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GAY AND LESBIAN RIGHTS IN THE UNITED KINGDOM: THE STORY CONTINUED

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I. INTRODUCTION

It is impossible to be almost equal before the law. Equality is an absolute. It is indivisible and it must be applicable to all.[1]

An earlier article in this Review[2] described the legal context in the United Kingdom (specifically, in the law of England and Wales[3]) within which claims for equality between gay men, lesbians, and the heterosexual majority come to be determined. These claims are broadly similar to those now being made in most Western legal systems—protection for lesbians and gay men against negative or less favorable treatment by reason of their sexual orientation. The article showed how, having neither a written constitution[4] nor a catalogue of fundamental rights with special legal status,[5] English law at present has no general principle enshrining such protection. Nor are there other relevant rights affirmatively guaranteed by law, like that of privacy, free expression, or of assembly, which would protect the assertion of sexual

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1. Lord Alli, speaking in the House of Lords on April 13, 1999 in the debate on the Sexual Offences (Amendment) Bill, where for the second time a proposal to equalize the age of consent between gay and straight couples was rejected. H.L. Off. Rec., vol. 599, col. 737. *See also infra* Part III.A.2.

2. Philip Britton, *The Rainbow Flag, European and English Law: New Developments on Sexuality and Equality*, 8 IND. INT'L & COMP. L. REV. 261 (1998).

3. "English law" will be used to refer to the law of both England and Wales, since—except for "legislation" recently adopted by the new National Assembly for Wales—the law in Wales is for most purposes identical to that in force in England, though under the Welsh Language Act 1993, ch. 38, §§ 22-24, court proceedings in Wales may take place in the Welsh language. No slight to the people, culture, or language of Wales is intended in the Article.

4. Few states are still without written constitutions—the United Kingdom of Great Britain and Northern Ireland (United Kingdom) and the Kingdom of Saudi Arabia are notable examples of this shrinking and anomalous class.

5. The Human Rights Act 1998, ch. 42, will bring the broad principles of the European Human Rights Convention into direct operation in English law for the first time when it enters force on October 2, 2000, but the approach adopted falls short of giving these principles (or the Act itself) a higher status than existing legislation. *See infra* Part III.A.5.

identity and assist the activities of gay or lesbian pressure groups by encouraging a strong public presence.

This absence of a "rights culture" comparable with that in North America is, the article argued, the result of two linked features: the supreme and all-powerful position accorded to Parliament as a source of law by the various laws and conventions which together form the British Constitution; and the prevailing ideology of the common law of England, as developed and interpreted by the judges of the superior courts.[6] Fear of overly-visible creativity, which might be thought to trespass into the field of action which properly belongs to Parliament, has discouraged the courts from themselves inventing or developing rights couched in terms of sexual orientation. In addition, the courts have maintained their traditional focus on *individual* rights, especially those gained through contract or in property, and have been reluctant to disallow or weaken the effect of any of these rights by reference to questions of membership of a *group or class*, like a disadvantaged minority. Thus the English courts have found no acceptable route compatible with the common law by which to condemn or discourage discrimination, whether based on race, ethnic origin, gender, disability, or sexual orientation.

In relation to race, ethnicity, gender, and disability, Government and Parliament have together filled the gap by statute, making discrimination illegal in employment as well as in the provision of goods and services.[7]

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6. For this purpose the superior courts, whose decisions are regularly reported and can thus "make law," are three: the High Court (hearing both civil and criminal cases at first instance, on appeal, and by way of review, with three Divisions according to subject matter: Queen's Bench, Chancery, and Family); the Court of Appeal (appeal only; cases divided between Civil and Criminal Divisions); and the House of Lords in its judicial capacity as supreme court of appeal for the United Kingdom (though not in criminal cases from Scotland, where the Court of Session in Edinburgh has the last word). The decisions of courts in England and Wales below these three are seldom reported and thus play little part in the development of the law. *See* RICHARD WARD, WALKER & WALKER'S ENGLISH LEGAL SYSTEM 73-87, 161-176 (8th ed. 1998).

