttering the word.[266] A strict liability standard is imposed in Singapore and Malaysia even though a negligence standard could easily strike a balance between ensuring government legitimacy in the public eye through free speech while protecting the character of the hypothetical omniscient politicians that do not want to serve the public because of the risk of ruining their character.

C. *Responsible Journalism & Content Regulation — Not an Excuse*

A primary rationale for regulating media in Singapore and Malaysia is its great influence on the citizenry of the nation. The media shapes the values of the citizens in a way that does not conform to those governments' nation building goals; it furthers subversive tendencies, and it can influence racial and religious animosities which cause riots.[267] Mahathir Mohamad's view on press freedom is quite clear: The choice is specifically up to each country depending on the social ability to adopt a certain press system whether based upon a libertarian, authoritarian, communist, or social responsibility model.[268] Indeed, many Asian nations share this view on the role of the press in their countries.[269]

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265. *See supra* text accompanying notes 212-22.

266. *See supra* text accompanying notes 158-68.

267. *See Brigadier-General Lee Hsien Loong speech to 40th World Congress of the International Federation of Newspaper Publishers in Helsinki 1987*, STRAITS TIMES, May 31, 1987, *reprinted in* 11 SING. L. REV. 130 n.2 (1990). *But see* G.P. Daniel, *It Is the Laws that Put Fear Into Us*, NEW STRAITS TIMES (Malaysia), Feb. 14, 1996, at 9. *See also* A. Kadir Jasin, *ASEAN Stand on Cambodia Commendable*, NEW STRAITS TIMES (Malaysia), July 13, 1997, at 13 (supporting the infusion of values in responsible reporting but later stating: "As we approach a new millenium and leave further behind the baggage of the Emergency and Cold War, we should guard more jealously our freedom and liberty, failing which the war we fought would end up a lost cause and the caring society we cherish will remain an illusive dream.").

268. *See* Mahathir Mohamad, *The Social Responsibility of The Press, in* PRESS SYSTEMS IN ASEAN STATES 107, 108-109 (1989).

269. "The promotion and preservation of political stability, rapid economic growth, social justice and greater regional cohesion should and will be the main prioriy of the ASEAN press." *Final Report of the Consultation on Press Systems in ASEAN, Jakarta, Indonesia, 23-26 August 1988, reprinted in* PRESS SYSTEMS IN ASEAN STATES 103, 103 (1989). *See also id.* at 105 (stating that the primary functions of the ASEAN press include: 1) "nation

The idea of the press being responsible to society is seemingly an Asian value ideal: People in societies must uphold their duty to the society as a whole because of the individual benefits received from living in the society.[270] Malaysia has a philosophy, called *Rukunegara*,[271] that prizes the order and well-being of a very diverse nation. The role of the press in Singapore is also considered an integral part in nation-building by educating the populace on values.[272]

Mahathir Mohamad posits the proposition that countries such as Malaysia and Singapore are constantly living in clear and present danger, and opines that press limitations must consider these historical underpinnings.[273] In theory, this may seem justified, but in application the contention does not hold true. Although the Singapore and Malaysia limitations in the name of national security and public order would prohibit speech that creates imminent violence, it also restricts speech that is nowhere near creating racial riots, and in fact, the speech abridged by this rationale may have helped quell tensions.[274] For example, denying circulation of Jehova's Witness publications because they may threaten war efforts is not an imminent threat to the security of Singapore.[275] If any threat exists, it is the spread of pacifist ideals that may challenge the apparent extreme political realism that was exemplified by the court.

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building;" 2)"promote and enhance relations between ASEAN member countries;" 3)"mould a national identity;" 4)"promote social harmony;" 5)"explain public issues and policies;" 6)"inform and educate;" and 7)"exercise self-restraint and good sense so as not to cause misunderstanding or tension between different ethnic, racial and religious groups"). *See also* Idid, *supra* note 112, at 51-54.

270. *See* Mohamad, *supra* note 268, at 116.

271. What does this term actually mean? Idid says it encompasses:

> 1. [A]chieving a greater unity of all her peoples; 2. [M]aintaining a democratic way of life; 3. [C]reating a just society in which the wealth of the nation shall be equitably shared; 4. [E]nsuring a liberal approach to her rich and diverse cultural traditions; and 5. [B]uilding a progressive society that shall be oriented to modern science and technology. To achieve these objectives, Malaysians are urged to pledge themselves to the five principles of the Rukunegara: 1. Belief in God. 2. Loyalty to the King and country. 3. Upholding the consitution. 4. Rule of law. 5. Good behaviour and morality.

Idid, *supra* note 112, at 49.

272. "[T]he press should avoid portrayal of situations as the norm which should not be accepted as the norm. For instance, homosexuality and living out of wedlock . . . should not be presented as acceptable . . . in the Singapore press." Nair, *supra* note 102, at 89.

273. *See* Mohamad, *supra* note 268, at 108-09. But he also points out that he is a "firm believer in the greatest freedom consonant with the vital interests of society," and not an apologist for repressive regimes. *Id.* at 109. Additionally, Mohamad freely criticizes the communist and authoritarian models. *Id.* at 109-11.

274. This is clearly the case in *Aliran* and Jehovah Witness limitations. *See supra* text accompanying notes 147-57.

275. *See supra* text accompanying notes 154-57.

Although criticisms of the government purportedly do not constitute sedition, mere criticisms without racial or religious pronouncements have been held likely to cause disorder because of their "seditious tendency," even if completely true.[276] Such practices will simply lead to an entrenched discontent for the government and will resurface time and again unless the debates are brought to public attention and openly discussed. The laws were designed to ensure that racial and religious conflict stay at a minimum, but they should not be used to ensure political change does not happen, and that people will be punished for challenging the views held by government leaders if change is advocated.

To develop a vague concept of responsible journalism, which is manifest in the laws of Singapore and Malaysia, laws must be worded in a clear and understandable manner for the populace to take notice of them and for the laws to be viewed as legitimate.[277] A cultural sense (Asian values) of a responsible press cannot be formed without freedom of expression. Culture and norms are not static, and restricting freedom of speech by calling for social order and unity ossifies the leadership's norms in lieu of the people's right to cultural development, which is clearly not static.[278]

In the Malaysian *Aliran* case, the Minister banned a publication that was aimed at promoting the integrity and national unity of Malaysia according to the unique philosophy of nation-building — *Rukunegara*.[279] Although the publication cherished Asian values, it was arbitrarily denied publication based on the Minister's undisclosed bias and favoritism that the court found to be legitimate. For people to enjoy Asian values as a community, they must be allowed to exercise their individual right to come

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276. *See* Pub. Prosecutor v. Ooi Kee Saik & Ors [1971] 2 MLJ 108 (Malay. 1971), 1971 MLJ LEXIS 59, at *16-17. *See supra* text accompanying notes 159-175.

