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COMMENTS

A COMPARATIVE LAW EXPERIMENT

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From time to time scholarly literature has attempted to compare and contrast the American lawyer-dominated procedures for fact presentation at trial with the civil law judge-centered procedures for fact gathering.[1] Although the relative advantages and drawbacks of both systems have been analyzed logically, there is little reported "empirical" data on the performance of the two systems in handling the same or similar cases.[2] It is thus difficult to get an "apples to apples" comparison of the relative efficiency, fairness, and accuracy of the two systems for case resolution.[3]

Comparative analysis of the two systems must also take into account differences in the substantive legal regimens and the legal cultures of the jurisdictions in which the two systems are in use. These circumstances make it more difficult to reach meaningful answers to the following question: "How would the procedures of the other system work in our legal environment?"[4]

In an effort to provide the basis for a more direct comparison of the methods of common law and civil law trial process, students in the author's Civil Trial Process Seminar, Harvard Law School, Spring 1997,[5] tried the

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1. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (Yale, 1997); Arthur T. Von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609 (1988) [hereinafter *Recent Reforms in German Civil Procedure*].

2. *See, e.g.*, Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 707-09 (1988) (commenting on the difficulty of making a comparison of the efficiency, accuracy, or fairness of both systems). It is difficult to develop empirical data on the effect of procedural reform on the performance of even a single system. *See* Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303 (1994) (reporting on the Rand Corporation's design for an evaluation of procedural reforms being undertaken on an experimental basis in ten "pilot districts" pursuant to the Civil Justice Reform Act of 1990).

3. Indeed, the differences in legal norms, in social environments, in national traditions, plus the infinite variety of individual cases make a meaningful comparison based on direct empirical data from real life almost impossible.

4. Indeed, the very different conceptions of the role and purpose of criminal trial proceedings in civil law countries and in the United States might well make any such comparison totally impossible. *See* DAMAŠKA, *supra* note 1, at 118-20. However, both systems seem to acknowledge that the primary purpose of civil proceedings is the resolution of private or individual disputes in a fair and principled manner.

5. The author wishes to express his appreciation to the members of the Civil Trial

same simulated case according to the procedures of both systems. The cases were tried as realistically as possible under law school conditions. By use in our experiment of a single fact pattern, the same cast of characters, and a single American legal regimen, we sought to minimize real-life differences in applicable law, in legal traditions, and in national cultures. The process and the results were documented and discussed.

No meaningful statement can be made about any "advantage" of one system over another based on the results of a single experiment involving only one relatively simple simulated case. To the participants, the experience was an eye-opener. The experience of trying the same case under both systems enabled us to appreciate first-hand the different "feels" of the common law and the civil law trial process. The quantitative data seemed at least interesting, if not statistically significant. Our experiment and its results may be of interest to persons considering the challenge of comparing systems of civil procedure and assessing their relative merits and disadvantages.

I. THE CASE

The simulated case employed for the experiment was *Cluney v. Borak*, a simple negligence case based on an intersection automobile accident. This simulated case file (based on a real case tried in Maine in 1974) has long been used in the Harvard Law School Trial Advocacy Workshop as well as in various law firm and bar association training programs around the country. It was selected because it is relatively simple and can be said to represent those routine tort cases which constitute a large percentage of actual civil trials in both common law and civil law courts.[6]

The underlying fact scenario is not complicated. On September 14, 1992, Raymond Cluney was a right rear seat passenger in a Chevrolet Camaro driven by one of his Bates College classmates in Lewiston, Maine. The group of five youths was returning to campus after a late Friday afternoon beer at a local hangout, the "Blue Goose." As the car headed up Wood Street, the driver, Arthur Clark, seemed to be going a little fast. Cluney asked him to slow down as they approached the intersection of Wood Street with Vale. Suddenly, there, right in front of them, was a car in the

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Process Seminar, Harvard Law School, Spring 1997, for the time, energy, and thought invested by each of them in the experiment discussed in this article.

6. According to the Annual Report of the Administrative Office of the United States Courts, in 1995, 33% of civil cases that were actually tried to juries were various kinds of tort claims. A survey conducted by the National Center for State Courts found that in 1992, tort cases comprised nearly 80% of civil cases tried to juries in 45 selected counties nationwide. *See* National Center for State Courts, *Cornell Judicial Statistics Project* (visited Mar. 28, 1998) <http://teddy.law.cornell.edu:8090/questtrs.htm>.

intersection! Brakes squealed, cars crashed, and Cluney (sans seat belt) was violently thrown about in the Clark car. He felt a sudden sharp pain in his back.

The car they hit was driven by Alfrieda Borak, age 55, owner of Borak's Dairy, who had been making Friday afternoon collections from the customers of her family business. Borak had been driving from west to east on Vale Street, which was controlled by a stop sign at the intersection with Wood. She was also injured. Her car was thrown by the impact up onto the lawn of Christina Godard at the northeast corner of the intersection. Ms. Borak was certain that she stopped at the intersection and looked both ways before entering Wood Street. The southwest corner of Wood and Vale Streets is a vacant lot, therefore Ms. Borak would have had an unobstructed view from a position stopped at the stop sign for a considerable distance down Wood Street.

Godard was out on her porch just before the accident. She saw a car come along from west to east on Vale Street and slowly enter the Wood Street intersection without stopping. She turned around and went back into her house only to hear a crash and find Borak's car on her front lawn.

The accident was investigated by Harold Anderson, a local police officer. Anderson measured seventy-two feet of skid marks made by the Clark car and took a statement from the driver, Arthur Clark, who admitted that he had been going fifty miles per hour. The posted speed limit was twenty-five miles per hour.

Cluney was taken to the local hospital and treated by Dr. Theresa Swallow. Dr. Swallow diagnosed a comminuted compression fracture of the L-2 vertebra and prescribed two weeks of immobilization in the hospital, followed by restricted activities and a hyper-extension brace until the bony fragments healed. Cluney followed this regimen, and after six months in the brace was able to resume a more-or-less normal life. He retained some restrictions against strenuous activity, and some residual pain when sitting on soft chairs or beds. The long-term prognosis was good, with future complications possible, but not probable.

Suit was brought against Borak and Borak's Dairy. Clark, a resident of Massachusetts, was not made a party. The witnesses besides the parties included Christina Godard, Harold Anderson, and Dr. Swallow.

Cluney v. Borak is designed so that it can be tried to a simulated jury (usually high school students) from start to finish in a single (long) afternoon. It has been used in the Harvard Trial Advocacy Workshop both as the source of individual "classroom" exercises in witness examination, opening and closing, as well as the "final examination" when the students put on complete trials of simulated civil and criminal cases. Over the past decade, it has been tried before mock juries literally hundreds of times.

II. PROCEDURE FOR THE SIMULATED TRIALS

In the comparative exercise seminar, participants were assigned roles as lawyers, witnesses, and fact finders in both the common law and the civil law trials.[7] The same students played their designated roles as witnesses and fact finders for both trials. The teams of student lawyers were different. The author served as judge in the common law jury trial and as presiding judge of the civil law tribunal.

The *Cluney v. Borak* case file as used in the Trial Advocacy Workshop represents the full pretrial "file" of an American lawyer ready for trial, including pleadings, depositions, witness statements, medical reports, and exhibits.[8] These materials formed the starting point for the common law lawyers. The case materials were adapted for the civil law proceeding. In an effort to simulate the kinds of material a civil lawyer would have at the start of a case, the civil law student lawyers were given only their own client's statements and materials, plus such other information (e.g. the police report) which was of public record.

Student trial lawyers were asked to keep track of their time and effort expended in case preparation and presentation. Other trial participants were asked to record their impressions of the fairness, accuracy, and efficiency of the procedures in which they took part.

Cluney v. Borak is a diversity case set in the United States District Court for the District of Maine. The applicable substantive law was that of Maine. The common law trial was governed by the Federal Rules of Civil Procedure and Federal Rules of Evidence. The civil law trial used the German form of civil procedure[9] as described by Kaplan, Von Mehren, and Schaefer, *Phases of German Civil Procedure*,[10] and Foster, *German Legal System and Laws II*[11] as supplemented by the author's own study and

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7. For the purpose of this article, the term "common law" will refer to the American system of trial procedures, and the term "civil law" will refer to trial procedures used in civil law countries as typified by Germany. In each case the governing substantive law was the same, American "common law."

8. Copies of the complete file in *Cluney v. Borak* will be gladly furnished to interested parties upon request.

9. Procedure in German civil cases is prescribed and regulated by a comprehensive federal statute, or *Zivilprozeßordnung* [hereinafter ZPO].

10. Benjamin Kaplan et al., *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 (1958). For a positive, if somewhat controversial, portrayal of German civil procedure, see Langbein, *supra* note 1.

11. NIGEL G. FOSTER, GERMAN LEGAL SYSTEMS & LAWS 121-34 (2d ed. 1996).

experience.[12] The trial exercises took place during a number of afternoon seminar meetings in February and March, 1997.

III. COMMON LAW PRETRIAL CONFERENCE

The common law trial started with submission of pretrial memoranda by both parties followed by a Rule 16 pretrial conference.[13] The pretrial memoranda followed the usual form and listed issues, witnesses, and exhibits. There were also a number of motions in limine addressed to evidentiary issues anticipated at the trial. The judge's file at the pretrial conference contained these memoranda as well as the pleadings.[14]

The pretrial conference commenced with a brief statement by each lawyer of his client's version of the case.[15] Discussion of witnesses and exhibits was perfunctory. As is usually the case in routine pretrial conferences, without more detailed factual information there was little the judge could do to structure and form the issues at the trial. The absence of a reliable factual context also required deferral of ruling on most of the motions in limine until the trial.[16]

The trial judge took an aggressive approach to settlement, requesting the parties to state their respective settlement positions and attempting to mediate a compromise. Although the parties did not seem to be widely separated in terms of dollars,[17] in attempting to "bring them together" the judge was limited to general statements of the value of settlement and to general predictions of the value of "cases of this type." First, the judge did not have sufficient information on which to base a reputable reaction or suggestion as to case value, and second the judge would at best be predicting the reaction of a jury, since he would not be the decision maker. No

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12. The author has participated in a civil law trial before the German Patent Court and has observed proceedings in negligence and contract cases in trial and appellate courts in Hamburg and Munich.

13. Since the exercise was intended to focus on the comparative methods of trial, the common law preliminaries of notice pleadings and of discovery (depositions) were not repeated in the simulation.

14. Although counsel's files included the parties' depositions, witness statements and reports, such are not ordinarily made part of the court record prior to trial, and were not included in the court's file in the simulated case.

15. As is usually the case, the parties were not present at the pretrial conference, but were "available" for consultation with respect to settlement.

16. This circumstance paralleled real life. Although motions in limine are encouraged as a means to resolve evidentiary issues in advance to minimize trial disruption, frequently it is impossible to rule on them without the complete fact context to be presented at the trial. *See, e.g.*, RICHARD FIELD & PETER L. MURRAY, MAINE EVIDENCE § 103.7 (4th ed. 1997).

17. Negotiations deadlocked with the plaintiff at $20,000 and the defendant offering $10,000.

significant progress toward settlement was made.[18]

The pretrial conference concluded with a perfunctory pretrial order listing the issues,[19] the witnesses, the exhibits, the expert witnesses, and setting a date for jury trial.

IV. CIVIL TRIAL INITIAL HEARING

The civil law case started at the beginning. The plaintiff's attorney drafted and filed a civil law complaint, including a detailed statement of the relevant facts as known to her and her client's theory of the case. Attached to the complaint and referred to as sources of proof were the police report and a photograph of the accident scene. The defendant's answer was in similar form, and included a diagram of the accident scene as well as detailed factual allegations admitting or denying the plaintiff's allegations.[20] The pleadings identified potential witnesses and included the substance of their expected testimony to the extent known at the time.[21]

Unlike the common law notice pleadings, the civil law pleadings provided considerable information about the case and the potential issues to

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18. This was also quite realistic. Although at one time it was thought that trial judges would frequently mediate settlements during Rule 16 pretrial conferences (*see, e.g.*, Advisory Committee Note to 1983 Amendment to Rule 16), 50 years of actual experience suggest that these expectations were overly optimistic. *E.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-45 (1994). The degree to which judges encourage, foster, and actually mediate settlement of pending civil cases varies widely from jurisdiction to jurisdiction and from judge to judge. Herbert M. Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28, 32-35 (1982). Currently there is increased emphasis on encouraging ADR involving professionals other than the trial judge as a part of the pretrial schedule of each case. *See, e.g., American Law Institute Study on Paths to 'A Better Way'; Litigation, Alternatives, and Accommodation: Steering Committee Report*, 1989 DUKE L.J. 811 (1990).

19. The issues included "Negligence of the defendant, contributory negligence of the plaintiff, damages . . . ."

20. §§ 130-31 Nr. 253, 282 ZPO.

> Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions. The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern.

Langbein, *supra* note 1, at 827.

21. For instance, the materials available to the plaintiff indicated that Christina Godard had seen the accident and thought that the Borak car had run the stop sign, but had no details. Consonant with German civil law practice, the plaintiff's lawyer did not interview Godard. She referred to Godard in her complaint as a potential witness in support of at least one of her alternative theories of liability.

be tried. The pleadings gave the judges a fairly complete picture of what had happened. They stated the parties' legal positions and their initial factual and legal theories in support of their positions. It was easy for the judges to discern the likely issues for trial from these pleadings.

Although the civil law student lawyers had received no formal instruction in civil law procedure, they appeared to have little difficulty in formulating civil law pleadings. This may be because once the purpose of the pleadings is understood, execution seems to follow intuitively. Elaborating the known facts, supporting them with reference to sources, and relating the facts to the legal theories are functions familiar to law students in the context of written briefs and memos. It did not seem difficult to transplant this process to the pleading stage.

Following receipt of the pleadings, the civil law proceeding opened with an initial hearing.[22] The parties and counsel were present. The presiding judge sketched the apparently uncontroverted facts of the case as disclosed by the pleadings and identified the apparent fact issues. The judges asked both parties[23] and counsel questions to clarify positions and facts not seriously in dispute. As a result of a few minutes of this kind of give-and-take, any apparent differences in the pictures portrayed by the parties' respective pleadings were reduced to a few real issues. These issues were identified as follows:

a. the plaintiff's claim of the defendant's negligence in running the stop sign, failing to look before entering the intersection, or both;

b. the defendant's weak claim of contributory negligence on the part of the plaintiff for riding in an overcrowded car without a seat belt with a driver who had been drinking; and

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22. German procedure permits civil cases to be shaped for decision either through an initial hearing or through an extended exchange of written pleadings. § 272 Nr. 275-76 ZPO. Unlike the common law procedure where there is a single "trial" preceded by one or more subsidiary proceedings such as motion hearings or conferences, under civil law procedure there is no single event which corresponds to the role of the trial at common law. Instead there are a series of meetings and hearings at which fact finding or legal argument may take place as required for the court to reach a disposition of the case. The reasons for a concentrated trial at common law and its effect on common law civil procedure and evidence law have recently been the subject of discussion and commentary by comparative law scholars. *See, e.g.*, Arthur T. Von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks, in* EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART; FESTSCHRIFT FÜR HELMUT COING 361-71 (Munich 1982); DAMAŠKA, *supra* note 1, at 58-73.

23. The discussion included conversations directly between the presiding judge and the parties, who were held accountable for accurate answers to the judge's questions.

c. the extent of the plaintiff's residual impairment, pain, and suffering.

As the issues were identified, the means of resolving those issues was addressed. The judges[24] agreed that Christina Godard could likely shed light on the potential negligence of the defendant and should be called as a witness. Similarly, Officer Anderson's report indicated that he had interviewed the driver about excessive speed. The court agreed to call him as well in order to get more immediate testimony and to be able to ask him questions.[25] Finally, it was agreed that the determination of the nature and extent of Cluney's injury would require expert testimony. Finding some degree of liability likely, the judges ordered that an expert witness be appointed[26] to evaluate Cluney's condition and permanent impairment, if any.

The logical person to serve as court-appointed expert witness was Dr. Swallow, the treating physician.[27] Dr. Swallow would be requested to re-examine Mr. Cluney, report on his condition, and give a prognosis for future consequences of his injuries. Four questions were formulated by the court to be asked of Dr. Swallow.[28] The parties were invited to submit additional questions following receipt of Dr. Swallow's initial report.[29]

The civil law initial hearing was concluded by setting a time for the

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24. Both the presiding judge and the single assistant judge were present at the initial hearing.

25. In most civil law jurisdictions, although the judges have a leading role in the actual examination of witnesses, the selection of the witnesses and other means of proof are within the control of the parties. *See, e.g.*, DAMAŠKA, *supra* note 1, at 106-07. Accordingly, in our simulated process, the judges confined their consideration of potential fact witnesses to those nominated by the parties.

26. The routine use of court-appointed expert witnesses and the virtual absence of party-called experts is one feature of civil law procedure that has been of intense interest to civil procedure scholars and reformers in recent years. *See, e.g.*, Langbein, *supra* note 1, at 835-41; Allen et al., *supra* note 2, at 735-45.

27. Ordinarily, a civil law court-appointed expert would have no connection with either party. However, in small personal injury cases such as this, it is not uncommon for a treating specialist, without other connection to the parties or the case, to serve as court-appointed expert. § 414 ZPO; ERNST JAUERNIG, ZIVILPROZESSRECHT § 54, at 196-207 (23d ed. 1991).

28. The questions were:

Please provide an updated diagnosis and prognosis of plaintiff's injury.

Please state your opinion of the relationship of the injury to the accident.

Please state the likelihood of future operations and their costs.

Please state the likelihood of future degeneration in the plaintiff's condition.

29. This closely followed the German procedure. "The expert is ordinarily instructed to prepare a written opinion. When the court receives the report, it is circulated to the litigants. The litigants commonly file written comments, to which the expert is asked to reply." Langbein, *supra* note 1, at 839. This was the procedure followed in the German Patent Court case in which the author participated in 1986.

continued hearing and by the dictation of a summary protocol of the proceedings by the presiding judge.[30]

V. COMMON LAW JURY TRIAL

The common law trial took place the following week in the law school moot courtroom. The proceedings followed the usual form, compressed to permit the entire trial to be presented in a single afternoon. There were brief opening statements and summations. The parties, Christina Godard, Harold Anderson, and Dr. Swallow[31] (appearing as the plaintiff's expert witness) all were examined and cross-examined in authentic American style. The jury was charged and retired to reach a sealed verdict, to be opened only after the conclusion of the civil law trial.[32] The performance of the student attorneys, fresh from the Trial Advocacy Workshop,[33] appeared comparable to the performances of young real-life lawyers in similar cases. For the lawyers in particular, the experience appeared to be a highly positive and dramatic one.

VI. CIVIL LAW FINAL HEARING

The final hearing in the civil law proceeding was held a week later. At the beginning of the hearing, the presiding justice briefly recapitulated the facts from the record summary dictated and recorded[34] two weeks before. With the issues in mind, the court called Ms. Godard and asked her what she knew about the accident. The court's questioning started with open-ended questions—"Please tell us what you can remember of the events surrounding the accident"—which gradually became more focused as the judges probed

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30. The protocol covered the essential fact picture, set forth the fact issues remaining, and documented the appointment of the expert witness. It became a part of the case file on which the judges could rely in ongoing proceedings. As the presiding judge dictated the summary, counsel for the parties were asked for additions or corrections. §§ 159, 160 ZPO. *See, e.g.*, Kaplan et al., *supra* note 10, at 1206-07; Langbein, *supra* note 1, at 828-29.

31. We were fortunate to have a real surgeon who agreed to play the role of Dr. Swallow in both trials.

32. Because of the press of time, the jury deliberations had to be recessed until later in the week. Other imperfections in the purity of the experiment were the small size of the jury (three) and the fact that one of the jurors was also an assistant judge in the civil law trial.

33. The Harvard Trial Advocacy Workshop is an intense program of advocacy skills training based on programs developed by the National Institute of Trial Advocacy. During a three-week period, students perform daily exercises in opening statement, direct and cross-examination of witnesses, dealing with exhibits, expert witnesses, and summation. These exercises are followed by simulated jury and nonjury trials presented entirely by the students.

34. Although in a real civil law trial, the summary would likely be dictated and typed right in the courtroom (*see* § 162 ZPO), in the simulated case, the summary was stated orally in the courtroom, notes were taken down, and the substance of what was spoken was reduced to writing afterward.

the witness' assertion that she had seen the defendant's car run the stop sign.[35] The parties were allowed to ask questions as well. Although there was no restriction placed on the form of questions, no party asked the closed declarative questions that are characteristic of American cross-examination.[36] The most rigorous form of question asked by either judge or lawyer was of the "soft leading" type, beginning with a verb and ending in an interrogative tone.[37]

Although the examination by the court with follow-up "cross-examination" by counsel did develop the witness' testimony on the issues in dispute, a fact possibly relevant to Ms. Godard's credibility escaped inquiry. According to her "script," Ms. Godard was disgruntled over Ms. Borak's failure to reimburse her for the shrubs on her lawn damaged by the Borak car. In the common law case, this fact was unearthed in an interview with the witness by plaintiff's investigator and was included in the investigator's report in the case file. At the trial, the witness was cross-examined for bias. In the civil law case the parties were only notified that Ms. Godard claimed to have witnessed the accident and to have seen a car run the stop sign. There was no pretrial contact with the witness and no discovery of any prepared statement.[38]

The examination of Officer Anderson, whose information was already set forth in his accident report, was brief and focused on the circumstances

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35. *E.g.*, "How did you know that the car which was on your lawn was the same car that entered the intersection without stopping?" The "funnel" method of interrogation, in which the interrogator starts with a broad, open-ended question and then progressively focuses more and more narrowly on the details, is recommended to civil law judges as the appropriate form of inquiry. § 396 ZPO. *See* SCHNEIDER, BEWEIS UND BEWEISWUERDIGUNG § 42 (4th ed. 1987); DAMAŠKA, *supra* note 1, at 93 ("According to prevailing practice, the Continental judge first invites witnesses to present a narrative account, and only then begins to question them."). Interestingly enough, this is the same technique recommended for witness interviews and discovery depositions in common law case preparation, a stage where the aim is to obtain from the witness as much potentially pertinent information as possible and when not everything is known in advance.

36. An example of such a question would be: "You did not see anything coming down Wood Street, did you Ms. Godard?" These declarative questions, favored for adversarial cross-examination, actually partake more of the characteristics of a strong statement coupled with a demand for affirmation. For a discussion of the form of cross-examination questions, see PETER L. MURRAY, BASIC TRIAL ADVOCACY 107-54 (1995).

37. Such as, "Did you see anything coming down Wood Street, Mrs. Godard?" These soft leading questions are not recommended for adversarial cross-examination as they allow the witness too much room to qualify or expand on the desired "yes" or "no" answer. *See id.* However, they seemed to come naturally as follow-up questions by counsel in a judge-led interrogation.

38. Civil law lawyers are generally forbidden from interviewing or preparing non-party witnesses before trial. *See, e.g.*, Kaplan et al., *supra* note 10, at 1200-01; Langbein, *supra* note 1, at 834; DAMAŠKA, *supra* note 1, at 76-79. This prohibition may have eroded somewhat in recent years. *See* Allen et al., *supra* note 2, at 721-22.

of the oral admission of Arthur Clark, the driver of the Cluney car, that he had been driving at fifty miles per hour.[39]

Dr. Swallow appeared at the civil law trial as a court-appointed expert witness. Counsel had been furnished copies of the doctor's updated report answering the court's questions[40] and supplementary written questions posed by counsel upon receipt of the doctor's initial report. The in-court examination focused on the key issues of permanent incapacity, the possibility of future surgery, and the extent of ongoing restrictions on the plaintiff's activities. The court asked the doctor to elaborate on the key conclusions and followed up with specific questions.[41] Follow-up "cross-examination" questions by counsel took the same interrogative and nonadversarial tone as was the case with the lay witnesses.

Following the examination of Dr. Swallow, counsel were given the opportunity to address the court in final argument. These were brief. The court then dictated the protocol of the final hearing and retired to decide the case.

Conscious of the need to find a rationale for the decision which would stand publication, the judges attempted to organize the analysis in a logical manner. Finding the evidence on the issue of whether the defendant had stopped at the stop sign unconvincing, the court focused on the defendant's apparently unobstructed visibility from the stop sign on Vale for a considerable distance down Wood Street.[42] From this circumstance the

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39. In the common law case it was necessary to lay a foundation for the admission of this statement as a "statement against interest." FED. R. EVID. 804(b)(3). In the civil law case the statement was elicited for whatever it was worth without regard to the requirements of any hearsay rule of exclusion.

40. The questions had been formulated at the initial hearing when it was decided to appoint the doctor as expert witness.

41. The questioning by the court would go something like the following:

Q. Doctor, you have indicated that there is a possibility of future surgery in this case. What do you mean by possibility?

A. I mean that it is possible that he would need future surgery if his symptoms get worse. It is very hard to say for sure.

Q. Well, would you say that it is more likely than not that he will need some kind of surgery?

A. Based on his present condition, I would not say that it is more likely than not that he would need surgery.

Q. How about the likelihood of future symptoms? Would you say that he is more likely than not to have some increased symptoms from this injury?

A. Yes, it is more likely than not that he will have some increased symptoms. However I do not think that he will require surgery.

42. Both the photograph and the testimony of all the witnesses had established that Wood Street is straight and flat and that there was a vacant lot on the southwest corner of Wood and Vale so that a driver at the stop sign on that corner would have had a good view to her right down Wood Street.

judges concluded that had the defendant really looked, she would have necessarily seen the Clark car coming, regardless of how fast it might have been going. Her failure to look, or at least to see and appreciate the oncoming hazard was determined to be sufficient negligence to support a recovery.[43] The civil law judges also evaluated the plaintiff's contributory negligence and found a factor of twenty percent[44] contributory negligence based on the plaintiff's failure to wear a seat belt.[45]

Damages were more difficult for the civil law judges. Again, the search was for a rationale which would stand the test of publication in a written opinion to support a specific number beyond the plaintiff's proven medical bills and lost wages to compensate for permanent impairment and pain and suffering. It turned out to be surprisingly elusive. How does one determine the value of modest physical impairment or pain and suffering? For want of a better gauge, the judges ultimately resorted to a multiplier of five times the special damages of $2,500[46] for a finding of total damages sustained in the amount of $12,500. Reduced by twenty percent to reflect the plaintiff's comparative negligence, the net award by the civil law court was $10,000.[47]

Following announcement of the civil law award, the sealed verdict from the common law jury was opened. The finding of the jury was startlingly similar. The special verdict form indicated that the parties' negligence had been apportioned eighty percent defendant and twenty

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43. The civil law judges followed the American rule of non-imputation to the passenger of any negligence of the driver. Thus, the fact that Clark was speeding was not imputed to Cluney as contributory negligence.

44. Quantifying the proportion of contributory negligence for the purpose of applying comparative negligence principles was unexpectedly difficult. What is the magic in 20%? Without a legal mechanism or rationale to quantify degrees of negligence, the civil law judges were very conscious of how arbitrary their choice of 20% might appear in a printed decision.

45. Whether failure to wear a seat belt can be considered contributory or comparative negligence is the subject matter of legislation in many jurisdictions. For instance, at the time the "real" *Cluney v. Borak* was tried, applicable Maine statutory law provided that failure to wear a seat belt could not be considered contributory negligence and could not be mentioned at trial. ME. REV. STAT. ANN. tit. 29, § 1368A (West 1965), *repealed and replaced by* ME. REV. STAT. ANN. tit. 29A, § 2081 (West 1996).

46. Medical bills were approximately $1,200 and the lost wage claim (part-time work during college vacations) was no more than $1,300. There was no proven loss of earning capacity or future medical expense. These numbers reflected the age of this 1970s case!

47. The civil law judges reduced the damages pro-rata based on the relative percentages of the "total negligence." The applicable Maine contributory negligence statute does not require that the reduction conform to the relative percentage of causative fault, but permits the fact finder to reduce the damages "by such amount as is just and reasonable considering the plaintiff's responsibility for his own injuries." ME. REV. STAT. ANN. tit. 14, § 156 (West 1980). Lacking any rationale for any other number, the civil law judges seized on the 20% by default.

percent plaintiff, and the net finding in favor of the plaintiff was $10,000![48] When asked for their rationales in reaching this verdict, the jurors mentioned the lack of a seat belt as the primary component of the contributory negligence, but failed to enunciate a specific theory of the defendant's negligence on which they all agreed.[49]

VII. COMPARATIVE ECONOMIC ASPECTS

With some diffidence, certain economic aspects of resolving this case under both systems from the standpoint of clients, lawyers, and overall system costs have been analyzed.[50] While the hypothetical "figures" developed have no statistical validity, the exercise was realistic enough to make the quantified results at least interesting to students of civil procedure and trial process.

Since the cost of legal representation is usually the largest privately-borne cost of civil litigation, an effort was made to analyze the relative cost of counsel under both systems. Counsel in both cases were asked to keep track of their time spent on case preparation and presentation.[51] Time invested by counsel was as follows:

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48. The verdict did not include a finding of the plaintiff's damages before reduction on account of contributory negligence as required by the Maine comparative negligence statute. *Id.* It was thus impossible to determine how the jury's finding of comparative negligence was reflected in the award of damages.

49. The common law jury is a "black box" and is not required to agree on or disclose any rationale for its verdict. Although sometimes counsel attempts to glean some inkling of the jury's reasoning processes from interviews with individual jurors after the jury's verdict, American law uniformly prohibits the use of such information to impeach or question a jury verdict. *See, e.g.*, FED. R. EVID. 606.

50. This exercise was designed primarily to familiarize the students with civil law trial procedures and afford a qualitative comparison of the trial experience under both systems. Although quantitative data was collected and recorded, rigorous techniques of economic modeling were not followed. The data collected are supplemented with stated assumptions which are believed to be realistic.

51. The civil law case started at the beginning following the initial in-depth client interview. The common law case started after the filing of pleadings and depositions of both parties. Time spent on these latter activities was conservatively estimated for purposes of the comparative model, as student counsel did not actually perform these activities in the simulation.

	COMMON LAW TRIAL		CIVIL LAW TRIAL	
Activity	**Plaintiff's Counsel**	**Defendant's Counsel**	**Plaintiff's Counsel**	**Defendant's Counsel**
Drafting Pleadings	0.5	0.5	3.0	3.5
Plaintiff's Deposition	2.0	3.0	—	—
Defendant's Deposition	3.0	2.0	—	—
Drafting Pretrial Memos	2.0	3.0	—	—
Prep. Pretrial/Initial Hearing	1.0	1.0	0.5	0.5
Pretrial Conference/ Initial Hearing	1.0	1.0	1.0	1.0
Prep. Trial/Final Hearing	20.5	19.0	2.7	4.0
Trial/Final Hearing	2.5	2.5	1.5	1.5
Totals	32.5	32.0	8.7	10.5

Both trials involved the use of an expert witness.[52] In both cases, counsel (and in the civil law case, the court) started with a routine preliminary report by the treating physician. Litigation activity of the doctor in the common law case included a follow-up examination of the plaintiff,

52. The use in *Cluney v. Borak* of a single expert, who testified for the plaintiff, was somewhat uncharacteristic of common law personal injury trials. More typically, if the plaintiff's condition were seriously at issue, the defendant would very likely retain her own expert to evaluate the plaintiff's condition and give testimony in opposition to the plaintiff's expert.

a meeting with the plaintiff's lawyer in preparation for the trial, and attendance and testimony at the trial. In the civil law case, the doctor met briefly with the presiding judge to receive her instructions as court-appointed expert witness, performed a follow-up examination of the plaintiff, drafted her answers to the additional questions from the court and counsel, and appeared and testified at the trial. Time spent by the expert witness could be modeled[53] as follows:

Activity	COMMON LAW TRIAL	CIVIL LAW TRIAL
Coordination/Instructions	0.5	0.5
Follow-up Examination	1.0	1.0
Preparation w/ Counsel	0.6	—
Drafting Follow-up Report	—	0.7
Trial Testimony	2.0	1.0
Totals	4.1	3.2

In the civil law trial, the compensation for the expert witness was established at $400 at the initial hearing and ordered paid in the first instance by both parties. In the common law trial the expert witness testified that her rate of compensation was $150/hour for a trial appearance, which was paid in the first instance by the plaintiff, but would be subject to recovery as "costs" in Federal Court and many state jurisdictions in the event of a plaintiff's verdict.

The presiding judge in the civil law case was required to expend a little more time and effort than his common-law counterpart:

53. Some of the doctor's activities, such as meetings with counsel and the court, actually took place. Others, such as follow-up examination of the plaintiff did not, and are represented by assumed values.

Activity	COMMON LAW TRIAL	CIVIL LAW TRIAL
Review Pleadings, Prep. for Pretrial Conference/Initial Hearing	0.4	1.0
Pretrial Conference/Initial Hearing (incl. dictating summary)	0.8	1.2
Conference with Expert Witness, Prep. for Trial/Final Hearing	0.3	1.0
Trial/Final Hearing	3.0	1.5
Prepare Final Minutes and Judgment	0.3	1.0
Totals	4.8	5.7

The common law case was tried to a jury, while in the civil law case there could have been two "assistant judges" to assist with the fact finding.[54] If the *Cluney* case had been tried to a federal civil jury of six (without alternates) and to a civil law court with two assistant judges,[55] the time expended by the jurors and the assistant judges would have been something like:

54. The roles of "assistant judges" in civil law trials vary among civil law systems, and among types of cases. In some cases, the assistant judges are lay persons performing a form of civic service. In others, the assistant judges are professional judges. Many smaller civil law cases are tried to a single professional judge. In recent years the trend has been toward professional judges in most civil cases. In civil law criminal prosecutions and in civil proceedings involving administrative, labor, or highly technical matters (*e.g.*, patent cases), "mixed" tribunals of professional jurists, and laity or specialized non-lawyer members are still widely used. *See, e.g.*, FOSTER, *supra* note 11, at 106-07.

55. In fact, the number of students in the seminar sufficed only for a jury of three in the common law trial and a single assistant judge in the civil law proceeding.

	COMMON LAW TRIAL JURORS		CIVIL LAW ASST. JUDGES	
Activity	**Time Spent**	**Person-Hours**	**Time Spent**	**Person-Hours**
Initial Hearing	—	—	1.2	2.4
Trial/Final Hearing	3	18	1.5	3
Totals	3	18	2.7	5.4

By making a few assumptions, the net recoveries and incurred costs of both trials can be analyzed and compared. It is assumed that Mr. Cluney's common law lawyer was working pursuant to a one-third contingent fee agreement, and that the lawyer hired by Ms. Borak's insurance company was being paid at an hourly rate of $75.[56] In the civil law case, it is assumed that all attorneys were paid on an hourly basis at the rate of $75.[57] The "American Rule," under which the parties bear their own attorneys' fees, was used in analyzing the results of the common law case; the "civil law rule," under which the loser pays the winner's fees and costs, was applied to the civil law case.

56. Today this kind of an hourly rate is probably conservative. Because of the age of the case itself, the other quantified values such as medical bills and lost wages are roughly proportional.

57. This assumption was made to improve comparability in effort between the two systems. In actuality, under the German system, attorneys are generally not paid by the hour to litigate, but are paid statutory fees based on the stage of the trial reached and the amount in controversy. Assuming an amount in controversy of, say $15,000, the German statute regulating attorneys' fees would have authorized fees of the order of $440 for each of the three legal services (overall case representation, representation at oral hearing, representation for taking of evidence) rendered with respect to the case, or a total of $1,320 for each side. *See* BUNDESGEBÜHRENORDNUNG FÜR RECHTSANWÄLTE §§ 11 & 31, Attachment 1 (as amended through 1991) (assuming 2 DM/Dollar).

	COMMON LAW CASE		CIVIL LAW CASE	
Item	**Plaintiff**	**Defendant**	**Plaintiff**	**Defendant**
Gross Damages	$10,000	-$10,000	$10,000	-$10,000
Plaintiff's Lawyer's Fee	- $3,333	—	—	$427[58]
Defendants' Lawyer's Fee	—	$2,400[59]	—	$525
Expert Witness Fee	- $150[60]	- $375[61]	—	$400
Net Recovery to Plaintiff	$6,517	—	$10,000	—
Net Cost to Defendant	—	$12,775	—	$11,352
Trial Costs to Both Parties	$6,258		$1,352	

In order to award the plaintiff compensation of $6,517, American trial procedures resulted in attorney and court costs to the parties totaling $6,258. Of these costs, the defendant paid $2,775 and the plaintiff (from the gross amount recovered) paid $3483. The civil law trial cost the parties a total of

58. 5.7 x $75 = $427.50.
59. 32.0 hours x $75 = $2,400.
60. For preparation and examination, not a taxable cost.
61. For appearance in court and testimony, generally a taxable cost.

$1,352, all of which was borne by the defendant, so that the plaintiff received a full recovery of $10,000.

Personnel costs to the court system can also be compared:

	COMMON LAW		CIVIL LAW	
Item	**Hours**	**Amount**	**Hours**	**Amount**
Trial Judge/ Presiding Judge[62]	4.8	$384	5.7	$456
Trial Jurors[63]	18	$300	—	—
Assistant Judges[64]	—	—	5.4	$324
Totals	—	$684	—	$780

The amount of public adjudicating resources for both cases seemed comparable, but were distributed differently. Almost half of the public cost of the common law trial was for the jury.[65] The slightly greater public cost of the civil law proceeding was entirely for professional judges.

VIII. OBSERVATIONS OF THE PARTIES, COUNSEL, AND WITNESSES

The students playing the roles of the parties, counsel, and witnesses were asked to record their comparative impressions of the experience in brief contemporaneous memos. These memos provided interesting glimpses of aspects of the process from various perspectives.[66]

Plaintiff Raymond Cluney felt more vindicated by the common law jury verdict than by the finding of the civil law judges. In terms of the common law jury, the size of the group and their inscrutability gave him the feeling that he would not be countering prejudices in his fact finders. On the other hand, questions from the civil law judges were interpreted by him as possible skepticism and adverse prejudgement which made him trust the civil law judges less. Another comparative virtue assigned by the plaintiff to the

62. Assumes salary and benefits totaling $120,000/year and 1,500 hours/year of trial or office time working on cases, resulting in a rate of $80/hour.

63. Assumes one day of service and jury pay of $50/day.

64. Assumes salary and benefits totaling $90,000/year and 1,500 hours/year of trial or office time working on cases, resulting in a rate of $60/hour.

65. When one considers that jurors' pay is often noncompensatory, there may be additional public costs borne directly by the jurors or their employers by way of foregone or made-up compensation above and beyond their daily jury pay.

66. One perspective from which the students did not comment was the financial one.

common law process was the psychological feeling of power to be in an adversarial contest with a strong advocate and a similar feeling of power to shape the trial.[67] Both of these were absent in the civil law process.

> Just briefly, I felt that one of the most important aspects of any trial is the power to shape it in order to tell my story. This power is largely absent in the civil trial system. It seems as though the real battle is over who gets to be admitted as witnesses. Once that has been decided you're stuck with the hand you're dealt. I also felt as though the civil trial was highly disorganized—we simply moved from witness to witness, our side got our say in, and then we moved on. There wasn't any ability to reinforce or contradict testimony, to structure the presentation to make a point, or any of the other tactics plaintiffs use to shape the trial and tell their story in the common law system.[68]

Alfrieda Borak, the defendant, felt more comfortable in the common law trial because of familiarity with the system and the fact that the decision-making process by the jury was a mystery, "allowing me to chalk up the loss to chance rather than to my real liability." She "knew my lawyer would ask me questions geared toward letting me tell my story in as positive a way as possible."[69] On the other hand, the experience as a party in a trial reminded her of the importance of lawyer skill, strategy, and theatrics in common law trials, which could result in injustice. From the perspective of the defendant, the biggest problem with the civil law system was the possibility that the judge-centered questioning might miss some facts in the stories.

The common law lawyers for both parties reveled in the importance and power of their roles, but were also conscious of their heavy burden of responsibility for generating the outcome. They both acknowledged spending considerable time in preparation so that they could meet this burden.

> Serving as a trial attorney in a common law trial was an experience both exhilarating and terrifying at the same time. It was exciting because the trial was the culmination of a great deal

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67. The fact that all of the participants, "lawyers" and "clients" alike, were law students just out of the Trial Advocacy Workshop may have contributed to some of the positive feelings expressed about the roles of the lawyers as their clients' champions. Would the "real" Raymond Cluney have placed as high a value on his ability to shape the trial with a partisan advocate?

68. Statement of Andrew Torrez, who played Raymond Cluney in both trials.

69. Statement of Carla Halpern, who played Alfrieda Borak in both trials.

> of training at law school and was an intellectual challenge and puzzle of the highest order. However, the pressure that accompanies the trial for the attorney is intense, especially in the situation for our simulation, where each attorney worked individually.[70]

As observers of the civil law trial, they expressed concern about potential bias on the part of the judges and the limited ability of counsel to counter it.

> At both civil law conferences, the judges seemed to doubt the defendant's credibility, even though she was barely given an opportunity to speak. While the defendant's story was doubted in the common law trial as well, at least she was given the opportunity to speak, be heard, and look her accuser face-to-face.[71]

On the other hand,

> [w]ith the civil law judge, it was possible to see what areas of skepticism the judge had from his questions and demeanor; the attorney can then utilize his limited role to address those issues if possible or can choose to settle the case. In the jury trial, I had no idea whether Raymond Cluney's story was reaching the fact finders and whether they saw the key issues as I had hoped they would, until the jury's verdict was read. By then, of course, it was too late for me to make any changes . . . .[72]

The civil law lawyers commented very favorably on their much lower level of stress in trial preparation and in participating in the hearings.

> From a stress level standpoint, the civil lawyer has a much easier time than the common law lawyer. Because the court carries the ball on setting out the broad strokes of the events at issue, the lawyer can focus on the key events. The hearing passes much more quickly as foundational evidentiary issues are nearly non-existent. The relaxed evidentiary standard struck me as particularly worthwhile.[73]

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70. Statement of Jonathan Kolodner, who was plaintiff's attorney in the common law trial.

71. Statement of Zachary Lehman, who was defendant's attorney in the common law trial.

72. Statement of Jonathan Kolodner, *supra* note 70.

73. Statement of Sean Carnathan, who was defendant's civil law lawyer.

Although they were not as prepared for adverse facts from their opponents, the civil law lawyers found that the opportunity for another hearing to address the new matter seemed to alleviate the concern. The absence of rules of evidence and a very rational approach to the fact finding made the process seem streamlined.

> In terms of time, I think the civil law trial was far more efficient. It wasted far less time (and therefore money) and reached an equivalent result. I know that I experienced the typical juror feelings during the common law trial . . . I sat there wishing the pace would pick up. In contrast, the civil trial got straight to the issues and moved at a fairly quick pace.[74]

The civil law process seemed more efficient. By removing the burden and responsibility for fact gathering from the lawyers, the civil system "effectively prevents the lawyers from spending more on the case than it is worth."[75]

The non-party witnesses both found the civil law trial experience more rational and considerate of their roles. The common law adversarial mode of presentation tended to push Ms. Godard "into a role she may not have been comfortable with."[76] On the other hand, in the civil law proceeding the absence of discovery, witness preparation, and adversarial questioning:

> [a]llowed too much important information to be ignored. In Ms. Godard's case, the fact that she overheard a potentially prejudicial statement from the police officer did not even come out in the civil law trial because plaintiff's lawyer was not allowed to interview her in order to probe for the information. This left plaintiff to be wholly reliant on the judge to obtain the information or on the witness to offer it. Neither is a satisfactory solution.[77]

Officer Anderson found the focus of the civil law inquiry refreshing in comparison with the long-winded and "frustrating" witness presentation at the common law trial.

> Conversely, the testimony at the civil trial was brief, and conducted primarily by the fact finders who had read the report

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74. Statement of Lisa C. Sullivan, who was plaintiff's civil law lawyer.
75. Statement of Sean Carnathan, *supra* note 73.
76. Statement of Samantha Halem, who played witness Christina Godard in both trials.
77. *Id.*

> and were seeking confirmation and clarification rather than a lengthy presentation. As was pointed out in class discussion, these proceedings seemed to place greater reliance on the credibility of such documents.[78]

Both witnesses, however, expressed some concern about relying on the fairness and lack of bias of a single judge rather than a group of people from the community.

Dr. Theresa Swallow, the expert witness, strongly preferred the civil law setting and her role as an impartial source of specialized knowledge. As treating physician, she felt uncomfortable in her common law role as plaintiff's partisan expert, and she did not like having to face common law cross-examination. Both the form and content of civil law questioning by court and by counsel seemed better calculated to get at the truth than the controlling, closed cross-examination in the common law trial.

The common law jury foreman and civil law assistant judge preferred his civil law role because: "I got to be more involved in the process. For instance, where I had trouble understanding a witness' testimony, I could immediately ask for clarification. I was more comfortable when I rendered my decision since I knew that it was an informed one."[79] By contrast, sitting for any length of time as a passive juror, merely looking and listening, seemed frustrating.

As presiding judge, the author similarly found his civil law role much more rewarding than presiding over a common law jury trial. Getting into the facts, asking the questions, and finding out what really happened, seemed more creative and interesting than sitting by and acting as neutral umpire over the unfolding adversarial drama. A sense of efficient inquiry replaced the passivity of a common law judge. The process of learning about most of the facts from the pleadings and at the initial hearing and focusing on the relatively few real fact issues at the final hearing seemed more natural, efficient, and reasonable than waiting for all of the facts, routine and contested, to be unfolded by the lawyers at the final hearing.

The fact that the common law jury and the civil law judges reached the same final result was undoubtedly coincidental.[80] However, no one suggested that either outcome was anything but a reasonable reflection of the evidence and application of the law. Quality of decision did not seem to be

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78. Statement of Jim Bauch, who played Officer Harold Anderson in both trials.

79. Comments of Luan Tran, who served as civil law assistant judge and common law jury foreman.

80. The jury was asked to keep its verdict secret until the judges had rendered the civil law decision. The foreman of the jury was also the assistant civil law judge. Although he did not reveal the jury verdict during the judges' deliberations, it is possible that his voice in the civil law deliberations was influenced by his knowledge of the jury's assessment of the case.

a problem with either the civil law or common law process. The fact that the civil law process did not bring out all of the potentially relevant facts did not seem adversely to affect the civil law decision.[81] Although the common law jurors could not agree on a rationale, their "bottom line" verdict was not perceived to be "out of line" to the participants and observers of the trials.

IX. CONCLUSIONS

Comparative trials of a single simulated case cannot justify major conclusions about the relative virtues or drawbacks of civil and common law trial processes. However, by eliminating the variables of: 1) governing substantive law, 2) national culture of the participants, and 3) the facts of individual cases, this kind of experiment approaches an "apples to apples" comparison from which some tentative impressions might be drawn.[82]

Looking at the policy issues of cost, accuracy, fairness, and party vindication, in *Cluney v. Borak* the civil law trial system had a decided advantage in cost[83] and accuracy, while perceived fairness seemed comparable; and the common law system provided a greater sense of party vindication, at least to American litigants.

A. *Relative Costs*

For resolving relatively small civil personal injury cases, civil law procedures (including fee-shifting) appear to offer a reasonable process at considerable savings of litigation resources over common law trial procedures. Even allowing for arbitrary assumptions concerning the rates of pay for lawyers and judges, the difference in lawyer effort between the common law and civil law cases strongly favors the civil law procedures. In our experiment, the total process costs for the common law trial exceeded those of the civil law trial by a factor of three.[84] The distribution of costs under the American Rule resulted in a heavy burden on the successful plaintiff, whose "full compensation" was reduced by a third.[85] The full

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81. The facts that did not come out in the civil law trial were non-obvious facts relevant only to possible witness bias. The basic details of "what happened" seemed to be fully developed in both proceedings.

82. Although the use of a simulated case rather than actual trial results reduces empirical quality, it may be the only way some of these variables can be eliminated effectively.

83. "Cost" includes all economic inputs, including uncompensated party time and effort, as well as attorneys' fees, witness fees, and judicial facilities.

84. Common law costs for judge, jury, lawyers, and expert witness amounted to $6,946. Civil law costs for judges, lawyers, and expert witness amounted to $2,104.

85. The level of costs relative to the amount awarded in our experiment appears to be consistent with cost profiles of tort cases tried in federal courts as studied by the Rand Corporation in the late 1980s. The Rand study found that in tort cases, lawyers' fees and

compensation awarded by the civil law process came at a lower cost to both parties and an only slightly greater expenditure of public resources.[86]

Although current civil justice reform literature has focused on large and complex cases as targets for procedural reform,[87] the smaller cases may make the most convincing case for process reform calculated to achieve a fair and considered result at a dramatic reduction in inputs.[88] The relatively high costs of counsel, whether paid hourly or by contingency fee, may currently act as a bar to the adjudication of many deserving cases that do not involve large sums of money.[89] A process that would operate much more inexpensively and provide recoveries in meritorious cases undiminished by counsel fees might make civil justice available to many potential litigants to whom it is currently denied.[90]

B. *Time*

Our experiment gave us no meaningful feedback on the question of

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other litigation expenses roughly equaled the amount of compensation awarded. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (Institute for Civil Justice, Rand ed., 1986).

86. For the sake of simplicity, case filing fees have been assumed to be nominal. However, court fees at civil law are often sufficiently substantial to defray a large part of the actual costs of judges and court facilities. These costs are also generally passed along to the losing party. For instance, the court fees that would have been payable under German law for trying *Cluney v. Borak* to judgment (again assuming an amount in controversy of $15,000) would have been of the order of $207 for the initial filing fee and an additional $414 for the judgment, or a total of $621. *See* GERICHTSKOSTENGESETZ §11, and Attachments 1 and 2 (as amended through 1991).

87. For instance, the competence of a jury to hear and decide complex or technical cases has been debated for some time. *See Development in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1489-1513 (1997) (recent summary of proposed reforms).

88. This is not to say that civil law procedures would not operate effectively in large and complex cases. It would be hard to draw any conclusions about such cases from our experiment with a relatively small and simple case.

89. Although such cases may not involve enough money to grease the gears of the American civil justice system, they may be of great importance to the persons involved as well as the overall justice system. In some cases, such as employment discrimination, civil rights, and the like, the substantive law has recognized the potential barrier of high litigation costs by modifying the "American Rule" to permit an award of attorneys' fees to a successful claimant. These measures do not necessarily reduce the overall cost burden, but they do reduce the impediment to claimants by shifting it.

90. Past American law reform measures aimed at providing a fair means of public adjudication at low cost have incorporated fact finding procedures rather similar to those of the civil law system. For instance, the role of the judge at small claims, or the role of an administrative law judge in a Social Security appeal or workers' compensation case often goes beyond passively listening to presentations by counsel for the parties. In these venues, where overall adjudication cost is an important consideration, the adjudicating officers take a larger role so that the cost of party representation can be greatly reduced or eliminated.

which process would be more time-consuming. Our hearings and trials were scheduled in an academic calendar untrammeled by other cases and conflicting participant schedules. In real life, lawyers and judges working in both systems are struggling to reduce the time required to bring civil matters to trial. Recent studies of American civil trial processes find time to disposition generally increases as the number of trials decreases.[91] Similar concerns are also voiced by current civil law observers. In particular, it has been pointed out that the process of serial hearings at civil law may tend to promote delay in reaching a final result.[92] One response in civil law jurisdictions has been an effort to reduce the number of hearings and concentrate fact finding in a single hearing.[93]

C. *Accuracy*

Both common law and civil law procedures were perceived to operate with acceptable fact finding accuracy in the context of *Cluney v. Borak*.[94] In both cases, the key relevant facts were developed and analyzed in a rational manner to reach a result based on reality. Although some concern was expressed that the civil law inquiry "missed" some facts potentially relevant to witness credibility,[95] the omitted facts did not ultimately appear to "matter" in the decision of the case by either jury or judges.

Although the opaqueness of the jury's decision making turned out not to be of practical significance in our case, discussion with the jurors of their rationales for reaching the result they did left a slightly disquieting impression.[96] Our experiment suggested that in a more complicated case,

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91. *See* Dunworth & Kakalik, *supra* note 2, at 1310-12.

92. *See* Von Mehren, *supra* note 22, at 368-71. The problem of delay in English chancery proceedings, which at one time resembled civil law proceedings in many respects, was graphically depicted by Dickens in *Bleak House*.

93. *Recent Reforms in German Civil Procedure*, *supra* note 1. "In civil matters, the contrast between the two legal traditions has been greatly reduced over the last half-century, especially in Continental jurisdictions pressured by swelling caseloads that have taken measures to encourage the disposition of lawsuits in a single concentrated hearing." DAMAŠKA, *supra* note 1, at 67.

94. It is hard to gauge the "accuracy" of a system designed to adjudicate disputed facts, since the "truth" is not objectively known. Under these circumstances, "accuracy" can best be taken to refer to the capacity of the system to produce apparently reasonable results under a process that seems calculated to uncover, assimilate, and publish the truth as far as it can be known.

95. These were statements by the individuals playing the parts of witnesses Godard and Anderson, which might indicate some bias on their part respectively against and in favor of defendant Borak.

96. Although the jurors agreed on a lump sum amount, they arrived at that sum by different rationales. All the jurors agreed that the defendant had been negligent, but they did not appear to agree on what that negligence was.

there might be material misapprehensions by individual jurors that would be shielded from correction by the mantle of secrecy thrown over the jury deliberations. The requirement that the civil law court expose its reasoning in a written decision would tend to ensure that errors and misapprehensions would be revealed and could be corrected on appeal.[97]

D. *Fairness*

Civil law procedures are perceived to address the issues with greater efficiency. The judge-centered inquiry seems to be easier on the witnesses, especially the expert witness, who do not become pawns in the partisan battle. The burden and wear and tear on lawyers is appreciably reduced.

At the same time, American lawyers seem to like having their hands on the controls: litigants seem to prefer to be able to shape and tell their own stories with partisan resources in preference to being examined by a neutral. There is the risk that civil law procedures might miss some important information that would be discovered by common law lawyers in preparing their cases. Finally, the enhancement of the civil judge's power to manage and conduct the proceedings is accompanied by a heightened suspicion and concern over possible judicial prejudice or skepticism which would prevent both parties from getting a "fair shake."

Our experiment suggests that common law and civil law processes both appear to be capable of producing high quality bottom line decisions, at least in a simple personal injury case. When one thinks of a court decision as an indication of future decisions in similar cases, the "bottom line" jury verdict would appear to be of dubious value. In our common law case, the jurors could not even agree on a rationale for their damages among themselves. Use of the common law verdict as a gauge of the potential value of a personal injury case would be hazardous in the extreme.[98]

On the other hand, the civil law judges were required to find a rationale for their decision which could stand the light of publication. A

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97. Civil law procedures generally permit free re-examination of facts and fact findings at the first level of appeal.

98. *But see*, Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JUSTICE SYSTEM 61-102 (Robert E. Litan ed., 1993) [hereinafter VERDICT] (arguing that although the American civil jury gives indistinct and blurry signals to litigants considering pretrial settlement, it does provide a useful overall regulatory function in the settlement process). *See also* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 60-91 (1995) (attempting to detect informative patterns in jury verdicts and concluding that the picture is one of high variability and complexity). Samuel R. Gross and Kent D. Syverud argue that only extreme cases reach trial, so jury verdicts are not good gauges for settlement of the vast majority of cases that must be settled if the system is not to be overwhelmed. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

rationale for overall damages of five times the out-of-pocket losses was far from elegant. However, it does provide lawyers arguing and judges considering other cases with a benchmark. The judges who sat in this case would be under some inducement to have a good reason for use of a measure other than five times special damages in a future case. Other judges would have an articulated standard to refer to when making their own assessments of damage. The articulation and publication of a reasoning process seems to lend some stability and rigor to the difficult process of estimating damages.[99]

The educational value of articulated judicial decisions to future litigants and negotiating parties may well be a significant advantage to judge-centered civil trial process. Settlements can be based on more realistic predictions of what would happen in the absence of settlements.[100] Since most cases settle, any measure contributing to the quality and reasonableness of settlements and the settlement process is likely to be of considerable value.[101]

As Americans wrestle with the perplexing problem of providing civil justice for all in the twenty-first century, we should look hard at many of the procedures of the civil law system, which may suggest meaningful reforms in our own. Our modest experiment suggests that judge-centered civil trials may offer high quality justice at great savings in litigation costs without

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99. Fans of the jury might point out that in assessing damages for such claims as pain and suffering, the collective ad hoc estimate of a jury is more likely to reflect community values than a proxy (such as five times the special damages of $2,500 as seized on by the judges in the *Cluney v. Borak* civil law trial). *See* Harry L. Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958). Robert Macoun marshaled empirical data on factors influencing jury decisions in civil cases and concluded that much remains to be learned on how juries decide controversies entrusted to them. Robert Macoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, *in* VERDICT, *supra* note 98, at 137-180.

100. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981). In *The Regulatory Function of the Civil Jury*, Professor Galanter points out that how information about trial outcomes is communicated to lawyers and their clients affects the value of the information as a guide to settlement of other cases. VERDICT, *supra* note 98, at 61. Information about jury verdicts is disseminated more widely than ever before, but still in a largely unsystematic manner. Judicial opinions, on the other hand, have long been widely and systematically disseminated by West's *National Reporter System*, and more recently by Lexis, Westlaw, and the Internet.

101. Only about 4% of civil cases filed actually go to trial. Of the rest, a minority are disposed of by pretrial decision and the balance are settled by agreement or are abandoned. *See, e.g.*, National Center for State Courts, *1992 Study of Selected Counties* (visited Mar. 28, 1998) <http://teddy.law.cornell.edu:8090/questcvs.htm>; 1991 ANNUAL REPORT OF ADMINISTRATIVE OFFICE OF THE COURTS, at tbl. C-4 (federal courts). For a thoughtful discussion of the importance of quality settlements in civil cases, see Galanter & Cahill, *supra* note 18, at 1339.

sacrifice of fairness or quality of outcome in many cases.[102] An important question would be whether the value of these savings to American litigants and lawyers would outweigh potential compromise of the feelings of party autonomy and control of fact presentation featured by the American civil trial system. Our results suggest that this and other questions raised by this comparison are worth addressing.

102. Current experiments in "pilot districts" under the auspices of the Civil Justice Reform Act of 1990 feature increased judicial involvement in civil cases at an earlier stage, which can be seen as a step in the direction of civil law procedures. The effect of such measures on the high costs and delay associated with traditional procedure is being studied by the Rand Corporation for the Judicial Conference. For a description of the study, see Dunworth & Kakalik, *supra* note 2, at 1303.

THE RAINBOW FLAG, EUROPEAN AND ENGLISH LAW: NEW DEVELOPMENTS ON SEXUALITY AND EQUALITY

Philip Britton[*]

I. INTRODUCTION

These are exciting times to be an observer of the legal scene in the United Kingdom, if your focus is on the rights and protections accorded to lesbians and gay men. During the last twelve months, there have been at least two significant legal victories for lesbians and gay men seeking legal protection: one on adoption and the other on equalizing the age of consent between homosexual and heterosexual young adults. At the governmental level, at least two major policy initiatives have led or will lead in the short term to significant improvements in the legal status of gay men and lesbians. Not only that, but these changes reflect in miniature wider movements within the English legal system, including a re-working of the relationship between the primary sources of law (which now include the ever-increasing scope of European law, as well as traditional legislation passed by Parliament) and the judiciary.

If you take the view that the way a country treats its minorities is an important test of its humanity and maturity as a society, then you will welcome these developments. But the United Kingdom has until this recent flurry of changes had one of the worst records within Europe,[1] not just of failure in legal terms to offer any protection to lesbians and gay men against discrimination and homophobia but of examples of both discrimination and homophobia inherent in both the law and the legal system.[2] Positively, these

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1. HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE (Kees Waaldijk & Andrew Clapham eds., 1992) [hereinafter HOMOSEXUALITY] reached this conclusion from a study of all European Community/Union countries.

2. As an example, official Home Office papers recently released at the Public Record Office show that gay male prisoners in England in the 1950s were routinely offered electric shock and estrogen treatment as a would-be cure, though apparently not under compulsion. Valerie Elliott, *How Homosexual Prisoners Were 'Cured,'* TIMES (London), Nov. 28, 1997, at 8. Some commentators suggest that a client's consent to an attempt to change his/her sexual orientation can never be real, so that an ethical therapist should refuse to cooperate. *See, e.g.*, Charles Silverstein, *Homosexuality and the Ethics of Behavioural Intervention*, 2 J. HOMOSEXUALITY 205-11 (1977).

used to include the criminalizing of all forms of sex between men[3] including kissing in the street;[4] treating consensual S/M practices in private between adults as assault;[5] treating gay men and lesbians as unfit parents;[6] giving the gay or lesbian partners of U.K. citizens no immigration or residence rights;[7] and discriminating against gay men and lesbians in government employment, at least in the security, military and diplomatic spheres. More fundamentally, the law has so far failed to adopt or recognize any principles to protect lesbians and gay men generally against negative consequences resulting from their sexuality, and has refused to recognize long-standing gay or lesbian relationships as entitling one partner to any special status in relation to immigration, property rights in the home,[8] or to succession on the

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3. The principal offenses are buggery (which carried the death penalty when first legislated in 1533); gross indecency, which covers any sexual act; persistently soliciting or importuning another man in a public place for an immoral purpose, which potentially includes just inviting a man back to your home for a drink and to spend the night (R. v. Gray, 74 Crim. App. 324 (C.A. 1982)); procuring an act of buggery, provided that the act itself is not covered by the Sexual Offences Act 1967, ch. 60, § 1 immunity, on which see *infra* text accompanying notes 18-21; and insulting behaviour or disorderly conduct under the Public Order Act 1986, ch. 64, §§ 4, 4A and 5. *See also* RICHARD CARD, CARD, CROSS & JONES—CRIMINAL LAW 242-47, 249-52, 399-408 (13th ed. 1995). There are also local Acts of Parliament and by-laws made under them which have been used against gay men, e.g. "threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace" under the Metropolitan Police Act 1839, ch. 47, § 54(13) (applicable to London only). Also discussed in Part II, *infra,* are the common law offenses of conspiracy to corrupt public morals, conspiracy to outrage public decency and blasphemy, all of which have been used against gay publications.

4. *See* Les Moran, *Sexual Fix, Sexual Surveillance: Homosexual in Law, in* COMING ON STRONG—GAY POLITICS AND CULTURE 180-81 (Simon Shepherd & Mick Wallis eds., 1989).

5. R. v. Brown (Anthony) [1993] 2 W.L.R. 556 (H.L.) (a 3-2 majority in the House of Lords); for the unsuccessful application under the European Human Rights Convention which followed, see *infra* text accompanying note 111.

6. *See* Re C [1991] 1 F.L.R. 223, where the Court of Appeal held that the judge below had been wrong to treat as irrelevant the fact that a mother was now living in a lesbian relationship in deciding which parent should have care and control of a child: this fact should not disqualify her but, as Balcombe L.J. said at 231C, should be an important factor in deciding which of the competing parents could offer the nearest approximation to the norm of a home with a mother, father, and siblings (if any). Glidewell L.J. agreed but added "[a] court may well decide that a sensitive, loving lesbian relationship is a more satisfactory environment for a child than a less sensitive or loving alternative." *Id.* at 229. *See also infra* text accompanying note 58.

7. *See* B. v. U.K., App. No. 16106/90, 64 Eur. Comm'n H.R. Dec. & Rep. 278 (1990) (refusal to allow applicant to remain in U.K. with same-sex partner—declared manifestly unfounded, since states were justified in wishing to protect "family-based" relationships and hence in treating same-sex couples less favorably).

8. To be fair, the recognition by equity of informally created rights in land via concepts of implied, constructive or resulting trusts or via the doctrine of proprietary estoppel is not limited to heterosexual (or even couple) relationships. However, under English law, to have

death of the partner.[9] Gay and lesbian couples also suffer the discrimination in tax terms which is faced by all unmarried couples.[10] As Les Moran puts it:

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lived together as an economic unit, regarding income and outgoings (including mortgage payments) as shared, is unlikely to be enough to give both partners a share in the property, if the formal legal title is in the name of one partner alone. *See* Burns v. Burns [1984] Ch. 317, applying Lord Diplock's speech in Gissing v. Gissing [1971] App. Cas. 886 (H.L.), *and* S.M. CRETNEY & J.M. MASSON, PRINCIPLES OF FAMILY LAW ch. 4 (6th ed. 1997). Regarding "sexually transmitted debt," there is a strong indication from the House of Lords that those lending to one member of a gay or lesbian cohabiting couple, with the shared property as security, need to make sure that the other partner truly consents to guaranteeing the other partner's debts if the surety is to be enforceable. Barclays Bank Plc. v. O'Brien [1993] 3 W.L.R. 786, 800C (H.L.) (Lord Browne-Wilkinson). The moral for all unmarried couples, gay or straight, is to consider what form of co-ownership is appropriate and then create it formally, with the property transferred into joint names: but surprisingly few yet do this. Many gay men in Britain in the 1980s and 1990s have expressly chosen not to do so, because of their justified fear that a joint purchase by two single men would attract the suspicion of lenders and insurers that they were members of what institutions still like to call a "high risk" group for AIDS, with the resulting discrimination, possibility of being required to take an HIV test and higher insurance premiums. For possible future changes in the property rights of cohabitees, see *infra* Part V.D.

9. On succession by the surviving partner to certain forms of tenancy, see *infra* Part III.B; on succession to the property of a deceased partner generally, English law maintains almost intact the principle that a testator has absolute freedom to do with his/her property what he/she wishes. The fall-back provisions which apply on partial or total intestacy (Administration of Estates Act 1925, ch. 23, § 46, amended by the Law Reform (Succession) Act 1995, ch. 41, § 1) completely exclude unmarried partners of either gender. Since the coming into force of the Inheritance (Provision for Family and Dependants) Act 1975 (as amended by the Law Reform (Succession) Act 1995, ch. 41, § 2) a surviving spouse and a person cohabiting with the deceased in the same household and "as his/her husband or wife" for the two years immediately preceding the death may ask the court to make reasonable provision for him/her (if necessary varying the will, if there is one), surviving spouses being in a privileged position as to the level of provision they are likely to receive; as with the rules on succession to tenancies, a gay or lesbian surviving partner will surely attempt to qualify under these rules, though there is no record of this yet. Under the same 1975 Act, a non-relative who can show that the deceased was making a substantial contribution in money or money's worth towards his/her reasonable needs at the date of the death can also apply. Few non-relatives have succeeded under these provisions, though Bishop v. Plumley [1991] 1 W.L.R. 582 (C.A.) and Graham v. Murphy [1997] 1 F.L.R. 860 (Ch.) are two examples; again, no reported case under this head so far concerns a gay or lesbian surviving partner. As with rights to land during the lifetime of the partners, the lesson for gay or lesbian partners is to make proper provision by will for the survivor, for the law is very unlikely to do it for you.

10. Transfers of assets between spouses do not count as disposals for capital gains tax purposes (Taxation of Chargeable Gains Act 1992, ch. 12, § 58); and transfers of capital or assets on death between one spouse and the survivor are "exempt transfers" for inheritance tax purposes (Inheritance Tax Act 1984, ch. 51, § 18). Married couples also enjoy a higher personal allowance in relation to income tax (Income and Corporation Taxes Act 1988, ch. 1, § 257A, the actual value of the relief being established annually).

> Where others might seek and realise rights and justice, the gay experience is victimization and discrimination. An everyday socially acceptable action becomes outlawed. A dismissal from work that otherwise would be unreasonable, unfair, becomes reasonable, fair.[11] An eviction, otherwise unlawful, becomes lawful. The *fundamental rights* embodied in these instances—the right to privacy, to a family relationship, to a sexual relationship, and others such as the right to freedom of speech, to freedom of assembly, to health care—are systematically denied.[12]

This is unlikely to be a surprise: after all, lesbians and gay men in almost every country of the world[13] face government policies, a set of legal rights, specific criminal offenses, and a justice system whose starting-point is that "we" (i.e. the establishment) comprise only straight people, so "you"—gay persons—are "other" and therefore need not be treated as we would treat "ordinary" people. At its extreme, this approach pathologizes lesbians and gay men as socially/sexually dangerous, as insatiably promiscuous, and as seeking to entice the weak and vulnerable (particularly children and adolescents) into their twilight worlds. On this construction of reality, gay men and lesbians must at all costs be restrained, as subversive of "normal family life," if not also of the church and the other established institutions of the state, like the monarchy[14] and the armed services.[15] Of course, there are many lesbians and gay men who would enjoy being taken seriously as this sort of threat; but, at least in the United Kingdom, they have so far been in the minority. As in the United States, the arrival in the 1980s

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11. For a modern example of the point Moran makes, see Smith v. Gardner Merchant Ltd. [1996] I.C.R. 790 (E.A.T.), where the alleged harassment and dismissal of a gay man on grounds of his sexuality were held not to be discriminatory under English or EC employment law. Virginia Harrison, *Using EC Law to Challenge Sexual Orientation Discrimination at Work*, *in* TAMARA K. HERVEY & DAVID O'KEEFFE, SEX EQUALITY LAW IN THE EUROPEAN UNION 271 (1996), records that the Equal Opportunities Commission once issued a non-discrimination notice under the Sex Discrimination Act 1975, ch. 65, § 67 against an airline (Dan Air) for limiting recruitment of cabin staff to females alone, Dan Air claiming in its defence that if it employed men they would be likely to be gay and a health risk in an accident(!). The airline no longer flies, its routes having been taken over by British Airways in 1993.

12. Moran, *supra* note 4, at 181.

13. *See* R. Tielman & H. Hammelburg, *World Survey of the Social and Legal Position of Gays and Lesbians*, *in* A. HENDRIKS ET AL., THE THIRD PINK BOOK—A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 24 (1993).

14. The delight with which lesbians and gay men in Britain have shared, spread and embellished rumors about the sexuality of one of the heirs to the throne is a small act of rebellion against this attitude.

15. The continued strength of feeling for and against allowing gay men and lesbians openly to serve in the armed forces—*see infra* text accompanying notes 97-99 and 132-37—reflects the symbolic importance that "Queen and country" still seems to play in British life.

of the AIDS epidemic has provided extra food for bigotry and homophobia.[16]

The explanation for institutionalized discrimination against lesbians and gay men depends on your point of view: we could argue that gay people *do* represent a psychological threat to many straight people, not because of who or how they are, but because of the desires they invoke, these desires being threatening to heterosexual identity and thus needing to be repressed.[17] Rejection and victimization of the gay person or lesbian is a convenient way, through external conduct, of keeping at bay feelings with which some (perhaps many or most) heterosexual members of society are profoundly uncomfortable. If true, this seems to be much more marked of gay men and the effect they have on straight men than of lesbians and the effect they have on straight women. Almost all incidents of unprovoked attacks on gay people are by men against other men—which in the United Kingdom we call queer-bashing. In this context, where patriarchy seems also to be involved, it is small wonder that in England a male-dominated and predominantly single-sex, private-school-educated legislature, government, and judiciary have taken such a negative and repressive line. This has been primarily directed against (we could say obsessed by) the genital activities of men who have sex with men.

Could this well-built edifice, with foundations going back to Victorian times and beyond, now be crumbling? Has something truly significant happened to soften the unwelcoming, uncomprehending, and moralizing face that English law offers to lesbians and gay men? To answer these questions, this article looks first at the historical and legal background to questions of gay and lesbian rights in England (Part II below), then considers two recent English cases where gay rights have been at stake, in order to take the temperature of the contemporary legal system (Part III below). Part IV then looks at the significant impact on England of European developments from two separate sources: the law created by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) and the law of the European Community/Union (EC law). Part V looks at initiatives taken by or under the Labour Government of Tony Blair since coming to power in May 1997 which affect (or will affect) gay and lesbian rights. Part VI, finally, brings these strands together by way of conclusion and looking to the future.

At the start, it should be made clear that most of the article focuses on *English* law, this term for convenience being used to refer to the law in force in England and Wales, including the Acts of Parliament referred to; it says

16. *See* SIMON GARFIELD, THE END OF INNOCENCE—BRITAIN IN THE TIME OF AIDS (1995).

17. *See* Dominic Davies, *Homophobia and Heterosexism*, *in* DOMINIC DAVIS & CHARLES NEAL, PINK THERAPY 41-65 (1996).

little about Scotland—which has its own legal system, including criminal law and procedure—Northern Ireland, the Isle of Man, and the Channel Isles, where the law in practice also differs from England and Wales in many respects. Where, however, the United Kingdom is referred to, this means either all the constituent parts of the state officially called the United Kingdom of Great Britain and Northern Ireland or the state itself in its external international manifestation.

II. ENGLISH LAW AND LEGAL REFORM

A. *The Start of Legal Reform*

The modern era, in terms of the position of gay men, began more than thirty years ago, with—after nearly ten years of long, subtle and difficult campaigning—the passing of the Sexual Offences Act 1967.[18] This short Act gained Royal Assent on July 27, 1967 and came into effect the same day. It enacted, though in a more restrictive form, the principal conclusions of the Wolfenden Report of 1957,[19] an official enquiry into, amongst other subjects, the law and practice of what were then called "homosexual offences."[20] Since genital acts between women were never specifically criminalized in English law, the report concentrated on male/male sexual conduct, recommending the decriminalizing of sex occurring in private between two men of twenty-one or over (i.e. the voting age at the time). This in essence is what happened in the 1967 Act.

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18. The campaign was kick-started in the traditional fashion by a letter to *The Times* (London) on March 7, 1958 under the heading "Homosexual Acts." Thirty-three signatories called for reform of the law along the lines recommended by the Wolfenden report. The group of the "great and good" included two bishops and a prominent Methodist churchman (Rev. Donald Soper), three members of the House of Lords (the former Prime Minister Lord Attlee, together with Lords David Cecil and Russell), the intellectuals Noel Annan, A.J. Ayer, Isaiah Berlin, C.M. Bowra, Jacquetta Hawkes, Julian Huxley, A.J.P. Taylor, C.V. Wedgwood and Barbara Wootton, a pair each of poets (C. Day Lewis and Stephen Spender) and novelists (J.B. Priestley and Angus Wilson). The letter led to the formation of the Homosexual Law Reform Society on May 12, 1958, whose secretary for most of the campaigning period was Antony Grey. *See also* ANTONY GREY, QUEST FOR JUSTICE—TOWARDS HOMOSEXUAL EMANCIPATION (1992); HUGH DAVID, ON QUEER STREET—A SOCIAL HISTORY OF BRITISH HOMOSEXUALITY 1885-1995 chs. 8-10 (1997); ALKARIM JIVANI, IT'S NOT UNUSUAL—A HISTORY OF LESBIAN AND GAY BRITAIN IN THE TWENTIETH CENTURY ch. 3 (1997); COLIN SPENCER, HOMOSEXUALITY—A HISTORY ch. 13 (1995); DEREK JARMAN, AT YOUR OWN RISK 41-68 (1992); and JEFFREY WEEKS, COMING OUT ch. 15 (1990).

19. REPORT ON HOMOSEXUALITY AND PROSTITUTION, 1957, Cmnd. 247.

20. On the functions and use of this concept, see Leslie J. Moran, *The Homosexualization of English Law*, *in* HERMAN & STYCHIN, LEGAL INVERSIONS 3-28 (1995).

As a step forward, this was as narrow and careful a reform as it sounds —all it did was create a specific and circumscribed immunity,[21] limited geographically to England and Wales and leaving the rest of the criminal law and its administration and enforcement completely unchanged. In *Knuller v. D.P.P.*, the publishers of an "underground" magazine, *IT* (International Times), discovered this the hard way in 1970. After a jury trial, they were convicted of two common law offenses of conspiracy, to corrupt public morals and to outrage public decency. All they had done was to include gay male contact advertisements in an edition of their magazine. Challenging the very basis of both offenses—as well as their applicability to the facts of the case—they appealed to the Court of Appeal (Criminal Division),[22] then to the House of Lords.[23] The Law Lords, by a 4-1 majority, re-affirmed its controversial approval in *Shaw v. D.P.P.*[24] of conspiracy to corrupt public morals as a valid offense, holding that it was for the jury to determine whether the publication would have the effect of depraving and corrupting those who saw it; but the publishers' conviction for conspiracy to outrage public decency was quashed, again by 4-1. On the issue of conspiracy to corrupt public morals, counsel for the appellants argued that all the magazine was doing was making it easier for men over twenty-one who wished to have sex with other men in private to do so: how could a conspiracy to further aims now legal lead to criminal liability?[25] But "legal conduct" as a class proved to be too narrow to include "formerly illegal conduct" within it, as Lord Reid, the lone dissenter in *Shaw* but now in the majority in *Knuller*, put it:[26]

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21. The 1967 Act excluded some specific situations from the reform, in particular sex between male crew members on merchant ships (§ 2) and between or with male members of the armed forces (§ 1(5))—though both exclusions were ended in 1994 by the Criminal Justice and Public Order Act 1994, ch. 33, § 146; *see also infra* text accompanying notes 97-98. The definition in the Act of "private" is also very narrow (excluding, for example, a hotel room or party on private premises), which an applicant to the European Human Rights Commission unsuccessfully challenged in Johnson v. United Kingdom, App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 72 (1986).

22. Knuller (Publishing, Printing & Promotions) Ltd. v. D.P.P. [1972] Q.B. 179 (C.A.).

23. Knuller (Publishing, Printing & Promotions) Ltd. v. D.P.P. [1972] 3 W.L.R. 143 (H.L.). The House of Lords in this judicial context is the highest court of appeal in the English legal system, consisting of Lords of Appeal in ordinary (i.e. full-time professional judges, ennobled with life peerages) sitting hearing appeals but within the Palace of Westminster rather than the Royal Courts of Justice. The House of Lords in its general sense is the upper house of Parliament, but its judicial and legislative functions are quite separate.

24. Shaw v. D.P.P. [1962] App. Cas. 220 (H.L.).

25. PAUL O'HIGGINS, CENSORSHIP IN BRITAIN 34 (1972) suggests that the publishers had in fact no adequate system for ensuring that advertisers and their contacts were all over 21.

26. *See* Knuller (Publishing, Printing & Promotions) Ltd. v. D.P.P. [1972] 3 W.L.R. at 149B.

> [T]here is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense . . . I find nothing in the [Sexual Offences] Act [1967] to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice.[27]

Revealingly, there was no higher legal principle of freedom of the press or freedom of expression like the U.S. First Amendment on which the appellants could also rely before the English courts.

Despite limitations such as these, the symbolic importance of the 1967 Act was fundamental to those who had courted prosecution or stifled the expression of their sexuality in fear of the law, as well as to those who were newly sexual young adults at the time. It sent a signal that society believed that what happened in bed (or at least behind closed doors) between two men was no business of the criminal law. This cut the automatic link between the expression of gay male sexuality and the fear of a shameful and degrading appearance in court, with all the negative social and employment consequences that might follow; and it significantly reduced the risk of blackmail.[28] At a higher level, it showed that if this modest change was

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27. The charge of conspiracy to corrupt public morals was used again in 1971 (while the *Knuller* case was on its way through the appeal system) as one of the charges against the publishing company and the three publishers of Issue 28 of another underground magazine, *Oz*, in the longest ever obscenity trial at the Old Bailey. *See* TONY PALMER, THE TRIALS OF OZ (1971); JOHN SUTHERLAND, OFFENSIVE LITERATURE—DECENSORSHIP IN BRITAIN 1960-1982, at 117-26 (1982); and GEOFFREY ROBERTSON, THE JUSTICE GAME ch. 2 (1998). The accused were acquitted of the conspiracy charge but convicted under the Obscene Publications Act 1959 and the Postal Act 1953; the magazine went into liquidation two years later. Despite the real risk of a prosecution before 1967, suitably ambiguous gay contact advertisements were commonplace in some magazines, notably the stable which included *Plays and Players* and *Films and Filming*; even though the reasoning in the *Knuller* case suggested that the risk was not lessened by the 1967 Act, they have become widespread, not just in gay- or lesbian-oriented publications, e.g. the London listings weekly *Time Out*. When the law of conspiracy was reformed and turned into statutory form by the Criminal Law Act 1977, ch. 45, § 1 required the object of the agreement itself to be criminal; but § 5(3) specifically preserved the common law offenses of conspiracy to corrupt public morals and to outrage public decency. Only the exercise of prosecutorial discretion (in turn reflecting an assessment of a jury's willingness to convict) explains the greater freedom gay men, lesbians and their lifestyles now appear to enjoy.

28. The Criminal Law Amendment Act of 1885 (An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes) was the result of a campaign by journalist W.T. Stead in his *Pall Mall Gazette* exposing the traffic in

possible, other more fundamental shifts in society's values might follow, in which legal change would similarly lead and shape public opinion into more rational and less punitive attitudes. No doubt it was not the law alone that started the slow trend to greater openness and freedom—after all, the 1960s was a time of extraordinary social change, in London in particular, but in Britain the change in the law gave it a major boost. Since 1968, and against the wishes of those mostly heterosexual reformers who courageously supported implementation of the Wolfenden report, what had started as deviant sexual behavior blossomed into a publicly visible gay culture which simply did not exist before[29]—newspapers and magazines;[30] a published literature of novels[31] and "queer theory,"[32] with bookshops stocking them;[33]

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young girls in London. The Act raised the age of consent from 13 to 16, but also included § 11, which created the offense of gross indecency between men (not further defined) with a maximum penalty of two years' imprisonment. Section 11 was added in a sparsely attended House of Commons late in the night of August 6, 1885 via an amendment proposed by the Liberal MP for Northampton and investigative journalist Henry Labouchère (1831-1912). Labouchère and Stead appear as characters on stage in TOM STOPPARD, THE INVENTION OF LOVE (1997), Labouchère claiming near the start of Act II (at 63-64) that his amendment was really intended to force the Government to send the whole Bill to a Select Committee or to withdraw it altogether. In 1895 Oscar Wilde became the most famous early target of § 11 (he was sentenced to the maximum two years, with the added penalty of hard labor), which became known as "the blackmailer's charter"; one of the first British feature films to treat gay men as its central subject, the aptly entitled *Victim* (dir. Basil Dearden, 1961) has the impact of blackmail on a closeted (and married) gay barrister (Dirk Bogarde) as its main theme.

29. *See generally* JIVANI, *supra* note 18, ch. 4, and SPENCER, *supra* note 18, ch. 13.

30. The current tabloid weekly freesheet is *The Pink Paper*, but the longest gay publication in continuous print is the national monthly magazine *Gay Times*. This took the place of the pioneering fortnightly tabloid *Gay News*, founded in 1972, whose publishing company and editor Denis Lemon were in 1977 privately prosecuted by England's most famous campaigner for decency and Christian moral values in television and the press, Mrs. Mary Whitehouse. Lemon and Gay News Ltd. were convicted (on a 10-2 jury verdict) of publishing a "blasphemous libel," a poem by James Kirkup suggesting that one of the Roman centurions at the crucifixion had sex with the crucified Christ and that Christ when alive regularly had sex with the disciples. *See also* SUTHERLAND, *supra* note 27, at 148-54; and ROBERTSON, *supra* note 27, ch. 6. As in the *Knuller* case (*see supra* text accompanying notes 21-26) this was an antique common law criminal offense newly dusted down for the occasion, apparently not used since 1922. *See* R. v. Lemon [1979] 2 W.L.R. 281 (H.L.), where the House of Lords traced the history of the offence and re-affirmed its modern existence, holding (by 3-2) that there was no need for the prosecution to prove a specific intent to blaspheme. Blasphemy came back into relevance in 1996 when the judges of the European Court of Human Rights held (by 7-2) that it was not a violation of article 10 of the Convention (freedom of expression) for the British Board of Film Classification to refuse a certificate to Nigel Wingrove's video *Visions of Ecstasy*, on the grounds that a jury might hold the work blasphemous, showing as it did both Christ and St. Teresa of Avila in an erotic light. The restriction pursued a legitimate aim (protecting Christians against serious offenses against their beliefs) and was not more than necessary in a democratic society to protect this aim. Wingrove v. United Kingdom, 23 Eur. H.R. Rep. 1 (1997).

31. It was notable in terms of visibility and acceptance that an English gay novel was one

bars, clubs, and cafés; gay pride marches[34]—and not just in London; therapy groups by and for gay men and lesbians; and social groups trying to build openness, trust, and a sense of community.[35] Much of this is a reflection nationally of events and trends in the United States, in particular of the post-Stonewall gay liberation movement,[36] for which those who pioneered cheap fares from London to New York and California in the 1970s should also share the credit.

Most important of all, though, gay people's beliefs in their own worth, identity, and specific culture, as well as in their power as a group, has grown immeasurably since 1968. This has had at least two important effects. First, it has become harder for those in authority to write off lesbians and gay men as perverted deviants. If "respectable" members of society like M.P.s (and now two ministers),[37] Q.C.s[38] and knights of the stage like Ian McKellen

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of the short-listed six in 1994 for the United Kingdom's highest profile literary award, the Booker Prize. ALAN HOLLINGHURST, THE FOLDING STAR (1994). The winner that year, though, was JAMES KELMAN, HOW LATE IT WAS, HOW LATE (1994), controversial for its use of colloquial Glasgow dialect.

32. *See, e.g.*, SIMON WATNEY, POLICING DESIRE (1987) *and* ALAN SINFIELD, THE WILDE CENTURY (1994).

33. In London, Gay's The Word was for many years the only bookshop that made an effort to stock all English-language gay literature and periodicals in print, including U.S. titles. In order to test the law, in 1986 it provoked a seizure by the U.K. Customs authorities of gay titles being imported from distributors in the Netherlands. Faced with an application in court by Customs for an order destroying the books, Gay's The Word relied on article 30 of the EC Treaty (freedom of movement of goods), but the Court of Appeal with tortuous reasoning held that article 36 of the Treaty (prohibitions on imports justifiable on grounds of public morality, etc.) made the statutory prohibition on the import of obscene goods compatible with European law, even though it applied a stricter test to imports than would apply to books newly published in the United Kingdom, where there was a "public good" defence: R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Noncyp Ltd. [1989] 3 W.L.R. 467 (C.A.). Now, however, despite the law on obscenity and indecency remaining unchanged, most bookshops operated by major national chains (e.g. Dillons, Waterstone's) have gay and lesbian sections. The impact of the obscenity laws can still be felt; unlike many gay bookstores in the U.S., few in Britain risk openly showing books, magazines, or videos that include hard-core erotic imagery without going through the additional costly and uncertain step of applying for permission from the local authority to trade as a registered sex shop.

34. The Gay Liberation Front organized the first United Kingdom Gay Pride march, in London, in 1971.

35. *See, e.g., Over The Rainbow*, the newsletter of the Edward Carpenter Community, which since the 1980s has regularly held Gay Men's Weeks at Laurieston Hall in Scotland and at other rural locations.

36. For the impact of this in Britain, see LISA POWER, NO BATH BUT PLENTY OF BUBBLES—AN ORAL HISTORY OF THE GAY LIBERATION FRONT 1970-1973 (1995). *See also* WEEKS, *supra* note 18, ch. 16, and JARMAN, *supra* note 18, at 71-74.

37. The two current ministers are Chris Smith M.P., Secretary of State for Culture, Media and Sport, who came out when an Opposition back-bencher in 1984; and Angela Eagle M.P., a junior Minister in the Department of the Environment, who came out in September

come out as lesbian or gay, the image of the lonely, bitter, sex-obsessed degenerate gets rather difficult to sustain. Different we may be—and glad to be so—but we are no longer "them" to the establishment's "us." Second, gay men and lesbians have been able to mobilize pressure for legal change through both lobbying and direct action and have created organizations to channel this energy. These groups include Stonewall (law reform), OutRage! (direct action), Rank Outsiders (gay men and lesbians in the military), GMFA (Gay Men Fighting AIDS), London Lighthouse, and Terrence Higgins Trust (services, care and health promotion relating to HIV and AIDS). We can now talk intelligibly of "a" or "the" gay movement in Great Britain—and of course adoption of the word gay is itself part of the emergence of this movement and a reflection of its origin in the U.S.

However, this trend has not only been in one direction, in favor of freedom and openness. In 1987, the Conservative government of Mrs. Thatcher reacted to reports of a gay-positive picture book in the resource center of one London education authority by adding what became universally known as "clause 28" to the Local Government Bill, then passing through Parliament. Gay and lesbian groups and individuals marched, rallied, and lobbied in their thousands. However, the Government's majority saw the proposals through.[39] The result, the Local Government Act 1988 s. 28, provides that local authorities shall not "intentionally promote homosexuality or publish material with the intention of promoting homosexuality" or "promote the teaching in any maintained school of homosexuality as a pretended family relationship." That legislation, which openly treats gay and lesbian relationships as second class, added insult to injury by having a "saving clause" in section 28(2), allowing anything whose purpose is for the "treating or preventing the spread of disease." The equation "Gay men and lesbians = subversion of decent family life = disease (especially AIDS) = death" was complete. No matter that the law's actual scope was limited and its drafting so bad that enforcement would always be unlikely;[40] it was the climate of fear, self-censorship, and discrimination that it could encourage, not the law itself, that did the damage. It was the ideology behind the 1988 Act that so enraged the gay and lesbian movement; and there were no judicial procedures available to challenge these rules, once they were enacted by Parliament.

1997. *Minister "vindicated" by Lesbian Admission,* TIMES (London), Sept. 12, 1997, at 8.

38. Most notably Martin Bowley Q.C., President of the Bar Lesbian and Gay Group (1997).

39. *See* SPENCER, *supra* note 18, at 381-84.

40. MADELEINE COLVIN & JANE HAWKSLEY, SECTION 28—A PRACTICAL GUIDE TO THE LAW AND ITS IMPLICATIONS (1989); identical rules apply in the Isle of Man but to all public authorities. Sexual Offences Act 1992 (IoM) § 38.

B. *The Claims by Gay Men and Lesbians*

Given the part that English law has played in legitimizing and perpetuating homophobia, legal change has always been top of the agenda for gay and lesbian activists, though the specific aims and techniques used have varied from time to time and place to place. For gay *men*, modification of the 1967 Act to lower what in England is called "the age of consent" below twenty-one has been an ongoing priority, made more urgent in 1969 when the voting age was lowered to eighteen[41] but the criminal law left unchanged. It took until 1994 for change to occur: after stormy scenes outside Parliament, M.P.s in a free vote (i.e. not along party lines) voted to lower the age of consent for gay men to eighteen, but not to sixteen, which would have equalized it with that for sex between young men and women.[42] Many would also argue for the abolition or the general recategorization of the criminal offenses typically used against gay men. HIV infection has added new weight to the argument that health promotion and saving lives is more important than enforcing outdated moral codes through crimes which in most cases have no victims. Repeal of the Local Government Act 1988 s. 28[43] would also be high on most activists' wish-list.

More generally, though, the claim of lesbians and gay men has become a broader one—to be treated fairly in comparison with straight people, or at least not to be treated less favorably on grounds of their sexuality. Leaving aside all the difficulties of definition of this principle, it is no less than a claim to legal equality across the board, since it covers treatment by employers (potential, present, and past), all the apparatus of the state (central and local government, plus all the agencies which in any way exercise any public power to decide rights or confer benefits), contact with any supplier of goods or services, the criminal law, and, last but not least, all the issues linked to legal and family status (children and reproduction, health care, land or housing rights and inheritance). It is therefore as great a challenge to the established order as the claims that racial minorities and women have been making over a much longer timescale; like them, lesbians and gay men want substantive rights that they can assert in their day-to-day dealings with individuals and organizations, as well as the effective protection of the law against ill-treatment, victimization, and actual or threatened violence. It is a demand to be taken seriously as a coherent minority with a history (hidden though much of it is)[44] of being oppressed and discriminated against.

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41. Representation of the People Act 1969, ch. 15, § 1(1).

42. Criminal Justice and Public Order Act 1994, ch. 33, § 145, which changed the law at the same time for Scotland and Northern Ireland; *see also infra* text accompanying notes 102 and 105.

43. *See supra* text accompanying notes 39-40.

44. For a recent attempt to reclaim this history, principally through photographs relating

C. *English Law's Response: Background*

English law is particularly ill-equipped to deal with a claim on as broad a front as this; it is worth examining why. England likes to imagine itself as the pioneer and architect of democratic traditions and institutions—"the mother of Parliaments" and so on—and likes to believe that the law guarantees the liberties necessary for us to call ourselves a free society in which the Rule of Law applies. So in a general sense English common law undoubtedly does. But English law, developed as it has over a long timescale by a combination of judicial activity and parliamentary intervention, has as its frame of reference remedies made available to individuals rather than groups. The focus of the common law has always been on the particular claim and the righting of particular wrongs, rather than grand statements of principle. This is partly the natural tendency of a case-based legal system—let the principles emerge slowly, if at all, out of a mass of decided cases—but it is also a consequence of the limits judges impose on their own creativity out of respect for the British constitution, one of whose (unwritten) principles is that Parliament has primary legitimacy to make law and can (legally speaking) do anything, short of limiting its own power for the future. Simply stated, the English courts and judges will give priority to a later statute in conflict with an earlier one, even if the earlier apparently attempts to forbid precisely what the later statute then provides.[45] In a judicial context, English law has no developed concept of unconstitutionality at all and no experience whatsoever of the judicial review of legislation.[46]

This situation came about following the great democratic triumph in English history in the seventeenth century, in which Parliament successfully asserted its dominance over the formerly unlimited powers of the monarchy. In Victorian times this was blessed by the influential constitutional theoretician, Arthur Venn Dicey,[47] who claimed that the unfettered power of

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to London, see JAMES GARDINER, WHO'S A PRETTY BOY THEN? (1996); *see also* the publications of DAVID, JIVANI, and SPENCER, *supra* note 18.

45. *See* JOHN F. MCELDOWNEY, PUBLIC LAW ch. 1 (2d ed. 1998).

46. As Lord Reid said in Madzimbamuto v. Lardner Burke [1969] 1 App. Cas. 645, 723, a case following the Unilateral Declaration of Independence in Rhodesia:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But this does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

Id.

47. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885), *discussed in* PAUL CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM

the House of Commons, to which the Government of the day was responsible, was the best (or only) way to ensure protection of rights and liberties against the Crown and the executive. This vision found no place for a written constitution with superior legal force or for U.S.-style catalogues of entrenched fundamental rights left to the courts to apply and interpret, especially if the sovereign will of the people, as expressed through Parliament, might thus be questioned or overruled. Nor did it encourage the development of special principles of law by which the exercise of executive or administrative power could be tested in court.

In the English context, the Diceyan view, which gave judges a secondary and interstitial role in the scheme of things, encouraged them to enunciate limits on their scope for judicial inventiveness; their growing awareness of the undemocratic way in which they are appointed and of their highly selective and elite social background may have further encouraged this self-denial.[48] At the present day, it would be fair to say that English judges will create or recognize no rights which conflict with anything contained in legislation, nor rights which need administrative as well as judicial support to be effective; nor will they create new criminal offenses, this too being thought to be "a question for Parliament, not the courts."[49] And these self-imposed limitations have come into greater prominence in the twentieth century, where the intervention of Parliament has been more far-reaching and more detailed than ever before. This does not reduce the courts' work, but it shifts the focus into interpretation of fixed texts, rather than the development of principles from the inherently more open-textured raw material of previous cases. The traditional scope of "pure" common law, untainted by legislative intervention, thus becomes ever smaller; and it has become more reasonable for judges to say of a given type of case that Parliament rather than the courts is now the proper forum for the weighing of competing policies, claims or values.

It is thus in the areas that we tend to think of as "lawyers' law"—tort, contract, trusts, property—that the courts can still innovate most openly. Here the interventions by Parliament, though significant, have built upon, and assume the existence of, the basic principles established by case-law.

AND THE UNITED STATES OF AMERICA (1990); Dicey became Vinerian Professor at Oxford in 1882, the same year his friend Oliver Wendell Holmes became a Professor at Harvard.

48. *See* J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY (3d ed. 1985); *see also* MARCEL BERLINS & CLARE DYER, THE LAW MACHINE ch. IV (4th ed. 1994).

49. As we have seen in the case of conspiracy to corrupt public morals (*see supra* text accompanying notes 21-26), in *Shaw v. D.P.P.* the judges came close to the creation of a new offence; but in *Knuller* in 1971, all five members of the House of Lords disavowed any general power to make conduct punishable of a type not hitherto subject to punishment; and the reason why those judges who thought *Shaw* was wrong refused to overturn it was precisely that this was a job for Parliament, not the courts.