7. Race Relations Act 1976, ch. 74 (direct or indirect discrimination based on race, nationality, national or ethnic origin made illegal); Sex Discrimination Act 1975, ch. 65 (similar rules for discrimination based on gender or marital status, now extended to cover transsexuals); *see infra* note 154 and accompanying text; Equal Pay Act 1970, ch. 41 (employer must justify differences of treatment between relevant employees of different gender). *See* GEOFFREY ROBERTSON, FREEDOM, THE INDIVIDUAL AND THE LAW 462-96 (7th ed. 1993). These statutes have now been joined by the Disability Discrimination Act 1995, ch. 50, and the Race Relations (Amendment) Bill currently in Parliament. As Robertson points out, the legal framework affecting sex discrimination in employment was transformed when the United Kingdom became a member of the European Economic Community (as it was then) on January 1, 1973, since Article 119 of the Treaty of Rome enshrines a principle of equal pay for equal work and since the European Community has exercised its power to legislate in terms broader than the existing U.K. law. See Council Directive No. 76/207, 1976 O.J. (L39/40) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and promotion and working conditions. Both of these European rules—under different conditions—can be relied on in litigation before the English courts, taking precedence over any

However, they have done so piecemeal, in the process creating three separate monitoring and enforcement agencies.[8] And in no case have they been *required* so to act by the courts: the scenario familiar to North American readers from the December 1999 judgment of the Supreme Court of Vermont in *Baker v. State*,[9] which imposed a duty on that State to provide for recognition of same-sex relationships on an equal basis with those of heterosexuals, would be unthinkable in England. The English courts may—and frequently do—suggest in their judgments that legislation is needed to solve a problem which the judges feel goes beyond the court's scope for development of the law,[10] but such a statement has no legal consequences.

As far as sexual minorities[11] are concerned, Government and Parliament have so far refused to recognize the need to articulate, then to legislate, new positive legal rights of a general kind, though a piecemeal dismantling of existing discriminations is taking place. Such discriminations are clearest in the field of criminal law as it affects gay men: an age of consent for gay male sexual activity which is higher than that for heterosexuals[12] and a series of specific offenses used only, or mainly, against expressions of gay male

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English law in case of conflict. *See also* Britton, *supra* note 2, at 295-304. In January 1998 the Equal Opportunities Commission (E.O.C.), a public body with a statutory responsibility for enforcing and reviewing all the law on gender discrimination, published a consultation paper, *Equality in the 21st Century: A New Approach*, which proposed to roll the Sex Discrimination Act 1975 and the Equal Pay Act 1970 into a single new statute, together with other anti-discrimination measures, including protection for gay men, lesbians, and transsexuals. By the time the proposals became final and were presented to the Government, gay men, lesbians, and transsexuals were no longer part of the proposal. *See* Francis Gibb, *Call for New Laws to Banish Sex Bias*, TIMES (London), Nov. 6, 1998. A year later, in November 1999, the E.O.C. under a new Chairwoman had widened its approach and was once again calling for legislation against discrimination affecting gay men and lesbians. *See* <http://www.eoc.org.uk.html/press_releases_1999_23.html> (visited Jan. 10, 2000).

8. These agencies are the Equal Opportunities Commission, the Commission for Racial Equality, and (since April 2000) the Disability Rights Commission. The powers and funding of each of these agencies is different. For criticism of this "British model," see Robert Wintemute, *Time for a Single Anti-Discrimination Act (and Commission)? Review of Bob Hepple, Anthony Lester, Evelyn Ellis, Dinah Rose and Rabinder Singh, Improving Equality Law: The Options, Justice and the Runnymede Trust*, 26 INDUS. L. J. 259 (1997). For the new Human Rights Commission in Northern Ireland, see *infra* note 138.