277. *See* Lyndell V. Prott, *Cultural Rights as Peoples' Rights in International Law, in* THE RIGHTS OF PEOPLES 93 (James Crawford ed., 1992).

278. All the religions practiced in Southeast Asia meet and many times exceed the rights set forth in the Universal Declaration on Human Rights. *See* Asoka De Z Gunawardana, *An Asian Perspective of Human Rights*, 1994 SING. J. LEGAL STUD. 521, 522 (1994). Additionally, religions are adaptable to change and may be subject to change when society decides adaptation is necessary — Islam, Confucianism and Buddhism are no exceptions. *See* Coulson, *supra* note 18, at 206-209 (stating that *itjihad* has been used to bring the *Qur'an* in conformity with changing views of society). *See* CH'EN, *supra* note 19, at 70-71 (noting that Buddhism and Confucianism when merged have been reconciled and adapted to fit societal needs). *See* Ching, *supra* note 19, at 65 (Confucian Analects support proposition that reverence becomes hypocritical without individual realization). *See also* William Theodore de Bary, *Human Rights — An Essay on Confucian and Human Rights, in* CONFUCIANISM: THE DYNAMICS OF TRADITION 109, 112 (Irene Eber ed., Macmillan 1986). *See also* Donald K. Emmerson, *Can East Meet West on Human Rights?*, L.A. TIMES, April 22, 1996, at B:5 (accounting attempts to reconcile Muslim, Buddhist, and Confucian ideals in everday life).

279. *See supra* text accompanying notes 147-53.

together as a collective and determine their community rights and values.[280] Fleeting governments are not the sole legitimators of rights, but rather it is the underlying collection of the people's legitimacy that determines rights.[281]

Irene Fernandez was prosecuted in Malaysia under the Printing Presses and Publications Act of 1984 (Rev. 1987) for allegedly publishing false reports about conditions that lead to deaths at alien detention camps.[282] The report details the inhumane conditions of detention centers, but does not point to religious or racial causes within the Malaysian government.[283] The report is centered on remedying the mistreatment and horrors of the detention centers, and the end of the report delineates positive measures to remedy the problem. Although a Board of Visitors was appointed to investigate the conditions alleged by Ms. Fernandez, no misconduct or ill treatment was found. Ironically, the board recommended that improvements be made in health and sanitation facilities, and the Home Affairs Department announced they would seek funds for improvement.[284] When Ms. Fernandez called attention to the horrific conditions, the government indirectly admitted faults in the detention centers, but the government would not rescind her prosecution because her report was allegedly irresponsible. Ms. Fernandez's report was an attempt to alleviate the racial animosities directed at immigrants; however, it was labeled false under a law designed to ensure that racial riots and hatred did not flare up within the country. This is clearly a case in which the law was not "necessary" or "expedient" in preserving the security or public order of the nation.[285]

More recently, two developments have raised concern in the international community over injustice in the Malaysian judiciary. Lim Guan Eng, DAP Member of Parliament, received an eighteen month jail sentence

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280. *See generally* Gillian Triggs, *The Rights of 'Peoples' and Individual Rights: Conflict or Harmony, in* THE RIGHTS OF PEOPLES 141, 145 (James Crawford ed., 1992).

281. *See generally* Richard Falk, *The Rights of Peoples (In Particular Indigenous People), in* THE RIGHTS OF PEOPLES 17 (James Crawford ed., 1992).

282. For a detailed account of the judicial procedures surrounding detainment under the Act, and a description of particulars surrounding the charges, see George E. Edwards, *Freedom of Expression and the Right to a Fair Trial in Malaysia: The Prosecution of Human Rights Worker Irene Fernandez,* 2 HUM. RTS. SOLIDARITY: NEWSL. ASIAN HUM. RTS. COMM'N 34 (Sept. 1996).

283. *See Press Statement on Abuse, Torture and Dehumanised Treatment of Migrant Workers at Detention Centres,* Tenaganita Women's Force, July 27, 1995, *reprinted in* George E. Edwards, *Observers Report, Deputy Public Prosecutor of Malaysia v. Irene Fernandez: Charge of Maliciously Publishing False News in Contravention of the Malaysian Printing Presses and Publications Act 1984,* Aug. 1996 (HUMAN RIGHTS WATCH ASIA) (accusations pertaining to the government are general accusations of guard corruption).

284. *See Malaysia Human Rights Report 1996, supra* note 3.

285. Necessary and expedient are constitutional requirements. *See* FED. CONST. OF MALAY. art. 10(2). *See supra* text accompanying notes 56-60.

for sedition.[286] He received the sentence and fine after publicly criticizing the government's handling of allegations of statutory rape against the former chief minister of Malacca.[287] In response to the sentence handed down, a large group of respected lawyers, including the former Lord President of the Federal Court, summarily denounced the sentence as being a message that no one can criticize the judiciary.

Dato' Param Cumaraswamy, the Special Rapporteur of the UN Commission of Human Rights on the Independence of Judges and Lawyers, was sued by two companies over an article which appeared in the November 1995 issue of *International Commercial Litigation*.[288] The libel suit is centered on Param Cumaraswamy's comments regarding his investigation of complaints that several corporations were influencing decisions made by the Malay Judiciary.[289] Although his comments related to official duties of the UN, and were therefore clearly entitled to protection,[290] the Malaysian Judiciary upheld the fine levied upon him. The Federal Court ruled that the scope of Param's mandate relating to his mission is determined by the jurisdiction where the libel suit is brought.[291] However, the International Court of Justice, the United Nations Economic and Social Council, and Malaysian lawyers all see the court as derogating from well-established

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286. *See Former DPM Sings New Tune for Guan Eng, Signs Petition,* NEW STRAITS TIMES (Malaysia), Sept. 17, 1998. He was prosecuted under the Printing Presses and Publications Act of 1984 and Sedition Act of 1948. *See id.*

287. *See Amnesty Criticizes Malaysia Over Sedition Case,* REUTERS NORTH AMERICA WIRE, Apr. 6, 1997.