These aspects of law are of course all primarily focused on the relations between private persons as individuals. Even here, though, the English courts operate a self-denying principle; in contrast to U.S. courts, this has prevented them from recognizing the "right to be let alone" as the foundation of a new tort of invasion of privacy.[50] The argument the courts have used is that there are too many policy issues needing to be balanced here—notably the rights of individuals versus the rights of the media and the rights of the public to know—for purely judicial development to be appropriate. Since a right to privacy would be one of the claims lesbians and gay men want to make as part of a proper structure of legal protection, campaigners' focus here has been on lobbying Government and Parliament, rather than on continuing to knock at the fairly closed doors of the courts. As we shall see in Part V, the courts will shortly be given a mandate to develop a law of privacy, which will no doubt bring a change of tactic from lesbian and gay campaigners.

As for relations between individuals and *public* power, the courts have, despite what Dicey said, very creatively developed the remedy of judicial review,[51] which allows a challenge to the procedure or substantive legality of a public-law rule or decision. However, the available grounds for challenge do not include violation of fundamental human rights,[52] nor do the courts insist generally that administrative decisions be accompanied by reasons, to make judicial review easier.[53] Here too, therefore, the scope for

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50. *See* Bernstein v. Skyviews Ltd. [1978] Q.B. 479, where in the Queen's Bench Division the plaintiff had to frame his claim (unsuccessfully, as it turned out) in the law of trespass to land to get a remedy against a company which had allegedly flown over his land in order to take photographs of it. *See also* Khorasandjian v. Bush [1993] 3 W.L.R. 476 (C.A.), where a majority of the Court of Appeal was willing to use the land-based tort of nuisance as a starting point in order to give a civil right, protectable via injunction, to prevent harassing telephone calls made by the defendant, even though the plaintiff had no proprietary interest in the property where the calls were received; in Hunter v. Canary Wharf Ltd. [1997] 2 W.L.R. 684 (H.L.), the House of Lords re-established the orthodoxy, saying that to widen the tort of nuisance beyond its protection of rights in land was wrong. Luckily for plaintiffs in the position of Claire Khorasandjian, there is now a statutory alternative in the Protection from Harassment Act 1997, ch. 40.

51. *See* MCELDOWNEY, *supra* note 45, chs. 5 and 15; for examples of applications for judicial review, see *infra* note 53 and *infra* text accompanying notes 97-99 and 132-37, where the attempt of four gay and lesbian ex-servicemen to rely on both the European Convention and EC law in R. v. Ministry of Defence, *ex parte* Smith is discussed.

52. *See infra* text accompanying notes 97-99 (discussing R. v. Ministry of Defence, *ex parte* Smith).

53. Two recent successful applications for judicial review illustrate this point. The first, R. v. Secretary of State for the Home Department, *ex parte* Fayed [1997] 1 All E.R. 228 (C.A.), is part of the long campaign for British citizenship by the Egyptian brothers who own the House of Fraser stores group (including Harrods). In that case, the Court of Appeal held that under neither general administrative law nor the statute in question did the Home Secretary have to give reasons for rejecting an application for citizenship; but a majority held

reform by judicial law-making seems limited: it would be hard, for example, to imagine the courts adopting a general principle of equality to require public authorities to deal even-handedly with gay men and lesbians in comparison with straight people. The campaigners' focus has once again been on Government and Parliament, rather than on mounting or defending test-cases in the courts.

One of the few areas where the courts have become active in a new way is the enforcement of rights derived from EC law—or, as we could call it since the treaty signed after the 1991 European Summit at Maastricht,[54] the law of the European Union. Insofar as this body of law improves the position of lesbians and gay men over English law pure and simple—and we shall see that it now offers the chance of doing so dramatically—then the English courts have the primary job of giving effect to it, including offering remedies against the state for failure to implement into English law rights derived from European legislation. So the judges, even if they cannot or will not create substantive rights, have a role and can still make an impact. This is sometimes true even where only English law is involved, as the two recent examples below seek to show.

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that where his decision involved the exercise of discretion, this had to be done reasonably, so he had to act fairly in reaching his decision. In this context, fairness required him to give the applicants enough information about the subject-matter of his concern (including material which the public interest justified him in refusing to disclose) to allow the applicants to make representations on those aspects of an application. This not having been done, the decision refusing citizenship was quashed; the present Home Secretary has announced that this decision will not be appealed to the House of Lords, the Government now reconsidering the Fayeds' application for citizenship and saying that reasons will henceforth be given for all refusals of such applications. Richard Ford, *Al Fayed nearer to British citizenship,* TIMES (London), Dec. 23, 1997, at 1. In the second case, R. v. Ministry of Defence, *ex parte* Murray, a Divisional Court of the Queen's Bench Division held that though decision-making bodies in general were under no duty to give reasons, a court-martial was subject to the duty of fairness: given all the circumstances, it should have given reasons for rejecting the evidence of the accused, a soldier of long and exemplary service, that the effects of an anti-malaria drug had induced him to commit an offence of wounding, and for then giving him a sentence of imprisonment which automatically caused his dismissal from the service. *Fairness often demands reasons,* TIMES (London), Dec. 17, 1997, at 33.

54. The Treaty on European Union, signed at Maastricht on Feb. 7, 1992, 31 I.L.M. 247; now further amended by the Treaty of Amsterdam (not yet in force), signed on Oct. 2, 1997 (visited Mar. 22, 1998) <http://alf.ci.uc.pt/CDEUC/CDEUC133.HTM>.

III. ENGLISH LAW IN ACTION

A. *Example 1: Adoption and the Rights of Lesbians*

1. *Background*

Under the present English Adoption Act, which dates from 1976, the social services departments of local authorities play an important role in reviewing children's suitability for adoption and placing them with the would-be adoptive parent or parents. It is a court which takes the first formal steps towards adoption—an order freeing the child from his or her legal links to the birth parent or parents. Under the 1976 Act, that order can be made even if either or both parents refuse consent, if the court finds that to make the order would safeguard and promote the welfare of the child. In April 1997, a case called *Re W*[55] was heard in the Family Division of the High Court, where the local authority had already placed a child with a lesbian couple who had been together ten years. The local authority asked the court for a freeing order in favor of one of the couple as the first step towards adoption.[56] But the parents objected, saying that the law did not ever allow, or in this case should not allow, a child to be freed for adoption in favor of a single woman living in a lesbian relationship with another.

2. *The Choices Open*

If there already existed in English law a general principle of equality between lesbians, gay men and others, it would have been easy for the judge to reach a conclusion that the parental objections were groundless: but of course we have so far no such principle, nor—perhaps to the North American reader's surprise—did the issue appear to have ever been raised in this form before an English court. The judge, therefore, had to use the words of the Adoption Act as the peg on which to hang an answer to the question of principle posed by the case. The Act, though, was completely unhelpful, in the sense that all it said about single prospective adopters was that they must be at least twenty-one years old.[57]

On one view, this was the best argument in favor of lesbians and gay men that could be devised—for if Parliament had wished to insist upon only

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55. Re W (A Minor) (Adoption: Homosexual Adopter) [1997] 3 W.L.R. 768 (Fam.).

56. It had to be only one of the couple, as only married couples can adopt jointly: Adoption Act 1976, ch. 36, § 14. In Re A.B. (Adoption: Joint Residence) [1996] 1 Fam. 227, Cazalet J. granted a joint residence order to the adoptive father of the child and to the father's long-term partner, but this fell short of creating for all legal purposes (e.g. succession) the relationship of parent to child between the partner and the child.

57. Adoption Act 1976, ch. 36, § 15(1)(a).

straight adoptive parents or to exclude lesbians or gay men in living together relationships, it could have said so. It would stretch interpretation too far, so the argument went, to read these limitations into the words of the statute. But counsel for the child's natural parents argued that Parliament in 1976 *did* intend to exclude people in gay relationships, going on to suggest that since the only couple who can jointly adopt is a married one, Parliament must have intended single adopters *not* to be in a couple relationship, straight or gay, since adoption in these circumstances would achieve the same result as joint adoption, but by those not qualified to do so. That neatly avoided having to attack the cases where *custody* of a child had been awarded to a parent now living in a lesbian relationship.[58]

3. *The Judge's Approach*

The judge, Singer J., agreed that the drafters of the 1976 Act probably never imagined a lesbian or gay man as a would-be adoptive parent but, equally clearly, did not rule this out in the words of the Act. But the practice of placing children for fostering or possible adoption with lesbians or gay men was well-established, he said; it had been recognized implicitly in an official review of adoption law and policy,[59] which recommended no change in the qualifications for prospective adopters. There was also a reported case from Scotland, where there is a different statutory framework from England and Wales but identical qualifications for single adopters.[60] In *Re AMT*[61] the Inner House of the Court of Session in Edinburgh firmly said that to allow adoption by a gay man in a couple relationship posed no fundamental question of principle and was clearly reconcilable with the words of the Scottish Act. Also relevant was a case called *In re D.*[62] from the House of Lords—the highest court of appeal in civil cases for England and Wales, Scotland and Northern Ireland—where the court refused to agree that a parent's consent to adoption should be dispensed with simply on the grounds that he (the parent) was a gay man. Giving judgment, Lord Kilbrandon said:

> It is not possible to generalise about homosexuals or fair to treat them as other than personalities demanding the assessment appropriate to their several individualities in exactly the same

58. *E.g.*, In re P. (A Minor) (Custody) [1983] 4 F.L.R. 401 (C.A.); *see also supra* note 6.

59. DEPARTMENT OF HEALTH AND WELSH OFFICE, REVIEW OF ADOPTION LAW: REPORT TO MINISTERS OF AN INTER-DEPARTMENTAL WORKING GROUP (1992).

60. Adoption (Scotland) Act 1978, ch. 28, § 6.

61. Re AMT (Known as AC) [1997] Scots Law Times 724 (Lord Hope); the Scottish equivalent legislation is the Adoption (Scotland) Act 1978, ch. 28, § 6.

62. In re D. (An Infant) (Adoption: Parent's Consent) [1977] App. Cas. 602.

> way as each heterosexual member of society must be regarded as a person, not a member of a class or herd.[63]

After all, said the judge in our case, the statutory framework makes the welfare of the child the primary concern of the whole adoption process—to rule out adoption from *any* person, whatever their sexuality or living situation, would risk jeopardizing this goal. And he went on to conclude that if there was to be a line drawn as a matter of policy to prevent homosexual cohabiting couples or single persons with homosexual orientation applying to adopt, Parliament could do so, but would have to do so more clearly than the 1976 Act did. The child's birth parents, therefore, were not entitled under the 1976 Act to object as a matter of principle to the order in favor of one of the lesbians.

4. *Comment*

This was a victory, then, for lesbians and gay men seeking to adopt a child and an example of a judge clearly taking note of current social work practice and thinking and—within the limits allowed by Parliament—seeking to avoid discrimination against lesbians and gay men. Not for the first time the judiciary were out of step with—or perhaps in advance of—general public opinion, since a poll in 1987 showed that eighty-six percent of the public were against lesbians ever adopting: the figure against gay men adopting was ninety-three percent.[64] It was, however, good luck that the 1976 Act said so little about the qualifications for adoptive parents: had the Act clearly said that only straight people can apply, the judge would have been unable to appeal to any higher principle of equality or non-discrimination to strike this down or to waive it in this case. His only option would have been loyally to apply it, perhaps at the same time adding a plea that the law should be reconsidered. What if the formula in the statute had been more detailed, but still capable of interpretation either for or against lesbian and gay single people as a class? Here the judge would, in our opinion, have made an effort to keep the category of acceptable adoptive parents as wide as possible, not only in light of the overall aims of the Adoption Act but also to avoid discriminating unfairly against lesbians and gay men.

Note finally that, though this judgment holds that it will be unlawful for parents and courts to refuse adoption on the ground alone that the would-be adoptive single parent is lesbian or gay, it says nothing about how the fact of that sexual orientation should be addressed and assessed as a part of the administrative and legal process leading towards an adoption order. So the outcome stops far short of a general guarantee of fair treatment to lesbians

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63. *Id.* at 641.

64. SPENCER, *supra* note 18, at 381.

and gay men in adoption. The case thus illustrates how far an enlightened but traditional judicial approach to problem-solving can go—but how short this is always likely to fall of the demands for equality now made by pressure groups from the gay movement.

B. *Example 2: Succession to a Tenancy on Death*

1. *Background*

Our second example of recent English case-law and the courts' approach to lesbian and gay rights within exclusively English law comes from housing law—or more precisely the law of landlord and tenant, as we in England more often call it. Given the scarcity of residential accommodation, relations between residential tenants and their landlords have since 1920 been heavily regulated by statute in England and Wales. The legislation has ebbed and flowed in the scope of its protection, according to the political color of the current Government, but at present some tenants paying modest rent have controlled levels of rent; they also have a degree of security of tenure.[65] Under the version of this security which applies to *private and semi-public landlords*, tenants have a statutory right to remain in occupation when their contractual right to do so would otherwise terminate (i.e. when a fixed term tenancy comes to an end or a notice to quit served by the landlord expires). A similar, but differently expressed, scheme of security applies to tenants of *public sector landlords* (i.e. mostly local authorities). Whatever the type of landlord, he or she must prove one or more of the grounds on the relevant statutory list in court to get the tenant out. A special form of security applies when the tenant dies: the surviving spouse of the deceased tenant (if there is one) acquires the tenancy by operation of law. By definition, lesbian or gay survivors cannot qualify as surviving spouses; for them the legislation offers alternative possibilities, but there are unhelpful and hard-to-justify differences of detail between the rules that apply to public sector tenants and those affecting tenants in the private sector. It will be obvious that success or failure in a claim to succeed to a tenancy is a major issue for any survivor after the death of a partner; the AIDS epidemic has added extra relevance to the issue so far as gay men are concerned.

In the *public* sector, the second route to succession requires the survivor to prove that he or she was a member of the original tenant's family residing with him or her for twelve months immediately before the tenant's

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65. For an overview, see TONY HONORÉ, THE QUEST FOR SECURITY: EMPLOYEES, TENANTS, WIVES 34-37, 51-60 (1982); for the current law, see ANDREW ARDEN & CAROLINE HUNTER, MANUAL OF HOUSING LAW chs. 3-5 (6th ed. 1997).

death.[66] The concept "being a member of the tenant's family" is statutorily defined as "liv[ing] together as husband and wife"[67] or as having one of a list of specific relationships to the deceased—parent, child, brother, sister, and so on. A gay or lesbian survivor does not fit within any of the prescribed relationship categories, but could he or she fulfill the "living together as husband and wife" test? There is authority from a 1984 Court of Appeal case, *Harrogate Borough Council v. Simpson*,[68] that s/he could never do so. In the *Simpson* case the defendant was a lesbian who had lived as a lover with the tenant who had died. The court held that she could not succeed to the tenancy, even though the relationship had all the outward appearances of a marriage, because the partners could not have been married at law and were of the same gender. These differences were decisive for the judges. Watkins L.J. agreed with the argument for the landlords, stating as follows: "[I]f Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognised state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so."[69] (Note in passing that this is the exact opposite of the argument Singer J. used in the adoption case, *Re W*,[70] to *include* gay and lesbian couples within potential adopters.) The surviving lesbian was refused leave to appeal to the House of Lords and started an action against the U.K. Government under the European Human Rights Convention, but the European Human Rights Commission held this inadmissible.[71]

2. *Recent Case: Introduction*

In July 1997, the Court of Appeal issued its judgment in *Fitzpatrick v. Sterling Housing Association Ltd.*[72] *Fitzpatrick* concerned a tenancy under the regime for *private* sector landlords, slightly different from that applying in the *Harrogate* case discussed above. Here, as in the public sector, a

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66. Housing Act 1985, ch. 68, §§ 87 and 113, now re-stated and slightly modified in the Housing Act 1996, ch. 52, § 62.

67. Housing Act 1996, ch. 52, § 62. For the effectively identical statutory test which applies where a surviving cohabiting partner asks the court to make provision for him/her after a death, see *supra* note 9; and for the right to claim under the Fatal Accidents Act, see *infra* Part V.D.

68. Harrogate Borough Council v. Simpson, 17 Hous. L. Rep. 205 (C.A. 1985).

69. *Id.* at 210.

70. *See supra* Part III.A.

71. S. v. United Kingdom, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1985). *See also infra* text accompanying notes 109-10.

72. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. 991 (C.A.); pre-publication transcript of the judgment kindly provided by William Rolt of John Ford (London), solicitors to Martin Fitzpatrick.

surviving spouse is the primary category to succeed. But the applicable statute, the Rent Act 1977 Schedule 1,[73] extends the definition of the word "spouse" to include "living with the original tenant as his or her wife or husband" (once again that difficult word: *as*); if there is no one in that primary category, someone who is a member of the original tenant's family and living with the tenant in the two years up to his or her death qualifies instead. Note that this second category requires the claimant actually to *be* a member of that family (as determined by the court from all the evidence), not merely to *live as* such a member: a subtle distinction which limits the qualifying class.

A surviving lesbian or gay partner would thus seem to have two potential chances under these rules, either as a spouse in its specially extended sense or as a member of the deceased tenant's family—though before this case there is no record of one ever having succeeded under either head. What the voluminous and confused case-law on who can or cannot be counted as "family"[74] does establish, however, is that the word family has to be defined by reference, not to a fixed or formalist legal view, but to its popular contemporary meaning, as determined by the court or judge[75] from time to time.[76] The question is the same in each case, but the answer even

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73. As amended by the Housing Act 1980, ch. 51, § 76.

74. Brock v. Wollams [1949] 2 K.B. 388 (C.A.) (child informally adopted did qualify); Gammans v. Ekins [1950] 2 K.B. 328 (C.A.) (unmarried heterosexual partner who lived with woman tenant as man and wife, adopting her surname, did not qualify); Ross v. Collins [1964] 1 W.L.R. 425 (C.A.) (sub-tenant who cared for deceased tenant in old age failed to qualify); Dyson Holdings Ltd. v. Fox [1976] 1 Q.B. 503 (C.A.) (woman partner of unmarried heterosexual couple who lived "as man and wife" for 21 years, woman taking man's name, did qualify); Helby v. Rafferty [1979] 1 W.L.R. 13 (C.A.) (male partner of unmarried heterosexual couple who had lived together for five years did not qualify, since woman did not take man's name and wished not to marry in order to keep independence); Joram Dev. Ltd. v. Sharratt [1979] 1 W.L.R. 928 (H.L.) (widow of 75 shared apartment with man of 25 with whom she enjoyed close but platonic relationship; House of Lords held that "family" connotes more than "household," so he failed to qualify); Watson v. Lucas [1980] 1 W.L.R. 1494 (C.A.) (man could qualify though married to other woman at the time and couple made no pretence of being married); and Sefton Holdings Ltd. v. Cairns [1988] 2 F.L.R. 109 (C.A.) (young woman taken in as orphan during the Second World War and treated as daughter by deceased tenant; held not to qualify, even though she had lived as member of family).

75. Note that under the Supreme Court Act 1981, ch. 54, § 69, a jury trial in the Queen's Bench Division of the High Court, which was the normal method until 1883, can be claimed only in a handful of rare types of cases such as defamation or malicious prosecution; even where the parties have a *prima facie* right to a jury, the court may refuse this if "the trial requires any prolonged examination of documents or accounts or any scientific local examination which cannot conveniently be made with a jury." *Id.* § 69(1)(c). *See* Taylor v. Anderton (Police Complaints Authority Intervening) [1995] 1 W.L.R. 447 (C.A.). Note also that most cases raising questions of succession to tenancies will be heard at first instance in the county courts, where juries have never been available.

76. In Dyson Holdings Ltd. v. Fox [1976] 1 Q.B. 503 (C.A.), James L.J. said: "The

on identical facts may not always be the same, depending as it does on what the court or judge finds society's views to be. That approach, while hard to reconcile with the classical doctrine of precedent and the principles of interpretation of statute, may be thought to improve the chances of a lesbian or gay man to succeed in a claim to a tenancy under these rules, insofar as society's attitudes are slowly moving towards greater acceptance of gay men, lesbians and their relationships.

3. *Factual Background*

The story is simple. John Thompson became the tenant of an apartment in London W.6. (Hammersmith) in 1972. Martin Fitzpatrick moved in with him as his lover in 1976 and remained there until John's death in 1994. For the last eight years, John was paralyzed following a head injury and Martin cared for him at home. It was Martin's claim to succeed to the tenancy, or rather the landlord's refusal to accept this claim, which triggered the litigation.

In the light of *Harrogate Borough Council v. Simpson*,[77] counsel for Martin made no more than a token argument that he could succeed to the tenancy as "living with the original tenant as his/her wife or husband." The main argument was, therefore, on the second possible issue: was Martin "a member of the original tenant's family"?

4. *The Response of the Courts: The Majority*

Attempting to synthesize the existing case-law, the judge at first instance considered that, as a matter of law, where a sexual relationship between those who were not blood relations was relied on, it had to be recognizably *like* marriage; the legislation and existing case-law clearly covered unmarried heterosexual partners, but he thought that a man and woman were essential, so no lesbian or gay relationship could ever qualify. The judge said this despite taking judicial notice of changing attitudes in favor of homosexuality, though he did refuse to hear the expert and other evidence which counsel for Martin Fitzpatrick wanted to call in order to document public opinion more fully.[78] In the Court of Appeal, the majority (Waite and Roch L.JJ.) agreed—but the language used is careful to acknowledge the injustice of this result and to give a moral stamp of approval

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popular meaning given to the word 'family' is not fixed once and for all time. I have no doubt that with the passage of years it has changed." *Id.* at 511D.

77. Harrogate Borough Council v. Simpson, 17 Hous. L. Rep. 205 (C.A. 1985); *see supra* text accompanying note 68.

78. The Court of Appeal backed this refusal.

to the gay relationship terminated by John's death. By English standards, it is a remarkable performance.

The following is Waite L.J. effusively describing the relationship of the two men: "Mr. Fitzpatrick and Mr. Thompson lived together for a longer period than many marriages endure these days. They were devoted and faithful, giving each other help and support in a life which shared many of the highest qualities to be found in heterosexual attachments, married or unmarried."[79] The tone of this alone shows how far the judiciary has moved since the old days of Lord Reid in *Knuller*,[80] who suggested that corruption and depravity were inseparable from sex between men and whose world view would have been severely challenged by the very notion (and vocabulary) of "gay relationships." But after that purple passage, why then find against Martin Fitzpatrick's claim to succeed to the tenancy? As in the lesbian adoption case above, it all comes down to what it is or is not appropriate for judges to do, rather than Parliament, in a context set by Parliament via legislation. The two judges who found for the landlord accepted openly that to limit "family" in this sort of case to unmarried heterosexual relationships is to discriminate against lesbians and gay men: it fails to give these relationships the respect society now accords them. In other words, were there a general principle of non-discrimination in the law, here was the perfect case to apply it. However, in the absence of that, and remembering that the legislation takes away landlords' traditional rights of property in the interests of social justice, the decision to extend the meaning of "family" should be left to Parliament.

5. *The Dissenting Judge*

Accepting the outcome as understandable, if legally conservative, is perhaps easier in light of the views of the majority that this area of the law is both arbitrary and discriminatory. The third judge, Ward L.J.,[81] made it both better and worse by dissenting and finding in Martin Fitzpatrick's favor—better, by showing that a judge *could* find a way to reinterpret "family" broadly enough to include lesbian and gay male partners; worse, because if he thought *he* could legitimately do so, why could the other two have not taken the same course?

The main thrust of Ward L.J.'s judgment was to note the legal changes happening throughout the world—but in North America in particular—to recognize and legitimize gay relationships, including extending the meaning

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79. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. at 1003j.

80. *See supra* text accompanying note 26.

81. Significantly perhaps, he was a judge of the Family Division of the High Court before becoming a member of the Court of Appeal.

of family to reflect its *function*, not its nearness to the traditional married model. Given that "family" should rightly be given its contemporary meaning and that Parliament should be presumed not to wish to attack the constitutional right to equal treatment enjoyed by all citizens, he said that to refuse recognition to lesbians and gay men in this context was an unacceptable result. This is a remarkable approach, given that there really are no rights yet recognized as having constitutional (i.e. special) status in English law. He went on to paint the outcome favored by the majority in these unflattering terms: "It proclaims the inevitable message that society judges their [i.e. gay or lesbian] relationships to be less worthy of respect, concern, and consideration than the relationships between members of the opposite sex. The fundamental human dignity of the homosexual couple is severely and palpably affected by the impugned distinction."[82]

What this judge would therefore have done was to go two steps beyond the majority. Step one was to recognize Martin Fitzpatrick as living with John Thompson as husband and wife; step two, as a fall-back alternative, was to hold Martin to be a member of John's family.

6. *Comment*

What then does either the outcome or the reasoning do for gay rights? The outcome on its own, very little of course: but the case is being appealed further to the House of Lords, so the fact that all three judges in the Court of Appeal thought that to discriminate against gay relationships was wrong will carry significant weight at that final stage. It is also noteworthy that comparisons with developments in other jurisdictions played such an important part in the arguments—in particular two North American judgments. First is the 1989 decision of the majority in the New York Court of Appeals in *Braschi v. Stahl Associates Co.*[83] In that case, the meaning of "family" was held as a matter of law not to exclude a surviving gay male partner. Equally significant, at least for Ward L.J., the dissenting judge, was the decision of the Canadian Supreme Court in *Egan v. The Queen*[84] from 1995, where the issue was whether state pension legislation (the Old Age Security Act) was contrary to the non-discrimination rule in the Canadian Charter of Rights and Freedoms in giving rights to spouses and opposite-sex partners alone. The court, though split in a complex 4-1-4 pattern overall, unanimously held that discrimination on grounds of sexual orientation was included within section 15 of the Charter, even though the

82. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. at 1021h.

83. Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989).

84. Egan v. The Queen [1995] 124 D.L.R. (4th) 609 (Can.), with case note by Robert Wintemute, 74 Can. B.R. 682 (1995).

words of the section cover only "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." By 5-4, the court went on to hold that a distinction between same-sex couples and unmarried opposite-sex couples in relation to a benefit provided by Government was "discrimination" contrary to section 15(1) of the Charter; but, again by 5-4, this violation of section 15(1) could be justified, at least temporarily, under section 1 of the Charter. The point that Ward L.J. in *Fitzpatrick* quoted approvingly came from Iacobucci J., who would have found for the plaintiffs on all issues: "[T]he definition of 'spouse' as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples."[85]

It is clear, therefore, that some judges in the common law world, though not yet a majority in England, are beginning to favor a view of family that looks at the essence of a relationship rather than the presence or absence of conformity to the married (and thus presumed heterosexual) state. Welcome though this recognition is of the realities and qualities of some lesbian and gay relationships, it naturally favors and supports those monogamous couple relationships which—but for the same-sex element—are most like that ever-diminishing institution, the traditional marriage. We may wonder perhaps whether the long-term care which Martin Fitzpatrick gave to John Thompson before he died increased the sympathy the judges obviously felt for Martin's position, for their moral approval is obvious.

In the context of legal rules which start from marriage and inch their way painfully outwards to less formal and less conventional relationships, that approach is understandable; but, many radical lesbians and gay men would criticize the whole process. It does, after all, rest on an "equal because similar" analysis, when some would say that "equal but different" more closely matches what lesbians and gay men *should* be striving for.

IV. THE IMPACT OF EUROPE

A. *Introduction*

The two cases discussed above both exclusively concern English law—but we must also look beyond the English Channel and consider the two separate European systems of law which overlap in different ways with English law.

First in time is the European machinery whose function is specifically the protection of human rights. In 1953 the U.K. ratified its signature of the European Human Rights Convention. Since 1966, individuals within the

85. Egan v. The Queen [1995] 124 D.L.R. (4th) 609, at para. 180.

jurisdiction of the U.K. have had the "individual right of petition" to the regional Human Rights institutions in Strasbourg (France), claiming a violation by the U.K. Government of any of the articles of the Convention, as amended or added to by its linked Protocols. The decisions and judgments which have resulted have had a real, but so far entirely indirect, impact on English law, since the Convention and case-law under it are not yet part of English internal law, though they bind the state in the international arena. Despite the tortuous procedure, cases under the Convention have delivered significant victories for gay men (though not yet for lesbians) within Europe and forced changes in the law within the U.K.; these are discussed in Section B below, followed in Part V by an assessment of the significance for English law of the Human Rights Bill (1997), which will achieve incorporation of most of the Convention and Protocol 1 into English law.

Later in time than the U.K.'s accession to the European Human Rights Convention, but more immediately momentous in legal, political, and constitutional terms, was the U.K.'s 1973 accession to membership of the European Communities (at that time grouping eight other nations, now fourteen). The law which has its source either directly in the constituent treaties founding and developing the Community or in legal instruments made by Community institutions under the legislative powers contained in those treaties has a unique and powerful status; gay men and lesbians have effectively exploited its possibilities, encouraged by the bold approach of the judges in the Luxembourg courts to interpretation of the basic texts and of the legislation coming from Brussels. Section C below looks at the track record of EC law to date, with a special focus on recent case-law.

B. *The European Human Rights Machinery*[86]

1. *Introduction*

The European Human Rights Convention dates from 1950, so by a long way pre-dates the creation of the European Economic Community (EEC) (later to become the European Community/European Union (EC/EU)) in 1957; institutionally it is quite separate from the European Community or Union, running under the auspices of the Council of Europe in the complex of buildings in Strasbourg which include the *Palais de l'Europe*.[87] It is one

86. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER (1996); the U.K. Government White Paper, BRINGING RIGHTS HOME: THE HUMAN RIGHTS BILL, CM 3782 (1997) [hereinafter BRINGING RIGHTS HOME] also includes a useful brief summary of how the Convention works.

87. Confusingly, the same complex also houses most sittings of the European Parliament, which *is* an EU institution. Even reputable newspapers in Britain —and TV news

of the first results of a post-war determination to protect at an international level democratic institutions, the rule of law and human rights after the horrors of the Second World War. It operates like a traditional international treaty, open for signature by all states within Europe (and in fact the Convention is now in force in almost all European states, including those newly democratic in central and eastern Europe). The special feature of the Convention is that it gives, for states willing to opt in to this system, a mechanism whereby individuals can take legal action against governments before special international bodies (a Commission and a Court[88]) to allege violations of the catalogue of rights which it protects.[89]

The essential focus is therefore on actions, rules, or procedures for which a state can properly be called to account. So where the right to a fair trial is concerned, the rights of the accused, his or her access to a lawyer, the speed of being brought before a court, the possibility of challenging the result on appeal—all these are things for which the state might be challenged under the Convention; but the quality of legal representation provided by a lawyer engaged by the accused would not.

This system is therefore the most well-established and long-lasting international form of protection of human rights: the Convention started practical operation in 1953 and the European Court of Human Rights in 1959, so its accumulated case-law is now voluminous and wide-ranging. In European terms, it is the closest we have to the U.S. Supreme Court. The Convention was used to provide a charter of fundamental rights for many former British colonies when they gained independence, so its significance is not limited to the current European states which are its signatories.

The Convention requires each state which accedes to it (and to any or all of the linked Protocols) to guarantee to all those within its jurisdiction the protection of the rights listed: these include the right to life (article 2), to liberty and personal security (article 5), to a fair hearing in the determination of rights and obligations (article 6), to respect for family and private life and

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programs—regularly talk about "the European court" without making it clear whether they mean the European Court of Justice/Court of First Instance (Luxembourg) or the European Court of Human Rights (Strasbourg); even when they make clear which institution they mean, they often get its geographical base wrong.

88. Following adoption in May 1994 of Protocol 11 to the Convention, this provides for replacement of the Commission and Court by a new single Court, whose jurisdiction will become mandatory rather than optional and will include a committee of judges to review the admissibility of applications by individuals: GOMIEN ET AL., *supra* note 86, at 91-92 and 441-42. This Protocol will come into force on November 1, 1998.

89. In fact, the Convention also provides mandatorily for actions by one signatory *state* against another under article 24, but actions brought by individuals have provided the vast majority of applications reaching the Human Rights Commission and all but one of the cases so far reaching the European Court of Human Rights. *See* GOMIEN ET AL., *supra* note 86, at 39-42.

the right to found a family (articles 8 and 12), and to freedom of expression (article 10) and of association (article 11). There is also a general principle of non-discrimination which states must respect in the protection of the rights guaranteed by or under the Convention (article 14). It is articles 8, 12 and 14 that have been principally relied on in cases concerning sexuality and gender identity.[90]

States have to provide an effective remedy nationally to protect each of these rights (article 13), but the Human Rights Court has said that there is no requirement that this take the form of incorporating the text into national law.[91] Most states have in fact done so; some do not need to, since under their constitutional arrangements international law is automatically part of (and superior to) national law.[92]

2. *The Convention's Status in English Law*

The U.K. has, until May 1997 and the arrival in power of the new Labour Government, firmly resisted incorporation, claiming—against all the evidence—that there was no need to do so since English law already adequately protected all the rights guaranteed by the Convention. Until now, therefore, the Convention and its case-law have had no formal legal authority at all in U.K. courts, let alone a force superior to national law. Judges can use the Convention and Protocols as an aid to interpretation where English law is ambiguous—on the basis that internal English law should be assumed to be consistent with the U.K.'s international obligations; but, where an English statute is clear, even clearly contrary to the rules or the case-law of the Convention, the courts have no choice but to apply it.

A good example of this "offshore" legal status of the Convention is the recent pair of criminal appeals, *R. v. Morrissey* and *R. v. Staines*.[93] The appellants sought to challenge their convictions for insider trading in the City of London by relying on the 1996 judgment of the European Human Rights Court in the *Saunders* case.[94] There the Human Rights Court held that the duty to give information to inspectors under the Financial Services Act 1986 s. 177, this evidence then being capable of being used against the informant in a criminal prosecution,[95] violated the right to a fair trial under article 6 of

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90. *See infra* Part IV.B.4.

91. Observer and Guardian v. United Kingdom, App. No. 13585/88, 14 Eur. H.R. Rep. 153 (1992) (Eur. Ct. H.R. (ser. A, no. 216)).

92. ANDREW DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW (1983).

93. R. v. Morrissey, R. v. Staines, TIMES (London), May 1, 1997 (C.A.).

94. Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1997) (Eur. Ct. H.R.).

95. Subject only to a discretion given to the trial judge to refuse to allow the evidence

the Convention. In the newer cases in the Court of Appeal (Criminal Division), the Lord Chief Justice, giving the judgment of the court, said that the words of the Financial Services Act clearly imposed the duty to provide information, creating at least a statutory presumption that information obtained in this way was fair. That being the law in England, the judgment of the European Court of Human Rights was strictly irrelevant, unfortunate though this was for the appellants. The appeals were consequently dismissed.

This lack of success does not mean that it is illegitimate or futile to rely on the European Human Rights Convention in litigation within England, as parties have done with increasing frequency over recent years;[96] but, it does mean that arguments based on the Convention rarely win cases on their own.

3. *Recent Examples*

The limited influence of the European Convention is exemplified for questions of gay and lesbian rights within English law by *R. v. Ministry of Defence, ex parte Smith* from 1994.[97] In that case, four gay men and lesbians formerly in the armed forces in Britain went to court in London to argue that their dismissal for being gay or lesbian was unlawful. *Ex parte Smith* was an application for judicial review, a public law challenge to the exercise of discretion by the Crown via the Ministry of Defence which had (and still has) a policy under which homosexual orientation, if disclosed or discovered, constitutes a bar to continued membership in the services. The ground relied on was irrationality: no reasonable minister could adopt such a policy, they asserted. In order to add extra force to their claim, the four relied on European rules from both the two different sources already described: from the European Human Rights Convention, articles 8 on family and private life and 14 on non-discrimination; and from EC law the Equal Treatment Directive. (The EC law claim is discussed separately under section C(3) below.)

In reply to the applicants' reliance on the European Human Rights Convention, the Government argued that the policy under attack was authorized by statute, the Criminal Justice and Public Order Act 1994 s. 146(4). As we have seen from the *Morrissey* and *Staines* cases above, if this were the case, it would have ended the argument conclusively in the Government's favor. What section 146 did was to extend the scope of

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to be given on grounds of unfairness. Police and Criminal Evidence Act 1984, ch. 60, § 78(1).

96. MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (1997), lists 473 cases in which the European Human Rights Convention was referred to in English litigation between 1953 and the end of 1996, more than half of these from 1991 or later.

97. R. v. Ministry of Defence, *ex parte* Smith [1996] 2 W.L.R. 305 (Q.B.).

section 1 of the Sexual Offences Act 1967, granting the same immunity from criminal sanction to two gay servicemen having sex in private as applies to two civilians; but section 146(4) was inserted in an effort to protect what were thought to be the needs of service discipline in two ways. First, it preserved the right of the internal regulations of the three services to retain "homosexual acts" as grounds for discharge from the service altogether. Second, section 146(4) provided that the same acts could continue to be offenses against the codes of discipline of each service, but only "if committed in conjunction with other acts or circumstances." The four argued successfully that the way the statute was worded could not make legal what was not already so—if therefore the policy of administrative discharge of any gay or lesbian service person was illegal, the statute would not save it. They went on to argue that such a policy must be irrational which was concerned with sexual *orientation*, not with inappropriate (let alone illegal) sexual *behavior*, with which they had not been charged and for which other less draconian rules would have been perfectly acceptable.

In the Queen's Bench Division of the High Court, Simon Brown L.J. showed that his heart, if not his head, was on the side of the four applicants. In a now famous passage, he said:

> The tide of history is against the Ministry. Prejudices are breaking down; old barriers are being removed. It seems to me improbable, whatever this court may say, that the existing policy can survive for much longer. I doubt whether most of those present in court throughout the proceedings now believe otherwise.[98]

But he and Curtis J. held that the policy, despite the weighty evidence from other countries and its impact on the careers of the four applicants, was not —or not yet—so clearly illogical as to justify the court quashing it. To reach this result involved recognizing both the strength of the human rights considerations in issue and the special sensitivity which the court should show when asked to review questions of policy so intimately linked to the defense of the country. As Simon Brown L.J. said, the fact that the European Human Rights Convention was not incorporated into English domestic law made all the difference:

> If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved

98. *Id.* at 319G.

> can be shown proportionate to its benefits [i.e. the tests that would be applied by the European Human Rights Court], then clearly the primary judgment (subject only to a limited "margin of appreciation" [reserved to the Government]) would be for us and not others: the constitutional balance would shift. But that is not the position.[99]

The Court of Appeal (Sir Thomas Bingham M.R. and Henry and Thorpe L.JJ.) took exactly the same line both on irrationality and on the relevance of the Convention. That is not, however, the end of the story, since the four have now challenged the outcome by applications against the U.K. Government under the European Human Rights Convention; these are still at a preliminary stage of investigation in Strasbourg.

As this example shows, the failure to incorporate the European Human Rights Convention into English law has serious negative consequences for litigants. Under article 26 of the Convention, they must first exhaust all "domestic" (i.e. national) remedies, then have six months to start an application in Strasbourg. This means they may have to go through three tiers of the English courts, losing at every turn, then start a separate action against the U.K. Government under the Convention. The Strasbourg stage alone is likely to cost at least £30,000 per case[100] and take up to five years between the date of application and a hearing before the European Court of Human Rights. As the negligible effect of the *Saunders'* judgment in the *Morrissey* case shows, even if an individual applicant wins in Strasbourg, the judgment of the European Human Rights Court does not by itself change English law: all that happens is that the court finds a violation of the Convention to have occurred at a defined moment in the past. This in turn puts the U.K. Government under an international obligation, by legislation or otherwise to modify the offending rule or practice within English law for the future. The European Human Rights Court may also order a government to pay monetary reparation to a successful applicant by way of "just satisfaction" under article 50 of the Convention. Proceedings in Strasbourg expose the U.K. Government to the full glare of international publicity when—as has happened more than fifty times up to the end of 1997—the court in Strasbourg finds it guilty of a violation of the Convention or of one of the Protocols.

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99. *Id.* at 327E.

100. Figure taken from BRINGING RIGHTS HOME, *supra* note 86. There is a system of legal aid for proceedings under the Convention: *see* GOMIEN ET AL., *supra* note 86, at 52-53.

4. *Sexuality and Gender in Applications Against the U.K. Under the Convention*[101]

Actions brought by gay men, lesbians, and transsexuals have figured regularly in Strasbourg. Three times the European Court of Human Rights has held that to criminalize consensual sexual relations in private between men over twenty-one contravenes article 8 on the right to respect for private life: in the *Dudgeon* case (Northern Ireland),[102] the *Norris* case (Ireland),[103] and the *Modinos* case (Cyprus).[104] It may have only been by a whisker that a similar outcome was avoided in relation to Scotland, where the law had been left unchanged by the Sexual Offences Act 1967, so sex in private between two men was theoretically still criminal; however, enforcement in Scotland had effectively stopped being concerned with such situations and in 1980 a Labour-proposed amendment to the Criminal Justice (Scotland) Bill formalized the position.[105] In both *Dudgeon* and *Norris*, the court recognized that the protection of young people justified some criminalization of sexual activity,[106] but did not lay down any age limit for this; nor did it address the separate claims brought under article 14 of the Convention—the principle that rights under the Convention must be available without discrimination.

In October 1997 the European Human Rights Commission—at present the first-stage investigative human rights body in Strasbourg[107]—made public its decision in the *Sutherland* case,[108] brought by an under-eighteen gay man against the United Kingdom. By a majority (14-4), the Commission found that the Criminal Justice and Public Order Act 1994 s. 145, which reduced the age of consent for sex between men to eighteen for the whole of the U.K., violated both article 8 on private life and article 14 on non-discrimination. The Commission found that there was no objective

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101. Pieter Van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights*, *in* HOMOSEXUALITY, *supra* note 1, at 183-206.

102. Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (judgment of Oct. 22, 1981) (Eur. Ct. H.R. (ser. A, no. 45)); the law was changed to be in line with that of England, Wales, and Scotland by the Homosexual Offences (Northern Ireland) Order 1982 (SI 1982/1536) (N.I. 19). The position in the Isle of Man is similar. Sexual Offences Act 1992 (IoM) §§ 9-10.

103. Norris v. Ireland, 13 Eur. H.R. Rep. 186 (judgment of Oct. 26, 1988) (Eur. Ct. H.R. (ser. A, no. 142)).

104. Modinos v. Cyprus, 16 Eur. H.R. Rep. 485 (judgment of Apr. 22, 1993) (Eur. Ct. H.R. (ser. A, no. 259)).

105. Criminal Justice (Scotland) Act 1980, ch. 62, § 80, now extended by the Criminal Justice and Public Order Act 1994, ch. 33, § 148; it was the present Foreign Secretary, Scottish M.P. Robin Cook, who proposed the amendment in 1980.

106. The court did not address this issue in *Modinos* since the Government of Cyprus did not argue justification.

107. *See supra* note 88.

108. Sutherland v. United Kingdom, App. No. 25186/94 (1997) (not yet reported).

justification for a different age of consent between gay men and straight couples, and the interference with human rights was serious enough to be beyond the "margin of appreciation" which each signatory state enjoys, free from review by the European human rights institutions. The case now goes to the European Court of Human Rights, which may likewise take the non-discrimination point for the first time, thus greatly strengthening the protections available to gay men and lesbians under the Convention. This reasoning echoes the view of the European Human Rights Commission in the earlier case *S. v. United Kingdom*,[109] where the lesbian who had been unsuccessful in claiming to succeed to a tenancy on the death of her lover in *Harrogate Borough Council v. Simpson*[110] started an action in Strasbourg relying on articles 8 and 14. On article 8, the decision of the Commission declaring her application inadmissible applied to her its earlier position that "despite the modern evolution of attitudes to homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by article 8 of the Convention"; that was therefore that, but the Commission apparently accepted, as it has done again in the *Sutherland* case, that "sex" in article 14 includes sexual orientation. All this is only partly relevant to Euan Sutherland and the gay law reform group, Stonewall, who are supporting him: the procedure in Strasbourg is really aimed at persuading the present Government in London to lower the age of consent for gay men from eighteen down to sixteen. This is likely to occur whatever the ultimate judgment in Strasbourg, since the Government has undertaken to make parliamentary time available as part of consideration of the new Crime and Disorder Bill 1998; the strong likelihood is that, even on a free vote, a majority of members of the House of Commons will approve the change.

This account shows that it is the *private life* part of article 8 which the Strasbourg institutions have used as the justification for findings of violation of the Convention in relation to gay men. The Court has recognized limits on the scope even of that right, based on its reading of article 8(2), which permits restrictions on this right if in accordance with law and necessary in a democratic society for the protection of one or more of a list of competing interests, including the protection of health and morals. It was this "health" qualification of article 8 that the Court relied on in *Laskey, Jaggard and Brown v. U.K.*[111] to hold unanimously that for English law to classify as an

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109. S. v. United Kingdom, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1985).

110. *See supra* text accompanying notes 68-69.

111. Laskey, Jaggard and Brown v. United Kingdom, App. Nos. 21627/93, 21826/93, 21974/93, 24 Eur. H.R. Rep. 39 (1997). This is the sequel to R. v. Brown (Anthony) [1993] 2 W.L.R. 556 (H.L.).

assault the consensual S/M practices of gay male adults in private was not a violation of article 8.

Under the same article, gay men and lesbians' right to *family life* may separately deserve protection, but no case on this basis involving these groups has yet been accepted by the institutions in Strasbourg. However, the case-law from the Human Rights Court already includes examples of the sort of definitional difficulties about what a family is and who is a member of one with which we saw the English Court of Appeal struggling in the *Fitzpatrick* case.[112] In the latest of the series of cases to refuse to protect transsexuals, the European Court of Human Rights has re-affirmed unanimously that the notion of "family" includes de facto relationships as well as marriage, the relevant factors including living together, the length of the relationship and whether the partners had demonstrated their commitment (e.g. by having and raising children).[113] It was, in part, fear that British immigration rules and practices, by denying the partners of same-sex couples rights of entry and residence, might contravene this part of article 8, that encouraged the Labour Government to change its approach to unmarried couples generally, as described in Part V, Section C below.

Neither the Commission nor Court has yet been called on to decide if gay men and lesbians have rights under article 12 in relation to the right to marry and found a family: but it is easy to imagine cases on all these issues in the near future.

C. *European Community Law*

1. *Basic Principles*

Though apparently the work of an international institution, of which states become members by the traditional route of accession under a treaty, EC law has four important special features:

> (1) It confers rights and duties not only on states but also on individuals. Take, for example, an employment dispute between an English employee and employer. If the principle of equal pay

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112. On the *Fitzpatrick* case, see *generally supra* Part III.B. On the notion of "family" under the Convention, *see* GOMIEN ET AL., *supra* note 86, at 239-40, 252-53.

113. X., Y. and Z. v. United Kingdom, App. No. 21830/93, 4 Eur. H.R. Rep. 143 (1997). The Court went on to hold, by a majority of 14-6, that the United Kingdom refusal to register a female-to-male transsexual as the father of the child his long-standing female partner had by A.I.D. was not a violation of article 8 since in the present transitional state of the law and public opinion in Europe about transsexuals, signatory states should be given a wide margin of appreciation. For the previous case-law on transsexuals, see GOMIEN ET AL., *supra* note 86, at 232-34.

under article 119 of the Treaty of Rome[114] may be in issue, the idea is that an employee should be able to rely on this article in litigation against the employer in England: this is the doctrine usually labelled *direct effect*.[115]

(2) Where EC law has this "direct effect" it must also, to achieve its aims, take priority over national law (statute law, case-law, or other law) where the two are in conflict, whatever the traditional constitutional position in the member state in question.[116] In its own terms and in its own areas, *EC law is therefore supreme*.

(3) This supremacy and the unified interpretation and development of the law are ensured not just by a pair of special supra-national courts in Luxembourg, the European Court of Justice (E.C.J.) and under it the Court of First Instance (C.F.I.), but also via the existing judicial machinery in each member state. Thus, our employment law dispute between English employee and employer would start as usual before the labor courts in England (usually a special body called the industrial tribunal), with the court expected to apply and interpret article 119 (and the case-law on it from the E.C.J.), just like the relevant rules of English law. In that sense, *most aspects of EC law are an integral part of English law*, though with a special higher status.

(4) National courts and judges are helped in this task by the fourth special feature of EC law: *a direct procedural link between national litigation and Luxembourg* under article 177 of the Treaty of Rome,[117] since significant questions of Community law raised in cases before the courts of member states can—in some cases must—be referred to the E.C.J. for prior decision before the hearing of the case is completed back before the national judge or court.

For the U.K., the past and future transfer of sovereignty from Westminster to Brussels represented by membership in the Community continues to be politically controversial, twenty-five years after, as the current debates about future membership of European Monetary Union

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114. About to become article 141, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

115. Case 26/62, Van Gend en Loos v. Nederlandse Administratië der Belastingen [1963] E.C.R. 1 (E.C.J.); *see generally* STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 337-67 (2d ed. 1995).

116. Case 6/64, Costa v. ENEL [1964] E.C.R. 585 (E.C.J.), [1964] C.M.L.R. 425 (1964); *see also* WEATHERILL & BEAUMONT, *supra* note 115, at 367-82.

117. About to become article 234, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

clearly show. At the judicial level, the revolution has been quieter and more complete, the English courts now clearly accepting that, even though for all other purposes legislation passed by Parliament is an unchallengeable and superior source of law, the same legislation must give way if it conflicts with a relevant principle of EC law having direct effect.[118] In two important respects this falls short of a general power to review legislation for unconstitutionality. First, it exists only where the conflict is between English law and EC law: so, for example, one litigant may be able to claim the protection of Community law (e.g. as a national of a member state) where another might not. Second, the minimum a court has to do to discharge its duty under EC law is to *disapply* the national legal rule to the concrete case, since that is enough to guarantee the supremacy of Community law: it does not have to go further and declare the national rule invalid, though it *may* of course do so if its own constitutional position so empowers it. That is far from being the case in Britain.[119]

2. *Relevance to Gay Men and Lesbians*

It will be obvious from the points made above about EC law in general that it offers a source of principles, some of which, if they conflict with national law, take priority over it. If gay rights could therefore find any support within EC law, it might be possible to short-circuit all the problems we have already described of the reluctance of English judges and courts to recognize in an effective way notions of equality or protection against discrimination. It might also avoid the need to persuade the British government to legislate specifically, since some aspects of EC law are, as we have seen, equivalent to but higher in status than any national piece of legislation.

Could the Community itself legislate (via a regulation or directive) to specifically extend a principle of equality or non-discrimination to lesbians and gay men? It has not yet done so, though five reports to the European Parliament have urged it to act.[120] However in a written answer on behalf of the Commission on November 29, 1988, its then President, M. Jacques Delors, took a limited view of the EC's powers in the area:

> The Community has no powers to intervene in respect of possible discrimination by the member states against sexual minorities. The powers deriving from the treaties enable it to

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118. Factortame Ltd. v. Secretary of State for Transport [1989] 3 W.L.R. 997 (H.L.).

119. *See supra* Part II.C.

120. *See* Frances Russell, *Sexual Orientation, Discrimination and Europe*, 145 NEW L.J. 374 (1995).

> intervene only in the event of discrimination because of nationality and to ensure equal treatment of male and female workers in employment relationships and with regard to social security.[121]

Though others take a different line,[122] any attempt to legislate would be likely to be challenged (politically, if not also legally) by those member states reluctant to be forced into a significant change of social policy which might also have far-reaching financial consequences.

It is also important to remember that, though it is tempting to think of the Community as a super-state in the offing, the Community's ability to act is limited. Not only do the founding treaties concentrate on *economic* activity (after all, the main original Community was called the EEC—the European *Economic* Community), but there is also the famous principle of subsidiarity,[123] which means that initiatives should be taken at the *lowest* level possible to reach the desired result. Supra-national legislation via a regulation or directive is therefore the technique of last resort, if coordinated actions at the national or even regional level clearly would not work better. Member states have automatic standing under article 173[124] of the Treaty of Rome—which they exercise frequently—to challenge directly before the E.C.J. the legality of secondary legislation adopted by the Community. There are also the political realities to bear in mind, especially within the Council of Ministers.[125] Finding a consensus to allow approval of plan A in return for consensus on plan B is the name of the game; proposals for legislation can be won, lost, or delayed for reasons quite separate from their merits or the actual support they generate.

Therefore, in the absence of Treaty articles or secondary legislation referring specifically to lesbians and gay men, what hope exists for gay rights at the Community level? It is via employment law, which *is* clearly within Community competence, that recent developments have shown that EC law has a dynamic life of its own and that bold judicial creativity can

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121. 1989 O.J. (C103/19); quoted by Simon Brown L.J. in R. v. Ministry of Defence, *ex parte* Smith [1996] 2 W.L.R. 305 (Q.B.). *See also infra* text accompanying notes 132-37.

122. Russell, *supra* note 120, reports that the Commission has acknowledged that it has the power to act but denies that it has a duty. Legislation to protect gay men and lesbians might have to be under the catch-all article 235 of the Treaty (to become article 308, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force), which requires unanimity in the Council of Ministers.

123. Article A of the Treaty on European Union (1992) (to become article 1 when the Treaty of Amsterdam (1997), *supra* note 54, enters into force). *See also* Francis Snyder et al., *Subsidiarity: an Aspect of European Community Law and its Relevance to Lesbians and Gay Men*, *in* HOMOSEXUALITY, *supra* note 1, at 225-46.

124. About to become article 230, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

125. *See* WEATHERILL & BEAUMONT, *supra* note 115, at 69-92, 136-54.

extend the meaning of static texts far beyond the likely intentions of their drafters.[126] Discussion of the recent cases which concern the U.K. follows.

3. *Using EC Law: Recent Examples*

Employment law includes article 119 of the Treaty of Rome: a good example of a rule recognized as having direct effect[127] and therefore available within national litigation. This article lays down the principle that men and women should receive equal pay for equal work. This principle is wide enough—or has been held by the E.C.J. to be wide enough[128]—to cover all benefits which flow from an employment relationship and to ban indirect as well as direct discrimination. There are also three directives (i.e. legislation adopted by the Community): the first ensures that equal pay for work of equal value can be guaranteed;[129] the second goes beyond pay to adopt a broader principle of equal *treatment* of men and women by potential, actual, and past employers ("Equal Treatment Directive");[130] and the third, adopted at the end of 1997 and due for national implementation by January 2001, makes proof of discrimination easier by requiring the employer to justify differences of treatment between men and women.[131]

We have already explained the background and some of the issues of the 1994 case about gay men and lesbians in the military, *ex parte Smith*.[132] As well as attempting (unsuccessfully) to rely on litigation in England on the European Human Rights Convention, the four gay men and lesbians also invoked the EC Equal Treatment Directive in order to argue that the policy under which they had been discharged from the service for being gay or lesbian was unlawful. It is significant that their legal action was against a central government department (i.e. against an arm of the State), for

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126. *See* Virginia Harrison, *Using EC Law to Challenge Sexual Orientation Discrimination*, *in* HERVEY & O'KEEFFE, *supra* note 11, at 267-80.

127. Case 43/75, Defrenne v. SABENA [1976] E.C.R. 455 (E.C.J.), [1976] 2 C.M.L.R. 98 (1976).

128. *E.g.*, Case 12/81, Garland v. British Rail Eng'g Ltd. [1982] E.C.R. 359 (E.C.J.), [1982] 1 C.M.L.R. 696 (1982) (travel facilities after retirement), and Case C-262/88, Barber v. Guardian Royal Exchange [1990] E.C.R. I-1889 (E.C.J.), [1990] 2 C.M.L.R. 513 (1990) (employer's pension scheme, including where replacing state pension scheme); *see also* WEATHERILL & BEAUMONT, *supra* note 115, at 613-29.

129. Council Directive No. 75/117/EEC, 1975 O.J. (L45/19), on the approximation of the law of the member states relating to the application of the principle of equal pay for men and women.

130. Council Directive No. 76/207/EEC, 1976 O.J. (L39/40), on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions.

131. Council Directive No. 97/80/EC, 1998 O.J. (L14/6), on the burden of proof in cases of discrimination based on sex.

132. *See supra* text accompanying notes 97-99.

directives are addressed to member states and require translation by local legislation or regulation into national law, usually giving a time limit within which this is to occur.[133] No individual can complain in court until this time limit has passed.[134] If by then the directive is unimplemented, so that the member state is in default, it can be relied on by an individual but only against the state or "an emanation of the state."[135] Therefore, had the action by the four service personnel been brought against a *private* employer, the Equal Treatment Directive could not have been relied on and the only recourse then would have been an action for damages under the *Francovich* principle[136] against the U.K. Government for the loss caused by failure to implement it—a much more circuitous and less certain route.

There was no argument in court about the ability of the four applicants to rely on the Equal Treatment Directive, nor on its force superior to English law: had therefore its words or the case-law from the E.C.J. interpreting those words clearly protected against discrimination on grounds of sexuality, the court would have been bound to find for the four and quash the policy as illegal. However, both the Divisional Court and the Court of Appeal held that the words of the Equal Treatment Directive were clear, speaking only about discrimination on the basis of gender. The court drew a clear distinction between this and discrimination based on sexual orientation, holding that the Equal Treatment Directive was historically and legally an extension and application of article 119, which was (only) about equal pay between men and women. This distinction echoes the views of M. Delors quoted above.[137]

What might have seemed the obvious and only possible view on the scope of the Equal Treatment Directive no longer looks so solid, since others have taken up the baton to use EC law as a lever for change in U.K. law and policy. *P. v. S. and Cornwall County Council*[138] concerned Mr. P., a man working at the time for Cornwall County Council. He was dismissed in December 1992 for telling his manager that he was a male-to-female transsexual and about to go through gender reassignment procedures. Under purely English law, the dismissal appeared not to be unfair; but was it

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133. Treaty of Rome, Mar. 25, 1957, art. 189(2), 298 U.N.T.S. 11 (to become article 249(2), when the Treaty of Amsterdam (1997), *supra* note 54, enters into force).

134. Case 148/78, Pubblico Ministero v. Ratti [1979] E.C.R. 1629 (E.C.J.), [1980] 1 C.M.L.R. 96 (1979).

135. Case 41/74, Van Duyn v. Home Office [1974] E.C.R. 1337 (E.C.J.), [1975] 1 C.M.L.R. 1 (1974). For further information on what is meant by "the state," see WEATHERILL & BEAUMONT, *supra* note 115, at 350-52.

136. Cases C-6/90 & 9/90, Francovich v. Italy [1991] E.C.R. I-5357 (E.C.J.), [1993] 2 C.M.L.R. 66 (1991).

137. *See supra* text accompanying note 121.

138. Case C-13/94, P. v. S. and Cornwall County Council [1996] E.C.R. 795 (E.C.J.), [1996] 2 C.M.L.R. 247 (1996).

unlawful under the Equal Treatment Directive? That question was referred to the European Court of Justice by the industrial tribunal (labor court) hearing the action for unfair dismissal; and on April 30, 1996, the E.C.J., in a bold move, held that the Directive is an expression of a more general principle of equality in Community law: it is not limited to discrimination on grounds of present gender but is wide enough to cover discrimination arising from gender reassignment. Put another way, Mr. P. was dismissed because of the sex he was about to become; therefore, a direct discrimination based on sex.

This approach to discrimination in turn raised again the possibility so firmly rejected in *ex parte Smith*:[139] if discrimination against transsexuals was covered, might not Community law also be wide enough to protect gay men and lesbians, at least in the employment context which is one of its areas of concern? That is one of the questions raised in a further case currently before the E.C.J., *Grant v. South-West Trains Ltd.*[140] *Grant* is about travel concessions for the partners of employees of one of the private companies that now operate the train services in the mainland of Great Britain. These have, since 1996, replaced what was marketed as British Rail but legally was the British Railways Board, a statutory corporation.

Our employee, a lesbian, Lisa Grant, was in fact first employed while the railways were still in public ownership, but nothing turns on this change of status. Under the terms of Lisa's employment, spouses of employees had a right to reduced rate tickets on the railway; but, under the section headed "spouses" in the published regulations, an employee could make a declaration of a meaningful relationship of two years or more with what was quaintly called a "common law spouse" (i.e. an unmarried partner). If a person made such a declaration, the partner also qualified for the travel privileges. But, the regulations specifically covered only opposite sex partners. As a result, Lisa Grant's male predecessor in the same job had been able to get travel concessions for his unmarried female partner. When Lisa applied, declaring in due form that the relationship with her female partner had already lasted the necessary two years, the company stood behind the rules and said that she did not qualify. Lisa then took South-West Trains Ltd. to an industrial tribunal.[141] Her principal claim was that under European law these travel concessions, being a benefit linked to her employment, counted as "pay"; that part of her pay (about $1600 a year) was therefore being denied her because she was a lesbian and her partner was of the same sex; and that this was a violation of article 119 of the Treaty

139. *See supra* text accompanying notes 132-37.

140. Case C-249/96, Grant v. South-West Trains Ltd. (Opinion of Advocate General, E.C.J.) (not yet reported).

141. The decision is not reported.

of Rome—the equal pay principle. She also relied, in case they proved to be relevant, on the two other equality directives already in force, mentioned earlier.[142]

On the substance of the Community law issue, we do not yet know the final outcome, since the E.C.J. has yet to give judgment. But a strong hint can be gleaned from the Advocate General in the case, a member of the court whose job it is to summarize the issues, discuss the law at stake and in a neutral and objective way propose a solution in a public document called an Opinion. The court is not obliged to follow either the outcome or the reasoning of this Opinion, but the court does both in more than eighty percent of all cases. In *Grant v. South-West Trains Ltd.*, Advocate General Elmer delivered his views on September 30, 1997, recalling first of all that the E.C.J. had clearly held in the *Garland* case[143] that travel concessions offered to employees form part of "pay." It therefore followed that the present case was likewise about pay, so only article 119 of the Treaty was relevant and the Equal Treatment Directive was not. Quoting from the *P. v. S. and Cornwall County Council*[144] judgment, the Advocate General said that the reasoning in that case applied equally to claims under article 119. Thus, according to the Advocate General, both the equal pay and equal treatment principles prohibited discrimination based exclusively or essentially on gender—not just of the employee but of relevant family members. But was such discrimination present? Was it not really gay or lesbian sexual *orientation* that the company's regulations were discriminating against? No, said the Advocate General: the travel concessions were for the employee's household, and it was the gender of the unmarried partner that ruled them out—gender was the only objective factor at work, so the discrimination was based on gender. Nor could the employer justify this discrimination on moral grounds of disapproving of a gay or lesbian lifestyle, since article 119 does not allow direct discrimination ever to be justified.

In the light of the tantalizing possibilities which these most recent two cases raise, the English courts have now realized that it was too simplistic to hold in *ex parte Smith*[145] that EC law could never protect against discrimination based on sexual orientation. In *R. v. Secretary of State for*

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142. For the directives, see *supra* notes 129-30. The great advantage to her of bringing her case under the umbrella of "pay," and hence article 119, was that it made no difference whether her employer was "an emanation of the State" (i.e. in the public sector) or not. *See supra* text accompanying notes 133-36.

143. Case C-249/96, Grant v. South-West Trains Ltd. (Opinion of Advocate General, E.C.J.) (not yet reported) (citing Case 12/81, Garland v. British Rail Eng'g Ltd. [1982] E.C.R. 359 (E.C.J.), [1982] 1 C.M.L.R. 696 (1982)).

144. P. v. S. and Cornwall County Council [1996] I.C.R. 795 (E.C.J.), [1996] 2 C.M.L.R. 247 (1996).

145. R. v. Ministry of Defence, *ex parte* Smith [1996] 2 W.L.R. 305 (Q.B.).

Defence, ex parte Perkins,[146] a test case brought by Terry Perkins, a gay man challenging his discharge from the Navy because of his sexuality, Lightman J. was willing to accept that there was now a real possibility that the Equal Treatment Directive might protect the sailor and thus make his dismissal unlawful. To resolve this uncertainty required that the issue be referred to Luxembourg, so that the E.C.J. could pronounce on it by way of preliminary ruling. The outcome will not be known until at least mid-1998.

4. *Comment*

As this sequence of cases shows, EC law appears to be moving, slowly but steadily, down a road which leads toward recognition that, in an employment context, discrimination based on sexual orientation can be seen as a violation of the equal pay and equal treatment provisions of Community law. *Grant*, as we have seen, is essentially about the way the *partners* of gay or lesbian employees are treated by employers, in comparison with the partners of heterosexual unmarried employees. This is of course important in itself, given that "pay" includes occupational pensions[147] and that the effects of the final judgment are not likely to be limited to claims already lodged; the final bill may run into millions of pounds in Britain alone, as well as requiring pension schemes to rewrite their rules to avoid discrimination against same-sex couples. However, even if Lisa Grant wins, neither EC nor English law is likely (yet?) to force South-West Trains Ltd. to treat married and unmarried couples on an equal footing: the travel concession regulations could validly be limited to married couples, as long as they did so in a gender-neutral way. Additionally, even if the E.C.J. follows the lead of the Advocate General, this will not necessarily protect the gay or lesbian employee, seen as an individual, against discrimination based on sexual orientation. That goal has not yet been attained, at least as a matter of general Community or English law, though the *Perkins* case raises this issue more nearly head-on, if the E.C.J. chooses to approach it that way.[148]

What these cases also clearly show is the dynamic and creative power wielded by the judges in the E.C.J.: their interpretive energies are not

146. R. v. Secretary of State for Defence, *ex parte* Perkins, TIMES (London), Apr. 8, 1997 (Q.B.).

147. Case C-262/88, Barber v. Guardian Royal Exchange [1990] E.C.R. I-1889 (E.C.J.), [1990] 2 C.M.L.R. 513 (1990).

148. For the view that discrimination against someone because of the gender of the partner they choose should properly be classed as direct sex discrimination, needing no special intellectual sophistry to fit within article 119, the Equal Treatment Directive, and the (English) Sex Discrimination Act 1975, see Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334 (1997).

limited by a consideration of what the drafters of the Treaty of Rome might have meant back in 1957 or of the Equal Treatment Directive back in 1976. Their job is to realize the objectives *behind* the Community's rules, so they take a purposive approach to interpretation. The contrast with the frame of reference of English judges in the cases we considered earlier is striking—and gay men and lesbians look to be the winners, given the trend that seems to be emerging.

V. INITIATIVES ON GAY AND LESBIAN RIGHTS SINCE THE MAY 1997 GENERAL ELECTION

A. *Incorporation of the European Human Rights Convention into English Law*

It was a pledge of the Labour Party before the May 1997 General Election to incorporate the Convention into English law, so as to make it possible for litigants to rely on its provisions in the English courts. The party consultation document *Bringing Rights Home* was followed in government by a White Paper, *Rights Brought Home: The Human Rights Bill*,[149] the text of the Human Rights Bill being published on the same day. This Bill, to incorporate most articles of the Convention and Protocol 1 into English (and Scottish and Northern Irish) law is presently passing through Parliament.

The Bill makes unlawful the acts of public authorities[150] which infringe any of the Convention rights listed in Schedule 1 to the Bill and empowers the courts to offer relief, including by way of negative injunction to prevent the unlawful act. The main remedy may be a traditional one, like an application for judicial review against a public law decision or rule or an appeal against a challenged decision of a court or tribunal, but the courts will become authorized to offer victims any relief within their power, including awards of damages.[151] In exercising their new powers, clause 2 of the Bill requires courts and tribunals to have regard to the whole body of case-law from Strasbourg from time to time; and clause 3 requires them to interpret

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149. BRINGING RIGHTS HOME, *supra* note 86.

150. Clause 6 of the Human Rights Bill defines "public" widely, to include courts, tribunals, and any person whose functions are of a public nature. The White Paper explains that this is intended to cover central and local government (including executive agencies), the police, immigration officers, and privatised utilities. It is likely also to cover broadcasting authorities, since all these are established by public licensing and have a shared monopoly of allocated frequencies. It will also cover churches and other religious bodies, who are hoping for exemption via an amendment to the Bill. *Id.*

151. Clause 8(4) of the Human Rights Bill requires courts to take into account the principles applied by the European Court of Human Rights in relation to compensation in awarding damages. *Id.*

U.K. legislation (both primary and secondary) so far as possible to be compatible with rights under the Convention. What if this cannot be done? The Bill contains no power to override provisions of primary legislation which violate the Convention, though it does for secondary (delegated) legislation. Thus rights derived from the Convention will not have a status of supremacy equivalent to the directly effective provisions of EC law, nor will any statutory rules already in force when the Human Rights Bill becomes law be impliedly repealed.[152] Instead, in case of conflict between protected Convention rights and an English statute, the court or tribunal will make a formal declaration of incompatibility under clause 4, which will have no impact on the validity or enforceability of that provision but which will then empower (but not oblige) the Government to take what is called "remedial action": exercising a power to amend the offending legislation under clauses 11 and 12 of the Bill, by ministerial order approved by both Houses of Parliament. In order to minimize the chance of this occurring in relation to future legislation, clause 19 of the Human Rights Bill also requires a Minister in charge of a Bill to make a statement to Parliament of his/her belief in its compatibility with the Convention rights. This requirement of course does not guarantee that compatibility but ensures that the risks of incompatibility are at least considered at the drafting stage.[153]

Many details of how this will work remain unclear until the Bill completes its passage through Parliament—but the press and broadcasting authorities are very concerned at the "judicialization" of what has hitherto been left to self-regulation, with non-statutory complaints bodies as the long-stop. Whatever the detailed result, the Bill is sure to pass and to transform the human rights landscape within English law. Of the cases in the English courts discussed above, *Morrissey* and *Staines*[154] would certainly have led to a declaration of incompatibility between English law and the Convention, with perhaps an award of compensation, had this Bill been in force at the time; *ex parte Smith*[155] might well have been determined in the applicants' favor without the need to go to Strasbourg, as might *Sutherland*;[156] and in the light of the developing case-law from Strasbourg on protection for de facto

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152. The Government's justification for this limit on the effect of incorporation is twofold: first, unlike EC law, the Convention does not itself *require* its provisions to take automatic precedence over domestic law, provided that there is some other form of effective remedy; and second, to empower English courts to strike down statutes would tip the balance too far away from the sovereignty of Parliament and in favor of judicial power.

153. Since incompatibility with Convention rights (and also rights under EC law) is also one of the limits on the legislative powers of the proposed Scottish Parliament, clause 30 of the Scotland Bill imposes a similar duty on the member of the Scottish Executive in charge of a Bill before that new Parliament.

154. R. v. Morrissey, R. v. Staines, TIMES (London), May 1, 1997 (C.A.).

155. R. v. Ministry of Defence, *ex parte* Smith [1996] 2 W.L.R. 305 (Q.B.).

156. Sutherland v. United Kingdom, App. No. 25186/94 (1997) (not yet reported).

family relationships under article 12,[157] *Fitzpatrick*[158] might also have gone in the plaintiff's favor (and might yet, if the Bill is in force by the time the appeal to the House of Lords comes to a hearing). In addition, there will be litigation in English courts on areas that have so far not been regarded as justiciable at all. The right to private life under article 8 of the Convention may bring about the creation of something close to a tort of invasion of privacy in English law, at least so far as interference by public authorities is concerned, with difficult balances being drawn between the rights of individuals and the right of expression of the media under article 10 of the Convention. That the media can for the first time assert substantive rights to gather and disseminate information may also lead to challenges to the criminal offenses which potentially hang so dangerously over gay publications, their publishers and distributors.[159] An obvious further effect should be fewer U.K. cases ending up in Strasbourg.

B. *The Impact of Devolution*

Approved in a two-question referendum in Scotland on September 11, 1997, the Government's plans for devolution will lead to the creation of a directly-elected Scottish Parliament, with a new Scottish Administration responsible to it, in May 1999. The 1997 White Paper *Scotland's Parliament*[160] proposed to transfer all law-making powers from Westminster to the newly elected body, so far as Scotland is concerned, subject to a list of "reserved powers" to be retained by Westminster. The Scotland Bill, which had its first reading in the House of Commons on December 17, 1997, gives effect to these plans and is at present still going through Parliament. Although the new Scottish Parliament in Edinburgh will have powers to deal with all questions of civil and criminal law and the administration of justice in Scotland (which are already uniquely Scottish), the Bill makes clear in clause 28(2)(d) that an Act of the Scottish Parliament will be outside its competence insofar as it is incompatible with any rights under the European Human Rights Convention or EC law.[161] Additionally, employment and industrial relations law, health and safety at work law, and equality legislation (sex, race and disability) will be reserved to Westminster.[162] This reservation of power to the English Parliament protects gay men and lesbians from any inroads into their existing rights under all these heads; but it also seems to prevent the Scottish Parliament from adopting any general non-

157. *See supra* text accompanying notes 112-13.
158. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. 991 (C.A.).
159. *See supra* text accompanying notes 27, 30 and 33.
160. SCOTTISH OFFICE, SCOTLAND'S PARLIAMENT, CM 3658 (1997).
161. Scotland Bill, cl. 28.
162. Scotland Bill, cl. 29 and Schedule 5 (Head 8, § 1, and Head 11, § 2).

discrimination principle, since this would change employment law. Respect for these limits on the Scottish Parliament's powers will be assured at three stages: (1) via pre-legislative checks, where the Presiding Officer (Speaker) of the new Parliament will have primary responsibility;[163] (2) via a pre-Royal Assent four-week delay, which will allow the U.K. Government to refer the Scottish Bill to the Judicial Committee of the Privy Council for judicial determination of its validity;[164] and (3) post-Royal Assent challenge as an issue in litigation in the ordinary courts, such challenges potentially coming ultimately before the Judicial Committee of the Privy Council, by reference from a lower court or on appeal.[165]

Momentous as these changes are for the constitutional arrangements of the United Kingdom, their likely impact on the rights of gay men and lesbians is slight, except perhaps in relation to the services provided by Scottish public authorities, where there appears scope for legislation to protect gay men and lesbians affirmatively, if the new Parliament or Executive so decides.

For the sake of completeness we should also mention the equivalent proposals for Wales, explained in a bilingual White Paper entitled *A Voice for Wales*,[166] which were approved in principle by a narrow majority in a referendum in Wales on September 18, 1997. The Government of Wales Bill had its first reading in the House of Commons on November 26, 1997 and is still continuing its path through the legislature. In contrast to the plans for Scotland, this Bill does not create an elected body with primary legislative powers; instead, the new directly elected National Assembly for Wales will take over responsibility for all the public services in Wales currently under the Secretary of State for Wales, including the appointment of members to unelected bodies and the funding of local government. It will have the power to adopt secondary legislation within the framework of statutes from Westminster and will be consulted on proposals for legislation at Westminster which affect Wales. The new Assembly, likely to be based in Cardiff or Swansea, will probably make little positive impact on gay men and lesbians living in Wales, although, as in Scotland, clause 105 of the Bill makes clear that the Assembly may do nothing which contravenes any rights under the European Convention which are incorporated into U.K. law or

163. Scotland Bill, cl. 31.
164. Scotland Bill, cl. 32.
165. Scotland Bill, cl. 91 and Schedule 6.
166. WELSH OFFICE, A VOICE FOR WALES/LLAIS DROS GYMRU, CM 3718 (1997).

under EC law.[167] According to the Government's timetable, the new Assembly will be at work in May 1999.

C. *Immigration Rights*

On October 10, 1997, Mike O'Brien, the U.K. Parliamentary Under-Secretary of State in the Home Office (a junior Minister), announced a concession outside the Immigration Rules to give unmarried partners of either sex a right of settlement in the United Kingdom, to accompany or join someone who is already settled in the United Kingdom. To be admitted under these new principles, the partners must show, *inter alia*, that they are legally unable to marry; that they have lived together for four years in a stable relationship "akin to marriage" and that they intend to continue to do so; and the partner without the right of settlement will gain this only after an additional year's residence in the United Kingdom.[168]

For the first time, the immigration authorities are now expected to treat gay and straight unmarried relationships on an equal footing, although under conditions much more restrictive than for those who are married. It is also to be noted that the form of the policy change does not make it part of the published Immigration Rules, which can be relied on before the administration and the courts if need be; it is merely a concession with an uncertain legal status and could probably be withdrawn (e.g. by a future Government of a different political color) without notice, formality or legal challenge. It therefore remains uncertain whether individual cases considering and determining what is meant by "stable" or "akin to marriage" will reach the law reports. These new "rights" will be of most benefit to partners who wish to enter the United Kingdom with passports from countries outside both the European Union and European Economic Area (EEA).[169] Nationals of the EU and EEA have in principle a right to seek and take up work, to establish themselves as self-employed persons, or to offer or receive services within any country which is a member of the EU or EEA.[170]

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167. The sanction for this under clause 107 of the Bill is an order from the Secretary of State directing that the proposed action not be taken (or requiring specific action to be taken to give effect to an international obligation), combined with the power to raise devolution questions in ordinary litigation (cl. 108 and Schedule 6) along lines very similar to the provisions in the Scotland Bill.

168. The press release and further information are obtainable from the Family Section, Immigration Policy Directorate, Apollo House, 38 Wellesley Road, Croydon CR9 2BY, U.K.

169. The EEA now in 1998 consists of only Liechtenstein, Norway, and Iceland, since Austria, Finland, and Sweden became full EU members at the start of 1995.

170. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C224/1), [1992] 1 C.M.L.R. 573 (1992), arts. 8, 8a, 48, 52 and 59 (about to become articles 17, 18, 39, 42 and 49, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force). *See also*

D. *The Rights of Cohabitees: The Law Commission*[171]

In September 1997, the Law Commission, the permanent statutory law reform body for England and Wales, published a Consultation Paper on damages for fatal accidents,[172] reviewing the scope and operation of the Fatal Accidents Act 1976, which determines who is able to claim if they have suffered pecuniary loss as a result of another's death. Under this Act, a cohabitee of the deceased has no right to sue, unless s/he lived in the same household as the deceased as his/her husband or wife for the two years immediately before the deceased's death—a rule almost identical to that which applies for claims against the estate of a deceased[173] and for succession to the tenancy of a deceased.[174] Unless *Fitzpatrick*[175] goes in favor of the surviving gay partner in the House of Lords, it is doubtful if a same-sex partner could ever qualify under the rules as they stand. Such a survivor is certainly excluded from suing for bereavement damages,[176] where only the deceased's spouse or parents (if the deceased was unmarried and under the age of eighteen) at present qualify. The Commission provisionally recommends replacing all the tests which determine who can claim damages for financial loss by a single new criterion: partial or total dependency on the deceased (including dependency that would have existed, but for the death). This would make it much easier for unmarried partners, *a fortiori* same-sex partners, to qualify for compensation. The report goes on to seek views on extending the right to bereavement damages to de facto partners. The report asked for responses by the end of 1997, the Commission intending to publish its final report (which will have a draft Bill annexed) on this and linked issues of tort law by the end of 1998. Legislation embodying the proposed changes will follow only after this report is accepted by the relevant departments within the Government, in this case probably the Lord Chancellor's Department. Finally, the Government has to make Parliamentary time available; however, there is a special fast-track procedure within Parliament for Bills having their origin in Law Commission reports.

WEATHERILL & BEAUMONT, *supra* note 115, at 543-612. These rights were extended to the territory of the EEA by the European Economic Agreement, 1992, arts. 1, 28, 31-34, 36-37 (modified in 1993 after the withdrawal of Switzerland). *See* DENIS MARTIN AND ELSPETH GOULD, FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 235-249 (1996).

171. Law Commission information can be accessed at *U.K. Law* (visited Mar. 22, 1998) <http://www.gtnet.gov.uk/lawcomm/homepage.htm>.

172. LAW COMMISSION, CLAIMS FOR WRONGFUL DEATH (Consultation Paper No. 148, 1997).

173. *See supra* note 9.

174. *See supra* Part III.B.

175. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. 991 (C.A.).

176. Currently fixed at £7,500; the Commission recommends raising it to £10,000 and index-linking the figure for the future.

The Law Commission is also at present part-way through a review of the (mostly case-law) rules of English law which determine unmarried partners' rights to a share of the family home. Like the report on fatal accidents, this is part of its own rolling program of topics for consideration, so this does not come from a specific reference from the current Government. As mentioned in Part I,[177] partners who do live together but do not formalize their property relations often discover upon breakdown of the relationship or upon the death of one partner that the partner whose name is not on the legal title has few (if any) rights to a share of the proceeds on sale or to any security in the accommodation. Gay and lesbian partners are especially vulnerable since their chances of inheriting from a deceased partner without a will are negligible.[178]

The options under consideration may include allowing unmarried couples to register their relationships officially, which would then trigger a new judicial power to apportion assets fairly upon breakdown of the relationship, by analogy to the powers which the courts already have upon divorce.[179] Such a power could be made available more generally, perhaps conditional on a minimum period of cohabitation (say two years). The Consultation Paper surveying the present law and canvassing the options for change, with the Commission's own provisional preferences highlighted, is due for publication before the end of 1998.[180]

Any changes in the law which result from these two areas of review by the Law Commission are likely to significantly improve the position of gay men and lesbians, although they may well fall short of putting unmarried cohabitees on an exactly equal footing with married couples.

VI. CONCLUSIONS—AND THE FUTURE

The cases and changes discussed above build a picture of a legal system in transition. From an insular, case-based structure of courts and judges who are sure of their position in reflecting society's views, as well as embodying its prejudices, with Parliament occasionally intervening through legislation, we are moving toward a legal system where legislation (or its equivalent) is the central fact of life. But this legislation appears in broader

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177. *See supra* notes 8-9.

178. *See supra* note 9.

179. Matrimonial Causes Act 1973, ch. 18, Part II, *modified by* Family Law Act 1996, ch. 27, Sched. 2. *See also* CRETNEY & MASSON, *supra* note 8, ch. 15.

180. Under reports headed "Property Rights for Partners" (Jan. 5, 1998, at 1-2) and "Sums and Lovers" (Jan. 10, 1998, at 64), the TIMES (London) summarized what it claimed would be options included in the Law Commission Consultation Paper; however, the Commission has refused to confirm these reports, saying that the process of drafting is simply not advanced enough for any possible reform proposals yet to be identified.

and more principled terms than allowed by our traditions and brings with it interpretation and case-law from international and foreign courts. These courts, like the E.C.J. or the European Court of Human Rights, include a majority of judges from countries whose approach to legal and social questions may be very different from our own. They bring to the task of interpretation their own traditions of scholarship and a view of the judicial process which embraces a commitment to further the goals of integration and social solidarity more openly than English judges have traditionally felt able to do. The paradox of this is that Continental jurists have in the past sometimes been shocked at the overt law-making which English courts undertake, many of their legal systems preferring or requiring their courts to hide creativity and change behind a facade of logical deduction of the outcome of a case from a fixed statutory text. Now in the 1990s, the positions are reversed: English law looks by instinct not at its past glories but across the Channel to the world beyond. English judges know, like U.K. Governments, that internationalism is the future and that Britain cannot be out of step with its European neighbors.

Showing the speed of change, a number of cases discussed by this article are already awaiting their next stage or further decision. These outcomes will add new elements to the topics considered. Developments for which to look out include:

(1) *Fitzpatrick*[181] reaching the House of Lords (if and when it does);

(2) The judgment of the European Court of Justice on the references of the EC law issues in *Grant v. South-West Trains Ltd*[182] and *ex parte Perkins*;[183]

(3) The decision of the European Commission of Human Rights on the case of the four gay and lesbian ex-servicemen;[184] and

(4) The judgment of the European Court of Human Rights on the age of consent in the *Sutherland* case.[185]

It is safe to predict that EC law will continue to provide the motor for change in employment law as it affects gay men and lesbians. This in turn is likely to force the abandonment of the policy against having gay men and

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181. Fitzpatrick v. Sterling Hous. Ass'n Ltd. [1997] 4 All E.R. 991 (C.A.).

182. Case C-249/96, Grant v. South-West Trains Ltd. (Opinion of Advocate General, E.C.J.) (not yet reported).

183. R. v. Secretary of State for Defence, *ex parte* Perkins, TIMES (London), Apr. 8, 1997 (Q.B.).

184. *See supra* text accompanying notes 97-99.

185. *See supra* text accompanying notes 107-10.

lesbians in the armed services, as well as to require employers generally to deal more fairly with gay or lesbian would-be, actual, or ex-employees. The law of the European Human Rights Convention is likely to evolve slowly in favor of greater protection for individuals (in both private life and the criminal law); for same-sex couples; and for gay or lesbian parents (in family life). The principle of non-discrimination might be transformed into a substantive protection for gay men and lesbians in its own right.

Within Parliament, it seems certain that the age of consent for gay men will soon be reduced to sixteen; it is also likely that the Local Government Act 1988 s. 28[186] will be repealed and that cohabitees generally will be given greater rights in relation to property and the death of a partner. Once the Human Rights Bill is enacted for the United Kingdom, it is inevitable that litigants will use arguments drawn from the Convention more frequently and confidently, and English judges will find themselves having to become familiar with new concepts and a substantial body of new case-law. This will draw the courts into controversial new areas, in particular privacy and press freedom; this may in turn force legislative change to keep English law in step with Strasbourg. The litigation which will be created by the legislation implementing devolution in Scotland and Wales may also involve questions of the rights of gay men and lesbians as fundamental areas protected from interference by the new bodies in Edinburgh and Cardiff, although this new category of case-law is not likely to appear until the year 2000.

This survey clearly shows how much legal activity there is presently in England concerning the rights of gay men and lesbians, much of it supported and encouraged by pressure groups who see the law as an important vehicle for their claims. Their relative success in these cases seems to stem from two main factors: (a) a willingness on the part of the English judiciary, at least in the civil courts, to recognize the realities of the lives of gay men and lesbians and of ongoing same-sex relationships and the indefensibility of discrimination against them, and (b) the increasing impact on English law of rules, principles, and approaches which come from outside England, in the form of EC law and the law of the European Human Rights Convention. The cases provide the raw data from which an answer can be attempted to the questions posed at the start: has English law left behind its homophobic, moralistic and discriminatory past? Should lesbians and gay men now look upon the law as their ally, rather than as their enemy?

For all the victories already won, the modest skirmishes recorded here leave out of reach the real prize: the creation or recognition within English law of a general principle of equality and non-discrimination on which gay

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186. *See supra* text accompanying notes 39-40.

men and lesbians can rely, in court if need be.[187] That principle would extend the scope of legal rights to areas where this survey has been able to record no significant changes—health care, reproduction and succession—and might even challenge the primacy the law accords to heterosexual marriage for so many legal purposes. Nor do the recent moves chronicled above have any significant impact on the arsenal of criminal offenses potentially available against expressions of same-sex desire, from those used against gay cruising to those preventing the sale of erotica. If English society and its law enforcers have become more tolerant, so that gay men and lesbians can have a visible place in society, meet and form relationships, communicate with each other freely, and exercise their 'rights' of assembly and free expression like other groups, these freedoms still depend not on positive enforceable rights but on the continued willingness of officials to allow this to happen. No gay or lesbian campaigner would be so naive as to regard the good sense of the Government and of chief police officers as an adequate safeguard against moves backwards to "the bad old days" of Mrs. Thatcher and clause 28[188] or even pre-1967. Reforming the criminal law and its enforcement as it affects gay men and lesbians is a whole enterprise barely begun; it may prove a harder fight than claiming rights in civil law.

The law remains, and should remain, an important area for the repeated expression by gay men and lesbians of their aspirations and claims and of their demands for the specificity of their lives and needs to be taken seriously. The pronouncements of the courts, along with legislation and statements by Ministers, are the primary symbolic vehicle through which the state expresses its official views: the inherent uncertainty of the law, hence its susceptibility to change, makes it open to dialogue through cases in court and the putting of pressure on Members of Parliament and Ministers. The lobbying group, Stonewall, is running an Equality 2000 campaign, focusing on five distinct areas, three of which this article has discussed above: protection for young lesbians, gays, and bisexuals at school (and repeal of clause 28[189]); reform of the criminal law; protection from discrimination in the workplace and elsewhere; recognition and respect for same-sex partners and for lesbian and gay parents and their children. None of these objectives

187. The Equal Opportunities Commissioner, a statutory watchdog and enforcer of sex and race discrimination law, has proposed such a principle in a consultation paper published in January 1998: EQUALITY IN THE 21ST CENTURY: A NEW APPROACH.

188. *Id.*

189. *Id.*

can be attained without legal change; and most require legislation.[190] In this context, as Les Moran has put it:

> To abandon law as a political objective would be to contribute to the legitimacy of discrimination and victimization already practised in law. It would be to condone the myth of impartiality, the myth of objectivity, the myth of universality. It would be to abandon a terrain of politics to the forces of reaction and oppression.[191]

190. The only goal which may not require legislation is eliminating discrimination in the workplace, if EC law proves broad enough to regard discrimination based on sexual orientation as equivalent to direct discrimination based on sex. *See supra* Part IV.B.3.

191. Moran, *supra* note 4, at 197.

POSTSCRIPT

On February 17, 1998, after the main body of this article was complete and type-set, the European Court of Justice delivered judgment in the case of *Grant v. South-West Trains Ltd.*[192] Unexpectedly refusing to follow the Opinion of Advocate General Elmer, the court in a not yet reported judgment held that to refuse benefits to same-sex couples that were available to opposite-sex couples was not direct sex discrimination contrary to the principle of equal pay in article 119 of the Treaty of Rome, since the company's policy treated the same-sex partners of lesbian employees on exactly the same basis as those of gay male employees. Nor did either Community law or the European Human Rights Convention at present require employers to treat the same-sex partners of employees in the same way as their spouses or unmarried opposite-sex partners. The court went on to hold that article 119 could not be interpreted so broadly as to cover discrimination based on sexual orientation, though the judgment notes that when the Treaty of Amsterdam (1997) comes into force, article 6a will empower the Council to take action to eliminate *inter alia* discrimination based on sexual orientation.

This judgment is clearly a major setback for those who looked to the judicial interpretation of existing principles of EC law to ensure better protection of gay and lesbian rights in the workplace. The reasoning openly limits the scope of the principle of equality relied on to find in favor of the transsexual employee in *P. v. S. and Cornwall County Council*[193] to gender reassignment cases alone and must make the chances of winning of Terry Perkins[194] in Luxembourg nearly non-existent.

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192. Case C-249/96, Grant v. South-West Trains Ltd. (not yet reported; transcript kindly supplied by Stonewall (London)). *See supra* text accompanying notes 141-44.

193. P. v. S. and Cornwall County Council [1966] I.C.R. 795 (E.C.J.), [1966] 2 C.M.L.R. 247 (1996). *See supra* text accompanying note 138.

194. R. v. Secretary of State for Defence, *ex parte* Perkins, TIMES (London), Apr. 8, 1997 (Q.B.). *See supra* text accompanying note 146.

PARTITION OR PERISH: RESTORING SOCIAL EQUILIBRIUM IN NIGERIA THROUGH RECONFIGURATION

*Okechukwu Oko**

I. INTRODUCTION

Ethnic identity is central to the life of Africans.[1] An individual's ethnic identity helps to shape perceptions, political behavior,[2] and even personal relationships.[3] Prospects of a better life, such as access to modern facilities, adequate health care, and state appointments, far too often depend on an African's ethnicity.[4] Fear of exclusion from power, and by extension from the nation's wealth, is genuine and remains a major impetus for aggressive ethnic identification in most African countries.[5] The fear of losing control of the machinery of government to another ethnic group reinforces the

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1. A. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1, 12 (1992) ("Ethnicity tends to be more important to Africans than it is to individuals elsewhere. In much of Africa, ethnicity is the hub around which life revolves."); GERHARD MARE, ETHNICITY AND POLITICS IN SOUTH AFRICA 2 (1993) ("Ethnic identity is similar to a story; it is a way of dealing with the present through a sense of identity rooted in the past.").

2. Rotimi Suberu, Comment, *Federalism and Nigeria's Political Future*, 87 AFR. AFFAIRS 431, 437 (1988) (commenting that in spite of remarkable institutional and constitutional reforms designed to reduce their impact on political life, ethnicity and religion still provide the basis on which political values are defined, articulated, contested or challenged) (citing Shehu Othman, *The Triumph of Theater*, W. AFR., June 15, 1987, at 1142).

3. *Saro-Wiwa's Peril*, ECONOMIST, Nov. 4, 1995, at 46 (noting that in Nigeria, as in all of Africa, ethnicity, language and culture, but not nationality, are becoming the touchstones of personal identity).

4. *See* J.O. IRUKWU, NIGERIA AT CROSSROADS: A NATION IN TRANSITION 284 (1985):

> Africa has suffered so much greatly as a result of tribalism. Wars have been fought and thousands of lives lost as a result of tribal and ethnic conflicts; important economic institutions that would have transformed national economies have been killed due to tribal differences; great African industrialists and scientists have had their careers ruined or programmes frustrated or destroyed because they belong to the 'wrong' ethnic group in relation to those in power at the material time.

5. Jerome Wilson, *Ethnic Groups and the Right to Self Determination*, 11 CONN. J. INT'L L. 433, 436 (1996) ("Ethnic identification seems to be driven by the desire, on the one hand, for psychological security and self-esteem, and, on the other hand, for material gain. The desire to have security, self-esteem, and material gain are strongest when common social goods are threatened.").

masses' resolve to rally around the leaders of their ethnic groups.[6] Whether motivated by fear or by a desire to dominate others, the resurgence of ethnicity in the political process has destroyed many African nations and mortally wounded others.[7] Failed[8] and failing states,[9] internecine wars, bitter and violent struggles for power,[10] and massive human rights violations in Africa are in large part traceable to ethnic rivalries.[11]

African nations' attempts to navigate through the thicket of ethnic tensions and to promote national unity have been consistently undermined and ultimately thwarted by political elites' inability to subordinate ethnic sentiments to the overriding interest of the nation.[12] Ethnic loyalties impede

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6. An ethnic group has been described as a group of persons who recognize themselves as members of a group that has very particular characteristics, including: (1) persistence over time, (2) shared religious, ideological, and other cultural features, (3) specific forms of communication and interaction, and (4) mutual self-identification as a category distinct from others. *See* Gwendolyn Mikell, *Ethnic Particularism and the Creation of State Legitimacy in West Africa*, 4 TULSA J. COMP. & INT'L L. 99, 103 (1996) (citing FREDRIK BARTH, ETHNIC GROUPS AND BOUNDARIES (1969)).

7. For an account of troubled and collapsed states in Africa, see *generally*, COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (I. William Zartman ed., 1995) [hereinafter COLLAPSED STATES].

8. Failed states are those whose governments have collapsed or have degenerated towards anarchy. *See* Gerald Helman & Steven Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 1, 3 (1992). An example of a failed state is Liberia. In 1990, the country collapsed following the attack of Samuel Doe's government by rebel forces led by Charles Taylor. Others include Somalia, which collapsed in 1991 when rebel forces overran the government of Mohammed Said Baire, and Rwanda, which collapsed in 1994 after the President Juvenile Habyarima, a Hutu, was killed in a plane crash.

9. Failing states are those whose central governments lack sufficient authority to maintain law and order within their boundaries. The legitimacy and authority of these states have been considerably eroded by social, economic, and political upheavals. Failing states include Nigeria, Sudan, Zaire, Ethiopia, Kenya, and Chad.

10. General Olusegun Obasanjo, former Head of State of Nigeria (1976-79), observed that "the continent is a theatre for more endemic deadly conflicts than any other region of the world. These have had devastating effects on African societies." CONFLICT RESOLUTION IN AFRICA (Francis Deng & William Zartman eds., 1991).

11. For a discussion of civil strife, civil wars, and state collapse in Africa, see THE FAILURE OF THE CENTRALIZED STATE: INSTITUTIONS AND SELF GOVERNANCE IN AFRICA (James Wunsch & Dele Olowu eds., 1990) [hereinafter THE FAILURE OF THE CENTRALIZED STATE]. For human rights violations under Nigeria's military regimes, see 1993 U.S. DEP'T OF STATE DISPATCH, NIGERIAN HUMAN RIGHTS PRACTICES (1994) (setting forth an account of human rights violations in Africa) [hereinafter NIGERIAN HUMAN RIGHTS PRACTICES].