9. Baker v. State, 744 A.2d 864 (Vt. 1999).

10. A relevant example is in the judgments of the majority in the Court of Appeal in the *Fitzpatrick* case. *See infra* note 39 and accompanying text.

11. For this purpose sexual minorities include transsexuals, as well as gay men and lesbians. Transsexuals are outside the scope of this Article, except insofar as cases concerning them are also relevant to the position of gay men and lesbians. *See infra* Parts III.A.3, III.B.2.

12. The age of consent is 18, reduced from 21 by the Criminal Justice and Public Order Act 1994, ch. 33, § 145; the earliest legal age for heterosexual intercourse is 16 in Great Britain and 17 in Northern Ireland. Sexual Offences Act 1956, ch. 69, §§ 5-6.

sexuality.[13] The result therefore is a legal impasse so far as litigation is concerned: few options are open to activists wanting to use test-cases as a lever for political and social, as well as legal, change.

In practice, as the article explained, this rather negative picture of English law, appearing still to uphold and enforce Victorian or pre-Industrial moral values, is not the whole story, in at least three respects. First, at least in civil courts and where questions of children, property, and family membership are at stake, the judiciary has in several landmark cases shown a more enlightened attitude and been willing to accept the injustice and inappropriateness of discrimination by law against same-sex couples or gay or lesbian parents or caregivers.[14] The judges have, however, been able to give practical effect to these attitudes only where the question before them has turned on statutory provisions drafted in broad enough terms to permit such an interpretation or reinterpretation, according to the traditions which define the acceptable limits of such activity by the judges. Second, European law has been and will continue to be one of the main spurs for reforming English law, so far as discrimination based on sexual orientation is concerned. European law takes two relevant forms: the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms (of which the United Kingdom is a signatory), which has no automatic self-executing effect within each signatory state[15] but which may require law reform nationally if one of its catalogue of protected rights is violated, as determined by the European Court of Human Rights in Strasbourg;[16] and the law of the European Community or Union (of which the United Kingdom is a member), which may

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13. *See* Britton, *supra* note 2, at 261-63. *See also* SMITH & HOGAN, CRIMINAL LAW 455-84 (9th ed. 1999).

14. *See infra* Part II.A.

15. Although at the international level states undertake to respect all the rights and freedoms protected by the Convention and by any of the linked Protocols to which they have subscribed, individual signatory states may, according to the European Court of Human Rights, validly adopt a dualist approach to international law. Observer and Guardian v. United Kingdom, App. No. 13585/88, 14 Eur. H.R. Rep. 153 (1992) Eur. Ct. H.R. (ser. A, 216). Under this approach, international obligations on a state, or rights which international law gives to individuals against a state, have no immediate impact on domestic law; for them to have effect in domestic law requires legislation or some other form of translation of the rules from the international to the domestic sphere. This is the prevailing view which applies in the United Kingdom; its effect is to tie the hands of the judiciary, which will interpret domestic law—so far as they can—to conform with international law binding on the United Kingdom but may be forced to apply clear domestic law even though this conflicts with the United Kingdom's international obligations. *See R. v. Morrissey and R. v. Staines*, TIMES (London), May 1, 1997, discussed by Britton, *supra* note 2, at 289-90.

16. This obligation arises from Article 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, under which signatory states undertake to abide by the judgment of the European Court of Human Rights in any case to which they are a party; under Article 54, execution of a judgment of the Court is supervised by the Committee of Ministers of the Council of Europe.

have such self-executing effect within national legal systems and override national law in case of conflict.[17] Finally, though the Labour Government of Tony Blair elected in May 1997 has not moved far enough or fast enough for gay and lesbian organizations and lobbyists, it has been willing to support some changes reducing the scope and impact of legalized discrimination. However, despite its large majority in the House of Commons and its reforms of the House of Lords (the upper house of Parliament), which have reduced the impact of the hereditary element in its composition, none of the legislative changes promised whose main aim is to improve the position of gay men and lesbians has yet become law.