288. *See, e.g.,* David Samuels, *Malaysian Justice on Trial,* INT'L COM. LITIG., Nov. 1995, at 4; Ruslaini Abbas, *Judiciary Won't be Dictated to by Anyone, Says Judge,* NEW STRAITS TIMES (Malaysia), Oct. 2, 1998, at 5; *See Param's Case: UN Commission Concerned Over Court's Decision,* NEW STRAITS TIMES (Malaysa), Sept. 7, 1998, at 5.

289. *See* LAWYER TO LAWYER NETWORK, *Action Update, Dato' Param Cumaraswamy - Malaysia UN Special Rapporteur on the Independence of Judges and Lawyers* (Aug. 1998) <http://www.lchr.org/121/cumar898.htm> [hereinafter *Action Update*].

290. Special Rapporteurs are accorded:

> in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, art.VI (b), *reprinted in* 43 A.J.I.L. Supp. 1, at 1 (1949). Malaysia has been a party to this convention since 1957. *See* LAWYER TO LAWYER NETWORK, *supra* note 289.

291. *See* Ruslaini Abbas, *Param Denied Leave Over Immunity Issue,* NEW STRAITS TIMES (Malaysia), Feb. 20, 1998, at 13. *See also* Ruslaini Abbas, *Question of Law on Param's Immunity,* NEW STRAITS TIMES (Malaysia), Feb. 19, 1998, at 8.

international law.[292]

D. *Justifying the Limitations on Foreign Influence*

Singapore and Malaysia will clearly limit attempts of foreigners and communists to influence the opinions of their populace.[293] The separation of Singapore from Malaysia exemplifies the notion that keeping racial tension low has been necessary to prevent security encroachment on the state, *vis-a-vis* ethnic conflicts which may cause separations. The foreign press in Singapore is allowed to take any ideological viewpoint when reporting outside of Singapore; but within Singapore the foreign press is not allowed to play the adversary to government as is done in the United States.[294] However, Singapore has attempted to remove foreign influence in domestic affairs and to concurrently reduce the inherent bias of the press by loosening restraints on the free flow of information by allowing reproduction of publications with certain restrictions.[295]

Lee Kuan Yew firmly believes that the U.S. model is not a universal one, and that the role of the press in society relies on "different historical experiences, political systems, and . . . national temperaments."[296] He is referring to Singapore's history under British colonial administration where the Communist[297] party would have infiltrated and dominated Singapore and Malaysia just as it did in China; he points out that Communist views should be left to the political arena and not the press.[298] This is a clear indication of the limits that have been and will continue to be imposed on political speech — not only in Singapore and Malaysia, but also in the United States.

The United States, Singapore and Malaysia limit the influence of

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292. *See ICJ Advisory Opinion on the Immunites of Special Rapporteurs*, 85 I.L.R. 301 (Int'l Ct. of J. Dec. 15, 1989). *See also IBA Head Welcomes UN Decision on Param's Case*, NEW STRAITS TIMES (Malaysia), Aug. 12, 1998, at 2 (showing support for Param by International Bar Association). *See Param Issue: Council Hails Move*, NEW STRAITS TIMES (Malaysia), Aug. 18, 1998, at 2 (showing Malaysian Bar Council support for the International Court of Justice (ICJ) opinion and belief that he is protected by article VI, section 22 of the 1946 Convention). The UNESC has referred the case to the ICJ. *See* Abbas, *supra* note 288. The Secretary General of the UN has also issued two certificates claiming Param's immunity. *See id.*

293. *See* Nair, *supra* note 102, at 87.

294. *See* Lee Kuan Yew, *supra* note 248, at 122-123. "The terms are that they should report us as outsiders for outsiders, i.e. [sic] do not become a partisan in our domestic debate. If they do not want to accept these conditions, they do not have to sell in Singapore." *Id.* at 123.

295. *See id.* at 124.

296. *Id.* at 117-19.

297. Malaysian Communist Party (MCP) in the 1950s - 1960s. *See id.* at 118.

298. *See id.* Although the media is free in India and Sri Lanka, he points to the failure of the liberal system in these nations because of their heterogenous, multi-racial societies. *Id.*

foreign propaganda in differing degrees.[299] The United States does not limit the content of foreign media, but rather ensures that the reader understands the ideological basis of the source.[300] In Malaysia and Singapore, the power of regulation is given to Ministers and officials to completely ban or regulate.[301] Under the printing press acts, these officials continually ban publications that are clearly marked as foreign, in effect belittling the intellect of the populace. This form of regulation will not ensure that the nation will not go astray, but conversely, the regulations will create a yearning for information. People must be able to explore alternative thoughts and visions to foster individual development when it does not threaten the security or well-being of others in society.[302]

E. *Sedition: National Security or Government Insecurity?*

Political speech is a "double-edged sword;" it is beneficial to democracy, but it can create public disorder — especially when there is a conflict between political factions in a country.[303] However, the limits imposed on speech seem to favor the national unity as determined by the leadership. Comparing the *Manjeet* and *Mohamad* cases reveals this bias. Both cases alleged judicial ignorance, yet Prime Minister Mahathir was not prosecuted while Manjeet Singh Dillon was prosecuted. The difference in result is attributable to the court's decision that Manjeet's words were "violent" and that the Prime Minister's words were mere "confusion."[304]

This contradiction is clarified by looking at *Public Prosecutor v. Ooi Kee Saik & Ors*,[305] where the court adopted the idea that legislators had a divine, unquestionable right; however, in a later case, *Public Prosecutor v. Oh Keng Seng*,[306] the court found the rationale of the Sedition Act to be the preservation of public order. These cases show the convenience of shifting values to legitimatize government ossification.

Ensuring that unfettered speech freedom is protected would free the courts from deciding whether particular speech has social value — an issue with pornography. In fact, such a decision is effectively impossible because

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299. For a discussion on Malaysian and Singaporean law, see *supra* text accompanying notes 64-207. For a discussion on United States law, see *supra* text accompanying notes 208-37.

300. *See, e.g., supra* text accompanying notes 44-298; *infra* text accompanying notes 302-62

301. *See supra* text accompanying notes 64-91.

302. *See* Redish, *supra* note 209 (expressing the value of individual development).