12. Howard French, *Can African Democracy Survive Ethnic Voting*, N.Y. TIMES, Mar. 17, 1996, at E4 (stating that the emotional pull of allegiances based on tribe, language, and religion remains far stronger than appeals based on policies and platform); LARRY DIAMOND, CLASS, ETHNICITY AND DEMOCRACY IN NIGERIA: THE FAILURE OF THE FIRST REPUBLIC 41 (1988) (noting that from the first significant elections in 1951, to the final fraudulent and brutal confrontations in 1964 and 1965, the regional classes used ethnicity as an electoral weapon against each other and against low class challengers from below).

the democratic process in two ways: (1) they often promote capricious conduct by the dominant ethnic group, which often employs repressive policies to retain political control; and (2) they heighten minority ethnic groups' fear of exclusion and ultimately engender disloyalty to the nation. Ethnic distrust has infested every aspect of the civil society, including revenue allocation, education, and distribution of social amenities.[13] The political process inevitably turns into a squabble about which ethnic group gets what reward. There are no reasoned debates or structured approaches to national issues, just balancing ethnic concerns. Ethnic hostilities will continue to serve as a countervailing force to national unity unless Africa devises a strategy that will meaningfully and effectively eliminate or relieve the problems that promote ethnic rivalries.[14]

Efforts at restoring social order in Africa have focused almost exclusively on the establishment of constitutional democracy. The calls for democracy as a panacea to Africa's problems proceed on the assumption that a democratically elected government will observe the rule of law, respect citizens' rights, and, more fundamentally, make governments accountable to the masses. A cursory examination of Africa's political landscape reveals that most attempts at setting up a constitutional democracy have succumbed to powerful destabilizing centrifugal ethnic forces, thereby creating a continent without any real prospects of peace.[15] Ethnic forces have also overwhelmed economic and social policies designed to elevate the moral and material well-being of citizens. The failure of democracy has led to civil war and endless military intervention in the political process with attendant massive human rights violations, corruption, and mismanagement.[16] Consequences of such failures are so ominous that continued replication of similar efforts is morally unacceptable.

This paper focuses on Nigeria to illustrate the impact of ethnicity on the search for a durable social order in Africa. Nigeria, one of the wealthiest nations in Africa, is at a crossroad. Once touted as the "most stable African nation,"[17] Nigeria has been plagued by intractable ethnic

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13. For a detailed analysis of the controversy surrounding revenue allocation in Nigeria, see Attorney General of Bended State v. Attorney of the Fed'n, 2 N.C.L.R. 1 (1982).

14. Professor Akande identifies six basic problems in Nigeria: fear of the predominance of one state over others, overcentralization of powers, lack of consensus politics and government based on community of interests, absence of truly integrative national political parties, non-establishment of the principle of public accountability for office holders, and inequitable system of revenue allocation. *See* Jadesola O. Akande, *Constitutional Development in Nigeria*, *in* THE CHALLENGE OF THE NIGERIAN NATION 27 (1985).

15. *See* THE FAILURE OF THE CENTRALIZED STATE, *supra* note 11; DANIEL HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985).

16. *See supra* text accompanying notes 11 and 12.

17. ARTHUR A. NWANKWO & SAMUEL U. IFEJIKA, BIAFRA: THE MAKING OF A NATION 125 (1972) (noting that Nigeria was expected to be "Africa's bastion of democracy and

tensions and rivalries, and the country is now degenerating toward anarchy.[18] After thirty-six years, Nigeria has been characterized by ethnic rivalries that have resulted in a traumatic thirty-month civil war,[19] six military coups,[20] an unsuccessful experimentation with various constitutional models,[21] and massive human rights violations.[22] As a result, Nigeria represents the faded hopes, broken promises, and tantalized aspirations of a people in search of a durable social order and economic empowerment.[23]

Contrary to the views of many Western nations that democracy

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stability").

18. A June 1994 report of the U.N. Development Program lists Nigeria "as among countries in danger of joining the world's list of failed states because . . . of disastrous social upheavals and explosions." Paul Lewis, *U.N. Lists Four Nations at Risk Because of Wide Income Gaps*, N.Y. TIMES, June 2, 1994, at A6.

19. The civil war lasted from 1967 to 1970. For a detailed account of the civil war, see JOHN DE ST. JORRE, THE NIGERIAN CIVIL WAR (1972); KEN SARO-WIWA, ON A DARKLING PLAIN: AN ACCOUNT OF THE NIGERIAN CIVIL WAR (1989); NTIEYONG U. AKPAN, THE STRUGGLE FOR SECESSION, 1967-1970 (1976).

20. The 1966 coup attempt marked the beginning of military involvement in Nigerian politics. The military, previously insulated from politics and subordinate to civilian authority, suddenly became a key player in the political process. Having tasted political power, the military found it increasingly difficult to accept civilian authority. *See* Paul Adams, *Reign of the General*, AFR. REPORT, Nov.-Dec. 1994, at 27-28 (commenting that the primary role of the Nigerian military has become political rather than military after 24 years of army rule out of the 34 years since independence). Between 1966 and 1996, there were five successful coups. In July 1966, General Gowon seized power and ruled until July 29, 1975, when General Mohammed seized power in a bloodless coup. General Mohammed ruled for 200 days until he was assassinated. On December 31, 1983, General Buhari seized power and ruled until he was ousted on August 7, 1985, in a coup led by General Babangida, who ruled Nigeria until August 26, 1993. On November 17, 1993, General Abacha, the current head of state, seized power from the interim national government of Chief Shonekan. Nigeria also experienced coup attempts in January 1966, February 1976, and April 1990. Two other coup plots were uncovered and circumvented in 1985 and in 1994. For an accurate chronicle and history of coups and attempted-coups in Nigeria, see *Factsheet on Coup Precedents in Nigeria*, AGENCE FRANCE-PRESSE, Mar. 10, 1995, *available in* 1995 WL 777542.

21. Nigeria has experimented with two constitutional models since attaining independence in 1960: a parliamentary system of government from 1960 to 1966, and a presidential system between 1979 and 1983.

22. For human rights violations in Nigeria, see U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1994, at 287 (1995); A. OLANREWAJU, THE BAR AND THE BENCH IN DEFENSE OF RULE OF LAW IN NIGERIA (1992); LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN DEFENSE OF RIGHTS: ATTACKS ON LAWYERS AND JUDGES (1994); NIGERIAN HUMAN RIGHTS PRACTICES, *supra* note 11.

23. This is not peculiar to Nigeria. The African political landscape is replete with crumbled, crumbling, and chaotic nations groping for solutions to civil strife and ethnic conflicts. The rate and frequency of reforms in Africa led Colin Legum to describe this era as the second independence of the continent. *See* Colin Legum, *The Coming of Africa's Second Independence*, 13 WASH. Q. 129 (1990).

provides an appropriate framework for preserving social order in Nigeria,[24] this paper argues that the most efficacious, and perhaps the only viable way to preserve order in Nigeria is to partition the nation.[25] The goals of resolving ethnic tensions and successfully implementing democracy in Nigeria entail wholesale changes in attitudes and social practices. These changes seem very unlikely in the near future. Preserving social equilibrium in Nigeria through constitutional democracy is an unwinnable battle—a task rendered more difficult by ethnic rivalries as well as by a conspicuous absence of democratic culture. The uneasy ethnic groups that comprise Nigeria have clearly and repeatedly demonstrated their unwillingness to subordinate ethnic loyalties to the interest of the nation.[26] The intense ethnic rivalries and aggressive ethnic identification among the political elites render democracy an inherently unworkable proposition.[27] Democracy can never work if "political competition only generates patterns of political mobilization and conflict which threaten the very integrity of the nation itself."[28] The deep-seated ethnic distrust and rivalries provide an inhospitable environment for the implementation of democracy.[29] Political leaders who manipulate ethnicity to gain political advantage often find themselves overwhelmed by the ethnic sentiments they have engineered. Far too often, ethnic rivalries result in weakened and ineffectual leadership, as citizens rarely accept or submit to the authority of leaders from different ethnic groups.[30] Pervasive ethnic irredentism has reached the point where the minimum conditions necessary for democracy no longer exist in most

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24. Western nations frequently use democracy as the yardstick for evaluating a nation's legitimacy. Consequently, the United Nations devotes considerable resources and time to assisting troubled nations establish democracy. For a detailed study of the United Nations' efforts in that regard, see Douglas Lee Donoho, *Evolution or Expediency: The United Nations' Response to the Disruption of Democracy*, 29 CORNELL INT'L L.J. 329 (1996).

25. William Schroeder, *Nationalism, Boundaries and the Bosnia War: Another Perspective*, 19 S. ILL. U. L.J. 153, 161 (1994) ("Only after an ethnic group has achieved self-government within secure and definite boundaries is democracy likely to take root.").

26. For a rich study of the various ethnic groups in Nigeria, see JAMES COLEMAN, NIGERIA: BACKGROUND TO NATIONALISM 15 (1958).

27. Michael Lind, *In Defense of Liberal Nationalism*, 73 FOREIGN AFF. 95 (commenting that the evidence is overwhelming that democracy does not work in societies divided along linguistic and cultural lines).

28. RICHARD A. JOSEPH, DEMOCRACY AND PREBENDAL POLITICS IN NIGERIA: THE RISE AND FALL OF THE SECOND REPUBLIC 185 (1987).

29. For a detailed analysis of ethnic conflicts in Nigeria, see NNOLI OKWUDIBA, ETHNIC POLITICS IN NIGERIA (1978); John Paden, *Communal Competition, Conflict and Violence in Kano*, *in* NIGERIA: MODERNIZATION AND THE POLITICS OF COMMUNALISM 113-44 (Melson & Wolpe eds., 1971).

30. Robert Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 1 (1992) (stating that many post-colonial states in Africa lack an independent political organization with enough authority and power to govern a people and territory; in other words, they lack the essential requirements of empirical statehood).

African states.[31] Neither the political elites who seek power nor the masses are willing to subordinate ethnic loyalties to the overriding interests of the nation.[32]

This paper contends that seeking political stability in Nigeria through constitutional democracy is an unattainable ideal, an illusory notion sedulously promoted by dominant ethnic groups and their foreign allies. Democracy can never resolve the deep-seated ethnic distrust and rivalries in Nigeria, currently kept within bounds by the ruling military junta.[33] Democracy is typically effective in countries where citizens have internalized democratic values and political elites observe the rule of law.[34] Constitutional democracy in Nigeria has always been a multi-headed monster with different faces: flagrant violation of the rule of law; brutal suppression of political opponents; exclusion of minorities from the governance process; and manipulation of the electoral process by ethnic entrepreneurs masquerading as nationalists.[35] Constitutional democracy cannot obliterate

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31. Most definitions of democracy draw heavily from ROBERT DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971). Dahl states that "a key characteristic of a democracy is the continuing responsiveness to the preferences of its citizens, considered as political equals." *Id.* at 1. To achieve the level of accountability described by Dahl, certain conditions must exist: freedom to form and join organizations, periodic free and fair elections, and the right to vote. *See generally* POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY 7 (Larry Diamond et al. eds., 1991), eloquently describing political democracy as

> meaningful and extensive competition among individuals and organized groups . . . for all elective positions of government power, at regular intervals and excluding the use of force; a highly inclusive level of political participation in the selection of leaders . . . and a level of civil and political liberties—freedom of expression, freedom of press, freedom to form and join organizations.

32. Makau Wa Mutua, *Redrawing the Map Along African Lines*, BOSTON GLOBE, Sept. 22, 1994, at 17 (noting that citizens as a whole lack an instinctual bond to the state; hence, those who become rulers pillage it in league with members of their ethnic group and resort to massive human rights violations to repress those they have excluded).

33. JOHN MACKINTOSH, NIGERIAN GOVERNMENT AND POLITICS 619 (1966) (noting that democracy in Britain and the U.S. was never intended and has never managed to settle the range of questions, the whole position of tribes, or the domination of the country by one or two areas).

34. Professor Wing correctly observed that "[d]emocracy is based in part on constitutionalism, the creation of a culture in which the governing document is followed as a charter for the exercise and limit of official power." Adrien Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT'L L. 689, 690 (1995) (book review).

35. David Peterson is probably correct in his assessment of the workability of democracy in Africa. He states:

> Africa is not ready for democracy. Africans neither want it nor understand it. What Africa really needs is food, stability, and development. Democracy is just another fad—another western imposition. Little has changed in Africa; the dictators are still in place, corruption and human rights abuse are the norm. Democracy only gives rise to tribalism and war; it hinders economic

the legacy of ethnicity. If this continues, there will be neither an end to ethnic strife nor a dearth of politicians eager to exploit ethnicity.[36] More importantly, there is no guarantee that a new civilian administration will not imitate its corrupt, inept, and abusive predecessors.[37] Moreover, the option of restoring equilibrium through democracy has long expired. It was fatally wounded by a selfish, insincere, ambitious, and often ethnically-motivated military that lacks a culture of subordination to civilian authority.[38] The military's litany of broken promises to restore civilian administration has irredeemably destroyed citizens' faith in the democratic process.[39]

Nigeria is in this precarious position by imperial design, and the position is rendered more intractable by Nigeria's inaction and perhaps complicity.[40] We cannot continue to allow boundaries arbitrarily drawn by colonial masters to imperil social equilibrium and political stability in Nigeria.[41] However unpalatable it might appear, Nigerians must

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> development. Africa is still too poor and illiterate for democracy. The entire continent is strategically insignificant anyway. All the foreign aid to Africa only makes the situation worse. At best, democracy will take decades to emerge.

David L. Peterson, *Debunking Ten Myths About Democracy in Africa*, 17 WASH. Q. 129 (1994).

36. Hurst Hannum, *Minority Rights, Introduction*, 19 SPG FLETCHER F. WORLD AFF. 1, 4 (1995) (noting that democracy is not a panacea for resolving competing ethnic demands).

37. For a vivid account of the misdeeds of the last civilian administration, led by Alhaji Shehu Shagari from 1979-1983, see WOLE SOYINKA, THE OPEN SORE OF A CONTINENT: A PERSONAL NARRATIVE OF THE NIGERIAN CRISIS 61-74 (1996).

38. The formidable obstacle posed by Africa's military in the continent's search for constitutional democracy was poignantly summarized by William Foltz. He writes that "in most of Africa, government has been synonymous with the military. Today, as civilian administrations struggle to create democratic traditions, their toughest task may be to convince their armies to accept secondary status and maintain political neutrality." William J. Foltz, *Democracy: Officers and Politicians*, 38 AFR. REP. 65.

39. Sakah Mahmud, *The Failed Transition to Civilian Rule in Nigeria: Implications for Democracy and Human Rights*, 40 AFR. TODAY 87, 91 (1993) (noting that the frequency with which Nigerians have been disappointed with the process of democratization is enough to create a negative and perhaps lasting feeling of hopelessness and disbelief that the cycle of military rule will be permanently broken).

40. Dr. Mutua places the blame for state failures in Africa on colonial policies, especially the grouping of diverse ethnic groups under one nation. He states:

> The ethnic plurality, and, in some cases, the duality of the state, have finally caught up with post-colonial Africa. Absent cold war or neo-colonial international guarantees to client states, the colonial state is nothing if not a house of cards. Its ethnic configuration, an integral legacy of colonization, is a major factor in its failure.

Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1147 (1995) (footnotes omitted).

41. Joseph Hummer, *A Generation of Failure*, NEWSWEEK, Aug. 1, 1994, at 32 (commenting that much of Africa is still paying the price of colonialism: in the late 19th

acknowledge that there is no way of encouraging warring, distrustful, and often intolerant ethnic groups to coexist harmoniously. We must look beyond the surface and appreciate the intense inter-ethnic hostilities simmering beneath the façade of calm held out by the Nigerian military rulers and their civilian allies.[42] The truth is that Nigeria is in deep trouble, roiled incessantly by ethnic rivalries and lack of loyalty to the nation. Unchecked, these clearly visible signposts of anarchy will consume the nation.[43] The genocide in Rwanda, the chaos in Somalia, and the pogrom that led to the Biafran failed secession attempt are merely signposts on the road to destruction that Nigeria will surely travel should it remain indifferent to ethnic conflicts.

The message to the proponents of "one Nigeria"[44] is simple but urgent: pursue your vision of one Nigeria and allow the nation to continue its downward spiral toward anarchy or act decisively and stanch the blood that flows from mortal wounds inflicted upon the nation by warring ethnic groups. Promoting the rule of law and preserving social equilibrium would be best achieved through redrawing boundary lines. Granting homogenous ethnic groups a nation of their own would reduce human rights violations and

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century, European imperialists carved up the continent without regard to natural tribal or political borders).

42. Military rulers frequently take out self-promoting advertisements in newspapers to reassure the public that all is well in Nigeria. The ruling Abacha regime has retained American public-relations consultants to help polish its image abroad.

43. Larry Diamond, an authority on Nigeria, eloquently discussed in his testimony before the United States House of Representatives' International Relations Committee, Sub-Committee on Africa, the warning signs of political and social decay and correctly states that these signs are increasingly evident today in Nigeria.

> States do not collapse all of a sudden, out of the blue. The process is anticipated by numerous signs of decay. Political institutions lose capacity, flexibility, and legitimacy. Social and economic problems mount in the face of state corruption and ineptitude. Crime and violence flourish and fear proliferates. State authority withers and people retreat into formal arenas. Political power and national wealth become monopolized by an increasingly narrow elite, which substitutes force for dialogue, bargaining and legitimate authority. Mass constituencies become more and more alienated, angry and embittered. Contending elites manipulate ethnic, regional, and religious cleavages in the struggle for power and incidents of deadly conflict escalate in number and scale . . . . Civil society fragments and recedes. Every type of institutional glue that binds diverse cultures, regions, classes and factions together into a common national framework gradually disintegrates.

Preventive Diplomacy for Nigeria: Imperatives for U.S. and International Policy: Testimony Before the Subcomm. on Africa of the House Comm. on International Relations (Dec. 12, 1995) (statement of Larry Diamond), *available in* 1995 WL 13415408.

44. "One Nigeria" is a slogan coined during the Nigerian Civil War (1967-1970) to denote the indivisibility of Nigeria. Successive regimes remain adamantly committed to the notion of one Nigeria.

insure that citizens participate in the governing process. Nigeria has very little choice in the matter: partition amicably now or do it at great cost after bitter strife.[45] Partition is the only realistic way for Nigeria to avoid the devastation, misery, and agony suffered by failed African states like Rwanda,[46] Somalia,[47] and Liberia.[48] Partition is the most creative and effective way of numbing ethnic tensions in Nigeria. The successful extraction of Eriteria from Ethiopia and the peaceful Balkanization of the former Soviet Union and Yugoslavia provide paradigms for the rest of Africa.[49]

Part II of this paper traces Nigeria's search for constitutional democracy. Part III examines the impact of ethnicity on the political process. Part IV reviews three strategies for combatting the evils of ethnicity in Nigeria. These strategies include enforcing legal rules, attacking the social forces that promote ethnicity, and partitioning the nation.

II. THE SEARCH FOR CONSTITUTIONAL DEMOCRACY IN NIGERIA

A. *Historical Perspective*

Before the coming of the British, the geographical area presently known as Nigeria consisted of different ethnic groups.[50] Each group was largely homogenous and was bound by shared religion, customary values, mores, and ethos.[51] There were three dominant ethnic groups in Nigeria: the Hausas in the North,[52] the Yorubas in the West,[53] and the Ibos in the

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45. *See generally* Mutua, *supra* note 40, at 1113. Mutua believes that a bleak future confronts Africa unless the boundary lines are peacefully and voluntarily redrawn. He states that "foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African states and reconfigure them." *Id.* at 1118.

46. For a detailed analysis of the Rwandan crisis, see David Newbury, *Irredentist Rwanda: Ethnic and Territorial Frontiers in Central Africa,* 44 AFR. TODAY 2211, 2211-22 (1997).

47. For a brilliant analysis of the crisis in Somalia, see THE SOMALI CHALLENGE: FROM CATASTROPHE TO RENEWAL (Ahmed Samatar ed., 1994).

48. For a study of the ethnically-motivated violence in Liberia, see Stephen Ellis, *Liberia 1989-1994: A Study of Ethnic and Spiritual Violence,* 94 AFR. AFFAIRS 165 (1995).

49. Michael Wrong, *Ethiopia Buries the African Nation State: For the First Time a Region's Right to Secede is Laid Down in the Constitution,* FIN. TIMES, May 5, 1995.

50. For a detailed history of Nigeria, see ALAN C. BURNS, HISTORY OF NIGERIA (4th ed. 1948).

51. K.A. BUSIA, AFRICA IN SEARCH OF DEMOCRACY 30-31 (1967) (noting that pre-colonial African communities were held together because they inhabited a common territory, their members shared a tradition, real or fictitious, of common descent, and they were held together by a common language and a common culture).

52. *See* COLEMAN, *supra* note 26, at 39. The Hausas were bound by common language,

East.[54] Surrounding and within the perimeters of each of these three major ethnic groups were an array of minority ethnic groups. For example, Efik Ibibios, Ijaws, and the Ekoi-Yakuri surrounded the Ibos. The Yorubas contained the Edos, Urhobos, and Ijaws, while the Hausa had the Kanuris, Tivs, and the Nupes.

Something more than geography separated these ethnic groups; there were profound cultural, religious, and linguistic differences as well.[55] Yet the colonial administrators, for political and economic reasons, brought all the ethnic groups together and created one country called Nigeria.[56] This was done without any concern for the inhabitants and pre-existing relationships between the ethnic groups.[57] The transition from autonomous

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history, and strong fidelity to Islam. At the beginning of the 19th century, during the holy war of 1804, the Muslim Fulanis led by Usman Dan Fodio conquered the Hausa Kingdom. Aided by an extensive military machine and the Islamic religion, Usman Dan Fodio established a centralized administrative structure with strong emphasis on class hierarchy and loyalty of subjects to constituted authority. The Emirs governed different segments of the area that constituted Northern Nigeria. The Emirs were assisted by other officials, including: the Waziri, directly accountable to the Emir; the Dagga, in charge of internal security; and the Alkali, in charge of judicial functions. For a detailed history of the Hausas, see E.D. MOREL, NIGERIA: ITS PEOPLE AND PROBLEMS 99-102 (1968); NOTES ON THE TRIBES, PROVINCES, EMIRATES AND STATES OF THE NORTHERN PROVINCE OF NIGERIA (C.L. Temple ed., 1965); POLLY HILL, RURAL HAUSA: A VILLAGE AND A SETTING (1972); CHARLES ORR, THE MAKING OF NORTHERN NIGERIA (1965).

53. *See* A. AKINOYE, REVOLUTION AND POWER POLITICS IN YORUBA LAND 1940-1983, at 5-6 (1971). The Yorubas consisted of loosely organized kingdoms that prided themselves on being able to ward off Fulani incursions. The kingdoms shared a common religion and were linked together by a common ancestry. The Yorubas had a highly structured organizational hierarchy with chiefdoms headed by the Alafin, assisted by a prince and a Bashorun or chief minister. Yoruba politics was highly participatory: dynastic and social groups were recognized as interest groups. Their political organization was pyramidal, and the social groups were contra-positive in a series of dyadic relationships characterized by conflict and competition. *See* ROBERT SMITH, KINGDOMS OF THE YORUBA (3d ed. 1988).

54. *See* WILLIAM EVANS-SMITH, NIGERIA: A COUNTRY STUDY xvi (1982). The Ibos consisted of autonomous villages united by common religion, culture, and political structure. The Ibos, unlike the Hausas and Yorubas, had a completely different political apparatus. The Ibos consisted of several fragments made up of more than 200 subgroups. These subgroups consisted of clusters of culturally and linguistically related communities but were politically cohesive. *See also* KALU EZERA, CONSTITUTIONAL DEVELOPMENT IN NIGERIA 8-9 (1964) (noting that the Ibos had no indeginous overall political authority around which their loyalty was crystallised).

55. B.O. NWABUEZE, A CONSTITUTIONAL HISTORY OF NIGERIA 129-30 (1982) (stating that the Muslim North and the population of the South are quite different peoples, separated not just by tribal and language differences, but also by those of race, culture, religion, social and political organization, economy and even geography).

56. DIAMOND, *supra* note 12 (noting that, like other colonial powers, the British carved arbitrary and artificial boundaries around their two Nigerian protectorates, merging people with few or no common cultural or political bonds).

57. Chris M. Peter, *The Proposed African Court of Justice—Jurisprudential,*

tribal communities to a nation-state, hurriedly forced on most African nations by the colonial administration, remains the major obstacle to constitutional democracy in Africa.[58] Though Nigeria has acquired many attributes of a nation-state, political elites have been unable to forge a collective sense of identity and unity among several ethnic groups that comprise the nation.[59] The area known as Nigeria is not really a unified country; it comprises multiple ethnic groupings, identified by ethnic loyalties and lacking a common sense of nationhood. Nigeria's failure to forge a sense of unity and nationhood among the various ethnic groups has been sufficiently documented. Chief Obafemi Awolowo, former Premier of the defunct Western Region and a Presidential candidate in the 1979 and 1983 general elections, stated that "Nigeria is not a nation. It is a mere geographical expression. There are no 'Nigerians' in the same sense as there are 'English,' 'Welsh,' or 'French.' The word 'Nigerian' is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not."[60] Tafawa Balewa, former Prime Minister of Nigeria during the first republic between 1960 and 1966, observed that "[s]ince the amalgamation of the southern and northern provinces in 1914, Nigeria has existed as one country only on paper. It is still far from being united."[61]

Ethnic rivalries in Nigeria are not rooted in history; they are recent struggles to control the machinery of the modern state called Nigeria.[62] Lawrence Friedman states that "ethnic identity is not natural or inborn, nor the product of ancient tradition; instead it is socially constructed. It is, in fact, one of the bastard children of modernization."[63] In pre-colonial Nigeria, ethnic rivalries and hatreds were small because each ethnic group rarely ventured beyond its boundaries. If they did, they engaged in peaceful,

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Procedural, Enforcement Problems and Beyond, 1 AFR. J. PEACE & HUM. RTS. 117, 124-25 (1993) ("[A]t the Berlin Conference, Africa was regarded as terra nullius, subject to the possession of the European power exercising effective authority. They never took any account that there were people of vastly different backgrounds and cultures living on the continent.").

58. BUSIA, *supra* note 51, at 171 (arguing that the tribal solidarity of the past invades the present—creating problems of political organization for the states of Africa—and has been a source of tension and instability).

59. OLUWOLE ODUMOSU, THE NIGERIAN CONSTITUTION: HISTORY AND DEVELOPMENT 17 (1963) (noting that marked differences in language, religion, custom, and culture could not be obliterated by the mere fact of amalgamation).

60. OBAFEMI AWOLOWO, PATH TO NIGERIAN FREEDOM 47-48 (1947).

61. NWANKWO & IFEJIKA, *supra* note 17, at 30.

62. DIAMOND, *supra* note 12, at 290 (noting that ethnic conflict was not deeply rooted in Nigerian history; different tribes exchanged goods amicably more often than they warred, and, in any case, they were less centralized in scale and much less regular in their external contacts).

63. Lawrence Friedman, *Introduction: Nationalism, Identity and Law*, 28 IND. L. REV. 503, 503 (1995).

productive, and mutually beneficial activities, like trading. Each ethnic group placed a tremendous premium on survival and rarely engaged in conduct that disrupted social equilibrium.

Severe ethnic polarization in Nigeria is traceable to the coming of colonialism. More specifically, a cause of this ethnic polarization is especially misguided colonial policies that have encouraged ethnic differences.[64] Aniagolu, a retired justice of the Nigerian Supreme Court, observed:

> The colonial rule, while not being all negative, poignantly left in its wake disaster and desolation. In order to rule Nigeria, the British had to adopt certain strategies and principles. They not only adopted the wise political principle of "indirect rule" but also the vicious, divisive policy of "divide and rule." Instead of emphasizing and harnessing the richness of our cultural diversities, the British exacerbated and pitched our differences. While the ethnic groups were at each others' throats, the British reaped their economic and political harvests.[65]

The first colonial policy that encouraged ethnic loyalties is the forcible grouping of radically different ethnic groups into one nation. The creation of a nation-state and the attendant modernization transformed the society from homogenous and autonomous, bound by shared cultural values, to a highly fragmented society in which citizens were forced to re-adjust to an alien civil order.[66] The colonial civil order undermined customary values and ethos that formerly preserved equilibrium in the society. It also considerably weakened the native political apparatus, thus rendering the administrative machinery too ineffective to generate the loyalty and support

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64. DIAMOND, *supra* note 12, at 28 (noting that colonial rule failed to develop institutions that could have integrated Nigeria's common cultural, social, and political symbols and structures).

65. A.N. Aniagolu, *Keeping Nigeria One Through Visionary Constitutional Engineering: Philosophy Behind Some Provisions of the 1989 Constitution*, 21 CAP. U. L. REV. 1033, 1034 (1992); Mikell, *supra* note 6, at 104, states:

> Many of the present situations of ethnic conflict and political chaos in West Africa have their roots in distorted processes of political competition that began with western colonialism approximately one hundred years ago. What we now call "ethnicity" was very much the outcome of the nineteenth century period of colonial conquest when western metropolitan or settler groups used force to divide, conquer, and then politically subjugate the African indigenous populations. In essence, colonial policy subverted the political and cultural legitimacy of both strong and weaker ethnic groups.

66. Mikell, *supra* note 6, at 105 ("colonial policies forced individuals to respond to norms which promoted individual or western interests, often to the exclusion of ethnic communal interests").

of the citizens. The re-adjustment process proved especially traumatic as powerless inhabitants painfully watched the colonialists discard, discredit, and, at times, desecrate traditional institutions and customs that preserved order in the society.[67] The ruthless and Machiavellian manner in which colonial masters pursued their policies, the flagrant disregard of customary values, and contempt for the traditional political apparatus alienated vast segments of the population.[68] Unable to exert themselves, citizens retired to their ethnic groups to find solace and form coalitions to ward off imperialism. Finding solace among citizens united by disgust for the imperial masters ultimately generated ethnic consciousness and resulted in cleavages that no government in Nigeria has overcome.

Ethnic rivalries were not so pronounced during the colonial era because the colonial administration's reputation for ruthlessness acted as a restraining influence on the ethnic warlords.[69] Moreover, the ethnic groups had nothing to fight over since the colonial powers maintained "exclusive control over the political and economic resources of their colonies."[70] When the colonial administration left, ethnic groups engaged in a fierce battle with each other to control the machinery of the state.[71] Freed from the pangs of despotism and dictatorship, ethnic groups became interested in acquiring political power and the economic resources that go with it.[72] The battle intensified as

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67. *Id.* at 106 (noting that under British rule, cultural values were assailed. Pride in the welfare of the people was frowned upon and was derisively described as "native." By this, the dignity of the human person based upon cultural awareness was devalued).

68. Mutua, *supra* note 40, at 1137, states:

> The newly contrived state represented, for many Africans, the physical symbol of the loss of independence and sovereignty over their societies. The manner in which it was created, after long periods of resistance, the way it was governed, and the purpose for which it was brought into existence, namely the exploitation of both natural and human resources, were a grim reminder of the luxuries of self-governance. Colonial policies were harsh and brutally implemented. Such practices did little to endear Africans to the state or develop a loyalty towards it.

69. George Carew, *Development Theory and the Promise of Democracy: The Future of Post Colonial African States*, 40 AFR. TODAY 31, 32 (1993) (stating that colonial administration kept its disparate ethnic groupings together through coercion and manipulation).

70. Wilson, *supra* note 5, at 447.

71. Francis Deng, *Africa and the New World Dis-Order: Rethinking Colonial Borders*, BROOKINGS REV., Spring 1993, at 34 (noting that because colonial institutions had divested the local communities and ethnic groups of much of their indigenous autonomy and sustainable livelihood, and replaced them with a degree of centralized authority and dependency on the welfare state system, once control of these institutions passed on to the nationals at independence, the struggle for control became unavoidable).

72. *Blood and Earth*, ECONOMIST, Sept. 23, 1995, at 17. Describing the struggle for power that followed the end of colonialism, the article states:

> under despotism or colonialism . . . it did not matter much whether frontiers reflected ethnic reality. . . . Now in sudden liberty, it is easy to persuade people

the state became increasingly identified as the purveyor of social amenities.[73] The state, especially the political process, became a battleground for ethnic groups bent on securing greater benefits for themselves.[74]

The second colonial policy that intensified ethnic cleavages was the decision to treat the North and South as two separate entities. This policy sowed seeds of ethnic distrust that blossomed over the years. Though the British recognized a single political entity called Nigeria, they rarely ruled Nigeria as a single nation. In 1900, the British proclaimed two separate protectorates, North and South, for Nigeria.[75] They established different administrative structures for each protectorate: they ruled the North through indirect rule, i.e., through traditional rulers,[76] and they administered the South directly.[77] Though they formally amalgamated the two protectorates in 1914, the British continued to rule each segment differently.[78] In 1939, the division of southern Nigeria into eastern and western regions coincided with ethnic boundaries: the West comprised predominantly of Yorubas and the East comprised of Ibos. All three regional governments were self-governing and functioned as autonomous organs of government.[79]

The deliberate encouragement of regional identities immensely contributed to ethnic schism in Nigeria.[80] By introducing and supporting regional governments, the colonial administration encouraged distinctive paths for each region that successive governments have been unable to negate.[81] Failing to treat the nation as one political unit exacerbated ethnic

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> to care about those things a lot. Freed from a common yoke, peoples fight for a prime position. No one wants to wind up a surrounded minority.

Id.

73. Mikell, *supra* note 6, at 108 ("Nigeria provides a classic case of conflict under conditions of scarcity where the state, after independence, has been seen as the major resource and is therefore the object of intense ethnic competition").

74. Some argue that the modernization process did not negate citizens' attachment to their ethnic groups. *See* DAVID SMOCK & AUDREY C. SMOCK, THE POLITICS OF PLURALISM: A COMPARATIVE STUDY OF LEBANON AND GHANA 3 (1975). The authors contend that "[e]vents in the last decade attest to the fact that communal attachments do not quietly wither away with the exposure to modernizing influences. Quite the contrary, modernization often creates the very conditions necessary for the incubation of strong communal identities and sets the stage for communal competition." *Id.*

75. COLEMAN, *supra* note 26, at 54-56.

76. C.S. WHITAKER, JR., THE POLITICS OF TRADITION, CONTINUITY AND CHANGE IN NORTHERN NIGERIA, 1946-1966 (1970).

77. DIAMOND, *supra* note 12.

78. *Id.* at 26 (noting that even after formal amalgamation in 1914, the British continued to rule Nigeria as two countries).

79. MACKINTOSH, *supra* note 33, at 87-138 (1965).

80. Ali Mazrui notes that the encouragement, even creation, of ethnic loyalty and consciousness was a leading feature of British colonial rule. DIAMOND, *supra* note 12, at 28.

81. Adopting different administrative strategies for the different regions, indirect rule in the North, and direct rule in the South, generated resentment and hostility towards the

differences and encouraged citizens to think about their own narrow ethnic group.[82] Although Nigeria at various stages of political development emphasized nationhood, politicians since independence have invoked and exploited ethnic loyalties to cling to power.[83] Since its inception as a sovereign nation, the largest and most populous African country has been plagued by grave problems: social unrest, lack of democratic culture, and economic mismanagement. In its thirty-seven year history as an independent nation, Nigeria's attempt to establish constitutional democracy has resulted in endless military coups,[84] ethnic strife, and civil war.[85] Different epochs of the country's bleak history require close scrutiny to enhance understanding of how Nigeria found itself in its current precarious position.

B. *1960-1966*

The attainment of independence in 1960 afforded an opportunity for Nigeria to control its destiny, to elevate the moral-being of its citizens, to raise the standard of living, and to foster unity among the various ethnic groups.[86] More importantly, it afforded a unique opportunity for the nation to structure a government capable of addressing the concerns of a multi-ethnic and complex society in search of identity and modernization. Instead, Nigerian leaders chose to tread on familiar grounds and adopted the Westminster model of parliamentary democracy, which it practiced until the military intervention in 1966.[87]

The years from 1960 to 1966 were ones of intense political unrest, rendered even more complicated by ill-prepared and insincere experimentation with constitutional democracy. In an attempt to fill the void created by the departure of colonial administrators, an array of ethnic

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western political apparatus, and ultimately undermined attempts to forge nationalist ideals.

82. COLEMAN, *supra* note 26, at 210 ("[t]he system of native administration was designed to foster love for and loyalty to the tribe").

83. W.B. Hamilton, *The Nigerian Constitutional Conference of 1957*, S. ATLANTIC Q., Fall 1958, at 491 (noting that all the leaders, and most minority groups, proclaim they are for a single, strong Nigeria, and it is the contradiction between their words and their actions that makes difficult the task of nationalism).

84. *See supra* note 20.

85. For an account of the civil war, see *infra* text accompanying notes 114-19.

86. INDEPENDENCE ACT § 1(2) (1960) (Nig.) states that as from October 1, 1960, Her Majesty's government in the United Kingdom shall have no more responsibility for the government of Nigeria or any part thereof.

87. For a detailed study of parliamentary democracy, see NWABUEZE, *supra* note 55, at 96-97 (noting that parliamentary democracy is characterized by four main features: the nominal position of the head of the executive and his separation from the effective head of government; the plurality of the effective executive which consists of cabinet members headed by a prime minister; the parliamentary character of the executive; and the responsibility of the ministers individually and collectively to the legislature).

political leaders, irredentists, and untested power seekers violated all democratic norms to satisfy narrow parochial and ethnic interests.[88] Additionally, the introduction of a multi-party system without an adequate infrastructure to promote democratic traditions inevitably resulted in group warfare.[89] Parties were formed along ethnic lines.[90] Political leaders were elected or supported not because of their policies or platforms, but because citizens perceived them as capable of protecting ethnic interests. Politicians played on ethnic sentiments of the largely unsophisticated citizenry, appealing to these sentiments whenever necessary to shore up political support.[91] Political leaders who admirably forged a united front in the fight for independence soon underwent complete transformation; they turned into irredentists, tribal chieftains aggressively identifying with their ethnic groups and seeking to recruit their clansmen into government.[92] The post-independence struggles revealed that the politicians never focused on the corporate welfare of Nigeria as the centerpiece of their opposition to colonial rule; rather, each was concerned with advancing ethnic interests. Political campaigns turned into an open season for destroying the fragile union.[93] Politicians, unfamiliar with the restraints of the democratic process, used their powers to loot the national treasury, to enrich their allies,[94] and to harass and intimidate innocent citizens, especially the opposition.[95] Professor

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88. Mikell, *supra* note 6, at 100 ("[i]n Nigeria and Liberia, the 'ethnic entrepreneurs' have emerged, using cultural identities as tools to hijack the political process and garner control and resources within the state").

89. This phenomenon is common in most multi-ethnic African countries. President Yoweri Museveni of Uganda succinctly captured this phenomenon when he said that "multi-party systems were created by industrial societies and fit them because they tend to divide along fluid lines of class. But in pre-industrial African countries split vertically along rigid tribal lines, party competition can lead to group warfare." John Darton, *Africa Tries Democracy, Finding Hope and Peril*, N.Y. TIMES, June 21, 1994, at A8.

90. *See infra* text accompanying notes 215-44.

91. VICTOR A. OLURONSOLA, THE POLITICS OF CULTURAL SUBNATIONALISM IN AFRICA.

92. This phenomenon occurred in virtually all African countries. The machinery of government in newly emancipated African countries often "involved the incorporation of 'kith and kin' into ruling oligarchies and the exclusion of other groups from enjoying the prerogatives of power. This generated problems of ethnicity, clanism, regionalism, and religious bigotry." Jibrin Ibrahim, *Political Exclusion, Democratization and Dynamics of Ethnicity in Niger*, 41 AFR. TODAY 15 (1994).

93. JOSEPH, *supra* note 28, at 153 (1987) (noting that in "Nigeria [ ] party politics as a relentless struggle to procure individual and group benefits via the temporary appropriation of public offices eventually reduces the electoral process to a Hobbesian state-of-war").

94. Several commissions of inquiry empaneled to investigate allegations of impropriety found gross violations, abuse of power, and fraud in most government parastatals. The commissions also found that politicians viewed board appointments as rewards for loyal party supporters.

95. This appears to be a common phenomenon in most post-independent African nations.

Ewelukwa provides an accurate characterization of the political process and the activities of politicians:

> Most of the politicians were ignorant, small minded and parochial in outlook, and sought to make the Nigerian political arena congenial to their acquisitive, corrupt and undemocratic tendencies in life. By their methods, they made politics a rough, uncomfortable and hazardous pursuit for anyone, and in their frantic bid to enrich themselves illicitly out of public funds, they combined with certain professionals, independent contractors and even public servants to trample upon the rights and liberties of individuals and to make life difficult for the common man, thereby alienating his sympathy . . . . In fact, all of them (politicians) directly or indirectly supported and encouraged improper dealings with public funds as well as aided and abetted gradual debasement of human rights and democratic values.[96]

Politicians, bent on retaining power, terribly upset whatever remained of social equilibrium in Nigeria. Elections, especially in the defunct western region, turned into warfare in which politicians brutally displayed their lack of respect for democracy and human dignity. Kirk-Greene aptly described the 1965 elections as "the ultimate debasement of the democratic process through chicanery and thuggery."[97] The country was slowly degenerating

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Jack Cope, in a fairly lengthy passage, clearly captured the African political elites' disrespect for the rights of fellow Africans:

> Looking back from the perspective of the present, I think it can justly be said that, at the core of the matter, the Afrikaner leaders in 1924 took the wrong turning. Themselves victims of imperialism in its most evil aspect, all their sufferings and enormous loss of life nevertheless failed to convey to them the obvious historical lesson. They became themselves the new imperialists. They took over from Britain the mantle of the empire and colonialism. They could well have set their faces against annexation, aggression, colonial exploitation and oppression, racial arrogance and barefaced hypocrisy, of which they themselves were victims. They could have opened the door to humane ideas and civilizing processes and transformed the great territory with its incalculable resources into another new world. Instead they deliberatively set the clock back wherever they could. Taking over ten million indigenous subjects from British colonial rule, they stripped them of what limited rights they had gained over a century and tightened the screws on their subjects.

Wole Soyinka, *The Past Must Address the Present* (1986 Nobel Lecture), *in* 3 OCCASIONAL PAPERS OF THE PHELPS-STOKES FUND, Mar. 1988, at 9.

96. D.I.O. Ewelukwa, *The Constitutional Aspects of the Military Take-Over in Nigeria*, 2 NIG. L.J. 1, 2 (1967).

97. A.H.M. KIRK-GREENE, 1 CRISIS AND CONFLICT IN NIGERIA: A DOCUMENTARY SOURCE BOOK 1966-1969, at 23 (1971).

toward anarchy and lawlessness.[98] Only the army could save the country, and they did on January 15, 1966.

C. *1966-1979*

In the early hours of January 15, 1966, a group of army officers led by Major Nzeogwu attempted to overthrow the Balewa federal administration.[99] Though the coup was unsuccessful, they killed some key federal ministers and government functionaries, including the Prime Minister.[100] The remaining ministers and the Senate President, who was then acting for the President,[101] invited the General Officer commanding the Nigerian army, General Aguiyi Ironsi, to take over administration of the country.[102] The army promulgated the Constitution (Suspension and Modification) Decree, which suspended the 1963 Republican constitution[103] and conferred authority on the federal military government "to make laws for the peace, order, and good government of Nigeria or any part thereof."[104] General Ironsi, unshackled by the constitution, embarked upon wholesale destruction of the democratic process.[105] In May 1966, General Ironsi promulgated the Unification Decree, which abolished regional governments.[106] The Supreme

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98. Several reasons have been advanced for the failure of the first republic. *See* DIAMOND, *supra* note 12, at 15 (blaming the failure of democracy on the strains and contradictions in the constitutional structure—which in consolidating regional inequalities and assigning such minuscule powers to so few regions encouraged ethnic political mobilization—made regional dominance the prerequisite and the basis for intense national political competition and so heightened regional and cultural insecurity); Walter Schwarz, *Tribalism and Politics in Nigeria*, 22 WORLD TODAY 460 (commenting that democratic order collapsed because historic competing nationalism of Nigeria's three largest tribal nations was never successfully reconciled and united into an overarching Nigerian identity).

99. For a detailed analysis of the failed coup attempt, see ST. JORRE, *supra* note 19, at 30-47.

100. For a detailed analysis of the 1966 crisis in Nigeria, see *generally* DIAMOND, *supra* note 12; WILLIAM PRAFF, THE NIGERIAN STATE: POLITICAL ECONOMY, STATE, CLASS AND POLITICAL SYSTEM IN THE POST COLONIAL ERA (1988).

101. The President, Dr. Nnamdi Azikiwe, was in Britain for a medical check up.

102. The character of the purported hand-over remains a subject of intense debate. Arguments rage as to whether the events of January 15, 1966, amounted to a revolution or a constitutional change of government. For detailed analysis of both sides of the controversy, see NWABUEZE, *supra* note 55, at 164-66; Abiola Ojo, *The Search for Grundnorm in Nigeria: The Lakami Case*, I.C.L.Q. 117 (1971); Ewelukwa, *supra* note 96, at 1.

103. CONST. (SUSPENSION & MODIFICATION) DECREE (1966) (Nig.).

104. *Id.*

105. For an interesting analysis of the structure of military government, see Abiola Ojo, *Constitutional Structure and Nature of the Nigerian Government—The New Constitution and Decrees*, 10 NIG. L.J. 82 (1976).

106. CONST. (SUSPENSION & MODIFICATION NO. 5) DECREE 34 (1966) (Nig.) provided that "Nigeria shall on the 24th May 1966 . . . cease to be a federation and shall accordingly

Military Council took all decisions at the center, thus effectively undermining the federal system of government.[107] Explaining the reasons for the abolition of the federal structure, General Ironsi stated that the Decree "was intended to remove the last vestige of intense regionalism of the recent past, and to produce that cohesion in the government structure which is so necessary in achieving and maintaining the paramount objective of the national military government . . . National unity."[108]

General Ironsi never restored equilibrium in Nigeria. The unitary administrative structure never recovered from the January coup attempt. The army gradually disintegrated into splinter groups with loyalties to their ethnic groups. On July 29, 1966, barely six months after assuming office, General Ironsi was killed in a counter-coup led by northern army officers.[109] After internal negotiations, the coup plotters named Colonel Gowon the Head of State and Commander-in-Chief of the Armed Forces.[110]

The major task for Colonel Gowon was to restore peace in a country severely troubled by ethnic tensions. The Ibos, from the eastern region, felt oppressed by the North and publicly demanded reparation for the carnage unleashed against Ibo military officers and civilians during the July counter-coup.[111] Colonel Ojukwu, then the governor of eastern Nigeria, refused to accept Colonel Gowon's authority, threatening to secede if the North did not make reparations for the brutality unleashed against the Ibos.[112] Nevertheless, in an attempt to dissipate ethnic tensions, General Gowon, on May 27, 1967, split the four regions into twelve states and appointed eleven military governors and a civilian administrator to run them.[113] The twelve-state structure split the former eastern region into three states: East Central State, consisting exclusively of Ibos; South Eastern State, comprising mainly of Efiks, Ibibios, Annangs, and Ekois; and Rivers State, inhabited mainly by Ijaws, Ogonis, and Ikweres.

On May 30, 1967, three days after the creation of more states,

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as from that day be a Republic by the name The Republic of Nigeria, consisting of the whole territory which immediately before that day was comprised in a federation."

107. For reactions to the unification decree, see ALEX MADIEBO, THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR (1980); OLUSEGUN OBASANJO, MY COMMAND: AN ACCOUNT OF THE NIGERIAN CIVIL WAR, 1967-1970 (1980).

108. Akande, *supra* note 14, at 15 (Major General Ironsi, broadcast to the nation by the Head of State (May 24, 1966)).

109. See ST. JORRE, *supra* note 19, at 65-73, for an account of the July 29, 1966, coup.

110. General Gowon was not the most senior officer in the army, but he was considered the most likely to Command the loyalty of the soldiers.

111. *See* ST. JORRE, *supra* note 19.

112. For the pogrom unleashed against Ibo military officers and civilians following the July 1966 counter-coup, see *id.* at 65-88.

113. STATES (CREATION & TRANSITIONAL PROVISIONS) DECREE 4 (1967) (Nig.).

Colonel Ojukwu declared the former eastern region the Republic of Biafra.[114] The federal military government, bent on preserving Nigeria's unity and territorial integrity, embarked upon what General Gowon described as a "short, surgical police action" to crush the rebellion.[115] The surgical police action resulted in a thirty-month civil war.[116] On January 12, 1970, in the face of excruciating defeat, Major General Effiong, the Biafran Chief of Army Staff, surrendered to the federal military government.[117] General Effiong stated: "We are firm, we are loyal Nigerian citizens and accept the authority of the Federal Military Government . . . . We accept the existing administrative and political structure of the federation of Nigeria . . . . The Republic of Biafra hereby ceases to exist."[118] Accepting the surrender, General Gowon described the thirty-month civil war as a "tragic and painful conflict," and stated that the civil war was fought to "[c]rush the rebellion, to maintain the territorial integrity of our nation, to assert the ability of the black man to build a strong progressive and prosperous modern state, and to ensure respect, dignity and equality in the comity of nations for our posterity."[119]

General Gowon embarked on a reconciliation process and introduced several measures designed to reassure the seceding easterners that the process of reconciliation was genuine.[120] The Gowon administration reinstated senior civil servants and police officers who served in Biafra and provided money to repair the war-ravaged parts of the region.[121]

Subsequently, in 1974, General Gowon reneged on an earlier promise to hand over power to a democratically elected civilian government by 1976, stating that Nigeria was not yet ready for democracy. In the 1974 Independence Day broadcast to the nation, General Gowon stated:

> It would indeed amount to a betrayal of trust to adhere rigidly to that date . . . . It was clear that those to lead the nation on the return to civilian rule have not learnt any lesson from past

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114. For the full text of the proclamation of the Republic of Biafra and a detailed analysis of the Biafra story, see NWANKWO & IFEJIKA, *supra* note 17, at 349-50.

115. FREDRICK FORSYTH, THE BIAFRA STORY 146 (1969).

116. The war started on July 6, 1967. Radio Nigeria Lagos announced on July 7, 1967, that "the Commander-in-Chief of the Armed Forces of Nigeria has issued orders to the Nigerian Army to penetrate the East Central State and capture Ojukwu and his rebel gang." AUBERON WAUGH & SUZANNE CRONJE, BIAFRA: BRITAIN'S SHAME 41 (1969).

117. ST. JORRE, *supra* note 19, at 400-01.

118. TIME, Jan. 16, 1970, at 18.

119. J.I. ELAIGWU, GOWON: THE BIOGRAPHY OF A SOLDIER-STATESMAN 136 (1980) (General Gowon, broadcast to the nation (Jan. 15, 1970)).

120. For details of the reconciliation, reconstruction, and rehabilitation programs, see ELAIGWU, *supra* note 119, at 140-45.

121. *Id.*

> experience. Consequently it would be utterly irresponsible to leave the nation in the lurch by a precipitate withdrawal which will certainly throw the nation back into confusion.[122]

On July 29, 1975, a group of senior army officers toppled General Gowon in a bloodless coup.[123] General Mohammed, a cabinet minister under General Gowon, was named the Head of State. General Mohammed promised to rid the country of corruption and restore democracy by 1979.[124] As part of its effort to combat corruption, the Mohammed regime established a Corrupt Practices Investigation Bureau and a Public Complaints Commission[125] to deal with allegations of impropriety against public servants. They constituted panels to investigate the assets of governors and top civil servants.[126]

In September 1975, the Military regime empaneled a fifty-one member Constitution Drafting Committee headed by Chief Rotimi Williams, one of Nigeria's leading lawyers, to draft a new constitution.[127] The fifty "wise men," as the media reverently called them, represented all states of the federation and were drawn from various segments of society including the legal profession, the universities, and the private sector.[128] To involve the public in the constitutional drafting process, the Constitution Drafting

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122. General Gowon, Broadcast to the Nation (Oct. 1, 1974).

123. ELAIGWU, *supra* note 119, at 241-50.

124. *Id.*

125. The Public Complaints Commission had authority to:

> Inquire into complaints lodged before it by members of the public concerning any administrative actions taken by any minister or department of the federation or any state government, statutory corporation, local government authorities and other public institutions and of companies whether in the public or private sector and of any officials of any of the aforementioned bodies.

PUBLIC COMPLAINTS COMMISSION ACT, CAP 377 (1990) (Nig.).

126. *See* FEDERAL GOVERNMENT VIEWS ON THE REPORT OF THE FEDERAL ASSETS INVESTIGATION PANEL (Federal Ministry of Information 1975) (Nig.).

127. Chief Obafemi Awolowo declined to serve on the committee, thus reducing the number to 50. *See* NIGERIAN CONSTITUTION DRAFTING COMMITTEE, 1 REPORT OF THE CONSTITUTION DRAFTING COMMITTEE xiii (Federal Ministry of Information 1976).

128. According to the federal military government:

> Members of this committee were selected, first on a basis of two per state, so as to obtain as wide geographical coverage as possible and, secondly from our learned men in disciplines considered to have direct relevance to constitution-making, namely . . . History, Law, Economics and other social sciences especially political science. Eminent Nigerians with some experience in constitution-making were brought in to complete the spectrum. It is enough to ensure that all the broad areas of interest and expertise are brought into the committee, and I am satisfied that members of this committee gathered here today represent a cross section of opinion in this country that can be trusted to do a good job.

Id. (statement of General Mohammed).

Committee held public hearings in various parts of the country and solicited memoranda and suggestions from members of the public.[129] On February 13, 1976, just two weeks after creating seven new states,[130] General Mohammed was assassinated during an unsuccessful coup attempt led by Colonel Dimka.[131] General Obasanjo, who succeeded General Mohammed, promised to honor the 1979 commitment to hand power back to civilians. On September 14, 1976, the committee, after extensive deliberations and consultations, submitted a draft constitution to the federal military government.[132] On October 7, 1976, the federal military government turned over the draft constitution to the Constituent Assembly and directed members of the public to send their comments and suggestions to the Constituent Assembly.[133] The Constituent Assembly was comprised of 203 elected members[134] and 27 government appointees.[135] After extensive and sometimes rancorous debate, the Constituent Assembly wrapped up its assignment in August of 1978.

The new constitution introduced a presidential system of government modeled after the American system—a written constitution with an elaborate Bill of Rights,[136] division of power between the federal government and the states,[137] a president with executive powers, [138] federal and state legislatures,[139] federal and state judiciaries,[140] and clear separation of powers among the three arms of government.[141] The constitution also contained elaborate provisions guaranteeing freedoms, rights, and liberties, including freedom of expression and of the press;[142] freedom of thought, conscience

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129. The Constitution Drafting Committee regularly inserted paid advertisements in national and local newspapers requesting memoranda from members of the public.

130. STATES (CREATION & TRANSITIONAL PROVISIONS) DECREE 12 (1976) (Nig.).

131. ELAIGWU, *supra* note 119.

132. J.O. OJIAKO, 13 YEARS OF MILITARY RULE IN NIGERIA, 1966-1979, at 178 (1979).

133. The Constituent Assembly was set up pursuant to the Constituent Assembly Act of 1977. *See* NWABUEZE, *supra* note 55, at 255.

134. Members were elected from all the local government areas in the country. FALOLA & IHONVBERE, THE RISE AND FALL OF NIGERIA'S SECOND REPUBLIC, 1979-1983, at 25, (1985).

135. Government appointees constituted chairmen of subcommittees of the Constitution Drafting Committee and representatives of interest groups that were not adequately represented during the constitution drafting process (such as student organizations and women's groups).

136. CONST. OF 1979 §§ 30-42 (Nig.).

137. *Id.* § 2(2) provided that "Nigeria shall be a Federation consisting of States and a Federal Capital Territory."

138. *Id.* § 5(1)(a).

139. *Id.* §§ 4(1), 84.

140. *Id.* § 6(1)-(2).

141. *Id.* §§ 4-6.

142. *Id.* § 36.

and religion;[143] right to life;[144] right to personal liberty;[145] the right to a fair hearing;[146] right to privacy and family life;[147] and the right to free assembly.[148]

The enjoyment of these rights, liberties, and freedoms were further secured by vesting the courts with jurisdiction to redress violations.[149] The government could not interfere with constitutionally guaranteed rights except "in the interest of defence, public safety, public order, public morality, or public health, or for . . . protecting the rights and freedom of other[s]."[150]

The military government promulgated the draft constitution into law effective October 1, 1979.[151] Following the promulgation of the constitution into law, the federal military government established the Federal Electoral Commission, which was charged with organizing elections and regulating the activities of political parties.[152] The military government lifted the ban on party politics on September 21, 1978.[153] Politicians, eager to assume the reigns of power, quickly formed political associations. The Federal Electoral Commission[154] insisted that political associations seeking registration must reflect the federal character of Nigeria and be open to every citizen of Nigeria despite his or her place of origin, religion, or ethnicity.[155] After thoroughly screening many applications, the Federal Electoral Commission granted approval to five parties: Great Nigeria People's Party (GNPP); National Party of Nigeria (NPN); Nigeria Peoples Party (NPP); Peoples Redemption Party (PRP); and Unity Party of Nigeria (UPN).[156]

After thirteen years of military dictatorship, conducting elections in a

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143. *Id.* § 35.
144. *Id.* § 30.
145. *Id.* § 32.
146. *Id.* § 33.
147. *Id.* § 34.
148. *Id.* § 37.
149. *Id.* § 42(1) provides that "[a]ny person who alleges that any of the provisions of this Chapter [fundamental human rights] has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."
150. *Id.* § 41(1) provides that:

> Nothing in sections 34, 35, 36, 37 and 38 [provisions relating to fundamental human rights] . . . shall invalidate any law that is reasonably justifiable in a democratic society–
> (a) in the interest of defence, public safety, public order, public morality or public health; or
> (b) for the purpose of protecting the rights and freedom of other persons.

151. CONST. (ENACTMENT) DECREE 25 (1978) (Nig.).
152. CONST. DECREE 73 (1977) (Nig.).
153. FALOLA & IHONVBERE, *supra* note 134, at 29.
154. *Id.* at 28-29.
155. CONST. OF 1979 §§ 201-03 (Nig.).
156. The Federal Electoral Commission chose only these five parties out of more than forty associations that applied for registration. *See* JOSEPH, *supra* note 28, at 154.

country plagued by ethnic rivalries and a lack of democratic traditions provoked anxieties and fears among various segments of the society. Most Nigerians feared that party elections would ignite ethnic rivalries that had been dormant for thirteen years. Citizens were especially troubled by the domination of the political scene by the same politicians who liquidated the first republic.[157] The army, to its credit, quickly and positively allayed the fears of the public by showing its willingness to deal ruthlessly with anybody who sabotaged the transition process.[158] After a ten-month campaign tightly monitored by the military, elections were held for the federal and state elective offices including the Senate, House of Representatives, State Legislature, Governors, and the President. The elections were tolerably free and fair, with no major incidents in any part of the country.[159] Any disputes that arose from the elections were resolved through the judicial system.[160] On October 1, 1979, the federal military government, amid pomp and pageantry, handed the reigns of government to the elected civilian administration.[161]

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157. *Id.* at 160. The author notes:

> Many of the surviving members of the political class of the First Republic, and their political machines, had moved once again to the fore of the country's politics . . . . The expectation that history was likely to repeat itself in any elections under a civilian party government was therefore a rational and even self-fulfilling one for the Nigerian citizenry.

158. Extolling the role of the army in the conduct of 1979 elections, Adamu Kurfi writes:

> The calm atmosphere prevalent during the 1979 elections was not brought about by the existence of [a] fine political culture in the Nigerian people but was due to the veiled threat of immediate military retribution should law and order break down—and worse, the possibility of postponement of the date of hand-over of power to the civilians.

ADAMU KURFI, THE NIGERIAN GENERAL ELECTIONS 1959 AND 1979, at 258 (1982). Similar views were expressed by ADAMU & OGUNSAWO, NIGERIA: THE MAKING OF PRESIDENTIAL SYSTEM: 1979 GENERAL ELECTIONS. The authors stated that "[t]he presence of a military government which rounded up potential party thugs and effectively checked their activities created a peaceful atmosphere for the elections." *Id.* at 255-56.

159. For a detailed survey of the 1979 elections, see KURFI, *supra* note 158; Keith Panter-Brick, *Nigeria: The 1979 Election,* 14 AFRIKA SPECTRUM 3 (1979); and Richard Joseph, *Democratization Under Military Tutelage: Crisis and Consensus in the 1979 Elections*, 14 COMP. POL. (1981).

160. Election Petition Tribunals were set up in various states to resolve electoral disputes. *See* CONST. DECREE 73 (1977) (Nig.). For a detailed analysis of the jurisdiction of election tribunals, see F. OLISA AWOGU, THE JUDICIARY IN THE SECOND REPUBLIC OF NIGERIA, 1979-1983, at 128-34.

161. General Obasanjo, along with key officers of his administration, retired from the army.

D. *1979-Present*

The period between 1979 and 1983 witnessed a replay of events and problems that led to the collapse of the first republic. Lack of democratic traditions, corruption, and abuse of power thwarted the nation's ill-prepared experimentation with the presidential system of government.[162] Religious riots, arson, and political disturbances ruptured prospects for democracy. Nigerian politicians squandered the ideals of presidential democracy. They routinely violated the rule of law[163] and manipulated the electoral process to retain power.[164] Economic chaos, corruption, abuse of office, and incessant squabbles among and within the political parties imperilled the nation.[165]

The 1983 general elections exposed the ethnic tensions smoldering beneath the façade of calm held out to the world for four years. Without the army to police the electoral process, politicians flagrantly violated the electoral rules.[166] President Shehu Shagari was re-elected in a controversial election characterized by electoral malpractice, thuggery, and rigging.[167] Virtually everyone condemned the election, which was aptly characterized as "a selection carried out through a strong alliance between the police, the Federal Electoral Commission officials, and members of the ruling National Party of Nigeria," with the latter supplying the money.[168] In December of

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162. For a detailed study of the 1982 religious riots and their implications for democracy in Nigeria, see Raymond Hickey, *The 1982 Maitasine Uprising in Nigeria: A Note*, 83 AFR. AFFAIRS 251 (1984).

163. The most egregious violation occurred in 1980 when the ruling party, the National Party of Nigeria, arrested and deported to Chad a prominent politician from a rival party, the Great Nigeria People's Party, on the unverified and unprovable allegation that he was not a Nigerian. Alhaji Shugaba, the Majority leader of the Great Nigeria People's Party in Borno state, was arrested in the early hours of the morning and transported across the borders by federal agents without an opportunity to defend himself. For details of the deportation and the lawsuit that followed, see Shugaba v. Federal Minister of Internal Affairs, 1 N.C.L.R. 25 (1981).

164. FALOLA & IHONVBERE, *supra* note 134, at 227.

165. For a catalogue of abuses and inter-party squabbles, see *id.* at 78-80; and JOSEPH, *supra* note 28, at 164-81.

166. For details of electoral irregularities, see JOSEPH, *supra* note 28, at 170-73.

167. The army in taking over from Shagari cited electoral malpractice as one of the reasons for assuming the reigns of power. General Buhari stated:

> The people could only look forward to a change in their circumstances by the installation through the mechanism of the ballot box of a government with a more purposeful and responsible leadership . . . . The conduct of the 1983 general election dashed that hope since that election could be anything but free and fair.

FALOLA & IHONVBERE, *supra* note 134, at 216 (Major General Buhari, address to the World Press Conference, Lagos (Jan. 5, 1984)).

168. FALOLA & IHONVBERE, *supra* note 134, at 217. All the politicians engaged in one form of electoral malpractice or the other, but the National Party of Nigeria (NPN) turned out

1983, the army ousted President Shehu Shagari. The coup plotters named Major General Buhari the Head of State and Commander-in-Chief of the Armed Forces on January 1, 1984. The new military regime suspended the 1979 constitution[169] and assumed legislative and executive functions at both federal and state levels.[170] Explaining the reasons for the army take over, General Buhari stated:

> Little did the military realize that the political leadership of the second republic would sacrifice most of the checks and balances in the constitution and bring us to the present situation of general insecurity . . . . The premium on political power was so exceedingly high that the political contestants regarded victory in election as a matter of life and death . . . . The last general election could be anything but free and fair. There is ample

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to be the most guilty of them all. Wole Soyinka, the Nigerian Nobel Prize Laureate, writing about the 1983 election, said:

> Discredited, condemned and rejected, even loathed by the majority of Nigerians, the National Party of Nigeria, buoyed by the image-building of its leaders by the western press—meek, unassuming, detribalized, and the guarantor of peace and stability etc. ad nauseam—went confidently ahead to commit the most breath-taking, in sheer scale, electoral fraud of any nation in the whole of West Africa. At every level, from acts of brutal ejection of the opposition at the polling both by "law enforcement agencies" to the simplest but most daring motion of all, swapping the figures at the very point of announcement—the scale of robbery is unprecedented, truly mind-boggling. Wherever all other measures failed, the secretaries to the State Electoral Commissions simply announced the wrong figures or else the Federal Commission in Lagos announced the forgeries.

Wole Soyinka, *The 1983 Elections and the Foreign Press*, GUARDIAN, Sept. 10, 1983, *in* FALOLA & IHONVBERE, *supra* note 134, at 216-17.

The Academic Staff Union of Universities, the elite national organization of Nigerian university professors, unequivocally condemned the conduct of the 1983 elections:

> Whereas the members of the ruling class are wallowing in stinking opulence, the masses of the working people have increasingly been overburdened by economic and social hardships. The people had hoped that the 1983 elections would enable them to replace the corrupt and rich politicians responsible for this state of affairs. But these high expectations have been dashed by the shameful manipulation of the electoral process to reimpose the same notorious people responsible for the hardships. Thus the right of the people to have responsible government and a dignified living has been denied.

Academic Staff Union of Universities (ASUU) National Executive Council Communique, *The Election Crisis, Dangers Ahead and the Way Out, in* FALOLA & IHONVBERE, *supra* note 134, at 222.

169. CONST. (SUSPENSION & MODIFICATION) ACT, ch. 64 (1990) (Nig.).

170. Section 2(1) vested in the Federal Military Government power to make laws for the peace, order, and good government of Nigeria or any part thereof with respect to any matter whatsoever. *Id.* § 2(1).

> evidence that rigging and thuggery were related to the resources available to the political parties. This conclusively proves to us that the political parties have not developed confidence in the presidential system of government on which the nation invested much material resources.[171]

General Buhari's depiction of the Shagari administration as corrupt and inept generated public support for the military regime.[172] Politicians who felt that the National Party of Nigeria massively rigged the 1983 general elections were especially supportive of the military regime.

The military regime quickly embarked upon fighting corruption and revamping the nation's economy. The thrust of the regime's effort was to restore probity in the nation. The Supreme Military Council, the highest organ of the military administration, promulgated several decrees to facilitate the attainment of the regime's objectives. Responding to public anger against corrupt politicians, the military government promulgated a decree specifically targeting corrupt politicians.[173] Key politicians, including the former president, vice president, governors, and ministers, were detained pending investigation of their assets. The new law empaneled a special military tribunal to try corrupt politicians.[174] The special military tribunal could dispense with certain evidentiary rules[175] and procedures of regular courts and had the power to impose harsh sentences ranging from twenty-one years to life imprisonment.[176] Despite protests from the Nigerian Bar Association,[177] the tribunal tried and convicted several politicians, including

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171. W. AFR., Jan. 7, 1984, at 58. Similarly, General Danjuma, the Chief of Army Staff under General Obasanjo, expressing disgust with the politicians stated:

> Democracy had been in jeopardy for the past four years. It died with the elections. The army buried it, they did not kill it. All the parties were involved, but the greatest offender was the National Party of Nigeria (NPN). The NPN had the largest gathering of the worst human beings that Nigeria could produce.

W. AFR., June 30, 1984, at 197.

172. Shehu Ottman, *Classes, Crises and Coup: The Demise of Shagari's Regime*, 83 AFR. AFFAIRS 441, 456 (1984) (noting that the reaction of the Nigerian public to the coup was decidedly favorable).

173. RECOVERY OF PUBLIC PROPERTY (SPECIAL MILITARY TRIBUNALS) ACT, ch. 389 (1990) (Nig.).

174. *Id.* § 5(1)-(2).

175. For a detailed analysis of the modus operandi of military tribunals, see M.A. Owoade, *The Military and the Criminal Law in Nigeria*, 33 J. AFR. L. 133 (1989).

176. RECOVERY OF PUBLIC PROPERTY (SPECIAL MILITARY TRIBUNALS) ACT, ch. 389, § 13(a)-(b) (1990) (Nig.).

177. The draconian provisions of the law drew the ire of the Nigerian Bar Association, which directed its members not to appear before the military tribunals. *See* Jadesola Akande, *A Decade of Human Rights in Nigeria*, *in* NEW DIMENSIONS IN NIGERIAN LAW 112 (1989) (noting that the Nigerian Bar Association's objections focused on three main issues: the trials

governors, ministers, and presidential advisers.[178]

In August of 1985, General Babangida, the then Chief of Army Staff, staged a palace coup and deposed General Buhari. General Babangida, eager to garner public support, openly castigated the Buhari regime for human rights violations.[179] He promised to respect human rights, to correct the country's social and economic ills, and to lay a solid foundation for democratic rule.[180] General Babangida expressed the hope that his regime would be the last military administration in Nigeria.[181] He promised to return power to an elected civilian administration in 1990. The President inaugurated a Political Bureau on January 13, 1986 to find out the wishes of Nigerians as to the preferable political program of governance.[182] Following the submission of its findings, the Federal Military Government appointed a committee of forty-nine Nigerians to review the 1979 constitution.[183]

The Constitution Review Committee met for six months and submitted a draft constitution to the Federal Military Government.[184] The draft constitution produced by the committee was ratified by a Constituent Assembly[185] and subsequently promulgated into law by the federal military

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were not conducted in public; the denial of right of appeal from the tribunal's decision; and the composition, nature, and powers of the tribunal).

178. Most of the sentences were later reduced by a Special Appeals Tribunal constituted in 1985 by General Ibrahim Babangida upon assumption of office. All the jailed politicians are now free, enjoying their ill-gotten wealth. Some of the jailed politicians are cabinet ministers serving under the current Abacha's regime.

179. For details of General Babangida's speech, see *Babangida Takes Over*, W. AFR., Sept. 2, 1985, at 1789.

180. *Id.*

181. *Id.*

182. The Political Bureau, headed by Dr. Sam Cookey, had the following terms of reference:

(a) Review Nigeria's political history and identify the basic problems which have led to our failure in the past and suggest ways of resolving and coping with these problems;
(b) Identify a basic philosophy of government which will determine goals and serve as a guide to the activities of government;
(c) Collect relevant information and data for the government as well as identify other political problems that may arise from the debate;
(d) Gather, collate and evaluate the contributions of Nigerians to the search for a viable political future and provide guidelines for the attainment of the consensus objectives;
(e) Deliberate on other political problems as may be referred to it from time to time.

Aniagolu, *supra* note 65, at 1040-41 n.9.

183. *See* Peter Koehn, *Competitive Transition to Civilian Rule: Nigeria's First and Second Experiments*, 23 J. MOD. AFR. STUD. 401 (1989).

184. For details of General Babangida's transition program, see Larry Diamond, *Nigeria's Search for a New Political Order*, 2 J. DEMOCRACY 54 (1991).

185. The Constituent Assembly was established by the CONSTITUENT ASSEMBLY DECREE

government,[186] with few amendments.[187] Besides the introduction of a two-party system,[188] the draft constitution paralleled the 1979 constitution. It provided for a presidential system,[189] federalism,[190] and separation of powers among the three arms of government.[191] Additionally, the new constitution contained an elaborate human rights provision.[192]

Another notable feature of the Babangida transition program was that it banned former politicians, particularly those found guilty of corruption and abuse of office, from running for elective offices.[193] The idea was to create room for "newbreed" politicians untainted by corruption, ethnicity, and all the other social ills that plagued the political process.[194] To ensure that tainted politicians were screened out of the process, anybody running for office was required to obtain a clearance certificate from the Federal Electoral Commission.

Thereafter, the Federal Military Government lifted the ban on party politics. The National Election Commission (NEC), charged with

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OF 1988 and consisted of a Chairman, a Deputy Chairman, 450 elected members, and 111 nominated members.

186. CONST. (PROMULGATION) ACT 12 (1989) (Nig.). The new constitution was scheduled to take effect on October 1, 1992.

187. The Armed Forces Ruling Council introduced eleven amendments. The first amendment deleted section 15 of the new constitution that declared Nigeria a welfare state, and sections 42 and 43 that provided for free education to age eighteen and free medical care for persons up to age eighteen or older than sixty-five, the handicapped, and the disabled. The second amendment streamlined the jurisdiction of sharia and customary courts of appeal to make them apply at the state level only to matters regarding the personal status of Muslims. Amendment three related to civil service reforms. Amendment four reduced the minimum age requirements for federal and state elective offices from forty to thirty-five for the president, thirty-five to thirty for senators and governors, twenty-five for members of the House of Representatives, and twenty-one for members of state houses of assembly and local government councillors. The fifth amendment replaced the six-year single-term tenure for the president and governors with a four-year, maximum two-term tenure. Amendment six removed from the National Assembly control over matters of national security. The seventh amendment made the federal judicial service commission accountable. The eighth amendment eliminated the provisions establishing an armed forces service commission to supervise compliance with provisions of the federal character principle, *i.e.* that government bodies such as the military reflect the various elements of the population. Amendment nine reduced the number of special advisers to the president from seven to three. Amendment ten eliminated section 1(4) which outlawed coups and criminalized them. Amendment eleven deleted the provisions which barred the federal government from obtaining external loans without the National Assembly's approval.

188. CONST. OF 1989 § 220(1) (Nig.).

189. *Id.* § 5.

190. *Id.* § 2(1)-(2).

191. *Id.* §§ 4-6.

192. *Id.* §§ 32-44.

193. Koehn, *supra* note 183.

194. *Id.*

conducting elections, received a total of thirteen applications for registration.[195] The National Election Commission recommended six parties for approval but noted that they "were poorly organized with stale ideologies firmly rooted in the past, had little differentiation in their policies and no convincing solutions to current problems."[196] On October 7, 1989, General Babangida announced the rejection of all the political organizations that applied for recognition and stated that the government would form two new parties.[197] Thus, he set up two new parties: the National Republican Convention (NRC) and the Social Democratic Party (SDP). He requested interested politicians to join the party in their respective local government areas.[198]

The Babangida regime amended the transition program several times and extended the final hand-over date to 1993.[199] Under the new plan, elections into state offices were to be held in 1991, while the regime postponed the presidential election until June of 1993. State elections were held as scheduled, and the elected civilian governors took office in the states in 1991. This arrangement involved a novel development in Nigerian politics—power sharing between the military and the civilians.[200] General Babangida retained his position as President and Commander-in-Chief of the Armed Forces while elected civilian governors and state legislators administered the states.

The presidential election proved problematic. After a series of rescheduling, the National Election Commission held the presidential elections on June 12, 1993. Barely twenty-four hours before the elections, a group called the Association for Better Nigeria (ABN) sued, seeking to restrain the National Election Commission from conducting the election. The NEC ignored the lawsuit and went on with the election. The June 12th presidential election differed markedly from previous elections held in the country. Unlike previous elections characterized by electoral malpractice, thuggery, and corruption, Nigeria for the first time in its history conducted what was widely described as a free and fair election. Anxious to derail the transition program, the Association for Better Nigeria sued, seeking this time

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195. *Id.*

196. James Read, *Nigeria's New Constitution for 1992: The Third Republic*, 35 J. AFR. L. 174, 188 (1992).

197. W. AFR., Oct. 16-22, 1989. According to President Babangida, "[a]ll we are saying is that we will not serve our people yesterday's food in glittering new dishes . . . . Many of the associations were either the offshoots of the defunct political parties or surrogates of banned or disqualified politicians."

198. TRANSITION TO CIVIL RULE (POLITICAL PARTIES REGISTRATION & ACTIVITIES) DECREE 27 (1989) (Nig.).

199. Koehn, *supra* note 183.

200. This is consistent with diarchy proposed by Dr. Azikiwe immediately after the civil war. *See* NNAMDI AZIKIWE, DEMOCRACY WITH MILITARY VIGILANCE (1974).

to restrain the NEC from announcing the election results. This sparked a plethora of lawsuits in various parts of the country. Various interest groups sued, seeking either to restrain NEC from announcing the results or to compel the NEC to announce the election results.[201] Amid widespread speculation that Alhaji Abiola, the Social Democratic Party candidate, had won the election, General Babangida annulled the elections and canceled the remaining portion of the transition program. According to General Babangida, his administration canceled the elections "to protect our legal system and the judiciary from being ridiculed and politicized nationally and internationally."[202] General Babangida, surprised and even chastened by the spate of protests, violent demonstrations, and mounting international pressures to restore democracy in Nigeria, stepped down in August of 1993 and appointed an interim government to run the affairs of the nation pending the election of another president.[203] The interim government led by Chief Shonekan promised to conduct the presidential election in February of 1994.[204] In December of 1993, General Abacha, the Defense Secretary, toppled the interim government and assumed the position of Head of State and Commander-in-Chief of the Nigerian Armed Forces.[205]

Upon assuming power, General Abacha suspended the constitution, disbanded the existing political structure, and dismissed all elected officials, including senators, members of the House of Representatives, and state governors.[206] In the face of intense domestic and international pressure to restore democracy in Nigeria, General Abacha reacted to criticism in the traditional military fashion—quelling the populace by brute force. General Abacha has adopted various repressive techniques to suppress public resentment.[207] The Abacha regime detains citizens without trial and security

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201. By one account, at least eight different interest groups filed lawsuits either praying for or against the release of election results. W. AFR., June 28, 1993, at 1078.

202. *Id.* at 1079. Many suspect that General Babangida was less than candid when he cited electoral malpractice as the main reason for annulling the results of the presidential elections. Strong suspicion persists that personal and ethnic considerations figured prominently in the decision to annul the elections. Chief Abiola, a Yoruba, would have been the second non-Northerner to rule since independence. Moreover, it was rumored that Chief Abiola was planning to probe the military hierarchy, a course of action that would have exposed massive corruption and human rights violations by the military. *See, e.g.*, Mahmud, *supra* note 39, at 90 (noting that Babangida did not allow a Yoruba to rule since that was not in the interest of Northern Hausa-Fulani).

203. Peter Lewis, *Endgame in Transition? The Politics of a Failed Democratic Transition*, 93 AFR. AFFAIRS 323, 328 (1994).

204. *Id.*

205. *Id.*

206. *Id.*

207. For techniques adopted by military regimes to curtail human rights, see Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy Under a Military Regime*, 10 HARV. HUM. RTS. J. 257 (1997).

agents selectively harass lawyers for human rights activities.[208]

General Abacha has promised to hand over power to a democratically elected civilian administration in 1998.[209] Pursuant to this, he impaneled a Constitution Conference Committee to draft a new constitution for Nigeria. The committee has since proposed a new constitution for the country. However noble General Abacha's intent may be in establishing a durable democracy in Nigeria, the truth is that Nigerians are becoming increasingly cynical about the workability of a western-style democracy in Nigeria.[210] Thirty-five years of gyration from the Westminster model to military rule and to the more recent presidential system has left citizens dismayed and disillusioned. In a 1994 address, General Abacha succinctly captured the mood of the nation:

> After nearly three and a half decades of hopes raised and hopes dashed, it should not be very surprising that Nigerians are weary and worried. Having gone through several years in which their faith in the national enterprise has been abused and affronted, our people's impatience with government and almost total distrust of its functionaries can no longer be dismissed as merely cynical.[211]

As Nigeria tinkers with the political order, an examination of the impact of ethnicity on the political process will help to understand and devise a workable constitutional framework that will preserve peace in the country.

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208. Despite incessant harassment and brutality, Nigerian human rights organizations have been remarkably resilient in demanding the restoration of democracy.

209. General Abacha, in the 1995 Independence Day broadcast to the nation, stated:

> To establish the foundation of a durable democracy, we estimate that the time required will cover a period of no more than thirty-six months. A detailed and carefully considered program of sequence of events that will lead to that deadline has been worked out. This sequence will begin with a stage by stage phased handing over at the local government level. It has been calculated that the completion date, at the level of the presidency when the final tier of a democratically elected civil government shall be installed, should be feasible for October 1, 1998.

W. AFR., Oct. 9, 1995, at 1557 (General Abacha, 1995 Independence Day Broadcast).

210. Nigerians are deeply suspicious of General Abacha's transition program that Chris McGreal aptly characterized as "a legacy of his predecessor's breach of faith." Chris McGreal, *A nation stained by Abacha's rule*, GUARDIAN, Nov. 18, 1995, *available in* 1995 WL 9953200.

211. General Abacha, Address to the Nation on the Presentation of the 1994 Budget in Abuja (Jan. 10, 1994), *available in* LEXIS AL/WO 316/WA 1994.

III. ETHNICITY AND THE NIGERIAN POLITICAL PROCESS

Ethnicity manifests itself predominantly in the political process.[212] The political process attempting to establish western-style constitutional democracy has become increasingly polarized, divisive, and counter-productive.[213] Despite integrationist rhetoric, political elites have not been successful in forming a truly national party. Ethnic-based politics ultimately undermines social equilibrium and national unity that should be the political process' chief goals. Walle Engedayehu, an Ethiopian scholar, eloquently describes the impact of ethnic-based politics on the democratic process:

> Ethnic-based politics has the propensity of intensifying group conflict since the primary interests of political actors in such a setting do not work for the collective good of the nation. Ethnic parochialism in politics does not only limit the broader examination of issues affecting the nation, but also encourages separatism in the social and political life of that nation. Both can be counterproductive to peace, stability and democracy.[214]

This portion of the paper reviews the impact of ethnicity on the formation and organization of political parties in Nigeria since the country attained independence in 1960.

A. *The Ethnicity and Party Politics*

One aspect of the political process that has repeatedly succumbed to ethnicity is the organization of political parties.[215] Formation of political

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212. Ike Udogu, *The Allurement of Ethnonationalism in Nigerian Politics: The Contemporary Debate*, 29 J. ASIAN & AFR. STUD. 159-71 (1994) (generally noting that the potency of ethnicity remains salient in Nigerian politics); Pita Agbese, *Ethnic Conflicts and Hometown Associations: An Analysis of the Experience of the Agila Development Association*, 43 AFR. TODAY 139 (1996) (noting that in Africa political issues are perceived in ethnic terms and political competition is structured primarily on an ethnic basis).

213. DEMOCRACY AND PLURALISM IN AFRICA 195 (Dov Roven ed., 1986) (commenting that efforts to institutionalize democracy (*i.e.* political parties, elections, electoral competition for office, etc.) have awakened, strengthened, and even created ethnic or ethno-national identities, and thus have, in reality, countered the efforts of centralized power to integrate, unify, institutionalize, and define the nation).

214. Walle Engedayehu, *Ethiopia: Democracy and The Politics of Ethnicity*, 40 AFR. TODAY 29, 50 (1993).

215. General Mohammed, whose regime set the stage for the second republic from 1979-83, was so concerned about the negative impact of party politics that he advised the Constitution Drafting Committee that "[i]f during the course of your deliberations, and having regard to our disillusion with party politics in the past, you should discover some means by which government can be formed without the involvement of political parties you should feel

parties along ethnic, rather than ideological lines, may be a consequence of politics in plural societies, especially in developing sectors of the world.[216] Political parties conjure different images in the minds of Nigerians. For some, they represent the state itself; for others, a political party is a forum for citizens from the same ethnic group to protect their interests. The underlying assumption in both views is that a political party consists of persons from the same ethnic groups who share an identifiable interest in gaining control of the state. Despite increased sophistication and political development, most Nigerians have been unable to separate political parties from the state. This attitude encourages citizens to join parties controlled or dominated by politicians from their ethnic group, thereby preventing the emergence of truly national parties—a *sine qua non* for durable democratic order.[217]

Ethnicity has always been the banner under which party loyalty is generated.[218] While class may be the initial unifying factor in the composition of political parties, ethnic groups quickly realigned their support and closed ranks to maintain hegemony over the process or to stave off perceived threats. For example, during the second republic, many perceived the National Party of Nigeria (NPN) as an assemblage of millionaires united more by class than ethnicity.[219] The hopes that ideology had finally taken precedence over ethnicity and that the political process had rid itself of ethnicity were quickly dashed as several party members broke ranks with the NPN and openly aligned with their ethnic groups. Even President Shehu Shagari, the leader of NPN, crudely appealed to religious and ethnic sentiments by publicly stating that voting for Christians was wrong for

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free to recommend [them]." NIGERIAN CONSTITUTION DRAFTING COMMITTEE, 1 REPORT OF THE CONSTITUTION DRAFTING COMMITTEE xiii (Federal Ministry of Information 1976).

216. ALVIN RABUSHKA & KENNETH A. SHEPSLE, POLITICS IN PLURAL SOCIETIES: A THEORY OF DEMOCRATIC INSTABILITY 20-21 (1972).

217. S.M. Lipset notes:

> A stable democracy requires a situation in which the major political parties include supporters from many segments of the population. A system in which the support of different parties corresponds too closely to basic social divisions cannot continue to operate on a democratic basis, for it reflects a state of conflict so intense and clear cut as to rule out compromise.

JOSEPH, *supra* note 28, at 25.

218. Chudi Uwazurike, *Confronting Potential Breakdown: The Nigerian Redemocratisation Process in Critical Perspective*, 28 J. MOD. AFR. STUD. 55, 76 (1990) (noting that in Nigeria, first ethnicity, then class, and lately religion have provided the basis for political mobilization with varying degrees of success; thus far, regional geo-ethnicity still remains the most potent).

219. Ottman, *supra* note 172, at 444 (noting that the ranks of NPN were filled by a staggering blend of what one party ideologue called "men of fibre and integrity . . . timber and caliber") (quoting CHUBA OKADIGBO, THE MISSION OF THE NATIONAL PARTY OF NIGERIA 38-39 (1980)).

Muslims.[220]

Ethnicity remains the driving force behind the formation of political parties in Nigeria for three main reasons.[221] First, the peculiar political and economic conditions in Nigeria have contributed immensely to the prevalence of ethnicity. Nigeria operates a semi-socialistic economy in which the government largely determines what private businesses can and cannot do. Before 1992, government involved itself in all kinds of businesses ranging from hotel management to the trucking industry.[222] This provided a broad range of options for politicians to enrich themselves and service their political supporters (or clients). "Each ethnic group seeks to be the dominant player in the political process and thus control and redirect social and economic amenities to their ethnic group."[223] The perception of the state as the distributor of largesse encourages citizens to coalesce around their ethnic leaders. Many Nigerians conceive state power as "a congeries of offices which can be competed for, appropriated and then administered for the benefit of individual occupants and their support groups."[224] Some people believe that the only way they can get ahead in modern pluralistic Nigerian society is to elect politicians from their clan. These beliefs are more prevalent among the illiterate members of the society. In the largely unsophisticated communities where citizens lack the capacity to evaluate party programs objectively, failing to support a party that enjoys popular support in the community was close to an abomination.[225] Even among the sophisticated citizenry, ethnicity remains a major force in politics. Typically, a Nigerian embraces the belief that "the real hope of socioeconomic betterment lies in the success of his relative, or other son of

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220. Soyinka, *supra* note 168, at 129 (noting that President Shagari's anti-tribalism was no doubt proven when he campaigned in his home state, Sokoto, and appealed so crudely to both religious and tribal sentiments).

221. Richard Sklar questions traditional assumptions about the role of ethnicity in party politics and maintains that class, rather than ethnicity, is the driving force behind formation of political parties. He writes that "tribalism was a mask for class privilege and that parties were really instruments used to promote class interests in the acquisition and retention of regional power." Richard Sklar, *Political Science and National Integration—A Radical Approach*, 5 J. MOD. AFR. STUD. 6 (1967).

222. For a detailed analysis of privatization in Nigeria, see Okechukwu Oko, Government Control of Public Corporations and Parastatals (unpublished LL.M. dissertation) (on file with author).

223. Jeffrey Herbst, *Is Nigeria a Viable State?*, 19 WASH. Q. 151, 156 (1996) (noting that the inability of ethnic groups to subordinate selfish interests to the overriding interest of the nation results in a pernicious political dynamic in which control of the state became critical in order to regulate the flow of patronage).

224. JOSEPH, *supra* note 28, at 63.

225. K.W.J. POST, THE NIGERIAN FEDERAL ELECTION OF 1959, at 396 (1963) (commenting that "for a man to support a political party different from the one supported by the rest of the community amounted almost to a repudiation of his own people").

the soil, in getting a lien on the public purse and trickling a few coins down to him."[226] This perception proves well-founded given that ethnic groups with the most politicians in government enjoy more modern facilities than their minority counterparts.[227]

The second reason results from the fact that far too often politicians frame political issues in Nigeria as preserving values dear to one ethnic group.[228] For example, any issue that poses a threat to Islam, however veiled, generates opposition from all Moslems. Similarly, politicians from the South easily garner support by accusing Moslems of attempting to dominate other religious groups. In the first republic, 1960-66, the political parties used unfounded ethnic accusations to generate support. The Hausa-controlled Nigeria Peoples Congress (NPC) spread rumors that the Action Group (AG), a Yoruba party, would ban Islam. The AG accused the NPC of attempting to force Islam upon the South. The National Council of Nigerian Citizens (NCNC), an Ibo-controlled party, was accused by both parties of scheming to stack the federal bureaucracy with Ibos. Such vile rhetoric and mischievous appeal to the peoples' fears generated considerable support for the parties.[229] Political cleavages along religious lines manifested themselves again in the second republic, 1979-83. The Sharia debate in 1979 illustrated the phenomenon. The Muslim members of the Constituent Assembly had suggested the insertion of a special provision in the 1979 Constitution to establish a Sharia Court of Appeal to hear appeals on matters of Islamic personal law. Upon rejection of this suggestion, all Muslim members of the Constituent Assembly stormed out of the meeting and boycotted further deliberations of the assembly. It took the intervention of the Head of State to bring them back.

Thirdly, ethnicity serves as a potent tool for manipulating the electoral process.[230] Nigerian politicians often mobilize the masses not toward the attainment of goals beneficial to the entire nation, but to secure narrow,

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226. RICHARD A. JOSEPH, POLITICAL PARTIES AND IDEOLOGY IN NIGERIA 90 (1987).

227. For a classic study of deprivations suffered by Ogoni minorities in Nigeria, see Eghosa Osaghae, *The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State,* 94 AFR. AFFAIRS 325 (1995).

228. Mafeje Archie, *The Ideology of Tribalism*, 9 J. MOD. AFR. STUD. 253, 259 (noting that by whipping up communal fears and suspicions, by casting each election as a threat to the sacred values and even the survival of the ethnic community, and by establishing tribalism as the ideology of politics, the politicians and business allies of each regional party were able to entrench themselves in power).

229. DIAMOND, *supra* note 12, at 43.

230. *Modernization and the Politics of Communalism: A Theoretical Perspective, in* NIGERIA: MODERNIZATION AND THE POLITICS OF COMMUNALISM 19 (Melson & Wolpe eds., 1971), states that "mass participation in the political process encourages aspiring politicians to make appeals to the most easily mobilized communal loyalties and to define themselves primarily as the representatives of community interests."

parochial sectional interests.[231] Nigerian politicians have historically appealed to ethnic loyalties and will continue to do so, especially when such a strategy yields clearly demonstrable results.[232] In politics, ethnicity has a very high survival value.[233] For the contestants, it ensures victory at the polls.[234] For the masses, ethnic identification helps them live richly and powerfully. Dudley, an authority on Nigerian politics, succinctly captures the manipulation of ethnicity by Nigerian political elites: "What has been called 'tribalism' is seen to be part of the mechanism through which the political elite maintains itself in power and exercises its influence. It is therefore an attribute of elite behavior . . . the educated became the chief proponents and purveyors of parochialism and particularistic values."[235]

For any, or a combination of all three reasons, political parties usually revolve around ethnic lines. In the first republic, political parties were regionally-based, with loyalties to their ethnic groups.[236] For example, the NCNC was seen as an Ibo party, the AG was supported by the Yorubas in the western part of the country, and the NPC drew its support from the North.[237] Each party made no pretense about its tribal base and made no

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231. Politicians frequently remind their followers of the serious consequences that will result should politicians from rival ethnic groups attain power. They typically promise their ethnic followers that if elected into office, they will protect and advance their ethnic interests. Anthony Smith characterizes this phenomenon as "internal colonialism" and concludes that "the implication is that autonomous ethnic control over the homeland's resources and budget would restructure the economy to support the interest of, and preserve intact, the community which would otherwise suffer further decline and assimilation or deprivation." ANTHONY SMITH, THE ETHNIC ORIGIN OF NATIONS 163 (1986).

232. DIAMOND, *supra* note 12, at 41 (notes that in a multi-ethnic society that was modernizing but still largely illiterate, where expectations were growing faster than resources, no electoral strategy seemed more assured of success than the manipulation of ethnic pride and prejudice).

233. JOSEPH ROTHSCHILD, ETHNOPOLITICS: A CONCEPTUAL FRAMEWORK 173 (1981) (arguing that the most emotionally intense type of political solidarity is currently in ethnic rather than in class or formal ideological affinities).

234. Wilson, *supra* note 5, at 446 (noting that ethnic groups are especially convenient bases for generating mass political support because they provide the loyalty not merely of ideologues but of family members).

235. B.J. DUDLEY, INSTABILITY AND POLITICAL ORDER: POLITICS AND CRISIS IN NIGERIA 44, 51 (1973). The late Professor Kenneth Dike, Africa's leading historian and former Vice Chancellor of the University of Ibadan, stated: "[I]t must be said to our shame that the Nigerian intellectual, far from being an influence for national integration, is the greatest exploiter of parochial and clannish sentiment." VAN DEN BERGHE, POWER AND PRIVILEGE IN AN AFRICAN UNIVERSITY 224.

236. For an interesting discussion of the emergence of political parties in Nigeria, see Minton F. Goldman, *Political Change in a Multi-National Setting*, *in* DYNAMICS OF THE THIRD WORLD: POLITICAL AND SOCIAL CHANGE (David Schmitt ed., 1974).

237. POST, *supra* note 225, at 13 (noting that from 1951 onwards, generally almost all Ibos supported the NCNC, while most Yorubas backed Action Group, and all but a small minority of the Hausa and Fulani were associated, if indirectly, with the NPC).

attempt to broaden its power base to include other ethnic groups. Framing electoral issues in ethnic terms and manipulation of ethnic sentiments by politicians generated conflicts and tensions that ultimately resulted in the collapse of the first republic.[238]

The political parties that emerged in the second republic, 1979-83, were constitutionally enjoined to uphold the idea of a united Nigeria and to embrace the constitutional ideal of federal character.[239] Consequently, they were less regional than the old parties, but political affiliations still ran along ethnic lines.[240] Each party tended to be identified with the ethnicity of its leaders. For example, the Nigeria Peoples Party was viewed as the "Ibo" party because of Dr. Nnamdi Azikiwe; the Unity Party of Nigeria was seen as the "Yoruba" party because of Chief Awolowo; the Peoples Redemption Party was identified as a "Hausa" party because of Mallam Aminu Kano. The National Party of Nigeria was much more broad-based than the others; nevertheless, strong suspicions persisted that it was a party for the Hausas, apparently because the presidential candidate, Alhaji Shehu Shagari, was Hausa.[241]

The two-party system introduced by the Babangida administration during the ill-fated third republic, between 1990 and 1993, considerably reduced the impact of ethnicity upon party membership. More by default than by reasoned calculation, the formation of two political parties by executive fiat broke the ethnic lines that historically determined party membership in Nigeria. Politicians, unable to set their own ideology or forge coalitions, were forced to join either of the two parties. Speculations were that ethnicity had finally crumbled under the pressures of democracy. We may never know the truth because the army aborted the democratic process before any scientific finding could be made on the impact of a two-party system on ethnicity.[242] The fourth republic, promised by General

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238. Horowitz eloquently describes the deleterious effects of vile ethnic rhetoric on the society:

> By appealing to electorates in ethnic terms, by making ethnic demands on government, and by bolstering the influence of ethnically chauvinistic elements within each group, parties that begin by merely mirroring ethnic divisions help to deepen and extend them. Hence the oft-heard remark in such states that politicians have created ethnic conflict.

HOROWITZ, *supra* note 15, at 291.

239. CONST. OF 1979 § 14(3) (Nig.).

240. *See* Olatunde Ojo, *The Impact of Personality and Ethnicity on the Nigerian Elections of 1979*, 28 AFR. TODAY 47 (1981).

241. *Id.* (noting that major ethnic groups voted overwhelmingly for candidates of their own ethnic origin).