What follows seeks to amplify these points by considering developments which have affected the position of gay men and lesbians under English law in 1998 and 1999 under the broad headings of English law in action (Part II), which covers the courts, Parliament, and Government; and European law (Part III), which covers both European Human Rights law and European Community law. The aim is to record the changes, to see whether the events foretold in the earlier article have come true,[18] and finally to examine how far the trends identified in the earlier article have been borne out by more recent changes and movements (Part IV).

II. ENGLISH LAW IN ACTION

A. *Example 1: Children and Their Relations with Gay or Lesbian Adults*

1. *Adoption by Gay Men or Lesbians*

The earlier article considered the position of would-be adopters and noted that, as a question of interpreting statutory frameworks which put the interests of the child as the primary consideration, the courts have clearly refused to rule out gay men or lesbians as would-be adopters.[19] In July 1999 the leading Church of England children's charity, the Children's Society, announced that it was falling into line with other adoption agencies, local authorities, and the official guidance from the Department of Health[20] by

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17. The term "may" is used because not all categories of legal rule with their source in the European Union or its predecessors have this effect of conferring rights and imposing obligations within the legal systems of member-states. *See also* Britton, *supra* note 2, at 295-304 and *supra* note 7.

18. *See* Britton, *supra* note 2, at 311.

19. Re W (A Minor) (Adoption: Homosexual Adopter) [1997] 3 WLR 768 (Fam.), following the Scottish cases of Re AMT (Known as AC) [1997] Scots Law Times 724 (Ct of Session) and In re D (An Infant) (Parent's Consent) [1977] App. Cas. 602 (H.L.), discussed by Britton, *supra* note 2, at 277-80.

20. For the English law regulating adoption, see S. M. CRETNEY & J. M. MASSON, PRINCIPLES OF FAMILY LAW 898 (6th ed. 1997).

lifting its ban on lesbians and gay men fostering and adopting children under its care.[21] The reports suggest that this change of policy, though in conflict with the Church of England's officially negative line on homosexuality,[22] was encouraged by the court judgments mentioned above.[23] The outcome is specially significant in light of the scale of operation of the Children's Society, whose annual budget is over fifty million dollars, and of the fact that since the Reformation in the sixteenth century the Church of England has been the established church of England.[24] As a result it enjoys a special relationship with the monarchy and the State and speaks with a semi-official voice on questions of morality and social policy.

In October 1999 the law's openness to the potential suitability of a gay or lesbian adoptive parent was clearly and authoritatively underlined. In widely-reported remarks, the new President of the Family Division of the High Court, Dame Elizabeth Butler-Sloss (at present one of only two women judges of Court of Appeal rank or above in England) strongly supported a non-discriminatory approach to cases where the sexual orientation of would-be adopters might be an issue.[25] She used the opportunity of an inaugural press conference to underline how the courts' views needed to reflect the results of research, which shows no negative effects when children are brought up in a gay or lesbian household.[26] It followed, she said, that in some cases this would be the best available solution.

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21. *See* Ruth Gledhill & Alexandra Frean, *Church Charity Lifts Ban on Gay Adoptions*, TIMES (London), July 28, 1999, at 1.

22. *See* Ruth Gledhill, *Liberal Bishops Routed in Vote on Homosexuals*, TIMES (London), August 6, 1998, at 1 (reporting a meeting of the world-wide Lambeth Conference of leaders of those Episcopalian churches which are in communion with the Church of England). The assembled bishops adopted a resolution by a majority of 526 to 70 (with 45 abstentions) which held that "abstinence is right for those not called to marriage" and rejected homosexual practice as "incompatible with Scripture." *Id.*

23. *See* Re W (A Minor) (Adoption: Homosexual Adopter) [1997] 3 WLR 768 (Fam.); Re AMT (Known as AC) [1997] Scots Law Times 724 (Ct of Session); In re D (An Infant) (Parent's Consent) [1977] App. Cas. 602 (H.L.).