303. Hor & Seah, *supra* note 62, at 332. *See also* MILL, *supra* note 223, at 68.

304. *See supra* text accompanying notes 125-139.

305. [1971] 2 MLJ 108, 111, 135 (Malay. 1971), 1971 MLJ LEXIS 59, at *22. *See supra* text accompanying notes 166-171.

306. [1977] 2 MLJ 206 (Malay. 1977), 1976 MLJ LEXIS 220.

everything people consume has some redeeming social value to them or they would not consume it.[307] Malaysia and Singapore have failed to allow beneficial political speech in countless areas while concomitantly restricting obscene speech.

The expansive limitations on free speech in Malaysia and Singapore are effective in suppressing critical speech and at the same time equally efficient in limiting speech that will questionably corrupt or change the morality of the societies. The requirement of registration and censorship of foreign media sources, and other limitations in the name of morality and public order, equally quell the voices of opposition in Singapore and Malaysia. Although these laws may pass current constitutional muster, the question remains whether or not this system is warranted. If not, should it be changed to resemble that of the United States?

The United States is no stranger to abridging political speech based on national security and concerns relating to public order. Additionally, the United States has ironically protected non-political and arguably socially harmful speech — *e.g.*, pornography — which negatively effects women throughout the United States and the world everyday. Dr. Mohamad believes that the legitimacy of codes is based on morality, which differs from country to country, not only in regards to obscenity principals, but unfettered individualism as a whole.[308]

Are all three nations wrong? Or, alternatively, is any one nation correct?

VI. THE U.S. MODEL — NOT A PANACEA

The U.S. model is seemingly just and desirable; however, it is not a cure for all the world. The concept of the marketplace of ideas has failed because truth cannot be substantiated, because the speech form tends to be regulated instead of the substance, and because of unequal access to media sources. These problems become substantial when looking at the pervasiveness of pornography and the inherent subjective bias of regulating such expression. Additionally, the U.S. model, like its Asian counterparts, has failed to protect political speech when it threatens the status quo. The United States uses measures such as sedition and alien acts, the clear and present danger test, and statutes that limit the influence of foreign media in domestic print and broadcast to restrict free speech.

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307. *See* Bork, *supra* note 211, at 29.

308. *See* Mohamad, *supra* note 268, at 108.

A. *Problems in the U.S. Marketplace*

1. *Truth Only Discoverable in Theory*

The idea that a multitude of tongues will arrive at the truth has been criticized by many espousing Asian and Western values alike. Few people believe in objective truth today, although it is crucial to the classic marketplace idea.[309] Truth must be discoverable in debate, and it must be capable of substantiation. Truth prevailing in a marketplace is unprovable without substantiation,[310] and it must be objective, not merely subjective. A subjective "truth," viewed with the lenses of social status and experience, will lead to irreconcilable differences because perceptions are different, and will ultimately lead to the dominant truth being that of the power holder.[311] Proponents of Asian values, within the context of free speech, claim that their truth is better than the media's truth although neither can be substantiated. Mahathir Mohamad criticizes the concept of truth-prevailing with the example of what the multitude of voices have said about Arabs in the United States.[312]

2. *Regulating Form Instead of Substance*

Individuals may not be able to differentiate between the form and substance of competing opinions.[313] Mahathir points to the assumption of social stability in the liberal model, but in reality one true or false word could lead to serious calamity, as evidenced by the United States' development of the clear and present danger test.[314] In the U.S. courts, the determination of what is protected and what is not protected is biased in favor of those with wealth and power when U.S. courts purport application of "neutral" principles such as protecting speech rather than conduct.[315]

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309. *See* Ingber, *supra* note 227, at 25 n.121.

310. *See id.* at 15.

311. *See id.*

312. *See* Mohamad, *supra* note 268, at 113. The problem Mahathir encounters with the philosophy of Mill is that man is as irrational as he is rational and that people do not go in relentless search of the truth, evidenced by the consumption of tabloids in Britain. *See id.* at 112. However, the utility of the self-development rationale clearly explains the tabloid consumption, and the seriousness of such publications is clearly questionable to the reader. *See supra* note 210 (explaining importance of self-satisfaction in free speech).

313. *See* Ingber, *supra* note 227, at 15-16.

314. *See* Mohamad, *supra* note 268, at 114.

315. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 188-220 (1985). *See also* Ingber, *supra* note 227, at 20. In draft cases the focus should not be on whether they can form a demonstration in the city, but should be on whether there should be a draft. *See id.* Limiting unfavorable political speech has led to the focus being on the procedure of the

"Consequently, the very market process reputed as the only way to determine which perspective should win merely reflects the preexisting perspectives of the market participants."[316]

3. *Access is Unequal in the Market*

Public forums give low-status individuals, who cannot pierce the mass media veil, an opportunity to be heard.[317] But courts in the United States have restricted this means of communication of the less able in the marketplace of ideas.[318] Monopolies, economies of scale, and unequal resources have made matters difficult for people hoping to participate in mass communication.[319] Mahathir points out that the liberal model falsely assumes that the press will adhere to ethics and have a drive towards public good; he points to the ex-publisher of the Wall Street Journal, who said "'[a] newspaper is a private enterprise owing nothing whatsoever to the public . . . [and is] affected with no public interest.'"[320] Government communications dominate the marketplace, and the mass media will not disseminate dissident views which leaves challengers to the established status quo with only public forums.[321] Additionally, the free speech system is biased in favor of corporate interests and people who have access to the media.[322] Singapore responded to the access problem by making amendments to the Newspaper and Printing Presses Act, which would allow more opinions to be viewed while eliminating a certain amount of profit motive.[323]

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marketplace and not the substance of social problems. *See id.* The distinction between "fighting words" and the "provocative speaker hostile audience doctrine" from that of the marketplace of ideas free speech has also been criticized because of its arbitrariness. *See id.* at 32-36. The speech that does not promote rational discourse is differentiated from free speech in a contradictory manner. "The distinction merely seems, at times, to forbid 'low' styled speech from a 'low' statured speaker. This 'class' focus only further entrenches a bias for established norms and respectable proponents." *Id.* at 34.

316. Ingber, *supra* note 227 at 26-27. *See* Jakob Oetama, *The Press and Society*, *in* PRESS SYSTEMS IN ASEAN COUNTRIES 135, 138 (Achal Mehra ed., 1989).