242. For an operational assessment of the impact of a two-party system on the Nigerian political process, see Oyedele Oyediran & Adigun Agbaje, *Two-Partyism and Democratic Transition in Nigeria*, 29 J. MOD. AFR. STUD. 213 (1991).

Abacha to begin in 1998, reverted to a multi-party system and approved five political parties on September 30, 1996.[243] The fourth republic will confirm whether class and ideology have finally emerged over ethnicity as the ultimate determinants of party membership.[244]

IV. RESPONDING TO THE PROBLEMS OF ETHNICITY IN NIGERIA

The prospect of a durable social order depends mightily on Nigeria's ability to construct a mechanism that can fairly address the ethnic problems that frustrated past attempts to set up democracy. Modern political apparatus, especially the breakdown of the two major divisions (North and South) into several states, failed to dissipate ethnic sentiments and loyalties among the ethnic groups.[245] Each ethnic group retains its identity and seeks to dominate the others. Ethnicity becomes heightened by modernization, especially migration from rural areas to the city. As citizens move from rural to urban areas in search of progress, they carry with them certain attitudes and biases that prevent complete integration with people from other ethnic groups. The urban city dweller becomes "concerned lest his ethnic group falls behind others in the struggle for wealth, power, and status."[246] Sometimes administrative rules and practices prevented interaction with other ethnic groups.[247] Mutual distrust among the various ethnic groups in Nigeria is well-documented.[248]

African political elites have adopted several legal and political

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243. *Nigeria: Review*, AFR. REV. WORLD INFO., Feb. 1, 1997, *available in* 1997 WL 10204078.

244. For General Abacha's transition program, see SOYINKA, *supra* note 37, at 159-61.

245. OSITA EZE, HUMAN RIGHTS IN AFRICA 135 (1984), stated:

> With independence . . . ethnic conflicts have surfaced and have in many African countries threatened the fragile geo-political bases of the new states. It was thought that the process of modernization would lead to the accommodation of the various primordial loyalties; the history of many African states tends to point to the contrary.

246. YOUNG, THE POLITICS OF CULTURAL PLURALISM 464.

247. OKWUDIBA, *supra* note 29, at 115 (noting that the Southerners who migrated to the North were forced to live in segregated housing and to educate their children in separate schools, and were prevented from acquiring freehold title to land); DIAMOND, *supra* note 12, at 26 (noting that Northern Muslims were forbidden on both religious and administrative grounds to associate with Southerners whom they were taught to regard as "pagans and infidels").

248. VAN DEN BERGHE, *supra* note 235, at 252, summarized the typical position thus:

> By and large, people expect members of ethnic groups other than their own to be "tribalists," i.e., to be biased in favor of their fellow ethnics and against "strangers". . . . Most people assume that all others except those in the same circle of intimates (fellow Kinsmen, townsmen, or persons linked by patron-client ties) will behave in ways which further the person's interest at the expense of oneself.

measures to combat the deleterious effects of ethnicity.[249] These techniques include: constitutional democracy with an emphasis on representative government; a federal system of government[250] with considerable autonomy for the state and local governments; a one-party state[251] with constitutional rules that enjoin governments to ensure fair representation of ethnic groups in government;[252] and recently shared key elective positions among ethnic groups.[253] African governments try to smother ethnic rivalries through economic programs and political patronage[254] targeted at minority ethnic

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249. The devastation wreaked on countries by ethnic rivalries was succinctly depicted by Donald Horowitz. He states:

> The importance of ethnic conflict, as a force shaping human affairs, as a phenomenon to be understood, as a threat to be controlled, can no longer be denied. By one reckoning, ethnic violence since World War II has claimed more than ten million lives, and in the last two decades ethnic conflict has become especially widespread. Ethnicity is at the center of politics in country after country, a potent source of challenges to the cohesion of states and international tension . . . . Ethnicity has fought and bled and burned its way into public and scholarly consciousness.

HOROWITZ, *supra* note 15, at 238.

250. Benjamin Neuberger, *Federalism in Africa: Experience and Prospects*, *in* FEDERALISM AND POLITICAL INTEGRATION 171, 173 (1984) (noting that federalism had an appeal in the late 1950s and early 1960s as a middle of the road approach between the poles of unitary centralism and outright secession. Intra-state federalism was seen as the only way to accommodate tribal and linguistic diversity within one political system. Federalism within the state was the outcome of devolution and thus its function was more to mediate between the ethnic groups than to integrate them into one uniform whole.) (footnotes omitted).

251. Some African nations, upon attaining independence, established a one-party state as a means of offsetting the divisive effects of multi-partisanship. Anyang' Nyong'o brilliantly articulates the arguments for the establishment of a one-party state:

> The single party would promote national unity; the peoples' efforts would be directed towards nation building and not wasted on politics; since people generally agreed that the government was to engage itself in development, party politics was not necessary; whatever differences would emerge, these could be freely discussed under the single-party regime as democracy and human rights would be practiced.

Peter Anyang' Nyong'o, *The One Party State and its Apologists*, *in* 30 YEARS OF INDEPENDENCE IN AFRICA: THE LOST DECADES? 3 (Peter Anyang' Nyong'o ed., 1992). The one-party system turned out to be a colossal failure in Africa as tyrants and despots used the machinery of state to oppress and silence dissidents. As Anyang' Nyong'o observed:

> No one party regime in Africa can boast of democratic practice or a good record on human rights. Sekou Toure's Guinea had its own Gulag Archipelagos; Mobutu' Zaire excelled in repression as a policy of maintaining a kleptocratic regime in power; Banda' Malawi has been the best run police state in Africa.

Id.

252. *See infra* text accompanying notes 258-63.

253. *See infra* text accompanying notes 333-40.

254. Attempts at promoting national unity have included economic policies, political patronage, and mass education. *See* Anthony Smith, *The Nation: Invented, Imagined,*

groups.[255] Both strategies, legal and political, failed chiefly because their efficacies require a level of good faith from politicians and technocrats which they are either unable or unwilling to display.[256] Most political elites continue to harbor deep-seated ethnic loyalties that diminish their capacity to make the necessary concessions and compromises required by the democratic process.[257] This portion of the paper will examine three available options for dealing with the resurgence of ethnicity. The options include: introducing legal rules to address minority concerns; attacking the social forces that engender ethnic rivalries; and partitioning the country.

A. *Promoting National Unity Through Legal Rules*

Before 1979, efforts at national integration were largely uncoordinated, unorganized, and solely dependent on the good faith of politicians and technocrats. Entrusting an issue as vital as integration to politicians with an uncontrollable propensity for self-aggrandizement proved calamitous. Without legal rules and democratic traditions to discipline their selfish tendencies, politicians behaved opportunistically, doing whatever was necessary to secure votes. Acutely aware of the citizens' commitment to their ethnic groups[258] and eager to promote unity in Nigeria,[259] the

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Reconstructed?, 20 MILLENNIUM 353, 364 (1991).

255. For example, a Commission of Inquiry—set up by the British Colonial government in Nigeria to investigate allegations of discrimination and unfair treatment by minorities in Nigeria—recognized as valid the fear of oppression and discrimination widely held by minorities in Nigeria and recommended certain safeguards for allaying the fears of minorities. These recommendations included the centralization of the police force, a constitutional guarantee of rights, decentralization of functions to provincial authorities, and the establishment of a development board to advise on the physical development of Niger Delta areas and midwestern Nigeria. *See* Report CMND 505 (1958), *in* NWABUEZE, *supra* note 55, at 151.

256. Professor B.O. Nwabueze, one of Africa's leading constitutional law scholars, describes why federalism has been unable to resolve ethnic conflicts in Africa:

> For federalism to be able to resist failure, the leaders and their followers must "feel federal". . . they must be moved to think of themselves as one people with one common self-interest capable where necessary of overriding most other considerations of small group interest. It is not enough that the units of a federation have the same ideal of "good" but that the good for anyone must be consciously subordinate to or compatible with the good of all.

Akande, *supra* note 14, at 28.

257. In his popular critique of group theory, Mancur Olson notes that "if the individuals in any large group are interested in their own welfare, they will not voluntarily make sacrifices to help their group attain its political (public or collective) objectives." MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 126 (1971).

258. The CDC observed that "as a general rule, every Nigerian owes or is expected to owe some loyalty to his community or sub-community." NIGERIAN CONSTITUTION DRAFTING COMMITTEE, 1 REPORT OF THE CONSTITUTION DRAFTING COMMITTEE xiii (Federal Ministry

Constitution Drafting Committee (CDC), in 1979, sought to promote national loyalty through legal rules. Specifically, the CDC included two main legal rules designed to promote national unity. The first provision demanded that a candidate, to be elected, must have the support of a broad segment of the country. The second provision called for a fair representation of all the existing ethnic groups in government. Both provisions were subsequently ratified by the Constituent Assembly and incorporated into the constitution.

To ensure that the president enjoyed national support, the 1979 Constitution of the Federal Republic of Nigeria provided that besides securing a majority of the votes cast at the election, a president must secure not less than one-quarter of the votes cast at the election in each of at least two-thirds of all states in the federation.[260] This provision was designed to elect a president acceptable to a broad segment of the country. An executive president, unlike a ceremonial president, needs acceptability among various ethnic groups to be able to act decisively.

The second constitutional provision enjoined all levels of government to ensure a fair representation of all ethnic groups. Section 14(3) provided:

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to Command national loyalty thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies.

Similarly, state and local governments were required to "recognize the diversity of the peoples within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the Federation."[261] This novel and extensive constitutional provision followed the recommendation of the CDC, which noted: "Once it is agreed or provided that the component states and all ethnic groups shall be accorded fair and equitable treatment, it follows logically that no few states or combination of a few ethnic groups shall be permitted to dominate the government to the exclusion of others."[262]

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of Information 1976).

259. The CDC noted that loyalty to one's community ought not to be allowed to inhibit or detract from national unity and resolved that "[t]he state shall foster a feeling of belonging and of involvement among various sections of the country, to the end that loyalty to the nation shall override sectional loyalties." *Id.*

260. *See* CONST. OF 1979 §§ 123, 125, 126(1a), 126(2a) (Nig.).

261. *Id.* § 14(2).

262. NIGERIAN CONSTITUTION DRAFTING COMMITTEE, 1 REPORT OF THE CONSTITUTION DRAFTING COMMITTEE viii-ix (Federal Ministry of Information 1976).

Explaining the reason for this novel constitutional provision, the CDC observed:

> There had in the past been inter-ethnic rivalry to secure the domination of government by one ethnic group or combination of ethnic groups to the exclusion of others. It is therefore essential to have some provisions to ensure that the predominance of persons from a few states or from a few ethnic or other sectional groups is avoided in the composition of government or the appointment or elections of persons to high offices in the state.[263]

"Federal character," as the media called it, was meant to have implications far broader than increasing social representation of different ethnic groups in government. It denounced domination of government by one ethnic group and sought to give all ethnic groups a sense of belonging. The CDC believed that including such an extensive policy statement in the constitution would allay the fears of exclusion widely nursed by some ethnic groups, and hopefully generate loyalty to the nation.

The CDC encouraged Nigerians to think that ethnic problems could be eliminated or at least contained by legal rules. Nigerians realized quickly that the efficacy of legal rules depended on social and political realities in the country. The prognosis for integration suggested by the Constitution Drafting Committee and included in the constitution was severely weakened by politicians and technocrats who abused it for selfish ends. The lofty constitutional ideal became embroiled in politics as politicians and key government functionaries openly and aggressively identified with their respective ethnic groups and pushed for preferential treatment for their people.

Moreover, the above provisions in some respects severely constrained efforts to promote unity. By constitutionally mandating "federal character," the system confessed its inability to promote unity and unwittingly rendered simmering ethnic tensions more intractable and less amenable to solution. In the hope of achieving increased social representation of all ethnic groups, the Nigerian government traded a long-term search for integration for short-term equilibrium. Government was forced to maintain a delicate balance between merit and allaying the ethnic minority's fear of ethnic domination or exclusion. The balancing act proved particularly invidious as government functionaries readily sacrificed merit at the altars of ethnicity.[264] Too much

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263. *Id.*

264. Alhaji Ali Ciroma, the President of the Nigerian Labor Congress, stated: "Any government that believes in federal character is basing its options on a wrong premise. This is because if you want to apply federal character as a yardstick for giving people opportunities,

emphasis on ethnicity unnecessarily injected ethnic sentiments in all matters of national concern, thus fracturing loyalty to the nation.[265] According to Dr. Okere: "If ethnic and state considerations have to be the salient factors in determining public appointments, would hankering after power and high federal offices not lead to inordinate and aggressive identification with the ethnic group or the state to the detriment of higher loyalty to the Nigerian nation?"[266]

Ethnic loyalties may decrease if Nigerian politics becomes less of a zero-sum game in which the winners partake of the national cake while the losers wallow in abject poverty and misery.[267] The sense of loss and even alienation felt by those who describe themselves as minorities engender pressure to question every facet of the civil society.[268] Many complain about the revenue allocation formula, the distribution of government appointive positions, and even the legitimacy of the government. Though some of these sentiments are misguided, they all cannot be dismissed as totally unwarranted. Minority ethnic groups have watched helplessly as the northern ethnic groups enjoy and squander the nation's resources. Northern ethnic groups have repeatedly exhibited a tendency to behave opportunistically, needlessly exploiting and dominating other groups. The feeling of exclusion and subjugation among the Ibos in 1966 resulted in the secessionist bid that resulted in a thirty-month civil war. Additionally, the feeling that the North was trying to manipulate the West into submission led to the 1966 western regional crisis.

Citizens profess commitment to ethnicity because it is efficient.[269] It serves the major purpose of assuring success and enjoyment of the facilities

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you will be denying other qualified Nigerians opportunities." N.Y. TIMES, July 20, 1986, at 15.

265. For a critical analysis of "federal character," see A.A.M. Kirk-Greene, *Ethnic Engineering and the "Federal Character" of Nigeria: Boon of Contentment or Bone of Contention?*, 6 ETHNIC & RACIAL STUD. 457 (1983).

266. B.O. Okere, *Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution*, 3 NIG. JURID. REV. 74, 75-76 (1988).

267. LEWIS, POLITICS IN WEST AFRICA 76 (arguing that plural societies cannot function peaceably if politics is regarded as a zero-sum game, which functions according to the erroneous definition that the majority is entitled to rule the minority).

268. Paul Magnarella, *Preventing Interethnic Conflict and Promoting Human Rights Through More Effective Legal, Political and Aid Structures: Focus on Africa*, 23 GA. J. INT'L & COMP. L. 327, 330 (noting that "ethnonationalism or politicized ethnicity represents a major legitimator and delegitimator of regimes. A government's legitimacy rests, in significant degree, on its ability to convince the governed that it either shares, represents, or respects their ethnicity.").

269. JOSEPH, *supra* note 28 (arguing that ethnicity remains a vital social force in Nigeria because it is an emotionally satisfying mode of self and group assertion, and its salience increases rather than being overridden by division according to social class during the struggle for survival and material advantage in the modern sectors of the society and economy).

of a modern state. The state has not been particularly successful in presenting a viable and credible alternative to ethnic identification. Many citizens perceive the nation-state as ethnically motivated and incapable of treating them fairly; therefore, they are reluctant to trade-in the privileges of ethnicity for the doubtful, even dubious, benefits of a nation-state.[270] Demanding allegiance to this abstract entity called the "state" requires citizens to ignore their life experiences[271] in the name of altruism, a move that is nonsensical and economically unwise.[272] Loyalty to the nation will only make sense if political elites have the courage and the will to attack the social forces that militate against national unity.[273]

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270. Anthony Anghie, *Human Rights and Cultural Identity: New Hope for Ethnic Peace*, 33 HARV. INT'L L.J. 341, 347 (1992) (noting that citizens are unwilling to surrender the known and felt securities provided by their ethnic affiliations for the uncertain benefits of an emerging state).

271. The average Nigerian takes great pride in his ancestry and will only support programs or policies that do not compromise values dear to his ethnic group. Moreover, there exists a prevalent perception that the dominant Hausa ethnic group is using the machinery of state as a subterfuge to forcibly assimilate other ethnic groups. Geertz's observation in 1971 regarding ethnic groups' fear of domination remains valid in contemporary Nigeria. He stated:

> To subordinate these specific and familiar identifications in favor of a generalized commitment to an overarching and somewhat alien civil order is to risk a loss of definition as an autonomous person, either through absorption into a culturally undifferentiated mass or, what is even worse, through domination by some other rival ethnic, racial, or linguistic community that is able to imbue that order with the temper of its own personality.

CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).

272. Jackson, *supra* note 30, at 1 (noting that citizenship means little and carries few substantial rights or duties compared with membership in a family, clan, religious sect, or ethnic community. Often the government cannot govern itself, and its officials may in fact be freelancers, charging what amounts to a private fee for their services. The language of the state may be little more than a façade for the advancement of personal or factional interests by people who are only nominally judges, soldiers, bureaucrats, policemen, or members of some other official category. In short, many states in sub-Saharan Africa are far more credible realities.).

273. S.I.O. Okita, *Ethnic Identity and the Problem of National Integration in Nigeria*, 55 NIG. MAG. 61, 64 (1987). Okita attributes Nigeria's inability to forge a sense of nationhood to the lack of political will.

> Unfortunately, the search or quest for nation building and national integration has largely been one of a grope in the dark. This grope in the dark is characterized by changing from one type of constitution to another and setting up one probe or tribunal after another . . . . This situation has been brought about not because as a people we lack ideas to formulate and fashion a constitution that will serve our purpose, or lack of expertise on the part of government functionaries to deal with issues being probed by panels or tribunals. What is lacking, on the part of our leadership, whether civilian or military[,] is the will to forge a strong national outlook and orientation around which a sense of identity, loyalty and belonging can be built by the citizenry.

B. *Attacking Social Forces That Engender Ethnicity*

Social equilibrium cannot be imposed on society or attained through constitutional reforms alone. Nigeria must devise strategies for counteracting the constraining effects of social forces that promote ethnicity. Much of the effort at starting democracy has gone into the creation of legal rules and establishment of political institutions. These efforts go on the popular but incorrect assumption that entrusting the governance of the country to democratically elected leaders is enough to satisfy the major requirements of democracy.[274] Nigeria has expended little effort to devise strategies for counteracting the social forces that paralyze democracy. Constitutional reforms, by themselves, scarcely produce stability because legal rules, however efficacious, cannot alter the psychology of citizens.[275] Moreover, frequent constitutional changes in some respects inhibit social equilibrium. Such reforms often produce the unintended consequence of making citizens believe that their problems lie with the rule, thus ignoring the underlying social problems.

Legal rules are necessary but never sufficient to resolve inter-ethnic conflicts. Social equilibrium through constitutional democracy can be achieved only through cultivating a culture that respects citizens' rights, involving all ethnic groups in the process of governance, and fairly distributing the nation's resources to all ethnic groups. Education may serve as a vehicle to strengthen and promote understanding of democratic traditions. Education should focus on two main areas: changing the political philosophy and overcoming the adverse effects of illiteracy, poverty and corruption. The major goal of education should be to change the attitude of both the political leaders and the governed. Politicians must be educated to change their perception of the political process[276] so they see that democracy

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Id.

274. Stephen Schnably, *The Santiago Comment as a Call to Democracy in the United States: Evaluating the Organization of American States Role in Haiti, Peru and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393, 524 (1994) (noting that it would be unfortunate if simply restoring elected heads of government came to be regarded as sufficient to vindicate democracy).

275. Stephen Ellmann, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5 (1994):

> The peril of ethnic division cannot be ignored. Reducing that peril by constitutional means is no simple task, for when ethnic groups pull in different directions a free country can only produce harmony between them by persuading each to honor some claims of the other and to moderate some claims of its own. It will require much more than technical ingenuity in constitution-writing to generate such mutual forbearance.

276. General Mohammed, then Head of State, in his inaugural address to the Constitution Drafting Committee, admonished that "politics must be transformed from its previous scenario of bitter personal wrangles into a healthy game of political argument and discussion."

is not simply a power game in which the winners impose their preferences on the losers. Politicians must be educated to appreciate and respect the central tenets of democracy, a process in which a pluralistic society, comprising citizens from diverse ethnic and social backgrounds, organizes itself and resolves its differences through established channels. Political elites must rise above ethnic, sectional, and selfish interests and commit themselves to the welfare of the nation. Political leaders' chief aim, according to Lewis, should no longer be to "[c]apture the government in order to benefit one group at the expense of another but rather to represent the views of their sectional group of supporters and prepare to govern in coalition with the leaders of other parties and groups."[277] Education can also change ignorance-driven sentiments about the democratic process. Education may emphasize and reinforce the basic tenets of civil society: subordination of the military to civilian authority, respect for constituted authority, and resolution of conflicts through established procedures. Education must also promote a culture of religious tolerance, tolerance that not only refrains from injecting religion into civil affairs, but also deeply resents preference of one religion over others. We must respect our pluralism and allow citizens to profess their religion without restraint. The ultimate goals of education must be to encourage citizens to coexist peacefully and to change their negative perceptions about other ethnic groups and the political process. We must educate ethnic groups to view others not as rivals or even threats, but as fellow citizens equally committed to peace and social equilibrium.

Ultimately, education becomes a question of values and how best to translate them into reality. Politicians are members of the society, products of its cultural synthesis; they often do not and cannot rise above their communities. It is doubtful whether education can cause wholesale behavioral changes given Nigerians' demonstrable lethargic attitude toward change. Moreover, education leaves undisturbed the fundamental problem that historically has plagued the process: the unfair treatment meted out to other ethnic groups by the dominant Hausa group. This is why the next option becomes crucial.

C. *Partitioning the Nation*

Nigerian boundary lines, like those of most African nations, were arbitrarily drawn with scant regard for the well-being of the inhabitants.[278]

NIGERIAN CONSTITUTION DRAFTING COMMITTEE, 1 REPORT OF CONSTITUTION DRAFTING COMMITTEE xii (Federal Ministry of Information 1976).

277. LEWIS, *supra* note 267, at 83-84.

278. ANTHONY SMITH, THEORIES OF NATIONALISM xxxiv (1983) (noting that African boundary lines were drawn by colonial masters at the 1885 Berlin conference "in complete disregard for the cultural preferences and ethnic sympathies of their populations").

Even the imperialists recognized that the boundary lines were arbitrarily drawn and that national boundaries failed to take into account pre-existing relationships. An after-dinner speech by Lord Salisbury, then British Prime Minister, provided some insight into the mindset of the imperial masters who demarcated the boundary lines. At the end of the Anglo-French convention, which officially designated imperial spheres of influence in West Africa, he stated that "we have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by small impediment that we never knew exactly where the mountains and rivers were."[279] Another British official, who was involved in creating the boundary between Nigeria and Cameroon, spoke similarly about the Nigerian boundaries:

> In those days we just took a blue pencil and a rule, and we put it down at Old Calabar, and drew that line to Yola . . . . I recollect thinking when I was sitting having an audience with the Emir [of Yola] surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.[280]

The creation of the Nigerian nation was rooted in greed, fueled by the arrogant belief that the colonial masters knew what was best for Africans.[281] Compelling hitherto homogenous and autonomous ethnic groups to exist as one nation significantly enhanced the potential for conflicts and rivalries.[282] As Jennifer Parmelee aptly observed: "[B]oundaries that ignored African

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279. J.C. ANENE, THE INTERNATIONAL BOUNDARIES OF NIGERIA 1885-1960, at 3 (1970).

280. *Id.* at 2-3.

281. Scarcely any doubt or question persists about the selfish and economic motives behind the demarcation of Africa in the nineteenth century. *See, e.g.*, Crawford Young, *The Heritage of Colonialism, in* WORLD POLITICS 19 (John W. Harbeson & Donald Rothschild eds., 1991) (noting that Africa, in the rhetorical metaphor of imperial jingoism, was a ripe melon ready for carving in the late nineteenth century. Those who scrambled fastest won the largest slices and the right to consume at their leisure the sweet succulent flesh. Stragglers snatched only small servings or tasteless portions. Italians, for example, found only desserts on their plates.); Mutua, *supra* note 40, at 1115 n.6 (noting that "[m]ost African states are the product of the competitive subjugation of the continent by Great Britain, France, Belgium, Portugal, Italy, and Spain between 1875-1900").

282. Mutua, *supra* note 40, at 1115 n.8, blames the perennial ethnic problems in Africa on colonial policy that grouped diverse ethnic groups under one nation.

> Severe cleavages, those which have been a major source of the persistent problem of the African state, are the direct result of the imposition of colonial rule and the modern state. Ethnic rivalries have arisen because previously independent and self-governing ethno-political nations, characterized in almost all cases by cultural, linguistic, and ethnic homogeneity, have been coerced to live together under single states.

Id.

realities, haphazardly slicing through tribal territories . . . have made Africa uniquely susceptible to tribalism's centrifugal pulls . . . . Most of the continent's civil wars, more than twenty in three decades, have had a significant ethnic component."[283]

Nigeria, from its very inception, was doomed to fail. The country that attained independence in 1960 was "not really a nation, but rather a conglomeration of ethnic groups, with three predominating."[284] Assembling ethnic groups with dramatically different cultural and political assumptions under the umbrella of a nation was a flawed tactic, a mistake that plagues the nation till this very date.[285]

> In 1884-1885 the European imperial powers met in Berlin and without the consent or the participation of the African people, demarcated the continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers. This event was the genesis of many present-day conflicts and virtually insoluble problems in the African continent.[286]

Boundaries artificially demarcated for powerless and unsophisticated rural nineteenth-century African societies can hardly satisfy the aspirations of a

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283. Jennifer Parmelee, *Africa: Bloodied, Torn at its Ethnic Seams*, WASH. POST, July 14, 1994, at A1.

284. M.G. Kaladharan Nayar, *Self Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321, 324 (1975).

285. Deng, *supra* note 71, at 34.

> [T]he colonial nation-state . . . brought together diverse groups that it paradoxically kept separate and unintegrated. Regional ethnic groups were broken up and affiliated with others within the artificial borders of the new state, with colonial masters imposing a superstructure of law and order to maintain relative peace and tranquility . . . . It can credibly be argued that the gist of these current internal conflicts is that the ethnic pieces put together by colonial glue and reinforced by the old cold war world order are now pulling apart and reasserting their autonomy.

Id. This phenomenon is not peculiar to Africa. The artificial demarcation of Europe by the Allied forces following World War II accounts for some of the unrest in the former Soviet Republic and Yugoslavia. *See generally* HURST HAANUM, AUTONOMY, SOVEREIGNTY, AND SELF DETERMINATION (1990); Angela M. Lloyd, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419, 423 n.17 (1994):

> Recurrent violence in the former Soviet Union and Yugoslavia and the bifurcation of Czechoslovakia into separate republics . . . serve as poignant examples of the fact that the forced incorporation of diverse ethnicities into artificially delineated states neither fulfilled 'national' aspirations for autonomy nor engendered any lasting sense of 'nationalism' in the state.

286. T.O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW viii (1988).

twenty-first century continent.[287] Economic and social development, increased political awareness, and education have increasingly focused attention on the propriety of nineteenth-century boundaries drawn by imperial fiat.[288] Also, the inequities suffered by minority ethnic groups have led repeatedly to the clamor for separate nations. The unsuccessful 1967 secessionist attempt by Ibos in Nigeria[289] and the more recent demands by the Ogonis for a separate nation accurately depict widely shared partition sentiments by ethnic minorities in Nigeria.[290]

Some ethnic groups have realized that independence did not translate into the end of oppression, and the beginning of justice and economic prosperity. As Albie Sachs noted:

> [T]he elimination of [colonialism] does not guarantee freedom even for the formerly oppressed. History unfortunately records many examples of freedom fighters of one generation who became the oppressors of the next. Sometimes the very qualities of determination and sense of being involved in a historic endeavor which give freedom fighters the courage to raise the banner of liberty in the face of barbarous repression, transmute themselves into sources of authoritarianism and historic forced marches later on. On the other occasions, the habits of clandestinity and mistrust, of tight discipline and centralized control, without which the freedom fighting nucleus would have been wiped out, continue with dire results into the new society.[291]

Self-government and constitutional democracy have frequently produced the twin evils of exclusion of minority groups from the governance process and human rights violations.[292] The democratic process, especially the principle

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287. Helman & Ratner, *supra* note 8, at 5 (noting that it is impossible to be certain that the political boundaries created under colonialism will in the end prove sustainable).

288. Magnarella, *supra* note 268, at 330, notes:

> Despite the ethno-nationalist rhetoric following World War I, most of the emerged states were not true "nation-states." Most incorporated multi-ethnic populations and subsequently experienced inter-ethnic conflict. Today many states are wrestling with two conflicting principles: 1) the right of nations to self determination; and 2) the inviolability and political integrity of sovereign territory, regardless of how that territory may have been acquired or how culturally diverse its population may be.

289. For an account of the Biafran secessionist attempt, see ST. JORRE, *supra* note 19.

290. For a detailed study of Ogoni demands, see Osaghae, *supra* note 227.

291. ALBIE SACHS, THE FUTURE OF CONSTITUTIONAL POSITION OF WHITE SOUTH AFRICANS 108-09 (1990), *in* Adrien Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT'L L. 689, 691-92 (1995).

292. *See* THE FAILURE OF THE CENTRALIZED STATE, *supra* note 11; COLLAPSED STATES, *supra* note 7.

of majoritarian supremacy, has been used to justify marginalization of minority ethnic groups. For example, both the parliamentary system of government practiced between 1960 and 1966 and the presidential system introduced in 1979 go on the assumption that majority rule is the essence of democracy. Because political alignments run along ethnic lines, democracy often produces permanent minorities. This is especially true in Nigeria, where some ethnic groups are much bigger than others.[293] The Hausa ethnic group, the biggest in Nigeria, has produced more presidents than have all the other ethnic groups combined.[294] The Hausa's record of marginalizing other ethnic groups has tremendously affected the search for social equilibrium in Nigeria: citizens from other ethnic groups are less inclined to play by the rules and sometimes behave in ways inimical to the overall interest of the nation.[295] In pluralistic societies, democracy can only translate into social equilibrium if the majority voluntarily checks its excesses and avoids actions that threaten the minority's existence.

Voluntary self-restraint is an exorbitant commodity in Nigeria, given a pervasive culture and a long history of arrogance. In Nigeria, as in most developing nations, cases abound where the majority ethnic group forcibly tries to impose its cultural and religious preferences onto other ethnic groups.[296] Minority ethnic groups' opposition to this forced conformity and injustice results in conflicts.[297] A movement toward heightened ethnic consciousness results in a call for an end to injustice and, more fundamentally, a call for partition. Only a nation of their own can satisfy minority groups' quest for freedom and guarantee both control of their destinies and a brighter future for their children.[298]

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293. *See* COLEMAN, *supra* note 26.

294. The only exceptions are General Ironsi, an Ibo, who ruled from January to July, 1966, and General Obasanjo, a Yoruba, who ruled from 1976 to 1979. General Obasanjo assumed office following the assassination of General Mohammed.

295. RABUSHKA & SHEPSLE, *supra* note 216, at 90 (noting that "majoritarianism" is the cause of the dominant community and their paradigm of politics in plural societies involves the sectional domination of decisional processes, a decline in democratic competition, electoral machination and political violence resulting in the destabilizing of the whole polity).

296. Forced assimilation techniques range from the damnable ethnic cleansing to exclusion from power.

297. Magnarella, *supra* note 268, at 333 (noting that "[a]ttempts by state governments to force diverse cultural populations into the majority ethnic mold have frequently led to human rights abuses").

298. Despite stiff opposition from international bodies and super powers, partitioning is gaining currency in the world. Eriterea broke away from Ethiopia and became an independent state in 1993. The former Soviet Union was broken into fifteen independent states: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikstan, Turkmenistan, Ukraine, and Uzbekistan. The former Yugoslavia was partitioned into six separate sovereign states: Bosnia-Herzegovina, Croatia, Macedonia, Slovenia, Serbia, and Montennegro. *See* Russell W. Howe, *Countries Are Breaking into*

Persistent clamor for statehood raises crucial questions: should African nations continue to ignore the enormous costs, human and material, involved in forcing unwilling ethnic groups to coexist? How long will African nations endure the pains of statehood inflicted on them by colonial masters for purely selfish reasons? Do Europeans, who arbitrarily thrust nationhood on unwilling and ill-prepared ethnic groups, have a moral responsibility to help African nations in finding a solution to the problem?[299]

African countries, upon attaining independence, had two basic options: redraw boundary lines to correct the errors of colonialism or accept the borders drawn by the imperialists. Opinions have differed considerably depending upon sentiments of the agitators. Some condemned the boundary lines arbitrarily drawn by colonial masters and called for "the abolition or adjustment of such frontiers at an early date."[300] Others, especially political elites eager to assume the reigns of power, felt that restructuring borders would delay the attainment of independence and "opted for maintaining extant lines as the most feasible method for speedy decolonization."[301]

Neither time nor circumstance has dulled the relevance of revisiting African border lines. Once overshadowed by the struggle for independence and endemic ethnic conflicts, political and economic crises in Africa continue to bring to the fore the highly controversial question of redrawing boundary lines.[302] Some writers recognize that ethnic conflicts are endemic in Africa

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Ministates and That's not Necessarily Bad, BALTIMORE SUN, Jan. 1994, at E8.

299. There is debate, largely academic, about what the appropriate response should be. Some advocate recolonization as the solution to Africa's political problem. *See, e.g.*, William Pfaff, *A New Colonialism? Europe Must Go Back to Africa*, 74 FOREIGN AFF. 1 (1995). Ali Mazrui, one of Africa's leading scholars, argues that the successive collapse of the state in one African country after another creates the need for recolonization of Africa. *See* Ali Mazrui, *The Message of Rwanda: Recolonize Africa?* N. PERSP. Q., Fall 1994, at 18. The recolonization proposed by Mazrui rests on humanitarian grounds and differs from European colonization because Africans would supervise it. Under the proposal, an African Security Council composed of five African states—Egypt, Ethiopia, Zaire, South Africa, and Nigeria—acting in concert with the United Nations, will restore peace and order in troubled African states. *See* Ali Mazrui, *Maybe Time Has Come to Recolonize Africa*, HOUST. CHRON., Aug. 3, 1994, at A27. Other suggestions include setting up a trusteeship under the auspices of the United Nations whereby the U.N. would act as the administering authority in troubled states. *See* Helman & Ratner, *supra* note 8, at 3.

300. *See* COLIN LEGUM, PAN AFRICANISM: A SHORT POLITICAL GUIDE 228, 231 (Resolutions Adopted by the All-African People's Conference, Accra, Dec. 5-13). One of the resolutions condemned artificial frontiers drawn by imperialist powers to divide the peoples of Africa and called for the abolition or adjustment of such frontiers at an early date.

301. Steven Ratner, *Drawing A Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 595 (1996). Ian Brownlie also notes that "Africa[n] boundaries which intersected ethnic territories were retained after independence to avoid disputes and threats to peace in Africa." IAN BROWNLIE, BASIC DOCUMENTS ON AFRICAN AFFAIRS 360 (1971).

302. Richard Mukisa identifies three factors as being responsible for rekindling the

but contend that partitioning would not be the best cure. Opponents of partition argue that granting desirous ethnic groups the right to secede will result in the proliferation of nations. One writer rules out partition as an option and maintains that "Africa is too integrated to be retribalized and too poor to be chopped up further into beggar republics."[303] Some also argue that complaining minorities and a domineering majority will always exist. Redrawing boundary lines might, therefore, serve only to reproduce problems that lead to agitation for separate states.[304] A 1922 report submitted to the United Nations by the Commission of Rapporteurs on the Aaland Island Question stated:

> To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in the international life.[305]

Even in the face of overwhelming evidence of civil strife, partition demands Nigeria face two seemingly insurmountable obstacles. First, international organizations, including the United Nations and the Organization of African Unity, are reluctant to assist ethnic groups seeking autonomy as such bodies have consistently favored the inviolability of a nation's sovereignty and territorial integrity. The Organization of African Unity (OAU) has ill-advisedly emphasized the inviolability of existing boundary lines and refused to review partition demands by oppressed minorities.[306] The OAU, as far back as 1963, resolved "to respect the

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discussion about redrawing Africa's boundary lines: (1) the determination of the African political leadership to resolve the continent's current economic crisis; (2) Africa's increasing realization that peace and security are the prerequisites for the economic development of the continent; and (3) the urgent need to curb political crisis. Richard S. Mukisa, *Toward a Peaceful Resolution of Africa's Colonial Boundaries*, 44 AFR. TODAY 7 (1997).

303. Pauline Baker, *Carving up Africa Isn't the Way to Help*, INT'L HERALD TRIB., Aug. 9, 1994.

304. Former United States Secretary of State Warren Christopher stated at his confirmation hearing that "[i]f we don't find some way that the different ethnic groups can live together in a country, how many countries will we have? . . . We will have 5000 countries rather than the hundred plus we now have." David Binder, *As Ethnic Wars Multiply, United States Strives for a Policy*, N.Y. TIMES, Feb. 7, 1993, at 1.

305. *Report Presented by the Comm. of Rapporteur on the Aaland Islands Question*, League of Nations Doc. C. 21/68/106 VII, at 28 (1921).

306. *See* ORGANIZATION OF AFRICAN UNITY CHARTER, 479 U.N.T.S. 39, 2 I.L.M. 766 (1963). Article II of the Organization of Africa Unity Charter enjoins member states to defend their territorial integrity and independence. Article III further requires member states to "solemnly affirm and declare their adherence to the principle of respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence."

frontiers existing on their achievement of independence."[307] The OAU stand, in effect, puts the ethnic groups on notice that partition or redrawing border lines would never be an option. The United Nations, for its part, hides under the policy of non-interference in internal affairs of states to deny assistance to ethnic groups fighting for partition.[308] Ethnic groups desirous of asserting a right of self-determination find themselves in a quandary: alienated from the political process, often robbed of their rights and brutally denied the right of self determination. Henry Richardson succinctly captures the plight of minority ethnic groups and the attitude of African governments:

> A state may indeed be disintegrating because its government will not justly represent the fundamental interests of a dissident defined people who may be occupying a designated territory. Secession being illegal and cession being a loss of political face to the ceding national government, military force is all too often called upon, justified not only under claims of law prohibiting secession but under various slippery slope arguments advocating suppression as the only remedy against the dissolution of the entire national state.[309]

National sovereignty and territorial integrity should be respected so long as ethnic groups' rights to self-determination and basic human rights are not compromised. International agencies should anchor the much taunted search for new world order on self-determination and respect for human rights, rather than on national sovereignty.[310] In contrast, a policy that emphasizes national sovereignty over self-determination will simply embolden despotic regimes and majority groups to engage in acts of oppression and human rights violations. Nations should be encouraged to redraw boundary lines whenever the current government fails to meet the

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307. BROWNLIE, *supra* note 301, at 361 (quoting OAU Resolution on Border Disputes (1964)).

308. The United Nations has limited its involvement to peace-keeping, placing itself between two opposing factions (Somalia and Bosnia are two recent examples). *See* H.E. Boutros Boutros-Gali, *Beyond Peace Keeping*, 25 N.Y.U. J. INT'L L. & POL. 113, 114-15 (1992). United Nations peace-keeping efforts proceed under two broad heads. First, where the warring parties exhibit the political will necessary for a successful intervention (*i.e.* willing to keep the peace), the United Nations will intervene and keep the peace. Examples include Cambodia, Mozambique, Namibia and El Salvador. The second is where the United Nations intervenes regardless of the consent of the parties. Examples include Somalia and Rwanda. *Id.* at 116-17.

309. Henry Richardson III, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 45 (1996).

310. For an interesting analysis of the central tenets of the new world order, see Ernest Easterly III, *The Rule of Law and The New World Order*, 22 S.U. L. REV. 161 (1995).

aspiration of its people. To continue to ignore minority rights violates basic standards of decency and makes a mockery of human rights championed by the United Nations and the "super powers."

The second impediment to redrawing boundary lines is national governments' adamant opposition to such a measure. The Nigerian government, ostensibly encouraged by international bodies' commitment to national sovereignty, remains adamantly committed to the nineteenth-century boundary lines. Even in the face of imminent disintegration, the Nigerian military regime has squelched all attempts to discuss the option of partition.[311] Nigeria's blind and unquestioning commitment to national boundaries contradicts sentiments expressed at the West African Conference held in Berlin, at which Africa was demarcated. The conference implicitly conceded that national boundaries are not cast in stone: "Possibilities and new requirements will probably reveal themselves and the time may arrive when a wise foresight will demand the revision of a system which was primarily adapted to a period of creation and of change."[312] Nigeria, like all nations plagued by ethnic conflicts, must weigh and balance the benefits of partition against the dubious benefits of national sovereignty. African countries should critically and dispassionately re-examine boundary lines to assess the effect of existing boundary lines on social equilibrium. African nations need to determine whether they can afford adamant commitment to national sovereignty, especially in the face of overwhelming evidence of ethnic strife and social unrest. Social equilibrium enjoyed by countries that have been successfully partitioned clearly demonstrate that the benefits of partition far outweigh the need for preserving a nation's territorial integrity.[313]

Dramatic changes in Nigeria and the African continent demand that we revisit the boundary lines artificially drawn in the nineteenth century.[314] Boundary lines are not cast in stone; they can and should be changed if doing so will promote peace and equilibrium. Nigerian and indeed all African nations should listen to Richard Mukisa, who advised: "One must avoid the

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311. General Sanni Abacha, Nigeria's current head of state, recently stated that "the country's unity is not a subject for negotiation." *Abacha Says Country's Unity Non-Negotiable at Constitutional Conference* (BBC Summary of World Broadcast, Dec. 13, 1993).

312. *General Act of the Berlin West African Conference*, art. 36 and annex 3 to protocol no. 9 of the General Act, *reprinted in* R.J. GAVIN & J.A. BETLEY, THE SCRAMBLE FOR AFRICA: DOCUMENTS ON THE BERLIN WEST AFRICAN CONFERENCE AND RELATED SUBJECTS 1884/1885, at 278-300 (1973).

313. Relative peace in the former Soviet Union and the former Yugoslavia amply illustrate that Balkanization can lead to peace.

314. Herbst, *supra* note 223, at 203 (commenting that so much has changed in Africa and the rest of the world, and the development record of Nigeria and other countries has been so stark that the principle that Africa cannot change the nature of its governing units should be thrown open to debate).

temptation to view the present patchwork of countries on the map of Africa as unchangeable and indispensable. Instead, the focus should be on how to peacefully reorganize the patchwork to maximize the prospects for Africa to become a zone of peace and prosperity."[315]

Nigeria as presently constituted has no answer to the coming anarchy, chiefly because various ethnic groups are pitted irredeemably against each other. Restoration of a civilian administration simply masks the problem or perhaps changes its dynamics or size. The calm that currently exists in Nigeria is due to the attitude of the current military dictatorship that sternly sets its face against all kinds of agitations and complaints.[316] Numbing ethnic tensions have been a simple task for brutal military dictators who easily choke off ethnic agitations by intimidation. Restoration of a civilian administration will provide a climate and opportunity for ethnic groups to express their concerns. Freed from the pangs of despotism and emboldened by the freedoms conferred by the democratic process, ethnic groups will renew their age long rivalries and agitation for increased access to the machinery of government.[317] Civilian administration will "lay bare ethnic tensions that have long simmered under the suppression of a dictator's boot."[318]

The only way to prevent the coming anarchy is to redraw boundary lines. Boundary lines can be peacefully redrawn; bloodshed is neither necessary nor inevitable. Existing boundary lines need not be "washed clean with buckets of blood."[319] Redrawing boundary lines is an effective way of numbing ethnic tensions and conflicts that threaten social equilibrium in Nigeria. Nigeria can be broken into three countries, along the lines of the three predominant ethnic groups. The first nation should comprise of states in the old Northern province. The second nation should consist of states in the old Western Nigeria. The third nation should comprise of states in the old Eastern Nigeria. These suggested nations are merely illustrative and not definitive. I proffer the creation of these states to provoke serious discussion

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315. Mukisa, *supra* note 302, at 21.

316. Adams, *supra* note 20, at 29 (noting that the army may be the only institution able to run this unwieldy country as one and its short-term horizons (controlling and benefitting from oil money) are taking their toll on a corrupt, wasteful, and spectacularly mismanaged economy); Benjamin Schwarz, *The Diversity Myth: America's Leading Export*, ATLANTIC MONTHLY, May 1, 1995, at 57 (noting that stability within divided societies is normally based on some form of domination and once internal differences become violent, usually only the logic of force can lay them to rest).

317. Schwarz, *supra* note 316, at 57 (commenting that democracy, which permits—in fact encourages—competition for power and benefits among contesting groups, actually exacerbates internal tensions and conflicts).

318. Darton, *supra* note 89.

319. Ali Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, INT'L J. REFUGEE, July 1995, at 22.

and good faith inquiry into the problems of post-independent Nigeria. Whatever boundary lines that ultimately emerge should be predicated on consent and voluntary association of all the parties involved. Unlike the imperialists who based boundary lines on geographical features,[320] the central focus of the Balkanization process should be to preserve the cultural homogeneity of the disparate ethnic groups that now comprise the nation called Nigeria. Partition along ethnic lines worked for Europe; nothing suggests that redrawing boundary lines will not produce similar results in Africa.[321]

Partitioning ethnic groups with common language, religion, and cultural and political ethos into one nation will make it much easier for civil society to develop into a nation-state, thus preventing many tensions posed by the existence of three parallel societies within one nation.[322] New nation-states consisting of homogenous groups will be in a much better position to devise political and legal structures that will preserve the heritage and custom of its inhabitants.

The fear that partition will increase demands for self-determination is not persuasive in Nigeria. Partition demand in Nigeria rests entirely upon a different assumption: to correct the errors of colonialism.[323] The three

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320. IAN BROWNLIE, AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA 6 (1979).

321. WASH. TIMES, Apr. 26, 1994, at A18. Sam Onwuesbu notes that "Europe has been divided into bits and pieces along ethnic lines—England, France, Ireland, the Netherlands, Italy, Germany, Sweden, Denmark, Poland, Greece, etc. If these ethnic partitions were good for Europe, they would be perfect for Africa." *Id.*

322. *See* Art Hansen, *African Refugees: Defining and Defending Their Human Rights, in* HUMAN RIGHTS AND GOVERNANCE IN AFRICA 161-62 (Ronald Cohen et al. eds., 1993):

> The term 'nation' refers to a group that shares a common history and identity and is aware of that; they are a people, not just a population. Using that definition, ethnic groups (once called tribes) in Africa are also nations. None of the new African states were originally nation-states because none of them were nations as well as states. Each of the new states contains more than one nation. In their border areas, many new states contain parts of nations because the European-inspired borders cut across existing national territories.

See also Abdullahi Ahmed An-Na'im, *The National Question, Secession and Constitutionalist: The Mediation of Competing Claims to Self Determination, in* STATE AND CONSTITUTIONALIST: AN AFRICAN DEBATE ON DEMOCRACY 101 (Issa G. Shirji ed., 1991):

> If we define a 'nation' simply as a people of common ethnicity and culture, the term nation-state is somewhat a misnomer because it is very rare for the population of a nation-state to consist of a single nation. In the vast majority of cases, and universally throughout Africa, the population of the nation-state consists of several "nations."

323. Osaghae, *supra* note 227, at 343 (contending that the Nigeria federation as it presently exists is an anomaly because the various ethnic groups have not been allowed to decide whether they want to continue to belong to it or not since the British "forced" them into union in 1914).

major ethnic groups in Nigeria are not just geographical areas; they are culturally, ethnically, and linguistically different from each other. Artificially joined by colonial fiat, they have never truly harmoniously coexisted. Peace cannot be secured by compelling culturally and linguistically different people to live together. The three major ethnic groups in Nigeria have no common bonds of nationhood; they are united by mutual disdain for one another.

A complex of factors renders a nation viable including willingness and desire to identify with and make the necessary connection with the nation. Such intangibles cannot be imposed upon the inhabitants of Nigeria. For some Nigerians, the state called Nigeria symbolizes oppression, a damnable legacy of colonialism that ensured Hausa domination.[324] Fear of domination has produced a cautious, even skeptical citizenry that questions every integrationist attempt. The net result of this existence is that ethnic consciousness has been raised to such a level that most Nigerians celebrate ethnicity above the nation. No political arrangement will ever succeed in shifting allegiances from the ethnic groups to an abstract entity called Nigeria.[325] It is time for the ethnic groups to part ways. Holding together and trying to democratize warring and implacable ethnic groups is a futile exercise that guarantees endless violence and postpones other political development.[326]

Problems in multi-ethnic countries have never been meaningfully resolved through legal rules, including constitutional democracy. Concession, compromise, observance of rules that safeguard against abuse, and love for the nation are elements that produce peace in a nation and cannot be secured through constitutional rules. Legal rules alone have never been able to negate the avalanche of ethnic distrust or transform ethnic irredentists into true nationalists. Nigeria needs to act decisively to avoid replicating the mistakes of the past. We cannot hold on to the territorial integrity at all costs. The government's failure to treat minority ethnic groups fairly has greatly compromised Nigeria's viability as a nation. How long must minority ethnic groups worship a god that is indifferent to their cause? Can we in all honesty expect citizens to be loyal to a "bankrupt and

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324. The statement by a 32-year farmer interviewed by Alec Russell of London's *Daily Telegraph* represents widely shared negative sentiments about the Nigerian nation. The man, who had been arrested and tortured three times, stated: "Nigeria means nothing to me. . . . How can you live in a place where your freedoms are denied? What we see every day is intimidation, threats and detention." DAILY TELEGRAPH (London), Oct. 1995, *available in* 1995 WL 8039288.

325. Magnarella, *supra* note 268, at 333 (noting that historically, diverse ethnic populations with a tradition of mutual animosity have not found common citizenship in a single state a sufficient basis for social harmony; on the contrary, the state form has simply become the new arena for inter-ethnic political and economic battles).

326. Schroeder, *supra* note 25, at 161.

abusive entity"?[327] In 1968, Tanzania recognized Biafra as an independent state contending that since Nigeria had failed the Ibos, they owed it no loyalty. In according recognition to Biafra, Tanzania's government noted:

> When the state ceases to stand for the honor, the protection, and well being of all its citizens, then it is no longer the instrument of those it has rejected. In such a case, the people have the right to create another instrument for their protection—in other words, to create another state.[328]

Preserving a nation's territorial integrity is a highly desirable goal, but the blood of innocent citizens should not water it. Pursuing the vision of one Nigeria is inherently problematic and carries a tremendous potential for another civil war. In the short term, it guarantees endless military coups. Ambitious military officers will always use ethnic rivalries as a convenient excuse to intervene in the political process forcibly. When a state loses its raison d'etre, which is the provision of a safe and conducive environment for citizens to pursue material and moral upliftment, it must be dismantled.[329] Nigeria is on the brink of collapse.[330] A confused military dictatorship and ethnic strife have overwhelmed all the elements that preserve equilibrium in society.[331] The only way out is to partition the country. Dividing the

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327. Mutua, *supra* note 40, at 1165.

328. *The Tanzania Government's Statement on the Recognition of Biafra*, Apr. 13, 1968, *in* FOREIGN POLICY OF TANZANIA 1961-1968: A READER 275, 278 (Mathews & Mushi eds., 1981).

329. *See* Makau Mutua, *Putting Humpty Dumpty Back Together Again: The Dilemma of a Post-Colonial African State*, 21 BROOK. J. INT'L L. 505, 509 (1995):

> A state is not an end in itself but a means to the creation of conditions for the happiness of the highest possible number of people. When the basic premise is violated, and is no longer the rationale for the existence of the state, then it becomes questionable why anyone would advocate the "redemption" of such an entity.

See also Mazrui, *supra* note 319, at 23 (listing six crucial functions of statehood: exercise sovereignty and control over territory, have sovereign oversight and supervision of the nation's resources, exercise an effective and rational collection of revenue, maintain adequate national infrastructure such as roads and telephone system, have capacity to govern, and maintain law and order).

330. DIAMOND, *supra* note 12; Paul Adams, *Africa's Next Pariah*, AFR. REP., May-June 1995, at 45 (contending that Nigeria's gradual disintegration through collapsing infrastructure and the decline of government institutions is a real but long-term threat to the centralized state; Nigeria has been left far behind by South Africa, politically as well as economically, but the danger is that it could follow the path of Zaire: disjointed, almost ungovernable, and abandoned by the rest of the world except for a few companies interested in extracting its mineral wealth).

331. The U.S. State Department's Bureau of Intelligence and Research notes:

> Nigeria is becoming increasingly ungovernable . . . . Ethnic and regional splits are deepening, a situation made worse by an increase in the number of states

country into homogenous nation-states is a much better option than trying to patch the country together "with ingenious but unworkable power sharing schemes."[332]

Speaking of an ingenious power-sharing scheme, the new Nigerian constitution, which takes effect in 1998, prescribes power-sharing schemes under which the presidency and key elective posts will rotate among the ethnic groups in the country.[333] The Head of State, General Sanni Abacha, in his 1995 independence speech explained the reasons for a rotational presidency:

> The Provisional Ruling Council decided that on the higher and long term national interest, the proposal of rotational power sharing should be accepted. This option will apply to all levels of government. The Provisional Ruling Council has also endorsed a modified presidential system in which six key executive and legislative offices will be zoned and rotated between identifiable geographical groupings. In the implementation of this provision, the country has been divided into six zones: North-east, North-west, Middle Belt, South-west, East Central and Southern minorities. The national political offices which will be filled by candidates on rotational basis are: the president, the vice president, prime minister, deputy prime minister, senate president and speaker of the house. The power sharing arrangement which will be entrenched in the constitution shall be at the federal level and applicable for an experimental period of thirty years.[334]

The proposal to rotate the presidency and other key elective posts among the ethnic groups implicitly acknowledges that democracy cannot work in Nigeria as presently constituted. Though the plan reflects bold moves to allay the fear of domination widely nursed by ethnic groups in Nigeria, it risks doing more harm than good. How do we decide which ethnic group will produce the first president? What happens, if after the first term, the

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> from 19 to 30 and a doubling in the number of local governing authorities; religious cleavages are more serious . . . . The will to keep Nigeria together is now very weak.

Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994.

332. Lind, *supra* note 27, at 98.

333. The power-sharing scheme parallels the federalist and conscotional principles contained in the New South Africa Constitution. *See* ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A NEW SOUTH AFRICA: A COMPARATIVE PERSPECTIVE (1994).

334. W. AFR., Oct. 9, 1995, at 1556 (General Sanni Abacha, 1995 Independence Anniversary Broadcast).

military aborts the process?[335] Would the division of the country into six zones not enthrone zonal loyalties at the expense of national loyalty?

Nigerians have sufficient historic justification to be skeptical about the efficacy of the power-sharing scheme.[336] The history of Nigeria suggests that legal rules have no enduring significance: politicians disregard them with impunity[337] and they have never bound the military.[338] Nigeria has reached a point where the social realities, especially ethnic rivalries, can no longer be ignored or treated as aberrant conduct of a few that executive fiat can easily correct.[339] No legal rule or power sharing, however ingenuous, can calm minority ethnic groups' apprehension of the nation-state, particularly the majority group's commitment to the minority's well-being. Nigerians must rise above this seductive, even fanciful, but untenable idea that power sharing will promote national loyalty and social equilibrium. The power-sharing scheme proposed by the fourth republic starting in 1998 should be

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335. Adams, *supra* note 20 (commenting that the debate about president by rotation is academic unless the armed forces intend to leave government to civilian hands long enough for all six regions to have their share of top political offices).

336. Professor Julius Ihonvbere's cynicism about the workability of the new rotation of power arrangement probably reflects the view widely shared by most Nigerians. He stated:

> This is not the first time that the idea of "zoning" or "rotating" key posts has been tried in Nigeria. It has never worked. Those who begin the process will not only want to hold onto power, but also to incapacitate others and reproduce themselves. The creation of multiple levels of authority will merely weaken government and administration in a political system where the state is the fastest avenue to capital accumulation. Moreover, without enabling civil society to accommodate popular interests, it is doubtful if the mere multiplication of political positions and rotation of power will lead to genuine democratization.

Julius O. Ihonvbere, *Are Things Falling Apart? The Military and the Crisis of Democratization in Nigeria*, 34 J. MOD. AFR. STUD. 193, 221 (1996).

337. Constitutional rules have no enduring significance in Africa. Constitutions, according to Green,

> do not in any meaningful sense represent the goals or operating principles of any significant interest groups/sub-classes, are not seen as relevant to constitutional orders, and exist because it is believed that, like national anthems, coats of arms and flags, constitutions, and "development plans" are something that states have to have for ceremonial and formal symbolic purposes.

Reginald H. Green, *Participatory Pluralism and Pervasive Poverty: Some Reflections*, THIRD WORLD LEGAL STUD. 21, 27 (1989).

338. The frequency of military assumption of political authority creates considerable doubts in the minds of many Nigerians about the durability of the scheme. Upon assumption of office, the military abolishes all political institutions and structures thus rendering irrelevant all power-sharing schemes.

339. DIAMOND, *supra* note 12 (commenting that the country's ethnic, regional, and religious cleavages cannot be resolved by force or fiat or denial of reality; they can only be eased and managed through an open political process that takes frank stock of the fears, grievances, and resentments on all sides and then crafts a new political framework, with popular legitimacy, to enable contending groups to compete and coexist with mutual security).

exposed for what it is: a convenient scheme designed by the ruling political elites to achieve short-term equilibrium to enable them to continue their shameless expropriation of the nation's resources.[340]

V. CONCLUSION

This paper has clearly shown that the idea of restoring social equilibrium through democracy is profoundly misconceived. Restoration of civilian administration cannot guarantee respect for human rights and preservation of democratic ideas. Brief experiments with democracy in Nigeria did not halt the phenomenon of ethnic rivalries. Oppression of minorities remained despite constitutional injunctions of equality and justice. So also did human rights violations, corruption, and exclusion of minorities from the governance process feature prominently in the political landscape. Dr. Mutua's pessimism about the workability of democracy in Africa is more well-founded than the reassurances of self-serving African political elites and their foreign cronies:

> It will not suffice to democratize the post-colonial state; as a fundamentally undemocratic entity in concept and reality, it is incapable of genuine democratization. Africa's political map must first be unscrambled and the post-colonial state disassembled before the continent can move forward. Put differently, the form and physical substance of the colonial state must be completely dismantled; otherwise, its tightening noose will strangle the entire continent.[341]

Nigeria cannot continue the costly experiment with democracy without risking the lives of its citizens. No Nigerian citizen confronts, without a feeling of despair, the civil strife, political instability, massive human rights violations, and economic deprivations that flow from failed attempts at establishing democracy. To avoid further destruction and relieve Nigerians from the tyranny of the dominant ethnic group, partition has become an unavoidable solution.[342] Wole Soyinka's message deserves more credit than

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340. Democracy and transition from military to civilian administration programs hold an addictive appeal to ethnic chieftains with access to power and the national treasury. JOSEPH, *supra* note 28, at 53 (characterizing democracy as a crucial defense by small groups to protect their access to the public till).

341. Mutua, *supra* note 40, at 1162.

342. Professor Ali Mazrui predicts that

> [o]ver the next century the outlines of most present-day African states will change in one of two main ways. One will be ethnic self-determination, which will create smaller states, comparable to the separation of Eriteria from Ethiopia. The other will be regional integration, towards larger political

it has received:

> We should sit down with square rule and compass and redesign the boundaries of African nations. If we thought we could get away without this redefinition of boundaries back when the Organization of African Unity was formed, surely the instance of Rwanda lets us know in a very brutal way that we cannot evade this historical challenge any longer.[343]

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communities and economic unions.

Ali Mazrui, *The Bondage of Boundaries*, ECONOMIST, Sept. 11, 1993, at 28.

343. ECONOMIST, Sept. 10, 1994, at 16.

EXTENDING THE FIREMAN'S RULE TO GREAT BRITAIN: PROTECTING BRITISH CITIZENS FROM TORT LIABILITY FOR FIREFIGHTERS' LINE-OF-DUTY INJURIES

I. INTRODUCTION

No one can reasonably argue that firefighting is not a career filled with hazards.[1] The men and women who serve our communities as firefighters routinely face such perils as structural collapse, burns, smoke inhalation, and heat exposure injuries. Considering the hazardous nature of the profession, firefighters will inevitably be injured while on duty. Naturally, firefighters will seek compensation for these line-of-duty injuries.

This note analyzes the methods that are appropriate to achieve the dual ends of compensating firefighters and avoiding the overburdening of citizens who call upon fire services for help. As will be discussed at length, the United States and Great Britain approach this compensatory dilemma from opposite directions. In Great Britain, tort law is applied to negligent landowners whose actions result in injuries to firefighters in the same manner that tort law is applied to any other British tortfeasor. The United States, on the other hand, generally denies firefighters recovery in tort for injuries caused by the actions of negligent landowners. The United States bases its denial of recovery upon the doctrine that has become known as the Fireman's Rule.[2] As will be demonstrated, the Fireman's Rule provides a more just and efficient approach to tort liability for firefighters than does the system used in Great Britain. To achieve the highest level of fairness and efficiency with respect to both British firefighters and British citizens, Great Britain should adopt the Fireman's Rule as it exists in the United States.

What is the Fireman's Rule?[3] "The classic formulation of the rule

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1. The National Fire Protection Association (NFPA) reported that there were 95,400 firefighters injured while on duty in 1994, and of that total, 52,875 of the injuries occurred to firefighters while on the fire scene. NFPA, *NFPA Fire Facts: U.S. Fire Loss Statistics for 1994* (visited Nov. 16, 1997) <http://www.theskanner.com/special/special96/fire/fe13.shtml>. Additionally, the United States Fire Administration reports that 94 firefighters died while on duty in 1996. United States Fire Admin., *National Fire Programs: Firefighter Fatalities in the United States in 1996* (visited Nov. 16, 1997) <http://www.usfa.fema.gov/nfde/ff_fat.htm>. The report did, however, indicate that "[t]he overall trend in firefighter fatalities is down 35% over the last 10 years" with deaths during that interval ranging from a high in 1978 of 171 deaths to a low of 75 deaths in 1992. *Id.*

2. The Rule may also be called the Firefighter's Rule, the Professional Rescuer Doctrine, or other variations of these names. However, because the Rule is traditionally called the Fireman's Rule, that is the name that will appear throughout this note.

3. While the term "Fireman's Rule" only mentions firefighters, the Rule also applies to police officers. Arguably, other occupations could also be subject to the Fireman's Rule. For example, the veterinarian who is bitten by a dog could logically be placed within the Fireman's Rule, because the hazard of being bitten is inherent when working with animals.

holds that 'negligence in causing a fire furnishes no basis for liability to a professional fireman injured [while] fighting the fire.'"[4] The Fireman's Rule is also defined as the "[d]octrine which holds that professionals, whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their professional capacity."[5] Simply stated, under the Fireman's Rule, firefighters and police officers will not be able to recover in tort for injuries resulting from the negligent conduct requiring their response.

The British legal system has been steadfastly opposed to the Fireman's Rule. Indeed, at least one British judge has gone so far as to say that "the American 'fireman's rule' has no place in English law."[6] British courts think it illogical to place firefighters and police officers at a "disadvantage" in recovering for the negligence of others simply because they have taken it upon themselves to protect lives and property. Instead, British courts find recovery by firefighters and police officers compelling because the presence of firefighters and police officers is foreseeable in circumstances of emergency. In light of this sharp contrast between the British and American systems, it is important to understand the bases for the American and British rules regarding firefighters' ability to recover in tort.

This note considers the advantages to both the British justice system and British citizens should Great Britain adopt the Fireman's Rule. Through a discussion of firefighters' status as *sui generis* entrants of land,[7] the doctrine of assumption of risk, and economic efficiency, this note demonstrates that the application of the Fireman's Rule in Great Britain is not only just, but also essential to maintaining the integrity of the British torts

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Since the veterinarian is not publicly employed, however, he is barred from recovery by what may simply be called assumption of risk. *See* Carter v. Taylor Diving and Salvage Co., 341 F. Supp. 628 (E.D. La. 1972), *aff'd*, 470 F.2d 995 (5th Cir. 1973) (denying recovery to doctor employed to render emergency services).

But cf. Solgaard v. Guy F. Atkinson Co., 491 P.2d 821 (Cal. 1971) (allowing recovery by a doctor who, after being hired by the company to render medical services, was injured executing this task in a trench rescue). In refusing to apply the Fireman's Rule, the court noted that "[i]t is not . . . a doctor's business to cope with steep, slippery embankments. Plaintiff agreed only to furnish medical aid to injured employees; he did not further agree to expose himself to risks and hazards not necessarily inherent in the performance of his services." *Id.* at 825-26. *See also* Kowalski v. Gratopp, 442 N.W.2d 682 (Mich. Ct. App. 1989) (holding that the Fireman's Rule must be limited to public employees).

4. Seibert Sec. Serv., Inc. v. Migailo, 22 Cal. Rptr. 2d 514, 518 (Cal. Ct. App. 1993) (quoting Walters v. Sloan, 571 P.2d 609 (Cal. 1977)).

5. BLACK'S LAW DICTIONARY 438 (6th ed. 1991).

6. Ogwo v. Taylor [1987] 3 All E.R. 961, 966 (H.L.) (Bridge, L.J.).

7. *Sui generis* means "of its own class." The reason firefighters are considered members of their own class is because they do not fit neatly within traditional land entrant categories, i.e., invitees and licensees. For a discussion of firefighters and land entrant categories, including *sui generis*, see *infra* Part III.A.

system. Additionally, application of the Fireman's Rule in Great Britain would relieve British citizens of the injustice of having to compensate firefighters in tort simply for making firefighters do their jobs.

Part II discusses the Fireman's Rule in the United States and acquaints the reader with some of the specific foundations of the Rule. This part traces the origin of the Fireman's Rule in the United States by discussing the seminal case of *Gibson v. Leonard*.[8] After this discussion, the next major case, *Walters v. Sloan*, is examined.[9] Although the court in *Walters* ruled in favor of the Fireman's Rule, this case is sometimes cited by opponents of the Fireman's Rule.[10] Opponents of the Rule find *Walters* persuasive because Justice Tobriner's dissenting opinion criticizes the Rule exhaustively. In fact, at least one British opinion has cited Justice Tobriner's dissenting opinion as persuasive authority. The last case discussed is *Krauth v. Geller*.[11] Justice Weintraub's opinion for the majority in *Krauth* thoroughly analyzes the bases for applying the Rule.

Part III analyzes the three bases for the Fireman's Rule: assumption of risk, the *sui generis* status of firefighters, and economic efficiency. The theories set forth in this section form the basis for application of the Fireman's Rule in the United States. The material discussed is essential to an understanding of the implications of extending the Fireman's Rule to Great Britain.

Part IV examines the British law of occupiers' liability toward firefighters. This part explains the foundation of Great Britain's refusal to adopt the Rule. First, this part discusses Great Britain's Occupiers' Liability Act 1957,[12] which abrogated status distinctions between entrants of land. The legislative history and the text of the Act are also examined.[13] The text of the Act and its application, or lack thereof, by British courts is interesting since three sections of the Act clearly bar recovery by firefighters.[14] Next, this part discusses Great Britain's failure to adopt the Fireman's Rule. By analyzing British case law, this part examines the courts' reasoning in recent as well as older cases that refused to apply the Rule. In addition to the

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8. 32 N.E. 182 (Ill. 1892).

9. 571 P.2d 609 (Cal. 1977).

10. Opponents of the Rule find *Walters* persuasive because Justice Tobriner's dissenting opinion criticizes the Rule exhaustively. In fact, at least one British opinion has cited to Justice Tobriner's dissenting opinion as persuasive authority. *See generally* Ogwo v. Taylor [1987] 3 All E.R. 961, 966 (H.L.). For a critical analysis of Justice Tobriner's conclusions, see *infra* Part III.C.2.

11. 157 A.2d 129 (N.J. 1960).

12. Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.) [hereinafter Occupiers' Liability Act 1957].

13. A critical review of the Act's wording, however, is reserved for Part IV.A.

14. Occupiers' Liability Act 1957, *supra* note 12, §§ 2(3)(b), 2(4)(a), 2(5).

British cases, Justice Tobriner's dissenting opinion in *Walters* is explored and criticized.

Finally, Part V reanalyzes and reinterprets the British cases discussed in Part IV by applying to them the American tort principles discussed in Part III. This section demonstrates that application of the Fireman's Rule in Great Britain is both workable and desirable.

II. THE FIREMAN'S RULE IN THE UNITED STATES

The Fireman's Rule took root in American jurisprudence over a century ago.[15] In the landmark decision of *Gibson v. Leonard*, the Supreme Court of Illinois barred a firefighter from recovering in tort against a landowner for injuries he suffered in an elevator while fighting a fire on the defendant's premises.[16] The court held that the firefighter entered the premises as "a mere naked licensee" and thus had no greater rights than any other licensee.[17] The only duty owed to the firefighter was that the owner refrain from "willful or affirmative acts which [were] injurious."[18] The court concluded that, because the landowner was under no duty to maintain his premises in a safe condition for firefighters, the firefighter in that case could not recover for injuries resulting from the dangerous condition of an elevator.[19] An important factor considered by the court was that firefighters

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15. The Fireman's Rule has not received unanimous support even in America. Four states have abolished their respective versions of the Fireman's Rule. Minnesota abolished its version of the Fireman's Rule in MINN. STAT. § 604.06 (1988); Oregon in *Christenson v. Murphy*, 678 P.2d 1210 (Or. 1984); Florida in FLA. STAT. ch. 112.182 (1995); and Colorado in *Rhea v. Green*, 476 P.2d 760 (Colo. Ct. App. 1970) (implicitly rejecting the Fireman's Rule), in *Banyai v. Arruda*, 799 P.2d 441 (Colo. Ct. App. 1990) (explicitly rejecting the Fireman's Rule), and in *Wills v. Bath Excavating*, 829 P.2d 405 (Colo. Ct. App. 1991) (following the *Banyai* decision). Note that some Minnesota and Florida cases are used in this discussion. Even though these cases have been abrogated by statute, they are still useful to determine how the Fireman's Rule would apply in jurisdictions still following the Rule.

Indiana may be on the threshold of either overruling or limiting the Rule. *See generally* Johnson v. Mark Stefan, No. 49A02-9508-CV-449 (Ind. Ct. App. Sept. 30, 1997), *cited and summarized in Court Summaries & Trial Reports*, IND. LAW., Oct. 29, 1997, at 6A [hereinafter *Court Summaries*]. The *Johnson* court, referring to *Heck v. Robey*, 659 N.E.2d 498 (Ind. 1995) (discussing the Fireman's Rule), held that "if a public safety officer is injured as a result of another's negligence, the Firem[an's] Rule will not categorically protect the negligent party merely because the public safety officer was engaged in his employment." *Court Summaries*, *supra*, at 6A. The tone of the *Johnson* opinion indicates that, at most, the Rule only will be applied to public safety officers who come upon the defendant's *premises* in the discharge of their duties, and since neither *Heck* nor *Johnson* involved premises liability, the continued validity of the Rule in Indiana was left unresolved.

16. 32 N.E. 182 (Ill. 1892).

17. *Id.* at 183-84.

18. *Id.* at 183.

19. *Id.* at 186.

may enter private property by virtue of a legal authority.[20] Thus, in exchange for the right to enter one's property, the firefighter is owed a duty of protection only from the landowner's willfully or wantonly injurious conduct. Although this particular standard has since been abandoned in Illinois, the state still uses the Fireman's Rule.[21]

One of the two most widely cited cases applying the Fireman's Rule is *Walters v. Sloan*.[22] In *Walters*, a police officer was injured by a minor whom the officer was arresting for public intoxication after the minor left a

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20. *Id.* at 183-84. *See, e.g.*, MD. ANN. CODE art. 48, § 181 (1994), which gives firefighters

> the authority without liability for trespass at any time of the day or night . . . [t]o enter at their own risk any building, including private dwellings, or upon any premises where a fire is in progress, or where there is reasonable cause to believe a fire is in progress, for the purpose of extinguishing the fire. . . . [And t]o enter at their own risk any building, including private dwellings, or premises near the scene of the fire for the purpose of protecting the building or premises or for the purpose of extinguishing the fire which is in progress in another building or premises[.]

In Illinois, 740 ILL. COMP. STAT. ANN. 75/1 (West 1993) provides that firefighters engaged in their duties "may enter upon the lands of any person, firm, private or municipal corporation or the State of Illinois to carry out his or her duties and while so acting shall not be criminally or civilly liable for entering upon such lands." *See also*, ALASKA STAT. § 18.70.075 (Michie 1996) (granting firefighters the power to trespass upon the land of another to extinguish a fire on that property or to enter non-involved property for the purposes of protecting the non-involved property or extinguishing a fire on other property), and Meiers v. Fred Koch Brewery, 127 N.E. 491, 492 (N.Y. 1920) (explaining that there really is no invitation by the landowner and no acceptance by the firefighter to come upon the landowner's property).

21. *See* Hedberg v. Mendino, 579 N.E.2d 398 (Ill. App. Ct. 1991). In *Hedberg*, the court stated that firefighters are owed the same duty of care as invitees. *Id.* at 399. Note, however, that "'while a landowner owes a duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire he is not liable for negligence in causing the fire itself.'" *Id.* (quoting Washington v. Atlantic Richfield Co., 361 N.E.2d 282, 285 (Ill. 1976)).

The following cases, like *Hedberg*, held that landowners are not liable at common law for negligence in creating a condition that prompts the response of firefighters and that proximately causes injury to the firefighters: Grable v. Varela, 564 P.2d 911 (Ariz. Ct. App. 1977); Washington v. Atlantic Richfield Co., 361 N.E.2d 282 (Ill. 1976); Koehn v. Devereaux, 495 N.E.2d 211 (Ind. Ct. App. 1986); Thompson v. Warehouse Corp. of Am., 337 So.2d 572 (La. Ct. App. 1976); Phillips v. Hallmark Cards, Inc., 722 S.W.2d 86 (Mo. 1986); Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984); Berko v. Freda, 412 A.2d 821 (N.J. 1983); Ferraro v. Demetrakis, 400 A.2d 1227 (N.J. Super. Ct. App. Div. 1979), *cert. denied*, 405 A.2d 834 (N.J. 1979); Hawkins v. Sunmark Indus., Inc., 727 S.W.2d 397 (Ky. 1986); Fletcher v. Illinois C. G. R. Co., 679 S.W.2d 240 (Ky. Ct. App. 1984); England v. Tasker, 529 A.2d 938 (N.H. 1987); Buchanan v. Prickett & Son, Inc., 279 N.W.2d 855 (Neb. 1979); Held v. Rocky River, 516 N.E.2d 1272 (Ohio Ct. App. 1986); and Moreno v. Marrs, 695 P.2d 1322 (N.M. Ct. App. 1984).

22. 571 P.2d 609 (Cal. 1977).

party. The officer sued the owners of the home in which the party was held. In denying recovery, the court explained that one reason the officer could not recover was that he, with knowledge of the danger, voluntarily elected to confront it.[23] A second reason given by the court was that an individual should not be allowed recovery for injuries sustained from the very situation that requires his engagement as an officer.[24] This argument implies that a civilian should not be held liable for calling upon a public safety officer to do the very job that the public safety officer is employed to do. The third reason advanced by the court is that safety officers are indeed compensated for the risks they confront.[25] For example, firefighters receive a competitive wage, health insurance,[26] workers' compensation,[27] and pension fund benefits.[28] Thus, the argument that firefighters are inadequately compensated for injuries because after-injury compensation (i.e., workers' compensation) is insufficient does not consider the entire spectrum of financial benefits provided to public safety officers.

The final concern of the *Walters* court was that abolishing the Fireman's Rule would result in an explosion of litigation.[29] "Whether the employee is ultimately compensated with money derived from taxes or from insurance, the public pays the bill."[30] Thus, it is more efficient simply to mandate recovery from the pre-established, publicly-funded system since public moneys will pay for the injury in either scenario.

In his famous dissent in *Walters*, Justice Tobriner attempted to rebut the long-standing principles of the Fireman's Rule.[31] Justice Tobriner first

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23. *Id.* at 612.

24. *Id.*

25. *Id.* at 612-13.

26. *See, e.g., Schedule of Benefits, in* WASHINGTON CIVIL TOWNSHIP (INDIANA), EMPLOYEE SUMMARY PLAN DESCRIPTION 12-19 (1992) [hereinafter EMPLOYEE SUMMARY PLAN] (setting forth insurance packages and parameters for drug, dental, and medical benefits). *See also Coordination of Benefits, Continuation of Coverage (COBRA), in* EMPLOYEE SUMMARY PLAN, *supra*, at 47-49 (providing for the extension of insurance benefits package after leaving the fire service).

27. *See, e.g.*, MD. ANN. CODE art. 38A, § 39 (1997); MINN. STAT. ANN. § 176.011 (West 1993 & Supp. 1997) and MINN. STAT. ANN. § 69.52 (West 1996); TEX. [LAB.] CODE ANN. §§ 504.001 to 504.073 (West 1996); and WIS. STAT. ANN. § 102.03 (West 1997).

28. *See, e.g.*, MD. CODE ANN., [STATE PERS. & PENS.] § 28-101 to 28-403 (1997); 40 ILL. COMP. STAT. ANN. 5/4-101 to 5/4-144 (West 1993 & Supp. 1997) and 40 ILL. COMP. STAT. ANN. 5/6-101 to 5/6-226 (West 1993 & Supp. 1997); D.C. CODE ANN. § 4-601 to 4-634 (1994 & Supp. 1997); ALASKA STAT. § 39.35.010 to 39.35.690 (Michie 1996); and GA. CODE ANN. § 47-7-1 to 47-7-126 (1993 & Supp. 1997).

29. *Walters*, 571 P.2d at 613.

30. *Id.*

31. The foundations of Justice Tobriner's arguments are briefly set forth in this Part. Please note, however, that a discussion of the faultiness of Justice Tobriner's theories is undertaken in Part III, *infra*.

pointed out that firefighters are unfairly denied recovery because of the inherent dangers of their jobs while other employees with dangerous jobs are allowed recovery in tort.[32] For example, highway and construction workers may recover for injuries sustained from the negligence of third parties.[33] According to Justice Tobriner, because firefighters are likewise exposed to the risks of third-party negligence, firefighters should be allowed tort recovery as well. Justice Tobriner also criticized the idea that there is no greater danger in fighting a negligently started fire than there is fighting a non-negligently started fire.[34] He argued that the "fortuity" of a particular fire being started negligently should not bar recovery.[35] He further suggested that a negligently started fire involves a higher degree of risk because it is simply an additional fire that must be fought.[36] Justice Tobriner additionally criticized the rule's cost-spreading rationale. Because other employees covered by workers' compensation are allowed recovery from third-party tortfeasors, firefighters should be entitled to such recovery as well.[37] He emphasized the increasing role of insurance in compensating for injuries resulting from negligence.[38] Justice Tobriner's final criticism was that judicial economy should not serve as a basis for denying recovery. He argued that many of the issues that would be resolved in a firefighter's tort case were already being litigated in cases of fire-related property damage and personal injuries to persons other than firefighters.[39]

The other frequently cited case involving the Fireman's Rule is *Krauth v. Geller*.[40] In that case, Justice Weintraub discussed two bases for the Fireman's Rule: firefighters' *sui generis* status, and assumption of risk (including public policy). As for the firefighters' *sui generis* status, the court in *Krauth* noted that firefighters have a legal right to enter the premises regardless of whether they are invited by the landowner.[41] Because firefighters may not legally be kept from entering a landowner's premises, they do not fit well within traditional land entrant categories (i.e., invitees and licensees) and are appropriately included in a class of their own. In discussing both assumption of risk and public policy, the court noted that "it is the fireman's business to deal with *that very hazard* and hence . . . he

32. *Walters*, 571 P.2d at 617 (Tobriner, J., dissenting).
33. *Id.*
34. *Id.* at 618.
35. *Id.*
36. *Id.*
37. *Id.* at 619.
38. *Id.*
39. *Id.* at 620.
40. 157 A.2d 129 (N.J. 1960).
41. *Id.* at 130.

cannot complain of negligence in the creation of the very occasion for his engagement."[42]

While recognizing these traditional applications of the Fireman's Rule, the court in *Krauth* also delineated some exceptions to the Rule. First, recovery by the firefighter will be allowed if he is injured by a hazard created in violation of a safety statute or ordinance passed for the firefighter's protection.[43] In this scenario, the legislature and, by extension, the people have spoken to allow recovery. A second exception allows firefighters to recover if the occupier has failed to warn of a hidden hazard.[44] If a landowner could have protected the firefighters with a simple warning, then the landowner should be held liable for resulting injuries. Landowners have also been held liable when they have failed to maintain a reasonably safe entrance to a structure which would otherwise have been open to the public.[45] Such entrances should always be safe since they are held open to the public, and firefighters should be able to rely upon that assumption when entering public grounds.

The preceding exceptions to the Fireman's Rule are not exhaustive. Firefighters also will be allowed recovery in tort if the nature of the hazard is misrepresented in such a way as to expose the firefighters to an increased

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42. *Id.* at 131 (emphasis added).

43. *Id. See also* Maloney v. Hearst Hotels Corp., 8 N.E.2d 296 (N.Y. 1937) (storage of dangerous substance), and Drake v. Fenton, 85 A. 14 (Pa. 1912) (open elevator shaft left unguarded); *but cf.* Flowers v. Rock Creek Terrace, 520 A.2d 361 (Md. 1987) (excluding open elevator shaft and barring recovery by firefighter).

44. *Krauth*, 157 A.2d at 131. *See also* Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964) (holding landowner liable for firefighter's death where landowner knew of the defective nature of a gas storage tank and failed to warn the firefighter of that danger after the firefighter's arrival); Shypulski v. Waldorf Paper Prod., 45 N.W.2d 549 (Minn. 1951) (holding landowner liable for injuries to firefighter from a wall collapse where the landowner knew that the wall's construction was dangerous, the landowner knew the wall could not withstand lateral pressure, and the landowner had an opportunity to warn the firefighter before the firefighter entered the structure and failed to give such warning), *abrogated by* MINN. STAT. § 604.06 (1987); Jenkins v. 313-321 W. 37th St. Corp., 31 N.E.2d 503 (N.Y. 1940) (allowing recovery by firefighter from a gas explosion where the landowner or his agents knew that gas was seeping into the closed room wherein the fire was burning and no one warned the firefighters of this hazard), *reh'g denied*, 33 N.E.2d 547 (N.Y. 1941); Schwab v. Rubel Corp., 37 N.E.2d 234 (N.Y. 1941) (sending issue of defendant's liability to the jury where a firefighter fell into a hole in the floor of an unused building for a determination of whether or not the hole constituted an unusual hazard known by the defendants); and James v. Cities Serv. Oil Co., 31 N.E.2d 872 (Ohio Ct. App. 1939) (allowing recovery by firefighter from gasoline explosion caused by vapors from a recently emptied gasoline tank where the defendant's agents knew of the hazard and failed to warn the injured firefighter of the hazard's presence), *aff'd*, 43 N.E.2d 276 (Ohio 1942).

45. *Krauth*, 157 A.2d at 131. *See also* Meiers v. Fred Koch Brewery, 127 N.E. 491 (N.Y. 1920); Beedenbender v. Midtown Properties, 164 N.Y.S.2d 276 (N.Y. App. Div. 1957); and Taylor v. Palmetto Theater Co., 28 S.E.2d 538 (S.C. 1943).

risk.[46] Next, even if the land occupier did not know of the hazard, firefighters will be allowed to recover if they are injured by an unanticipated hazard.[47] If firefighters are unaware of an item's dangerous condition, they cannot prepare themselves to face the risk. Therefore, it is unfair to bar recovery when the firefighter could have taken appropriate actions to mitigate the chance of injury had he known the hazard existed. Moreover, firefighters will be allowed recovery if injured by a positive wrongful act or reckless or wanton conduct.[48] The Fireman's Rule is based upon the notion that firefighters may not recover for injuries caused by the hazard prompting their response. On the other hand, a positive wrongful act constituting reckless or wanton conduct is independent of the hazard that prompted the firefighter's response. Accordingly, injuries deriving from a positive wrongful act fall outside the purview of the Fireman's Rule.

At first blush, the Fireman's Rule could be construed to apply to all professional rescuers. The Rule, however, has not been routinely applied to emergency medical technicians (EMTs). The basic reason for not applying the Rule to EMTs is that the nature of the employment of firefighters is wholly different from that of EMTs.[49] Although ambulance attendants may face danger as an indirect result of their employment, facing danger is not their primary task, and they cannot be held to the same standard as firefighters and police officers whose primary duties involve confronting

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46. Lipson v. Superior Court, 644 P.2d 822 (Cal. 1982). The court held the Fireman's Rule inapplicable to the plaintiff-firefighter because the owners of the premises misrepresented the nature of the fire to the firefighters upon their arrival. *Id.* at 827. The generally accepted basis for the Fireman's Rule is that firefighters may not recover for injuries stemming from causes dependent on the fire. Due to the misrepresentation in *Lipson*, the firefighters believed they were confronting a wholly different type of fire than they actually found. Thus, since the misrepresentation misled the firefighters and occurred after their arrival on the scene, the court held that it constituted "an act of misconduct independent from any tortious act which may have been the cause of the [fire]." *Id.* Therefore, independent acts causing injury to firefighters do not fall within the requirements of the Fireman's Rule, and firefighters will be allowed recovery when injured by independent hazards.

47. *See, e.g.*, Haubolt v. Union Carbide Corp., 467 N.W.2d 508 (Wis. 1991). In *Haubolt*, a defectively manufactured acetylene tank ruptured, exploded, and injured a firefighter. The court held that it would "not expand the firefighter's rule to cover manufacturers whose defective product directly causes injury to firefighters during the course of a fire, when the danger caused by the defective product is not reasonably apparent to them, or a risk anticipated by them." *Id.* at 512.

48. *See, e.g.*, Migdal v. Stamp, 564 A.2d 826 (N.H. 1989). In *Migdal*, a police officer was allowed recovery after being shot on the basis that aiming a gun at and shooting a police officer constitutes "a positive wrongful act." *Id.* at 829. Additionally, the parents of the minor-shooter were held liable because they knew of their child's mental and emotional instabilities, failed to seek help for their child, and allowed the child access to a firearm and ammunition. *Id.* at 828. This situation is an exception to the Fireman's Rule since it demonstrates reckless or wanton conduct. *Id.* at 828-29.

49. *See generally* Lees v. Lobosco, 625 A.2d 573 (N.J. Super. Ct. App. Div. 1993).

danger.[50] Although the purpose of employing firefighters is to have a group readily available to confront fire, which is hazardous by nature, the primary purpose of employing EMTs is to have a group readily available to confront acute injury and acute and chronic illness, which pose no immediate threat to the EMT. Thus, dangers to EMTs arise indirectly, and any resulting injuries should be compensable in tort.

The Fireman's Rule has also been extended to volunteer firefighters.[51] Volunteer firefighters, like professional firefighters, are trained to be experts in dealing with fires.[52] Furthermore, the dangers encountered by volunteer firefighters are no different from those encountered by professional firefighters, and volunteer firefighters, like professional firefighters, voluntarily confront these inherent risks. Finally, like professional firefighters, volunteer firefighters have the legal authority to enter private property in order to combat fires. Thus, it is logical to apply the Fireman's Rule to volunteer firefighters as well as to professional firefighters.

In sum, there are several theories for applying the Fireman's Rule. Firefighters may be barred from recovery since they voluntarily face the risks inherent to the calling. Additionally, firefighters already receive compensation—in the form of wages, insurance plans, pension funds, and workers' compensation—for the hazards they face. Preventing an explosion of lawsuits is another reason for barring recovery by firefighters. Firefighters also may be barred recovery under theories that they enter the landowner's premises as licensees or *sui generis* entrants, which would thereby eliminate any affirmative duty of care on the part of landowners. Thus, even though varying approaches to the Rule have been employed since it was first introduced, it has been a fundamental principle of American tort law for over a century and will likely remain a facet of American jurisprudence for years to come.

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50. *See, e.g.*, Krause v. U.S. Truck Co., 787 S.W.2d 708 (Mo. 1990) (holding that the Fireman's Rule was inapplicable to an ambulance attendant). *Cf.* Kowalski v. Gratopp, 442 N.W.2d 682 (Mich. Ct. App. 1989) (refusing to extend the Fireman's Rule to a paramedic injured from a slip and fall on icy walkway); *but cf.* Siligato v. Hiles, 563 A.2d 1172 (N.J. Super. Ct. Law Div. 1989) (barring recovery under the Fireman's Rule by a member of a rescue squad forced to witness the death of his own baby). For a discussion of the relationship between the Fireman's Rule and EMTs and paramedics, see Stephen E. Ruscus, *Empty Pockets: Application of the Fireman's Rule to Emergency Medical Technicians*, 7 J. CONTEMP. HEALTH L. & POL'Y 339 (1991).

51. *See* Flowers v. Rock Creek Terrace, 520 A.2d 361 (Md. 1987).

52. For examples of the training requirements for both professional and volunteer firefighters, see IND. CODE ANN. § 36-8-10.5-6 (West 1997) (setting forth minimum training requirements for *all* firefighters) and IND. CODE ANN. § 36-8-10.5-7 (West 1997) (establishing basic training subject matter to be learned by *all* firefighters).

III. THE BASES FOR THE FIREMAN'S RULE IN THE UNITED STATES

Up to this point, the theories set forth in support of the Fireman's Rule have been primarily descriptive and relatively neutral. This note now undertakes a critical analysis of the bases for the Fireman's Rule. This careful scrutiny of the principles underlying the Rule provides a foundation for the argument that the Rule should be applied in Great Britain. Thus, this part more closely examines the principles of *sui generis*, assumption of risk, and economic efficiency.

A. *Sui Generis Status of Firefighters*

Although the purpose of this section is to discuss firefighters' status as *sui generis* entrants of land, it is useful to first explore the rationale behind their classification as invitees or licensees.[53] An examination of these different classifications reveals the superiority of the *sui generis* classification.

1. *Firefighters as Invitees*

Some American jurisdictions hold that firefighters enter land as invitees.[54] An invitee is defined as a "person who goes on to [sic] the land of another at the express or implied invitation of the owner or occupant either to transact business or for the mutual benefit of the invitee and the owner or occupant."[55] Landowners owe invitees a "duty of reasonable care."[56] The reasoning behind the classification of firefighters as invitees is that firefighters confer an economic benefit upon the landowner by preventing his property or life from being destroyed. Accordingly, landowners should be held to a higher standard of care because a benefit is conferred upon them.

Although the higher standard of care owed to an invitee might seem to significantly increase a firefighter's chance of recovery, the firefighter is not

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53. For a brief explanation of these varying approaches, see David L. Strauss, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2034-35 (1992).

54. The following cases held that firefighters entered land as invitees: Netherton v. Arends, 225 N.E.2d 143 (Ill. App. Ct. 1967); Horcher v. Guerin, 236 N.E.2d 576 (Ill. App. Ct. 1968); Briones v. Mobil Oil Corp., 501 N.E.2d 821 (Ill. App. Ct. 1986); Walsh v. Madison Park Properties, Ltd., 245 A.2d 512 (N.J. Super. Ct. App. Div. 1968); Mistelske v. Kravko, Inc., 88 Pa. D. & C. 49 (1953); Buckeye Cotton Oil Co. v. Campagna, 242 S.W. 646 (Tenn. 1922); and Strong v. Seattle Stevedore Co., 466 P.2d 545 (Wash. Ct. App. 1970).

55. Clem v. United States, 601 F. Supp. 835, 841-42 (N.D. Ind. 1985).

56. *Strong*, 466 P.2d at 548.

assured recovery.[57] Despite their invitee status, firefighters have been denied recovery because of their superior knowledge about fire and its behavior.[58] Another situation in which recovery has been denied involves the fire inspector who is injured by that which he was called upon to inspect.[59] Reasonable care under these circumstances does not require a landowner to "affirmatively guard against defects in the apparatus" that the inspector has entered the premises specifically to investigate.[60] That the injured inspector was summoned to inspect potential violations of safety codes alerts him to be on guard for dangerous conditions; indeed, if there were no risk, he would not have been summoned in the first place.[61]

It is not difficult to see how these principles extend to firefighters injured in the line of duty. The need for firefighters is premised upon the likelihood that dangerous conditions exist. If dangerous conditions are expected, then the firefighter is on notice of their potential existence, and the land occupier should be relieved of liability if the firefighter is injured by one of the expected risks, such as structural collapse or dangerous internal structural conditions.

Although firefighters sometimes have been treated as invitees, there is no real change in the landowner's liability under such a classification. Furthermore, firefighters do not fit well into this category. There is no way for the invitee classification to address the unique nature of firefighting and the particular risks involved in that calling. Accordingly, many jurisdictions have regarded firefighters as licensees.

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57. *See* Horn v. Urban Inv. & Dev. Co., 519 N.E.2d 489 (Ill. App. Ct. 1988).

> [I]f the fireman is on the premises in the performance of his official duties at a place where he might reasonably be expected to be, he is owed the same duty which the possessor of land owes to an invitee, that is, to protect him against dangerous conditions constituting an unreasonable risk of harm which the landowner/occupier should expect the invitee will not discover or realize or will fail to protect himself against; but there is no duty to warn against risks which are known or obvious.

Id. at 492. *See, e.g.*, Horcher v. Guerin, 236 N.E.2d 576 (Ill. App. Ct. 1968) (denying recovery because the landowner adequately warned the firefighter of the danger when he called the fire department for help); Netherton v. Arends, 225 N.E.2d 143 (Ill. App. Ct. 1967) (denying recovery to firefighter for smoke-inhalation injuries that were incidental to his employment); and Mistelske v. Kravko, Inc., 88 Pa. D. & C. 49 (1953) (approving instructions to the jury that a fireman was an implied invitee, but that he assumed the risk of the fire's loosening a cable attached to a counterbalance).

58. *Strong*, 466 P.2d at 550.

59. *See* Walsh v. Madison Park Properties, Ltd., 245 A.2d 512 (N.J. Super. Ct. App. Div. 1968).

60. *Id.* at 516.

61. *Id.*

2. *Firefighters as Licensees*

A more traditional classification of firefighters is that they enter land as licensees;[62] this was the classification employed in the first case that applied the Fireman's Rule.[63] A licensee may be defined as "one who enters the premises of another for his own convenience, curiosity or excitement."[64] The notion behind this approach is that firefighters do not confer an economic benefit upon the landowner. Instead, a firefighter acts to prevent an economic loss. Benefit conferral and loss prevention are two different concepts. The former attempts to place the individual in a better position, whereas the latter seeks only to preserve the status quo. Economic benefit cannot logically form the foundation for a duty of care owed to firefighters.

Next, the firefighter's invitation to the premises must be considered. Whether or not the firefighter is actually invited onto the landowner's property by the landowner is irrelevant because the firefighter is given the right by law to enter the landowner's premises.[65] Since the landowner does not decide whether the firefighter may come onto his property, it is unfair to hold the landowner to a standard of care any higher than that owed to a licensee.

Finally, the landowner has no means by which to predict when a firefighter's services will be needed.[66] If the landowner cannot predict when

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62. The following cases held that firefighters enter land as licensees: Gibson v. Leonard, 32 N.E. 182 (Ill. 1892); Roberts v. Rosenblatt, 148 A.2d 142 (Conn. 1959); Todd v. Armour & Co., 162 S.E. 394 (Ga. Ct. App. 1931); Baxley v. Williams Constr. Co., 106 S.E.2d 799 (Ga. Ct. App. 1958); Wilbanks v. Echols, 433 S.E.2d 134 (Ga. Ct. App. 1993); Pincock v. McCoy, 281 P. 371 (Idaho 1929); Steinwedel v. Hilbert, 131 A. 44 (Md. 1925); Aravanis v. Eisenberg, 206 A.2d 148 (Md. 1965); Brosnan v. Koufman, 2 N.E.2d 441 (Mass. 1936); Aldworth v. F. W. Woolworth Co., 3 N.E.2d 1008 (Mass. 1936); New Omaha Thomson-Houston Electric Light Co. v. Anderson, 102 N.W. 89 (Neb. 1905); New Omaha Thomson-Houston Electric Light Co. v. Bendson, 102 N.W. 96 (Neb. 1905); Wax v. Co-operative Refinery Ass'n, 49 N.W.2d 707 (Neb. 1951); Moravec v. Moravec, 343 N.W.2d 762 (Neb. 1984).