317. *See* Ingber, *supra* note 227, at 41.

318. *See id. See, e.g.*, Hague v. Comm. Indus. Org., 307 U.S. 496, 516 (1939); Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39, 48 (1966), *reh'g denied*, 385 U.S. 1020 (1967).

319. *See* Ingber, *supra* note 227, at 38 & n.188.

320. Mohamad, *supra* note 268, at 113-114 (pointing also to violence and pornography in the U.S. film industry).

321. *See* Ingber, *supra* note 227, at 40.

322. *See* Trudy Lieberman, *Censorship That Dare Not Speak Its Name*, NATION, June 23, 1997, at 10.

323. *See* Nair, *supra* note 102, at 90. The Newspaper and Printing Presses (Amendment) Act, effective Sept. 1, 1986, allowed the Minister for Communications and Information to restrict the sales and distribution of foreign publications which have "engaged in the domestic politics of Singapore." *Id.* However, it allows reproduction of the restricted publications if

An idea of equal access has also been criticized on the international level as simply imposing Western notions of the way rights should be determined (normative basis) which ignores many problems of states throughout the world.[324] Scholars criticize the human rights objective of the United States as a means of achieving political objectives.[325] For example, the United States is unconcerned with human rights or democracy in the Middle East and does not attempt to export its values unless its vital interest of maintaining a stable government structure from which it can ensure oil interests is threatened.[326] Muzaffar, who was detained in 1987 under ISA and who has had the *Aliran* censored by Malaysian press laws, nevertheless criticizes Amnesty International for irresponsible reporting surrounding the Persian Gulf crisis.[327]

Mahathir Mohamad has clearly upheld the denouncement of unfettered individualism and the importance of the individual's responsibility to others in the community.[328] Mahathir proclaims the "social responsibility" model

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no profits are made and other conditions are met, including removal of advertisements; these reproductions can be made and circulated and sold in Singapore only. *See id.* When the amendment took affect in February of 1988 the *Far Eastern Economic Review* was reproduced and available under this statutory guise. *See id.*

324. One protest of universal rights is the manner in which they are enforced by Western Nations, and not necessarily the lack of universality common to all citizens, as put forth in the Universal Declaration of Human Rights (UDHR). *See* Gunawardana, *supra* note 278, at 522. *See also* CHANDRA MUZAFFAR, HUMAN RIGHTS AND THE NEW WORLD ORDER 4-5 (1993). The United Nations Development Programme (UNDP) has been criticized as not effectively measuring rights of developing nations in its Human Freedom index on several grounds: 1) it has a normative Western slant, 2) it does not measure subsistence rights of individuals and 3) it is biased toward individual rights. *See id.* One example Muzaffar gives is that out of the 40 measuring tools to determine the status of human rights one of them is the right to engage in homosexual activity which is a normative determination not in accord with Asian Cultural traditions. *See id.* Another is the right to determine the amount of children, but in many countries there are serious demographic problems that make such regulations imperative for the countries well-being. *See id.* A third example is that individual rights are an entrenchment of the West left over from the fight over the dominance of the Medivial European Church, but in Asia and Africa the struggle is to end colonialism and Western dominance. *See id.*

325. *See* Gunawardana, *supra* note 278, at 528. *See also* Association of Southeast Asian Nations Declaration (Bangkok Declaration) ¶ 4, Aug. 8, 1967, *reprinted in* 6 I.L.M. 1233 (1967).

326. *See* Mahbubani, *supra* note 5, at 9. *See also* Kausikan, *supra* note 5, at 24.

327. *See* Mahbubani, *supra* note 5, at 9. However, Muzaffar criticizes the Internal Security Act: "[U]nder the ISA the lie is protected. It is sanctified. It is made sacrosanct. This is the ultimate power of the lie: it crucifies the truth." *Id.*

328. *See* Mohamad, *supra* note 268, at 107. Mahathir Mohamad has stated:

> 'In the beginning, there was Individual Man, living in splendid isolation, doing 'his own thing', [sic] behaving exactly as he pleased, unfettered by a single rule, regulation, or code of behaviour of any sort.' In fact, from the beginning, there never was this Individual Man, born free, living completely unfettered in isolated splendour. From the beginning of time man lived in groups — first, the

of the press, which takes the rights of society (strong in communist models) and the rights of the individual (strong in libertarian models) and blends the two together to come up with a qualitative balancing of the two.[329] His clear philosophy is that the media must be responsible to society and must not possess unchecked power, similar to the government not having unchecked power.[330] Lee Kuan Yew supports this contention by espousing the goal of creating a system of shared values and a single national identity while embracing divergent cultures and religions.[331]

4. *Lack of Moral Justice in the United States*

The theory of the First Amendment under which most pornography is protected from governmental restriction proceeds from liberal assumptions that do not apply to the situation of women.[332]

The marketplace of ideas has clearly failed in protecting over half of the U.S. population. The U.S. test of obscenity is not concrete and is ultimately up to the majority of the Supreme Court, which has substantial trouble determining the standard.[333] Justice Harlan once said that obscenity determinations must be "pricked out on a case-by-case basis."[334] U.S. courts, although seeming to promote the free exchange of ideas, refuse to protect free speech based on what they arbitrarily find objectionable.[335]

> family, then the village, then the district, then the state — because he was instinctively gregarious and because he needed the security and the services and values that only living in a group could provide.

Id.

329. *See id.* at 114-15. In his writings Mahathir clearly espouses his belief that free press is conducive to good democratic government — that which most Westerners believe. But he is also quick to qualify the free press: "The media must be given freedom. But this freedom must be exercised with responsibility." *Id.* at 115.

330. *See id.* at 115-16.

331. *See* Lee Kuan Yew, *supra* note 248, at 119.

332. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 204 (1989) (footnote omitted). *See generally* Baker, *supra* note 210 (summarizing these liberal assumptions).

333. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) *reh'g denied*, 414 U.S. 881; Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Marcus v. Search Warrants of 104 East Tenth Street, 367 U.S. 717 (1961); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Blount v. Rizzi, 400 U.S. 410 (1971); Jacobellis v. Ohio, 378 U.S. 184 (1964).

334. Jacobellis v. Ohio, 378 U.S. 184, 204 (1964) (Harlan, J., dissenting).

335. Justice. Stewart once said, "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 904-05. *See* Ingber, *supra* note 227 (showing evidence of judges discriminating on social and economic grounds in decisions). Recent civil rights legislation has been introduced in the U.S. Congress, Minneapolis, Indianapolis, and Bellingham, Washington; these attempts met opposition by lower government officials and

In the United States, rape and overall crime rates are perplexing, and the causes of these astronomical rates are multifaceted. However, many scholars and activists point to pornography as a culprit in violence against women.[336] In *Roth v. United States,* the court abandoned the *Hicklin* test (which Malaysia and Singapore have upheld as the judicial standard) because it looked at the effect of a particular part of the publication on an individual and not at the whole value of the publication.[337] The U.S. *Miller* test requires that the work be taken as a whole to determine if it lacks any literary, artistic, scientific, or political value.[338]

What men and women find morally evil is differently played out in politics; what men find morally harmless — pornography and the subordination of women — is found to be valuable as protected speech in the United States.[339] The reason why pornography leads to sexual violence against women is simple: Women are portrayed in pornography as continually available to men; these images are regarded as not having feelings or opinions of their own, hence they are commodities for male

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have been struck down as unconstitutional. *See* Steven Hill & Nina Silver, *Civil Rights Antipornography Legislation: Addressing the Harm to Women, in* TRANSFORMING A RAPE CULTURE 283, 285 (Emilie Buchwald et al. eds., 1993). *See generally* Ingber, *supra* note 227, at 23-24 (arguing that "[o]fficial determination of what social change is unacceptable and should not be contemplated is just as antithetical to an open search for the truth as is official determination of truth itself").

336. *See, e.g.,* TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993); MACKINNON, *supra* note 332; Diana Scully & Joseph Marolla, *"Riding the Bull at Gilley's:" Convicted Rapists Describe the Rewards of Rape, in* FEMINIST FRONTIERS III, at 402 (Laurel Richardson & Verta Taylor eds., 1993); Jane Caputi & Diana E. H. Russel, *"Femicide:" Speaking the Unspeakable, in* FEMINIST FRONTIERS III, *supra,* at 424; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, ONLY WORDS (1985); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981).

337. *See* Roth v. United States, 354 U.S. 476 (1957), *reh'g denied,* 355 U.S. 852 (1957). "Material is obscene if, considered as a whole its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters." MODEL PENAL CODE § 251.4 (1962). The *Hicklin* test of obscenity is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Reg. v. Hicklin, 3 Q.B. 360, 371 (Eng. 1868).

338. This is a rejection of the *Memoirs* test that made anything "utterly without redeeming social value" obscene. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973), *reh'g denied,* 414 U.S. 881 (1973); Roth v. United States 354 U.S. 476 (1957), *reh'g denied,* 355 U.S. 852 (1957); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), *reh'g denied,* 414 U.S. 881 (1973).

339. *See* MACKINNON, *supra* note 332, at 201.

pleasure.[340] The dividing line between obscenity and pornography is a difference between morality and political power, or powerlessness, in the latter.[341] If women are subjected to violence inextricably linked to pornography, why should it be protected as valuable speech?[342] Malaysia and Singapore clearly give no merit to obscenity within an otherwise beneficial publication; however, pornography in the United States is repeatedly upheld as valuable speech.[343]

B. *Faults in the U.S. Model: Keeping the Status Quo*

1. *Failure to Protect Political Speech in the United States*

Abridgment of political speech in the United States is not as succinctly tendered as in Singapore and Malaysia, but in theory, it supports the Asian value contentions. The United States has a long history of abridging civil liberties when its national security has apparently been threatened.[344] The Alien and Sedition Act of 1798[345] was the first U.S. law which is similar to present day Malaysian and Singaporean sedition legislation.[346] When the United States Federalist majority passed this Act, it led to "at least 25

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340. *See id.* at 196. MacKinnon elaborated on feminist concerns with pornography:

> Sex forced on real women so that it can be sold at a profit to be forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed and this presented as the nature of women; the coercion that is visible and the coercion that has become invisible — this and more grounds the feminist concern with pornography.

Id. *See also* Hill & Silver, *supra* note 335, at 286-87. There are numerous studies that lend positive support to this proposition. *See, e.g.*, NEIL M. MALAMUTH & EDWARD I. DONNERSTEIN, PORNOGRAPHY AND SEXUAL AGGRESSION (1984); DOLF ZILLMANN, CONNECTIONS BETWEEN SEX AND AGGRESSION (1984). Some findings of these studies include: After average men were exposed to pornography they were more likely to believe "no means yes," and the men believed women to be more responsible for their own rape; males said that 30% of women they knew would enjoy being forced into sex; and repetitious exposure to sex and violence in the media desensitized men to women's experience of being attacked. *See* Hill & Silver, *supra* note 335, at 286-90. Portrayal in Penthouse and Playboy, so called 'soft-porn,' may even have a greater impact on this effect than 'hard core' porn. *See* MACKINNON, *supra* note 332, at 196 & n.6.

341. *See* MACKINNON, *supra* note 332, at 192.

342. A question first posited by MacKinnon. *See id.* at 202.

343. *See* Penthouse Int'l v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). *Accord* Coble v. City of Birmingham, 389 So. 2d 527 (Ala. Crim. App. 1980).

344. *See* Justice William J. Brennan, Jr., *The American Experience: Free Speech and National Security, in* FREE SPEECH AND NATIONAL SECURITY 10 (Shimon Shetreet ed., Matinus Nijhoff Publishers 1991).

345. 58 Stat. 570 (1798).

346. *See supra* text accompanying notes 158-74 & 292-302.

arrests, 15 indictments, and 10 convictions" against Republicans.[347]

During World War I, Congress passed the Espionage Act of 1917, which made it unlawful to interfere with the success of the Military by uttering false statements; in 1918, it was amended to make it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about" the U.S. government or the Constitution.[348] During World War II, the civil liberties of "untrustworthy" Japanese[349] were called into question, and the United States further abridged civil liberties under the guise of security. The Alien Registration Act also made it a crime to print anything advocating the overthrow of the government or to urge the subordination of the military.[350] When Congress initiated its witch hunts for the Communists, it passed the Internal Security Act of 1950[351] and the Communist Control Act of 1954.[352]

Clear and present danger[353] has also limited free speech in the United States by forbidding speech when the audience cannot reasonably consider

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347. Brennan, *supra* note 344, at 11.