63. *See generally* Gibson v. Leonard, 32 N.E. 182 (Ill. 1892).

64. Clem v. United States, 601 F. Supp. 835, 842 (N.D. Ind. 1985).

65. *See supra* text accompanying note 20.

66. *See* William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). Prosser states:

> Why . . . are visiting firemen and policemen set apart as a class to whom no duty is owed to inspect and prepare the premises? One obvious reason . . . is that these individuals enter at unforeseeable moments, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation cannot reasonably be looked for. A man who climbs in through a basement window in search of a fire or a thief cannot expect an assurance that he will not find a bulldog in the cellar. Regardless of benefit or invitation, there is no reason to suppose that the place has been made safe.

Id. at 610.

firefighters will come to his premises, it is impossible for the landowner to prepare the premises for their arrival. To require an owner or occupier to exercise at all times the high degree of care owed to an invitee "would be an intolerable burden which it is not in the best interest of society to impose."[67] Thus, the most logical approach is to require the firefighter, like the landowner, to take the premises as he finds them; this is the approach embodied in the licensee classification.

As licensees, firefighters are subject to the standard that "the licensor assumes no duty to the licensee, except the duty to refrain from affirmative or willful acts that work an injury."[68] The basic rationale behind this standard is that it is unfair to allow a landowner to take affirmative steps to injure an innocent visitor to his property. Firefighters can reasonably be expected to take the premises as they find them because the landowner is not expected to take steps to prepare the premises for the arrival of firefighters in an emergency. But when the landowner acts willfully or wantonly, the landowner's action shifts from sitting idly on the property to actively taking steps toward injuring the firefighter. It is fair to allow recovery by firefighters when the landowner commits such acts because the premises are no longer as the firefighter originally found them; rather they change with each new affirmative or willful act of the landowner.

Given the unpredictable nature of fires and the unpredictable modes of ingress and egress used by firefighters, basing liability upon the idea of firefighters as licensees seems practical and just. It is certainly a widely supported position and works better than trying to classify firefighters as invitees. However, the reasons for classifying firefighters in this way do not form the traditional basis for a licensee classification. The traditional basis is that a licensee is a guest *invited* upon the property by the landowner. Classifying firefighters as licensees ignores this traditional rationale since firefighters have a legal right to enter the property without an invitation or

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67. *Baxley*, 106 S.E.2d at 805.

68. *Gibson*, 32 N.E. at 184. *See also* Whittin v. Miami-Dade Water & Sewer Auth., 357 So. 2d 430 (Fla. Dist. Ct. App. 1978) (holding that injuries resulting from toxic fumes not attributable to defendant-landowner since the injuries from the fumes were not caused by wanton or willful conduct), *cert. denied*, 364 So. 2d 894 (Fla. 1978), *abrogated by* FLA. STAT. ch. 112.182 (1990); Todd v. Armour & Co., 162 S.E. 394, 395 (Ga. Ct. App. 1931) (denying recovery to firefighter injured by fall into open stairwell because maintenance of an open stairwell did not constitute willful and wanton negligence); Flowers v. Sting Sec., Inc., 488 A.2d 523 (Md. Ct. Spec. App. 1985) (denying plaintiff-firefighter recovery from a fall into an open elevator shaft since the landowner did not act wantonly or willfully); Lave v. Neumann, 317 N.W.2d 779, 781 (Neb. 1982) (holding that an occupant's duty only requires refraining from willful or wanton negligence or designed injury, "'except in certain cases where there may be a duty to warn of hidden danger or peril known to the owner but unknown to, or unobservable by, firefighters in the exercise of ordinary care'" (quoting Wax v. Co-Operative Refinery Ass'n., 49 N.W.2d 707, 709 (Neb. 1951)).

permission. The proper approach to classifying firefighters, therefore, treats them as *sui generis* entrants on the land.

3. *Firefighters as Sui Generis Entrants*

The theory that the firefighters are invitees or licensees simply places firefighters into categories in which they do not belong.[69] There are two reasons that these classifications do not work. First, the designation of invitee or licensee implies that the individual was invited onto the property. That is not necessarily the case with firefighters. Firefighters, in discharging their duties, will come onto the owner's property whether the owner likes it or not. Firefighters are given the right to enter one's property by law and cannot be kept from entering the property.[70] Second, while a landowner can force an invitee or licensee to leave his premises,[71] he cannot force firefighters to leave. Indeed, firefighters can require the landowner to leave his own property, and should the landowner attempt to remove the firefighters, the landowner may face criminal liability for interfering with fire scene operations.[72] Usually, if a landowner believes that the conditions

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69. Meiers v. Fred Koch Brewery, 127 N.E. 491, 492 (N.Y. 1920) (concluding that a landowner does not extend an invitation to the firefighter since the firefighter has a duty to enter the premises regardless and that "[u]nder such circumstances it is a misuse of terms to call him a bare licensee."). The following cases also recognize the *sui generis* classification: Buren v. Midwest Indus., Inc., 380 S.W.2d 96 (Ky. Ct. App. 1964); Krauth v. Geller, 157 A.2d 129 (N.J. 1960); Jackson v. Velveray Corp., 198 A.2d 115 (N.J. Super. Ct. App. Div. 1964); Berko v. Freda, 459 A.2d 663 (N.J. 1983); Beedenbender v. Midtown Properties, Inc., 164 N.Y.S.2d 276 (N.Y. App. Div. 1957); McGee v. Adams Paper & Twine Co., 271 N.Y.S.2d 698 (N.Y. App. Div. 1966), *aff'd*, 233 N.E.2d 289 (N.Y. 1967); McCarthy v. Port of New York Auth., 290 N.Y.S.2d 255 (N.Y. App. Div. 1968); Carpenter v. O'Day, 562 A.2d 595 (Del. Super. Ct. 1988), *aff'd without opinion*, 553 A.2d 638 (Del. 1988); and Pearson v. Canada Contracting Co., 349 S.E.2d 106 (Va. 1986).

70. *See supra* text accompanying note 20.

71. *See* WILLIAM L. PROSSER, LAW OF TORTS § 61, at 395 (4th ed. 1971) (discussing the possessor's "power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his own hands").

72. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.241 (West 1997), which states:

> (1) Any person who shall knowingly and willfully hinder, obstruct, endanger or interfere with any fireman in the performance of his duties is guilty of a felony.
>
> (2) Any person who, while in the vicinity of any fire, willfully disobeys any reasonable order or rule of the officer commanding any fire department at such fire, when such order or rule is given by the commanding officer or a fireman there present, is guilty of a misdemeanor.

See also IND. CODE ANN. § 35-44-3-8 (West 1986) ("[a] person who knowingly or intentionally obstructs or interferes with a fireman performing or attempting to perform his emergency functions or duties as a fireman commits obstructing a fireman, a Class A misdemeanor") (Under IND. CODE ANN. § 35-50-3-2 (West 1986), a Class A misdemeanor

of his premises are unsafe for invitees or licensees, the landowner can make them leave and thereby avoid the threat of liability for negligence.[73] For example, assume A invites B to A's home for a social gathering. During the course of the gathering, a window is shattered, thereby exposing B to the risk of injury. A can tell B to leave until the situation is made safe. By law, B has to comply with A's command, and A is allowed to relieve himself of all potential liability. The landowner loses this right with regard to firefighters. For example, if a fire were to break out in a landowner's garage, the landowner could attempt to prevent injury to any firefighters arriving on the scene by requesting that they simply allow the property to burn. Such a request, however, would likely be ignored. Without the Fireman's Rule, the landowner would then be subject to liability even though he had taken maximum steps to remedy the firefighters' exposure to danger. Because the law effectively requires the landowner to watch idly as firefighters place themselves in peril, the Fireman's Rule serves to mitigate the landowner's liability from this powerlessness.[74]

Furthermore, invitees and licensees come onto an owner's premises at foreseeable times. Normally, an invitee will come onto the premises for routine business purposes, and a licensee will come onto the premises for a planned gathering. Firefighters, on the other hand, enter property under circumstances of emergency. Landowners are therefore unable to predict when firefighters will be called. In circumstances requiring the fire department's response, a landowner simply will not have time to prepare the

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is punishable by not more than one year in jail and not more than a $5000 fine); MD. ANN. CODE art. 27, § 11D (1996) (making it a misdemeanor, punishable by not more than three years in prison, to "interfere with or obstruct . . . a fire fighter, rescue squad member, or emergency services personnel, while the . . . fire fighter, rescue squad member, or emergency services personnel is fighting a fire, performing emergency service, proceeding to a fire or other emergency, or while dispatched to a call for emergency service"); and KY. REV. STAT. ANN. § 519.020 (Michie 1990) ("[a] person is guilty of obstructing governmental operations when he intentionally obstructs, impairs or hinders the performance of a governmental function by using or threatening to use violence, force or physical interference").

73. *See supra* text accompanying note 71.

74. Discussing this approach is *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96 (Ky. Ct. App. 1964). In that case the court explains:

> When [the firefighter] arrives on the scene the field is his. The owner has no power to direct or control his actions. He may not order him to stay outside, or to stay off the roof, or to wear a . . . mask, or to limit his actions to shooting water into the building from a safe position outside. To hold the owner responsible while denying him any right or discretion to say what the firemen shall or shall not do would not consist with what this court believes to be the fundamental law of liability by reason of negligence. Having bound his hands, the law cannot justly inflict upon him the consequences of what he might otherwise have been able to prevent.

Id. at 99.

premises for the firefighters' arrival. The *sui generis* status accounts for the fact that a landowner will likely be unable to predict when firefighters will be needed, and it accordingly lowers the standard of care owed to firefighters as compared to that owed to invitees or licensees.[75] Considering the unpredictable nature of firefighters' responses, firefighters are most appropriately placed within the *sui generis* category.

The duty owed to firefighters as *sui generis* entrants accounts for the limited control the landowner has over a firefighter as compared to a business patron or a social guest. The landowner's essential duty to individuals in this classification is to warn them of hidden or unanticipated dangers, but the landowner has no duty to discover hidden defects on the premises.[76] Under the circumstances of a typical fire, "it is not reasonable to require the level of care that is owed to invitees or, without some modification, the level of care owed to licensees."[77]

B. *Assumption of Risk*

Assumption of risk takes one of the following two forms: primary or secondary. When risk is assumed by the plaintiff in the primary sense, the defendant owes no duty to the plaintiff in the first place.[78] Secondary assumption of risk, on the other hand, takes into account the plaintiff's contributory negligence and apportions fault accordingly.[79] Assumption of

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75. *See, e.g.*, Pearson v. Canada Contracting Co., Inc., 349 S.E.2d 106 (Va. 1986).

> [F]iremen and policemen, unlike invitees or licensees, enter at unforeseeable times and go upon unusual parts of the premises, including areas not open to the public. Except for scheduled inspections, their presence at any particular time cannot be reasonably anticipated. In such situations, it is not reasonable to require the level of care that is owed to invitees or, without some modification, the level of care owed to licensees.

Id. at 111.

76. Beedenbender v. Midtown Properties, Inc., 164 N.Y.S.2d 276, 281 (N.Y. App. Div. 1957).

> The owner owes no duty to those privileged to enter irrespective of consent to safeguard those parts of his property not ordinarily utilized for passage through the premises, or to discover potential dangers therein, for the entry thereon by such persons under unusual conditions at any hour of the day or night is not reasonably foreseeable.

Id. For other cases employing the duty to warn of hidden dangers standard, see *infra* note 90.

77. *Pearson*, 349 S.E.2d at 111.

78. Meistrich v. Casino Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959).

79. *Id.* In summing up its conclusions of law, the *Meistrich* court stated:

> each case must be analyzed to determine whether the pivotal question goes to defendant's negligence or to plaintiff's contributory negligence. If the former, then what has been called assumption of risk is only a denial of breach of duty and the burden of proof is plaintiff's. If on the other hand assumption of risk is advanced to defeat a recovery despite a demonstrated breach of defendant's

risk occurs "where the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against the risk. He may then be regarded as tacitly or impliedly consenting to the negligence, and agreeing to take his own chances."[80] One court has noted that "the fireman's rule is based on a principle as fundamental to our law today as it was centuries ago . . . . [O]ne who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby."[81]

No one can doubt that firefighting is inherently dangerous. The fact that firefighters must wear self-contained breathing apparatus and numerous layers of protective clothing when fighting a fire is evidence of fire's hazardous nature. Additionally, intuition suggests that entering a burning structure may lead to serious injury. Firefighters undoubtedly understand and realize the dangerous nature of their work—yet they still choose to confront that danger. Thus, the unavoidable conclusion is that firefighters assume the risks naturally associated with fighting fire.[82]

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duty, then it constitutes the affirmative defense of contributory negligence and the burden of proof is upon defendant.

Id. at 97. This subsection analyzes only primary assumption of risk as it is the applicable doctrine for the Fireman's Rule because the Rule is based upon the idea that the landowner owes no duty to the firefighter in the first instance. Therefore, if secondary assumption of risk applied, courts would be forced to determine whether or not the landowner breached a duty owed to the firefighter, which runs counter to the assumption-of-risk basis of the Rule. *See also* Strauss, *supra* note 53, at 2035-37.

80. PROSSER, *supra* note 71, at 440. Prosser then states:

> Thus, he may accept employment, knowing that he is expected to work with a dangerous horse; or ride in a car with knowledge that the brakes are defective and the driver incompetent; or he may enter a baseball park, sit in an unscreened seat, and so consent that the players may proceed with the game without taking any precautions to protect him from being hit by the ball. . . . [T]he legal result is that the defendant is simply relieved of the duty which would otherwise exist.

Id. While firefighting is not explicitly set out by the author, it may be included in the list. For instance, a firefighter accepts employment knowing that he is expected to work with dangerous elements, namely fire and those hazards naturally occurring therefrom, thereby relieving the owner of the owner's duty of care.

81. Walters v. Sloan, 571 P.2d 609, 612 (Cal. 1977). "The rule finds its clearest application in situations . . . [where] a person who, fully aware of the hazard created by the defendant's negligence, voluntarily confronts the risk for compensation." *Id. See also* Hubbard v. Boelt, 620 P.2d 156 (Cal. 1980) (following the approach set forth in *Walters*).

82. "[T]here are certain risks which anyone of adult age must be taken to appreciate: the danger of slipping on ice, of falling through unguarded openings, of lifting heavy objects, of being squeezed in a narrow space, . . . and doubtless many others." PROSSER, *supra* note 71, at 448. Firefighting can certainly be included under the broad "many others" possibility. It can scarcely be argued that anyone of adult age, indeed many of minor age, would not appreciate the risks of working in direct contact with fire. Again, considering the elementary nature of the relationship between danger and fire, the inescapable conclusion is that firefighters assume the risks naturally associated with their calling. *See also* Flowers v. Rock

It also should be noted that just because firefighters may not be able to tell precisely which dangers lurk within a burning structure does not mean that they have refused to assume those risks.[83] Assumption of risk is based less upon precise knowledge of the risk and more upon the consent to confront the dangers that naturally may result under the circumstances.[84] Thus, although firefighters may not specifically know that a wall is ready to collapse, such a risk is always a possibility in firefighting, and the intent of the firefighters to assume that risk is clearly manifested by their donning protective clothing and entering the structure anyway.

If there is assumption of risk on the part of the firefighter, the landowner owes no duty to him or her. The proper application of assumption of risk considers the duty of the defendant in the first instance.[85] If there was no duty owed in the first place, assumption of risk cannot be treated as an affirmative defense because affirmative defenses contemplate a duty of care. The impact of this approach is significant. If assumption of risk included an analysis of contributory fault, as in an affirmative defense, the courts would have to consider the reasonableness of firefighters' conduct in confronting the risks in any given situation. Under the primary-assumption-of-risk rationale, the reasonableness of the firefighters' actions is irrelevant because they are owed no duty of care. If firefighters realize and appreciate the danger but willingly opt to confront it, they do so at their own peril.

Creek Terrace, 520 A.2d 361 (Md. 1987) (falling into open elevator shaft is a risk inherent to firefighting), and Castellano v. City of New York, 624 N.Y.S.2d 38 (N.Y. App. Div. 1995) (climbing a ladder without another firefighter to secure it was a risk that the plaintiff-firefighter assumed as part of his duties).

83. "[T]he 'determinative factor' in applying the firefighter rule's bar is 'whether the injury sustained is related to the particular danger which police officers [and firefighters] are expected to assume as part of their duties.'" Zanghi v. Niagra Frontier Transp. Comm'n, 649 N.E.2d 1167, 1172 (N.Y. 1995) (quoting Cooper v. City of New York, 619 N.E.2d 369, 371 (N.Y. 1993)).

84. *See* PROSSER, *supra* note 71, at 449. "Since the basis of assumption of risk is not so much knowledge of the risk as consent to assume it, it is quite possible for the plaintiff to assume risks of whose *specific* existence he is not aware, provided his intent to do so is made clear." *Id.* (emphasis added).

85. *See* Krauth v. Geller, 157 A.2d 129, 130-31 (N.J. 1960):

> the prevailing rule is sometimes stated in terms of 'assumption of risk,' used doubtless in the so-called 'primary' sense of the term and meaning that the defendant did not breach a duty owed, rather than that the fireman was guilty of contributory fault in responding to his public duty.

See also Kreski v. Modern Wholesale Elec. Supply Co., 415 N.W.2d 178, 185 (Mich. 1987):

> Primary assumption of risk is not technically an affirmative defense, as it involves a situation where the defendant does not owe a duty of care to the [firefighter] . . . . In other words, primary assumption of risk involves a circumstance where the plaintiff agrees in advance to relieve the defendant of a duty of care owed the plaintiff.

However, simply because firefighters undertake hazardous employment certainly does not mean that they assume all risks that could possibly materialize. Instead, there are some risks that are anticipated and some that are unanticipated. Only anticipated risks are held to be assumed by firefighters.[86] Thus, assumption of risk is not strictly applied in all situations. In fact, under the assumption-of-risk approach, the landowner owes firefighters a duty of reasonable care to warn them of unanticipated or hidden dangers.[87] "Thus, the fire fighter may not recover damages from a landowner if his injury is caused by an apparent risk, but may recover if his injury is caused by an unanticipated risk attributable to the landowner's negligence and such negligence is the proximate cause of the injury."[88]

For example, firefighters engaged in fighting a garage fire generally do not anticipate dynamite being stored within the structure. If there is dynamite and it explodes, and the firefighters were not warned of its presence, the landowner most likely will be held liable since the danger of stored dynamite is both unanticipated and hidden. Furthermore, because firefighters are owed reasonable care under the circumstances, "a landowner may be held liable to an injured fireman for negligence in allowing the existence of a hidden danger even though the landowner did not know of the danger or have an opportunity to give warning of its existence."[89] This rationale does not run counter to the notion that firefighters may be barred

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86. "[F]iremen . . . do not, by accepting dangerous employment, generally assume all risk that *may* occur. Rather, each situation encountered may involve some risks which are anticipated and assumed and some which are unanticipated and therefore unassumed." Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602, 605 (Minn. 1981) (emphasis added), *abrogated by* MINN. STAT. § 604.06 (1984).

87. "[U]nder the assumption of risk rationale, fire fighters do not assume the risk of injury from hidden and unanticipated dangers, so landowners continue to owe fire fighters a duty of reasonable care with respect to such risks." Daniel F. Sullivan & Jonathan M. Purver, *Breach of Duty of Care to Fire Fighter or Police Officer*, 41 AM. JUR. P.O.F.2d § 6, at 151 (1985 & Supp. 1997).

88. Hedberg v. Mendino, 579 N.E.2d 398, 400 (Ill. App. Ct. 1991).

89. Sullivan & Purver, *supra* note 87, § 6, at 151. The following cases recognize that landowners may be held liable for failure to warn of hidden dangers: Netherton v. Arends, 225 N.E.2d 143 (Ill. App. Ct. 1967); Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964); Aravanis v. Eisenberg, 206 A.2d 148 (Md. 1965); Moravec v. Moravec, 343 N.W.2d 762 (N.M. 1984); Moreno v. Marrs, 695 P.2d 1322 (N.M. Ct. App. 1984); Jenkins v. 313-321 W. 37th St. Corp., 31 N.E.2d 503 (N.Y. 1940), *reh'g denied*, 33 N.E.2d 547 (N.Y. 1941); Schwab v. Rubel Corp., 37 N.E.2d 234 (N.Y. 1941); Beedenbender v. Midtown Properties, Inc., 164 N.Y.S.2d 276 (N.Y. App. Div. 1957); McGee v. Adams Paper & Twine Co., 271 N.Y.S.2d 698 (N.Y. App. Div. 1966), *aff'd*, 233 N.E.2d 289 (N.Y. 1967); McCarthy v. Port of New York Auth., 290 N.Y.S.2d 255 (N.Y. App. Div. 1968); Mason Tire & Rubber Co. v. Lansinger, 140 N.E. 770 (Ohio 1923); James v. Cities Serv. Oil Co., 43 N.E.2d 276 (Ohio 1942); Youngstown v. Cities Serv. Oil Co., 31 N.E.2d 876 (Ohio Ct. App. 1940); Rogers v. Cato Oil & Grease Co., 396 P.2d 1000 (Okla. 1964); Mignone v. Fieldcrest Mills, 556 A.2d 35 (R.I. 1989); and Clark v. Corby, 249 N.W.2d 567 (Wis. 1977).

recovery for risks inherent to firefighting. In the preceding scenario, unlike in a situation involving an inherent risk, the firefighters did not anticipate stored dynamite and could not be held to assume a risk for which they did not have a chance to prepare. Naturally, if a danger is hidden and unanticipated, it will not be a danger inherent to firefighting. Since firefighters cannot be held to be aware of hidden and unanticipated risks, they should not be barred from recovery when injured by such risks.[90]

Despite its apparent logic, the assumption-of-risk doctrine has been thoroughly criticized as the basis for the Fireman's Rule. There are five major arguments levied against the assumption-of-risk-rationale.

The first argument claims that since workers in other inherently dangerous occupations, such as road repair, may recover for injuries in tort, firefighters should be able to as well.[91] However, the primary task of the roadworker is not to encounter danger. The primary job of a roadworker is to fix the road, not to face on-coming traffic. Similarly, it is not the letter carrier's primary task to confront the territorial dog, nor is it the convenience store manager's primary job to encounter the crazed gunman. These dangers are secondary to these types of employment. Firefighters, on the other hand, are *primarily* employed to face the hazards associated with fire. Allowing a firefighter to recover in tort for injuries stemming from the

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90. *Bartels v. Continental Oil Co.*, 384 S.W.2d 667 (Mo. 1964), provides a most enlightening discussion of this principle. In that case, several firefighters were killed when an inadequately vented oil storage tank exploded. The defendant was aware that the tank was improperly vented and that such ventilation increased the risk of explosion. The defendant, however, never disclosed this information to the firefighters. On explosion, the tank which caused the firefighters' deaths "left its concrete cradle and 'rocketed' or was catapulted 75 to 100 feet over the filling station into Southwest Boulevard and 'a ball of fire' engulfed several crews of fire fighters . . . killing one bystander and five firemen." *Id.* at 669. "[A]dmittedly, an experienced fire captain would of course accept the presence of kerosene and gasoline as a known hazard of a fire in a gasoline storage facility. But the law does not compel firemen in fighting a fire to assume all possible lurking hazards and risks." *Id.* (citations omitted). In holding the defendant liable, the court stated that "in these particular . . . circumstances the evidence favorable to the plaintiffs supports the finding of a known hidden danger of which there was no warning whatever, a hazard that in any and all events Bartels as a fireman was not bound to accept as a usual peril of his profession." *Id.* at 671.

See also Lipson v. Superior Court, 644 P.2d 822 (Cal. 1982). In allowing recovery by the firefighter, the *Lipson* court held that the conduct in question occurred after the fireman arrived and that the conduct resulted in a heightened exposure to risk. *Id.* at 827. The court further stated:

> the risk that the owner or occupier of a burning building will deceive a firefighter as to the nature or existence of a hazard on the premises is not an inherent part of a firefighter's job. A fireman cannot reasonably be expected to anticipate such misconduct on the part of an owner or occupier of a building.

Id. at 828.

91. Walters v. Sloan, 571 P.2d 609, 617 (Tobriner, J., dissenting).

inherent risks of his job would be like allowing a boxer to recover from his opponent for battery—it makes no sense.

The second approach challenges the notion that firefighters voluntarily confront the hazards associated with firefighting.[92] Because firefighters are always required to confront the hazards of fire, they cannot be held to encounter these hazards voluntarily.[93] This argument, however, has no basis in fact. In reality, firefighters *are* allowed some latitude when deciding whether or not to confront a particular hazard.[94] Sometimes a situation is so dangerous that firefighters simply allow the structure to burn and focus on keeping surrounding exposures cooled down. It therefore runs contrary to standard firefighting principles to argue that firefighters are required to dash into a raging inferno regardless of the circumstances. Firefighters are highly-trained specialists whose professional judgment may dictate that they not face a particular hazard.

As for those risks that require confrontation by firefighters, it is not unjust or impractical to conclude that firefighters implicitly assume those risks when they become firefighters. Presumably, firefighters voluntarily decide to join the profession. It is difficult to imagine that an individual

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92. *See* Note, *Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749, 769 (1981) [hereinafter *Fireman's Rule*].

93. *Id.* "The voluntariness of a fireman's . . . conduct is questionable in light of the nature of [his/her] employment . . . . While it is true that they initially accept employment voluntarily, firemen . . . are not allowed to pick and choose among the dangers they are willing to face." *Id.*

94. "Once a conscious decision has been made to fight a fire it is important to remain calm and keep a clear perspective regarding safety." WASHINGTON TOWNSHIP FIRE DEPARTMENT (INDIANA), BASIC FIREFIGHTER TRAINING MANUAL 30 (1995). If a conscious decision to fight the fire may be made, then by necessity a conscious decision not to fight the fire may be made, too. "If fire conditions are so advanced or the condition of the building so poor that rescuers have a good chance of losing their lives, rescue should not be attempted . . . [because] it is unlikely the victim would be alive." *Id.* at 273.

> There are times when interior attack is not advisable because of the peril of structural collapse or because hand-held nozzles cannot provide the required water flow. In such cases, the next tactic is to fall back upon artillery rather than infantry, and resort to the use of master streams.

WILLIAM E. CLARK, FIREFIGHTING PRINCIPLES & PRACTICES 277 (2d ed. 1991). When the preceding quote refers to master streams, it means that the firefighters surround the structure from a distance and spray large volumes of water into the structure, as opposed to actually entering the structure. This tactic is referred to as the "surround and drown" method in firefighting circles.

"Limited access to ceiling spaces and the danger of ceiling collapse usually rule out interior firefighting at well-advanced church fires." *Id.* at 401 (fig. 16.27). "Rural firefighting is often devoted almost entirely to the protection of exposures." *Id.* at 423.

"The risk concept found in this hazardous occupation recognizes acceptance of certain dangers as almost inevitable, yet it does not require extreme personal risk unless there is no alternative." *Id.* at 95-96. A situation of "no alternative" would be when a known, living civilian or firefighter is trapped in the structure.

would not be aware of the basic risks associated with fighting fires at the time he or she decides to join the fire department.

The next argument is that the Fireman's Rule acts as a disincentive to the safe maintenance of property and to fire prevention.[95] Under this argument, because negligent landowners will not be held liable for injuries to firefighters, they will not take care to prevent fires. However, this argument assumes too much. It implies that people are indifferent about burning down their houses and businesses. Yet it is just not logical to conclude that, because of the Fireman's Rule, people will decide to stop guarding against fires. The threat of being left homeless and possessionless is enough of an incentive to make people guard against fires. Given the magnitude of that threat, people undoubtedly take as much care now as they would if they were to be held liable in tort to firefighters. The Fireman's Rule has been in effect for over a century, and people have always taken care not to burn down their dwellings and businesses. The last 105 years have not seen widespread carelessness on the part of landowners, and such carelessness is not likely to develop in the future, as long as people continue to value their property and possessions.

The fourth argument against assumption of risk is based on a cost-spreading rationale.[96] According to this argument, firefighters are inadequately compensated through workers' compensation, even though their jobs are more hazardous than most. The Fireman's Rule further disadvantages firefighters by not allowing them to bring an action in tort to make up the difference.[97]

This fourth argument is flawed in that it assumes that firefighters may never bring an action in tort. That is clearly not the case. Firefighters may bring suit against those who negligently fail to disclose hidden or unanticipated dangers. Firefighters may also bring a suit in tort if the nature of the fire has been misrepresented or if the landowner willfully or wantonly injures them. Additionally, they may bring suit if the danger was not one inherent to firefighting.

Furthermore, although this fourth argument against assumption of risk considers only workers' compensation benefits, there are other forms of

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95. "The fireman's rule, by allowing negligent persons to escape liability, does not encourage the public to use care in maintaining property and to avoid carelessly starting fires." *Fireman's Rule*, *supra* note 92, at 772.

96. For a detailed discussion of the cost-spreading rationale, see *infra* Part III.C.

97. *Fireman's Rule*, *supra* note 92, at 773, states:

> The policy of denying recovery to firemen because of the availability of public funds for compensation seems particularly unfair when firemen . . . are compared with other employees. In all cases, the funds may be inadequate to compensate fully for injuries. Although their job risks may be considerably greater than those of the average worker, firemen . . . are unable to bring an action against negligent third parties for uncompensated damages.

compensation available to firefighters. For example, firefighters are routinely provided with excellent health insurance plans.[98] Also, firefighters work an average of only about 122 days per year; however, they receive pay comparable to that of the average person who works the standard 255 days per year.[99] Firefighters are also given pension plans and paid vacations.[100] Thus, firefighters enjoy many other benefits in addition to workers' compensation. That these payments do not take the form of after-the-fact compensation for injuries by no means decreases their value.

The final argument against the assumption-of-risk rationale is based on the theory that judicial economy is an improper basis for denying recovery, especially when firefighters are denied the opportunity to protect personal rights.[101] By the same token, since the issue of negligence in starting a fire is frequently litigated and determined in actions by other parties to determine property damage and personal injury, firefighters could easily be made parties to this type of litigation because the issues are the same.[102]

Again, this argument improperly assumes that there is a per se bar to recovery by firefighters. Additionally, at the heart of the above argument is the assumption that firefighters have a personal right to sue for their injuries. As stated previously, in some circumstances firefighters do have a personal right to sue, and they are not denied access to the courts in those

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98. *See supra* text accompanying note 26.

99. Firefighting is not a "nine-to-five" job. Most firefighters work twenty-four hour shifts with a number of days off in between. One very popular system, the Kelly System, has shifts scheduled as follows: twenty-four hours on duty, twenty-four hours off duty, twenty-four hours on duty, twenty-four hours off duty, twenty-four hours on duty, ninety-six hours (four days) off duty. Another popular system is the Twenty-Four/Forty-Eight System, where the firefighter works twenty-four hours and has the next forty-eight hours off duty. Under both the Kelly System and the Twenty-Four/Forty-Eight System, firefighters work an average of only 122 days per year.

Note that the 255 day per year work schedule of the average worker was calculated by multiplying fifty-one by five. The fifty-one figure represents the number of weeks in a year minus one week for vacation. The five figure represents the number of days in a business work week.

100. Under the Kelly System, if the firefighter takes a vacation day on his last scheduled shift, he will get six days off. Under the Twenty-Four/Forty-Eight System, one day of vacation gives the firefighter five days off. Firefighters are, therefore, much better off than the average person who must take at least three days off work (this figure includes a weekend) to get a comparable vacation.

101. *Fireman's Rule*, *supra* note 92, at 773, states:

> the fear that allowing injured firemen . . . to bring an action against any person whose negligence causes the injury would result in a flood of litigation is also invalid. It violates the basic principle of our legal system that no one should be denied the opportunity to protect personal rights simply to avoid problems of judicial administration.

See also Walters v. Sloan, 571 P.2d 609, 620 (Cal. 1977) (Tobriner, J., dissenting).

102. *Walters*, 571 P.2d at 620 (Tobriner, J., dissenting).

situations. However, in other instances, there is no basis for a suit in the first place.[103] Thus, since firefighters do not have a right to bring suit in the first instance, the legal system is not denying them the opportunity to protect personal rights.

In sum, the assumption-of-risk rationale is an appropriate basis for the Fireman's Rule. Some risks are inherent in firefighting. For injuries resulting from these inherent risks, firefighters should be denied recovery in tort. Unanticipated and hidden dangers, however, should not bar recovery because firefighters cannot be held to assume risks they cannot reasonably foresee.[104] The assumption-of-risk doctrine provides logical boundaries to the application of the Fireman's Rule and serves as an adequate basis upon which recovery may be barred.[105]

C. *Economic Efficiency*

1. *Self-Insurance and Public Policy*

The final rationale underlying the Fireman's Rule is based upon principles of economic efficiency.[106] "The fireman's rule reflects the judicial determination that the public has become a self-insurer of its own wrongs."[107] Basically, since it is the public that calls upon firefighters to act, it should be the public that compensates firefighters for their injuries. This rationale reflects the belief that "it [is] too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable . . . occurrences."[108]

An important consideration behind the economic rationale is that firefighters are supported by *public tax funds* to take the risks and incur the injuries inherent to firefighting. Included in this public compensation scheme

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103. *See, e.g.*, Pennington v. Stewart, 10 N.E.2d 619 (Ind. 1937) (discussing the personal right to bring suit and due-process jurisprudence).

104. For an extensive analysis of the law regarding realization of risk, see Ernest H. Schopler, Annotation, *Modern Status of the Rule Absolving a Possessor of Land of Liability to Those Coming Thereon for Harm Caused by Dangerous Physical Conditions of Which the Injured Party Knew and Realized the Risk*, 35 A.L.R.3d 230 (1971 & Supp. 1997).

105. The following are other cases applying assumption of risk to the Fireman's Rule: City of Redlands v. Sorenson, 221 Cal. Rptr. 728 (Cal. Ct. App. 1985); Sayes v. Pilgrim Manor Nursing Home, Inc., 536 So. 2d 705 (La. Ct. App. 1988); Moreno v. Marrs, 695 P.2d 1322 (N.M. Ct. App. 1984); Fiola v. Korman, 592 N.Y.S.2d 429 (N.Y. App. Div. 1993); and Mignone v. Fieldcrest Mills, 556 A.2d 35 (R.I. 1989).

106. *See generally* Strauss, *supra* note 53, at 2037.

107. Benjamin K. Riley, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218, 219 (1983).

108. Krauth v. Geller, 157 A.2d 129, 131 (N.J. 1960).

are salary, disability benefits, and retirement benefits.[109] Furthermore, money paid to firefighters performs two services. First, it is useful for persuading people to become firefighters. Second, it allows the costs of injuries to firefighters to be spread among the tax-paying public.[110] Injuries to firefighters are inevitable, and under the current cost-spreading scheme, society has established a compensation system that allows the public to act as a self-insurer when firefighters sustain the unavoidable injuries inherent in the profession.[111] Taxpayers have established a public insurance fund to guarantee that firefighters are compensated for their injuries. The certainty of this system provides peace of mind for both the public and firefighters because all parties know that these funds have been set aside.

Apart from these considerations of efficiency, public policy supports the cost-spreading rationale. Because a workers' compensation system has been established for firefighters, it is not fair to make citizens also pay for their negligence in tort. If this were allowed, the taxpayer would be forced to pay the firefighter twice—once with his tax dollars and again with compensatory damages.[112] Allowing multiple recoveries for the same injury clearly contradicts public policy. The goal of our compensatory system is to place the injured party in the position in which he or she would have been had the injury not occurred.[113] Allowing multiple compensatory recoveries for the same injury destroys this basic principle of tort law by granting the injured party a windfall.[114]

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109. Riley, *supra* note 107, at 235.

110. *Id.*

111. *Id.* at 235-36. Regarding this "self-insuring" approach, Riley notes:

> The same . . . considerations that support individual private insurance coverage of negligent and reckless conduct support the application of the fireman's rule to that conduct. . . . [T]he ability to anticipate [negligent and reckless] wrongs and protect against them in advance is seen when the public provides a disability and compensation system for its public officers.

Id. at 237.

112. *Id.* at 236. "[S]ince the public has anticipated negligent and reckless injuries to its officers and has established a scheme to offset the costs of these injuries, it should not be held doubly accountable through liability in tort." *Id.* at 237. *See also* Steelman v. Lind, 634 P.2d 666, 667 (Nev. 1981) ("[T]he [fireman's] rule developed from the notion that taxpayers employ firemen . . . to deal with future damages that may result from the taxpayers' own negligence. To allow actions by . . . firemen against negligent taxpayers would subject them to multiple penalties for the protection.").

113. "[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977).

114. *See* Berko v. Freda, 459 A.2d 663, 666 (N.J. 1983):

> Exposing the negligent taxpayer to liability for having summoned the [fire department] would impose upon him multiple burdens for that protection. . . . [T]he taxpayer who pays the fire and police departments to confront the risks occasioned by his own future acts of negligence does not expect to pay again

2. *Workers' Compensation*

As noted above, a workers' compensation scheme underlies the cost-spreading rationale. Some opponents of the Fireman's Rule maintain that workers' compensation does not provide an adequate basis for barring recovery in tort by firefighters. Justice Tobriner's dissenting opinions in two court cases put forth this specific argument.[115] In analyzing the applicability of workers' compensation to firefighters, Justice Tobriner observed that members of the public are no different than third-party tortfeasors in any other action. Justice Tobriner concluded that firefighters should be allowed to sue citizens in tort for their injuries because the workers' compensation system allows tort recovery against third-party tortfeasors. While Justice Tobriner's proposition may seem appealing at first blush, there are compelling reasons why the workers' compensation system provides the better approach.

First, sound reasons exist for treating the public as employers rather than as third-party tortfeasors. "Rather than standing in the shoes of a third-party tortfeasor, the public stands in the shoes of the employer who operates a hazardous workplace."[116] At least three reasons support this position:

> First, fire companies . . . are created by the public to take care of those hazards that individuals inevitably create. Since the public has no need for their services until some danger arises, there is no "workplace", [sic] for these officers except for hazardous ones. . . . Second, . . . the fireman's rule will not apply to all injuries that occur while the officer is on duty, but only to those caused by dependent acts of misconduct . . . [; this] places the same limitations on the fireman's rule that the "arising out of and in the scope of employment" test [places] on workers' compensation . . . . Third, . . . the public supports the public officers' disability and compensation scheme through its tax dollars, which are functional equivalents of the workers' compensation insurance premiums that employers pay.[117]

Thus, the parallel to the workers' compensation system is clear. The

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when the officer is injured while exposed to those risks. Otherwise, individual citizens would compensate [firefighters] twice: once for risking injury, once for sustaining it.

115. *See generally* Walters v. Sloan, 571 P.2d 609 (Cal. 1977) (Tobriner, J., dissenting), and Hubbard v. Boelt, 620 P.2d 156 (Cal. 1980) (Tobriner, J., dissenting).

116. Riley, *supra* note 107, at 239.

117. *Id.* at 239-40.

public, like other employers, hires and pays individuals to perform certain tasks. In the case of firefighters, that task is to confront hazards. Accordingly, firefighters will not be allowed recovery if injured by those very hazards. Finally, like other employers, the public pays a premium in the form of tax dollars to insure against these injuries. Therefore, contrary to Justice Tobriner's assertions, there exist very compelling arguments for considering the public as an employer and not a third-party tortfeasor.

3. *Foreseeably Injurious Intentional Acts v. Intentionally Injurious Conduct*

The foregoing discussion does not mean, however, that a firefighter will always be barred recovery in tort. A line must be drawn between two types of conduct that form the boundaries of liability. These types of conduct are foreseeably injurious intentional conduct and intentionally injurious conduct.[118] As the name implies, intentionally injurious conduct is committed for the purpose of inflicting injury. By contrast, foreseeably injurious intentional conduct lacks the intent to do harm. Both principles involve intentional conduct, but the intended results are wholly different.[119] With intentionally injurious conduct, the actor intends to commit the act in question and for that act to cause harm to another. An example of an intentionally injurious act is discharging a firearm at a firefighter. Intentionally injurious conduct opens wide the doors to tort liability. The possibility of injury to firefighters reaches unacceptably high levels when this type of conduct is involved.[120] Just like any type of insurance plan, the Fireman's Rule does not insure against intentionally injurious conduct.

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118. *See generally* Johns-Manville Prod. Corp. v. Superior Court, 612 P.2d 948, 954-55 (Cal. 1980) (announcing the distinctions between foreseeably injurious intentional conduct and intentionally injurious conduct).

119. A useful approach for understanding the difference between these two principles is to draw a parallel to the criminal law classifications of specific and general intent crimes. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 218 (6th ed. 1995). Specific intent crimes are closely related to intentionally injurious conduct. General intent crimes, on the other hand, are closely related to foreseeably injurious intentional conduct. Examples of these principles in criminal law are breaking and entering and burglary. Breaking and entering only requires that the individual intend to enter another's premises without permission—it is a general intent crime. Similar to the intent present in breaking and entering, the actor committing foreseeably injurious intentional conduct intends only to commit the act in question without intending any further harm. Burglary, on the other hand, takes breaking and entering one step further by requiring that the entrant intend to commit a felony while within the premises. *Id.* Thus, burglary requires an intent to enter and an intent to commit a felony—it is a specific intent crime. Similarly, the actor committing intentionally injurious conduct intends to commit the act in question and further intends that act to cause harm. For a more in-depth discussion of general and specific crimes, see *generally id.*

120. Riley, *supra* note 107, at 244.

On the other hand, when foreseeably injurious intentional conduct is involved, the actor intends to commit the act but does not intend to hurt anyone by that act—the threat of injury is merely foreseeable and not intentional. An example of foreseeably injurious intentional conduct is when a contractor intentionally builds a cheaply constructed home. Should the home begin to burn, it is foreseeable that injury may result to the responding firefighters from a structural collapse, but such injury is not the contractor's intent.

A farmer burning down an old barn to clear land is another example of foreseeably injurious intentional conduct. The setting of the fire is intentional. The intentional nature of the fire, however, does not change the normal risks associated with fighting the fire. The basic argument is that "fire is fire," no matter what its origin.[121] Therefore, the firefighter should only be allowed recovery through workers' compensation since the risks that prompted the establishment of public compensation are present in both intentional and accidental fires.[122]

Injuries stemming from intentionally injurious conduct, however, lead to the opposite result. "Intentionally injurious acts . . . present hazards that differ in degree of probable harm."[123] Firefighters face identical dangers when facing either foreseeably injurious intentional conduct or negligent conduct. "In contrast, . . . since intentionally injurious conduct poses a very high probability of injury, the cost-spreading rationale . . . indicates that the fireman's rule should not bar a private suit."[124] Therefore, "[t]ort liability is not barred . . . where injuries are caused by . . . intentionally injurious conduct . . . [because it] represents an unacceptably great and thus uninsurable risk."[125]

4. *The Test for Liability*

The preceding analysis examined two distinct kinds of conduct: one of foreseeably injurious intentional conduct and another of intentionally injurious conduct. In order to determine which applies and whether or not to bar recovery in tort, a court must follow a series of steps. First, the court

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121. *Id.*

122. *Id.* Riley's example used arson as a foreseeably injurious intentional act. Under Riley's example, the firefighter would be barred recovery since arson is a foreseeably injurious intentional act. *But cf.* Flowers v. Rock Creek Terrace, 520 A.2d 361 (Md. 1987) (holding arsonists not protected by Fireman's Rule); Grable v. Varela, 564 P.2d 911 (Ariz. 1977) (holding arsonists not protected by Fireman's Rule); Giorgi v. Pacific Gas & Elec. Co., 72 Cal. Rptr. 119 (Cal. Ct. App. 1968) (suggesting arsonist exception to Fireman's Rule); and Krauth v. Geller, 157 A.2d 129 (N.J. 1960) (suggesting arsonist exception to Fireman's Rule).

123. Riley, *supra* note 107, at 244-45.

124. *Id.* at 245.

125. *Id.* at 247-48.

must decide if the conduct causing injury was independent or dependent. If firefighters are injured by conduct secondary to that which prompted their response, the conduct is independent. "Since the fireman's rule applies only to those injuries that are dependent on the presence of the officer and thus anticipated through the compensation scheme, the rule should be inapplicable to independent hazards, and the wrongdoer should be liable."[126] "If, on the other hand, the court finds the injury to be caused by the original misconduct, then the cost-spreading rationale . . . appl[ies]."[127]

Next, the court must determine whether the misconduct in question was intentionally injurious or a foreseeably injurious intentional act. If the act was intentionally injurious, recovery in tort will be allowed. However, if it was only a foreseeably injurious intentional act, recovery will be barred under the Fireman's Rule.

It cannot be denied that the public uses a portion of its tax dollars for self-insurance. Because the public pays for this self-insurance, individual citizens should not be held liable for negligence in starting fires that result in injuries to firefighters. Furthermore, the strong public policy against holding citizens doubly liable for injuries to firefighters adds support to the cost-spreading rationale. Finally, as mentioned previously, intentionally injurious conduct and causes independent of the need for the firefighter's presence give rise to liability in tort, but foreseeably injurious intentional conduct does not.

IV. BRITISH LAW OF OCCUPIERS' LIABILITY TOWARDS FIREFIGHTERS

A. *The Occupiers' Liability Act 1957*

In 1958, British law underwent a transformation regarding its law of occupiers' liability toward land entrants. On January 1 of that year, the Occupiers' Liability Act 1957 went into effect. In general, the Occupiers' Liability Act 1957 regulates the duty that a land occupier owes to his visitors with respect to dangers present upon the premises.[128]

With the passage of the Occupiers' Liability Act 1957, the traditional

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126. *Id.* at 248.

127. *Id.*

128. For the duty owed to those entering the premises without permission, see the Occupiers' Liability Act, 1984, ch. 3 (Eng.) [hereinafter Occupiers' Liability Act 1984]. The provisions of this Act are pertinent to firefighters who enter a landowner's premises without permission. These provisions, however, impose nearly identical burdens upon the landowner. *See generally id.* § (3) to (7). For the sake of efficiency, the Occupiers' Liability Act 1957 will be the statute of reference for this note. For a discussion of the varying liability of landowners, see Jon Holyoak, *Occupiers' Liability: Inconsistent Approaches*, 85 LAW SOC'Y GAZETTE 19 (1988).

common law categories of land entrants in Great Britain have been largely abrogated.[129] The terms "invitee" and "licensee" are no longer terms of art in British law. Under the Act, all lawful visitors are owed the same duty of care. "An occupier of premises owes the same duty, the 'common duty of care', [sic] to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."[130] The "common duty of care" may be regarded as a duty of care on the part of the land occupier to take all measures necessary under the circumstances to keep the visitor safe while on the occupier's premises.[131] Thus, the liability of the occupier may be considerably increased under this standard. For instance, even if a social guest has been warned of a danger and nothing wanton or willful has been done by the landowner to injure the guest, the landowner will still be liable if it is determined that it would have been reasonable under the circumstances to correct the problem.

Before considering the possible application of the Fireman's Rule in Great Britain, one must first see how firefighters fit into the current statutory

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129. The abrogation of status distinctions of land entrants is not limited to Great Britain. In the landmark case of *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), California abrogated status distinctions between all entrants of land, including trespassers. The court stated: "'All persons are required to use ordinary care to prevent others being injured as the result of their conduct.'" *Id.* at 564 (quoting McCall v. Pacific Mail S. S. Co., 55 P. 706, 707 (Cal. 1898)).

The California Supreme Court's reasoning—with the exception of its treatment of trespassers—is similar to that contained in the Occupiers' Liability Act 1957. According to the majority in *Rowland*:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Id. at 568. Additionally, the fact that California still employs the Fireman's Rule indicates that the Rule is workable under a scheme, like that in Great Britain, abrogating distinctions of land entrants. For a discussion supporting the abrogation of status distinctions in all American jurisdictions, see Mark J. Welter, *Premises Liability: A Proposal to Abrogate the Status Distinctions of 'Trespasser,' 'Licensee' and 'Invitee' as Determinative of a Land Occupier's Duty of Care Owed to an Entrant*, 33 S.D. L. REV. 66 (1987/1988).

130. Occupiers' Liability Act 1957, *supra* note 12, § 2(1).

131. *See id.* § 2(2):

> The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

scheme. Under the Occupiers' Liability Act 1957, firefighters are owed the same common duty of care as any other person entering another's property. Still, in light of the wording of the statute, the fact that firefighters are indeed allowed to recover is remarkable. One section of the Act states that "an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so."[132] Another section of the Act states:

> [W]here damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.[133]

In light of the fact that firefighters are experts in the field of firefighting, a landowner's telephone call to the fire authority to report the fire should adequately warn firefighters and put them on notice that hazardous conditions exist. In fact, as experts, firefighters do recognize the dangers inherent to the job; accordingly, they can begin preparing for those hazards the moment they receive the summons for help. Finally, the Act states that "[t]he common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor."[134] Incredibly, this section, along with the two above-mentioned sections, has been held inapplicable to firefighters. As evidenced by these sections, the wording of the Occupiers' Liability Act 1975 is perfectly adapted for excluding recovery by firefighters who sustain injuries from the inherent risks of their calling.

It is difficult to determine why British courts have not focused on the language of the Occupiers' Liability Act 1957. Since the courts have not addressed the issue, there is really no clear basis upon which to form a theory on their failure to consider the Act's exceptions. However, in all likelihood, British courts have avoided explicitly addressing the Act's

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132. *See id.* § 2(3)(b).

133. *See id.* § 2(4)(a).

134. *See id.* § 2(5). *See also* Douglas Payne, *The Occupiers' Liability Act*, 21 MOD. L. REV. 359, 365 (1958):

> If the visitor has actual knowledge of a condition by which the occupier excludes his liability his claim might also be barred by section 2 (5) of the Act, which preserves the common law defence of assumption of risk. The effect of a notice excluding liability should, however, be carefully distinguished from the effect of a notice warning a visitor of a danger. The latter . . . will absolve the occupier from liability only if it was enough to enable the visitor to be reasonably safe.

exceptions in cases involving firefighters because they have instead wished to construe the act in a way that is favorable to firefighters.

Another theory why British courts do not consider the Act's exceptions is that the courts normally may not use legislative history when construing the meaning of legislation.[135] Because British courts normally cannot refer to legislative history,[136] they employ a plain-meaning test in interpreting legislation. However, under the plain-meaning test, British courts are on their own in defining the scope of legislative provisions. Accordingly, the courts may actually use the plain-meaning test to interpret provisions however they see fit, rather than to determine the true, plain meaning of a provision. It has been suggested "that courts evade unpopular provisions through interpretation."[137] Since British courts allowed firefighters to recover under the common law, the courts may regard the exceptions to the Occupiers' Liability Act 1957 as unpopular provisions. They may then attempt to avoid these unpopular provisions by simply interpreting firefighters out of the purview of the exceptions.

"Reliance on individual conceptions of words introduces elements of subjectivity that are inconsistent with many of the justifications for relying on the words alone. This subjectivity threatens the view that judges are simply translating the meaning of the words chosen by the legislature."[138] Subjectivity seems to have played a role in judicial interpretation of the exceptions to the Occupiers' Liability Act 1957. The exceptions to the Act quoted above do not contain language indicating that public safety officers are to be excluded from the Act's exceptions. Indeed, the Act does not contain any provision excluding *any* person or group from its reach. British courts, then, have independently decided to exclude firefighters from the Act's exceptions by *disregarding* the plain meaning of the Act.

If British landowners are held to owe firefighters a common duty of care, it is only logical to conclude that firefighters should be subject to the same exceptions as any other person entering another's property. This trade-off mitigates the burden on landowners by allowing them to escape liability under certain circumstances. As it stands, however, British landowners must bear the burden of a common duty of care toward firefighters without the possibility of mitigation, even though a firefighter may squarely fall within an exception to the Act. Such an anomalous result clearly contravenes the spirit of the Occupiers' Liability Act 1957.

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135. *See generally* Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1 (1996).

136. *Id.* at 6.

137. *Id.* at 58.

138. *Id.* at 21.

B. *Great Britain's Failure to Adopt the Fireman's Rule*

Although the Fireman's Rule is almost universally applied in the United States, Great Britain has never applied the Rule. In determining landowners' liability with respect to firefighters, British courts have looked to the foreseeability of the firefighters' response and the foreseeability of injuries to the firefighters under the circumstances. In Great Britain, foreseeability establishes the landowner's duty of care. However, British courts also consider other factors that are the same as those found in negligence cases in the United States: proximate causation and actual harm.

First, a number of British cases have discussed the duty owed a firefighter (or police officer) by a land occupier. The more recent cases include *Sibbald v. Sher Brothers*,[139] *Salmon v. Seafarers Restaurant Ltd.*,[140] *Ogwo v. Taylor*,[141] and *Hibbert v. John Blundell Ltd.*[142] Two cases not involving firefighters are also relevant to this discussion. They are *Haynes v. Harwood*[143] and *Chadwick v. British Transport Commission*.[144]

1. *Sibbald v. Sher Brothers*

In *Sibbald*, a firefighter's wife brought suit to recover for the death of her husband who was killed in the line of duty while fighting a fire in a warehouse. As the fire blazed, an untreated hardboard ceiling erupted into flames thereby blocking several firefighters' exit. As a result, seven firefighters were killed. Lord Fraser found in favor of the defendant-landowners. He held that it is too great a burden to require landowners to ensure that adequate means of access to and from the building will exist for the duration of the fire.[145]

At first blush, Lord Fraser's reasoning looks very close to that underlying the Fireman's Rule. Yet, the two are not the same. The *sui generis* basis of the Fireman's Rule[146] deals only with the efficiency of

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139. Sibbald v. Sher Brothers, (H.L. 1980), *Transcript* [hereinafter *Sibbald Transcript*].

140. [1983] 3 All E.R. 729 (Q.B.).

141. [1987] 3 All E.R. 961 (H.L.).

142. Hibbert v. John Blundell Ltd., (C.A. 1995), *Transcript* [hereinafter *Hibbert Transcript*].

143. [1934] 1 K.B. 146 (C.A.) (involving police constable).

144. [1967] 2 All E.R. 945 (Q.B.) (involving private citizen engaged in rescue).

For a discussion of recovery for psychiatric injuries suffered by a police officer as the result of his employer's negligence, see Frost v. Chief Constable of the South Yorkshire Police [1997] 1 All E.R. 540 (C.A.). *See also* Page v. Smith [1995] 2 All E.R. 736 (H.L.) (declaring the standard for recovering for psychiatric injury).

145. *Sibbald Transcript*, *supra* note 139, at 4.

146. The *sui generis* theory is discussed in detail and adopted as the appropriate land entrant categorization of firefighters in Part III.A, *supra*.

requiring the occupier to keep his or her premises safe before and at the arrival of the fire units. *Sibbald*, on the other hand, dealt only with the feasibility of requiring sufficient access and egress for the period *after* the arrival of fire units. The *Sibbald* opinion never discussed the obligations of the occupier with respect to adequate access for firefighters *upon their arrival*. Because the Fireman's Rule was not even an issue in *Sibbald*, that case was not an affirmation of the Fireman's Rule.

2. *Salmon v. Seafarers Restaurant Ltd.*[147]

In *Salmon*, the plaintiff-firefighter was injured while fighting a fire at a restaurant. While the plaintiff was stabilizing a ladder used to gain access to the second story of the building, heat melted the seals on some gas meters causing an explosion that threw the plaintiff to the ground. The court ruled in favor of the plaintiff-firefighter. It was held that the landowner, who caused the fire, owed a duty to the firefighter that extended to the ordinary and inherent risks of firefighting and was not limited to only special, exceptional, or additional risks.[148] The landowner argued that the firefighter's special skills and training were relevant in determining liability. However, the court found that where it was foreseeable that a firefighter exercising those skills could nevertheless be injured, the occupier was in breach of his duty of care.[149] In essence, the court determined that since the fire was caused by the defendant's negligence and since it was foreseeable that the plaintiff would be required to attend the fire and would be at risk for the type of injuries he received, the defendant was liable in tort for those injuries.[150]

3. *Ogwo v. Taylor*[151]

In *Ogwo*, the defendant-landowner was removing paint from his house with a blowtorch when the house caught on fire. The plaintiff-firefighter entered the attic to attack the fire. When the water from the plaintiff's hose made contact with the fire, intense steam was produced. Since this was an attic fire, the fire was in an enclosed area and the steam had no means of

147. [1983] 3 All E.R. 729 (Q.B.). For an examination of this case and exceptional hazards, see Jon Holyoak, *Occupiers' Liability to Firemen*, 84 LAW SOC'Y GAZETTE 964, 965 (1987).

148. [1983] 3 All E.R. at 733.

149. *Id.* at 735-36.

150. *Id.* at 736.

151. [1987] 3 All E.R. 961 (H.L.). For a brief discussion of this case and predictable damage, see Holyoak, *supra* note 147, at 966.

escape. As a result, the plaintiff suffered serious burns.[152] Lord Bridge stated that it was predictable that the fire brigade would be called and that a firefighter might be injured despite all his skills and protective clothing.[153] The only issue was whether liability would attach to an injury caused by steam. It was held that this was the same type of damage that would result from contact with flames and that it could be the subject of a claim.[154]

The defendant argued that no duty was owed since the plaintiff must be taken to bear the ordinary risks of his calling.[155] In essence, the defendant was arguing the assumption-of-risk theory that underlies the Fireman's Rule. In rejecting the defendant's argument, Lord Bridge declared: "I am left in no doubt whatever that the American 'fireman's rule' has no place in British law."[156]

4. *Hibbert v. John Blundell Ltd.*

In this case, a plaintiff-firefighter was passing through a smoke-filled structure where the floor was wet and slippery. The plaintiff slipped on the wet floor and collided into his partner, causing serious injury to his own wrist. It was determined that in order to fall, the plaintiff must have departed from a standard procedure known as the "shuffle method," which is specifically designed to keep firefighters from slipping on wet floors.[157]

In *Hibbert*, Lord Beldam analyzed proximate causation. In Lord Beldam's opinion, simply because some other cause intervenes in no way means that the initial cause is not the proximate cause.[158] He proceeded to determine that the negligence of the defendant-landowner's servants was the proximate cause of the plaintiff's injuries.[159] But for the servants' negligence in starting the fire, the plaintiff would not have been at the premises and

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152. While one may believe that a firefighter's protective clothing would guard against burns from water, the scalding hot steam can, and often does, penetrate the protective materials.

153. [1987] 3 All E.R. at 966.

154. *Id.* at 964.

155. *Id.*

156. *Id.* at 966.

157. *Hibbert Transcript*, *supra* note 142, at 61.

158. Beldam's actual words were:

> What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is . . . out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which culminate in a result of which it still remains the real efficient cause to which it can be ascribed.

Id. at 64 (quoting Leyland Shipping Co. Ltd. v. Norwich Fire Ins. Soc'y Ltd. [1918] App. Cas. 350, 369 (H.L.)).

159. *Id.*

would not have slipped on the wet floor. The fact that the plaintiff momentarily departed from the prescribed method of passing through the structure did not break the chain of causation.[160]

Lord Beldam also found, however, that the firefighter contributed to his own injuries. Accordingly, Lord Beldam attributed fifty percent of the fault to the plaintiff.[161] Using similar reasoning, the only other judge on the panel, Lord Ward, found a causal connection between the injuries and both the defendant's and the firefighter's conduct. He too apportioned fault between the parties at fifty-fifty.[162]

Hibbert, however, does not undermine the assumption-of-risk basis for the Fireman's Rule. This case barred a portion of the plaintiff-firefighter's recovery on the basis of comparative fault. To conclude that this indicates a willingness of British courts to apply the Fireman's Rule is to misunderstand the very foundation of the Rule. The purpose of the Fireman's Rule is not to bar recovery under a theory of comparative fault; indeed the Fireman's Rule does not contemplate the impact of a *firefighter's* conduct upon his ability to recover. Rather, the Fireman's Rule is concerned with the conduct of the party who started the fire. If the firefighter's injuries were caused by a defendant's independent act of negligence, then the firefighter's comparative fault is a proper subject of inquiry; in that scenario, though, the Fireman's Rule does not apply in the first instance because the injury is not caused by the negligently started fire, but by some other act of the defendant. In a case where the Fireman's Rule applies, the comparative fault of the firefighter is immaterial because he will be barred recovery regardless of his conduct. Thus, the reasoning employed in *Hibbert* does not even implicate the Fireman's Rule.

5. *Haynes v. Harwood*

Although *Haynes v. Harwood* did not involve a firefighter, it is still informative in the analysis of British policy. In *Haynes*, the plaintiff-police constable was injured while stopping a team of runaway horses. The case was decided in favor of the plaintiff-police constable. Greer, L.J., held that

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160. Beldam stated:

> So here the chain of causation between the floor becoming slippery and the negligence of the defendants' servants in starting the fire was intact. It was not, in my view, broken or rendered inoperative by the momentary failure of the appellant [firefighter] to follow the shuffle method of advancing up this slippery floor, nor could such a lapse of concentration be characterised as foolhardy exposure to unnecessary risk.

Id.

161. *Id.* at 65.

162. *Id.* at 67.

the defendant's servant failed "to use reasonable care for the safety of those who were lawfully using the highway in which this van with the two horses attached was left unattended."[163]

The court in *Haynes* considered the doctrine of *novus actus interveniens*, meaning "new intervening act." Testimony established that a boy had thrown a rock at the horses, causing them to bolt. According to the opinion, if the *novus actus interveniens* is exactly what one would expect to happen by leaving horses unattended, then it may not be used as a defense.[164] "[I]t is only a step in the way of proving that the damage is the result of the wrongful act."[165] Thus, the boy's act failed to mitigate the defendant's conduct. Additionally, the court examined assumption of risk. The court held that assumption of risk does not apply in a case where an individual has placed himself in peril in order to save another person from the danger of personal injury or death.[166] Thus, the fact that the victim was a police officer who had voluntarily undertaken a duty to protect the citizens of his community was irrelevant because he had attempted to rescue a person from personal injury or death.

6. *Chadwick v. British Transport Commission*

Although *Chadwick* involved a civilian rescuer, it is relevant to this discussion because the same law is applied to both civilian and professional rescuers in Great Britain. In *Chadwick*, an accident involving two trains killed ninety people and trapped several more in the wreckage. The plaintiff sought to help the victims. As a result of the rescue, the plaintiff suffered mental shock for which he sought compensation.

Judge Waller decided that the defendant train companies were negligent for allowing two trains to collide.[167] The foreseeable result of this negligence was that the passengers would be placed in danger.[168] People would foreseeably attempt to rescue the victims, and some of the rescuers would

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163. Haynes v. Harwood [1934] 1 K.B. 146, 153 (C.A.).

164. *Id.* at 156.

165. *Id.* In concluding this point, Greer stated:

> There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

Id.

166. *Id.* at 157.

167. [1967] 2 All E.R. at 951.

168. *Id.* at 952.

thereby incur injury.[169] Since it was foreseeable that rescuers would be injured as a result of the defendants' negligence, the defendants were held liable for the plaintiff's injuries.[170]

Because Judge Waller emphasized the status of the plaintiff as simply a rescuer, his analysis applies with equal force to a professional rescuer. Indeed, the methodology employed by Judge Waller was followed closely by Lord Bridge in *Ogwo*,[171] which did involve a professional rescuer. The fact that the courts do not separate rescuers as either professional or civilian means that the result in *Chadwick* would have been the same if the plaintiff had been a professional rescuer.

British courts have not focused upon the unique nature of firefighting. Nor have they considered a firefighter's voluntary decision to undertake the risks inherent in the calling, a firefighter's right to enter property, or a firefighter's expertise in dealing with the hazards of fire.[172] The British approach, therefore, runs counter to the fundamental principles of the Fireman's Rule as applied in the United States. As will be demonstrated below, the American approach to liability is ultimately the better approach.[173]

V. EXTENDING THE FIREMAN'S RULE TO GREAT BRITAIN

To see how the Fireman's Rule would work in Great Britain, it is useful to apply the principles of *sui generis* status, assumption of risk, and economic efficiency to the facts of existing British case law.[174] The application of these three principles to British case law demonstrates not only that the Fireman's Rule is a workable alternative in Great Britain, but also that it is a desirable approach to the determination of landowners' liability with respect to firefighters.

A. *Status of Firefighters as Sui Generis Entrants on Land*[175]

In Great Britain, firefighters clearly are *sui generis* entrants on land. In fact, a British statute grants firefighters the same authority to enter an individual's premises as American firefighters are granted in the United

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169. *Id.*

170. For further discussion of liability and foreseeable victims, see S.P. Broome, *A Skiver's Charter?*, 137 NEW L.J. 1201 (1987).

171. *See generally* [1987] 3 All E.R. 961 (considering the foreseeability of the response of rescuers and the foreseeability that some of those rescuers would be injured).

172. For a discussion of the argument that firefighters are not foreseeable plaintiffs because of their training and experience, see Holyoak, *supra* note 147, at 967.

173. *See infra* Part V.

174. *See supra* Part III.

175. Note that *Haynes* and *Chadwick* will not be discussed under this subsection because the plaintiffs in those cases were not injured on private premises.

States.[176] Furthermore, as is also the case under American law, anyone who interferes with British firefighters while they are executing their duties may be held liable.[177] Thus, British landowners are held just as powerless to exclude firefighters from their premises as are American landowners. Because British firefighters occupy a status *sui generis*, landowners should only owe the firefighters a duty to warn of known, hidden dangers and to refrain from wantonly or willfully injuring the firefighters. Existing British case law may be used to demonstrate this proposition.

In *Sibbald*, the firefighter would have been denied recovery under the *sui generis* theory. When the fire occurred, it was not known by the landowner that untreated hardboard could suddenly ignite and become engulfed in flames.[178] The landowner, therefore, should not be held liable for failing to alert the firefighters of a hidden danger, because there was no way for the landowner to know that the ceiling would erupt into flames.[179] Furthermore, the landowner did not wantonly or willfully injure the firefighters. The firefighters simply had the misfortune of being in the room that was overcome by flames. Considering these factors, and the fact that the landowner could not exclude the firefighters, the firefighters were properly denied recovery in tort.

Although the result is the same under both the *sui generis* theory and the court's theory, the two theories are based on wholly different grounds. The *Sibbald* court reached its conclusion in light of the burden that would be placed on landowners if they were required to keep entrances and exits open for firefighters after their arrival on the scene. The *sui generis* theory, on the other hand, considers only the burden of providing adequate access prior

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176. Fire Services Act, 1947, 10 & 11 Geo. 6, ch. 41, § 30(1) (Eng.). The Fire Services Act 1947 states:

> Any member of a fire brigade maintained in pursuance of this Act who is on duty, any member of any other fire brigade who is acting in pursuance of any arrangements made under this Act, or any constable, may enter and if necessary break into any premises or place in which a fire has or is reasonably believed to have broken out, or any premises or place which it is necessary to enter for the purposes of extinguishing a fire or of protecting the premises or place from acts done for firefighting purposes, *without the consent of the owner or occupier thereof*, and may do all such things as he may deem necessary for extinguishing the fire or for protecting from fire, or from acts done as aforesaid, any such premises or place or for rescuing any person or property therein.

Id. (emphasis added).

177. *Id.* § 30(2) ("Any person who willfully obstructs or interferes with any member of a fire brigade maintained in pursuance of this Act who is engaged in operations for firefighting purposes shall be liable on summary conviction to a fine . . . .").

178. *Sibbald Transcript*, *supra* note 139, at 48.

179. For an American parallel, see Buren v. Midwest Indus., Inc., 380 S.W.2d 96, 98-99 (Ky. Ct. App. 1964) (holding that condition of premises causing fire to spread rapidly was not actionable).

to the arrival of the firefighters; after that point, the firefighters officially take over the premises. This "firefighter takeover" is perfectly appropriate. Firefighters know how to maintain adequate modes of access and egress. A civilian trying to keep the entrances and exits clear would only get in the way. Plus, firefighters may enter the structure by various means (e.g., windows or even holes in walls), which would make it difficult for a landowner to anticipate what openings need to remain safe for entrance and exit. Thus, the more persuasive basis for the result in *Sibbald* is that because the landowner did not fail to warn of a danger of which he knew, did not wantonly or willfully injure the firefighters, and could not do anything to exclude the firefighters since they entered his property out of a right granted by law, the firefighters are of a class *sui generis*, and the landowner should not be held liable for their deaths.

The same result may be reached in *Salmon*, *Ogwo*, and *Hibbert*. In none of those cases did the landowner fail to warn of a danger. In *Salmon*, the firefighter must have known that gas mains were present since the fire occurred at a restaurant, which very predictably used gas. Furthermore, the firefighter must have known that exposure to heat could cause the mains to rupture. Therefore, if the firefighter knew that the mains were present and that they could explode, then the landowner did not fail to warn of a hidden danger since the firefighter, through his expertise, must be taken to recognize those types of hazards. As such, the hazards were not hidden and the landowner had no duty to warn of them.

In *Ogwo*, the danger of sustaining a steam injury was not hidden. Anytime a fire is fought with water, steam will be emitted. In *Ogwo*, not only was the firefighter spraying water onto the fire, but he was also spraying the water in a confined space. That considerable steam production in a confined space will increase the potential for steam burns is not surprising. Firefighters, who are experts in dealing with the hazards of fire, must therefore realize that producing large amounts of steam in a confined area will result in the area filling with hot vapors that may cause burns. Thus, the landowner had no duty to warn the firefighter of the potential for injury from steam. Furthermore, the landowner did not willfully or wantonly injure the firefighter. The steam production resulted from the firefighter's actions, not from those of the landowner. The steam was simply the natural result of placing water in an environment of considerable heat. Therefore, since the landowner had no duty to warn the firefighter of the danger of steam and did not willfully or wantonly injure the firefighter, the landowner cannot be held liable for the firefighter's injuries.

The *sui generis* theory applies with equal force to *Hibbert*. That wet tile is slick is a basic physical principle. Of all people, firefighters should recognize this obvious hazard since they routinely work around wet

surfaces.[180] The threat of slipping on wet surfaces is a routine hazard of which firefighters should be aware. Furthermore, in *Hibbert*, the firefighter's injuries did not result from wanton or willful conduct by the landowner. The landowner did not spray the water on the tiles, and he certainly had no duty to mop up the water or to warn the firefighters of the water's presence before the firefighters passed along the slick surface. The injuries sustained were simply the result of the plaintiff-firefighter's decision to depart from the prescribed manner of walking on wet surfaces; thus, the landowner should not have been held liable since he neither failed to warn of a hidden danger nor acted willfully or wantonly.

In *Sibbald*, *Salmon*, *Ogwo*, and *Hibbert*, the firefighters entered the landowners' premises out of a right conferred upon them by law. The landowners were held powerless to do anything to protect the firefighters since interference with fire-scene operations may result in criminal liability. Additionally, the actual responses of the firefighters could not have been predicted ahead of time. Without the Fireman's Rule, the landowner may be held liable for failing to prepare properly for their arrival. In all of these cases, the firefighters were *sui generis*, and the landowners should have been held liable only if they failed to warn of a hidden danger or if they wantonly or willfully injured the firefighters while they were executing their duties. In none of these four cases was either basis for liability present, and the firefighters should have been denied recovery.

B. *Assumption of Risk*

The doctrine of assumption of risk provides another basis for denying recovery to British firefighters. The very language of the Occupiers' Liability Act 1957 protects the occupier from liability when the entrant fails to guard against risks inherent to his calling.[181] Additionally, the Act provides that landowners shall be shielded from liability if they warn the entrant of the danger and such warning is enough to make the entrant reasonably safe.[182] The Act also provides that landowners do not have to guard against risks that the entrant willingly confronts.[183] Amazingly, these standards have never been applied to firefighters in Great Britain. Given its language, the Act clearly provides a basis for applying assumption of risk to British firefighters. Additionally, British tort law follows the common law

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180. This argument is strengthened when one considers that the firefighters in *Hibbert* were taught a special method of walking, discussed *supra* in Part IV.B.4, to combat this type of hazard.

181. *See* Occupiers' Liability Act 1957, *supra* note 12, § 2(3)(b).

182. *See id.* § 2(4)(a).

183. *See id.* § 2(5).

doctrine of *volenti non fit injuria*,[184] which means that one who has consented to an injury may not be heard later to complain.[185] Accordingly, the American common law doctrine of assumption of risk may be easily applied to existing British case law involving injuries to firefighters.

The threat of the rapid spread of fire in *Sibbald* was no doubt a risk inherent to firefighting.[186] Nonetheless, the firefighters willingly chose to confront the possibility that more fire would erupt. Furthermore, the defendant did not interfere with the firefighters while they executed their duties; instead, he left them free to do their job. Thus, the firefighters should have been barred recovery under both common law assumption of risk and the Occupiers' Liability Act 1957.

The *Salmon* case lends itself to a similar analysis. Restaurants routinely have gas lines for cooking and heating purposes. Accordingly, firefighters should be aware that gas mains will be present at a restaurant fire. Anytime gas is being used on a premises, there is an inherent threat that it will cause an explosion if exposed to heat. Knowing that the gas mains could potentially explode, the plaintiff in *Salmon* willingly confronted that hazard and began climbing a ladder. The firefighter, therefore, willingly confronted the inherent risk of explosion. Moreover, the defendant-landowner did not interfere with the plaintiff-firefighter in any way. Given the fact that the threat of explosion must have been realized, that the firefighter willingly confronted it anyway, and that the landowner left the firefighter to do his job, the firefighter assumed the risk of explosion. Thus, under the plain wording of the Occupiers' Liability Act 1957 and common law assumption of risk, the landowner should have been protected from liability.

The plaintiff-firefighter in *Ogwo* also assumed the risk of injury. One does not need to be a firefighter to realize that steam causes burns. The risk of steam burns is particularly high in firefighting because anytime a fire is fought, tremendous amounts of steam are generated. In *Ogwo*, the firefighter should have been especially aware of the risk of steam burns because he was fighting the fire in a confined space, which makes being burned even more likely since the steam has only limited means of escape. Again, the landowner in this case left the firefighter free to do his job.

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184. For a discussion of the doctrine of *volenti non fit injuria*, see Morris v. Murray & Anor, 140 NEW L.J. 1459 (1990), and Syvil Lloyd-Morris, *The Age of Consent*, 141 NEW L.J. 426 (1991).

185. For an in-depth discussion of a variety of topics related to this doctrine (e.g., *volenti non fit injuria*, *ex turpi causa*, and contributory negligence), see Kevin Williams, *The Wrongdoing Passenger*, 140 NEW L.J. 1235 (1990).

186. Several factors, such as wind, dryness, and building materials disposed to rapid burning, are frequent causes of the accelerated spread of fire. These risks are not uncommon in fighting fire and firefighters should be held to realize these inherent risks.

Given all of these factors, the firefighter's claim should have been barred under both the Occupiers' Liability Act 1957 and common law assumption of risk.

As for the *Hibbert* case, slipping on a wet floor is an inherent risk of firefighting.[187] The plaintiff—a firefighter who had been taught the "shuffle method"—must have realized the inherent risk of slipping. In light of the fact that the defendant-landowner had not interfered with the plaintiff's performance of his job, that the plaintiff had been taught a special method of walking on wet tiles, that such a risk of injury is inherent in firefighting, and that the plaintiff willingly confronted such danger anyway, his claim should have been barred by assumption of risk and the Occupiers' Liability Act 1957.

In *Haynes*, the dangers of attempting to stop the horses were open and obvious. There is an obvious threat of being trampled or run over by the coach in an attempt to stop a team of runaway horses. The officer, nonetheless, willingly confronted the inherent dangers of attempting to stop the horses. Since the officer must have realized the dangers inherent in this attempted maneuver and nevertheless voluntarily confronted those dangers, his suit should have been barred by assumption of risk.[188]

Unlike the plaintiffs in the previous cases, the plaintiff-rescuer in *Chadwick* was properly allowed recovery. It was not the plaintiff's calling to confront the gruesome nature of mass casualty incidents. He was simply a citizen attempting to lend a hand to others in need. Given the fact that the plaintiff was not employed to confront these types of hazards, he does not fall within the purview of the Fireman's Rule. Instead, the plaintiff is protected by what is known as the rescue principle.[189] Under the rescue principle,[190] the rescuer is regarded as a foreseeable plaintiff when the

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187. The inherent nature of this risk is further evidenced by the fact that the fire brigade, realizing the potential for slipping on wet floors, taught firefighters the "shuffle method" to combat the risk of slipping.

188. Note that the Occupiers' Liability Act 1957 was not in effect when *Haynes* was decided. Nonetheless, the Act would not have been applied in *Haynes* even if it had existed because the officer was injured on a public street, not a private premises.

189. Note that this principle applies only to the amateur rescuer. The Fireman's Rule is an exception to this principle since it takes into account the unique character of the calling of public safety officers. The basic line that can be drawn to justify this distinction is that the average citizen is not expected to confront the hazards of rescue while the firefighter or police officer is. Furthermore, amateur rescuers have not received the extensive training provided to professional safety officers. As such, they cannot be held to realize all the dangers to which they may be exposed during a rescue effort. Additionally, the experience of professional safety officers allows them to keep a level head during tense rescue situations, thereby giving them an opportunity to survey the situation and recognize the risks involved. The amateur rescuer, on the other hand, cannot be expected to remain calm under the circumstances of an emergency rescue.

190. *See also* Solgaard v. Guy F. Atkinson Co., 491 P.2d 821, 825 (Cal. 1971) (holding

defendant negligently causes the occasion for rescue.[191] Accordingly, the injured rescuer may recover in tort for his injuries resulting from the defendant's negligence.[192]

In *Chadwick*, the defendant negligently operated its train. It was foreseeable that the train accident would result in injuries to, at the very least, the passengers on the train. The accident, therefore, foreseeably caused the occasion for rescue. The plaintiff in *Chadwick*, recognizing the occasion for rescue, began rescuing injured passengers. His injuries were the foreseeable result of the defendant's negligence, and he was properly allowed recovery under the rescue principle.

In summary, it is clear that the firefighters and police officer involved in these British cases should have been denied recovery on the basis of assumption of risk. In none of these cases was the plaintiff exposed to risks that were not inherent to his work. Indeed, the risks involved in these cases were basic to the operations undertaken. Furthermore, in none of the cases did the landowner interfere with the operations of the public safety officers. Finally, with full knowledge of the dangers inherent in those operations, the public safety officers willingly confronted the hazards. The only logical conclusion that can be drawn from these circumstances is that the plaintiffs assumed the risk of injury, and the British citizens should not have been held liable to them for risks knowingly and voluntarily encountered.

C. *Economic Efficiency*

The final basis for applying the Fireman's Rule to Great Britain is the cost-spreading rationale. Application of the cost-spreading rationale to British firefighters is both logical and efficient. To demonstrate this point,

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that the rescue principle varies the ordinary rules of negligence in two respects: first, the rescuer can sue on account of defendant's negligence toward the party rescued rather than negligence toward the rescuer himself; and, second, it restricts the availability of the defense of contributory negligence by making the defendant prove the rescuer acted rashly or recklessly).

191. For a discussion of the applicability of the rescue principle in both Great Britain and the United States, see J. Tiley, *The Rescue Principle*, 30 MOD. L. REV. 25 (1967).

192. *See* Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921). In this famous decision, Justice Cardozo explained the rescue principle:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Id. at 437-38.

the following discussion examines the six British cases discussed in the preceding subsections.

The cases of *Sibbald*, *Salmon*, *Ogwo*, *Hibbert*, and *Haynes* may be treated summarily. Each of these cases involves professional public safety officers injured during the execution of their duties.[193] As such, since each plaintiff is a public safety officer, each is covered by the same public compensation system.

Similar to the United States, Great Britain has established a system of public compensation for firefighters. The publicly-funded system allows the citizens of Great Britain to act as self-insurers. Firefighting in Great Britain is no doubt as inherently dangerous as it is in the United States. British citizens, therefore, have foreseen that no matter what measures are taken, firefighters will be injured during the course of their duties. In an effort to combat these inevitable injuries, British citizens provide compensation to their firefighters in order to persuade them to undertake the hazardous calling, as well as to compensate firefighters for injuries sustained on the job.

Like the American compensatory system, which seeks to place the individual in the position he or she would have been in had injury not occurred, the British compensatory system should compensate for the injury at hand and nothing more. British firefighters, like American firefighters, may recover for line-of-duty injuries from a publicly-funded compensation scheme for injuries and ill health.[194] As it stands, however, the British firefighter also can recover for injuries in tort.[195] This system of double recovery runs counter to the very purpose of the compensatory system. It provides the firefighter with a windfall and charges the citizen twice for the same job. No citizen injured by a negligently constructed product would be justified in recovering for his injuries from both the dealer of the product as well as from the manufacturer. The individual would be required to seek compensation from one party or the other or from some combination of the two. Recovering a judgment from both parties individually is repugnant to the compensatory system—yet that is exactly what British law allows firefighters to do. Under the British system, firefighters recover once from a citizen through tax-based compensation and again through a privately-

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193. As a reminder, *Sibbald*, *Salmon*, *Ogwo*, and *Hibbert* involved firefighters, *Haynes* involved a police constable, and *Chadwick* involved a civilian.

194. Firemens' Pension Scheme, S.I. 1992, No. 129 [hereinafter Firemens' Pension Scheme]. Schedule 2, part B3 provides for an ill-health award, and schedule 2, part B4 provides for an injury award that allows recovery "if the infirmity was occasioned by a qualifying injury." *Id.* at sched. 2, pt. B4.

A qualifying injury is defined as "an injury received by a person without his own default in the execution of his duties as a regular firefighter." *Id.* at sched. 2, pt. A9. "An injury shall be treated as having been received by a person without his default unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct." *Id.*

195. *See supra* text accompanying note 194; *see generally supra* Part IV.

funded tort judgment. The practice of allowing firefighters to recover twice for these injuries removes the incentive for maintaining workers' compensation and paves the way for grave economic inefficiency. More importantly, allowing this type of compensation promotes double recovery in its most basic form and violates the fundamental principles underlying the compensatory system.

Firefighters are also provided with pensions.[196] These pensions are funded through both contributions of firefighters and of the fire authority, which is funded by the British public.[197] Pensions are a wonderful means for firefighters to plan for their retirement.[198] The financial security associated with a pension is tremendous. Pensions provide for both financial and mental security, and British firefighters, therefore, receive a considerable benefit from the tax money set aside for their financial stability after leaving the fire service.[199] These pensions are another powerful example of firefighter compensation provided extensively by the public purse.

The plaintiffs in *Sibbald*, *Salmon*, *Ogwo*, *Hibbert*, and *Haynes* were all covered by the above-discussed public funds. Thus, compensation for the risk of the plaintiffs' injuries and for the injuries themselves had already been contemplated and provided. As such, all of these plaintiffs should have been barred recovery in tort under the cost-spreading rationale.

Chadwick provides quite a different perspective on the preceding discussion. The plaintiff in *Chadwick* was not a professional rescuer of any sort; he received no salary provided by public funds. He was not eligible for

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196. *See generally* Firemens' Pension Scheme, *supra* note 194 (setting forth the parameters for coverage, payment systems, and types of recovery allowed).

197. *See* GOV'T ACTUARY'S DEP'T (GREAT BRITAIN), MAIN FEATURES OF THE FIREFIGHTERS' PENSION SCHEME at Annex B (1996) (stating that British firefighters must pay eleven percent of each check into the pension scheme).

198. Firemens' Pension Scheme, *supra* note 194, at sched. 2, pt. B1, lays the foundation for the ordinary pension. This pension allows pension payments to be recovered by a retired firefighter who has attained the age of fifty and has at least twenty-five years of pensionable service provided he has not become entitled to an ill-health award. *Id.*

199. The following are brief descriptions of the other pensions available to firefighters. Schedule 2, part B2 of the Firemens' Pension Scheme establishes a short service award. This provision allows the recovery of a limited pension by a firefighter required to retire because of a mandatory retirement age limitation or who has attained the age of sixty-five. *Id.* He is entitled to at least two years pensionable service if not entitled to any additional recovery under any other provision of part B. *Id.* Schedule 2, part B5 of the Firemens' Pension Scheme provides for a deferred pension. A deferred pension basically allows a firefighter not serving until retiring age to recover a pension for the time he did serve beginning on his sixtieth birthday, or on an earlier date if he becomes permanently disabled. *Id.* Finally, schedule 2, part B6 provides for repayment of aggregate pension contributions. Generally, this provision allows a firefighter, who quits one fire brigade to work for another or who decides to stop paying into his own pension fund, to recover the aggregate contributions he has made into his fund prior to his leaving the employment of that fire brigade. *Id.*

workers' compensation benefits for his injuries because they were unrelated to his employment. Finally, his post-employment financial well-being was not secured through public funds in the form of a pension. Considering his status as a civilian rescuer, the plaintiff in *Chadwick* was justified in recovering in tort for his injuries. Since he was neither employed nor compensated by the public, the only recourse available to him to recover for his injuries caused by the negligence of another was through the courts. The *Chadwick* scenario is precisely the type of situation for which the tort system was established.

The injustice of Great Britain's compensation system becomes especially apparent when *Chadwick* is compared to the other five cases. Chadwick had no obligation to help the victims of the train accident. Nonetheless, he undertook to help his fellow citizens in a time of great tragedy and need. For his injuries, he was placed in the position he would have been in had the accident not occurred. Like Chadwick, the public safety officers in the other five cases undertook rescues. However, it is the firefighter's and police officer's *job* to encounter these situations. Yet when they were injured, they received compensation from both the public and the private citizen. Thus, professional safety officers, whose very job is to encounter these dangers, receive compensation far greater than that awarded to the private citizen who undertakes to help others for no salary at all. It is an odd situation, indeed, that the benevolent citizen receives appropriate compensation for his goodness, while professional safety officers, who are paid to confront these hazards, receive a windfall. The firefighters and police officer, like Chadwick, should have been placed in the position they would have occupied had the injuries never occurred and nothing more. It is very curious that British courts ignore this fundamental principle of tort compensation that they themselves defined for the United States.

The same bases that apply to the cost-spreading rationale in the United States are relevant to Great Britain. Workers' compensation benefits, by allowing citizens to act as self-insurers, efficiently spread the costs of inevitable injuries to firefighters among the public rather than concentrating the loss on the individual. Additionally, firefighters are provided with outstanding pension opportunities, funded partially by the public, that give them the security of knowing that they will be able to retire with a steady stream of funds for years to come.

The allocation of the costs associated with all of these benefits among the public is the most appropriate way to provide for their availability. By allowing firefighters to recover both through these public means as well as in tort, British courts effectively undermine the efficacy of public self-insuring and unjustly allow double recovery by firefighters. Allowing such recoveries places a heavy burden on the public who has tried to remedy these inevitable injuries in advance through public compensation systems. The

public, as well as the integrity of the compensatory system, are much better served by allowing recovery only from the public compensation systems.

In summary, extending the Fireman's Rule to Great Britain is a workable and practical solution to ending the problem of firefighters recovering in tort for injuries caused by the inherent risks of firefighting. Under the *sui generis* theory, British citizens would be spared the burden of compensating firefighters for injuries that the citizens are, by law, powerless to prevent. Firefighters would still be allowed to recover for wanton or willful conduct that injures them and for the landowner's failure to warn of hidden dangers. Furthermore, assumption of risk properly bars recovery; British citizens should not be required to pay firefighters for injuries resulting from inherent risks that are voluntarily confronted. By recognizing these inherent risks and confronting them anyway, firefighters consent to injury and thereby relieve landowners of their duty of care. Finally, economic efficiency provides a sound basis for extending the Fireman's Rule to Great Britain. Firefighters are already compensated for encountering the inherent risks of the profession through workers' compensation and pensions. Allowing recovery both through these publicly-financed programs and in tort requires the British citizen to pay the firefighter twice for the same job. Allowing this double recovery by firefighters places an extreme financial burden on British citizens and results in a windfall to firefighters.

VI. CONCLUSION

Since its creation in the late nineteenth century, the Fireman's Rule has become a fixture in American jurisprudence. It has been embraced almost unanimously by American jurisdictions and appears to be settled law for years to come. Although American courts are obviously persuaded by the efficacy of the Fireman's Rule, British courts have never embraced it. The following conclusions, however, demonstrate the need for Great Britain to begin employing the Rule.

First, British firefighters, like American firefighters, enter property by virtue of a legal right, and interference with the firefighters' operations after their arrival may result in liability on the part of the landowner. It is a great injustice for British law to remove the landowner's ability to exclude firefighters and then hold the landowner liable for injuries that the law renders him powerless to prevent. Application of the Fireman's Rule would protect British citizens from this legislatively-mandated powerlessness.

Assumption-of-risk theory also supports the application of the Fireman's Rule in Great Britain. Anyone of adult age must realize that firefighting poses inherent risks of structural collapse, smoke inhalation, burns, and heat injuries. It violates basic tort principles to allow firefighters to recover for injuries resulting from the dangers they have consented to encounter. Under assumption-of-risk theory, British citizens would be

relieved of the burden of compensating injuries caused by risks inherent to firefighting. Furthermore, British firefighters could still recover for injuries caused by risks not inherent to firefighting. Assumption-of-risk theory, therefore, protects landowners from liability in tort without completely depriving firefighters of the chance to recover.

Finally, cost-spreading forms another rationale for extending the Fireman's Rule to Great Britain. The British public uses tax-based funding to provide compensation for firefighters. Allowing recovery beyond these modes of compensation results in double recovery for firefighters. The tax-based compensation system allows for low-cost, yet highly effective, compensation for firefighters. The costs associated with maintaining a fire service and compensating those individuals serving within it may be efficiently spread over the populous through tax-based funding.

All of these considerations lead to one conclusion: the most efficient, just, and beneficial approach to liability for injuries sustained by British firefighters from hazards inherent to their calling is to apply the Fireman's Rule. British firefighters should not be heard to complain about injuries resulting from the need for their services. Great Britain, for the sake of its citizenry and its justice system, should begin employing the Fireman's Rule.

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CULTURE IN THE BALANCE: WHY CANADA'S COPYRIGHT AMENDMENTS WILL BACKFIRE ON CANADIAN CULTURE BY PARALYZING THE PRIVATE RADIO INDUSTRY

O Canada, we stand on guard for Thee![1]

I. INTRODUCTION

In many ways, Canada and the United States enjoy a mutually beneficial and unprecedented relationship.[2] That the two countries share the world's longest unprotected border, in itself, underscores the unique opportunity for Canada and the United States to reciprocally benefit each other. The countries have been "comrades in arms and in the grand endeavors to rebuild a world shattered by war," as well as allies in NORAD and NATO.[3] Economically, "Canada does twice as much business with the United States as [the Untied States'] next biggest trading partner, Japan."[4] Philosophically, the two countries "see the world in almost the same way" and "are cut from the same cloth, both offspring of a vanished British empire; both pluralist democracies tempered by constitutions; both speaking

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1. The reiterated last line of Canada's national anthem, approved by the Parliament of Canada in 1967, is a resolute expression of the country's determination to retain its identity. Frank E. Manning, *Reversible Resistance: Canadian Popular Culture and the American Other, in* THE BEAVER BITES BACK? 3 (David H. Flaherty & Frank M. Manning eds., 1993) [hereinafter BEAVER]. Northrop Frye, the internationally famous literary and cultural critic, has commented extensively on Canada's "garrison mentality"—an attitude "defensive and separatist." *Images of Canada: Journey Without Arrival* (Canadian Broadcast Corporation [CBC] 1975). The novelist Margaret Atwood described the same persistent phenomenon in SURVIVAL: A THEMATIC GUIDE TO CANADIAN LITERATURE (1972); *see also* BARBARA GODARD, THE CANADIAN ENCYCLOPEDIA 143 (James H. Marsh ed., 2d ed. 1988).

2. *See* JOHN SLOAN DICKEY, CANADA AND THE AMERICAN PRESENCE at vii (1975). "We are dealing with an ongoing interplay of vastness and intimacy . . . all gathered together in a drama of disparities and of alternating attraction and rejection that has no counterpart in the international community." *Id.*

3. Bernard Ostry, *American Culture in a Changing World, in* BEAVER, *supra* note 1, at 37.

4. *Id. See Business Costs Lowest in Canada,* CANADA Q., Oct. 1997:

> U.S. merchandise exports to Canada in the first half of 1997 totaled [U.S.] $75.8 billion, an increase of 10 [%] over the same period [in 1996]. The increase, about [U.S.] $8 billion, was more than the U.S.'s *total* exports in the six months to markets such as France, Hong Kong or China.

Id. See generally Stephen R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281 (1993). In 1989, "$200 billion worth of goods flowed between the two nations." *Id.* at 283. "In that same year shipments from the U.S. to Canada accounted for more than 20% of the value of all U.S. exports of merchandise . . . ." *Id.* Reciprocally, "in 1991, Canadian exports [made up] 19% of all U.S. imports, an amount matched only by Japan." *Id.*

the language of liberty and dollars."[5]

Considerable ambiguity undermines this relationship, however, as the U.S. entertainment industries threaten to consume Canadian culture.[6] More than any other country with similar concerns, Canada is especially susceptible to this phenomenon because of its immediate proximity to the United States.[7] That more than eighty percent of the Canadian population lives within 100 kilometers of the U.S. border exacerbates this vulnerability, as does the vast difference in population size.[8] This makes maintaining a national identity distinct from that of the United States increasingly difficult for Canada. Simply put, the stereotype is that there is no true Canadian culture. It has even been suggested, by extension of this misconception, that Canada should simply join the United States for the sake of convenience.[9]

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5. Ostry, *supra* note 3, at 37. *See* DICKEY, *supra* note 2, at 6. Dickey admonishes that "Americans would do well not to mistake the appearance of similarity or similar terminology for the reality of similarity." *Id.* Even the appearance of similarity breaks down quickly when one pays attention. For example, there is regionalism in the United States in that the country is "divided and dispersed by fifty different state governments, while in Canada the geographic definition and size of only ten provinces give regionalism a cultural integrity and a political authority of its own." *Id.*

6. The U.S. entertainment industries unapologetically impose American culture on the rest of the world. The potent mediums of music, radio, books, film, and television represent the greatest export of the United States as a result of aggressive pursuit of foreign markets. *See* Andrew Carlson, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585 (Summer 1997).

7. *Id.* at 586-87. The number of nations asserting rights to protect their cultural industries against the U.S. onslaught is rising rapidly. *See also* Rudy Fenwick, *Canadian Society*, *in* THE ACSUS PAPERS (1989). Discussing the notion of "nation building," the author argues that although these issues are more sharply drawn in Canada, they are not uniquely Canadian concerns. *Id.* at 48.

> [R]ecent American political campaigns and product advertising—on the one hand promoting a free, open world market, but on the other encouraging consumers to "buy American" [while] worrying about the effects of the trade deficit and foreign investments on the nation's economy—[suggest] that these are shared concerns in a changing world.

Id.

8. Carlson, *supra* note 6, at 586-87. *See also* Fenwick, *supra* note 7, at 4. "Most basic of all is the disparity in size of the two populations, the United States being about ten times larger than Canada's twenty-two million." DICKEY, *supra* note 2, at 4. The author argues that this disparity in population size leads to almost every other disparity, and few flow against the enormous difference in population size. The few exceptions to this rule that do exist—"for example, the fact that Canadians on a per capita basis in 1971 had $4,476.19 of life insurance compared to $775.60 in the United States"—indicate "inconspicuous but culturally significant differences in the two societies." *Id.*

9. PIERRE BERTON, WHY WE ACT LIKE CANADIANS 17 (1987). The author responds to a purportedly average American who, upon visiting Canada, asks typical questions that indicate to the author (through ignorance of the Canadian experience) that Canadians "*are* a different people." *Id.* at 16. *See also* Annette Baker Fox, *Canada In World Affairs*, *in* THE

This perceived lack of individuality is not what Canada intended when it became an independent country in 1867. A popular Canadian creation myth suggests that the Fathers of the Confederation intended to borrow "the best of what their ancestors and neighbors had produced" by combining "French culture, British politics, and American technology. But the plan went wrong, and Canada was left instead with French politics, British technology, and American culture."[10] The implication is clear: even from the beginning, Canada has struggled to maintain a distinct identity. Since 1967, the seminal year in Canada's national self-consciousness, this struggle has grown increasingly controversial and political.[11] The stakes are high, as articulated by Former Heritage Minister Michel Dupuy: "[W]e must bring back culture to the forefront of society's concerns, for it is essential to our identity, to our pride, to our unity and to our independence in international society."[12] Recognizing this priority, the Canadian government has implemented a host of initiatives, programs, agencies, and regulations designed to promote Canadian creativity.[13]

ACSUS PAPERS (1989). Canada's "post-World War II diplomacy as a middle power demonstrates both the opportunity offered by that status and the constraints imposed by it, such as the frequent inattention of foreign onlookers." *Id.* at 31. Canada's conduct in foreign affairs is distinguished from other middle powers by two conditions: "(1) the task of living 'distinct from, but in harmony with, the world's most powerful and dynamic nation' and (2) the interest 'to ensure the political survival of Canada as a federal and bilingual sovereign state' . . . ." *Id.* Regarding the notion that Canada might as well be part of the United States, see JAN MORRIS, CITY TO CITY (1990). Morris states that this is "pure nonsense" and that

> almost nowhere in Canada could I suppose for a moment that I was on American soil. Not only is there the utterly distinct French element, not only are the political and social systems quite different, but the whole temper of life in Canada, its manners, its looks, its values, I think, are unmistakably Canadian.