348. 40 Stat. 553 (1918). About two thousand convictions resulted, most of which were based upon "false statements" about the war which conflicted with President Wilson's speeches. Brennan, *supra* note 344, at 14.

349. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 95-99 (1943); Korematsu v. United States, 323 U.S. 214, 218 (1944), *reh'g denied*, 324 U.S. 885 (1945).

350. Alien Registration Act, 54 Stat. 670 (1940).

351. This Act was a very strong anti-Communist piece of legislation to stop the "world communist movement." *See* Internal Security Act of 1950, 64 Stat. 987 (1950).

352. "Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact . . . a conspiracy to overthrow the Government of the United States." 68 Stat. 775 (1954).

353. Justice Holmes originated the theory in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Mr. Schneck as head of the Socialist Party circulated pamphlets urging draftees to resist the draft during World War I. Justice Holmes upheld the Espionage Act on grounds that his acts presented a "clear and present danger that . . . Congress has a right to prevent." *Id.* at 52. In the Holmes dissent to the 'bad tendency' test development in *Abrams v. United States*, 250 U.S. 616 (1919), he expounded a belief that Congress "certainly cannot forbid all effort to change the mind of the country . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 628-30. He further warned that a check on free speech should only be used when it "is required to save the country." *Id.* at 630. In *Gitlow v. New York*, 268 U.S. 652, 671 (1925), the court rejected "clear and present danger" relevancy; however, it resurfaced in *Whitney v. California*, 274 U.S. 357 (1927). Ms. Whitney was convicted of being a member of the Communist Labor Party who violated the Syndicalism Act, which was to prevent violent overthrow of the government. In his concurrence, with which Holmes joined, Justice Brandeis opined the state cannot "ordinarily" prohibit doctrines "which a vast majority of its citizens believes to be false and fraught with evil consequences . . . [liberty is justified] . . . as an end and as a means." *Id.* at 374-75. "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." *Id.* at 377.

the message before it.[354] The Supreme Court, during the Red Scare, upheld modifications of the *Whitney* clear and present danger test,[355] which later was refined to regulate speech if the speaker intended incitement, the words were likely to cause imminent action, and the words objectively encouraged incitement.[356]

2. *United States Constraints on Foreign Criticisms*

The United States, like Malaysia and Singapore, has exhibited failure in the marketplace of ideas for discovering the truth and allowing equal access to the open forum; U.S. limitations on foreign influence in domestic reporting is a clear example.

The United States Foreign Agents and Propaganda Act [357] is a case of manifest failure of the marketplace of ideas by the United States government. The thrust of the Act is to protect United States security and foreign relations by providing disclosure of foreign propagandists.[358] The Act requires "foreign principals" and agents of the principal to register the following information with the Attorney General: the nature of business, the source

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354. *See* Whitney v. California, 274 U.S. 357, 375-77 (1927).

355. *See* Dennis v. United States, 341 U.S. 494 (1951), *reh'g denied*, 342 U.S. 842 (1951). Attempts, even when not imminent, to overthrow the government violently is "a sufficient evil for Congress to prevent." *Id.* at 509. They adopted the typically methodical approach of Learned Hand's decision allowing the danger to be less imminent if the gravity of the danger was high. *Id.* at 510. *See also* Yates v. United States, 354 U.S. 298 (1957). *Accord* Scales v. United States, 367 U.S. 203 *reh'g denied*, 366 U.S. 978 (1961).

356. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overruling *Whitney*). *See also* Hess v. Indiana, 414 U.S. 105 (1973) (affirming the conviction of the stringent test of *Brandenburg*).

357. 22 U.S.C.A. §§ 611-21 (West 1990 & Supp. 1998). *See, e.g.*, Robert G. Waters, *Foreign Agents Registration Act: How Open Should the Marketplace of Ideas Be?*, 53 MO. L. REV. 795 (1988); Karim G. Lynn, *Unconstitutional Inhibitions: "Political Propoganda" and the Foreign Agents Registration Act*, 33 N.Y.L. SCH. L. REV. 345 (1988). Deportation for violation of 22 U.S.C.A. may be allowed. *See* 8 U.S.C.A. § 1251 (West 1990 & Supp. 1998). Another failure on the market place of ideas is the limitations of foreign nationals on federal elections. *See* 2 U.S.C.A. § 441 (West 1995 & Supp. 1998). *See also* Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1602 (West 1997 & Supp. 1998). *See, e.g.*, Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder*, 78 KY. L.J. 237 (1989-90); Donna M. Ballman, *Political Campaign Contributions by Foreign Nationals in Florida Elections*, FLA. B.J., Mar. 1991, at 31.

358. *See* Attorney Gen. v. Irish Northern Aid Comm., 346 F.Supp. 1384 (D.C.N.Y. 1972), *aff'd*, 465 F.2d 1405, *cert. denied*, 409 U.S. 1080 (1972). *See also* Meese v. Keene, 481 U.S. 465 (1987) (ruling the Act is not unconstitutional because it does not restrict access to materials, and the use of the Act does not have an impact on distribution of the foreign materials).

of funding, the names of employees, and the activities of the business.[359] Additionally, propaganda must include, within the publication, the relationship of the propagandists and the foreign principal and the fact that it is registered as such with the Attorney General.[360]

Lee Kuan Yew recognizes other failures of the libertarian market model, namely, the FCC regulations on foreign ownership in broadcast media and United States outrage of attempts of foreigners to control newspapers in the United States.[361] The United States Communications Act clearly restricts foreign corporate activities in broadcast and telecommunications industries, chiefly by not allowing more than twenty percent ownership by a foreigner.[362]

The U.S. model will not cure all the ills of Singapore and Malaysia. Although purporting to allow unfettered expression, the United States has repeatedly limited public speech. Moreover, the United States has allowed the First Amendment to permit non-public speech to be nearly unregulated to the detriment of women. The appropriate model for Singapore and Malaysia must arise from democratic norms that provide the foundations for the two systems and that are developed fully by judges loyal to open political discourse, but not to unfettered individualism.

VII. CONCLUSION

The Asian model may indeed challenge the U.S. system in the

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359. "Foreign principal" and agents are defined by section 611 and include nearly all foreigners and organizations except for citizens domiciled in the United States not working for a principal, and their agents. Section 611(d) excepts news sources in the United States that are 80% owned by U.S. citizens and have U.S. directors and officers, and 611(q) provides an exception to commercial actors not funded by a foreign political party or government. Section 612 requires that all activities and funding sources and purposes be registered and supplemented. Section 613 excepts registration of diplomatic and consular officials so long as it is within the scope of their official duties. *See* 22 U.S.C.A. §§ 611-613.