Id. at xiii. *See also* Joe Chidley, *Millennial Angst*, MACLEAN'S, Jan. 6, 1997, at 23. Interestingly enough, *Maclean's* polled readers about issues that will face Canada in the year 2005. In response to whether there will be parts of Canada joining the United States, 29% say that is unlikely, and 26% say that is unacceptable. *Id.* These percentages do not represent the overwhelming majority that might be expected.

10. Manning, *supra* note 1, at 3.

11. The struggle engages a further complication, namely, the limitations of political bodies to comprehend the problem. *See* BERTON, *supra* note 9, at 4 (stating that "Americans don't really understand how different we are . . . . [U.S.] leadership doesn't understand it . . . . What distresses me is the realization that our own government doesn't appear to understand it either.").

12. Amy E. Lehmann, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT'L L. & COM. 187, 188 (Spring 1997).

13. Protection of Canada's "cultural industries" has been accomplished, with undeniable success and continuing controversy, through a variety of governmental initiatives, some of which will be addressed throughout this note. Examples of such measures include cultural industry exemptions in international treaties, the use of content requirements imposed on broadcasters, and, most recently, the extensive revisions of the Canadian Copyright Act. The

The most recent attempt to shelter the fragile Canadian culture came in the form of Bill C-32, *An Act to Amend the Canadian Copyright Act*, which was passed by Canada's Senate in April 1997[14] and took effect 1 September 1997.[15] These recent amendments to the Copyright Act represent the "most comprehensive attempt at reform of [Canadian] copyright law in 75 years."[16] The world was a vastly different place when the copyright legislation was first established in 1921,[17] and the Canadian Copyright Act has received only minor amendments since that time.[18] Canada's copyright

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catalyst that brought "cultural industries" to the foreground was the debate about various types of free trade, which developed into a remarkable demonstration of unity among Canadians for the protection of their "cultural industries." Lehmann, *supra* note 12, at 188-89. In general, the United States-Canada Free-Trade Agreement Implementation Act of 1988 (FTA) was designed to promote fair competition by removing trade barriers between the United States and Canada. *Id.* at 189. Culture became a focal issue in these negotiations, instigated by the government of Ottawa, because of the overall Canadian view that the United States dominates the communications and entertainment industries. *Id.* at 188. "The FTA was the first free trade agreement to broadly exempt cultural products from its general free trade provisions . . . ." *Id.* at 189. "Cultural industries, as defined in the FTA, include the publication, distribution or sale of books, magazines, periodicals, newspapers, films, video recordings, audio or visual music recordings, and music in print, as well as radio, television, cable, and satellite broadcasting services." *Id.* at 189.

14. *Performers Cheer Final Passage of Copyright Bill*, CANADA NEWSWIRE, Apr. 25, 1997.

15. Ross Mutton, *Status of Bill C-32, an Act to Amend the Copyright Act* (visited Nov. 24, 1997) <http://ccins.camosun.bc.ca/~amtec/c32forc1.html>. The Heritage Department was principally responsible for this reform.

16. Howard P. Knopf, *Canada's Copyright Law Gets an Overhaul: There are plenty of winners and losers under the federal government's new Bill C-32*, FIN. POST, May 25, 1996, at 1.

17. *See* BERNARD GRUN, THE TIMETABLES OF HISTORY 478 (1991). For historical perspective, Gandhi was emerging as India's leader in its struggle for independence, and the 18th Amendment to the U.S. Constitution had just gone into effect. *Id.* at 478-79.

18. But this was not for a lack of trying. *See* JAN MATEJCEK, HISTORY OF BMI CANADA LTD. AND PROCAN: THEIR ROLE IN THE FORMATION OF SOCAN 44 (2d ed. 1996). After many years of trying to change the Canadian Copyright Act of 1924, in 1977, two consultants to the Department of Consumer and Corporate affairs released the first revision-oriented publication entitled *Copyright in Canada: Proposals for a Revision of the Law*. *Id.* Hopes vanished quickly because the government did not intend to change the Act, but this publication heightened the pressure for change, as did the increasing international successes of Canadian composers and performers. In 1982, the final report by the Federal Cultural Review Committee was released, which said "the artistic profession must be placed on the same footing as any other honorable and vital vocation. When creative artists, and what they create, receive recognition and esteem commensurate with their contributions to our community and culture, much else will follow." *Id.* at 71. As copyright reform became a focus of PROCAN (Performing Rights Organization of Canada), it was also a dominant theme at the 1982 Rome Congress of CISAC "when a report called *The Price of Copyright*, presented by SACEM, the French Performing rights society, was discussed." *Id.* The report showed that the percentage of musicians who can live off their royalties was below 10% and only 4% (of 87,000 persons sampled) "received the average minimum salary of countries surveyed."

reform was indeed a response to recent technological advances that are forcing the entire world to revise outgrown copyright laws, especially in relation to issues presented by the internet and digital reproduction.[19] Because copyright law generally reacts to technology, and consequently is behind it, the timeliness and necessity of copyright reform in Canada can hardly be questioned.[20]

This note focuses on the recent establishment of "neighboring rights"[21] in the Canadian Copyright Act through Bill C-32.[22] A form of derivative copyright protection benefitting various contributors to a work, neighboring rights were created to protect Canadian culture. However, these rights may actually hamper cultural development by imposing increased copyright fees on Canadian radio—a medium that has played a crucial role in promoting Canadian culture.[23] Part II of this note examines the distinct qualities of

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Id. Promises of a new Copyright Act emerged again in 1984 through a "White Paper," *From Gutenberg to Telidon,* which originated in two departments—the Department of Consumer and Corporate Affairs and the Department of Communications. Nothing tangible came of it. *Id.* at 79.

19. *See* Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can it Protect U.S. Sound Recording Copyright Owners in a Global Market,* 14 CARDOZO ARTS & ENT. L.J. 702 (1996). The "growing recognition that new digital technologies threaten to displace the traditional methods of sound recording distribution" and "the United States' desire to establish sufficient protection in an expanding global market" led to *The Digital Performance Right in Sound Recordings Act of 1995. Id. See also* Barbara Waite, *Communications and Copyright in Canada and the U.S.: A Survey of Current Law and Proposals for Change,* 1 TRANSNAT'L LAW. 121 (Spring 1988).

20. *See generally* S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (2d ed. 1989). Advances in technology communication set the pace for copyright laws the world over because "pirates set the speed their pursuer must take if they are to be caught." Lord Scarman, *Foreword* to STEWART, *supra* at v. *Cf.* Prudence Adler, *WIPO: Summary and Key Accomplishments* (visited Nov. 24, 1997) <http://arl.cni.org/newsltr/192/wipo.html>. The internet is currently the single greatest culprit in wreaking havoc on copyright systems, forcing many changes and reforms. Witness the WIPO treaties, primarily initiated to address copyright problems relating to the internet. *Id.*

21. "Neighboring rights" extend copyright protection—traditionally available only to the author of a work—to performers, musicians, producers, and other creators and contributors. *See infra* text accompanying notes 130-41 for a more detailed explanation of neighboring rights.

22. *See* Michael McCabe, Speaking Notes from Insight Conference on Copyright Reform, May 30, 1996, *in Paying Twice for the Same Goods* (visited Jan. 25, 1998) <http://www.cab—acr.ca/Insight_MM.htm>. McCabe refers to the intense debate that surrounded Bill C-32 and expresses the idea that "[i]n the popular parlance [the discussion of neighboring rights] often ends up being a battle between broadcasters and creators." *Id.*

23. This note will focus on private Canadian radio stations, as distinguished from the governmental Canadian Broadcasting Corporation (CBC). The neighboring rights provisions in the copyright amendments will have the most severe impact on the private stations. Despite increasingly drastic cuts in CBC funding, the threat of financial burdens caused by the copyright amendments are more threatening to privately owned stations. *See* KNOWLTON NASH, THE MICROPHONE WARS 550 (1994). Although private broadcasters have improved

Canadian music and the role of radio in promoting Canadian musicians. It also explores some of Canada's reasons for attempting to protect the country's culture from bombardment by U.S. influences. This section explains how radio plays an integral role in developing new artists and, therefore, culture itself.[24] Part III turns to the neighboring rights provisions of the copyright amendments.[25] Included is a brief overview of Canada's approach to copyright law in general, the procedural changes that the amendments created, and the political posturing that impacted the shape and timing of the amendments. Part IV offers reasons why the objectives of the copyright amendments will not be met and proposes some suggestions to remedy the problem. For example, in addition to imposing economic hardship on struggling radio stations, the neighboring rights provisions will fail to help the artists they were intended to benefit. As a result of the amendments, only the most successful Canadian artists will earn extra income from the performers' rights provision. In short, by paralyzing the private radio industry, the new copyright amendments threaten to backfire on Canadian artists and the nation itself.

II. THE ROLE OF MUSIC AND RADIO IN DEFINING CANADIAN CULTURE

The CEO of the Recording Industry Association of America recently told a joke on a Canadian radio show: "What's the difference between yogurt and Canada? Yogurt has an active culture."[26] While Canadians are generally good humored and can accept a healthy dose of self-deprecation, this joke reveals a damaging, yet all too common, misconception of Canada.[27] The definition of "culture" suggests that much is at stake when a nation's culture is threatened. Culture is "the totality of socially

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their Canadian programming in recent years, their decisions will always be limited by profit considerations. As a taxpayer-supported body, the CBC's bottom line is public service. *Id.*

24. Naturally, much more than music and radio contribute to a culture, but this note is limited to these factors because of their particular contributions to Canadian culture.

25. The recent amendments will affect many groups not covered in this note. These groups include students, educators, and booksellers, each with respective concerns about how the copyright amendments would restrict the purchase of used textbooks, increase the cost of photocopying coursepacks, and prevent the importation of foreign books without authorization. *Opinion, Cracks in Liberals' Copyright Bill*, FIN. POST, Apr. 26, 1997. *See* NORMAND TAMARO, THE 1997 ANNOTATED COPYRIGHT ACT (Christopher McGuire trans., 1996). Another bill, C-307, amended the Criminal Code and the Copyright Act. *Id.* at xxix. Bill C-307 was not associated with neighboring rights, but it does grant the Crown profits from authorship that accrue to a convicted person or his family. *Id.*

26. Carlson, *supra* note 6, at n.188.

27. The cultural impact is largely internal (within Canada) and "goes all but unnoticed in the United States." DICKEY, *supra* note 2, at x. Persistent article titles such as Mike Mettler's *Everybody Thinks This Is Nowhere: Canadian Rock Is Alive and Well. But Will It Pass Customs?* certainly aggravate matters. GUITAR, Nov. 1997, at 48-59.

transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought."[28] The secondary meaning of culture broadens to include "intellectual and artistic activity, and the works produced by it."[29] From Latin, by way of Middle English, "culture" derives from "cultivate," which means "to improve and prepare; to promote the growth of; to nurture; to form and refine."[30] Thus, a biological metaphor emerges: culture is capable of being grown. Accordingly, it is not only understandable but also essential that the Canadian government take action to nurture its delicate culture.[31]

The circumstances surrounding Canada's origins help to explain Canada's problem of maintaining a cultural identity distinct from that of the United States. British Loyalists moved north as a result of the American Revolution; Canada was founded in 1867 to avoid being assimilated into the United States.[32] The fundamentally different organizing principles upon which each country was founded have generated widely divergent social impulses. "The United States adopted Whig values of . . . liberal democracy and laissez-faire economics, . . . embraced an ideological understanding of its national identity . . . , and carried the Reformation to its social conclusion by embracing sectarian Protestantism as a popular but strictly 'unofficial' religion."[33] Canada, however, accepted

> Tory values of monarchy and hierarchy, adopted the concept of public political responsibility for economic management and social well-being, embraced a pragmatic, historically conditioned, and compromised sense of national identity rather than an ideological or vocational one, and remained loyal to the Catholic and denominational Protestant churches, allowing them a formal and state-supported relationship to secular society.[34]

Beyond this philosophical separation from the United States, until the early 1900s Canada was geographically cut off from the world. Cultural activities

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28. THE AMERICAN HERITAGE DICTIONARY 454 (3d ed. 1992).

29. *Id.*

30. *Id.*

31. There is no question that culture is essential to the survival of a civilization. In addition to the classical antecedents such as Plato's *Republic* (where a philosopher-king ruled) or Gibbon's commentary on the Roman Empire, Toynbee's cyclical theory of history, Mumford's *Technics and Civilization*, and the writing of Canada's media guru, Marshall McLuhan (especially in *The Medium is the Message* and *Understanding Media*) exemplify this point. Martin Segger, THE CANADIAN ENCYCLOPEDIA, *supra* note 1, at 1277-78.

32. Lehmann, *supra* note 12, at 192.

33. Manning, *supra* note 1, at 25.

34. *Id.* at 25-26.

depended on the talents of local residents.[35] Canadians "participated" in culture, so to speak, by singing in church or attending concerts by amateur performers at private parties. "Only the wealthiest" members of society "could afford to buy books or hire musicians to play at parties," and the "elite joined lecture clubs, poetry circles, and reading groups."[36] Despite this class-based inequity, it is clear that even from the beginning, listening to musical performances was often an intimate, communal activity reflecting, and contributing to, the collectivist view Canadians held.[37]

By 1967, Canada's centennial year, interest in strengthening the Canadian image swelled. The occasion was a well-spring for national pride. Boosted by the success of the Montreal World's Fair, Expo '67, the Centennial spurred tremendous growth in Canada's cultural industries. Canadian publishing experienced a renaissance, through the expansion of the paperback *New Canadian Library* and the new eighteen-volume history, *The Canadian Century Series*, as well as through best-selling authors like Pierre Berton, Farley Mowat, Irving Layton, Mordecai Richler, and through the emergence of several new publishers.[38] Musically, many works by Canadian composers were commissioned for the Centennial by the Canada Council, and by various cities, municipalities, and performing organizations.[39]

Unfortunately, these efforts to foster national pride (as well as the Centennial itself) were undermined in subtle ways, as evidenced by Canada's failure to adopt the country's national flag (the red maple leaf between two red bars) until 1965, ninety-eight years after confederation.[40] The irony of a one-hundred-year-old nation largely indifferent to its two-year-old flag was significant because a national flag is typically unparalleled at generating "learned responses to an evocative national symbol."[41] Furthermore,

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35. K. MARIE STOLBA, THE DEVELOPMENT OF WESTERN MUSIC: A HISTORY 620 (1990) ("The centers of musical activity were the local church, the coffee house, and, in larger communities, the military band.").

36. Lehmann, *supra* note 12, at 193.

37. These wholesome communal values are celebrated in the humorous Mariposa stories of the economist-author Stephen Leacock. *See* SUNSHINE SKETCHES OF A LITTLE TOWN (1912).

38. James Marsh, *Book Publishing, English-Language*, *in* THE CANADIAN ENCYCLOPEDIA, *supra* note 1, at 248-49.

39. MATEJCEK, *supra* note 18, at 13.

40. JAMES L. HALL, RADIO CANADA INTERNATIONAL: VOICE OF A MIDDLE POWER 2 (1997). Northrop Frye commented that Canada is "the only country with a vegetable device as its national symbol." John Ross Matheson, *Flag Debate*, *in* THE CANADIAN ENCYCLOPEDIA, *supra* note 1, at 502. The debate involved proponents of the British Union Jack design and those supporting a red ensign that would honor British and French traditions. The 23-point sugar maple leaf was adopted by Royal Proclamation under Queen Elizabeth II on 15 February 1965.

41. HALL, *supra* note 40, at 2.

Canada's Constitution remained in England until 1981.[42]

Despite some of the cultural ironies surrounding the Centennial, Canada's national identity has continued to emerge. Indeed, from 1982 to 1994, cultural growth in Canada occurred more rapidly than in the past century: in 1982, for example, 352,000 Canadians worked in the cultural industries; by 1994, the number had grown to 660,000.[43]

Given the vast philosophical and historical differences between Canada and the United States, it would be surprising if a unique and vibrant Canadian voice had *not* developed. Nevertheless, defining Canadian culture precisely is impossible because of the ineffable and amorphous nature of culture itself. Perhaps the closest thing to a definition is the elusive statement that "there is not one Canadian culture, but many."[44] Canadian culture, then, is ethnicity in its plural expression; it is the "symbolic total of what the country's ethnic collectivities choose to reveal about themselves through a plethora of media and community events that tourists visit, scholars study, and politicians patronize."[45] Still, these factors at times seem to combine to form an uncertain, ironic, ambivalent, and self-contradictory identity.[46]

In procedure and substance, Canadian popular music reflects the various elements that contribute to the divergent Canadian identity. In the same way that most American music is derivative in nature,[47] Canadian music has imported American genres as well as the general American "proclivity for musical syncretism and eclecticism."[48] This has led to unlikely loyalties: American blues artist Lemon Jefferson has a devoted fan base in Newfoundland, while the Ink Spots "stir the souls of Saskatchewan wheat farmers."[49] "American, Cajun, and French music have been syncretized in Quebec, for example, while country music from the United States has been mixed with Anglo-Irish folk music to make what entertainers

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42. *The British North America Act*, enacted by British Parliament in 1867, provided for confederation and was renamed the *Constitution Act of 1867* in 1981 as part of the movement toward "patriation" of the Constitution, which included bringing the Constitution home from Westminster, England, to Ottawa, Canad.

43. Lehmann, *supra* note 12, at n.52.

44. Manning, *supra* note 1, at 6.

45. *Id.*

46. David H. Flaherty, *Preface to* BEAVER, *supra* note 1, at xii.

47. Jazz is often cited as the only truly American art form. Of course, jazz also exhibits international derivations, developing from the "complex polyrhythms of African tribal music and the call-response nature of musical performance in African societies." STOLBA, *supra* note 35, at 798. Jazz also borrowed from "spirituals, gospel songs, secular songs dealing with personal situations and feelings, blues, cakewalk, and ragtime." *Id.*

48. Manning, *supra* note 1, at 20.

49. *Id.*

call the 'Newfoundland Sound.'"[50] In addition, Canada has long had a "home-grown" country music industry. Canadian country performers have been popular in the United States since the 1930s, reversing the direction of the usual cultural flow and thus "contributing Canadian content to the eclectic repertory of American popular music."[51]

Like Canada itself, Canadian popular music is distinguished by contrasts, contradictions, regional peculiarities, and collective synergies. "Ingrained in our music is the sound of waves crashing on craggy shores, tuned to the roar of Cape Breton coal mines," writes one Canadian music critic.[52] Everything from bar-blues to visionary songwriting to kids in garage-bands reflects the "mix of primal and sophisticated international flavors introduced by [Canada's] multicultural makeup."[53] One explanation for the depth and variety of Canadian popular music, in language echoing psychologist Carl Gustav Jung's theories on the collective unconscious,[54] is that "subconscious elements of these multiple environments and inheritances are somehow transfused at birth to all, distilled through characteristic Canadian restraint."[55] And while Canadian popular music reflects an undeniable attraction to the "larger-than-life, instantly disposable American dream," it is balanced by "formal British reserve and classicism, a devotion that can flare with francophone passion and impulsiveness when sufficiently provoked."[56]

Private Canadian radio stations play a significant role in promoting Canadian musicians. Private radio has been called "Canada's #1 talent agent,"[57] although the total revenue of the private radio industry equals only

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50. *Id.* at 20-21.

51. *Id.* at 21. This suggests that Canadian music may be a secret weapon of sorts in Canada's defense against the U.S. onslaught. As early as 1954, BMI Canada hired song pluggers to promote Canadian songs in the United States. By 1972, BMI Canada launched the "Maple Music Junket" which was "aimed at the overseas media and music industry representatives in order to give them a chance to meet and hear the individuals and groups who helped create the booming Canadian music scene." MATEJCEK, *supra* note 18, at 29. These concerts were held over four day periods in Montreal and Toronto and involved European guests from fifteen countries. *Id.*

52. Roch Parisien, *Collections Celebrate Canadian Culture* (visited Nov. 30, 1997) <http://www.taponline.com/tap/music/reviews/roch/0209.html>.

53. *Id.*

54. *See generally* C.G. JUNG, MEMORIES, DREAMS, REFLECTIONS (1989). *See also infra* text accompanying notes 232-37.

55. Parisien, *supra* note 52.

56. *Id.* Parisien characterizes Canadians as "polite party animals with a social conscience." *Id.* This image, if not created by, was sustained and immortalized by Canada's Bob and Doug McKenzie, one of the most famous sitcom duos on the North American continent. Their most famous skit involved "two 'hosers' in front of a map of Canada talking about beer and hockey." Lehmann, *supra* note 12, at 201.

57. Canadian Association of Broadcasters, *Private Radio Music Awards to Boost New*

about half the operating costs of the public Canadian Broadcasting Corporation (CBC).[58] Beginning with station XWA in Montreal in 1920, radio broadcasting quickly became the dominant carrier of entertainment, news, music, and cultural values for the densely populated areas of Canada.[59] From the very beginning, Canadian radio was intended to promote unity and to encourage cultural development and awareness.[60] In 1937, Canada began planning its entrance into shortwave radio broadcasting in order to enhance national prestige, foster international goodwill, and project Canadian culture.[61] With many of the same goals as Radio Canada International (RCI),

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Canadian Talent (visited Jan. 24, 1998) <http://www.cab-acr.ca/newsrel97.htm> [hereinafter *CAB Press Release*]. This distinction is due in great part to Prime Minister Diefenbaker, who changed the idea of a single Canadian broadcast system consisting of a dominant public broadcaster and merely supplementary private broadcasters. NASH, *supra* note 23, at 268. He thought that the Canadian Broadcasting Corporation (CBC) "indiscriminately embraced North American continentalism and could not differentiate between American national opinion and true internationalism." *Id.* at 266-67. Thus, in 1957, he introduced a broadcast bill establishing two boards. The first was regulatory in nature, giving equal status to private stations and the CBC alike. The second ran the CBC. As a result, the CBC annually had to petition Parliament for money. The bill thus tightened governmental control of CBC operations, beginning a nightmare of long-range programming plans that propelled the CBC into "the most tumultuous era in its history." *Id.* at 269.

58. Michael McCabe, Opening Statement Before the House of Commons Standing Committee on Canadian Heritage Hearing Respecting Bill C-32, an Act to Amend the Copyright Act, Oct. 8, 1996 (visited Dec. 3, 1997) <http://www.cab-acr.ca/statement_C32.htm> [hereinafter *CAB Opening Statement*].

59. HALL, *supra* note 40, at 3. Radio Canada International (RCI) was similarly formed with the programming goal of protecting Canadian identity and a pledge to represent all of Canada. *Id.* at ix-x. RCI interpreted Canada to the world radio audience "through broadcast topics that reflect[ed] elements of Canadian life in the form of news, features, and entertainment." *Id.* Musical programs were an original staple of daily programming. One program, "Concert from Canada," was a half-hour recital featuring Canadian instrumentalists and vocalists. *Id.* at 38. Complaints of too much music on the radio soon followed. NASH, *supra* note 23, at 42. An October 15, 1924, *Maclean's* article, *How Can Radio Be Best Utilized to Inculcate National Ideals and Foster National Unity?*, said that "thousands of fans . . . want something more than an orchestra from their loud speaker. They want news stories . . . talks on science, politics, religion . . . . They do not want every station in the country at all hours to be broadcasting nothing but . . . music." *Id.*

60. As an historical aside, it was a Canadian who accelerated radio technology beyond encrypted Morse Code messages. On December 23, 1900, the first transmission of intelligible speech by electromagnetic waves was accomplished by a Quebec-born inventor named Reginald Fessenden, who was working for the U.S. Weather Bureau at the time. NASH, *supra* note 23, at 25.

61. HALL, *supra* note 40, at x. The need was real because Canada was often inaccurately perceived, as a quote from a German prisoner demonstrates:

> Due to the . . . isolation of life in the Third Reich, and due to the strongly propagandistic publications in Germany about foreign countries, I had always imagined Canada to be the dead end of the world. How surprised I was when I saw modern limousines rushing over smooth roads, instead of the trapper

Alan Plaunt and Graham Spry formed in 1930 the Canadian Radio League, the early incarnation of the CBC.[62] Espousing the motto "Canadian radio for Canadians," these men believed radio could be the greatest of all Canadianizing instruments, since radio could be an educational vehicle, a model for experiments in the conduct of public business, and even the beginning of a larger social revolution.[63]

Similar ideals and objectives are sustained in the current Broadcasting Act. The broadcasting policy was designed to nurture Canadian expression "by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values, and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view."[64] The Act also requires that the programming "should be of high standard."[65]

Radio brought high hopes for unifying the massive Canadian territories, as the optimism of RCI, the Canadian Radio League, and the Broadcast Act suggests. Radio offered unparalleled potential for "information dissemination, generated new communications channels crucial to nation building, and increased awareness of the political processes among the populace."[66] However, the pervasive radio broadcasting ultimately

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> cutting his way through the virgin forest with a bush knife! And how thoughtful I became when I realized that I, a German worker, allegedly the best paid worker in the world, had barely been able to afford a bicycle, while here in Canada lots of workers own cars and think nothing about it.

Id. at 29. In a modern context where multi-media entertainment forms have increased the competition in radio's market, it is easy to underestimate the significance of radio in these times. The fact that Hitler placed enormous emphasis on foreign broadcasts, having decreed the death penalty for listeners of foreign broadcasts, demonstrates the influence radio was once believed to wield. *Id.*

62. NASH, *supra* note 23, at 22. Spry and Plaunt knew that Canadians listened to American radio programs 80% of the time, and they thought that this was a "cancer eating into the Canadian sense of nationhood." *Id.* at 21. They also "abhorred the insistent, ceaseless hucksters [selling soap], laxatives, and toothpaste on the radio" and the prevalence of programming aimed at the lowest common denominator. *Id.*

63. *Id.* at 22.

64. Broadcasting Act of 1991, ch. 11, § 3(d)(ii), 1991 S.C. 117 (Can.), *in* Carlson, *supra* note 6, at 623 n.157. This language has been maintained since its adoption in 1968. While more focused, the language of this Act obviously reflects the early objectives of Canadian broadcasters.

65. *Id.* § 3(g). The Broadcasting Act is likely to be amended soon. The bill, entitled "Canadian Voices: Canadian Choices," provides new broadcasting policies and "requires that the government spend $210 million over four years to achieve the policy goals." *See* Lehmann, *supra* note 12, at 196. "Canadian Voices: Canadian Choices" was propelled by the failure of the Canadian broadcasting bill of 1988, Bill C-136, which suffered a political death due to the 1988 general election. *Id.* Bill C-136 was "intended to ensure that audiences were offered a wide range of programming." *Id.*

66. HALL, *supra* note 40, at 3.

offered false hope for Canadian nationalists. "[F]rom the inception of Canadian radio broadcasting, there was the threat of denationalization" because American broadcasts could easily reach the heavily populated Canadian cities along the border.[67]

Perhaps as a result of optimism prematurely deflated, Canadian radio has consistently been plagued by financial instability.[68] Radio stations were never expected to be able to pay for themselves, but the first attempts at financing radio developed slowly in the 1920s.[69] Consequently, the divergent financial success of Canadian stations followed an obvious pattern: stations surrounding densely populated metropolitan areas prospered, while those in sparsely populated regions floundered. "The lack of adequate geographic coverage of Canadian broadcast programming" created tension between the government and the public.[70] The reality was that while urban areas received Canadian programming, much of the population heard only American stations.

The government quickly realized that "[i]f radio broadcasting was to foster national unity, the large numbers of people living across rural Canada needed access to Canadian radio stations."[71] In order to study the radio broadcasting situation throughout Canada, the House of Commons spent $25,000 in 1928 to explore the future management and financing of radio stations.[72] As a result, Parliament passed the Canadian Radio Broadcasting Act (1932) and established the Canadian Radio Broadcasting Commission (CRBC).[73] The CRBC operated under an astute principle: "broadcast frequencies were a 'scarce public resource,' and all broadcast licenses are 'a temporary monopoly, to be operated as part of a single national system in the

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67. *Id.* These men foresaw the cultural invasion of Canada by American values, American performers, and American stories. They believed if Canadian radio could offer an exciting alternative, it would win over the fans of American programs. While Spry and Plaunt were specifically working toward shortwave international broadcasting, their views nonetheless reveal the high expectations held for broadcasting. *Id.* at 21.

68. *See infra* notes 176-77, 215-16 and accompanying text.

69. HALL, *supra* note 40, at 4. Most of the first radio stations were owned by newspapers or firms selling radio equipment. Perhaps this was a response to predictions of printed newspapers becoming obsolete in the wake of radio. More likely, publishers wanted to promote their newspapers or feared future competition for advertising revenue. Newspaper radio station owners did not support the idea that the new medium should be supported solely by advertising. "[T]he proposal of charging a license fee was unpopular among Canadians since the Americans had 'free radio.' The first Canadian attempt to finance the new medium was termed 'indirect advertising,' and followed the American model." *Id.*

70. *Id.* at 5.

71. *Id.* at 5 (footnote omitted).

72. *Id.* at 6.

73. *Id.* at 7. The CBC replaced the CRBC four years later in 1936. NASH, *supra* note 23, at 16 (discussing major Canadian radio developments).

public interest.'"[74] This principle became the foundation for subsequent Canadian broadcasting legislation.

Although private radio lost an estimated $180 million in the first half of the 1990s,[75] Canadian radio is nevertheless extremely popular and is an important vehicle for fostering Canadian culture. Throughout Canada, private radio stations provide free local services (news, weather, sports, public affairs, and music selected for targeted audiences), and the programming is better suited for the immediate listening area than are the CBC satellite broadcasts. That these stations fill a need is evidenced by the fact that radio listening has been steadily increasing in spite of many new entertainment choices. Studies have consistently confirmed the critical role radio plays in promoting Canadian culture, especially pertaining to consumer music purchases. In May of 1997, the Angus Reid Group conducted an independent survey of 1000 Canadians who bought a CD, tape or record in a six month period.[76] Radio, as the number one factor influencing these purchases, outscored the next biggest factor, television—with its music video channels—by three to one.[77] This confirmed a Quebec study conducted by the music industry in 1993 and 1994, and yet another study conducted by Decima Research, which focused on teenagers. Both studies revealed radio airplay is the single greatest influence on retail music sales.[78]

Still, radio cannot take all the credit for promoting Canadian musicians. When BMI Canada (an owner and promoter of a vast repertoire of music) started in 1947, Canadian music was rarely recorded or published, much less played on radio. The Canadian branches of U.S. recording companies were not interested in Canadian product, and the few "Canadian companies that existed were mostly unwilling and unable to take chances on local talent."[79] By 1951, BMI Canada's publishing and promotional efforts led to the launch of the *BMI Pin-Up Sheet (Yes, there IS Canadian Music)*, which provided radio stations with a list of recorded popular music by Canadians, followed by *The BMI Canada Newsletter*, which gave news about BMI affiliates and their activities.[80] Other publications also sprang up to

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74. HALL, *supra* note 40, at 7 (footnote omitted).

75. Ashley Geddes, *New Royalties Spur Disharmony Between Artists, Radio Stations*, EDMONTON J., Oct. 29, 1996.

76. Jane Logan, *CAB Opening Statement, supra* note 58. This should not be interpreted as an indication that Canadian music video channels are not viable. *See* Joel Stein, *The M Is Back in MTV*, TIME, Dec. 1, 1997, at 103. In the United States, the popularity of MTV has been waning. MTV used the Canadian equivalent of MTV, MuchMusic, as a model for restructuring its lagging programming.

77. *CAB Opening Statement, supra* note 58.

78. *Id.*

79. MATEJCEK, *supra* note 18, at 16.

80. *Id.* at 18. "Composers of 'serious music' received direct and indirect benefits from the Canada Council, while the Canadian Music Centre provided a library and information

promote Canadian music. The trade magazine *RPM* reported on the fledgling Canadian music industry through articles, reviews, and surveys. CAPAC's (Composers, Authors and Publishing Association of Canada) *The Canadian Composer* and BMI Canada's *The Music Scene* were also helpful in promoting the writers, composers, and publishers of their respective organizations.

Nevertheless, the effect of all these efforts, even when measured in the aggregate, could not keep pace with the efforts of U.S. entertainment companies to promote their own artists. Canadians, like many other peoples, seek out American culture. Visiting the United States is part of the Canadian experience, and statistics reflect the enormous impact of cross-border travel on Canadians. Over "85% of the foreign trips made by Canadians are to the United States."[81]

The bigger problem is that U.S. entertainment industries have thoroughly saturated the Canadian market. For example, "63% of Canadian television viewing time is spent watching non-Canadian programs, primarily programs from the [United States]," and the figure rises to eighty-five percent in the area of drama; eighty-two percent of all newsstand periodicals sold in Canada originate from foreign countries, mostly the United States.[82] The exception appears to be the medium of radio. Canadians appear to prefer Canadian radio stations over the U.S. stations, which are equally accessible.[83]

While it is difficult to determine the exact nature of the loyalty to Canadian radio stations, there can be no doubt that the decision by the Canadian Radio and Television Commission to adopt Canadian content regulations has had an enormous impact on the Canadian music industry.[84]

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services from 1959." *Id.*

81. Manning, *supra* note 1, at 22. Thus, mass tourism is a vehicle of American cultural hegemony. "For years, half the British emigrants who went to Canada" hoped to reach the United States. MORRIS, *supra* note 9, at xii. Morris recollects being told by a Turk in the 1970s that "if you lived to a ripe old age in Canada you died of boredom." *Id.*

82. The Honorable Donald Macdonald, *The Canadian Cultural Exemption Under Canada-U.S. Trade Law*, 20 CANADA-U.S. L.J. 253, 254 (1994). Macdonald served as a Canadian High Commissioner to Great Britain and Northern Ireland in the early 1990s. *Id.* at 261 n.a.

83. *Id.* While other factors contribute to this loyalty, it is unquestionably due in part to comparative quality. The cost of making television shows has increased dramatically (because of actors demanding higher salaries, viewers demanding movie-quality special effects, etc.). The dollar expense to meet such demands is no less in Canada, but, with only a fraction of the U.S. population, the chance to turn a profit on the investment is small. Conversely, the cost of producing commercial quality music has dropped dramatically as technology has made digital quality recording equipment affordable even to amateur musicians. Thus, musical competitiveness more accurately reflects talent, and there is no question that Canadian musicians rival those from the United States or any other nation.

84. *See* MATEJCEK, *supra* note 18, at 24.

The Canadian content rules, specifically the restrictions on foreign ownership and on broadcast content, are considered the most important policies that the Canadian Radio-Television and Telecommunications Commission (CRTC) has implemented to protect Canada from American entertainment.[85] Essentially, radio is required to play Canadian artists thirty percent of the time.[86] These minimum requirements are widely regarded as the key to the success and growth of the Canadian music industry. Without the content laws, Canadian performers competing with those of the United States might never have found the opportunity to demonstrate their talents. Since the establishment of the content laws, "Canadian popular music groups have been highly successful."[87] The Minister of Heritage explicitly recognized that the Canadian music industry has blossomed and developed a critical mass of artists, primarily because of Canadian content rules.[88]

However, the Canadian content rules, like more recent efforts to protect Canadian culture, have not been well-received in the United States.[89] Some have stated that such policies overtly "discriminate against . . . U.S. cultural industries."[90] This argument falters upon recognition that Canada's cultural policies do not block American books, magazines, records, programs, and movies from entering Canada; such policies "would be impossible as well as foolish."[91] The policies simply ensure a place in the

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85. *Id.* The CRTC issues broadcast licenses and oversees Canada's centralized communications network, including the CBC.

86. Carlson, *supra* note 6, at 588. "Sixty percent of all programming and 50% of all prime time programming must be of Canadian origin." *Id.* Until recently, Canadian television and radio stations had to be at least 80% Canadian owned. *Id.*

87. Macdonald, *supra* note 82, at 263. Of course, the content rules benefit more than just musicians. One may wonder how writer Stephen Leacock would have fared with help from content rules. In order to get published, he wrote as an American because the American market was not prepared to accept an obviously Canadian writer.

88. *CAB Opening Statement, supra* note 58.

89. *See supra* note 13.

90. Hale E. Hedley, Note, *Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries*, 28 GEO. WASH. J. INT'L L. & ECON. 655, 655 (1995). The author of that note asserted that through an exemption negotiated by the Canadian government in NAFTA, "Canada is able to discriminate against corresponding U.S. cultural industries for any reason without being subject to the NAFTA enforcement procedures." *Id.* *See also* Lehmann, *supra* note 12, at 188-89 ("The inclusion of the cultural exemption clause created minimal controversy but became subject to definitional and explanatory refinement in future negotiations for the North American Free Trade Agreement."). *See also* Carlson, *supra* note 6, at 598. Without diverging into a NAFTA analysis, such protests reveal an almost tyrannical quest to monopolize Canada's entertainment industry. Furthermore, the United States has five distinct ways to combat Canada's protectionism under NAFTA: "the GATT/WTO system, NAFTA/FTA, section 301, a lawsuit in Canadian court, and an independent private action." *Id.*

91. Macdonald, *supra* note 82, at 254.

market for Canadian books, magazines, television shows, and movies.[92] Such allegations—that Canada is discriminating against the United States—expose a lack of respect and sensitivity for Canada's need to maintain a cultural identity. Many Canadians believe "that Americans are bringing their bulldozers into Canada and running over every regulation that protects Canadian culture."[93] For example, while some have called Canada's NAFTA exemption a "virus that needs to be stamped out,"[94] others have offered the more complicated proposition that Canada's efforts at cultural protectionism are motivated by a "hidden agenda that is more economic than cultural."[95] The Canadian response to such allegations is that "if somebody insisted on getting 100% of the market here in the U.S., he would be sued for antitrust," yet the United States feels it is being treated unfairly.[96] While the debate over cultural exemptions is sure to continue, the general position of each side seems clear: for the United States, it is economic interests that are at stake; for Canada, it is the right to foster a national identity.[97]

Regardless of the cultural exemptions controversy, there is no question that a distinctively Canadian voice resounds with the strains of a unique people and a national heritage that are decidedly its own. And perhaps the Canadian voice is more vibrant than commonly believed, considering what the National Director of the Canadian Conference of the Arts Keith Kelley recently stated: "One thing everybody forgets is that it has taken us only fifty years to come to this level of cultural development."[98]

The Canadian government is working to ensure that its "own tender shoots of art and imagination and individuality are not extinguished."[99] One

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92. The need is real; U.S. domination of cultural products in Canada has resulted in a cultural trade surplus for the United States of about $1.5 billion. *Id.*

93. Lehmann, *supra* note 12, at 199.

94. *Id.* at 202 (footnote omitted). Advocates of Canadian culture argue that Canadian entertainers such as Rick Moranis, Jim Carrey, Dan Akroyd, and Michael J. Fox owe their success to the Canadian policies. *Id.*

95. *Id.* at 206 (footnote omitted).

96. Macdonald, *supra* note 82, at 265. Macdonald's agitation was evident as he continued, "[g]iven the percentages, I think Hollywood should stop whining. Go back and tell [your] . . . President that from me." *Id.*

97. *Id.* *See also* Ostry, *supra* note 3, at 38 (The "modest flowering" of Canadian imagination and Canadian heritage is attributable to the combined efforts of the Canada Council and provincial arts councils, the CBC, TVOntario, provincial educational broadcasters, Telefilm Canada, the National Arts Centre Orchestra, national museums, and parks. American "companies already have their 70 and 80 and 90 percent, and unless they can get one hundred percent they cry foul! Restrictive practices! Unfair! Canadian cultural sovereignty cannot exist under these conditions.").

98. Lehmann, *supra* note 12, at 193. While the point is clear, culture clearly did not wait for governmental approval to start developing. Surely it began when the first creation of music, poetry, or painting was inspired by some part of the Canadian experience.

99. Ostry, *supra* note 3, at 40.

writer eloquently builds on a recurring theme in Malcolm Lowry's novel *Under the Volcano*—involving a sign in a public garden that reads: "You like this garden which is yours. See that your children do not destroy it"—by elaborating: "In our own bush garden (as Northrop Frye has called Canadian literature), there are weeds blowing in on the wind, there are bugs, there are caterpillars. It may look just like an American garden, but it is Canadian. We should see that our gardeners do not destroy it."[100]

Radio performs a public service much more profound and far-reaching than merely providing news and playing music.[101] As former Minister of Communications Flora MacDonald recognized, radio is much more than just a source of entertainment or a national pastime:

> It is of fundamental importance to our political and cultural sovereignty that our broadcasting system be an accurate reflection of who we are, of how we behave, of how we view the world . . . . It plays a major role in defining our national, regional, local and even our individual identities. It is, therefore, much more than just another industry.[102]

Canada must be careful not to inadvertently strangle an industry, through legislation or otherwise, that is an irreplaceable component in supporting Canadian culture.

III. CANADA'S COPYRIGHT SYSTEM, NEIGHBORING RIGHTS, AND THE RECENT AMENDMENTS

The most controversial aspect of Bill C-32, as it made its way through the channels of Canadian government, was that it created "neighboring rights." These rights include a "performance right ensuring that performers, musicians, and owners of rights to a master recording (including record companies) will be remunerated when songs are aired on radio."[103] The recent amendments to the Canadian Copyright Act have two objectives. The

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100. *Id.*

101. STEWART, *supra* note 20, § 7.56. Thus, the international problems encountered by broadcasting organizations (with regard to their rights) are often handled at the diplomatic level or by public international law. On the other hand, copyright is the exercise of a private right. As a result, broadcasting organizations were not concerned about solutions based on copyright in the early days of broadcasting (i.e., the 1930s and 1940s). *Id.* Consequently, radio not only developed a degree of dependency on government but also enjoyed a close proximity to the government because radio's influence on the government exceeds that of authors, publishers, or neighboring rights owners. *Id.*

102. Lehmann, *supra* note 12, at 196-97 (footnotes omitted).

103. Larry LeBlanc, *Performance Right Merits Debated Pending Bill Would Create New Airplay Royalties*, BILLBOARD, Nov. 16, 1996.

first objective is "to strengthen Canada's cultural industries"; the second is "to 'modernize' Canada's copyright legislation by bringing it into line with fifty other countries . . . and to achieve 'a level of fairness' by acknowledging the rights of creators to receive recognition and remuneration for the use of their works."[104] Whether these objectives will be met has been hotly debated.[105] Neighboring rights[106] will be costly to radio, and the income generated will rarely reach the artists who are supposed to benefit from the legislation.[107] Furthermore, the timing and substance of the amendments appear to have been negatively impacted by Canadian politicians and their personal agendas, which may account for some of the complications identified in this note. These provisions seem contrary to the logical assumption (based on the frailty of Canada's culture, as discussed in Part II) that the Canadian government would be reluctant to impose burdens on a medium that develops culture to the extent that radio does.[108]

The use of copyright to promote culture is, in itself, not surprising because "Canada has always used copyright as a broad based economic tool."[109] This "cultural argument" is one of four fundamental theories behind the application of copyright protection.[110] The premise for this theory

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104. Cynthia Rathwell, Copyright Bill C-32—The Broadcasting Perspectivity, Speech at the Canadian Institute Executive Briefing on Amendments to Copyright (June 27, 1996) (visited Jan. 20, 1998) <http://www.cab-acr.ca/CIE_CR_speech.htm>.

105. *See also* Ostry, *supra* note 3, at 39. Referring to these changes, Ostry writes that, while this "legislation is designed to further protect and reward creators in light of technological changes that have occurred since the Copyright Act was adopted in 1924. . . . [M]uch more needs to be done to avoid being swamped by U.S. cultural products." *Id.* (footnotes omitted).

106. Neighboring rights are similar to rights protected by copyright laws and may be, but are not necessarily, protected under a nation's copyright law. Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 769 (Summer 1997).

107. Many groups not discussed in this note will be affected by the copyright amendments. For example, book distributors will be protected from cheaper parallel imports, unwanted remainders, and other forms of competition. Educators will have to pay for teaching-related photocopying (to organizations acting as collectives on behalf of authors and publishers). Consumers of ordinary blank audio tape will have to pay royalties for copying a CD they already own to use in a car or walkman. Also, the millions of dollars raised annually by these changes will leave Canada because there will be virtually no payments in return from the United States. Howard P. Knopf, Bill C-32 and Copyright Reform in Canada: Never Say Never, Presented to Insight Conference (May 30, 1996) (visited Dec. 2, 1997) <http://www.node.on.ca/networking/forums/copyright.html>.

108. One explanation is that the governmental bodies that passed Bill C-32 did not understand music industry practices. The provision of neighboring rights is intended to help performers, not hurt radio. Unfortunately, it is likely that the legislators will accomplish the latter, but not the former. *See infra* notes 164-89 and accompanying text.

109. McCabe, *supra* note 22.

110. STEWART, *supra* note 20, § 1.04. The other justifications include the principle of natural justice, the economic argument, and the social argument. Natural justice supposes that

is that because creative works form a considerable national asset, rewarding creativity is in the public interest as a contribution to the development of the national culture.[111] Similarly, the use of neighboring rights was developed to extend protection similar to that of a copyright to those who deserve some degree of protection, but do not qualify for traditional copyright protection. In practice, "the term copyright is often used to include neighboring rights or, in an effort to be precise, the two are awkwardly linked in every statement"—a result of differing understandings of the terms.[112] To avoid problems in terminology, it is essential to understand Canada's copyright philosophies and origins.

While it seems apparent that a copyright system that had gone largely unaltered for over seventy-five years would be in dire need of update, that same system was arguably effective due to its simplicity. Canadians have always interpreted their copyright laws to include new technology, although the laws themselves were not explicit on this point; to Canadians, a copy was a copy.[113] Some felt the "Canadian copyright law may be superior to the U.S. law due to the fact it contains less confusing exceptions."[114] For better or worse, Canada now has moved away from this relative simplicity with the passage of the new amendments.

Despite the former "keep it simple" approach whereby technological changes were absorbed into the existing law, Canada's philosophy on copyright has never been simplistic. On the one hand, copyright means the right to copy, and, on the most basic level, "all original creative works are protected by copyright in Canada."[115] On the other hand, "Canada has always recognized copyright as a balance of creator and user interests."[116]

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the "author is the creator of the work which is the expression of his personality. He should be able to decide whether and how his work is to be published and to prevent any injury or mutilation of his intellectual offspring." *Id.* § 1.02. The economic argument suggests that considerable investment is needed for the creation of some works, such as architecture or films. The process of making the work available to the public, such as publication and distribution of books or records, is also expensive, and investments will not be made without a reasonable expectation of turning a profit. *Id.* § 1.03. Finally, the social argument rests on the idea that the "dissemination of works to large numbers of people forges links between classes, racial groups and age groups and . . . the creators thus render a social service." *Id.* § 1.05. These four arguments have generally been accepted, but different legal systems usually emphasize one principle over the others. *Id.*

111. *Id.* § 1.04.

112. DAVID SINACORE-GUINN, COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS § 3.8 (1993) (footnote omitted).

113. *Briefly from CANCOPY* (The Newsletter for CANCOPY Affiliates), Vol. 7, No. 2 (Summer 1997) (visited Jan. 24, 1998) <http://cancopy.com/new.html>.

114. The Copyright Website, *What's News, Canada National Newspaper Praises The Copyright Website* (visited Nov. 29, 1997) <http://www.benedict.com/new.htm>.

115. *About CANCOPY* (visited Jan. 24, 1998) <http://cancopy.com>.

116. McCabe, *supra* note 22.

This juxtaposition of two typically opposing philosophies on copyright—the traditional Anglo-copyright view, which encourages release of the work to the public, and that of *droit d'auteur* (author's rights)—has formed a hybrid of competing interests and priorities.[117] Under Canada's Copyright Act, the person who owns the copyright (usually the creator of the work) has the right to decide when and how the work is copied.[118] Still, the basic reasons for protecting a work through copyright varies between the two approaches.[119] Authors' rights countries generally protect the natural rights of the author in his work, whereas countries following the Anglo-copyright tradition are more sensitive to users' interests.[120]

The substantial philosophical differences between the individualistic and idealistic *droit d'auteur* system and the commercially oriented Anglo-copyright system break down in practice.[121] Both systems grant a high level of protection to creators, although the Anglo-copyright system adapts more easily to new technology.[122] Both systems were created when the system of privileges, which had been in operation both in England and on the European mainland from the fifteenth to the eighteenth century, was abandoned.[123] Influenced by the French Revolution, continental European countries followed the French Act of 1783; countries of the common law legal

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117. *See* Fraser, *supra* note 106, at 801-02. Canada's copyright approach exhibits elements of the "Anglo-copyright tradition and that of droit d'auteur more commonly found in the civil law countries of Europe." *Id.* at 801 (footnote omitted). *See also id.* at 771 (the difficulty in balancing these views kept the United States from participating in the Berne Convention). However, other countries do attempt to balance these approaches. *See* STEWART, *supra* note 20, § 1.15: "Several states like Germany, the Nordic countries, and Japan which ideologically belong to the continental 'droit d'auteur' system are in some respects closer to the copyright system than to the French system." This is particularly true where it grants "performers, producers of phonograms, and broadcasting organizations rights which they term neighboring rights as they are exclusive rights which are close to and neighboring on copyrights." *Id.* They do not see the fact that some of these rights may originate in legal entities as opposed to natural persons as a discrepancy. *Id.* (footnotes omitted).

118. *About CANCOPY*, *supra* note 115.

119. This merger occurred because Canada's Copyright Act was based on the United Kingdom's Copyright Act of 1911, while Quebec subscribes to a civil law system because it is a former French colony. Fraser, *supra* note 106, at 801.

120. *Id.* at 771-73. As a further consideration, *droit d'auteur* stems from the doctrine of natural law and the ideas of the French Revolution, resulting in a personalized copyright approach that joins the work with the personality of the author. STEWART, *supra* note 20, § 1.13.

121. STEWART, *supra* note 20, § 1.16.

122. *Id.* On the other hand, in coping with the difficulties posed by the fact that, increasingly, works are reproduced in employment and by team-work, the *droit d'auteur* doctrine still has relevance.

123. *Id.*

tradition followed the 1709 Statute of Queen Anne.[124] As it became increasingly apparent that international copyright was a commercial necessity, England and France (the protagonists of each system) became founding members of the Berne Union in 1886.[125] The Berne Union sought to achieve a set of compromises between the two systems.[126]

With this historical perspective, it is understandable how the need for neighboring rights emerged. The international compromise that eliminated the *droit d'auteur* doctrine in order to resolve this "philosophical impasse" provided that, while the initial right in the new material is not a *droit d'auteur*, it is nonetheless an intellectual property right connected with, or neighboring on, the *droit d'auteur*.[127] Radio stations in fifty-one countries around the world currently pay a neighboring rights royalty;[128] as such, neighboring rights are widely applied and relatively common.[129]

Bill C-32's most controversial aspect was that it created neighboring

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124. *Id.*

125. Most nations (most recently the United States), whether of the *droit d'auteur* or Anglo-copyright tradition, have ratified the convention. The acceptance of neighboring rights into most European and Latin American countries of the *droit d'auteur* tradition exemplifies the influence of the Anglo-copyright tradition. *Id.* § 1.15. These countries also have ratified neighboring rights conventions such as the Rome Convention and the Phonogram Convention, which are examples of the influence of the copyright concept on *droit d'auteur* countries. *Id.*

126. *Id.*

127. *Id.* § 7.10. Neighboring rights usually involve rights born from derivative works because neighboring rights presuppose a pre-existing work. For illustration, consider that performers (who are not also the creator) receive protection only if they perform works; music releases (CDS, tapes) are nearly always recordings of a work; and radio broadcasts consist largely of performances of works. Thus, the comparison to be made is with copyrights in other *derivative* works, which can be of many kinds. The first, historically, was translations of literature into another language, as well as transcriptions of musical works. Later followed derivative works involving a change of medium, such as a book into a movie. It is interesting to note that the stigma that used to attach to derivative works—based on the assumption that the derivative work demanded only technical, not artistic, skill—no longer exists. *Id.* § 7.11.

128. Geddes, *supra* note 75. "The Rome Convention governs the rights of performers, producers of phonograms and broadcasting organizations. The loosely connected group is said to have 'neighboring rights,' that is, rights similar to, but not subsumed under, national copyright laws." Bonnie Teller, *Toward Better Protection of Performers In The United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, 28 COLUM. J. TRANSNAT'L L. 775, 800 (1990). Historically, these groups were not considered to have created anything warranting copyright protection on the level of the authors. The Rome Convention sought to overcome this inequity by extending "copyright-like protection to these performing artists. . . . In 1979, it was estimated that since the adoption of the Rome Convention, fifty-one states had legislated in the field of neighboring rights." *Id.*

129. *See* STEWART, *supra* note 20, § 1.16. Overall, the "increased importance of 'neighboring rights' in the 'droit d'auteur' countries . . . [will create a gradual] synthesis of the two philosophies . . . which will greatly strengthen the position of copyright as a legal discipline both nationally and internationally." *Id.*

rights. These rights include "a performance right ensuring that performers, musicians, and owners of rights to a master recording (including record companies) will be remunerated when songs are aired on radio."[130] Prior to the amendments, "only composers and publishers receive[d] a royalty for airplay on Canadian radio."[131] The specific provisions of Bill C-32 that established neighboring rights are contained in Part II of the Act, entitled "Copyright in Performer's Performances, Sound Recordings and Communication Signals."[132] The original Bill C-32 utilized a five-year phase-in plan for the neighboring rights provisions, but this was accelerated to three years by the Heritage Committee.[133]

Because neighboring rights were developed to provide protection to creators and contributors who were not afforded traditional copyright protection, they signify rights neighboring on the authors' copyright (hence the name), and mainly apply to the rights of performers, the company or investors producing the release,[134] and broadcasting organizations. Neighboring rights are best exemplified by the rights given to producers of sound recordings, since such producers tend to be business entities rather than individual authors.[135] The modern concept of copyright stems directly from the 1709 Statute of Queen Anne in the United Kingdom. At that time,

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130. LeBlanc, *supra* note 103.

131. *Id.*

132. Act of Apr. 25, 1997, ch. 24, 1996-97 S.C. (Can.) [hereinafter BILL C-32]. Section 15 of the Act addresses "Performers' Rights"; section 18 addresses "Rights of Sound Recording Makers"; section 19 addresses "Provisions Applicable to Both Performers and Sound Recording Makers"; and section 21 addresses "Rights of Broadcasters."

133. Jill Vardy, *Copyright bill faces last hurdle as Senate eyes amendments*, FIN. POST, Apr. 19, 1997, *available in* 1997 WL 40922758. The CAB lobbied unsuccessfully to maintain the five year phase-in term. *Id.*

134. This type of "producer" should not be confused with the more common association implied by "producer" or "record producer"—that is, the person who literally operates the recording equipment and captures the performer's music on tape. (Of course, producers usually have considerably more input than this explanation suggests.)

135. Fraser, *supra* note 106, at 769. "The distinction arose in part because authors' rights countries generally grant protection to natural authors for their creative endeavors. Although corporations may hold certain rights, by definition, they cannot create; only its officers, directors, employees, and contractees can create [on the corporation's behalf]." *Id.* *Compare* STEWART, *supra* note 20, § 1.15: "[A]s the economic argument had always been in the foreground, copyright countries were not shocked by the notion that the first copyright owner in the case of films or phonograms or broadcasting programmes is a company or a corporation." (*See supra* note 110 for the other three copyright arguments.) The United States only recently began protecting public performances of sound recordings. Fraser, *supra* note 106, at 770. "Many countries, on the other hand, have been providing copyright-like protection to producers and performers under the aegis of neighboring rights, including a public performance right in sound recordings . . . on the condition of material reciprocity." *Id.*

the law sought to protect the investment of booksellers.[136] From the beginning then, economic protection was a fundamental goal of copyright, which extended copyright protection to the technological advances of the twentieth century. For example, the works of film producers and broadcasting organizations simply joined "writing" as a means of communicating a work.[137] "On the other hand, proponents of the pure 'droit d'auteur' concept saw these entities more as users than as creators and would not extend a 'droit d'auteur' to such users."[138] Since it was evident that these entities had created or contributed *something* warranting protection, neighboring rights developed essentially out of necessity in the *droit d'auteur* system.

The establishment of performer's rights through section 15 ("Performer's Rights") of the copyright amendments creates new rights in exchange for inevitable costs.[139] It is paradoxical that of all neighboring rights owners, performers are closest to derivative authors, such as translators of literary works or adaptors of musical scores who receive full author's rights, yet their rights are often the weakest.[140] Unlike the other

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136. STEWART, *supra* note 20, § 1.15. Booksellers were the equivalent of the modern publisher. *Id.*

137. *Id.* § 7.08. Droit d'auteur jurisdictions reacted differently to each new invention presented by technological developments. For example, it was rationalized (through a legal fiction) that a film is no more than thousands of photographs strung together. *Id.* Everyone who participated in the process became a co-author (authors, cameramen, cutters, actors, directors, composers of accompanying music). It was cumbersome for the film producing company to acquire the rights from the individual co-authors, but when sound recording was invented, the difficulty became unmanageable. *Id.* To recognize the sound engineer, the record producer (*see supra* note 134), or the performing artists as co-authors of the recording stretched the fiction beyond the breaking point. "Thus on the international plane for phonograms and broadcasts a new solution had to be found which would be acceptable to 'droit d'auteur' countries." *Id.*

138. *Id.* § 7.14. The emergence of neighboring rights generated considerable concerns among authors. If a user had to "pay two royalties for the same performance, one to the author and one to the neighbouring right owner . . . he would . . . [simply] pay less to the author." *Id.* Known as the "cake theory" because "[t]here is [supposedly] only one cake and if the neighbouring right owners [took] a slice of it, the slice of the author would be smaller. Practice has proved these fears to be unjustified." *Id.*

139. Geddes, *supra* note 75. "Pay-per-play royalties to be paid to artists and producers" are part of these neighboring rights. *Id.*

140. STEWART, *supra* note 20, § 7.16. Two reasons for this weakness are postulated by Stewart. The first is historical. "'[S]trolling players' were . . . 'vagrants' by the law during the formative period of copyright." *Id.* Adam Smith, in *The Wealth of Nations*, used players, musicians, opera-singers, and opera-dancers as "examples of 'unproductive labor.'" *Id.* Of course the stigma is gone as star performers are idolized in modern society. The second reason is technological. Adam Smith also pointed out that the work of these unproductive laborers "perishes in the instant of its production." *Id.* Thus, the ephemeral nature of a performance was a valid reason for denying a copyright to performers. But once performances could be fixed and reproduced in large numbers, as well as performed to large

neighboring rights owners, such as corporations, performers are physical persons, thus making it difficult to justify a difference in treatment of the work of a derivative author (a translator or an arranger) and that of a performer. Nevertheless, performances of the same work by different artists vary greatly in artistic interpretation and execution.[141] Itzhak Perlman's performance of Paganini's *24 Caprices*, for example, obviously will be more valuable than that of an amateur violin student using the work as a technique-builder.

The growing pains Canada may experience with neighboring rights are likely to be pronounced. One authority on the Canadian Copyright Act stated that, perhaps for reasons having to do with economic ties with the United States or with constitutional rights, the "Canadian legislature would prescribe as 'copyright' any law that distinguished itself radically from theoretical points of view and judicial concepts."[142] It seems as though "political motives exist to justify, with no bearing upon two centuries' historical judicial practices, . . . [the creation of] laws that concern the exclusivity and particularity of the fruits of creative labour."[143] International copyright law is predicated on principles of national recognition, which allows foreigners to seek protection under Canadian law and Canadians to do the same while abroad. Thus, regarding neighboring rights, Canada now assures the U.S. government that American holders of neighboring rights are protected in Canada. However, under Canadian constitutional law, the legislature's ability to create such neighboring rights is less than certain. Supporters might attempt "to justify the federal legislature's competence [in the copyright field] in light of article 91(23) of the *Constitution Act* of 1867, which fully enables the federal legislature in authorial rights matters," but such general legislation does not explicitly address neighboring rights.[144] Due to the newness of neighboring rights in Canada, it remains to be seen whether there will be a sufficient constitutional basis to support the

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audiences (thus involving the two basic rights in the copyright bundle, the reproduction right and the performance right), the second reason had also been removed. "The question of what, if any, rights performers should have in law has been debated among jurists and legislators ever since." *Id.* Even so, there is "no doubt that performers 'spend sufficient skill and labour' to merit copyright protection." *Id.*

141. *See* discussion *infra* Part IV. Even granting a neighboring right does not fully compensate performers, particularly musicians, due to "technological unemployment." STEWART, *supra* note 20, § 7.25. Once a performance is recorded it can be repeated without any performer, causing performers to lose employment opportunities. It has been widely recognized that the performance right in recorded performances "benefits the stars far more than . . . [average] . . . musicians." *Id.* Some collecting societies propose to pay those members who have lost such opportunities. *Id.*

142. NORMAND TAMARO, THE 1997 ANNOTATED COPYRIGHT ACT at xxx (1997).

143. *Id.*

144. *Id.* (footnote omitted).

legislature's provisions.

In addition to neighboring rights, the recent amendments also establish procedural changes, including acceleration of copyright infringement claims as well as increased damages. Prior to the recent amendments, copyright owners could only recover damages to the extent they resulted from the infringement. Statutory damages provisions now guarantee a minimum award once infringement is proven.[145] The introduction of statutory damages is expected to make enforcement of reproduction rights by individual rights holders more efficient. A copyright holder could demand, in lieu of damages, an award of statutory damages on a sliding scale between $200 and $20,000.[146] This "sliding scale" presents possible difficulties: "while it is widely recognized that it is very difficult to assess damages pertaining to infringements, it would be tempting for judges to use the sliding scale as a tool to evaluate each and every case of copyright violation."[147]

In addition, new procedures in the bill allow claims by copyright owners to be dealt with "without delay and in a summary way."[148] From now on, judgments may be obtained without trials using less costly, less time-consuming summary procedures.[149] Many feel that these provisions are too strong and that they have created "propos[ed] remedies and penalties for copyright infringement that are more severe than virtually every other country in the world . . . [and] make artillery available to kill a fly."[150]

Before looking at what these neighboring rights provisions will mean to Canadian radio, it should be noted that external forces also made a strong impact on the shape of the amendments.[151] Political tension, stemming

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145. *Id.* at xxxiii. It is probable that, in many cases, neighboring rights holders would find a court case too costly to pursue. *Cf.* STEWART, *supra* note 20, § 14.49. France, in its 1985 Law, increased copyright infringement penalties and applied the same penalties to the infringements of neighboring rights. Furthermore, Article 425 of the French Penal Code "punishes any act of infringement . . . with imprisonment from three months to two years or a fine of FF 6,000 to 120,000, or both." *Id.*

146. TAMARO, *supra* note 142, at xxxii.

147. *Id.*

148. BILL C-32, *supra* note 132, pt. IV, § 34(4).

149. *Briefly from CANCOPY*, *supra* note 113.

150. Canadian Association of Broadcasters—Television Board, Executive Summary, Submission to the House of Commons Standing Committee on Canadian Heritage Respecting Bill C-32, an Act to Amend the Copyright Act, Sept. 3, 1996 (visited Jan. 23, 1998) <http://www.cab-acr.ca/Statement_C32.htm> [hereinafter *CAB Television Board*]. *See also* West's Legal News Staff, *Canadian Copyright Bill Could Force Live TV Broadcasts Nationwide*, Dec. 5, 1996, *available in* 1996 WL 692711. The brief news report notes that "since taping a live broadcast would constitute copyright infringement," the bill "would necessitate live simulcasts between time zones, an inconvenience for viewers and broadcasters alike." *Id.*

151. These tensions lead to a suggestion in Part IV of this note about switching copyright decisions to Canada's Senate to avoid dilution of the copyright amendments due to political

primarily from the top two government ministers responsible for broadcasting in Canada, surrounded the passage of Bill C-32.[152] For example, wanting nothing more than to win a round for struggling artists and secure a political victory for herself, the embattled Heritage Minister Sheila Copps tabled seventy last-minute amendments to Bill C-32, after the parliamentary committee had already waded through eighty on its own. However, most of these proposed amendments faced opposition from Industry Minister John Manley, who supported the radio broadcasters.[153]

The extensive—and extensively reported—friction between the federal Heritage and Industry departments has caused uncertainty for Canadian businesses as to which department to look for leadership.[154] The root of the conflict between Manley and Copps stems from a 1993 federal decision to split responsibilities between the two departments: broadcasting policy was assigned to Heritage, while telecommunications regulation was given to Industry.[155] The result is that "Industry bureaucrats see themselves as champions of a more open economy and foreign investment," while "Heritage mandarins are custodians of a range of policies designed to foster

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pressures. *See infra* text accompanying notes 186-89.

152. Sheila Copps is the Minister of Heritage; David Manley is the Minister of Industry. These two fought constantly as Bill C-32 made its way through the Canadian channels. *Copyright Laws Spur Battle Within Canada*, HOLLYWOOD REP., Dec. 11, 1996, *available in* 1996 WL 11415472. Manley and Copps "most recently clashed over a bid [currently before the Canadian government] by Dutch media giant PolyGram NV" to begin business in Canada. *Id.* The movement to change the Copyright Act was often subject to political posturing. *See* MATEJCEK, *supra* note 18, at 79, 80. In 1984, Conservative Canadian Prime Minister Brian Mulroney came to power after making pre-election promises to revise the antiquated Canadian copyright legislation. At first there was momentum as the new Minister of Communications and Culture, Marcel Masse, stated that the Copyright Act was a top priority. This led to the tabling of *From Gutenberg to Telidon* in the House of Commons, but no action was taken on the paper after many months of lobbying efforts, meetings, and conferences. *Id.*

153. E. Kaye Fulton, *Pre-Election Jitters: Antics and animosity upset the Liberals' plans*, MACLEAN'S, Feb. 17, 1997, *available in* 1997 WL 8471523. *See also* Knopf, *supra* note 107, at 38 (noting that the increasing politicization of copyright law creates serious problems, particularly since copyright laws affect "multi-billion dollar deals and debates concerning trade, the information highway, [and] the entertainment industry"). This reality has brought "the advent of lobbyists, new and larger casts of bureaucrats, and politicians eager to be political." *Id.* Indeed, an "issue that is still too esoteric for most Canadian law schools has now become a front page headline on a regular basis." *Id.*

154. John Geddes & Jill Vardy, *Business caught in Ottawa's inter-ministry shootout*, FIN. POST, Dec. 28, 1996, *available in* 1996 WL 5749287.

155. *Id.* In addition, "the two departments share duties where the government's economic-development aims run counter to its cultural-protection goals." *Id.* While Bill C-32 undoubtedly suffered as a result of this turmoil between Manley and Copps, it is perhaps not entirely their fault. Referring to the legislation that split otherwise closely related responsibilities between departments, the National Director of the Canadian Council of the Arts, Keith Kelly, has stated that "the architecture is so bad it would drive the best of friends apart." *Id.*

culture."[156]

For legislation that had percolated for almost ten years, the recent copyright amendments should have been more carefully drafted. In light of the seventy-five year process behind the current changes, it is somewhat troubling that Heritage Minister Copps has said that Bill C-32 only "laid the groundwork" for more ambitious legislative efforts, and already "has promised that the next round of amendments will deal with digital technology."[157] Copyright lawyer Leslie Ellen Harris, who drafted the initial version of Bill C-32, admits that the "Canadian government hasn't yet explicitly looked at [copyright] in the context of digital technology."[158] However, the World Intellectual Property Organization (WIPO) has taken action through three new international treaties on exactly this subject.[159] Without diverting to a separate issue, it is intriguing to consider the passive role Canada played in the WIPO treaties, balanced against the somewhat aggressive stance it is taking with the copyright amendments. "Canada has sent comparatively large delegations, . . . sometimes surpassing in the size the delegations of the USA or EU . . . . However . . . Canada has been an infrequent and low profile participant in terms of statements and interventions in the official recorded proceedings."[160] The WIPO treaties are likely to either directly contravene Canadian law or, at a minimum, set policy in areas Canada has not yet legislated.[161] This is a vulnerable position

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156. *Id.*

157. *Briefly from CANCOPY*, *supra* note 113. *See, e.g., Performers Cheer Final Passage of Copyright Bill*, *supra* note 14.

158. *Copyright* (CANCOPY's Newsletter for Licensees), Vol. 2, No. 1 (Spring 1997) (visited Jan. 24, 1998) <http://cancopy.com/copyright/spg1997/spring1997.html>.

159. WIPO OMPI, *WIPO Press Release No. 106* (Dec. 20, 1996) (visited Nov. 15, 1997) <http://www.wipo.int>. *See, e.g.*, Jill Vardy, *Treaty may cause internet headaches: Canada needs ground rules suited to our own realities*, FIN. POST, Dec. 5, 1996, *available in* 1996 WL 5747645; Prudence Adler, *WIPO: Summary and Key Accomplishments* (visited Nov. 15, 1997) <http://arl.cni.org/newsltr/192/wipo.html>.

160. Knopf, *supra* note 107, at 35. *But cf. Canadian Elected Head of World Intellectual Property Organization* (Nov. 14, 1997) (visited Jan. 23, 1998) <http://www.dfait-maeci.gc.ca/english/news/press_~1/97_press/97_188E.HTM>. For an intriguing twist on these WIPO events, consider the recent announcement that Sheila Batchelor, Canada's Commissioner of Patents, Registrar of Trademarks, and CEO of the Canadian Intellectual Property Office, has been named Chair of WIPO's General Assembly. *Id.*

161. Jill Vardy, *Copyright bill amendments introduced to committee*, FIN. POST, Dec. 4, 1996, *available in* 1996 WL 5747569. For example, the "treaties would . . . supersede the report of the Information Highway Advisory Council (IHAC), an industry-government group mandated to help Ottawa set new policy." Jill Vardy, *Copyright law imperiled by new treaties*, FIN. POST, Nov. 30, 1996, *available in* 1996 WL 5747280. "[T]he IHAC report said more consultation is needed before Ottawa decides how browsing on the Internet should be treated under copyright law." *Id.* The issue is whether "calling something up on [a computer] screen constitute[s] a reproduction that is subject to copyright law and compensation . . . ." *Id.* The WIPO treaties could put Canada in a situation where the ability to "devise laws that

in which Canada has put itself—a position likely not contemplated during the deliberate and intentional (if misdirected) maneuvering that led to the passage of the Copyright Act amendments.

IV. THE DEVIL'S IN THE DETAILS: WHY THE COPYRIGHT AMENDMENTS WILL BACKFIRE ON CANADIAN CULTURE

The arguments concerning the establishment of neighboring rights in the Canadian Copyright Act center around the competing priorities of radio broadcasters, record companies, and the creators and performers. The traditional relationship between the record and radio industries allowed radio stations to benefit from the use of music to attract listeners; in turn, this broadcast exposure helped performers and record companies sell records.[162] The economic advantage that radio provides for record companies and the artists was the main argument behind the lobbying by the Canadian Association of Broadcasters (CAB) for a full neighboring rights exemption in the amendments.[163]

The CAB Radio Board focused on several areas of Bill C-32 in its proposals to amend the bill. Its principal argument was that neighboring rights would hurt local radio programming and local artists by placing Canadian radio stations at a competitive disadvantage with its American

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suit [Canada's] needs is circumscribed." *Id.* The WIPO's database treaty also was of concern to Canada, which felt the premature treaty should be rejected (though the United States aggressively pushed for it). *Id.* Furthermore, Article 7 may make it impossible for Canada to allow "fair dealing," which permits free copying of small portions of a copyrighted work for private study or research purposes. *Id.* "Article 7 would extend copyright beyond anything in the current Copyright Act or in Bill C-32. It addresses issues around which there is no consensus in Canada." *Id.* *See also* Fraser, *supra* note 106, at 781 (observing that the WIPO treaties give authors and neighboring rights holders the exclusive right to authorize the distribution of their works).

162. Executive Summary, Submission to the House of Commons Standing Committee on Canadian Heritage Respecting Bill C-32, an Act to Amend the Copyright Act, Sept. 3, 1996 (visited Jan. 24, 1998) <http://www.cab-acr.ca/Sub_rc32.htm> [hereinafter *CAB Executive Summary*]. "The Canadian Association of Broadcasters represents more than 375 of Canada's private radio stations." *Id.* The non-profit organization ensures "that the laws and regulations governing the broadcast industry are suited to the industry's long-term health and service to Canadians." *Id.*

163. *Id.* As an alternative to a full neighboring rights exemption, CAB proposed certain limitations: (1) "the proposed base exemption should increase with the Consumer Price Index"; (2) "the wording should be strengthened in the Bill where the Copyright Board is [instructed on] . . . (a) the value of airplay, (b) payment based on eligible recordings, and (c) payment based on volume of recordings used in setting a tariff"; and (3) eligibility for neighboring rights payments should be more strictly defined to reduce payments to the United States (which will not provide reciprocal payments to Canada). *Id.* None of these proposals was implemented.

counterparts.[164] However, these concerns involved more than the radio industry trying to protect its profit margins. After fifteen years of financial losses or only marginal profits, the radio industry had already begun to make drastic expenditure cuts, and modest estimations predict the recent copyright amendments will cost these stations up to $13 million annually in new copyright fees.[165] Prior to the amendments, radio stations paid about $22 million a year to the authors and composers of the songs they played.[166] The impact of these additional, significant expenses will quickly translate into the loss of local station jobs, because the radio stations will have to absorb these new costs that cannot be passed onto advertisers.[167] This in turn will swiftly damage the local programming content of private radio stations. Local programming has been a primary reason "why Canadians . . . listen to local radio for more than 22 hours a week, instead of turning to American stations."[168]

The wide-spread injunctive powers and statutory fines that were created through Bill C-32[169] will also weigh heavily on radio stations because in many cases obtaining appropriate clearances for music will be prohibitively expensive. "These new expenses will fall as heavily on small stations as large ones"[170] within Canada:

> [m]ost radio stations in Canada belong to companies which own two or more stations. The bigger, more profitable stations have often carried their less profitable counterparts during these lean years. The bottom line is that if larger stations are saddled with

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164. *CAB Opening Statement, supra* note 58. Interestingly, CAB does not categorically oppose neighboring rights, such as those that would counteract the effects of new technology on music sales; but radio fully compensates the music industry acting as the "marketing arm of the recording industry" (by providing free airplay, talent development, and artist and concert promotions). McCabe, *supra* note 22.

165. *CAB Executive Summary, supra* note 162.

166. *CAB Opening Statement, supra* note 58. Because authors and composers (despite being the original creators) receive only forty cents per CD from record sales, this amount has always been considered fair. *Id. See* app. A.

167. *CAB Executive Summary, supra* note 162.

168. *Id.*

169. For example, see BILL C-32, *supra* note 132, pt. IV, § 38.1(1):
> [A] copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just.

170. *CAB Executive Summary, supra* note 162.

> Neighboring Rights, they will be less able to cross-subsidize smaller stations, and the smaller stations will suffer.[171]

Once the trimming of costs begins, cuts will likely start with local radio services—the very stations most capable of tailoring the programming to local listeners. Beyond these potential problems, which are strictly the concerns of Canadian stations, is the stark reality that U.S. stations will not be impacted at all by neighboring rights.[172] Basic business principles, if not common sense, dictate that the Canadian border stations cannot consistently maintain higher cost structures than those in the United States and still remain competitive.

Promoting new Canadian artists also poses substantial financial risks for radio stations. One of the most successful Canadian artists of late is Alanis Morissette, whose history with Canadian radio exemplifies these risks. One station took an interest in her before any other station would give her a chance. Over an eight-year span, the station spent $42,000 on her: "We shamelessly featured her, invited her to co-host various shows, and hired her to play at community events."[173] The reality is that competition is fierce and most artists rarely achieve Morissette's level of success. One radio industry spokesperson reports that "[e]very day, someone shows up at our door looking for a break . . . hoping they will be the next Alanis or Neil Young."[174] Under the new copyright amendments, when a local performer asks to have his song played on air, it may no longer be possible because confirming the rights holders and getting permission from each creator and music publisher will be cost-prohibitive and time consuming.[175]

The financial struggles of private Canadian radio stations should not be interpreted as a sign of failure.[176] In fact, Canadian broadcasters have competed head-on in every border town with the American broadcasting system. But even before the amendments, Canadian radio paid fifteen

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171. *CAB Opening Statement, supra* note 58.

172. *Id.* Even without neighboring rights expenses factored in, Canadian radio stations spend 15% more than U.S. stations on copyright expenditures. *Id.*

173. *Id.* The $42,000 was a prudent investment in Alanis' case. *See* Lynn Brenner, *What People Earn*, PARADE MAG., June 22, 1997, at 5. Morissette's 1996 earnings topped $22 million, primarily from record sales of over 9,000,000 to date. She was 23 years old on the *Parade* report's publication date. *Id.*

174. *CAB Opening Statement, supra* note 58.

175. *Id.* Even if the performer claims the composition as his own, the risk of infringing on a copyright or neighboring right will be too great in light of the statutory and injunctive provisions contained in the new amendments. *Id.*

176. *See supra* note 76 and text accompanying notes 76-78 for evidence of radio's consistent popularity.

percent more for copyright than did U.S. stations, which has made the prospect of paying significantly higher amounts due to neighboring rights a critical concern for Canadian border stations.[177]

The fears and concerns engendered by the establishment of neighboring rights are compounded by various administrative uncertainties. The method for collecting and distributing the neighboring rights fees has yet to be established, and the Canadian copyright board has not yet determined the percentages at which neighboring rights holders will receive remuneration.[178] The establishment of neighboring rights will also require some sort of collection agency. Some music industry sources support a fifty-fifty split of revenue between the record company and musicians.[179]

Administration of the neighboring rights revenue will be complicated, and administrative costs will likely erase any profits for some time to come. First of all, half of the collected revenue will leave Canada because fifty percent of eligible recording-industry repertoire is foreign.[180] Furthermore, the start-up costs of incorporation, tariff submissions, database management, and enforcement, along with the costs of preparing policies and creating management structure, are substantial. Estimates suggest that, from the time of full enforcement of the neighboring rights, it will take almost five years to break even and will require close to $10 million before there is a plus figure.[181] Predictably, when the discussion turns to who should bear these costs, there are few volunteers.[182]

While SOCAN (Society of Composers, Authors, and Music Publishers of Canada—the Performing Rights Organization of Canada Ltd.) supports the principle of neighboring rights, it has resisted launching a neighboring rights agency because CAB, in its pursuit of full exemption from neighboring rights for all private radio stations, has sought in the alternative a reduction in royalties payable to SOCAN. SOCAN naturally is opposed to any dilution of its radio tariffs to help pay for neighboring rights. While there is widespread endorsement in the music industry for a single agency to oversee the neighboring rights tariffs and revenue, and even general agreement for the agency to operate on the basis of a fifty-fifty split, several industry

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177. *CAB Opening Statement, supra* note 58.

178. LeBlanc, *supra* note 103. *See* STEWART, *supra* note 20, § 7.50. In some countries, the "whole protected repertoire is licensed in bulk for an annual sum . . . [that] is divided among right owners according to the amount of time their records have been played"; others provide payment "according to a minute rate for protected music." *Id.* Radio stations would have to keep and furnish logs showing all programs broadcast that would be analyzed to ascertain which releases were protected. *Id.*

179. LeBlanc, *supra* note 103.

180. *Id.*

181. *Id.*

182. Naturally, it would be harder for individual performers to collect the payments than for a corporation to do so. *Id.*

observers doubt that recording artists would be able to hold on to the profit.[183] Record companies, or "labels," feel entitled to keep revenue generated by the master recordings they have paid for, and thus take the position that, if anything, fifty percent should go towards the recoupment of the label's expenditures for the artist.[184] If labels do *not* receive the neighboring rights revenue, they will offer less favorable terms in their recording contracts, because the labels are usually in a superior bargaining position. Labels often argue that since they (the record companies) do not receive income from merchandising, publishing, or touring, artists should not "complain about (the low royalty rate), because we're giving you a start and we're spending all this money."[185] Record companies may also stop giving big advances and start cutting back on tour support. A subsidiary problem is that smaller independent labels, which are traditionally more willing to support unknown artists, will feel pressured to give up their share of neighboring rights revenue in order to compete with larger record companies. As demonstrated by these scenarios, the neighboring rights provisions have the potential to send shock waves through the music industry and produce harmful repercussions that may not have even been considered by the drafters of Bill C-32.

One intriguing, if unlikely, proposal would alleviate some of these administrative hurdles while having the added benefit of reducing the political influences that complicated Bill C-32.[186] The proposal calls for establishing "a Senate Committee with ongoing responsibility to deal with intellectual property."[187] The Senate could then initiate copyright legislation. The rationale is that Senators often have experience in broadcasting, cable, or media and the arts, and "[i]t is said that they have time on their hands."[188] The Canadian Senate often gives a more considered, less partisan review of intellectual property legislation than does the House of Commons. The Senators are more insulated from "interference by Ministers, their staffs, and bureaucrats than Members of Parliament."[189]

While most of CAB's lobbying efforts have been based on credible statistics and arguments, there appears to be some doubt surrounding its argument that performers and record companies profit amply from the sales of recordings and concert tickets, earning "$2 to $3 from the sale of each

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183. *Id.*

184. *Id.* The up-front costs that labels pay to launch a new act are considerable. *See* app. A.

185. LeBlanc, *supra* note 103.

186. *See supra* notes 151-56 and accompanying text.

187. Knopf, *supra* note 107, at 39.

188. *Id.*

189. *Id.*

successful CD."[190] In actuality, the figure is much lower for performers, and potentially much higher for record companies. In the past, the music industry has relied on the mutually beneficial relationship between radio and record companies. Since radio exposure generates sales for the artists and record companies, these sales were traditionally considered radio's full compensation to performers.[191] However, this balanced relationship has been thrown off by technological developments that impinge on legitimate record sales. Performers' revenues are increasingly threatened by unscrupulous people who make perfect copies of a commercially released CD using digital recording equipment, and then post it on the internet for anyone else to make a digital quality copy—without paying. While this is a formidable problem that requires some sort of remedy, "radio does not contribute to this problem and should not have to pay for it through Neighbouring Rights."[192]

If the money will indeed go to any artists, only those who are already superstars will receive any measurable amounts. More likely, the money will go to the record labels that will have required newly acquired artists to assign their copyrights to them.[193] High-income Canadian recording artists like Bryan Adams and Tom Cochrane undoubtedly will profit from the royalty. But less popular artists are less hopeful; for example, the rising country artist "Sky" recently returned to Canada after spending ten years in the United States. Sky would welcome any monetary gain from the royalty because it would boost performers "like herself who are just beginning to get radio air play."[194] The problem is that thousands of musicians would do nearly anything for a recording contract; this creates a buyer's market, and the record companies can easily exploit this situation to their advantage.[195]

Clearly there are considerable misconceptions as to how much successful performers earn. Many assume that vast riches await all performers lucky enough to sign a record deal. In reality, record companies and their lawyers may take advantage of musicians who do not understand their legal rights, the meaning of obscure clauses in lengthy contracts, or the

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190. *CAB Opening Statement, supra* note 58.

191. *Id.*

192. *Id.*

193. Paul W. Weber, *Serious Problems with Copyright Bill*, FIN. POST, May 3, 1997, *available in* 1997 WL 4093910.

194. Geddes, *supra* note 75.

195. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (1994). Throughout his book, Passman warns of the uses and abuses of the various players within the industry. "There have been a lot of big names associated with disasters over the years." *Id.* at 40. *See generally id.* at ch. 3 (Personal Managers), ch. 4 (Business Managers), and ch. 5 (Attorneys) for advice in avoiding industry abuses. *See also* 1996 SONGWRITER'S MARKET: WHERE & HOW TO MARKET YOUR SONGS (Cindy Laufenberg ed., Writer's Digest Books 1995). The "music industry has its share of dishonest, greedy people who try to unfairly exploit the talents and aspirations of others." *Id.* at 13.

ramifications of giving up vast amounts of their own publishing rights to the record label.[196] A financial breakdown of an artist who not only has beaten the odds and acquired a record deal, but who also has had the extraordinary luck of having his or her first release achieve gold status (selling 500,000 units), illuminates the financial realities of the music business.[197]

Because the establishment of neighboring rights will probably not help new Canadian artists, the copyright amendments will do little to promote Canadian culture. Since the new protections will only benefit artists already receiving royalties, and may also face constitutional challenges, a recent editorial in *The Financial Post* suggested that it may be better to boost cultural grants directly to artists. Nevertheless, a response in the following issue panned the idea as "the type of thinking that has kept Canada's copyright reform behind most Third World countries for 74 years."[198]

Artists may benefit more from the tried-and-true Canadian content laws, which require radio stations to devote a certain amount of air time to Canadian artists. However, the continuing need for these regulations is increasingly under fire.[199] Established superstars like Alanis Morissette and Celine Dion are examples of how competitive the Canadian music industry has become. Even so, without Canadian content regulations, many radio stations might stop playing Canadian music.[200] Michael McCabe, president

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196. *See* PASSMAN, *supra* note 195. Many artists "have never learned such basics as how record royalties are computed, what a copyright is, [and] how music publishing works." *Id.* at 23. Discussing the need for artists to be represented by a manager or lawyer, Passman explains that major record companies have a policy of not accepting submissions unless they come from a manager or attorney in the business. *Id.* at 34. "The reason for this practice is that record companies can get 300 to 400 tapes *per week*, and restricting who can send in tapes is one way they regulate the floodgates." *Id.* (emphasis in original).

197. *See* app. A.

198. Brian Robertson, *Copyright Bill a Step Forward*, FIN. POST, May 3, 1997. *But see* Etan Vlessing, *Trading Shots: Canada's Culture Czars Wrap Themselves in the Flag. But Who Are They Protecting?*, HOLLYWOOD REP., Nov. 25-Dec. 1, 1997, at 16 (discussing the practice of governmentally issued tax credits to entertainment companies that meet quotas). However, "the tax credit and subsidy schemes . . . actually favor large, vertically integrated producers who create programming for the world market—typically based on ideas from U.S. shows, books or characters." *Id.* at 17. The dilemma is, as articulated by Patrice Theroux, executive vice president of Alliance Communications Inc., that the "tiny size of the Canadian market means international sales are essential to the bottom line." *Id.*

199. Shawn Ohler, *CanCon Debate Rages On and On; Proponents Argue Law Necessary to Ensure Homegrown Artists Heard*, EDMONTON J., Mar. 7, 1997. These laws are also extremely controversial and recently became a hot topic after federal Trade Minister Art Eggleton proposed changes to the regulation. *Id.*

200. *Id.* *See* NASH, *supra* note 23, at 259. There may be other dangers in reverting to "old ways" in light of an unofficial CBC philosophy that became apparent in the early 1960s. Various performers complained of there being no "star system in the CBC to develop TV headliners." *Id.* Alex Barris, a well-known variety show host, said: "The CBC's determination to deflate show business egos is clear. . . . The CBC has always been uneasy

of the Canadian Association of Broadcasters, has suggested that "the government should reduce the 30[%] requirement to reflect Canadian consumers' music preferences, [based on the fact] that 13[%] of record sales in Canadian retail are by Canadian artists."[201] Based on the idea that the law has made radio stations less attuned (so to speak) to listener preferences, this position reflects the sentiment that content laws are no longer necessary to protect national culture.[202]

Regardless of the reasons behind the results, Canada has produced a long list of music and musicians who have achieved great success in the United States. Adding to the irony and complexity of this situation, then, is the possibility that Canada's secret weapon in combatting the U.S. cultural invasion may well be the Canadian musicians themselves. Americans have not been oblivious to this possibility, and have gone so far as to state that Canadian cultural protection is just economic favoritism in disguise.[203] One U.S. lobbyist said that Canadian singers are welcome in the United States, but U.S. singers "are treated like skunks up north."[204]

The content laws have produced ridiculous situations in which some artists do not qualify as Canadian artists under the laws due to mere technicalities. Bryan Adams, a massively popular Canadian pop star, has faced challenges from the CRTC as to whether his music satisfies the

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about proclaiming anyone as a 'star.'" *Id.* Another Canadian icon known simply as Juliette agrees: "The corporation . . . [never] wanted anyone to have the kind of power a real star has because then they couldn't control them." *Id.* Nash suggests that "at the CBC, it was the producers, not the performers, who were treated like stars." *Id.*

201. Ohler, *supra* note 199.

202. *Id. But see* Christopher John Farley, *Gallapalooza! Lilith Fair—A Traveling Festival Featuring Female Folk-Pop Stars—Is Rocking the Music World,* TIME, July 21, 1997, at 60-64. There are subtle discrepancies between American and Canadian artists. For example, one of Canada's fastest rising artists as of late 1997 was Sarah McLachlan, organizer of the best-selling tour of the 1997 summer concert season, *Lilith Fair.* Nevertheless, the *Time* cover story, reporting on the success of a revolutionary, all-female tour, featured American artist Jewel on the cover. Jewel played less than one-third of the *Lilith Fair* dates; McLachlan, as the organizer, was the *only* artist to play every date of the tour. *See also Re-Mail,* REQUEST MAG., Oct. 1997, at 4 (responding to a previous McLachlan feature story that attributed her double platinum success to radio support, one reader stated that "the thing that turned me on to McLachlan's music was not . . . radio, but rather a Canadian TV show called *Due South.* It is shot in Toronto and distributed around the world. Several of McLachlan's songs have appeared on *Due South.*").

203. There is substantial evidence that the U.S. recognizes the importance of Canadian radio. *See* MATEJCEK, *supra* note 18, at 15. For example, as far back as 1969, when BMI Canada launched the BMI Canada Awards Dinners, the event was "attended by some of the most prominent personalities of the . . . US music industry and public life." Senator and Mrs. Albert Gore, Congressman Richard Fulton, Governor Frank Clement of Tennessee, President of Capitol Records Stan Gortikov, and President of BMI Edward Cramer were among the attendees. *Id.*

204. Lehmann, *supra* note 12, at 207.

content-regulation criteria.[205] The criteria require that, in order to be considered a Canadian performer, at least four of the song writers, producers, and sound recorders involved in the making of the song must be Canadian.[206] Adams had co-written one song with a friend from England, and consequently the song could not be considered the product of a Canadian writer.[207] Still, although the content laws did produce an unfortunate result on this one occasion, the same laws arguably were responsible for elevating his career to a point where he could even experience this phenomenon.[208] The Minister of Heritage has stated that the Canadian music industry has "blossomed and developed a critical mass of artists, because of Canadian content rules."[209]

In its quest for cultural independence, perhaps Canada should leave the training-wheel stage of content laws. "Some worry . . . that protectionism risks making Canada look backward and reactionary in the global economy."[210] Canadian culture appears strong enough to now stand on its own merits. There is a degree of appealing logic in the argument that if it is worthy, it will be competitive. Insisting on content regulations "for reasons of cultural nationalism is therefore ironic and possibly self-defeating."[211] The cost of direct regulation of private broadcasting will invariably exceed the cultural benefits, and Canada's "obsession with quantity must yield to a commitment to less, but better and different, Canadian programming."[212] If cultural regulation of broadcasting is to become more effective, the "first step will be for legislators, regulators, and the public to abandon the National Broadcasting Dream, to acknowledge the external realities of American stations and commercial dominance, and to devise new policies in light of these realities."[213] As such, Canada should abandon the preoccupation with quantity when it comes to promoting Canadian artists. It has even been suggested that little of cultural

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205. Macdonald, *supra* note 82, at 264-65.

206. *Id.*

207. *Id.*

208. *Id.* at 265. "[H]is success as a Canadian . . . singer is not coincidental, because the Canadians were very seldom on the popular music scene prior to 1976. But since the rules went into effect, they have had a very prominent role." *Id.*

209. *CAB Opening Statement*, *supra* note 58.

210. Vlessing, *supra* note 198, at 16. It is interesting to consider the fact that, as artists of the cultural industry began equating Canadian content with trash, the CBC picked up on this view. When advertising the sitcom *Mosquito Lake* in 1989, the CBC used a slogan saying, "[w]e're on the CBC . . . but watch us anyway!" Lehmann, *supra* note 12, at 200-01.

211. Manning, *supra* note 1, at 13.

212. Bruce Feldthusen, *Awakening from the National Broadcasting Dream: Rethinking Television Regulation for National Cultural Goals*, *in* BEAVER, *supra* note 1, at 43. Feldthusen also asserts that "[c]ommercial television is the source of our cultural problems, not a vehicle for solving them." *Id.* at 64.

213. *Id.* at 65.

significance will ever be achieved by private broadcasters, however they are regulated, because:

> the quotas . . . are simply not powerful enough to overcome the tremendous commercial advantages of American programming. So much is at stake that the commercial broadcasters will always lobby to reduce the impact of the regulations. So great are the net revenue differentials between Canadian and American programs that the commercial broadcasters will always prefer to schedule American programs during peak periods.[214]

A recent *Maclean's* article shows the poignancy of this commercial threat. The editor commented on the uncelebrated crossing of the border by Howard Stern, the immensely popular trash-talk DJ.[215] Such indignities support the notion that the tide is turning in Canada and radio stations are approaching the financial breaking point. Traditionally, Canadian broadcasters have seemed to prefer the high-ground in programming, even if such programming decisions would not be the most profitable. For example, in all of the reports and evaluations of the CBC over the years, one clear message can be ascertained: "what matters most is not the plumbing of organizational structure, flow charts, or 'repositioning' strategies, but the content of programming."[216] Those days may be waning, as the advent of Howard Stern on Canadian airwaves seems to indicate.

Private efforts may be preferable to legislation, such as copyright amendments and content laws, designed to foster culture. Sixty-six percent of Canadians do not have confidence in the ability of the government to protect Canadian culture and identity.[217] One fear is that government involvement can quickly result in a subtle form of censorship. Without any copyright protection, creators can be forced to resort to forms of patronage, which, in modern times, comes largely from the state.[218] If creators were

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214. *Id.* at 62.

215. Robert Lewis, *From the Editor: Tuning in to Trash Radio,* MACLEAN'S, Oct.13, 1997, at 2. Stern is quoted in the article as saying "[m]ost stations we go on are usually in the toilet. No successful station in its right mind would put us on." *Id.* Since September 2, 1997, his syndicated show has aired on two Canadian stations that are struggling to improve their ratings, thereby putting their federal licenses at risk because of Stern's raunchy content. While early reports indicate that Stern has improved ratings, a rival broadcaster said that his competitor's decision to carry Stern's show put about $800,000 in his pocket due to ad cancellations on the station airing Stern. Lewis concludes that "[p]rotecting a distinctive culture along the 49th parallel will become a larger challenge, especially if civilized dialogue is overtaken by trash talk." *Id.*

216. *See* NASH, *supra* note 23, at 11.

217. Lehmann, *supra* note 12, at 198.

218. STEWART, *supra* note 20, § 1.19. "The absence of such censorship is an essential

dependent on the state, a subtle form of censorship could emerge. Still, although an "up-to-date and virile copyright law in a free society will greatly assist its preservation . . . a bad copyright law may help to destroy it."[219] Even the United States has experienced the effect of well-intended legislation harming what it is designed to promote. By the time the Constitution was drafted, twelve of the thirteen colonies had passed copyright legislation, following the Statute of Anne, but with "one major deviation from English law: foreign authors were not protected."[220] While concentrating protection exclusively on American authors may have seemed like a good idea at first blush, "the new law sanctioned the unrestrained reprinting of popular English writers, to the disastrous competitive disadvantage of the very indigenous American literature it was pledged to encourage."[221]

Yet another financial dilemma that the copyright amendments present involves the traditional use of governmental subsidies and tax measures that the CRTC has used to help broadcasters combat the onslaught of American culture. For example, "until 1987, any investment in a Canadian-produced film was 100 percent tax-deductible."[222] Similarly, "[t]otal Canadian direct and indirect federal arts subsidies in 1989-1990 were estimated to be Canadian $2.93 billion."[223] In the wake of the recent copyright amendments, Canadian subsidies likely will decrease because of the perception that new streams of income will be generated. "[S]ubsidies to Canadian artists will now disappear even faster than before, with the new law serving as a convenient neo-conservative excuse."[224]

For a country of Canada's international stature, "[t]he proper forum

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ingredient of a free society." *Id.*

219. *Id.*

220. *Id.* § 2.18.

221. *Id.* "It took a century of agitation to remedy this fatal error." *Id.* In the meantime, Edgar Allan Poe, James Fenimore Cooper, and Herman Melville "were pirated in England and the reprints sold at cheap prices so that the legitimate product could not compete," resulting in the authors losing their rightful monies. *Id.* *See also* THE OXFORD COMPANION TO AMERICAN LITERATURE (James D. Hart ed., 5th ed. 1983). Ironically, Melville traveled to England in 1849 to legitimize foreign publication arrangements. *Id.* at 485. One may wonder about the economic detriment such pirating caused Melville. In typical artistic fashion, Melville died broke in "complete obscurity." *Id.* at 486.

222. Carlson, *supra* note 6, at 588. Bill C-58, a tax measure, would deny "advertising cost deductions for Canadian businesses that attempt to reach their domestic market by advertising in non-Canadian media." *Id.*

223. *Id.*

224. Knopf, *supra* note 16. In contrast to the inefficiency and awkwardness of a government attempting to legislate for cultural promotion, private successes frequently promote Canadian culture. A recent example came by way of CAB's creation of the annual "Canadian Radio Music Awards." *CAB Press Release*, *supra* note 57. This "gala event" is designed to "promote the careers of rising stars, boost the sales of Canadian music and help bring more great talent onto the international scene." *Id.*

in which to seek co-operation . . . must be multinational."[225] Accordingly, a multinational agreement on information trade, which would be binding on all parties, seems like a prudent proposal: "Information, education, and entertainment are too closely linked in domestic government policies and in the market not to be linked in international trade policy."[226] Particularly in a world moving ever closer to a global economy, cultural development will expand to an international, rather than merely national, priority. To that end, Canada and its allies, most likely led by the United States, "should be able to negotiate better conditions for all of us, to institute something approaching fairness in cultural relations. We need a GAIET, a General Agreement on Information and Entertainment Trade, to walk through freely and proudly."[227]

It is evident, as seen in the GAIET proposal and the recent WIPO treaties, that Canada must look beyond its own borders in seeking to promote its culture. Furthermore, Canada must not underestimate the impact of its efforts, as viewed by other countries, in defining Canadian culture. Canadian commentators regularly disagree about Canada's role in the international community.[228] The shadow cast by the United States "may inhibit Canadians from acting on the world stage in an un-Canadian strident manner."[229] Given the "tremendous resources and competence of its government officials," Canada could certainly take a more prominent role in world affairs; nevertheless, this aspiration has been stalled by ten provinces pulling "in different directions and cling[ing] to protectionist tendencies inappropriate for a middle power."[230] Canadian political scientist Stephen Clarkson stated almost thirty years ago that Canada "cannot afford not to exploit the nation-building potential of our foreign policies since the way others perceive us—dynamic and bicultural, or ineffectual and divided—can strengthen, or undermine, our own national identity."[231] As the new millennium approaches and the nations of the world increasingly move toward a global economy, Clarkson's words resound with a sustained relevance.

V. CONCLUSION

The financial impact that neighboring rights will have on Canada's private radio industry remains to be seen, and the picture will likely not

225. Ostry, *supra* note 3, at 41.
226. *Id.*
227. *Id.*
228. *See supra* text accompanying note 160.
229. Fox, *supra* note 9, at 32.
230. *Id.*
231. *Id.* (citation omitted).

come into focus for several years. Private radio has struggled financially for some time, and the neighboring rights provisions, established through the recent Bill C-32, will increase the economic burdens. At the same time, there can be no question about the integral role private radio stations play in promoting Canadian culture.

Stepping back from the complex inter-relatedness of copyright laws, political posturing, cultural fragility, and the limitations on a government attempting to strengthen its identity (all of which contributed to the shape and scope of Bill C-32), reveals a more fundamental consideration involving the process of creativity itself: the creative process is one of "change, of development, of evolution, in the organization of subjective life."[232] The "inventive minds through whose activity that evolution has been initiated . . . have usually been the only ones much concerned with it."[233] More often than not, society has hindered rather than furthered these efforts:

> There is little comfort in reflecting that vital change has gone on despite all opposition or indifference, that the work of Galileo was done and put to use in spite of obstruction and that Bartok composed a great deal of music while enduring the neglect that left him in sickening poverty. There is no way of estimating how much the development of humanity has been lamed by such delay and waste.[234]

By implication, then, the general good of humanity would benefit from an "effort to foster the invention of life," but such an effort can only be effective and meaningful if it is guided "by insight into the nature of the creative process."[235] By "[u]nderstanding the activities of those who supply the needs of life, both their own and others', by defining some fresh organization of subjective processes, we may help them get their work done."[236]

These considerations raise the unanswerable question as to the extent to which Canada can expect its efforts to promote its culture. Such a goal may be inevitably beyond the scope of any government's regulation. Perhaps Canada should be reassured that truly creative people will continue

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232. Brewster Ghiselin, *Introduction* to THE CREATIVE PROCESS—A SYMPOSIUM 12 (Brewster Ghiselin ed., 1952). This collection includes essays on the process of creating by such notable visionaries as Albert Einstein, Vincent Van Gogh, Friedrich Nietzsche, Carl Gustav Jung, Mary Wigman, A.E. Housman, W.B. Yeats, Henry Moore, and D.H. Lawrence, among others.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

to create, no matter what the national flag or geographic region, no matter what degree of governmental interference. Canada has a good chance of enjoying a unique identity, then, almost in spite of itself. C.G. Jung has stated "[t]he work in process becomes the poet's fate and determines his psychic development. It is not Goethe who creates *Faust*, but *Faust* which creates Goethe."[237] By extension, no matter what the Canadian government does to foster and promote its national identity through its culture, it is not Canada that will create its culture. It is the culture that will define Canada.

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237. *Id.* at 13.

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APPENDIX A[238]

*Figures in U.S. dollars.

If the cost of a CD is rounded up to $16 and multiplied by 500,000, the figure comes to $8 million. From the $16 list price a 25% packaging charge is deducted. Thus, the cost of the record as determined by the record company is down to $12. This is multiplied by 8%, the artist's net royalty rate per record sold (assuming a royalty rate of 11% after the industry standard deduction for the producer's take, which is 3%). The base royalty rate for each record sold is $0.96. Rounded up, $1 multiplied by the number of units sold equals $500,000, the base amount due to the artist. Now it gets interesting:

$500,000	records sold
(75,000)	15% deducted for freebies, promos, review copies for radio/magazines
425,000	Total new royalty base due to the artists
(148,750)	35% of royalty held in reserve by record companies for returns
276,250	new royalty base paid band after freebies and returns are deducted
(27,625)	10% deducted by record company for breakage or returns
248,625	Total paid to band by record company; band can start using this money
(150,000)	recording expenses: studio/engineer's time, equipment rental, per diems
98,625	Band's gross earnings after expenses
(19,725)	manager's 20% of the band's earnings
78,900	Band's net earnings from sales of 500,000 records
(divided by 4)	number of people in band, assuming equal division among members
$19,725	Individual member's final paycheck.

These figures exclude lawyer's fees, and the expense of video production (an average of $75,000 for MTV-quality production). Given that the above numbers involve approximately a two-year process, each member earns less than $10,000 annually, before taxes—hardly the riches that are often assumed to accompany fame and notoriety.

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238. H.P. Newquist, *Piece of the Pie*, GUITAR, July 1996, at 51.

A SHARED HISTORY OF SHAME: SWEDEN'S FOUR-DECADE POLICY OF FORCED STERILIZATION AND THE EUGENICS MOVEMENT IN THE UNITED STATES

I. INTRODUCTION

Each society has its own values and models of desirable behavior. The multiplication of socially incompetent and mentally deficient people, coupled with the corresponding diminution of the superior classes of society[1] has, in the eyes of some, had a detrimental effect on social classes around the world. Frenzied and over-zealous eugenicists in Sweden and the United States attempted to warn humanity of what they saw as its impending self-destruction in the early part of the twentieth century, and now Sweden is faced with the hard truth of compensating victims of the resultant eugenics movement and compulsory sterilization.

In the early part of the twentieth century, eugenics was considered the science of human betterment.[2] With the emergence of highly technological and economically competitive societies, great value was placed on academic success and intelligence, and "persons whose intellectual skills are obviously less developed than the norm have traditionally been devalued and treated as deviants."[3] It was from an underlying belief in the ability to improve the human race that compulsory sterilization and the eugenics movement emerged.

Coercive,[4] compulsory, or involuntary sterilization involved the

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1. J.H. LANDMAN, HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT 4 (1932).

2. *Id.* at 3. "It [eugenics] is concerned with the study of being well born and with all the social agencies which may improve or impair, physically and mentally, the racial qualities of future generations . . . . Its purpose is to discover how we may breed better human beings." *Id.*

3. RUTH MACKLIN & WILLARD GAYLIN, MENTAL RETARDATION AND STERILIZATION: A PROBLEM OF COMPETENCY AND PATERNALISM XIX (1981).

4. According to one author,

> [c]oercive sterilization usually involves one or more of the following:
> 1) deception (sterilization during the course of another medical operation, or telling the victim that the operation is for appendicitis or some other medical condition);
> 2) undue pressure (offering sterilization as a condition of parole or release from an institution);
> 3) threats (withdrawal of social benefits);
> 4) violation of the principle of informed consent (sterilizing persons such as minors or the mentally retarded who cannot give a legal informed consent);
> 5) lying about the procedure (telling the victim that it is reversible);
> 6) failing to explain the procedure fully or in a language the patient understands;
> 7) pressing it upon someone who has not voluntarily sought it.

STEPHEN TROMBLEY, THE RIGHT TO REPRODUCE: A HISTORY OF COERCIVE STERILIZATION

sterilization of mentally incompetent persons "upon the request of a parent or guardian, superintendent or other official of a public institution or a psychiatrist."[5] This note compares the twentieth century compulsory sterilization practices of the United States and Sweden, the result of which has been a trail of survivors now seeking help from the governments that had promised protection. Part II begins by examining the recent outcry from 20,000 living victims of compulsory sterilization in Sweden and the state of political affairs after the government, on August 27, 1997, promised to launch a full investigation into the policies and procedures of forced sterilization and to explore possible compensatory measures. This section then examines the history behind sterilization in Sweden, the underlying force of the eugenics movement throughout the twentieth century, and the movement to repeal the Swedish sterilization laws in the late 1970s. Part III examines the American eugenics movement through history and notes the irony of sterilization in a land where all men are supposedly created equal. This section also inspects court decisions involving the sterilization of the mentally incompetent, the sterilization of "hereditary" criminals, the American efforts to keep the Aryan/white race pure, and the recent repeal of sterilization statutes in the United States. Part IV points out the gross violation of human rights that the eugenics movements and compulsory sterilization programs effected in the United States and Sweden. This section also offers suggestions for Sweden to consider in establishing a solid compensation scheme. Although Sweden has received much criticism from the United States, the latter is not completely free of blame. The United States has not established a systematic and positive means of compensation for its victims of compulsory sterilization. Finally, Part V concludes by noting the pressing concerns about fertility control in both countries. Both societies must face their grim experiences with the practice of eugenics and search for measures to prevent such practices from re-emerging in the future.

II. SWEDEN

In the early part of the twentieth century, Swedish victims of sterilization were perceived to be lesser human beings, flawed by

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1 (1988).

5. IRVING J. SLOAN, THE LAW GOVERNING ABORTION, CONTRACEPTION & STERILIZATION 42 (1988). "The most common surgical method for accomplishing voluntary sterilization of men is vasectomy, which is the surgical excision and/or ligation (tying off) of a portion of each vas deferens (the excretory ducts of the testes)." *Id.* at 37. For more information on vasectomies, see *infra* note 95. "The most common surgical method for accomplishing voluntary sterilization of women is tubal sterilization, which is the surgical excision, occlusion and/or ligation of portions of the oviducts, or fallopian tubes." *See* SLOAN, *supra* at 37.

unacceptable mental, social, and socioeconomic characteristics; many were said to suffer from "genetic inferiority."[6] "To prevent this genetic heritage from being passed on, they were sterilized—sometimes involuntarily."[7] *Dagens Nyheter*[8] revealed that Swedish citizens were subject to involuntary sterilization from the 1930s to 1976 on the grounds of having undesirable racial characteristics or otherwise "inferior" qualities, such as very poor eyesight,[9] mental retardation,[10] or an "unhealthy sexual appetite,"[11] as described by authorities at the time.[12]

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6. "Genetic inferiority" is considered to be a malfunctioning of many human traits; such as "'poor or mixed racial quality[,]' . . . poor families or not of the common Nordic blood stock." *Europe's Taboo, Sterilization, Out of the Shadows*, CHI. TRIB., Aug. 28, 1997, *available in* 1997 WL 3582897 [hereinafter *Europe's Taboo*].

7. Jim Heintz, *Sweden in Self Examination of its Sterilization of Thousands*, ORANGE COUNTY REG. (Cal.), Aug. 26, 1997, at A16, *available in* 1997 WL 7440163.

8. *Dagens Nyheter* is a Swedish newspaper. Barbara Amiel, *Sweden's Shameful Eugenics Policies*, MACLEAN'S, Sept. 8, 1997, at 13, *available in* 1997 WL 8474073.

9. "In 1943, at age 17, [Maria] Nordin had her ovaries removed on the instructions of the headmistress and consulting physician at a reform school for girls." Dean E. Murphy, *Publicity Over Sterilization Program Spurs a Now-Repentant Nation to Make Amends to 20,000 Surviving Victims*, L.A. TIMES, Aug. 31, 1997 [hereinafter *Publicity*]. At that time, Nordin was "said to suffer from 'genetic inferiority' that, in the interest of the Swedish welfare state, was best not passed on to offspring." *Id.* In an interview with National Public Radio (NPR), the director of the Swedish Social Welfare Board, Karl Grunwald, stated: "The case of Maria Nordin is a sad example. As a child, Nordin fell way behind in school. The assumption was made she had sub-normal intelligence. In fact, she was nearsighted, but had no glasses and couldn't see the blackboard." *All Things Considered* (National Public Radio broadcast, Aug. 25, 1997), *available in* 1997 WL 12833288 [hereinafter *All Things Considered*]. No one bothered to check her eyes. Instead her "school doctor classified her as 'feebleminded' and 'unable to raise children.'" *See Publicity, supra.*

> I'll never forget when I was called into the headmistress's office . . . . I was aware of it well before. I hid in the basement bathroom crying all by myself. I was thinking of killing myself, and I have been thinking of it ever since. But I never wanted to give [the government] the satisfaction of getting rid of me.

Id. (quoting Maria Nordin's agonizing disclosure of being one of the thousands of victims of forced sterilization).

10. In the early part of the twentieth century in Sweden, mental retardation was said to exist if the person could be compared intellectually with a person twelve years old or younger. EUGENICS AND THE WELFARE STATE: STERILIZATION POLICY IN DENMARK, SWEDEN, NORWAY, AND FINLAND 115 (Gunnar Broberg & Nils Roll-Hansen eds., 1996) [hereinafter WELFARE STATE]. For an in-depth discussion on various definitions of mental retardation, see MACKLIN & GAYLIN, *supra* note 3.

11. "Among those sterilized were unmarried mothers with several children, people judged to be habitual criminals, and even a boy considered 'sexually precocious.'" Jim Heintz, *Sweden Regrets its Eugenic Past*, GUARDIAN (London), Aug. 26, 1997, at 7, *available in* 1997 WL 2398018 [hereinafter *Eugenic Past*]. The sexually precocious were victims of sterilization because their sex drive was considered to be inferior. *Id.*

12. *Id.*

A. *Current State of Affairs in Sweden*

> I had a dream of a home of my own, and of having my own children. Nobody said anything about sterilization. I knew, though, and said I didn't want it. I led an ordinary life after that. I applied for damages from the government last year, but that has been denied because the institution had only followed the law. I'm angry and bitter and sad. I'm trying to forget, but it will not work.[13]

This desperate cry for government relief by Maria Nordin, a victim of forced sterilization during the 1940s, is not a lone voice reproaching the cold conscience of Sweden.[14] Sweden must now face the chilling realization that it is time for its government to review a painful chapter of its own history.

On August 26, 1997, the Swedish government promised a full investigation into involuntary and coercive sterilization measures. Approximately 63,000 people[15] were sterilized under Sweden's policy of eugenics which began in 1935 and came to a quiet close in 1976,[16] when the law was silently dropped from the books.

The investigation resulted from unwelcome publicity generated when Majcie Zarembas[17] wrote several highly publicized articles on the sterilization laws and the recent denial of a compensation claim by the Swedish government.[18] Social Welfare Minister Margot Wallstrom,[19] who

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13. *All Things Considered, supra* note 9 (quoting Maria Nordin speaking of her desperate application to receive compensation from the government).

14. Another unnamed girl was doomed to the horrid punishment of sterilization for running away as a teen. "I ran away from the [youth] home. I kept running away and they thought I might have children. I mean, imagine, children just like us. They must have thought I was dangerous." Ben Fenton, *The Gulag Archipelago for Children in Sweden is Recoiling from the Shock that 63,000 People were Forcibly Sterilised by One of the Most Liberal Countries in the World,* DAILY TELEGRAPH (London), Aug. 29, 1997, *available in* 1997 WL 2334741 [hereinafter *Gulag Archipelago*]. Her doctors thought that she would probably transfer the supposed retardation to her children. *Id.*

15. The actual number of sterilizations between 1935 and 1975, as reported by the Swedish Central Bureau of Statistics, is 62,888. WELFARE STATE, *supra* note 10, at 110.

16. Robert Fox, *Sweden Promises Full Inquiry into Forced Sterilization,* DAILY TELEGRAPH (London), Aug. 27, 1997, *available in* 1997 WL 2334413 [hereinafter *Full Inquiry*].

17. Majcie Zarembas is currently a journalist in Sweden, though she is of Polish origin. *Gulag Archipelago, supra* note 14.

18. *Id.*

19. Wallstrom is the leading spokesperson of Sweden's Social Democrats on the sterilization issue. The government claims that the involuntary sterilizations were not illegal because they were authorized by a law passed by Parliament. *Full Inquiry, supra* note 16.

recently highlighted the case involving Maria Nordin, is now preparing to argue for a compensation program before the government.[20]

Sweden's past sterilization policies have been termed "barbaric."[21] Wallstrom has indicated that she intends to launch a full investigation into the sterilizations to determine if compensation is necessary; however, a compensation program would require the overturning of a law stating that those sterilized are ineligible for compensation because the procedure was done legally.[22] Her announcement came only hours after Sweden's most "influential opposition politician," Carl Bildt, demanded that the government begin a probing investigation into the sterilization scandal.[23] Nevertheless, the governmental inquiry is rapidly evolving into a mere political debate with little real concern for the actual victims and their families.[24]

The sterilization program stemmed from the pursuit of eugenics, a once popular movement seeking to improve humanity by controlling genetic factors. It is important to note that Sweden's sterilization laws were not overturned until 1976, more than thirty years after Nazi Germany's brutal human engineering policies collapsed with the fall of the Third Reich.[25] Wallstrom expressed the fear that a similar practice might again gain a foothold in Sweden since "[w]e know [there are] neo-Nazis in Sweden and that the manipulation of genes could take a wrong road if . . . [Swedes] are not careful."[26] It is doubtful that the Swedish government can duck responsibility by claiming that sterilization laws were legal because they

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20. *Swedish to Consider Compensation for Forced Sterilisations*, AGENCE FRANCE-PRESSE, Aug. 24, 1997, *available in* 1997 WL 13382604 [hereinafter *Consider Compensation*].

21. *Sweden Sterilized "Inferior" Racial Types, Reporter Reveals*, CHI. TRIB., Aug. 25, 1997, *available in* 1997 WL 3581891 [hereinafter *Racial Types*]. Arne Ruth, editor-in-chief of *Dagens Nyheter*, called the sterilization policies, "barbarism on an incredible scale." *Wired from Sweden*, 33 INTERNET EDITION 2 (last modified Sept. 8, 1997) <http.//www.si.se/wired 33.html> [hereinafter *Wired from Sweden*].

22. *Sweden Bildt/Sterilization-2: Pressure from Within the Government*, DOW JONES INT'L NEWS, Aug. 26, 1997 [hereinafter *Sweden Bildt*]. *See infra* Part IV.A and B for a more complete look into the political pressure from the Swedish governmental parties.

23. *Government to Probe Sterilization Scandal*, CHI. TRIB., Aug. 27, 1997, *available in* 1997 WL 3582458 [hereinafter *Government Probe*]. Bildt is the leader of Sweden's opposition conservatives, known as the Moderates. Jim Heintz, *Sweden Agrees to Investigate Forced Sterilizations*, ASSOCIATED PRESS, Aug. 26, 1997, *available in* 1997 WL 4881073 [hereinafter *Investigate*]. "Swedish society risks being injured if we do not make a serious, thorough and non-partisan probe of this period in Swedish history," said Bildt in a letter to Prime Minister Goeran Persson. *Id.*

24. For an in-depth discussion of the political debate in Sweden, see *infra* Part IV.B.

25. *Investigate, supra* note 23.

26. Wallstrom also warned the press that "there was a risk 'an elite' might emerge who thought they could 'improve human material through sophisticated genetic manipulation.'" *Consider Compensation, supra* note 20.

were passed into law by Parliament,[27] and at the same time avoid awarding large compensation packages to those who fell victim to the influential Social Democrats who attempted to cleanse Swedish society of gypsy features, psychopathy, and vagabond lifestyles.[28]

B. *The Eugenics Movement in Sweden and the Institutionalization of Race Biology*

In the early days of the eugenics movement in Sweden, the notion of a distinct Nordic race[29] was established, linking both genetic and medical concepts.[30] Sweden embraced the eugenics movement, particularly sterilization, with great fervor. It was among the first of the Nordic countries[31] to implement forced sterilization and to create an image of the model Swedish citizen. The eugenics movement was in full force throughout the world at the turn of the century, but there was a fatal flaw in the way it was carried out in Sweden. The "mentally handicapped" were not all sterilized for genetic reasons; they were often sterilized as a result of social reasons. The low IQS that prompted sterilization were often the result of people being raised in poor families or being understimulated as children, rather than the result of genetic abnormality.[32]

Eugenics and sterilization were increasingly being touted as the salvation for the nation. One psychiatrist, Herman Lundborg, preached eugenics and stressed that "heredity is everything."[33] Lundborg described what he perceived to be a threat to the Swedish population: "a host of . . . poorly equipped individuals come into being, and they will soon make their will known, especially in periods of unrest or unemployment."[34] It is not

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27. *Full Inquiry, supra* note 16.

28. *Eugenic Past, supra* note 11.

29. The Nordic race stemmed from the classic Viking history and Gothic traditions in Sweden. WELFARE STATE, *supra* note 10, at 81.

30. *Id.* at 83. In 1909, the Swedish Society for Racial Hygiene was formed in Stockholm predominantly by the medical profession to influence public opinion and establish funding for the sweeping eugenics movement. *Id.* at 83-84.

31. Sweden was not the only participant in the eugenics movement in Scandinavia in the early 1930s; Norway, Denmark, and Finland "all put the theory of selective breeding and forced sterilisation into practice." *Full Inquiry, supra* note 16. In Denmark and Sweden, compulsory sterilization laws have been in effect since before World War I. Neither law was voluntary, and the victims were not required to give consent. TROMBLEY, *supra* note 4, at 159. Sweden, Norway, and Denmark all explored "racial-cleansing 'sciences' after World War I." *Racial Types, supra* note 21.

32. *All Things Considered, supra* note 9.

33. Herman Lundborg was a prominent eugenics scientist in the years preceding World War I and took the stance that eugenics and hygienics were becoming something of a religion in certain scientific circles. WELFARE STATE, *supra* note 10, at 84.

34. *Id.* at 85.

surprising, then, with this influx of fear and prejudice, that genetic inferiority was perceived to doom mankind to destruction. During the early 1920s, a race biology scare ran rampant through universities and the Parliament.[35] Conservatives on the right and Social Democrats on the left—with Lundborg leading the pack—joined forces in 1921 to pass a bill creating the first state institute of race biology in the world.[36] At the forefront of the eugenics movement, then, were elected officials and representatives with authority vested in them by the Swedish people and ratified by the king. Still, "[a]ll Swedes . . . bore a share of the blame for the sterilisations because all parties had acquiesced in the laws and their implementation."[37] An act of Parliament in 1922 provided for the creation of a Swedish eugenics institution, thereby lending a degree of legitimacy to the nation's sterilization procedures. The Swedish Institute for Race Biology has been coined the "highwater mark of the eugenics movement in Sweden."[38] The debate surrounding the institution was vigorous in the Parliament, but the advocates' strong voices for passing the bill reflected the sentiment of the country. A popular Social Democrat of the era stated, "[w]e are lucky to have a race which is as yet fairly unspoiled, . . . a race which is the bearer of very high and very good qualities."[39] However, neither the Parliament nor any of the advocates for the bill took a positive stance on what those particular "unblemished" qualities were.

The implementation of the Swedish Institute was not only the springboard for the establishment of sterilization in Sweden, but also the creation of an international trend.[40] One Swedish historian maintained that the idea of sterilizing the least advantaged members of society took root not only in the minds of Swedish doctors, but also in the rest of the world.[41] "Although eugenics had been advocated in many countries, Sweden was the

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35. *Id.* at 85-88. Author Jan Myrdahl disclosed that the idea of sterilizing the "dregs of society" took hold in some Swedish universities and throughout the Parliament at the turn of the century. *Consider Compensation, supra* note 20.

36. WELFARE STATE, *supra* note 10, at 86-87. The bill pointed to the value of Swedish stock, and the institute was to be utilized for human plant breeding to preserve the Aryan genetic value. *Id.* at 86.

37. Carl Bildt, speaking on the shared concern over sterilization in the current state of moral revelation in Sweden. *Wired from Sweden, supra* note 21.

38. WELFARE STATE, *supra* note 10, at 88.

39. *Id.* at 87 (statement of Arthur Engberg, the future Minister of Education and Ecclesiastical Affairs for the Social Democrats). Engberg also found it "odd that while we are so very particular about registering the pedigree of our dogs and horses, we are not at all particular when it comes to preserve our own Swedish stock." *Id.*

40. Several other institutes, concentrating on eugenics research and anthropological science, were proposed for establishment in Africa, Central America, France, the United States, and Germany. *Id.* at 89-90.

41. *Consider Compensation, supra* note 20 (citing Swedish historian Alf Johansson's remarks).

first in the world to 'grant this pseudo-science official recognition.'"[42] Germany embraced the concept and followed the Swedish example by establishing the Berlin Institute for Racial Hygiene, an organization which would eventually contribute to the Nazi race ideology.[43] But it was not until 1933, after the race-based genetic experiments in Germany, that the Swedish Institute fell upon financial hardship. Still, as a result of enlarged public attention through lectures and publications, there was a hastened demand for sterilization.[44] Finally, the Swedish Institute was put on sound footing after vigorous fundraising and efforts by some members of the Parliament.[45] By this time, the concept of human engineering and race biology was well established in Sweden.

1. *The Beginning in Marriage*

Sterilization evolved slowly from the eugenics movement in Sweden. A close look at the marriage laws paints a clear picture of this evolution. Marriage laws instituted in 1915[46] prohibited the mentally retarded and those diagnosed or suffering from a mental illness or epilepsy from lawfully marrying. These laws purported to prevent both the transmission of these proclaimed hereditary diseases to progeny and the propagation of weak genes.[47] When compared to these undeniably restrictive laws, sterilization was seen as a more humane alternative and thus garnered increasing acceptance.[48] Eventually, the general principles of race hygiene were enthusiastically embraced, and the 1920s paved the way for eugenic sterilization.

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42. *Eugenic Past, supra* note 11 (quoting the *Dagens Nyheter* comments on the establishment of an institute for racial biology in 1921).

43. WELFARE STATE, *supra* note 10, at 90. For a discussion on the Berlin Institute for Racial Hygiene, see ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE 349, 357, 360-61, 369 (1986).

44. WELFARE STATE, *supra* note 10, at 88-89. In 1926, *The Racial Character of the Swedish Nation* was published and drew a great deal of attention to the study of genetics throughout Sweden and the international community. Several reprints were issued in illustrated form (*Svensk Raskunskap*), in the German language (*Rassenkunde des schwedischen Volkes*), and in a copy which was used solely for photographic explanation. *Id.*

45. *Id.* at 91. Alfred Petren and Nils Wohlin, members of Parliament, made several attempts to raise money for the Institute. *Id.*

46. *Id.* at 100.

47. *Wired from Sweden, supra* note 21.

48. Elis Essen-Moller, professor of medicine, described sterilization as a relief from mental institutions: "[I]t appears to me incomprehensible that sterilization can be designated as brutal." WELFARE STATE, *supra* note 10, at 100.

2. *Victims and Implementation*

The research conducted by Lundborg and his advocates for the Swedish Institute eventually paid off for the eugenics movement. The first proposal for a sterilization law was introduced by the Social Democrats who argued for systematic sterilization of the mentally retarded. The necessity of government action "[t]o keep the human race in good order, and to improve it, [was] naturally of considerable interest to the state."[49] A commission was established to investigate the issue, but the issue was not put to a vote. Not until 1934, when the Social Democrats put forth a bill proposing the sterilization of anyone suffering from "deranged mentality," did the final proposal find its way to the Parliament.[50] The bill stated that a private interview—without any observation of legal formality—could be used to aid the mentally retarded in overcoming any reluctance and accepting sterilization. Coercion had become the norm: "Persuading a patient to accept sterilization was thus the method recommended by the government."[51] The bill was passed, and Sweden's Sterilization Act went into force on January 1, 1935.[52] There was no need for the victim to consent, no required court hearing, and no eugenic board to oversee the program. "Sterilization without the consent of the patient was now permitted in cases of mental illness, feeble-mindedness, or other mental defects."[53]

Sterilization was ordinarily justified by social and eugenic considerations. From the social perspective, a prerequisite for sterilization was the person's inability to properly care for children; from the eugenics perspective, if a person's genes were thought likely to transmit mental illness, then the person would inevitably fall victim to sterilization.[54] From a modern, progressive perspective, the Swedish policy is appalling because the sterilizations were not restricted to hardened criminals or to severely mentally retarded people already confined to institutions.

Seemingly, just about anyone in a position of authority could authorize sterilization procedures. Doctors, judges, and school headmistresses were all entitled to great power in the enforcement of sterilization laws.[55]

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49. *Id.* at 101. Psychiatrist Alfred Petren was an advocate for the bill and believed legislation should be restricted to determine when an operation for sterilization would be permissible. "I know of no country where there has been so close a relation between research and application as in Sweden." *Id.* at 95-96.

50. TROMBLEY, *supra* note 4, at 159.

51. WELFARE STATE, *supra* note 10, at 102.

52. *Id.*

53. *Id.* at 103.

54. *Id.*

55. "If an operation concerned a mentally retarded patient, two physicians could jointly decide to enforce sterilization of the patient." *Id.* "After the sterilization law was broadened in 1941, the right to decide the fate of a victim was given to several groups of physicians

Dissatisfied with this broad authority, some leading physicians felt that sterilization was a matter only for the skilled judgment of the medical community, not for jurists or politicians. According to Karl Grunwald, Director of the Social Welfare Board, "[w]e had in the '30s about 150,000 mentally handicapped, as we today have less than 40,000. So you must understand that 'mentally handicapped' was a very large group in our society, and it was a threat against the welfare state."[56]

The legislation that was passed was in line with this philosophy. The 1934 Sterilization Act "was extended in 1941 to include those whose 'social behavior' might make them an unfit parent."[57] In addition to individuals suffering from mental illness or retardation, persons suffering from physical disease, defects of a hereditary nature, or any "anti-social way of life" were also subject to sterilization.[58] Sweden acted swiftly in implementing these laws. Between 1935 and 1941, sterilizations were performed at an average of 481 each year.[59] By 1941, the number exploded to 1164 and steadily climbed to an astounding 2351 compulsory sterilizations performed in 1949.[60] In the mid-1940s, over ninety percent of compulsory sterilizations were performed on women; in the 1970s, women constituted ninety-nine percent of all sterilizations.[61] There were no precise grounds on which the sterilizations were performed. Statistics from the Swedish Board of Health show that both eugenic and social indications gave rise to recommendations for sterilizations.[62] It becomes difficult to establish grounds for compensation due to compulsory sterilization when there is little knowledge or documentation as to the specific reasons behind the sterilization of certain individuals.

Research has suggested mental retardation was the primary consideration in the sterilization process: if there was at least a ten percent likelihood that the mental disease or defect could be passed on to progeny, the person was sterilized.[63] In some cases, such as those involving deaf-mutism or schizophrenia, for which the risk of inheritance was determined to be under one and one-half percent, persons inflicted with these diseases

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employed by the state, in addition to parents, guardians, physicians, superintendents of institutions, poor law boards and child welfare committees." *Id.* at 116.

56. *All Things Considered, supra* note 9 (quoting the director of the Social Welfare Board).

57. TROMBLEY, *supra* note 4, at 159.

58. WELFARE STATE, *supra* note 10, at 108.

59. TROMBLEY, *supra* note 4, at 160.

60. WELFARE STATE, *supra* note 10, at 108. The number of operations in 1940 was 0.9 per 10,000; 3.3 per 10,000 in 1950; and 2.2 per 10,000 in 1960. *Id.* at 109.

61. *Id.* at 109-10.

62. *Id.* at 110.

63. *Id.* at 111.

were sterilized nevertheless.[64] Epileptics were simply prohibited from marrying unless they submitted to sterilization or were infertile.[65]

However, many victims of sterilization were not inflicted with mental disease or retardation. Unlike many of his friends, Strue Johannesson was spared from "the chop."[66] Johannesson was part of a race-biology experiment and lived in an institute for neglected children[67] where half of the boys were victims of sterilization. At the time, Johannesson and several others felt that the boys who were allowed to leave the institute were privileged:

> We spent all our days behind a two-metre fence, never allowed out. When this boy went out, we all envied him because he got to see the outside world . . . . [E]ven more so when he came back and he wasn't made to have cold showers in the morning for the next five days. Then, when we did shower with him, we saw he had what became known as a 'cut in the crutch.'[68]

These victims were casualties of a program that flourished in Sweden and several other countries. A young woman, Astrid, was one of the many victims who referred to this era as a "slaughter," never revealing it to society.[69] According to Johannesson, "[m]ost of my friends from the institution died young, in their '40s. I think some of them were broken by the operations."[70]

3. *Compulsory v. Voluntary: Is There Really a Difference?*

All but the earliest sterilizations were required to be voluntary. Both the 1934 Sterilization Act and the extension of that statute in 1941 were

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64. *Id.*

65. *Id.*

66. Synonymous with a vasectomy, "the chop" was a phrase coined by young children of the Robyland Institute for Misled and Morally Neglected Children and was alternatively deemed a "cut in the crutch." *Gulag Archipelago, supra* note 14. Johannesson believes he was spared from "the chop" because he had blue eyes and stereotypical Nordic features. *Id.*

67. The institute was the Robyland Institute for Misled and Morally Neglected Children where Johannesson was sent after he was orphaned and ran away from a foster home in 1943. Johannesson would later describe the Robyland Institute as a concentration camp. The institute housed 22 inmates, all of whom were the subject of chemical experiments designed to keep them tranquil. *Id.*

68. *Id.* Johannesson is not so envious now that he is a successful artist and his first grandchild is due in 1998. *Id.*

69. Astrid, now 68, says her father refused consent, but the government sterilized her anyway: "They sent me there in a taxi and gave me three oranges. I was in for a week, I think." *Id.*

70. *Id.*

based on voluntary measures. Those persons considered legally competent could not be sterilized without their consent. That being so, why is it that the knowledge of forty years of *voluntary* sterilization now presents such a problem to progressive thinkers and forms the substance of such a heated debate in Sweden? The answer lies in the fact that coercive and forced sterilizations were performed whenever they were regarded as desirable and in the interest of the state.[71] Still, the government publicly advocated persuasion as opposed to force. Men and women were "persuaded" to agree to sterilization as a condition for release from mental institutions[72] or group homes,[73] or as a condition for marriage.[74] Frequently, hospitals and other institutions made sterilization a condition for discharge. A study published in 1962 revealed that "some 36 percent (527) of all girls leaving Swedish special schools between 1937 and 1956 were sterilized."[75] This horrific method of birth control was widely employed. According to the National Board of Social Welfare, "the application of the [1941] law was earlier so that sterilization in several cases was performed although the operation was later shown to have been unnecessary"—the National Board was referring to "especially cases where sterilization on social indication [had] been made a condition for discharge from reform schools or other institutions."[76]

Few victims received explanations or operations to correct the procedure. One victim pleaded for help in an application to the Swedish Board of Health: "I was sterilized there . . . . Now I wonder if there is any hope for me, won't you help me to have a child . . . . If you help me you have saved a life."[77] The Swedish Board of Health replied with brief

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71. When asked about the question of coercion, one advocate of sterilization commented during a 1942 radio talk show:

> Sterilization is such an important operation that the individual should not be allowed to decide the matter for himself. Very many of those who should be sterilized are feeble-minded or mentally ill and are therefore not even able to understand what it is all about . . . . Most of the time they would not want an operation at all; nor would they agree to one.

WELFARE STATE, *supra* note 10, at 115.

72. "Victims regarded as having undesirable racial characteristics, congenital handicaps, or other 'inferior' qualities were pressured by doctors or officials to consent to the procedure." *Government Probe, supra* note 23.

73. In Maria Nordin's case, sterilization was made a condition of her release from school. *Publicity, supra* note 9.

74. For a more complete discussion of marriage and its relationship to sterilization, see *supra* Part II.B.1.

75. WELFARE STATE, *supra* note 10, at 117. In nine out of the twenty-eight schools surveyed in the study, nearly half of the girls were sterilized before they were released. *Id.*

76. *Id.* It is evident that several sterilizations were performed simply in response to the unwarranted fear that these women did not have the ability to adjust to society.

77. *Id.* at 119. In 1948, this young man of 25 pleaded to have his operation reversed in order to bear a child with his fiancée. *Id.*

comments stating that no action would or could be taken.[78] However, in the mid-1950s, general attitudes toward sterilization of the mentally retarded and as a condition for marriage were slowly beginning to change and there was a rapid decline in the application of the program.[79]

C. *The Repeal of Sterilization Laws*

Attitudes toward eugenics and sterilization changed slowly in Sweden, and the program continued into the 1970s. The fact that laws had been instituted no longer drew much public attention. The policy was a matter of official record, but it was rarely referred to in public life or mentioned in textbooks used in schools or universities.[80] Finally, in 1967, the National Board of Health admitted[81] that the program of sterilizing patients had been implemented because of an unsubstantiated fear of genetic decline and as a result of attempts at eugenic perfection. A number of studies were published in the 1970s revealing that sterilization was often performed on questionable grounds.[82] Several reforms were implemented to protect reproductive rights and to improve gender equality. A national policy regarding reproductive health was developed and included: legislation on abortion, contraceptives, and sterilization; provisions for contraceptive services within the public health system; and a comprehensive education program in sexuality, fertility, and gender issues.[83] Eventually, in 1976, the 1941 Sterilization Act was repealed, and currently all sterilizations without the consent of the person concerned are prohibited.[84]

III. THE UNITED STATES

Revelations that Sweden forcibly sterilized thousands of its citizens in order to "weed out inferiors" may sound like a dehumanizing practice to some Americans, but the same practice has a long history in the United States.[85] The fact that sterilization was performed on approximately 63,000

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78. *Id.*

79. *Id.*

80. *Full Inquiry, supra* note 16. For more information concerning references in schoolbooks, see *Sweden Bildt, supra* note 22.

81. At the same time the Board also admitted that "sterilization of the mentally retarded was most often legitimate on social grounds." WELFARE STATE, *supra* note 10, at 134.

82. *Id.* at 135.

83. *Family Planning in Sweden* (visited Sept. 23, 1997) <http://www.si.se/english/factsheets/familypl.html>.

84. The 1976 Sterilization Act prohibits "any authority, representative of society, guardian or other person from putting pressure on an individual to be sterilized." *Id.* at 2.

85. Gretchen Cook, *Forced Sterilization has Long History in the West,* AGENCE FRANCE-PRESSE, Aug. 26, 1997, *available in* 1997 WL 13383941.

people in Sweden may shock some Americans, but by the end of 1960 in the United States, eugenic sterilizations were performed on 61,540 persons.[86] Of these victims, 27,436 were mentally ill; 31,931 were mentally defective; and 2,263 were sterilized for other unknown reasons.[87] Sweden is not alone in its genetic endeavors, and the rest of the world must take responsibility for its own past actions.[88]

A. *The Eugenics Movement in the United States*

In the United States, "human sterilization originated in unsexing individuals as a form of punishment" for crimes such as prostitution.[89] Swedish eugenists were not alone in their quest to cure the epidemic of socially inadequate traits. Several American scientists joined the crusade to improve the human condition through the use of eugenical science.[90] The

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86. HAROLD K. BECKER ET AL., NEW DIMENSIONS IN CRIMINAL JUSTICE 139 (1968). The report came from figures determined by the Human Betterment Association. *Id.*

87. *Id.*

88. Hitler was the most famous proponent of sterilization of the mentally and physically handicapped and the leader of efforts to "cleanse society." *Europe's Taboo, supra* note 6. Currently in Austria, about 70% of handicapped women are still sterilized, most of them against their will. *Id.* Belgium never had a systematic sterilization program, but recent reports indicate that officials carried out forced sterilizations on women who were not mentally or physically handicapped. *Id.* The Swiss have also been known to eliminate and sterilize people who were not of the Aryan race. *Id.* For further discussions on sterilizations in Switzerland, see *Sterilization Scandal Widens in Switzerland*, ORANGE COUNTY REG. (Cal.), Aug. 29, 1997, *available in* 1997 WL 744072. Britain has taken the position that sterilizations could be carried out with only informed consent, and court-ordered sterilizations have been "very rare" in that country. *Europe's Taboo, supra* note 6. Finland had a smaller forced sterilization program, but prior to World War II "most doctors considered it as a normal medical application." *Id. See also 11,000 Fins Force-Sterilized, Researchers Say*, ORANGE COUNTY REG. (Cal.), Aug. 31, 1997, *available in* 1997 WL 7441350. Beijing and Tibet encourage women who have had one child to undergo sterilization, and human rights groups allege that China forces sterilization under its one-child policy. *Europe's Taboo, supra* note 6. *See also Scandals Over Sterilization*, MACLEAN'S, Sept. 8, 1997, *available in* 1997 WL 8474113; Cook, *supra* note 85; Elizabeth Rohrbaugh, *On Our Way to Ten Billion Human Beings: A Comment On Sustainability and Population*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 253 (Winter 1994); and UNITED NATIONS FUND FOR POPULATION ON FERTILITY CONTROL 38 (1979) [hereinafter UNITED NATIONS].

89. LANDMAN, *supra* note 1, at 51. The method for sterilization was usually castration, or elimination of the male testicles. The removal of the ovaries, ovariotomy, received little attention until the beginning of the 19th century. *Id.*

90. "The most notorious American eugenicists, such as Charles Davenport, Harry Laughlin, Francis Galton, and Karl Pearson, all attempted to develop a professional record of human traits categorized as 'healthy' or 'unhealthy,' and 'normal' or 'abnormal.'" Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1-4 (Fall 1996). For further research involving the scientific discoveries of Galton, Pearson, and Davenport, see

eugenicists emphasized three major concepts:

> 1) that social, moral, physical, and mental qualities are transmitted in predictable patterns by the mechanisms of heredity; 2) that the human race can be improved by selective mating; and 3) that the ills of society (disease, crime, poverty, and other social abnormalities) can be eradicated by discouraging, or preventing if necessary, the reproduction of socially deviant individuals.[91]

The United States was beginning to perceive a threat from societal ills, and the cure was pioneered in seemingly effective eugenic measures. A variety of political perspectives welcomed the message that societal ills could be cured with science, treating as poison those "socially deviant individuals" who posed such a threat to America's future.

Eugenicists were successful in incorporating their proposals into public health law. Between 1900 and 1970, advocates of eugenics and sterilization "drafted and endorsed nearly one hundred statutes that were adopted by state legislatures."[92] The majority of this legislation attempted to abolish the transmission of such purportedly inheritable defects as criminal propensity, poverty, and mental disease. The first eugenic sterilization bill in the United States was introduced in 1897 in the Michigan legislature but was not enacted.[93] However, by this time, superintendents of institutions were secretly sterilizing some "feeble-minded and idiot inmates" at the Winfield, Kansas State Home for the Feeble-minded,[94] and at the Indiana State Reformatory.[95] The operations were all done without legal sanction. This was the beginning of eugenic sterilization in the United States.

TROMBLEY, *supra* note 4, at 15-17, 40-44, 53-55.

91. Lombardo, *supra* note 90, at 3-4. One eugenicist, Laughlin, defined the socially inadequate to include "the feebleminded, the insane, the criminalistic, the epileptic, the inebriated or the drug addicted, the diseased—regardless of etiology, the blind, the deaf, the deformed, and dependents (an extraordinarily expansive term that embraced orphans, 'ne'er-do-wells,' tramps, the homeless, and paupers)." *Id.* at 3.

92. *Id.* at 1.

93. ABRAHAM MYERSON, M.D. ET AL., EUGENICAL STERILIZATION, A RE-ORIENTATION OF THE PROBLEM 4 (1936).

94. "In 1855 the Kansas Territorial Legislature legalized the castration of any black or 'mulatto' convicted of rape, attempted rape or kidnapping of a white woman." TROMBLEY, *supra* note 4, at 49.

95. LANDMAN, *supra* note 1, at 52. H.C. Sharp, the institutional physician who was legally practicing sterilization at the Indiana State Reformatory, made a mark in history by devising a surgical procedure of human sterilization known as a "vasectomy." *Id.* Vasectomy removed many objections to public support of human sterilization policies. "It was not an apparent mutilation and it left the sexual powers, though not the procreative powers, of the subject intact." TROMBLEY, *supra* note 4, at 50.

The first sterilization law was passed in 1907 in Indiana and provided for the prevention of the procreation of "confirmed criminals, idiots, imbeciles and rapists."[96] In 1909, sterilization laws were introduced in California, Washington, and Connecticut.[97] Sterilization statutes were rapidly adopted by a number of other states shortly thereafter. A total of twenty-seven states encouraged the sterilization of persons suffering from mental disorders, and the laws in all of these states permitted the sterilization of citizens who were not institutionalized.[98]

Like Sweden, which had established the Swedish Institute for Race Biology,[99] the United States established an organization to research biologically based social ideologies. "[T]he American Genetic Association was founded in 1913"[100] and began publishing *The Journal of Heredity*.[101] Later its editors teamed up to create the Human Betterment Foundation (Foundation).[102] The Foundation was established to ensure that the California law was applied as widely as possible, with the Foundation serving as an "inspiration to wider legislation both in the U.S. and abroad."[103] The United States Supreme Court affirmed the extensive approval of sterilization as a method of preventing reproduction of the

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96. LANDMAN, *supra* note 1, at 54. In 1909, Indiana's governor made it virtually impossible to enforce coercive sterilization "and in 1920 it was declared unconstitutional." MYERSON, *supra* note 93, at 4.

97. California became the leader of American eugenical sterilizations and enthusiasm for sterilization was far more immense in California than in other states. "By 1920 sterilizations in California represented 79 percent of the total number in the United States." TROMBLEY, *supra* note 4, at 51. All inmates of state institutions (including the California Home for Feeble Minded Children) and prisoners convicted twice for any sexual offense, and those convicted three times for any offense who might be construed as being a "sexual or moral" pervert were automatically candidates for sterilization. *Id.* at 51-52. For further reading on California sterilization laws, see BECKER, *supra* note 86, at 160-62 (California's experience with compulsory sterilization).

98. For a complete list of the application of the sterilization laws in each state in the United States, see THE NATIONAL CENTER FOR FAMILY PLANNING SERVICES, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB. NO. 74-16001, FAMILY PLANNING, CONTRACEPTION, AND VOLUNTARY STERILIZATION: AN ANALYSIS OF LAWS AND POLICIES IN THE UNITED STATES, EACH STATE AND JURISDICTION (1971) [hereinafter ANALYSIS].

99. *See supra* text accompanying notes 37-38.

100. The American Genetic Association was not a new organization but was actually the renamed American Breeders' Association. TROMBLEY, *supra* note 4, at 59.

101. *Id.*

102. *Id.*

103. *Id.* The founders, Paul Popenoe and E.F. Gosney, dismissed the doctrine in the Declaration of Independence that all men are created equal as too sentimental. Popenoe argued that reproduction was not an inalienable right and that "'inefficients, the wastrels, the physical, mental and moral cripples are carefully preserved at the public expense.'" *Id.* at 59-60.

socially inadequate.[104] Three landmark decisions illustrate the fear and racism behind the eugenics movement in the United States.

B. *Landmark Decisions on Human Sterilization and the Eugenics Movement: Buck v. Bell*

The United States Supreme Court's 1927 approval of state-mandated surgery on unwilling patients in *Buck v. Bell*[105] was a radical departure from existing Supreme Court medical jurisprudence. *Buck* was the first and only instance in which the Court allowed a physician, acting as an agent of the state government, to perform an operation that was neither desired by the patient nor medically necessary.[106] Before *Buck*, "[e]xcept in the context of vaccination for contagious disease, coercive court ordered medical procedures had not been endorsed by the Supreme Court."[107]

In March of 1924, the Virginia legislature "legalized the compulsory sterilization of 'inmates of institutions supported by the State who shall be found to be afflicted with a hereditary form of insanity or imbecility.'"[108] At the age of seventeen, Carrie Buck was committed to the Virginia Colony for Epileptics and Feebleminded in Lynchburg, Virginia, with a diagnosis of "moral imbecility."[109] Her mother had been committed to the Lynchburg Colony four years prior, and the sterilizers were convinced "that two generations of feeble-mindedness" proved the hereditary nature of the mental defect and served to justify sterilization as the obvious remedy.[110] Carrie had also given birth to a child out of wedlock shortly before being committed;[111] it was determined that the seven-month-old infant, Vivian, had "a look" that was "not quite normal," and therefore the newborn was also deemed

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104. Buck v. Bell, 274 U.S. 200 (1927) (Virginia Compulsory Sterilization Act was challenged, and sterilization of the socially inadequate was approved); Loving v. Virginia, 388 U.S. 1 (1967) (overruled efforts to keep the white race pure through prevention of interracial marriages); and Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of hereditary criminals denied equal protection of the laws).

105. *Buck*, 274 U.S. at 200.

106. *Id.*

107. Lombardo, *supra* note 90, at 8.

108. TROMBLEY, *supra* note 4, at 88.

109. *Id.* Very few mental patients left institutions like the Lynchburg institution in Virginia without being sterilized. In cases where children, parents, or guardians refused consent, "doctors or the sheriff would forge the signatures." *Id.* at 237. Often, the hospitals or institutions would sterilize anyway and leave the authorizing papers blank or just have the child's or doctor's name on them. *Id.*

110. *Id.* at 88.

111. Her pregnancy was the result of having been raped by the nephew of her foster parents. *Id.* at 89. "[E]ugenicists of the day called her a prostitute." J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK 5 (1989) [hereinafter CARRIE BUCK].

defective.[112] Without examining Carrie or her mother, the head of the Eugenics Record Office submitted to the lower court a report stating that Carrie and her family "belong[ed] to the shiftless, ignorant, and worthless class of anti-social whites of the South."[113]

It was in the context of this factual background[114] that the Virginia Compulsory Sterilization Act was upheld. Justice Holmes delivered his stinging, historic opinion that brought the terror of forced sterilization into the forefront of reality:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Three generations of imbeciles are enough.*[115]

The opinion of Justice Holmes was based on the philosophy that mental retardation could be eliminated by sterilizing the mentally retarded—a philosophy which has been proven false: "over 80 percent of retarded persons are born to nonretarded parents."[116] It was on the basis of this now-outmoded philosophy that Carrie Buck was sterilized without her understanding of what was being done to her, and without her consent. Her capacity to have children was taken away. Following the Court's approval of compulsory sterilization in *Buck*, over thirty states eventually passed sterilization laws.[117]

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112. TROMBLEY, *supra* note 4, at 89.

113. *Id.* Carrie's doctor wanted immunity from performing sterilization procedures and stated that she "[h]as [a] record during life of immorality, prostitution, and untruthfulness; has never been self-sustaining; was maritally unworthy, having been divorced from her husband on account of infidelity; has had a record of prostitution and syphilis; has had one illegitimate child and probably two others." Lombardo, *supra* note 90, at 9.

114. CARRIE BUCK, *supra* note 111, at 89-172.

115. Buck v. Bell, 274 U.S. 200, 207 (1927) (citation omitted) (emphasis added).

116. ROBERT H. BLANK, FERTILITY CONTROL: NEW TECHNIQUES, NEW POLICY ISSUES 60-61 (1991).

117. *See supra* note 98.

C. *The Sterilization of Hereditary Criminals: Skinner v. Oklahoma*[118]

In 1942, the Supreme Court took a sharp turn away from its decision in *Buck* when it held that the Oklahoma Habitual Criminal Sterilization Act was unconstitutional because it violated many constitutional rights. The statute defined the "habitual criminal" as a person twice convicted of crimes involving "moral turpitude."[119] The statute mandated involuntary sterilization for repeated offenders. This statute came to light when the Oklahoma Attorney General chose to sterilize Jack Skinner.[120] Skinner had been convicted three times for theft, which was considered to be a crime of "moral turpitude."[121] The prosecution presented no evidence at trial that Skinner possessed a hereditary criminal disposition. Despite the absence of this evidence, the Oklahoma Supreme Court affirmed the judgment of the lower courts and found that Skinner met the definition of a habitual criminal, and that he was accordingly subject to sterilization.[122]

It was not until 1942, when Justice Douglas of the United States Supreme Court scrutinized eugenic sterilization under the Fourteenth Amendment, that the United States finally embraced the ethical standards it tries so desperately to incorporate into modern jurisprudence. "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects . . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[123] However, in his concurring opinion, Justice Stone asserted that "[u]ndoubtedly a state may . . . constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies."[124] Although the Court was unanimous in holding that the Oklahoma law was unconstitutional, it is difficult to determine if there was any single rationale on which the Justices agreed. At first glance, it might appear that *Skinner* overturned *Buck*, but sterilization laws remained alive after *Skinner*. *Skinner* qualified, but did not overrule, *Buck*. As a result, the search for scientific solutions to social ills continues in this country even

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118. Skinner v. Oklahoma, 316 U.S. 535 (1942).

119. *Id.* at 536. Several offenses were omitted from the act, namely "'offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses . . . .'" *Id.* at 537 (quoting Oklahoma's Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57, § 195).

120. Lombardo, *supra* note 90, at 15.

121. *Skinner*, 316 U.S. at 537. Testimony revealed that Skinner plead guilty to each crime he committed and testified that he stole because of his inability to work or support his wife. *Id.* at 536.

122. *Id.* at 537.

123. *Id.* at 541.

124. *Id.* at 544 (Stone, J., concurring).

today.

D. *Attempts at Preserving the White Race: Loving v. Virginia*[125]

Although the case of *Loving v. Virginia* did not involve sterilization procedures in the United States, it challenged both the constitutionality of Virginia's ban on interracial marriages[126] and the notion of protecting the purity of the white gene pool.

The 1924 Virginia Racial Integrity Act prohibited interracial marriages involving white persons and made it "unlawful for any white person . . . to marry any save a white person, or a person with no other admixture of blood than white and American Indian."[127] The Lovings were a bi-racial married couple who lived in Washington, D.C., until 1963 when they returned to their native Virginia. After being charged with violating the Racial Integrity Act, the Lovings argued that the Act violated their Fourteenth Amendment guarantee of equal protection of the law. The case made it all the way to the Supreme Court, where Chief Justice Warren's opinion asserted that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[128] After this case, proponents of the eugenics movement in the United States slowly came to the realization that the invasion of personal reproductive rights may constitute an intrusion on constitutional rights.

The three aforementioned cases lay the foundation for understanding the legal aspects of the eugenics movement in the United States. All of these cases provide points of reference whenever reproductive rights controversies reach the courts.

E. *The Present Legal Status of Human Sterilization Laws in the United States*

In 1978, the majority of states still had laws which allowed compulsory eugenic sterilization. If a doctor, parent, guardian, or even the state wanted someone sterilized, there were few hurdles to get in the way.[129] Finally, in February of 1979, the United States Department of Health, Education, and Welfare set new guidelines for male and female sterilizations; these guidelines made compulsory sterilizations very difficult to achieve.[130] Federal funds would not be apportioned unless there was strict adherence to

125. Loving v. Virginia, 388 U.S. 1 (1967).
126. *Id.*
127. *Id.* at 5 n.4.
128. *Id.* at 12.
129. TROMBLEY, *supra* note 4, at 197.
130. *Id.* at 199. *See also* UNITED NATIONS, *supra* note 88.

the guidelines.[131] By 1981, the Department of Health and Human Services had discovered flagrant violations of the 1979 guidelines:

> Oregon continued to sterilize indigent under-21s, and defended itself by saying that it did not seek federal reimbursement for such operations . . . . Illegal double billing in which both the hospital and the surgeon were reimbursed for sterilization operations was uncovered in Colorado, Illinois and Oregon . . . . In Illinois, 2,755 cases of illegally overbilling of the federal government were eventually uncovered.[132]

It is not surprising to find that several hospitals abided by their own rules of sterilization, and that hysterectomies did not fall under the federal sterilization guidelines.[133]

Sterilization continues in the United States, and courts, legislatures and administrative agencies are all vigorously involved in making sterilization policies. Many of the policies regarding sterilization are often "contradictory and conflicting."[134] As this note points out, several states have been particularly discrete with respect to the sterilization policies of their hospitals and the contradictory policies espoused by their judicial systems. The ethical debate is sure to continue in the United States, and as new, less intrusive measures of sterilization become available,[135] these methods will no doubt pose more of a threat to the fundamental rights and freedoms of the poor and underprivileged. Americans may easily preach equal rights and privacy for all persons, but the United States is clearly no further ahead in recognizing fundamental personal freedoms than its Swedish

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131. The guidelines included the following safeguards:
1) The patient must be twenty-one or over;
2) No one who is declared mentally incompetent or institutionalized may be sterilized;
3) A thirty-day waiting period;
4) No consents to be obtained while patient is in labor or childbirth, or is seeking or having an abortion;
5) An interpreter is required if the patient cannot understand the language of the consent form.

TROMBLEY, *supra* note 4, at 199.

132. *Id.* at 201. For more information on specific guidelines, see ANALYSIS, *supra* note 98.

133. For example, in 1980, the mayor of Richmond, Texas, favored mandatory sterilization of all welfare recipients: "I'm a little discouraged and irritated at the families growing in size all the time and those of us who work and pay taxes having to pay for them." TROMBLEY, *supra* note 4, at 201.

134. BLANK, *supra* note 116, at 12.

135. Subdermal hormonal implants have evolved as a long term, reversible method of fertility control. The most tested and widely used version is NORPLANT, which has been found to provide contraceptive protection for five or six years. *Id.* at 35-36.

counterpart.

IV. THE FUTURE OF EUGENICS IN THE SWEDISH SOCIALIST STATE AND THE AMERICAN DEMOCRACY

> [W]hat [sterilization] does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. . . . This is not . . . just a matter of interfering with her . . . right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means—a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?[136]

Coercive and involuntary sterilization directly affects the right to beget children because it involves an invasion of the body and undermines the fundamental right of bodily integrity. Almost every country in the world recognizes and protects reproductive freedom, which is embodied in international human rights instruments such as the Universal Declaration of Human Rights,[137] the Convention on the Elimination of All Forms of Discrimination Against Women,[138] and the International Covenant on Civil and Political Rights.[139] The United Nations Declaration of Human Rights states that "[m]en and women of full age . . . have the right to marry and found a family."[140] The United Nations World Population Plan of Action declares that reproductive rights are components of "the basic right of couples and individuals to decide freely and responsibly the number and

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136. Morgenthaler, Smoling and Scott v. The Queen [1988] 44 D.L.R. (4th) 385, 492 (Can.) (Wilson, J., separate opinion), *available in* 1988 DLR LEXIS 44, 246-47.

137. Universal Declaration of Human Rights, art. 16, G.A. Res. 217A (III) at 71, U.N. Doc. A/810 (1948), *reprinted in* FRANK NEWMAN & DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 24 (2d ed. 1996) [hereinafter SELECTED HUMAN RIGHTS INSTRUMENTS].

138. Convention on the Elimination of All Forms of Discrimination Against Women, art. 16.1(e), G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979), *entered into force* Sept. 3, 1981, *reprinted in* SELECTED HUMAN RIGHTS INSTRUMENTS, *supra* note 137, at 62.

139. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *reprinted in* SELECTED HUMAN RIGHTS INSTRUMENTS, *supra* note 137, at 33.

140. Universal Declaration of Human Rights, *supra* note 137, art. 16.

spacing of their children."[141] The right to decide the number of children one has cannot exist without the right to beget or rear children in the first place.

In 1936, the Commission on Population in Sweden regarded "the idea that people should have the right to decide about their own bodies as an extremely individualistic view."[142] But a fundamental shift in thought came after World War II, and sterilization became and has remained a personal matter. Instead of being looked upon as an instrument of the state, sterilization became an individual right. This new formulation changed both the outlook of politics and the medical procedures used in carrying out sterilizations.[143] In the United States, the Supreme Court has recognized that the right of privacy entails the right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[144] Therefore, the right to bear and raise children and found a family is inherent in both the Untied States and Sweden.

Governments must deal with the basic human rights violations that involuntary and coerced sterilization present. Reproductive health and services are connected to the whole of human rights.[145] Two methods to discourage further human rights violations and to enforce compensation for victims of sterilization are humanitarian intervention and the use of economic sanctions. Sweden should take notice of these types of intervention when considering compensation and should utilize humanitarian intervention and economic sanctions to set the standard for the rest of the world. International human rights standards and the United States Constitution protect a woman's right to conceive at will. Without compensation or relief from forced sterilization, Sweden is in violation of international law and takes a dangerous step towards what the United States considers to be an intrusion upon a woman's fundamental rights of liberty and privacy.[146]

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141. Rebecca Bresnick, *Bearing Children: The Right to Decide*, 22 WTR HUM. RTS. 22, 23 (Winter 1995).

142. WELFARE STATE, *supra* note 10, at 138.

143. "The question is to what extent the talk of sterilization as 'an individual right' reflects a real change in outlook with regard to eugenics and population policies . . . ." *Id.*

144. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

145. "The right to reproductive health care raises concerns related to all human rights—economic, civil, social, and political." Anika Rahman, *Toward Government Accountability for Women's Reproductive Rights*, 69 ST. JOHN'S L. REV. 203, 204 (Winter-Spring 1995).

146. Karen Walinski, *Involuntary Contraceptive Measures: Controlling Women at the Expense of Human Rights*, 10 B.U. INT'L L.J. 351, 382-83 (Fall 1992).

A. *Sweden's Social Democrats Under Scrutiny: One More Paradox in a Paradoxical Land*

The policy of forced sterilization in Sweden seems even more vexatious because it was ushered in under the seemingly intense scrutiny of the Social Democrats. The Social Democrats "built Sweden's welfare state and proclaimed it a paragon of enlightened government."[147] In urging preventative social measures that combined social welfare and efficiency, the party was among those who advocated sterilization most fervently.[148] Under the party's leadership, Sweden successfully introduced the most expansive welfare system in the world. Swedes are now wincing from the idea that the party which introduced a law forbidding parents to slap a naughty child could be capable of supervising institutionalized violence in the form of forced sterilizations of the young, the mentally handicapped, and the lower social classes.[149]

It is easy to blame Sweden's tragic combination of docile, submissive citizens and venomous government officials on the Social Democrats who, except for a brief coalition government, have ruled the country since 1932. The Social Democrat Party (SDP) has held power alone or in coalitions during the periods 1932-1976 and 1982-1991, while the non-socialist parties were in government during 1976-1982 and 1991-1994.[150] After the elections in 1994, the SDP returned to power and formed a minority government with 162 of the 349 seats in Parliament.[151] Ironically, the period in which the SDP dominated the country almost exactly coincides with the sterilization program. But is the party really to blame? One social commentator in Stockholm viewed the trend of thought during the period of coerced sterilization as universal: "The Social Democrats may have been part of that zeitgeist, but they did not create it. If another party had been in power, the sterilisation law would still have been passed."[152]

The concept with which the Swedish citizen was obsessed was an extreme form of security: "[Sterilization] implies the absence of all things unpleasant and uncomfortable, and always has a connotation of escape from

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147. Heintz, *supra* note 7.

148. It was a widely held view in the 1930s that sterilization programs "could yield considerable economic gains for the state." WELFARE STATE, *supra* note 10, at 135.

149. *Gulag Archipelago, supra* note 14. For a closer examination of Swedish law see THE PENAL CODE OF SWEDEN (Thorsten Sellin trans., 1972).

150. *The History of Sweden, Parliamentary Democracy*, (visited Sept. 23, 1997) <http:www.si.se/english/factsheets/history.html>.

151. *Id.*

152. *Gulag Archipelago, supra* note 14. Andres Isaksson, social commentator, feels that "[i]n the end, all this does is just add to the general contempt for politicians." *Id.*

danger or of a frightened child running to his mother."[153] It appears that citizens in the socialist state sought complete security for themselves and wanted the state to keep them safe from their defective neighbors. The SDP offered protection not only from the mentally retarded, but also from the opinions, disabilities, and misfortunes of the lower classes. The model Swede expected the state to keep him or her safe, not only from war, but also from the "non-Nordic ethnic stock."[154] Furthermore, in the late 1920s, the Swedish model for the welfare state was labeled as "the people's home" and emphasis was placed on solidarity between the social classes.[155] This view is reverberated by other historians who claim that all political parties were jointly responsible for the eugenics policies of the 1920s.[156] Hans-Albin Larsson is one such historian: "No party ever made any fuss about the legislation that permitted forcible sterilisations under such a long time."[157] Such widespread acquiescence may have been due to the fact that the SDP initiated the sterilization process for reasons that were ostensibly based on social progress.

The Swedish Social Welfare Board oversaw the government sterilization policy, the purpose of which was to prevent financial strains on the social welfare state.[158] The Parliament voiced its general endorsement of race hygiene: "To keep the human race in good order, and to improve it, is naturally of considerable interest to the state."[159] The Swedish socialist state, which has preached for the protection of its citizens and which apparently values both group rights and individual liberties, is considered the world's center of moral relativism. Accordingly, it must now pledge to address the past and future victims of sterilization by pursuing avenues of monetary compensation and preventative measures.

B. *Remedying the Situation in Sweden: Politics v. Real Remedies*

A political game has begun. Long-anticipated action by the Swedish government is proving, not surprisingly, to have been politically motivated. Only after pressure from competing governmental parties has the Health and Social Affairs Minister[160] indicated that compensation should be paid to the

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153. ROLAND HUNTFORD, THE NEW TOTALITARIANS 7 (1972).

154. *Gulag Archipelago, supra* note 14.

155. WELFARE STATE, *supra* note 10, at 95.

156. *Wired from Sweden, supra* note 21.

157. *Id.*

158. *All Things Considered, supra* note 9.

159. WELFARE STATE, *supra* note 10, at 101. After aggressive lobbying, psychiatrist Alfred Petren attempted to convince the Parliament to put the question of forced sterilization to a vote. *Id.*

160. Margot Wallstrom is the Social Welfare Minister of the Social Democrats. *See supra* note 19 and accompanying text.

victims. Former Prime Minister Bildt demanded investigation into forced sterilization that sparked new attention both inside and outside the government.[161] Polls show that he is far more popular than Prime Minister Persson's Social Democrats since his rapid gain of moral authority after he served as administrator of the Bosnian Peace Accord.[162] Bildt's party, officially designated as the Moderates, is expected to give the Social Democrats a serious challenge in the 1998 election.[163] This is especially worrisome to the SDP since it was the party that oversaw the sterilization program. Now nine million Swedes must come to terms with the past and put forth an effort to correct the evils of their history. However, the new-found moralism in Sweden seems to be more the result of political posturing than a true desire to compensate casualties of forced sterilization.

The pressure continues from the Christian Democratic Party in Sweden: "this is a frightening picture that now is being shown to the Swedish people."[164] Swedes have known for years that forced sterilizations took place, but only around thirty women of the estimated 63,000 victims of sterilization have been compensated.[165] While a monetary value cannot be placed on the violation of an inherent human right, compensation is at least progress in the form of recognition of a grave error. A life alone, with no family or progeny, suggests a grim and forsaken existence.[166] A seven-person committee is conducting a comprehensive review of the issue and will attempt to apportion responsibility for the establishment and application of the sterilization laws.[167] The committee will also attempt to "make amends and propose forms of compensation for the victims."[168] Should Sweden then look to the United States in developing a compensation plan for gross violations of the fundamental human right of procreation?

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161. *Sweden Bildt, supra* note 22. For more information on Carl Bildt, see *supra* note 23 and accompanying text.

162. *Id.* For more information on Bildt's involvement with the Bosnian Peace Accord, see *Wired from Sweden, supra* note 21 (Bildt launches moderate call for cross party co-operation).

163. *Sweden Bildt, supra* note 22.

164. *Eugenic Past, supra* note 11. Alf Svensson, chairman of the opposition Christian Democratic Party, called attention to the issue to gain public support for his party by addressing the need for compensation in a letter to Prime Minister Persson. *Id.*

165. *Wired from Sweden, supra* note 21. Ninety-three percent of the 62,888 victims of recorded forced sterilizations were women and research reveals that no male victims have received compensation. WELFARE STATE, *supra* note 10, at 110.

166. Maria Nordin expressed her feelings after applying and being rejected for compensation: "I'm angry and bitter and sad. I'm trying to forget, but it will not work." *All Things Considered, supra* note 9.

167. *Wired from Sweden, supra* note 21.

168. *Id.*

C. *The United States Has Not Fulfilled Its Responsibility to Compensate Its Own Sterilization Victims*

The ethical debate over non-consensual sterilization in the United States continues at an intense level even today. However, the legal system has yet to take a firm stance on compensation for victims, even though "[h]uman reproduction is not taken lightly in American society."[169] After one of the most horrific human rights violations in the United States was exposed, little compensation was afforded the victims of coerced sterilization. In 1980, a lawsuit was brought by the American Civil Liberties Union (ACLU) on behalf of 8300 men and women who had been coercively sterilized in Virginia state hospitals between 1924 and 1971.[170] As alleged in the suit, residents were sexually sterilized without any notice or proper explanation of the long-term results of the operation,[171] and were not given the proper psychological and medical assistance.[172] One of the petitioners in the suit was Carrie Buck's[173] sister, Doris Buck, who had been sterilized at Lynchburg in 1928.[174] Doris and the other victims wanted compensation for their pain and suffering, similar to the desperate plea of Maria Nordin after the Swedish government acted to take important life decisions away from her.[175] Several excerpts from statements of former inmates of Lynchburg, like Doris and Carrie Buck, describe "sexual abuse, medical experimentation and other activities reminiscent of the Nazi concentration camps."[176]

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169. BLANK, *supra* note 116, at 121. This is evident from the emphasis placed by the Supreme Court on the natural rights of individuals.

170. TROMBLEY, *supra* note 4, at 235-38. While Virginia had sterilized less than half as many people as did California, the news still sent shockwaves around the world. The hospitals and institutions that reported these sterilizations were Lynchburg, Central, Eastern, Southwestern, Western, and Petersburg. *Id.* at 236.

171. *Id.* at 252.

172. CARRIE BUCK, *supra* note 111, at 252.

173. *See supra* Part III.B for an in-depth look at the case of Carrie Buck.

174. Under the illusion of an appendectomy, Doris Buck was permanently sterilized. After learning the truth, she recalled, "I broke down and cried . . . . My husband and me wanted children desperate—were crazy about them. I never knew what they'd done to me." TROMBLEY, *supra* note 4, at 91.

175. CARRIE BUCK, *supra* note 111, at 251. For further discussion of Maria Nordin's sterilization, see *supra* note 9 and accompanying text.

176. TROMBLEY, *supra* note 4, at 238. Mr. D (his name has not been published), sterilized at age 13 in 1949, revealed his experience at the institute:

> I worked in the operating room. They'd bring in a new one [victim] every 15 minutes for four hours. I'd get a tray of bloody instruments and have to clean him and sterilize them and take them back out. We do this two days a week, but it never was the same two days. On what I called a bad day we'd have forty people.

Id. Mr. D was also subjected to sexual molestation, drugged and then sterilized in his sleep. "I think people would get jobs there just so they could use us sexually. . . . They did lots of

The lawsuit was heard in January of 1985 by the United States District Court for the Western District of Virginia. The ACLU alleged that:

1) [defendants] failed to obtain informed consent from victims;
2) [defendants] failed to provide adequate notice and explanation;
3) sterilization hearings were procedurally defective . . . ;[177]
4) forced sterilizations violated constitutional standards;
5) inherited mental disease or defect was unproved; and
6) the defendants failed to provide counseling, instruction or medical advice.[178]

These allegations could easily describe the eugenic practices in Sweden. It is easy for the rest of the world to mock Sweden's disregard for human rights, but the rest of the world must bear the burden of staring down the cold hallway of its own gruesome history.

The ACLU case generated world-wide coverage, similar to the recent explosion of media criticism directed towards Sweden.[179] A final settlement was approved in March 1985, and merely provided for a media campaign featuring a series of radio and television announcements directed at the patients of Lynchburg before 1974.[180] The former residents could inquire and be informed whether they had been sterilized and would be provided counseling services charged only on "their ability to pay."[181] Although the Virginia Sterilization Act was revised after 1974, the ACLU failed to win costs for reversal operations for the victims or obtain remedies for any infliction of emotional or physical distress.

Sweden should not look to this hollow victory in the United States as guidance on compensation or remedial measures for the victims of forced

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bad things to me, but they shouldn't have done that [sterilized him]." *Id.* at 238-39.

177. *Id.* at 252. The ACLU also alleged:

a) The representation of members of the sterilized class provided by appointed guardians was inadequate and defective;
b) There was no independent and impartial judicial decision-maker at the hearings;
c) Independent genetic and medical evidence was not presented and received at the hearings;
d) No consistent standard of proof was applied at the hearings; and
e) Findings were not made by clear and convincing evidence at the hearings . . . .

Id.

178. *Id.*

179. News coverage ran the story around the world and it was even chronicled in the *New Delhi Times*. The media uncovered information that across America, fifty thousand people, terminally ill or retarded, had been sterilized after *Buck v. Bell*. CARRIE BUCK, *supra* note 111, at 252.

180. TROMBLEY, *supra* note 4, at 253.

181. *Id.* The counseling services were not free of charge and were only for persons who were sterilized against their will or without their knowledge. *Id.*

sterilization.[182] Instead, it appears as if the United States needs guidance, and Sweden should be the first to set an example by amply compensating the wounded and their families. In the eyes of the rest of the world, Sweden represents peace and prosperity; its welfare program has been successful and people generally live longer and are wealthier than elsewhere. It is a model of prosperity and should take positive and decisive measures to compensate victims of forced sterilizations.

V. CONCLUSION: THE EUGENICS OF THE FUTURE

Coercive and compulsory sterilization are political expedients, yet as solutions to human inadequacies they have failed both theoretically and practically. The history of the eugenics movement has shown that sterilization of the poor, unfit, undesirable, and mentally retarded is unlikely to solve either social or medical problems. If one acknowledges that all deviant behavior is not necessarily genetically determined, then one has to acknowledge that a whole range of non-genetic factors continue to contribute to poverty, crime, and sexual precariousness.[183] Even within the eugenic framework, mutation will always act as the joker in the pack.

Sterilization in Sweden, the United States, and in other areas of the world, that once considered its victims in some way "defective" for social or eugenical reasons, simply exists in order to relieve the imagined burden of the fertility of the unfit on those around them: parents, teachers, social workers, heads of institutions, the medical profession, and the state.[184] It is difficult to conclude that in every case of coercive or compulsory sterilization, more good than harm is achieved. As a political, social, or medical expedient, coercive and compulsory sterilization does not exist, and never existed, for the benefit of the victim.

Involuntary sterilization has thankfully become a practice of yesterday's science. But its victims have not disappeared. There is no doubt that the cries from the grave are not only those of the victims of sterilization, but also the hushed whimper of generations unborn in Sweden and the United States.

Stephanie Hyatt[*]

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182. The author was unable to uncover any further positive compensation packages awarded to victims of these procedures.

183. *Europe's Taboo, supra* note 6.

184. Heintz, *supra* note 7.

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OWNERSHIP AND ENFORCEMENT OF PATENT RIGHTS IN RUSSIA: PROTECTING AN INVENTION IN THE EXISTING ENVIRONMENT

> If somebody invents any machine or process to speed up silk-making or to improve it, and if the idea is actually useful, the inventor can obtain an exclusive privilege for ten years from the Guild Welfare Board of the Republic.[1]

I. INTRODUCTION

Since the collapse of the Soviet Union, Russia has been struggling with problems created by its unstable economy. The government sees the cure for the country's economy in Russia's accession to the World Trade Organization (WTO).[2] The advantages of joining the WTO are clear: "Membership would create jobs, attract foreign investment, secure access to western markets on excellent trade terms and help to revive the output of domestic goods."[3] However, Russia cannot join the WTO until it is able to provide adequate protection for intellectual property (IP), which is one of the major WTO membership requirements.[4] A survey conducted among U.S. companies showed that inadequate protection of trademarks and patents is "one of the four basic reasons preventing an influx of foreign investment capital to Russia."[5] As U.S. Trade Representative Jeffrey Lang noticed: "So much of our trade is invested with intellectual property that we always have to look on this as an important issue."[6]

Traditionally, Russia has been known for its disregard of IP rights. The Russian market is flooded with counterfeit products. For example, the

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1. WILLIAM H. FRANCIS & ROBERT C. COLLINS, CASES AND MATERIALS ON PATENT LAW 65 (4th ed. 1995) (quoting The Senate of Venice, 1400-1432).

2. The World Trade Organization created by Uruguay Round negotiations on January 1, 1995, "is the only international body dealing with the rules of trade between nations." *About the WTO* (visited Nov. 22, 1997) <http://www.wto.org/wto/about/factso.htm>.

3. Bradford W.C. Price, *Russia's Economic Future: A Step Towards Economic Recovery or Merely a Detour Towards Economic Absorption?*, 4 J. INT'L L. & PRAC. 571, 579 (1995).

4. Obligations of WTO members with respect to issues of intellectual property are covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). *WTO Intellectual Property* (visited Nov. 22, 1997) <http://www.wto.org/wto/intellec/intel12.htm>.

5. Vladimir Zadera, *Russia Faces Threat of Being Centre of Intellectual Piracy*, TASS, Feb. 8, 1996, *available in* LEXIS, Europe Library, Tass File.

6. Jeffrey Lang, Remarks at the U.S.—Russia Business Council Conference (Apr. 1, 1997), *available in* LEXIS, Europe Library, SBE File [hereinafter *Remarks by USTR Jeffrey Lang*]. While in 1947 intellectual property accounted for only 10% of all American exports, in 1995 it accounted for more than 50% of U.S. exports. Raymond Damadian, *Patent System Faces Sabotage in Congress*, NEWSDAY, Nov. 29, 1995, *available in* 1995 WL 5128525.

number of authentic Reebok products sold in Russia is less than the number of imitation ones in the country.[7] There are so many software pirates in Russia that the Business Software Alliance, a group of leading U.S. software companies, has called Russia a "one-copy" country, meaning that "one legitimate copy of a piece of software can satisfy the entire country."[8] The situation regarding violation of patent rights is no better. In October 1997, SmithKline Beecham filed a lawsuit in the Moscow Arbitration Court to protect its patent covering the technology for producing Clavulanate, a key ingredient in the antibiotic Augmentin.[9] The patent had been violated by a Slovenian company, Lek, which sells in Russia a drug identical to Augmentin.[10] The Association of International Pharmaceutical Marketers, a group of forty international pharmaceutical producers in Moscow, claims that sales of counterfeit medicine is a big business in Russia where "lax intellectual property enforcement" allows offenders to go unpunished.[11]

Current disregard of patent rights is rooted in the absence of patent protection under the old Soviet system. The former USSR ignored a five-centuries-old, worldwide tradition of granting exclusive rights to a patent owner and replaced such protection with a system of "collective ownership of certified inventions protected by inventors' certificates of authorship," which allowed any Soviet organization to use an invention without its author's permission.[12] Since the collapse of the Soviet system, Russia's goal has been to provide adequate protection for inventions and other intellectual property. Although the new Patent Law of the Russian Federation, adopted in September of 1992, conforms to international standards of patent legislation, "remnants of old Soviet practices still manifest themselves in the day-to-day experience of foreign investors in Russia."[13] Yet, despite the

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7. Astrid Wendlandt, *High-Fashion Fakes Flood into Russia*, MOSCOW TIMES, Apr. 3, 1996, *available in* LEXIS, Europe Library, Mostms File (quoting Sergei Lepatrikov, chief Reebok watchdog).

8. Karl Emerick Hanuska, *Microsoft at the Gates to Confront Software Pirate-Infested Russia*, AGENCE FRANCE-PRESSE, Oct. 9, 1997, *available in* 1997 WL 13410803 (quoting the Business Software Alliance).

9. Jeanne Whalen, *SmithKline Beecham Files Lawsuit to Protect Patents*, MOSCOW TIMES, Nov. 1, 1997. The patent was granted by the Russian Patent Office in June 1997. *Id.* "Augmentin (amoxicillin/clavulanate potassium) is a formulation of amoxicillin, which is a broad-spectrum penicillin, and clavulanate, which is a beta-lactamase inhibitor. . . . Augmentin is one of the world's most widely used antibiotics for infections in adults and children." *SmithKline Beecham's Augmentin Cleared in U.S.* (visited Jan. 17, 1998) <http://www.pslgroup.com.1dg1623a.htm>.

10. Whalen, *supra* note 9.

11. *Id.*

12. Andrew A. Baev, *Recent Changes in Russian Intellectual Property Law and Their Effect upon the Protection of Intellectual Property Rights in Russia*, 19 SUFFOLK TRANSNAT'L L. REV. 361, 366 (1996).

13. *Id.* at 365.

existing problems, few established foreign companies are leaving Russia. Most foreign companies believe that "if reforms continue, opportunities justify the risks, uncertainties and considerable bureaucratic obstacles."[14] While "the enormous potential of Russia as a trading nation is not being met at this point," Russia nonetheless ranked thirty-fourth in U.S. export trade in 1995, with $2.8 billion in U.S. goods exported to Russia and $4 billion in Russian imports to the United States.[15] Recently, the Samara region of Russia, 530 miles southeast of Moscow, has attracted twenty-two U.S. companies, including General Motors, General Electric, Pepsico, Coca-Cola and others, to start operations there.[16] "Microsoft's revenues from sales in Russia from July 1, 1996[,] to June 30, 1997, totaled 26.2 million dollars . . . ."[17] Pushed by its desire to join the WTO, the Russian government has taken some steps to improve protection of IP rights in the country, including the adoption of the new Criminal Code, which imposes criminal liability for violations of IP rights and authorizes "police raids on street vendors offering counterfeit goods."[18] However, as U.S. Vice President Al Gore concluded during his visit to Russia in September 1997, Russia must make further improvements in the protection of IP rights in the country.[19] The most severe problem faced by patent owners in Russia is the lack of a judicial structure capable of addressing complex patent disputes. Resolution of these and other legal and practical impediments is vital to Russia's ability to provide adequate protection of patent rights and requires immediate action from the Russian government.

This note discusses the protection of inventions in Russia's current environment. Part II begins by examining the legal protection of inventions in the former Soviet Union. The section then focuses on the current state of Russian patent legislation, including the first Patent Law of the Russian Federation, adopted in September 1992, and subsequent laws enacted between September 1992 and November 1997. Part II also compares Russian and U.S. patent statutes and examines the administrative and judicial systems available in Russia for resolving patent disputes. Part III discusses the practical implementation of the existing patent legislation. After

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14. *Investment Climate in Russia*, RUSSIA EXPRESS BRIEFING, Sept. 30, 1996, *available in* 1996 WL 8618978.

15. Ivan Lebedev, *There Are Still Some Obstacles to Russo-US Trade*, TASS, Apr. 2, 1996, *available in* LEXIS, Europe Library, Tass File.

16. Richard C. Paddock, *Gore Visits City on Volga to Promote Investment*, L.A. TIMES, Sept. 25, 1997, *available in* 1997 WL 13983531.

17. *Bill Gates, Russian Banking Giant to Discuss Automation Plans*, AGENCE FRANCE-PRESSE, Oct. 8, 1997, *available in* 1997 WL 13410124.

18. Michael Solton, *Enforcing Intellectual Property Rights in Russia Remains Problematic*, RUSS. & COMMONWEALTH BUS. L. REP., Jan. 29, 1997, *available in* LEXIS, Europe Library, SBE File.

19. Paddock, *supra* note 16.

acknowledging some of the positive steps taken by the Russian government to improve patent protection in the country, the section examines flaws in the current legislation and focuses on practical problems faced by patent owners in Russia. Three major practical impediments to businesses include: (1) inadequate enforcement of patent rights; (2) problems with inventions predating the current legislation; and (3) the lack of legal protection of Russian inventions abroad. While the problems with inventions developed prior to the new laws will become less critical with the passage of time, Russia's failure to enforce patent rights is the primary obstacle to its accession to the WTO and prevents the influx of foreign investments to the country. Furthermore, inadequate enforcement combined with the lack of protection of Russian inventions abroad hinders development of domestic innovations in Russia. Next, Part IV suggests ways to combat the aforementioned problems. While businesses themselves cannot create a workable enforcement mechanism, they should not wait passively for the government to eliminate the problems. Instead, they should use available legal means to protect their rights. Still, the problems cannot be effectively solved without the active involvement of the Russian government. The section suggests that in order to provide adequate patent protection, the Russian government should create an effective judicial infrastructure to adjudicate patent disputes. As the experience of progressive foreign countries demonstrates, the best solution would be to establish specialized patent courts. Finally, Part V concludes by addressing the importance of adequate patent protection in today's Russia.

II. LEGAL AND PROCEDURAL ASPECTS OF PROTECTING PATENT RIGHTS IN RUSSIA

A. *Before the New Patent Law: The Law of Inventions Under the Soviet System*

Private ownership of inventions was not recognized in the former Soviet Union. Although patent protection for inventions was formally available to inventors, in practice, Soviet inventors rarely applied for patents. Instead, the inventors applied for certificates of authorship. A certificate of authorship, a form unfamiliar to the western legal model, gave no legal protection to the inventors' rights.[20] The issuance of the certificate actually rendered the state the owner of the invention, thereby giving the state all rights to use the invention in the USSR and abroad.[21] Upon issuance of the certificate, the invention was transformed into "general state property"—any

20. ENCYCLOPEDIA OF SOVIET LAW 103 (F.J.M. Feldbrugee et al. eds., 2d ed. 1985).
21. *Id.*

Soviet organization was allowed to use the invention without consulting the author.[22] In return, a certificate holder received a number of benefits which actually made certificates more valuable than patents.

Not only did a certificate holder obtain social recognition and prestige from the right to be named the author of the invention, but he also received a monetary reward for the use of his invention, the right to a bigger apartment, and better scientific research positions at higher salaries.[23] Certificates of authorship were indefinitely valid and could be challenged only within one year of issuance.[24] By contrast, a patent's life was fifteen years and its validity could be attacked any time during its life.[25] A certificate holder, unlike a patent holder, was not required to pay filing fees, issuance fees, or annuities. Moreover, non-technological inventions and all other inventions made in the course of employment with a Soviet organization could be protected only by certificates of ownership.[26] Since at least eighty percent[27] of all inventions were made in the course of employment, patent protection was not even an option for the overwhelming majority of Soviet inventors.[28] Generally, patents were recognized "only in order to encourage foreigners to apply for Soviet legal protection of new technological solutions."[29] Between 1970 and 1975, four patents were issued to Soviet inventors, compared to 203,046 certificates of authorship during the same time period.[30]

An application for a certificate of authorship could be submitted by an inventor or by his employer.[31] The employer filed a joint application when the invention was made in the course of the employment. If the employer failed to file the application within one month after the invention was

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22. O. IOFFE, SOVIET CIVIL LAW 346 (1988). The term "general state property" (*obshche gosudarstvennaya sobstvennost'*) was commonly used in relation to inventions and many other forms of property which are recognized as private property in the West. The notion of private property in the USSR was almost non-existent.

23. ENCYCLOPEDIA OF SOVIET LAW, *supra* note 20, at 103.

24. *Id.* at 104.

25. *Id.* at 103, 563.

26. IOFFE, *supra* note 22, at 344.

27. Baev, *supra* note 12, at 368.

28. Even when an invention was protected by a patent, a patent holder's rights were limited. The holder could neither refuse to license his invention when the state found its use "socially important," nor register or use his "patents abroad without approval of the Council of Ministers." ENCYCLOPEDIA OF SOVIET LAW, *supra* note 20, at 563.

29. IOFFE, *supra* note 22, at 344. After the USSR adhered to the Paris Convention, the number of foreign patents received in the USSR grew significantly. "About 10,000 foreigners hold patents obtained in the former Soviet Union." Baev, *supra* note 12, at 367 n.9.

30. George M. Armstrong, *Invention and Innovation*, *in* THE IMPACT OF PERESTROIKA ON SOVIET LAW 277 (Albert J. Schmidt ed., 1990).

31. INNA BOYCHUK, SOVIET PATENT PROCEDURES: THE EXISTING PROCESS AND THE IMPACT OF THE NEW LAW 7 (1992).

developed, the inventor was free to file an application independently.[32] All applications were processed by the State Committee for Inventions and Discoveries (Gospatent) or by the Scientific Research Institute for State Patent Examination (VNIIGPE).[33] If the application was rejected, the inventor could appeal the examiner's action within two months after receiving the rejection notice.[34] The same examiner reviewed the material supplied with an appeal and either sent a second rejection or invited the inventor to attend an examination conference.[35] The examination conference, led by the same examiner, very rarely resulted in a reversal of the examiner's original decision because of the potential devastating effect on the examiner's career.[36] Usually the inventor was convinced by the examiner to stop the appeal process and, as a result, would not exercise his final opportunity to appeal the examiner's decision to the Examination Control Council. Members of the Examination Control Council, an organ subordinate to Gospatent, analyzed the application independently of the examiner, but a ruling in the inventor's favor was rarely granted.[37] Decisions of the Examination Control Council were final and could not be appealed.[38] In practice, then, Soviet inventors lacked effective means to appeal rejections of their applications.

When a certificate of authorship or a patent was granted, all subsequent disputes, including "claims regarding the right to and amount of compensation, priority of authorship, alleged co-authorship, and patent infringement," were to be heard by the regular courts.[39] However, cases involving governmental decisions on coercive purchases of licenses or patents,[40] as well as cases involving state interests, were not within the courts' jurisdiction.[41] In fact, judicial resolution of disputes related to

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32. *Id.*

33. *Id.*

34. *Id.* at 28.

35. *Id.* at 29.

36. *Id.* at 30. Only in 10% of cases was the examiner's original decision reversed because "VNIIGPE's internal rules consider[ed] the reversal of two rejection decisions as failing performance on the part of the examiner." *Id.*

37. *Id.* at 30-32. Since members of the Examination Control Council were reviewing a decision of Gospatent, to which they were subordinate, they did not want to risk their careers by reversing Gospatent's decision. *Id.*

38. *Id.* at 32.

39. ENCYCLOPEDIA OF SOVIET LAW, *supra* note 20, at 563. The court's resolution, though, had to follow a preliminary decision "taken by the manager of the organization concerned, after consulting with the trade union or society of inventors . . . of the same organization." IOFFE, *supra* note 22, at 349.

40. The government could decide that national interests allowed it to purchase a license or a patent without the consent of the patent owner; i.e., the government could decide to purchase a license or patent coercively. IOFFE, *supra* note 22, at 349.

41. *Id.*

inventors' rights was so rare that "[i]t would be difficult . . . to illustrate application of these rules by citing cases from administrative or judicial practice in the USSR."[42]

Generally, the Soviet system of inventions and intellectual property was absolutely incompatible with Western standards. It neither gave owners of inventions exclusive rights to use the inventions, nor encouraged people to respect the property rights of owners of inventions. After the end of the Soviet era, new laws were needed to turn an invention from "general state property" into the property of its actual owner, the inventor.

B. *From "General State Property" to Inventors' Exclusive Patent Rights: Current State of Patent Law in Russia*

The main legal document in Russian patent law today is the Patent Law of the Russian Federation (Patent Law), which was adopted on September 23, 1992, by the Fifth Session of the Supreme Soviet of the Russian Federation and went into force on October 14, 1992.[43] Under the new law, the state is no longer the principal owner of inventions developed in Russia. With the enactment of the Patent Law, patents became the exclusive form of legal protection of inventions in Russia. Today, a Russian inventor can derive a profit from the use of his invention during the entire life of the patent, after which time the invention is available for public use without restrictions.

1. *Ownership of Patent Rights Under the First Patent Law of the Russian Federation*

The Patent Law provides protection to inventions, industrial designs, and utility models.[44] Utility models, which were not protected under the Soviet law, include designs and constructions of industrial equipment and consumer goods and their components.[45] The reason utility models[46] were

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42. *Id.* at 350. According to published data, only 250 cases related to inventions were heard by courts annually in the entire Soviet Union. A.P. SERGEEV, PATENTNOE PRAVO [PATENT LAW] 164 (1994). For reasons for such a low number, *see infra* notes 168-71 and accompanying text.

43. Mark Douma & Rudolph Chistyakov, *The First Patent Law of the Russian Federation*, 1 U. BALT. INTELL. PROP. L.J. 162, 162 (1993).

44. Patentnii Zakon RF [RF Law of Patents Act] art. 1, Sobr. Zakonod. RF, 1992, No. 42, Item 2319, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File [hereinafter Patent Law]. The author of this note who is a native of Russia uses the term "utility model," instead of the term "working model," which is used in the translated version, since "utility model" is a term commonly used in English legal literature.

45. *Id.* (art. 5). Utility models, which are not recognized in the United States, are given protection in over 30 countries, including Japan, Germany, and Italy. SERGEEV, *supra* note

added to the Russian patent law was to encourage small private enterprises to produce much-needed domestic goods by giving them "fast, inexpensive protection of new product development."[47]

A patent's life is twenty years for inventions, ten years for industrial designs, and five years for utility models.[48] An invention is granted patent protection "if it is new, is up to invention standard, and is industrially applicable."[49] Significantly, patentable inventions now include cell cultures and micro-organisms; this protection of medicines "alleviates one of the major complaints of foreigners."[50] An industrial design is given patent protection if it is new, original, and industrially related.[51] A certificate for a utility model is granted if the model is new and industrially related.[52]

The Russian law follows a first-to-file patent system. Such a system grants a patent to the first party to file a patent application in Russia or in a country participating in the Paris Convention if an application is subsequently filed in Russia within twelve months from the filing date in another country in the case of an invention or a utility model, or within six months in the case of an industrial design.[53] Eighteen months after a patent application, or

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42, at 28.

46. Utility models receive certificates, not patents. The Patent Law, in addressing issues of ownership and the enforcement of patent rights—the main focus of this paper—treats the holders of invention patents, industrial design patents, and utility model certificates equally.

47. Douma & Chistyakov, *supra* note 43, at 168.

48. Patent Law, *supra* note 44 (art. 3). Until recently, the patent monopoly term was 17 years in the United States. 35 U.S.C. § 154 (1952). Pursuant to recent amendments, patents granted on applications filed after July 8, 1995, have a term of 20 years. 35 U.S.C. § 154 (1994). The term may be extended where commercialization is interrupted due to a delay in regulatory approval under the Food, Drug, and Cosmetic Act. 35 U.S.C. §§ 155-56 (1984). In the United States, designs (which are called "industrial designs" in Russian law) receive patent protection for a term of 14 years. 35 U.S.C. § 173 (1984).