360. *See* 22 U.S.C.A. § 614(b). Section 614(a) also provides that the extent of propoganda transmission must be sent to the Attorney General. *See also* 22 U.S.C.A. § 618(a) (violation of the Act provides a maximum fine $10,000 or a maximum of five years imprisonment, or both).

361. *See* Lee Kuan Yew, *supra* note 248, at 122-23. Outrage ensued when stories broke over John McGoff, a sympathiezer to South Africa, when he tried to use funds allegedly tied to South Africa to try to buy the *Wahington Star* and *Sacramento Union*. *See* Sanford J. Ungar, *South Africa's Lobbyists*, N.Y. TIMES, Oct. 13, 1985, at 30. *See also* Claudia Maclachlan, *NAACP to FCC: Turn Off Murdoch*, NAT'L L.J., July 4, 1994, at B1.

362. *See* 47 U.S.C.A. §§ 301 & 310(b) (West 1991 & Supp. 1998). *See generally Barring Foreigners From our Airwaves: An Anachronistic Pothole on the Global Information Highway*, Note, 95 COLUM. L. REV. 1188 (1995); Henry Geller, *Ownership Regulatory Policies in the U.S. Telecom Sector*, 13 CARDOZO ARTS & ENT. L.J. 727 (1995).

future.[363] Kishore Mahbubani believes the American mind has become ossified. In effect, Americans worship abstract concepts such as human rights, freedom, and liberty without ever challenging the system; the U.S. Constitution cannot govern eternally — "no society has ever in history devised social arrangements that suit all times and all circumstances."[364] The quest in determining whether or not liberal democracy will prevail or if a sort of Asian style democracy or soft authoritarianism will prevail is a difficult one. The determination centers on a fundamental question of whether or not the populace of a nation is willing to sacrifice individuality and concomitant individual speech freedoms for the community as a whole.[365]

Determining the merit of individual rights versus collective rights is a normative balancing act.[366] An individualistic focus takes the individual as the sole unit of value and accordingly measures the level of freedom according to rights allocated to the individual. Alternatively, the community can be deemed the focus (Asian values) with the valuation of rights commensurate with the choices the community makes.[367]

A universal speech right, in order to be universal, must depend on a common notion of humanity, which is not based on "culture, history or anything else."[368] Does a system like Singapore's and Malaysia's that limits not only pornography — even so called "soft porn" like *Playboy* — but also speech that would incite racial or religious uprisings have any merit? The question centers on how to order a modern industrial society: Should

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363. For example, Lee Kuan Yew questions the present democratic model: "We would have a better system if we gave every man over the age of 40 who has a family two votes because he's likely to be more careful, voting also for his children . . . and at 60 . . . go back to one vote." Zakaria, *supra* note 5, at 119.

364. Mahbubani, *supra* note 9, at 19.

365. *See generally* Thio Li-Ann, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study*, 1993 SING. J. OF LEGAL STUD. 80 (1993).

366. *See* Virgina A. Leary, *Postliberal Strands in Western Human Rights Theory, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 105 (Abdullahi Ahmed An-Na'im ed., U. Pa. Press 1992). Several Western scholars (Emmanuel Mounier, Jacques Maritain, and Roberto Unger) have developed a concept of a person's rights within communities distinguished from individual rights. This is an attempt to reach for a consensus between two conflicting world views of communism and capitalism. *See id.* at 113-14.

367. *See* Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 133, 154 (Abdullahi Ahmed An-Na'im ed., U. Pa. Press 1996). *See also* Stephen J. Toope, *Cultural Diversity and Human Rights*, 42 MCGILL L.J. 169, 180-81 (1997) (showing that the Western tradition of human rights may change to focus on the community and is not necessarily individualistic).

368. *See* Peter R. Moody, Jr., *Asian Values*, 50 COLUM. J. INT'L AFF. 166, 169 (Summer 1996).

freedom trump social order? The proponents of "Asian Values" clearly say "yes," while suppressing unfavored political speech and speech which would arguably usurp social order, and America says "no." In this decision the first step necessarily must be allowing the populace to determine its community rights in an open forum, which Malaysia and Singapore have clearly failed to do.

When criticizing freedom of speech in Singapore and Malaysia, it is important to take notice of the United States historical trend of limiting free speech when threatened with outside views that may disrupt the status quo of the state. Malaysia and Singapore are no different in this respect, except they take it a step further based on history, moral values, and potential racial and religious conflict.

Any limitation on political speech should not be allowed, nor justified by any leaders based on their interpretation of history. No legitimate government may claim that people do not have a right to political speech. Political speech may not include immoral or blatant, racially upsetting comments; however, it must include speech remotely connected to the function and duties of government. In Singapore, Malaysia, and the United States, political speech has been limited under the guise of national security and public order. This has happened with Communist threats in all of these nations, but it does not reduce the legitimacy of criticizing these institutional arrangements.

The movement to increase political freedom must be challenged throughout the world — on both the domestic and international fronts. The wide spectrum of allowed political speech differs in degree between nations based on their domestic situation, but the value of wide-open political debate should be pushed beyond any abridgment, in any nation, to develop a stable and legitimate order that people have confidence in and can participate in regardless of their political view. Obviously, the market inequalities in the fight for a favored political ideal will be troublesome, but the source of dominance in such a system should not become entrenched in legitimacy in the beginning of a cyclical debate and claim legitimacy throughout the debate.

If an entrenched system — whether Democratic, Soft-Authoritarian or Communist — claims dominance to a competing ideology, it will be subject to violent change. Although there is a strong claim of the finality of the liberal democracy,[369] entrenching this view with institutional legitimacy is once again denying the efficacy of a potentially more or less egalitarian

369. *See generally* FRANCIS FUKAYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (claiming liberal democracy has conquered all other governance systems). *See generally* Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429 (1997) (arguing the United States and its industrialized partners should foster the promotion of a "liberal democracy").

system that may serve the populace of the world more effectively. However, the freedom of political speech must be allowed in order to determine the legitimacy of such forthcoming views; whether it leads to a social democracy or another ideology taking precedence in the tumultuous decades the world is sure to face.

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