49. Patent Law, *supra* note 44 (art. 4). The U.S. requirements that the invention has to be "new and useful," 35 U.S.C. § 101 (1984), and non-obvious, 35 U.S.C. § 103 (1984), are similar to the Russian definition.

50. Douma & Chistyakov, *supra* note 43, at 167. Cell cultures and micro-organisms were not protected under the Soviet law because "patenting medicines was considered anti-social." *Id.*

51. Patent Law, *supra* note 44 (art. 6). In the United States, the patent is granted for a new, original, and ornamental design. 35 U.S.C. §§ 171, 173 (1984).

52. Patent Law, *supra* note 44 (art. 5).

53. *Id.* (art. 19). In contrast, the United States employs a first-to-invent patent system; it is "virtually the only nation left" that uses this system. G. Scott Erickson, *Patent Protection for Central and Eastern Europe: Lessons from the West*, *in* PRIVATIZATION AND ENTREPRENEURSHIP: THE MANAGERIAL CHALLENGE IN CENTRAL AND EASTERN EUROPE 241, 246 (Arieh A. Ullman & Alfred Lewis eds., 1997). The U.S. system grants the patent to the "true inventor"—the one who conceived the idea of the invention first—if the idea has first been reduced to practice and proven to be workable. *Id.* This system encourages risk-taking and provides a better quality of innovation because it allows time "to prove out an idea[,] design it for optimal manufacturing, marketing, and legal purposes[,] and then file a

"claim," is filed—if the result of the formal examination was positive and the claim has not been revoked—the Patent Office will publish the "information on the claim," after which time any person is entitled to view its materials.[54] Between the time of publication and the time the patent is issued, the invention receives "temporary protection in law."[55] A party using the invention during this period has to pay compensation to the patent owner after the issuance of the patent.[56] The patent owner will be compensated for the use of the invention from the date of publication or from the date when the user of the invention receives notice that the application has been filed, whichever date is earlier.[57] The validity of patents can be attacked any time during their life. A patent may be terminated if it is invalidated, if the patent owner files the petition with the Patent Office, or if maintenance fees have not been paid.[58]

Under the Patent Law, a person is deemed the author of an invention[59] only if the invention is a result of his creative efforts. A person is not considered to be the author if he, with no creative contribution of his own, merely gave the author technical, organizational, or financial assistance or helped the author to obtain or use the patent.[60] If the invention has more than one author, they must come to an agreement on how to use their rights of authorship.[61] In practice, co-authors are not always able to reach an

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strong patent application." *Id.* at 248.

54. Patent Law, *supra* note 44 (art. 21(6)). Upon the applicant's request, the Patent Office can publish information on the claim "before the aforesaid date." *Id.*

55. *Id.* (art. 22(1)-(2)). Temporary protection will not be granted if the application is rejected and appeals are exhausted. *Id.*

56. *Id.* (art. 22(3)). The amount of the compensation will be defined by the agreement between the parties. This agreement, while similar to the license agreement in form, will differ from the license agreement in substance for two reasons: (1) at the time of use the patent has not yet been issued, so the applicant did not have a right to refuse use of the invention; and (2) the agreement should not be registered with the Patent Office. S.P. GRISHAEV, PRAVOVAYA OKHRANA IZOBRETENII, PROMISHLENNIKH OBRAZTSOV, POLEZNIKH MODELEI V ROSSII I ZA RUBEJOM [LEGAL PROTECTION OF INVENTIONS, INDUSTRIAL DESIGNS, AND UTILITY MODELS IN RUSSIA AND ABROAD] 33 (1993). For a detailed discussion of license agreements, *see infra* notes 86-88 and accompanying text.

57. Patent Law, *supra* note 44 (art. 22(4)). "Thus, the effective term of a patent is 20 years only in the case where the applicant notifies possible infringers on the filing date of the application. Publication on schedule without further action would result in an 18.5 year effective term." Douma & Chistyakov, *supra* note 43, at 179 n.124.

58. Patent Law, *supra* note 44 (art. 30).

59. Hereinafter, the word "invention" will also include "industrial design" and "utility model," unless indicated otherwise.

60. Patent Law, *supra* note 44 (art. 7). This provision is similar to the U.S. law under which a person is not the author if "he did not himself invent the subject matter sought to be patented." 35 U.S.C. § 102(f) (1984).

61. Patent Law, *supra* note 44 (art. 7(2)). The U.S. law is different: applicants do not have to agree among themselves before filing the application. A joint inventor is permitted

agreement.[62] Thus, before filing a patent application, they will have to rely on a court for resolution of the issue; otherwise, they may be subjected to criminal liability for misappropriation of authorship or for unauthorized disclosure of information on an object of industrial property.[63] Under the first-to-file patent system, where an early priority date is important, the recommendation is to "file, naming all inventors, and to be prepared to withdraw the application before it is published."[64]

Article 8 of the Patent Law defines the rights of patent owners. A patent owner may be an author, the author's employer, or a person assigned by the author in the application or in a written declaration filed with the Patent Office before the patent is issued.[65] Article 8 is mainly devoted to issues concerning inventions made in the course of employment. In resolving the many disputes concerning these issues, lawmakers gave priority to the interests of employers in order to create incentives for employers to support the development of inventions.[66] Thus, the right to obtain a patent for an invention created in the course of employment belongs to the employer unless there is an agreement to the contrary. However, the employer must compensate the employee in proportion to the profit which is received, or which could have been received, when the employer does any of the following: obtains the patent; assigns the right to obtain the patent to a third party; decides to keep the invention secret; or receives a rejection on the application for reasons within its control.[67] On the other hand, if the employer, within four months after the employee informed the employer about the invention, "fails to: (1) seek a patent, or (2) assign his right to file an application to a third party, or (3) notify the employee that he has decided to keep the invention secret,"[68] then the employee himself has the right to

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to apply without the other inventor. 35 U.S.C. § 116 (1984).

62. GRISHAEV, *supra* note 56, at 34-35.

63. Patent Law, *supra* note 44 (art. 32). The U.S. law is less stringent; it allows an inventor to execute an application if he can show "sufficient proprietary interest in the matter" and that "such action is necessary to preserve the rights of the parties or to prevent irreparable damage." 35 U.S.C. § 118 (1984).

64. Douma & Chistyakov, *supra* note 43, at 169. Douma and Chistyakov have noted that, according to their private communications with Valentin M. Oushakov and Vladimir A. Mescheryakov from the Department of Foreign Communications at the Russian Patent and Trademark Office, such an application would be allowed. *Id.* at 179 n.56.

65. Patent Law, *supra* note 44 (art. 8(1)). While in the United States the employee/employer relationship is defined by common law rules, in Russia it is entirely statutory. Douma & Chistyakov, *supra* note 43, at 170. *See also* ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 251-52 (3d ed. 1994).

66. GRISHAEV, *supra* note 56, at 37. This approach is in accordance with the one accepted worldwide. *Id.*

67. Patent Law, *supra* note 44 (art. 8(2)). A translation reads: "for reasons beyond the employer's control." However, this language does not correspond to the original.

68. Douma & Chistyakov, *supra* note 43, at 170.

obtain the patent. The employer will still be able to use the invention in its operations, but it will have to compensate the patent owner according to the agreement between them. If the parties fail to reach an agreement, or if the employer breaches the agreement, a civil court will resolve the dispute between them.[69]

A patent owner has exclusive rights to use the invention if his use does not result in an infringement of other patent owners' rights. A joint patent owner can use the patent independently but cannot assign or license it without the consent of the other owners.[70] Infringement of a patent owner's rights occurs in cases of unauthorized making, use, import, offer for sale, sale, or any other form of marketing or storage of the invention for the purpose of making a sale.[71] Use of a patented process, or the marketing or storage of a product made by a patented process, also constitutes infringement, and a new product is presumed to be made by a patented process unless there is proof otherwise.[72] Thus, the burden is on the defendant to establish that the product was not made by a patented process.

The patent owner's exclusive right is not, however, absolute. The first limitation applies when the patent owner fails to use the patent or inadequately uses it during the four years[73] after the patent was issued. If another person is willing and ready to use it, but the patent owner refuses to enter into a license contract with him, the would-be user can apply to the Supreme Patent Chamber for a non-exclusive license, which will be granted if the patent owner fails to present a sufficient excuse for his actions.[74] The terms of the license will be fixed by the Supreme Patent Chamber.[75] A

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69. Patent Law, *supra* note 44 (art. 8(2)).

70. *Id.* (art. 10(1)). *Cf.* 35 U.S.C. § 262 (1984) (emphasis added): "In the absence of any agreement to the contrary, each of the joint owners of a patent may make, use, offer to sell, or sell the patented invention . . . *without the consent of and without accounting to the other owners.*"

71. Patent Law, *supra* note 44 (art. 10(3)). The U.S. law is narrower: acts of infringement are limited to unauthorized making, use, offer for sale, sale, and import of a patented invention. 35 U.S.C. § 271 (1994).

72. Patent Law, *supra* note 44 (art. 10(3)). Under the U.S. law, the product is presumed to be made by a patented process "if the court finds—(1) that a substantial likelihood exists that the product was made by the patented process, and (2) that the plaintiff has made a reasonable effort to determine the process actually used in the production of the product and was unable so to determine." 35 U.S.C. § 295 (1994).

73. Patent Law, *supra* note 44 (art. 10(4)). The limitation for the use of a utility model is three years. *Id.*

74. *Id.* The purpose of this limitation, used all over the world, is to prevent companies that hold patents from refusing to utilize them, thereby impeding industrial progress. GRISHAEV, *supra* note 56, at 41.

75. Patent Law, *supra* note 44 (art. 10(4)). "Market value will be determined as in the U.S. through expert testimony." Douma & Chistyakov, *supra* note 43, at 172 (referring to private communications with Oushakov and Mescheryakov).

second limitation allows one patent owner to demand from another patent owner the conclusion of the license contract when the former cannot use his invention without infringing patent rights of the latter.[76] This provision is not explained and it may be dangerously interpreted to mean that "a minor improvement by a second inventor theoretically gives him the right to a license without a reciprocal requirement to license the first."[77] A third limitation is codified in Article 12 of the Patent Law: prior users who, in good faith, began using or made necessary preparations for the use of the "identical solution" before the priority date of the invention "shall retain the right to further gratuitous use thereof."[78] However, the scope of this use may not be expanded. Moreover, the right of prior use may be assigned to others only with the transfer of the production facility; i.e., this right can only be used for purposes of the prior user's business and may not be a subject of licensing or other independent agreements.[79] A fourth limitation allows unauthorized use of patented inventions in the following situations: (a) in the construction or operation of transportation facilities in a foreign country which provides similar privileges to Russian facilities, when the foreign transportation facilities enter the territory of the Russian Federation temporarily or accidentally;[80] (b) in conducting scientific research or experiments involving a matter containing the patented invention;[81] (c) in using matters containing patented inventions in emergency situations with subsequent commensurate compensation to the patent owner; (d) in using matters containing patented inventions "for personal purposes, without gain";[82] (e) in "one-off preparation of drugs in pharmacies on doctor's prescription"; and (f) in using matters containing patented inventions where these matters were legitimately introduced into commerce[83] (i.e., "one may use or resell an invention purchased from a patent owner"[84]). Finally, "[i]n the interests of national security," the government of the Russian Federation

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76. Patent Law, *supra* note 44 (art. 10(5)).

77. Douma & Chistyakov, *supra* note 43, at 173.

78. Patent Law, *supra* note 44 (art. 12).

79. *Id. See also* GRISHAEV, *supra* note 56, at 42.

80. This provision is in accordance with Article 5 of the Paris Convention and with 35 U.S.C. § 272 (1984).

81. This exception was "meant to legalize reproduction of the invention in order to understand and improve it and does not allow making and selling." Douma & Chistyakov, *supra* note 43, at 171 (referring to private communications with Vladimir Shitikov, director of the Department of Licensing at the Russian Patent and Trademark Office).

82. The U.S. law also allows a person "to make or use a patented invention if her purpose is only to satisfy her scientific curiosity or to amuse herself as an intellectual exercise," but not if the person "has a commercial motivation, or motivation to self-convenience." MARGRETH BARRETT, INTELLECTUAL PROPERTY 56 (2d ed. 1996).

83. Patent Law, *supra* note 44 (art. 11).

84. Douma & Chistyakov, *supra* note 43, at 171 (citing private communications with Vladimir Shitikov).

may permit a non-owner to use the patented invention without its owner's consent, as long as he pays the owner "commensurate compensation."[85]

A patent owner may assign his exclusive right to use the patent to any person, as long as the assignment is registered with the Patent Office.[86] A patent owner can also grant the use of his patent to another by entering into a licensing agreement with that person. Under an exclusive license, a licensee obtains the exclusive right to use a patented invention within the limits specified in the agreement. Under a non-exclusive license, the patent owner, while granting the licensee the right to use the invention, retains all of his patent rights, including the right to license his patent to a third person.[87] A patent owner may also obtain an "open license" by notifying the Patent Office that he would be willing to grant a license to any interested party. The offer to grant the license is irrevocable.[88]

Patent applications for inventions created in the Russian Federation can be submitted to countries abroad no earlier than three months after filing a claim with the Patent Office.[89] Foreign persons and entities enjoy equal rights with Russian citizens under international treaties or under the principle of reciprocity.[90] Where the Patent Law conflicts with international treaties of the Russian Federation, international treaties will prevail.[91]

While the Patent Law of the Russian Federation remains the principal legal document in the area of patent law, other legislative provisions enacted after the Patent Law also play an important role in this area of the law.

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85. Patent Law, *supra* note 44 (art. 13(4)).

86. *Id.* (art. 10(6)). While U.S. law renders an assignment that was not recorded in the Patent and Trademark Office "void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice," 35 U.S.C. § 26 (1984), Russian law renders such assignment a legal nullity.

87. Patent Law, *supra* note 44 (art. 13(1)). "U.S. licensees should note that Russian law goes further than U.S. law in requiring that a license, even a non-exclusive one, must also be recorded." Douma & Chistyakov, *supra* note 43, at 169.

88. Patent Law, *supra* note 44 (art. 13(3)).

89. *Id.* (art. 35). "The purpose is to allow the Patent Office to determine if the invention should be kept secret." Douma & Chistyakov, *supra* note 43, at 179 n.96.

90. Patent Law, *supra* note 44 (art. 36). Despite their equal status, "the foreign applicants to acquire patent and trademark rights have to conduct the business through patent attorneys registered with [the] Patent Office (except those from . . . most . . . CIS countries)." Alexander A. Christophoroff, *Protection of Intellectual Property in Russia* (visited Nov. 19, 1997) <http://www.ruslaw.ru>.

91. Patent Law, *supra* note 44 (art. 37). "Russia is a party to the Paris Convention, the Patent Cooperation Treaty, Madrid Agreement (acceding to the Madrid Protocol is also planned), the Universal Convention and Berne Convention, and some other multilateral and bilateral treaties." Christophoroff, *supra* note 90.

2. *Other Laws Impacting Protection of Patent Rights in Russia*

The Russian patent law system is continually developing. During the five years following the adoption of the first Patent Law, Russia adopted several other legislative acts which impacted the protection of patent rights.

In the former Soviet Union, over ninety-nine percent of inventions and industrial designs were protected by certificates of authorship.[92] Certificates predating the Patent Law of the Russian Federation still remain in effect.[93] However, the Russian government did adopt a decree regulating the use of inventions and industrial designs protected by certificates of authorship.[94] The decree provides that use of such an invention or industrial design by any entity is considered use without a required permit.[95] Any entity that uses the invention before the twenty-year expiration date[96] (from the date the application for the certificate was filed) and after the decree was enacted must notify the author within three months from the day it begins using the invention, and must pay compensation to the author according to the agreement between them.[97] If use of the invention began before the decree was enacted, the compensation is to be paid in conformity with the law effective at the time the use began, but its amount is to be increased according to the existing rate of inflation.[98]

Despite the new Patent Law, some provisions of the former Soviet legislation are still in effect in the Russian Federation. The USSR Law on

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92. *See supra* notes 20-29 and accompanying text.

93. Certificates of authorship and patents issued in the former Soviet Union are effective in the Russian Federation unless: (1) they are deemed invalid under the law effective at the time an application for a certificate was filed, or (2) they have been exchanged for patents. O Vvedenii v Deistvie Patentnogo Zakona RF [Enacting RF Law of Patents Act], Sobr. Zakonod. RF, 1992, No. 42, Item 2320, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File. Where a party begins using the invention protected by the certificate of authorship before the certificate owner applies for a patent, the party has a right to continue using the invention without entering into a licensing agreement with the patent owner. The amount of compensation is defined in conformity with the law effective at the time the use of the invention begins. *Id.* § 8.

94. O Poryadke Ispol'zovaniya Izobretenii I Promishlennikh Obrastzov, Okhranyaemikh Deistvuyushimi na Territorii RF Avtorskimi Svidetel'stvami na Izobretenie I Svidetel'stvami na Promishlennii Obrasez, I Viplati ikh Avtorami Voznagrajdeniya [Use of Inventions and Industrial Designs Protected by Certificates of Authorship in Effect on RF Territory and Payment of Compensation to their Authors], Sobr. Zakonod. RF, 1993, No. 29, Item 2681, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File [hereinafter Use of Inventions Protected by Certificates of Authorship].

95. *Id.* § 1.

96. In the case of an industrial design, the term is 15 years. *Id.*

97. *Id.* Every person or entity using the invention has to pay compensation, the amount of which is defined by the agreement between the parties and does not have any limits. *Id.*

98. *Id.* § 2. Compensation paid before this decree was enacted is not subject to recalculation. *Id.*

Inventions still applies in the following situations: (1) in establishing benefits and material incentives for inventors; (2) in the state's contracting for delivery of products for the state's needs (where the products utilize patented inventions owned by other citizens or enterprises, including foreign patent owners); (3) in calculating the compensation to be paid to the author of an invention where the author and his employer that owns the patent cannot reach an agreement as to the amount of compensation; and (4) in awarding compensation to be paid by enterprises to persons giving assistance in the creation and use of inventions.[99]

On February 12, 1993, a new statute was enacted creating the Committee of the Russian Federation on Patents and Trademarks (Rospatent) as a central agency of the federal executive power in the area of intellectual property protection.[100] The statute defines the functions and goals of Rospatent's activity.[101] The Chairman of Rospatent is appointed by the President of the Russian Federation,[102] and the Board of Rospatent has to be approved by the government. To promote efficiency in the filing of patent applications and the maintenance of patents, the government enacted a statute creating a new class of professionals called "patent agents."[103] A patent agent is a citizen who successfully passes an examination administered by Rospatent and thereby obtains the right to represent an individual or an organization before Rospatent or any other organization that is part of the patent system.[104] A patent agent must have a bachelor's degree, must have at least four years of work experience in the area of intellectual property or in the general law—an attorney or other person allowed to engage in law practice would probably qualify—and must know Russian and international laws necessary for practicing in this area.[105]

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99. O Poryadke Primeneniya na Territorii RF Nekotorikh Polojenii Zakonodatel'stva Bivshego SSSR ob Izobreteniyakh I Pormishlennikh Obraszakh [Application on RF Territory of Some Provisions of Ex-USSR Legislation on Inventions and Industrial Designs], Sobr. Zakonod. RF, 1993, No. 34, Item 3191, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File.

100. Polojenie o Komitete RF po Patentam I Tovarnim Znakam [Statute of the RF Committee on Patents and Trademarks], Sobr. Zakonod. RF, 1993, No. 8, Item 655, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File.

101. *Id.* §§ 4-5. In addition to functions similar to those performed by the U.S. Patent and Trademark Office, Rospatent has to frame proposals for shaping the uniform state policy in the area of IP protection and for improving legislation in this area, and must provide educational programs for specialists in this area. *Id. See also* 35 U.S.C. §§ 1, 2, 6, 9 (1984).

102. In the United States, the Commissioner of patents is also appointed by the President, but with the advice and consent of the Senate. 35 U.S.C. § 3 (1984).

103. Polojenie o Patentnikh Poverennikh [Statute of Patent Agents], Sobr. Zakonod. RF, 1993, No. 7, Item 573, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File.

104. *Id.* § 1.

105. *Id.* § 2. *Cf.* 37 C.F.R. § 10.7: One must be "possessed of the legal, scientific, and

The Russian Federation Law on Competition and Restriction of Monopolistic Activities in Commodities Market gives legal protection to patent owners if violation of their rights can be classified as unfair competition.[106] Some forms of unfair competition for which the law gives relief are: (1) "circulating false, inaccurate or distorted information" capable of causing losses to another business entity or "damaging its business reputation"; (2) "misleading consumers" about the nature, method and place of manufacture, consumer properties, and quality of a product; and (3) "obtaining, using or disclosing" scientific, technical, production-related, "or trading information, including commercial secret, without the owner's consent."[107] Thus, where patent infringement results in unfair competition, the patent owner may resort to the anti-monopoly law.

The new Russian Criminal Code, which became effective on January 1, 1997, imposes criminal penalties for the unlawful exploitation of a patent; the unauthorized divulgence of the nature of an invention, industrial design, or utility model before its publication; the misappropriation of authorship; or the obtaining of co-authorship by compulsion.[108] The penalties include: a fine 200 to 500 times greater than the minimum wage, a fine equal to two to four months of the infringer's income, 180 to 240 hours of mandatory labor, or imprisonment for up to two years.[109] However, criminal liability is imposed only if an infringer caused "significant damages."[110] Repeat infringers and group conspirators receive greater punishment.[111]

Finally, the Edict of the President of the Russian Federation, issued on September 11, 1997, requests the formation, in the Patent and Trademark Office (Rospatent), of an entity to carry out the functions of the Supreme Patent Chamber.[112] Accordingly, the government, in its decree of September

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technical qualifications necessary to enable him or her to render applicants for patents valuable services." A patent agent in the United States is one who successfully passes the Patent Agent's Exam, administered by the Patent and Trademark Office, but who is not an attorney. *Id.*

106. O Konkurenzii I Ogranichenii Monopolisticheskoi Deyatel'nosti na Tovarnikh Rinkakh [RSFSR Competition and Restriction of Product Market Monopoly Act] § III, art. 10, Sobr. Zakonod. RF, 1991, No. 16, Item 499, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File [hereinafter Anti-Monopoly Law]. For details on the application of the Anti-Monopoly law, *see infra* notes 220-26 and accompanying text.

107. Anti-Monopoly Law, *supra* note 106, § III, art. 10.

108. UK RF [Criminal Code of RF], Sobr. Zakonod. RF, 1996, No. 25, Item 2954, Art. No. 147, *available in* CONSULTANTPLUS (visited Oct. 13, 1997) <http://www.consultant.ru>.

109. *Id.*

110. *Id.*

111. *Id.* Greater punishment includes a fine of 400-800 times the minimum wage, a fine equal to four to eight months of the infringer's income, arrest for four to six months, or imprisonment for up to five years. *Id.*

112. Ukaz Presidenta RF O Rossiiskom Agenstve po Patentam I Tovarnim Znakam [RF

19, 1997, ordered that Rospatent, in cooperation with the Ministry of Justice, present to the Russian government a proposal for the formation of such an entity.[113] This proposal was to be presented to the Russian government within three months from the date of the decree. Thus, the actual establishment of the Supreme Patent Chamber, the absence of which has generated numerous complaints over the last five years, is becoming a reality.

The Supreme Patent Chamber is supposed to be a part of the administrative system designed to adjudicate certain types of patent disputes. Currently, courts resolve patent disputes that are not within the jurisdiction of administrative organs. Some serious problems concerning the protection of patent rights are closely related to the existing structure of both the administrative and judicial systems.[114]

3. *Administrative and Judicial Systems of Patent Adjudication*

Under the Russian Patent Law, some patent disputes can be resolved only by administrative proceedings. When the Patent Office establishes, during preliminary examination, that the subject matter of the claim is not patentable, the applicant may appeal to the Chamber of Patent Appeals within two months.[115] The Chamber of Patent Appeals must then render a decision within two months of the date of appeal. If the application was rejected during substantive examination, the appellant has three months to appeal the Patent Office's decision to the Chamber of Patent Appeals, which then has four months to render a decision.[116] This decision may be appealed

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President's Edict on the Russian Patent and Trademark Agency], Sobr. Zakonod. RF, 1997, No. 37, Item 4267, *translated in* RUSSICA, *available in* LEXIS, Intleg Library, Rusleg File.

113. O Rossiiskom Agenstve po Patentam I Tovarnim Znakam I Podvedomstvennikh emu Organizaziakh [Statute on Patent and Trademark Office and its Subordinate Organizations], Ross. Gazeta, Oct. 7, 1997, *available in* CONSULTANTPLUS (visited Oct. 26, 1997) <http://www.consultant.ru>.

114. *See infra* notes 151-55 and 172-83 and accompanying text.

115. Patent Law, *supra* note 44 (art. 21(3)). The U.S. patent process does not have the step of preliminary examination. Unlike the Russian Patent Office, the U.S. Patent Office can itself institute interference proceedings over patentability issues (i.e., when it needs "to determine who was the first to invent, and therefore entitled to patent an invention, when two or more applicants claim the same invention"). John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 HOUS. L. REV. 67, 97 (1995).

116. Patent Law, *supra* note 44 (art. 21(8)). A U.S. applicant can appeal to the Patent and Trademark Office's Board of Appeals after his application has been twice rejected or finally rejected by the Patent and Trademark Office's patent examiners, or in any interference proceeding over which the Patent and Trademark Office has jurisdiction. Clifford A. Ulrich, *The Patent Systems Harmonization Act of 1992: Conformity at What Price?*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 405, 412 (1996).

within six months to the Supreme Patent Chamber, whose decision is final.[117] If a patent was issued and then invalidated because it either failed to meet the conditions of patentability or because the patent's claim was inconsistent with the patent's description, the invalidation may be appealed to the Chamber of Patent Appeals, which will render its decision within six months.[118] Again, the decision of the Chamber of Patent Appeals may be appealed within six months to the Supreme Patent Chamber, whose decision is final. In addition, the law assigns to the Supreme Patent Chamber exclusive jurisdiction over the following classes of cases: (1) disputes arising when a party wants to obtain a non-exclusive compulsory license for use of a patented invention which was not sufficiently used by its owner;[119] (2) disputes over terms of the agreement in the case of an open license;[120] and (3) disputes over compensation paid to a patent owner whose invention will be used without his consent upon permit from the government.[121]

The civil courts have jurisdiction over all other disputes, including those arising over inventorship, patent ownership, patent infringement, licensing contracts, rights of prior users of patented inventions, and inventions created in the course of employment.[122] A dispute in which at least one party is a physical person, and not a legal entity, can be resolved by a court of general jurisdiction. Arbitration courts adjudicate disputes between "legal entities and/or businessmen."[123] A lawsuit can be filed in a court in the district[124] in which the defendant is situated (the place of residence if the defendant is an individual, or the location of the business or property if the defendant is an organization), or where the contract is performed (if the lawsuit is based on a contract).[125] The prerequisite for the

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117. Patent Law, *supra* note 44 (art. 21(9)). The United States Court of Appeals for the Federal Circuit (CAFC) has appellate jurisdiction over all appeals from the Board of Patent Appeals. 37 C.F.R. § 1.614 (1995). CAFC decisions, in turn, are reviewable by the Supreme Court of the United States. *Id.*

118. Patent Law, *supra* note 44 (art. 29).

119. *See supra* notes 74-75 and accompanying text.

120. *See supra* text accompanying note 88.

121. *See supra* text accompanying note 85.

122. Patent Law, *supra* note 44 (art. 31).

123. Christophoroff, *supra* note 90. Arbitration courts only resolve disputes over economic matters. C.A. GORLENKO ET AL., PRAVOVAYA OKHRANA INTELLEKTUAL'NOI SOBSTVENNOSTI [LEGAL PROTECTION OF INTELLECTUAL PROPERTY] 193 (1995). In the United States, patent disputes are adjudicated by federal district courts. Pegram, *supra* note 115, at 70.

124. The meaning of "district" in Russia is different. It is closer to "county." For example, St. Petersburg, a city with a population of five million, is divided into more than 10 districts, each with its own court of general jurisdiction.

125. GORLENKO ET AL., *supra* note 123, at 194. A plaintiff does not have to file a lawsuit in a lower court (district court). A higher court can adjudicate in the first instance a dispute over which a lower court has jurisdiction. Even the highest Russian court, the

court's adjudication of a patent dispute, except disputes over compensation paid to inventors for inventions created in the course of employment, is the existence of a patent for an invention or industrial design, or of a certificate for a utility model.[126] Since patent rights disputes are usually complex and require specific technical and scientific knowledge, courts appoint their own experts.[127] The court's decision is binding on all persons and entities involved and must be followed throughout the entire territory of the Russian Federation.

III. PRACTICAL IMPLEMENTATION OF LEGAL CHANGES

The practical implementation of the recent changes in patent owners' rights has not been accomplished easily in Russia. One of the major obstacles to Russia's admission to the WTO has been its inadequate protection of intellectual property rights, including protection of patent owners' rights.[128] Although serious problems still remain, some positive advances can be seen in this area. Although acting more slowly than the United States and other western countries would like, Russia is taking steps to improve protection of patent owners' rights.

A. *Overcoming Obstacles to Accession to the World Trade Organization: The Slow Improvement of Patent Rights Protection in Russia*

It has been five years since Russia adopted its first Patent Law, which is generally recognized as "a world-class intellectual property law."[129] The procedure for obtaining a patent under this law is similar to the one in the United States and has proved to be workable. In 1995, Rospatent processed more than 24,000 patent and trademark applications.[130] According to official

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Supreme Court of the Russian Federation, can adjudicate a patent dispute in the first instance if it so chooses. SERGEEV, *supra* note 42, at 24. However, the plaintiff's desire to file suit with the higher court is not enough—after the plaintiff files a complaint with the higher court, the court determines whether it will hear the case or not. GORLENKO ET AL., *supra* note 123, at 195.

126. GORLENKO ET AL., *supra* note 123, at 195.

127. *Id.* at 196. This differs from the U.S. judicial system in which parties to the lawsuit are allowed to use their own experts. *Id.*

128. Bruce A. McDonald, *Protection of Technology Transfers and International IP Agreements*, 6 CENT. EUR. BUS. GUIDE 5 (May 1, 1996), *available in* 1996 WL 8665105.

129. *Remarks by USTR Jeffrey Lang*, *supra* note 6. *See also Russia Adopts Statement on Intellectual Property Protection*, 8 NO. 4 J. PROPRIETARY RTS. 29 (1996) [hereinafter *Statement on IP Protection*]; and Baev, *supra* note 12, at 371.

130. *Clamping Down on Russian Piracy*, LAWYER INTERNATIONAL 7, June 1, 1996, *available in* 1996 WL 9610794. This number is especially significant if compared with the five to seven applications processed in the former Soviet Union ten years ago, *id.*, and with the four patents received by Soviet inventors between 1970 and 1975. *See supra* Part II.A.

Russian statistics, as of January 1, 1996, 76,186 patents for inventions, 4700 patents for industrial designs, 1339 certificates for utility models, and 92,915 trademarks were maintained in Russia.[131] Patent agents are now available to assist inventors in filing patent applications and in maintaining patents.[132]

As of January 1, 1996, inventions can also be protected in the former Soviet republics under a common Eurasian patent document.[133] A favorable decision on one application filed in the Eurasian Patent Office in Moscow has ensured protection of the invention in all countries belonging to the Eurasian Patent Convention (EAPC).[134] Today, a foreign or a native applicant who wants to obtain a patent in the former Soviet republics needs only to be familiar with one legal procedure and one language.[135]

The new law imposing criminal liability for patent infringement demonstrates that Russia is making progress in providing adequate protection of patent rights.[136] Fear of imprisonment has a much greater deterrent effect on would-be infringers than do fines and penalties. "The adoption of the new Criminal Code brings Russia one step closer to compliance with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) and to its accession to WTO."[137]

Improvement in the protection of patent owners' rights is also demonstrated by Russia's taking action to enforce existing laws.[138] According to the Economic Crime Department of the Interior Ministry,

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131. B.A. Lobach, *Chem Chrevato Narushenie Patentnikh Prav* [*Consequences of Patent Infringement*], PATENTI I LIZENSII [PATENTS AND LICENSES], No. 8 (1996) [hereinafter Lobach I]. Foreign firms register 2500 patents in Russia annually. *Russia: Specialists Notice Low Level of Intellectual Property Protection*, DELOVOI MIR, Mar. 26, 1997, *available in* 1997 WL 92972093 [hereinafter *Low Level of IP Protection*].

132. *See supra* notes 103-05 and accompanying text.

133. *Russia: Inventions Will Be Protected in the Former Soviet Republics with a Common Eurasian Patent Document*, MOSKOVSKIE NOVOSTI, Feb. 14, 1996, *available in* 1996 WL 9207687 [hereinafter *Eurasian Patent*].

134. *Eurasian Patent Convention—New Regional System for Protection of Patent Rights*, PATENTS-DESIGNS-TRADEMARKS-LITIGATION (Sojuzpatent, Moscow, Russia), Mar. 1996, at 1. As of March 1996, the Eurasian patent covers two-thirds of the territory of the former Soviet Union, including Azerbaijan, Belarus, Kazakhstan, Russia, Tajikistan, Turkmenistan, Kyrgystan, Moldova and Armenia. *Id.* at 2.

135. Only the Russian text of the patent application is required. *Id.* The cost of obtaining a Eurasian patent is $2100. *See Eurasian Patent, supra* note 133.

136. For more details on this statute, *see supra* notes 108-11 and accompanying text.

137. Solton, *supra* note 18. "More and more people in Russia are beginning to realize that intellectual property costs a lot of money and that 'thieves' must be punished and face both criminal and material sanctions." Alexander Nechaev, *Russia Focuses on IPR, Fight Against Piracy*, TASS, Apr. 23, 1997, *available in* LEXIS, Europe Library, Tass File.

138. "[T]he Russian government, to their credit, have begun some enforcement actions." *Remarks by USTR Jeffrey Lang*, *supra* note 6.

> a total of 123 criminal cases against intellectual property pirates were brought in 1996; in 29 widespread mopping-up operations mounted in 17 cities across the nation, police closed down 16 clandestine businesses, seized over 400 pieces of copying equipment, as well as nearly 100,000 compact discs worth $3 million.[139]

The major incentive for these actions is Russia's desire to join the WTO.[140] In addition, Russia is finally beginning to realize that it is losing revenues from unlicensed goods. Russia estimates that money lost on video counterfeiting alone amounts to $270 million a year.[141] Russia's actions in enforcing its intellectual property laws, even though directed at improving protection of the more tangible copyright and trademark rights, are important for the protection of patent rights as well, because they demonstrate a change in Russia's priorities. Only a year ago, commentators defined enforcement of IP laws as a low priority for Russia.[142] Now, the Russian government has stated that it intends to deal very intensively with problems of protecting intellectual property. It considers this issue "a priority . . . in the work of the relevant agencies, ministries on the territory of the Russian Federation."[143] If Russia's intentions to confront IP protection problems directly lead to concrete actions, eventually foreign and Russian companies "will be able to have some confidence in intellectual property protection in Russia."[144]

Another positive sign is a decision by the Supreme Court of the Russian Federation allowing judicial review of the administrative decision of Rospatent's Patent Chamber of Appeals.[145] This decision was a result of the

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139. Alexei Grishin, *'Intellectual Pirates' Are Still Running Riot In Russia*, BIZEKON NEWS, June 19, 1997, *available in* LEXIS, Europe Library, SBE File. According to a statement by Microsoft in October 1997, "in the past eight months police have conducted 40 raids in Moscow and seized more than 200,000 pirated CD-rom disks." Hanuska, *supra* note 8.

140. For reasons for Russia's desire to join the WTO, *see supra* text accompanying notes 2-3.

141. *EU/Russia: "Substantial" Progress on Trade Issues, Claims EU*, EUR. REP., Sept. 3, 1997, *available in* 1997 WL 13046339. "[E]xperts estimate that no less than 80 percent of all sales in this country are pirated audio, video, software, and data base products, losing it annually at least $1 billion, half of which could replenish its treasury." Grishin, *supra* note 139.

142. *See generally Investment Climate in Russia*, *supra* note 14; Grishin, *supra* note 139; and Kenneth A. Cutshaw, *Russian Roulette*, 43-JAN FED. LAW. 30, 34 (1996).

143. *Press Briefing on Current Activities of RF Government* (Official Kremlin international news broadcast, Apr. 15, 1997), *available in* LEXIS, Europe Library, SBE File.

144. *Remarks by USTR Jeffrey Lang*, *supra* note 6.

145. Postanovlenie Prezidiuma, Verkh. Suda RF, 2 Mar. 1994 [Decision of the Presidium

St. Petersburg City Court's refusal of jurisdiction to the plaintiff Korpachev. Korpachev resorted to the St. Petersburg City Court to challenge the decision of the Patent Chamber of Appeals which affirmed the finding of the Patent Office as to the invalidity of his certificate of authorship.[146] The St. Petersburg City Court refused jurisdiction because: (1) the law of the former USSR did not allow judicial review of administrative decisions on the validity of certificates of authorship, and (2) the new Patent Law of the Russian Federation required the Supreme Patent Chamber to be the final arbiter in hearing appeals from the Patent Chamber of Appeals. On Korpachev's subsequent appeal, the decision of the St. Petersburg City Court was affirmed. However, the Presidium of the Supreme Court reversed and remanded the case to the St. Petersburg City Court, finding the decisions of the lower courts in conflict with the Constitution, which ensures everyone's right to judicial review of administrative decisions.[147] The decision of the Presidium of the Supreme Court created a precedent of judicial review of Rospatent decisions.[148] This is especially important because it mitigates the impact of the Supreme Patent Chamber's absence from the system.[149]

Russia has made definite progress in improving its protection of patent rights. However, problems in this area are still overwhelming. Impediments to U.S. companies doing business in Russia are so serious that the International Intellectual Property Alliance (IIPA) has recommended that the United States Trade Representative (USTR) designate Russia as one of several "priority foreign countries" whose policies or practices are the most harmful to U.S. industries.[150]

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of the RF Supreme Court from March 2, 1994], *available in* MAT.SUDEBN.PRAKT. [Materials of Courts' Decisions] [hereinafter Decision of RF Supreme Court from March of 1994]. Unlike U.S. sources, Russian official sources refer to cases by case numbers or by the date of the court's decision.

146. The Patent Law allows the Supreme Patent Chamber to hear appeals from the Patent Chamber of Appeals. *See supra* notes 115-18 and accompanying text. However, Korpachev could not appeal to the Supreme Patent Chamber because it has yet to come into existence.

147. Decision of RF Supreme Court from March of 1994, *supra* note 145.

148. Even though Russia is not a common law country, a precedent created by a decision of the Supreme Court is likely to be followed by lower courts. SERGEEV, *supra* note 42, at 25. On October 15, 1996, the Highest Arbitration Court of the RF, in its guiding explanation of case No. 225/96, declared that arbitration courts do have jurisdiction to review decisions of the Patent Chamber of Appeals. *See* Materials from Michael Solton, an American attorney from Stepotoe & Johnson specializing in U.S./Russian transactions (on file with author).

149. The impossibility of appealing Rospatent's decisions to the Supreme Patent Chamber may be evidence of a lawless society; however, allowing judicial recourse in questions of the patentability and validity of patents does have its drawbacks. V.A. Mesheryakov, *Patentnie spori v Rossii: Kto postavit tochku? [Patent Disputes in Russia: Who Will Put an End?]*, PATENTI I LIZENZII, No. 9, 7, at 11 (1996).

150. *U.S. Industries Recommend Greater Scrutiny for Countries Lacking IP Protection*, 9 NO. 4 J. PROPRIETARY RTS. 37 (1997).

B. *Contributing to Problems in Patent Rights Protection: The Drawbacks to Russian Legislation*

There are several flaws in Russian patent legislation that contribute to ineffective protection of inventions. A source of major difficulty in enforcing the Patent Law is the absence of the Supreme Patent Chamber to which the law assigns several important functions.[151] One of its functions is to review decisions of the Patent Chamber of Appeals. Since appeals from the Patent Office to the Patent Chamber of Appeals are reviewed by the same individuals,[152] it is unlikely that an unfavorable initial decision will ever be reversed. After the *Korpachev* ruling of the Supreme Court of the Russian Federation,[153] one can resort to judicial review of Rospatent decisions. Unfortunately, the courts' competency in such disputes is questionable. Furthermore, V.A. Mesheryakov, the chairman of the Patent Chamber of Appeals, said that the right to judicial review of Rospatent decisions was allowed for reasons of expediency, rather than for legal reasons.[154] In addition to reviewing Rospatent decisions, there are other functions assigned to the Supreme Patent Chamber. The law mandates that the Chamber resolve disputes arising over non-exclusive compulsory licenses, over open licenses, and over patented inventions used upon permit from the government, but without consent of the patent owner.[155] Parties to such disputes are currently left without remedy, since these disputes are under the exclusive jurisdiction of the Supreme Patent Chamber, which has not yet been established.

Another shortcoming of the Patent Law is that some of its provisions are so broad and unclear that their interpretation can lead to an unpredictable result. Article 10(5) is one example of such ambiguity.[156] Moreover, in granting rights of "further gratuitous use" to prior users of an invention,

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151. The President of the RF, in his edict from September 11, 1997, requested the formation of the Chamber. Subsequently, on September 19, 1997, the RF Government promulgated a decree which ordered Rospatent to present a proposal on the formation of an entity carrying out the functions of the Chamber within three months. *See supra* text accompanying notes 112-13. However, currently the Chamber still does not exist and no exact date has been set for its creation.

152. Cynthia Vuille Stewart, *Trademarks in Russia: Making and Protecting Your Mark*, 5 TEX. INTELL. PROP. L.J. 1, 14 (1996). The appellate procedure in Rospatent is similar to the procedure that existed under the Soviet system. *See supra* notes 34-38 and accompanying text.

153. For details on the Korpachev ruling, see *supra* text accompanying notes 145-47. Despite this ruling, courts may still refuse jurisdiction over these disputes: "functions [of the Supreme Patent Chamber] are sometimes performed by courts, but there is no common practice on this point." Christophoroff, *supra* note 90.

154. Mesheryakov, *supra* note 149, at 11.

155. *See supra* text accompanying notes 119-21.

156. *See supra* text accompanying notes 76-77.

Article 12 uses the terms "scope," "necessary preparations," and "identical solution" without providing any guidance to courts on how to interpret those terms.[157] Article 10(4), in using the terms "inadequate use" and "sufficient excuse" to describe the actions of a patent owner, gives the Supreme Patent Chamber too much discretion in making its decision on granting a non-exclusive license.[158]

In addition to using ambiguous terms, the existing legislation fails to cover some aspects of patent rights protection. For example, despite its title—"Protection of Rights of Patent Owners and Inventors"—Part VII of the Patent Law includes only two articles, neither of which provides assistance to courts in the adjudication of patent owners' and inventors' disputes.[159] Article 31 simply contains a list of potential patent disputes which can be resolved by the courts. Article 32 states that usurping inventorship or making unauthorized disclosure will result in criminal liability; however, in practice, such liability rarely attaches.[160] The law fails to define concrete methods of protection for patent owners' rights. It neither addresses the issue of liability, nor specifies sanctions that can be used by courts. The legislation does not provide any direction for calculating damages in patent infringement cases—a task which has proven to be a source of great difficulty for courts in adjudicating such cases.[161]

Finally, as part of the new Criminal Code, which imposes criminal liability when an infringer causes "significant damages," the term "significant damages" has made many law practitioners unhappy. Aware that "the courts will be hesitant to make such an interpretation,"[162] they want clarification of this terminology. Practitioners also suggest that targeting only repeat offenders, conspirators, organized crime rings, and those offenders who cause "significant damages," renders the measures of the new Criminal Code "too mild to serve as an effective deterrent for infringers."[163]

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157. *See supra* text accompanying notes 78-79.

158. *See supra* notes 73-75 and accompanying text.

159. A law professor at the St. Petersburg State University, A. P. Sergeev, calls Part VII "the most weak and incomplete part of the Patent Law." SERGEEV, *supra* note 42, at 165.

160. *Id.*

161. GORLENKO ET AL., *supra* note 123, at 200. Article 14(2) is the only place where remedies are briefly mentioned: "On [the] patentholder's demand, infringement of [the] patent must be ceased, and [the] natural or legal person infringing [the] patent shall have the duty, in conformity with RF civil legislation, to indemnify [the] patentholder for the losses caused." Patent Law, *supra* note 44 (art. 14(2)).

162. *Russia Steps Up Enforcement of Intellectual Property Rights*, RUSS. & COMMONWEALTH BUS. L. REP., July 29, 1996, *available in* LEXIS, Europe Library, SBE File (citing Eugene Arievich, a partner in the Moscow office of Baker & McKenzie). Irina Savelyeva of Lex International has noted with disappointment that the requirement for damages to be "significant" creates "a burden of proof that does not exist in Western law." *Id.*

163. Solton, *supra* note 18.

C. *Practical Problems in Protecting Patent Rights in Russia*

Protection of patent rights in Russia is one of the major concerns of western companies when they consider investing in Russia. In the meantime, this issue continues to generate complaints from western companies that are already located in Russia. It is the main obstacle to Russia's accession to the WTO. Inadequate protection of patent rights is also hurting domestic companies and discouraging development of innovations within the country. Russia is losing millions of dollars in revenues from unlicensed goods and from its failure to patent inventions abroad. Despite some positive changes, serious problems with the protection of patent rights still exist and continue "to present major problems for both Russian and foreign companies with negative implications for Russian consumers."[164]

1. *Inadequate Enforcement of the Existing Legislation*

Among other problems, most critical is the inadequate enforcement of the existing law.[165] The judicial system in Russia is incapable of resolving complex patent disputes.[166] One of the reasons for this is a lack of experience. For example, the City Court in St. Petersburg, a city with a population of over five million people and a great potential for innovations, adjudicates less than ten patent disputes annually.[167] Such a low number of patent disputes has a historical explanation. In the former Soviet Union, where patent protection was essentially non-existent, patent infringement disputes could not even arise.[168] A majority of other kinds of patent disputes were not within the courts' jurisdiction and had to be decided by administrative organs.[169] The lack of skilled attorneys and their unwillingness to take such cases also contributed to the dearth of judicial decisions regarding patent disputes.[170] Furthermore, courts refrained from

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164. West's Legal News Staff, *Conference Calls for Russia to Take Immediate Steps for IP Protection*, WEST'S LEGAL NEWS, Feb. 15, 1996, *available in* 1996 WL 258540 [hereinafter *Conference on IP Protection*].

165. According to John Romary of Finnegan Henderson Farabow Garrett & Dunner, a Washington-based law firm that specializes in patents, "although in theory Russian law provides world-class protection of IPR according to their terms and conditions, he doubts the practical enforceability of IPR in the Russian Federation." Pamela Pohling-Brown, *Contracting Issues: International Property Rights Require International Reform*, JANE'S DEF. CONT., Sept. 1, 1997, *available in* 1997 WL 9097513.

166. Solton, *supra* note 18; SERGEEV, *supra* note 42, at 26; *Conference on IP Protection*, *supra* note 164; Stewart, *supra* note 152, at 16.

167. SERGEEV, *supra* note 42, at 26.

168. *See supra* Part II.A.

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

170. SERGEEV, *supra* note 42, at 26. Attorney's fees in patent cases were significantly

adjudicating patent cases because the amount of compensation awarded to inventors was usually low (much less than judicial expenses), although the lawsuits themselves were complex and lengthy and required judges to delve into scientific and technical issues.[171]

Unfortunately, this situation has not changed. Parties are still reluctant to bring legal actions. Unlike western countries, Russia has no courts specializing in patent disputes.[172] Patent disputes are resolved by civil courts and arbitration courts that suffer from case overload and a lack of expertise in questions involving the protection of patent rights. The judges lack training and experience in the adjudication of patent law issues, which involve complex technical and scientific matters. The poor record of judicial enforcement also has its roots in judges' reputations for taking bribes[173] and for ignoring the existing laws and decisions of higher courts.[174] The resources allocated to the judicial system are extremely limited.[175] Foreign firms that have brought lawsuits in Russia complain about the impossibility of predicting an outcome, the slow and expensive court actions, and the low fines.[176] Furthermore, Russian patent law specialists complain that the existing courts are inadequate to adjudicate patent disputes.[177] Often the only

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lower than the fees for civil and criminal cases because of the limited financial abilities of inventors. *Id.* at 164.

171. *Id.* Only 200 lawsuits related to inventions were filed annually in the courts of general jurisdiction in the former USSR; arbitration courts did not adjudicate such cases at all. GORLENKO ET AL., *supra* note 123, at 195.

172. The United States CAFC and the German Federal Patent Court both specialize in patent disputes. *See infra* notes 260-63 and accompanying text.

173. Stewart, *supra* note 152, at 16. The parties' faith in a fair outcome is reduced by "the traditionally low level of societal respect for the judicial branch of government." *Id.*

174. Alexei Renkel, *Izobretatel' v sudebnikh jernovakh* [*An Inventor in a Judicial Grindstone*], ZAKON, No. 2, Feb. 1997, *available in* KODEX. Vladimir Shitikov of Soyuzpatent gives the example of the case between the patent owner, an enterprise, and the authors of the invention patented abroad where the judge repeatedly ignored opinions of the higher courts, including the opinion of the Supreme Court of the RF. Vladimir Shitikov, *Delo ne v zakone, a vtom, chtobi on rabotal* [*The Cause is not the Law but its Enforcement*], ZAKON, No. 2, Feb. 1997, *available in* KODEX.

175. Solton, *supra* note 18. Judges become "an endangered species, as their jobs grow increasingly more complex and more dangerous—without a corresponding raise in pay." Suzanne Possehl, *New Crime and Punishment*, 82-NOV. A.B.A. J. 72, 75 (1996).

176. Stewart, *supra* note 152, at 16.

177. Alexei Renkel gives an example of a case involving a dispute between the inventor, Kriman, and his employer, NPO Ekran. Renkel, *supra* note 174. In 1989, Kriman designed an incubator for premature babies. The enterprise Ekran, Kriman's employer, refused to apply for certificates of authorship for inventions included in the design of the incubator, because Kriman did not add the Chief Engineer as an author of the inventions. Kriman himself applied for two certificates and informed directors of Ekran that he received the certificates and that the design included other patentable inventions. Ekran neither disputed Kriman's rights to the certificates, nor attempted to patent other inventions. As a result, from 1989 to 1994, Kriman himself obtained three more patents for two inventions and one

possible explanation that can be given for a court's actions at trial is that the court had decided the case beforehand.[178] Such actions by the Russian courts destroy the faith of future litigants in a fair outcome and discourage them from bringing suits to protect their patent rights.

It is noteworthy that some representatives of the Rospatent administration think that the Russian judicial system is capable of providing adequate protection of patent rights.[179] However, the low number of patent disputes resolved by the Russian courts suggests the contrary. B.A. Lobach of Rospatent, in his articles in *Ekonomika I Jizn'* [*Economy and Life*] and *Patenti I Lizenzii* [*Patents and Licenses*], tried to come up with an optimistic conclusion about the courts' ability to provide adequate protection of patent rights by relying on the courts' decisions in two patent disputes.[180] One may

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industrial design. In 1992, Ekran began producing incubators. Kriman offered Ekran the opportunity to buy a license for the use of Kriman's patents. Ekran refused, and in 1995 Kriman filed a lawsuit in the Nagatinskii District Court, which held for the defendant. The Moscow City Court affirmed the decision. Both courts ignored the fact that the inventions were originally protected by certificates of authorship in accordance with the old Soviet law and instead applied the new Patent Law of the RF. In addition, the Moscow City Court, citing the right of prior use in justifying its decision, never requested the defendant, who should have had the burden of proof, to prove that it had such a right. The court refused to admit the deposition of Ekran's patent specialist, stating that applications for four inventions were drafted at Ekran and were filed by Kriman himself merely because Kriman refused to include the Chief Engineer as an author. Moreover, not only did the court hold that Ekran had a right to use Kriman's patents without a license, it awarded no compensation to Kriman for Ekran's use of Kriman's patents. *Id.*

178. Renkel, *supra* note 174. Another case described by Alexei Renkel involved a decision of the Lefortofskii District Court (Moscow) in April 1996 on the infringement of the plaintiff's invention by the foreign company Rank Xerox. The court allowed the defendant first to dispute the validity of the patent in question, and then to claim that its Moscow office was not a legal entity, thereby sheltering Rank Xerox from responsibility for its actions. However, the court did not even require Rank Xerox to explain the presence of the Rank Xerox office in Moscow and how thousands of its goods have crossed the customs control of the Russian Federation. The testimony of the experts used by the court clearly demonstrated their bias for the defendant, but the court simply ignored the plaintiff's claim of expert partiality and decided for the defendant. The Moscow City Court affirmed the decision. *Id.*

179. Lobach I, *supra* note 131, at 13; B. Lobach, *Kontrafaktnaya produkziya – eto vsegda sankzii* [*Counterfeit Products Always Lead to Sanctions*], EKON. I ZH., No. 26 (1996), *available in* KODEX [hereinafter Lobach II].

180. In the first case, the Jeleznogorsk City Court, on March 16, 1995, found the local company, Kristall, liable for infringing the plaintiffs' patent. In calculating damages, the court took into account the intentional character of defendant's infringement, since Kristall had ignored the plaintiffs' offer to enter into a licensing agreement and continued to produce counterfeit products even after the plaintiffs filed a lawsuit. On appeal, the Kursk Regional Court affirmed. The second case, which was decided by the Savelovskii Municipal Court of Moscow in the summer of 1995, involved unintentional infringement of plaintiffs' patent rights by AO Eliz. The court encountered numerous difficulties because of its lack of experience in adjudicating similar disputes and because of the defendant's attempts to delay the trial. However, the court, to its credit, was able to determine the fact of infringement and calculate

consider these two decisions to be encouraging, but certainly they are not enough to overcome the negative stereotype of Russian courts that people have harbored in their minds for many years. In addition, the third case used by B.A. Lobach to support his conclusion that the courts are able to enforce patent owners' rights has been in litigation since 1993, but has not yet been decided.[181] The four-year litigation of a patent dispute is not a sign of adequate protection of patent rights, especially considering the limited life of patents. Moreover, the decisions that B.A. Lobach relies upon were neither independently published in a legal journal, nor contained in any legal database, thereby diminishing the positive impact of these decisions on potential litigants.[182] Relatedly, the lack of a comprehensive legal journal with published court decisions presents a further impediment to future parties by depriving them of any indication of their chances in court.[183]

Problems with the judicial enforcement of patent rights have led to further non-use of the Russian legal system by patent owners.[184] Thus, no judicial precedent has developed to interpret the existing laws and establish the legal climate in the patent law area.[185] Although the reluctance of patent owners to resort to the courts for the protection of their rights is understandable, it nonetheless compounds the problem, since without practice Russian judges are unlikely to develop expertise in adjudicating patent law disputes.[186]

Another practical problem hindering the effective enforcement of patent rights is corruption and organized crime. CIA Director John Deutch told the U.S. House of Representatives that although calling Russia a lawless state is going too far, organized crime and corruption pose an increasing

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damages in light of the unintentional character of defendant's actions. Lobach I, *supra* note 131, at 12-13; Lobach II, *supra* note 179.

181. The defendant in this fairly straightforward infringement case is the Moscow office of the Japanese firm Shimadzu Corporation. A delay in the trial was caused by the refusal of the defendant to appear in court based on the argument that its Moscow office is not a legal entity. Lobach II, *supra* note 179. It seems that the court should have found a way to address the defendant's argument. *See* Renkel, *supra* note 174, for Alexei Renkel's comments on a similar case against Rank Xerox.

182. Russian legal databases contain only decisions of the Supreme Court of the RF.

183. Stewart, *supra* note 152, at 16.

184. *Id.* "Ironically, many IP owners themselves are, in a sense, contributing to the perpetuation of the enforcement vacuum that is so detrimental to their business in Russia." Solton, *supra* note 18.

185. Stewart, *supra* note 152, at 16.

186. Solton, *supra* note 18. Vladimir Shitikov of Soyuzpatent says that some blame for inadequate protection of patent rights in Russia should be borne by foreign firms because of their failure to prosecute infringers. He explains that even the most progressive law is inefficient when the victim has no desire to protect his or her own rights. Shitikov, *supra* note 174.

threat to its political and economic stability.[187] A feeling of helplessness caused by corruption and organized crime discourages patent owners from actively pursuing enforcement of the law and destroys their belief in the existence of fairness in Russia.

Finally, the misunderstanding of basic patent law concepts among the vast majority of the Russian population, including its most educated citizens, causes a serious impediment to effective protection of patent rights.[188] During the seventy-five years preceding the first Russian Patent Law, the Soviet legal system neither recognized nor protected rights of inventors. Instead, the notion was that a discovery or creation, made for the good of the entire country, was owned by all the people and had to be disseminated to a "wider sector of the population rather than to curtail undue competition and protect the individual rights of creators."[189] The five years following the adoption of the new Patent Law were not enough to change this ideology. As a result, local companies and even judges often do not realize that the use of an invention created by another without permission is theft.[190] The Russian government, wanting to join the WTO, has been forced to recognize that the protection of intellectual property rights in Russia needs improvement. Still, Russia has failed to make IP protection a highest priority, perhaps because the government does not realize the importance of IP protection in achieving Russia's major tasks of economic and social stabilization.[191]

2. *Problems with Inventions Predating the Patent Law of the Russian Federation*

One of the problems in providing adequate protection of patent rights is the uncertainty of ownership with respect to inventions predating current legislation. Certificates of authorship issued in the former Soviet Union still remain in effect, and unless the certificates have been exchanged for patents, the inventions protected by them may be freely utilized by any company.[192]

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187. Possehl, *supra* note 175, at 79. "Extortion, government corruption, organized crime . . . are now thriving in the absence of a firmly entrenched legal system," *id.* at 72, which forces companies to pursue other means in protecting their rights "ranging from manipulation of the political system to use of less desirable means of coercion." Stewart, *supra* note 152, at 16.

188. Solton, *supra* note 18.

189. Baev, *supra* note 12, at 364. For more on protecting inventions under the Soviet system, *see supra* Part II.A.

190. SERGEEV, *supra* note 42, at 165. *See also* Solton, *supra* note 18.

191. Baev, *supra* note 12, at 365.

192. *See supra* note 93 and accompanying text. The law requires payment of compensation to the holder of the certificate. *See supra* notes 94-98 and accompanying text. However, in practice, they can be "utilized by the state or any private company without

Thus, when a foreign or Russian company decides to use an invention protected by a certificate of authorship, it takes the risk to find that, after significant spending on preparation, it may not be the sole user of this invention in the market.

In addition, it is unclear who holds the patent rights to inventions formerly owned by state enterprises and research and development institutes that have been recently privatized.[193] Since state-owned enterprises do not have exclusive rights to inventions protected by certificates of authorship, the inventions cannot be practically transferred to the new company during the process of privatization. Therefore, a foreign company planning "to export a Russian technology that promises to provide a handsome income" has to be aware that any private or state entity, or the government itself, may claim a property right to an invention protected by a certificate of authorship.[194] Moreover, if a privatized company wants to assert rights to its inventions, an infringer may be able to contest the claim of infringement on the basis that the privatization process was not conducted properly with respect to intellectual property rights.[195]

Overlap of the old Soviet law and the new Russian law presents a further impediment to those who want to protect their inventions in Russia. For example, under the current law a person or entity using a patented invention without a license is an infringer and is subject to civil and criminal liabilities.[196] By contrast, the old law allowed the use of a patented invention without a license: since only foreign inventions had patent protection, the law wanted to protect Soviet enterprises from foreign companies who were using a similar invention on the Soviet market.[197] Today, when a dispute involves an invention predating the existing legislation, it is unclear which law should be applied.[198] The inconsistencies between the old law and the

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compensation." Baev, *supra* note 12, at 369.

193. Baev, *supra* note 12, at 369. Analysis of the process of privatization in Russia demonstrated that issues of ownership regarding these inventions were not resolved during privatization of state-owned enterprises. B. Maksimov & V. Sesekin, *Voprosi regulirovaniya imusheztvennikh otnoshenii, svyazannikh s ob'ektami okhranyaemoi intellektual'noi sobstvennosti, voznikayushie v prozesse privatizazii* [*Questions on Regulating Ownership of Intellectual Property Arising in Respect to the Process of Privatization*], KHOZ. I PRAVO, No. 10, at 121 (1995).

194. Baev, *supra* note 12, at 370. The government may do it to "protect national strategic interests, obstruct suspicious projects, or bargain with large foreign investors." *Id.*

195. *Id.* It will be easy to contest the claim on this basis because the intellectual property rights are not usually clarified in the charter or privatization plan of the privatized company. *Id.*

196. E. Danilina, *Zashita prav, vitekayushikh iz patenta, na docydebnom etape* [*Pre-Trial Protection of Patent Rights*], INTELLEKTUAL'NAYA SOBSTVENNOST', No. 7-8, at 78 (1997). *See also* Patent Law, *supra* note 44 (art. 14).

197. Danilina, *supra* note 196, at 76.

198. *Id.*

current legislation create uncertainty with respect to the ownership of patent rights, thereby impeding the protection of patent rights in the country.

Another practical problem results from the economic conditions in Russia. Rapid inflation makes it very hard for the patent owner to estimate the actual amount of damages that may be received.[199] The Moscow City Court, in a decision dated January 21, 1993, awarded the plaintiff Prohorenko 3240 rubles as compensation for the use of his invention by the factory Metallist.[200] The plaintiff requested the court to recalculate the amount of damages due to inflation.[201] On July 5, 1994, the court increased the award to 526,437 rubles, in accordance with the inflation rate in January 1993. The Supreme Court left this amount unchanged, although the plaintiff argued that the Moscow City Court should have relied on the inflation rate as of July 1994 and awarded him 2,896,041 rubles instead.[202] Thus, by the time the plaintiff received the compensation, its actual value had dropped by more than 500%.

3. *Failure to Protect Russian Inventions Abroad*

Russian inventors not only lack adequate patent protection for their inventions in Russia, but their inventions rarely receive protection abroad. Only 100 to 150 patents have been obtained abroad annually during the years of economic reform, compared to 2450 patents received in 1988.[203] The main reason for this is that inventors themselves now have to pay for obtaining patents abroad. In the former Soviet Union, the state incurred all

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199. For example, the inflation rate in Russia was 21.8% in 1996, more than 130% in 1995, and much higher in the previous three years of economic reforms. *Russian 1996 Inflation*, UNITED PRESS INT'L, Jan. 6, 1997 (visited Nov. 8, 1997) <http://www.nd.edu/~astrouni/zhiwriter/97/97010803.htm>.

200. Opredelenie Sudebnoi kollegii po grajdanskim delam, Verkh. Suda RF, 24 Aug. 1994 [Decision of the Judicial Board on Civil Cases of the Supreme Court of RF from August 24, 1994], *available in* MAT.SUDEBN.PRAKT. [Materials of Courts' Decisions].

201. In calculating the amount of damages, the Moscow City Court properly applied the statute effective at the time the defendant began to use the invention but failed to increase the amount in accordance with the rate of inflation. *Id.*

202. The Supreme Court reasoned that the proper rate is the rate existing at the time the trial court initially awarded compensation to the plaintiff. *Id.*

203. A. Kolesnikov & L. Tolchkova, *Sostoyanie rinka otechestvennikh tekhnologii* [*The State of the Market of Native Technologies*], INTELLEKTUAL'NAYA SOBSTVENNOST', No. 11-12, at 13 (1996) [hereinafter *Current State of Native Technologies*]. Expenses related to patenting abroad currently exceed native patenting by 3-5 times. *Id.* Inventions in the former USSR were covered "in more than 50 countries of the world with the total number of patented technologies estimated at 40,000." Irina Skibinskaya, *High-Tech Exports Are To Be Covered By Patents To Avoid Losses*, BIZEKON NEWS, Sept. 29, 1997, *available in* 1997 WL 7802816 [hereinafter Skibinskaya, Sept. 1997].

expenses related to patenting Soviet inventions abroad.[204] Today, Russian inventors lack the money to patent inventions themselves and are denied governmental assistance.[205] In addition, there is little understanding of the value of patenting abroad. Russian inventors, including the government, are not accustomed to considering inventions as a source of revenue. As a result, Russia is losing millions of dollars by selling high-tech items abroad without patenting each of their elements.[206] One recent example involved the sale of twenty-nine MIG warplanes to Malaysia by one of the former vice-premiers. Since some of the technologies involved were not patented abroad, the buyer completely dismantled one of the MIGs and copied it outside of Russia without paying any patent fee whatsoever.[207] Another example involved an exhibit in the United States which was mounted by "a reputed domestic industrialist . . . without bothering to gain patenting safeguards."[208] The result was that most of the displayed innovations "were just pilfered, as admitted by the hosts themselves, and such instances are aplenty."[209] Lack of adequate protection of Russian inventions abroad is also the source of Russia's serious concern regarding the execution of an agreement to export Russian machinery to China.[210] While the value of Russian exports to China is expected to reach $20 billion by the year 2000, only eight patent applications were filed by Russia in the Chinese Patent Office in 1994, compared to 3461 patent applications filed by Japan and 2178 applications filed by the United States.[211] Russia's failure to protect its inventions abroad has impeded the development of innovations in the country and has led to Russia's inability to influence relevant foreign markets, gain

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204. *Current State of Native Technologies*, *supra* note 203. Another reason for a decrease in the number of patents obtained abroad is a lower number of inventions created in Russia in general. Sergei Zhiltsov, *Government To Address Venture Capital Problems*, BIZEKON NEWS, Aug. 14, 1997, *available in* LEXIS, Intlaw Library, Russica File. For more information on problems with innovations in Russia, see Nataliya Davydova, *New Technologies Bank On Small Business*, BIZEKON NEWS, Aug. 14, 1997, *available in* LEXIS, Intlaw Library, Russica File; and *Russia: Development of the Intellectual Property Market in Russia is in Progress*, DELOVOI MIR, Aug. 22, 1997, *available in* 1997 WL 14053905 [hereinafter *IP Market in Russia*].

205. Irina Skibinskaya, *Licenses Are More Profitable To Sell Abroad Than Diamonds*, BIZEKON NEWS, Mar. 26, 1997, *available in* 1997 WL 7801643 [hereinafter Skibinskaya, Mar. 1997]. Patenting abroad used to be a significant source of Russia's profits: "in 1993, for instance, such profits amounted to USD 400 million." *Id.*

206. *Id.*

207. Skibinskaya, Sept. 1997, *supra* note 203.

208. Skibinskaya, Mar. 1997, *supra* note 205.

209. *Id.*

210. V. Evdokimova & V. Blinnikov, *Rossiya—Kitai: pravovaya zashita intellektual'noi sobstvennosti* [*Russia—China: Protection of Intellectual Property*], EKON. I ZH., No. 27, at 20 (1996), *available in* CONSULTANTPLUS.

211. *Id.*

profits from the sale of licenses, and receive the advantages of exporting its goods and technologies.[212]

IV. RECOMMENDATIONS FOR IMPROVING PROTECTION OF PATENT RIGHTS IN RUSSIA

A. *Using Means Available Today: Recommendations to Patent Owners*

While waiting for radical governmental improvements in the protection of patent rights, patent owners—whether they are individuals or foreign or domestic private firms—should take action themselves to protect their rights. Aggressive action by private owners will deter infringers, bring to light the most serious problems in patent protection, and help to eliminate those problems.

Since the resolution of patent disputes in courts is problematic, a patent owner needs to exhaust all possible alternatives before bringing a lawsuit.[213] In the making of a license agreement, contractual safeguards may be used to avoid future disputes should patent misuse occur.[214] To protect their interests, patent owners should include provisions depriving the licensee of all rights granted by the license if the licensee misuses the patent in any way. An effective agreement will also make the licensee accountable for significant liquidated damages (which are now enforceable under Russian contract law) for violations of the licensing agreement.[215] Such provisions will deter the licensee from possible wrongdoing and shift the court's review from complex patent law issues to more familiar contract law issues if the misuse nonetheless occurs. In addition, the parties can "include an international arbitration clause or choice of law provision indicating foreign law" in order to avoid placing themselves into the unpredictable hands of the Russian judiciary.[216]

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212. Russia's failure to patent its inventions abroad is especially unwise since it "has a vastly untapped renewable resource to offer the world as yet." Georgi Osipov, *A Man Who Masterminded VAZ*, BIZEKON NEWS, May 29, 1997, *available in* 1997 WL 7802107. At a recent international show in Brussels, all of the 227 displayed Russian inventions received awards, including Grand Prix for a man-made cardiac valve. *Id.*

213. B.A. Lobach recommends resorting to nonjudicial means of patent protection for an additional reason: if the plaintiff fails to demonstrate to the court that the resolution of the dispute was impossible without judicial intervention, the plaintiff loses its claim in any arbitration court. GORLENKO ET AL., *supra* note 123, at 196.

214. Stewart, *supra* note 152, at 24 (recommendations to trademark owners which are applicable to patent owners as well).

215. *Id.* (citing GK RF art. 330, *translated in* RUSSIA AND THE REPUBLICS LEGAL MATERIALS, No. 33, 160 (John N. Hanland & Vratislan Pechota eds., 1996)).

216. *Id.* "However, companies should be aware that even the successful use of arbitration may not adequately address enforcement deficiencies." *Id.* (citing U.S. Council for

In case of infringement, the patent owner has two options to consider before filing a lawsuit. The patent owner should first make an attempt to peacefully coexist with the infringer on the market.[217] A mutually profitable licensing agreement with provisions protecting the invention from other infringers may be the most feasible way to eliminate the conflict, thereby benefitting both the licensor and the licensee and avoiding expensive and lengthy litigation in the unpredictable legal climate of contemporary Russia. The second option for the patent owner would be to force the infringer to stop using the patent. Warnings, letters threatening to bring a lawsuit, publications in the press, and other means of self-help seem to be the safest, easiest, and most inexpensive ways for patent owners to protect their rights.[218] According to Michael Solton of Steptoe & Johnson in Washington, D.C., these methods are usually chosen by U.S. companies faced with violation of their IP rights in Russia and have proven to be effective in some situations.[219]

When self-help does not work, a victim of infringement still has another option before resorting to a court's assistance: an unfair competition claim may be filed with the Anti-Monopoly Committee (AMC), which is an administrative organ existing in every region of the Russian Federation.[220] With respect to inventions, any use of scientific, technical or industrial information without the owner's consent, as well as any violation of standards of good faith or the encroachment upon industrial property rights, constitute unfair competition.[221] AMC proceedings can provide an effective means for patent owners to protect their patent rights for several reasons. First, the AMC proceedings are well-defined, inexpensive, fast, and closed to the public, which reduces the risk of disclosure of confidential information.[222] Second, the AMC has its own enforcement mechanisms: it

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International Business, Intellectual Property Committee Working Group on Central Eastern Europe/CIS, at 2 (General Discussion Points for Meeting with USTR Officials Regarding IPR Enforcement in Russia) (Mar. 15, 1996) (unpublished manuscript on file with the *Texas Intellectual Property Law Journal*)).

217. Danilina finds from her legal practice that such an option is the best possible solution. Danilina, *supra* note 196, at 79.

218. *Id.*

219. Private Communications with Michael Solton (on file with author) [hereinafter Solton Communications].

220. Danilina, *supra* note 196, at 79; Solton, *supra* note 18; Stewart, *supra* note 152, at 25.

221. Danilina, *supra* note 196, at 79. *See also supra* text accompanying notes 106-07. An unfair competition claim can be filed by any federal or local government agency or any foreign or local business entity; the AMC itself can also initiate such a claim. Solton, *supra* note 18. AMC does not protect patent rights if no proof of unfair trade practices exists, even when a clear violation of patent rights may be evident. *Id.*

222. Solton, *supra* note 18. "As of January 1, 1996, total AMC fees were 50 minimum monthly wages, or approximately $700." *Id.* It takes one month for AMC to determine

may grant injunctive relief, impose severe administrative fines, or file civil and criminal charges against the infringer.[223] Third, administrative enforcement mechanisms in Russia are more developed and have proved to be more efficient than judicial enforcement.[224] Fourth, AMC proceedings do not bar subsequent or concurrent legal action.[225] Finally, a "favorable final AMC decision may serve as a deterrent for other existing and potential infringers of petitioner's IP rights or as a precedent in any subsequent AMC proceedings involving the similar rights."[226] Thus, the AMC proceedings can effectively protect patent owners when the infringer's actions constitute unfair trade practices.

When all other alternatives have been exhausted, the patent owner should not ignore the availability of recourse to the courts. Although the Russian judicial system is far from flawless, the patent owner still should seek recourse in the courts instead of passively waiting until IP protection changes in Russia. Russian patent law specialists are unanimous in their insistence that the new Patent Law provides adequate protection of patent rights and that patent owners should pursue their claims in courts to avail themselves of remedies provided by the law and to punish wrongdoers.[227] To increase the possibility of getting a court's favorable decision, though, the patent owner, before bringing suit, needs to be well-prepared for trial. Thorough preparation for trial requires that a plaintiff secure three specific categories of proof. First, the patent owner must establish that the alleged infringer is using exactly the same invention claimed in the patent, or else the use will not be considered an infringement. Additionally, the patent owner should have evidence of its lost profits and harm to its business reputation in order to lay grounds for the court's award of damages. For a more effective

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whether alleged anti-competitive practices exist (though sometimes it may be extended to three months), and another three months to complete the proceeding if AMC determines that a violation is likely to exist (though the completion of the proceeding may be extended up to six additional months). *Id.* Thus, the proceedings will never take more than twelve months.

223. Danilina, *supra* note 196, at 79. Fines imposed on the infringer range up to 25,000 minimum monthly wages, or approximately $380,000; fines imposed on the infringer's officers and directors, in their individual capacities, can reach as high as 200 minimum monthly wages, or approximately $30,000. Solton, *supra* note 18. In addition, AMC "can freeze bank accounts, seize goods, and compel the payment of fines up to 5,000 minimum monthly salaries." Stewart, *supra* note 152, at 25.

224. Solton, *supra* note 18.

225. *Id.* Where a party appeals an AMC's decision in court, enforcement of the AMC decision is suspended until the court rules on the appeal. *Id.*

226. *Id.* A favorable AMC decision can be used as evidence in a subsequent civil or criminal trial. *Id.*

227. *See generally* Lobach I, *supra* note 131, at 13; Shitikov, *supra* note 174; Danilina, *supra* note 196, at 80; V. Trushina, *Izobretatel' pobedivshii zavod* [*The Inventor Winning the Factory*], INTELLEKTUAL'NAYA SOBSTVENNOST', No. 3-4, at 56 (1996).

trial, it is also helpful to produce a sample of the counterfeit product.[228] Another important threshold concern for plaintiffs is the choice of forum. B.A. Lobach recommends that the patent owner seek to have a higher court (such as a regional court) adjudicate the dispute in the first instance in order to receive a more skilled review of the claim.[229] The active use of judicial enforcement by patent owners will lead to the refinement of patent legislation and, more importantly, will help Russian judges to develop expertise in the adjudication of patent disputes.[230]

Patent owners can also promote their interests by influencing legislative changes in Russia. In October of 1997, trademark holders launched the Association of Trademark Owners, which advocates protection of trademark rights against "rampant trademark infringement" in the country.[231] Gene Arievich, of the Moscow firm of Baker & McKenzie, believes that such a powerful public organization was much needed "to introduce changes in the laws at the State Duma level . . . [and] to work closely with the Ministry of Interior, State Customs, even the Anti-Monopoly Committee, and make them aware of the issues."[232] The protection of patent rights is no less necessary today in Russia. The formation of an organization that could join patent owners to lobby its interests to the Russian government would promote stronger patent protection in Russia.

Finally, foreign companies that either enter into licensing agreements with Russian companies or have Russian partners can take several practical steps to protect their patent rights under Russian law. For example, when a foreign company provides a Russian company with the right to use a foreign invention, both the invention and the licensing agreement transferring rights of use to the Russian company should be registered with Rospatent.[233] Otherwise, the foreign company will not be able to defend its patent rights, and the licensing agreement could be deemed invalid, with the further consequence that the tax authorities would disallow tax deductions for

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228. Danilina, *supra* note 196, at 80.

229. GORLENKO ET AL., *supra* note 123, at 195. District courts have little experience in resolving patent disputes since traditionally patent disputes were adjudicated by higher courts. *Id.* On how to get higher courts to try patent disputes, see *supra* note 125.

230. Solton, *supra* note 18. "[I]f no one brings suit, Russian judges are unlikely to develop the much needed IP expertise in the near future." *Id.*

231. Erin Arvedlund, *Trademark Association Founded*, MOSCOW TIMES, Oct. 14, 1997, *available in* LEXIS, Europe Library, Mostms File.

232. *Id.* As Arievich notes: "The association will lobby the government via . . . Rospatent." *Id.*

233. Scott Antel & Mikhail Bortnyaev, *Intellectual Property: Protecting Your Rights*, MOSCOW TIMES, July 16, 1996, *available in* LEXIS, Europe Library, Mostms File. The procedure of registering the invention is often "overlooked or ignored." *Id.* Note that inventions that are well-known worldwide do not need to be registered. *Id.*

royalty payments made by the Russian user.[234]

Where foreign companies have Russian partners, they have to be particularly careful in using any of the Russian partners' inventions predating current legislation. If an invention is still protected by a certificate of authorship, the foreign company should insist that its partner exchange the certificate for a patent.[235] However, the foreign company needs to be aware that exchanging the certificate for a patent does not guarantee the exclusive rights to the invention where the invention was rightfully used by any party at the time the application for a patent was filed.[236] Moreover, when the Russian partner is a privatized enterprise or a former state research and development institute, the foreign company must verify that the process of privatization was proper and that the patents have been recorded as part of the Russian company's assets.[237] Because of the uncertainty surrounding ownership of inventions predating the new Patent Law, companies should conduct extensive research before deciding to use such inventions.

B. *Radical Changes Necessary to Provide Strong Protection of Patent Rights in Russia: Proposals for Government Actions*

Although private companies must undertake "defensive maneuvers" before they can have confidence in the protection of their patent rights in Russia, a permanent solution to the problems in Russian patent law will be impossible without governmental involvement.[238] Russia cannot wait until the actions of patent owners slowly lead to improvement of patent protection. Russia must take immediate action since adequate patent protection is vital to Russia's accession to the WTO and to the achievement of "Russia's strategy to attract and maintain foreign investment in the country."[239]

The first step the Russian government should take is to establish the

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234. *Id.* Recent years have seen "several instances in which tax authorities challenged the validity of deductions for profits tax purposes for unregistered license agreements." *Id.*

235. Baev, *supra* note 12, at 369. For more on problems with inventions predating current legislation, see discussion *supra* Part III.C.2.

236. *See* Use of Inventions Protected by Certificates of Authorship, *supra* note 94.

237. Baev, *supra* note 12, at 370-71. Since the IP rights are rarely clarified, companies should "insist that the Russian partner disclose in the joint-venture agreement all its legal rights and obligations" with respect to inventions in its possession; the Russian partner should also assure that it "will remedy all possible legal defects and disputes that might arise." *Id.* at 371.

238. Stewart, *supra* note 152, at 20.

239. The International Conference on the Protection of Trademarks and Patents in Russia, held in Moscow on February 9, 1996, issued a consensus statement requesting the Russian government to take "immediate steps to strengthen intellectual property, trademark and patent protection" in order to join "the World Trade Organization as a full member" and to "achieve Russia's strategy to attract and maintain foreign investment in the country." *Conference on IP Protection*, *supra* note 164.

Supreme Patent Chamber as the Patent Law of the Russian Federation requires.[240] Although the Patent Law was enacted on September 23, 1992, it was not until September 19, 1997, that the Russian government ordered Rospatent to present a proposal for the formation of the Chamber by December 19, 1997.[241] As a result, today's administrative system still lacks an effective mechanism by which to appeal Rospatent's decisions on patentability.[242] The attempts of the Supreme Court and of the Higher Arbitration Court to correct this flaw by allowing recourse to the civil courts did not solve the problem because the civil courts' judges lack expertise in adjudicating patent disputes.[243] Not only is the Supreme Patent Chamber needed as a venue in which patent owners may appeal decisions of the Patent Office, the establishment of the Chamber is also needed for those parties who have been left without remedy in disputes over which the Supreme Patent Chamber has exclusive jurisdiction.[244]

The most serious obstacle to the importation of foreign technology and investment in the country is Russia's inability to enforce existing patent legislation.[245] To remove this obstacle, the Russian government must take steps to provide an effective enforcement infrastructure; this can be accomplished only by creating a judicial system capable of addressing complex patent law issues.[246] The best solution would be to establish specialized patent courts with trained and experienced judges and attorneys.[247]

Although the original version of the Patent Law of the Russian Federation provided for the establishment of specialized patent courts, at the last moment the lawmakers refused to create such courts.[248] Russian patent law specialists give several reasons for the lawmakers' opposition to the establishment of patent courts. First, the Supreme Court of the Russian

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240. *Id.*

241. *See supra* text accompanying notes 112-13.

242. *See supra* notes 151-53 and accompanying text.

243. *See supra* text accompanying note 153-54. Four trademark cases have been on appeal in the Moscow City Court from the Patent Chamber of Appeals since 1995 and still have not been decided despite the relative simplicity of trademark cases compared to patent disputes. Mesheryakov, *supra* note 149, at 11.

244. *See supra* note 155 and accompanying text.

245. *Statement on IP Protection*, *supra* note 129. One of three major recommendations given to the Russian Government during the International Conference on the Protection of Trademarks and Patents was to "[e]nforce existing law to stop rampant trademark, patent and copyright infringement." *Id.*

246. *Id.*

247. *Investment Climate in Russia*, *supra* note 14. This proposal is supported by many patent law specialists. *See generally Clamping Down on Russian Piracy*, *supra* note 130; GRISHAEV, *supra* note 56, at 45-46; Solton Communications, *supra* note 219; Renkel, *supra* note 174; and Mesheryakov, *supra* note 149, at 8-10.

248. GRISHAEV, *supra* note 56, at 46.

Federation was against further division of the Russian judicial system, which already had separated the Constitutional Court and arbitration courts from the courts of general jurisdiction.[249] Furthermore, the Supreme Court was of the opinion that the courts of general jurisdiction had accumulated enough experience to adjudicate patent disputes.[250] Second, the need for judges who have technical rather than just legal backgrounds would in turn require new rules of judicial procedure.[251] Finally, in the opinion of Russian lawmakers, the number of patent disputes is too low to require specialized courts for resolution of such disputes.[252]

None of these reasons, however, withstands scrutiny. First, other countries with separate patent courts consider this specialization advantageous to their legal systems since it provides an effective mechanism to adjudicate patent disputes.[253] Furthermore, contrary to the belief of the Supreme Court, the five years following the adoption of the new Patent Law have proven that the courts of general jurisdiction have *not* developed expertise in resolution of patent disputes.[254] By the same token, having judges with a technical background is so important for the effective adjudication of patent disputes that it would justify changes to the procedural rules in patent courts.[255] Finally, the low number of patent suits in Russia is more likely a result of the lack of an adequate judicial infrastructure to adjudicate such disputes, rather than a demonstration of a low level of patent infringement in the country.[256] Alexei Renkel, commenting on the negative attitudes of the Supreme Court and the Ministry of Justice toward the establishment of specialized patent courts, has predicted that if this opposition to patent courts remains, patent disputes in Russia will simply become extinct.[257]

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249. Mesheryakov, *supra* note 149, at 7.

250. *Id.* at 8.

251. *Id.*

252. Renkel, *supra* note 174.

253. *See generally* Pegram, *supra* note 115. In 1981 testimony, Howard T. Markey, then Chief Judge of the Federal Circuit, pointed out an advantage of specialization that would be even more aptly applied to a trial court: "If I am doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker, or a number of them, than someone who does brain surgery once every couple of years." *Id.* at 71 n.12 (quoting *Court of Appeals for the Federal Circuit: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 42-43 (1981)).

254. *See supra* notes 166-72 and accompanying text.

255. Mesheryakov, *supra* note 149, at 14. The patent court in Germany currently has about 100 judges with technical backgrounds and 50 judges with degrees in jurisprudence. *Id.*

256. *See supra* notes 173-75 and accompanying text.

257. Renkel, *supra* note 174.

Examples of patent systems in other major industrial countries demonstrate that patent disputes are more effectively addressed by separate patent courts or by specialized patent divisions of trial courts.[258] In England, issues of a patent's validity and infringement are brought before the Patents Court, a part of the High Court's Chancery Division, and before the Patents County Court, which was created in 1990 to adjudicate patent disputes between entities of small and medium size.[259] In Germany, all patent validity disputes are resolved by a special patent court in Munich.[260] Infringement suits are brought in the federal courts of general jurisdiction, which have a special panel, or "senate," for industrial property infringement cases.[261] In Japan, although issues of patent validity are within the exclusive jurisdiction of the Patent Office, patent infringement cases are decided by the courts of general jurisdiction, which have special intellectual property sections to adjudicate patent disputes.[262] In the United States, no patent specialization exists at the trial level, though all patent disputes are resolved by the federal rather than state courts. The United States does provide specialized patent adjudication at the appellate level and requires that all patent appeals be argued before the Court of Appeals for the Federal Circuit. The Federal Circuit has exclusive jurisdiction over district court decisions involving patent issues, as well as over decisions of the Patent and Trademark Office's Board of Patent Appeals.[263]

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258. Mesheryakov, *supra* note 149, at 9; Pegram, *supra* note 115, at 71.

259. Pegram, *supra* note 115, at 103-05. Patents Court cases may take up to several years, but if parties agree to a simplified trial, even complex litigation can be completed within a year. *Id.* at 104. The Patents County Court, created to address concerns over the litigation cost in the Patents Court, has jurisdiction in all of England and Wales with no limitation on amount in controversy or geography. *Id.* at 104-05. Unlike the Patents Court, the Patents County Court has strict limits on pretrial time and cheaper, speedier and more informal procedures for litigation. *Id.* at 105.

260. Thomas H. Case & Scott R. Miller, Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301, 333 n.103 (1984) (citing *Hearings on S. 677 & S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 96th Cong., 1st Sess. 478, at 612-13 (1979)).

261. N. Thane Bauz, *Reanimating U.S. Patent Reexamination: Recommendations for Change Based upon a Comparative Study of German Law*, 27 CREIGHTON L. REV. 945, 963 (1994).

262. Pegram, *supra* note 115, at 109-10. Among forty-two civil divisions of the Tokyo District Court, two divisions deal with intellectual property. *Id.* at 47. Although most cases are handled by a single judge, patent disputes require collegial decision by three judges. *Id.*

263. *Id.* at 71. The CAFC was created in 1982. *Id.* "The Federal Circuit, which is highly specialized, is considered a success," largely because the establishment of the court improved enforcement of the law and eliminated forum shopping. *Id.*

Russia may be able to find the most workable model for its patent courts, not in the judicial systems of the United States, Japan, or Germany, but in the English Patents County Court.[264] The Patents County Court has proved to be an effective venue for the adjudication of patent disputes: it received seventy-seven cases in its first fifteen months and 307 cases in its first four years, and has attracted cases that would not have been brought in other courts.[265] By contrast, within the U.S. patent system judges trying patent cases often lack special expertise in the area,[266] and while both Japan and Germany have specialized IP divisions to adjudicate patent infringement disputes, they do not have separate patent courts. Still, the establishment of separate patent courts seems to offer the fastest and most reliable way to provide strong enforcement of patent rights in Russia. While the formation of specialized IP divisions in existing courts would involve overcoming the negative reputations that current courts and judges traditionally have in Russia,[267] newly-established, independent patent courts would not have to share the reputation of existing courts. A separate system of courts that would hear only patent cases would result in the fast development of "a cadre of skilled judges."[268] These courts could employ special procedures tailored to the specific needs of patent litigants. Technical specialists and scientists, rather than only jurists, could be allowed to become judges in these courts. All of England's Patents County Court judges, for example, have technical knowledge.[269] As in the Patents County Court, the patent courts in Russia could use simplified procedures in order to allow "a single patent agent familiar with a patent" to initiate an action.[270] The government could encourage the use of these courts by expediting litigation, decreasing costs, "increasing fines for infringement, and adding additional remedies such as lost profits or treble damages."[271] The availability of patent courts

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264. Considering the large territory and population of Russia, one patent court is unlikely to satisfy Russia's needs. A system of regional patent courts may be a more effective solution. In addition, the patent courts' jurisdiction perhaps should not be limited to patent disputes, but should include other IP disputes as well.

265. Pegram, *supra* note 115, at 106, 108 (citing Alan Burrington, *Costs in the Patents County Court*, 22 CIPA 26, 30-32 (1993); Alan Burrington, *The UK Patents County Court—Is it Working?*, PAT. WORLD, Dec. 1991/Jan. 1992, at 41; Letter from The Honourable Peter Ford, Judge of the Patents County Court, to John B. Pegram (July 18, 1994) (on file with the *Houston Law Review*)).

266. Pegram, *supra* note 115, at 71 (citing The Advisory Comm'n on Patent Law Reform, Report to the Secretary of Commerce 75 (1992)).

267. For more about the reputation of Russian judges, *see supra* notes 173-78 and accompanying text.

268. Stewart, *supra* note 152, at 20.

269. Pegram, *supra* note 115, at 105 (citing Interview with His Honour Judge Ford, 6 PAT. LITIG. ASS'N NEWSL. 1, 7, 11).

270. Pegram, *supra* note 115, at 105-06.

271. Stewart, *supra* note 152, at 20.

with judges knowledgeable in patent law issues would build patent owners' trust in the courts' ability to resolve patent disputes and would encourage patent owners to file lawsuits. Furthermore, it would encourage western companies to bring technologies to Russia, since the technologies would be protected by mechanisms similar to those existing in their home countries.

Another step that the Russian government should take to ensure the adequate protection of patent rights is to provide training for the judiciary on patent legislation and regulation.[272] Regardless of whether the government decides to form specialized patent courts or leave patent disputes for the courts of general jurisdiction and arbitration courts, most judges in today's Russia lack training and experience in deciding complex patent law issues.[273] The government needs to provide the necessary means to educate judges involved in patent litigation. The training would be best accomplished with the help of foreign judges who have "special expertise in intellectual property cases, such as the judges of the U.S. Federal Circuit,"[274] the judges of the English Patents County Court, the judges of the IP divisions of German and Japanese courts, or judges from other countries who have expertise in the resolution of patent disputes. Local training programs should also be implemented to increase judges' knowledge of patent legislation and of decisions of the Supreme Court on patent law issues. In addition, a comprehensive law journal publishing the courts' decisions on patent law issues is needed to help interpret the law, to allow parties to evaluate their chances in future litigation, and to throw light upon the courts' level of expertise in adjudicating patent disputes.[275] These few simple actions would ensure conformity in the application of the laws, "further facilitate growth of the legal system," and "help give credibility to the judicial branch."[276]

The government must take action to overcome the communal attitude toward inventions (an attitude rooted in the Soviet ideology) held by the Russian population. Russians have to realize that inventions are no longer owned by all the people,[277] and that using an invention without its owner's permission is theft.[278] The recognition of patent owners' rights by Russian officials and public and private companies would help stop rampant patent

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272. *Conference on IP Protection*, *supra* note 164.

273. *See supra* notes 166-75 and accompanying text.

274. Stewart, *supra* note 152, at 21.

275. Specifically, Russia needs a regular and central publication of courts' decisions in a form easily accessible to the public; a journal that perhaps even should be distributed in English to other Patent and Trademark Offices. Stewart, *supra* note 152, at 21 (citing U.S. Council for International Business, Intellectual Property Committee Working Group on Central Eastern Europe/CIS, at 1 (Mar. 15, 1996) (unpublished manuscript, on file with the *Texas Intellectual Property Law Journal*)).

276. Stewart, *supra* note 152, at 20-21.

277. *See supra* Part II.A.

278. Solton, *supra* note 18.

infringement in the country. To provide education on the nature of patent rights, the government needs to organize training seminars covering various aspects of patent law, with emphasis on the consequences of its violation. Involving the media in the process of education could be another way to raise the level of awareness of fundamental patent law concepts among the Russian public.

Finally, the Russian government should improve patenting and licensing of Russian inventions abroad.[279] Again, seminars for public and private companies and for research and development institutes need to be implemented to explain the need for protecting inventions abroad, the advantages of patenting and licensing abroad, and the process of patenting and licensing in different countries. Since Russian patent owners often lack the money to patent their inventions abroad, the government should consider subsidizing such patents. Adequate protection of Russian technologies abroad would not only facilitate development of innovations in the country, but would also allow Russia to play a more important role in foreign markets.[280]

V. CONCLUSION

The past five years have been years of revolutionary change in Russia: the nation has undergone the transition from a socialistic country with a centrally-planned economy to a capitalistic country with "a market economy."[281] This transformation is clearly seen in Russia's reformation of its patent law. The legislation adopted in September 1992 officially ended state ownership of inventions and returned to inventors the exclusivity of ownership that inventors in other countries have enjoyed since the fifteenth century. Unfortunately, merely changing the legislation could not by itself ensure the protection of patent owners' rights. Adoption of the new law did not erase seventy-five years of disregard for IP owners' rights from the minds of the Russian people. This means that the Russian government must now develop and implement an extensive and systematic process of educating the Russian people. More importantly, the Russian government must adopt an effective mechanism for enforcing the existing laws in order to deter infringers from wrongdoing. A workable enforcement mechanism is especially needed given Russia's current political and economic instability. Although other obstacles impede strong patent protection in the country, the lack of a judicial infrastructure that is capable of adjudicating complex patent

279. *See supra* Part III.C.3.

280. *See supra* note 212 and accompanying text.

281. *US to Review Rules of Trade with Russia*, AGENCE FRANCE-PRESSE, Sept. 23, 1997, *available in* 1997 WL 13400527.

disputes is the most serious impediment and requires immediate resolution.

In August of 1993, Peter B. Maggs, Corman Professor of Law at the University of Illinois, wrote of Russia's pressing need for an effective patent law judiciary:

> Russia has now adopted industrial property legislation generally complying with international standards. However, until it has a strong and functioning commercial court system with serious enforcement powers, there is a great risk that the new legislation will remain on paper. Only backed by a strong judiciary can the laws effectively encourage innovation and high-quality production.[282]

At the time of this writing, more than four years after Professor Maggs wrote his essay, Russia still lacks a judicial system capable of providing adequate protection of patent owners' rights. Meanwhile, given the existing economic conditions, Russia's need for a strong patent protection system has become critically urgent. Russia is "decidedly behind the curve in most technologies."[283] Therefore, there is a "crying need for technology transfer as an aid to modernizing" Russia's national economy.[284] The Russian economy would benefit not only by gaining products imported from production facilities abroad, but also by achieving "large-scale investment in high-technology production facilities employing domestic workers and providing both managerial skills training and an entrepreneurial attitude."[285] Russia, with the huge potential of its market and its "lack of competition from domestic producers,"[286] seems to be a particularly attractive country for such technology transfer. However, a strong patent protection system must be in place "to encourage outside investment in high-technology goods and production."[287] Furthermore, Russia's accession to the WTO would be extremely beneficial for the country.[288] However, the major obstacle to Russia's WTO membership is inadequate protection of intellectual property rights, including the failure to protect the rights of patent owners. Russia has long been famous for the genius of its engineers and scientists. Adequate

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282. Peter B. Maggs, *Industrial Property in the Russian Federation*, *in* THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE: ESSAYS IN HONOR OF F.J.M. FELDBRUGGE 377, 390 (George Ginsburg et al. eds., 1996).

283. Erickson, *supra* note 53, at 250.

284. *Id.*

285. *Id.* at 251.

286. Theodore K. Smith, *Russian Legislation Expands Options Available to Foreign Exporters*, RUSS. & COMMONWEALTH BUS. L. REP., Feb. 12, 1997, *available in* LEXIS, Europe Library, SBE File.

287. Erickson, *supra* note 53, at 252.

288. *See supra* text accompanying notes 2-3.

legal protection of Russian inventions both at home and abroad will create incentives for the development of native innovations, thereby helping Russia to gain a respectable position in the global economy.

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