24. The Presbyterian Church of Scotland is the established church in Scotland; there is no longer an established church in Wales or Northern Ireland. *See* BRITAIN 1999: THE OFFICIAL YEARBOOK OF THE UNITED KINGDOM 239-48 (1999).

25. *See Gays Can Bring up Children—Judge*, GUARDIAN, Oct. 16, 1999.

26. *See* LESBIAN AND GAY FOSTERING AND ADOPTION: EXTRAORDINARY YET ORDINARY (Stephen Hicks & Janet McDermott eds., 1998). See also a report of research into gay fathers by Dr. Gill Dunne (London School of Economics Gender Institute) which suggests that "they are more committed to caring for their children, and get on better with their children's mothers, than many straight ones." Karen Gold, *A Better Breed of Dad*, GUARDIAN, Jan. 12, 2000, § G2, at 10.

The principles in the legislation[27] remain unchanged and no further relevant litigation on adoption has been reported; but a recent reported case and two others discussed in the press in closely related fields raise similar issues.

2. *Contact Between Children and Gay Men or Lesbians*

In *G. v. F. (Contact and Shared Residence: Applications for Leave)*[28] one member of a former lesbian couple applied to the court for contact rights and for a shared residence order in relation to the child which the other partner conceived by artificial insemination when they lived together, the baby then born being co-parented by them for the first three years of his life. Granting the orders sought, Mrs. Justice Bracewell in the Family Division of the High Court made clear that it was the quality of the relationship and the impact on the child that mattered:

> The fact that the relationship between the applicant and the respondent was a lesbian relationship, in my judgment, is to be seen as background circumstances of the case and there is no basis for discriminating against the applicant in her wish to pursue these proceedings on the basis that she and the respondent lived together in a lesbian relationship.[29]

It is likely that the English courts would take a similarly non-judgmental line about contact between children and a parent who had come out as gay or lesbian, though no reported case addresses this issue directly. Certainly, the sort of moralistic judicial approach criticized in the recent European Court of Human Rights judgment in *Salgueiro da Silva Mouta v. Portugal*[30] would be difficult to imagine in England.

3. *Other Recent Issues*

In a case reported only in newspapers,[31] a gay teenager threatened a local authority's social services department with an application for judicial review, in order to challenge the unreasonableness and irrationality of the

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27. There are separate statutes for England and Wales (Adoption Act 1976, ch. 36) and Scotland (Adoption (Scotland) Act 1978, ch. 28). Northern Ireland has the Children (Northern Ireland) Order 1995 (SI 1995/755).

28. G. v. F. (Contact and Shared Residence: Applications for Leave) [1998] 2 Fam. L. Rep. 799 (Fam.)

29. *Id.* at 805C.

30. *See infra* note 129 and accompanying text.

31. *See Teenager Wins Fight for Gay Fostering*, TIMES (London), June 26, 1998.

department's refusal to consider fostering him with gay caregivers. Since the defendant authority reversed its policy before the case came to court, the application was not proceeded with; however, the teenager's chances of success in court must have been good, though no reported case has yet dealt with this issue.

More recently (December 1999-January 2000) there has been the high-profile story of a couple of British gay men who were rejected by English authorities as would-be adoptive parents. Instead, each donated sperm to a surrogate mother based in California. When twin girls were then born, both men then successfully claimed in court in Los Angeles the right to joint registration by the U.S. authorities as the girls' fathers.[32] English law at present treats the surrogate mother and her husband as the girls' parents,[33] though obviously factually inaccurate in the case, so it seems unlikely that the English authorities will be willing to recognize the two men's registration as the babies' fathers. It is therefore unclear how far English law will support the American willingness officially to recognize the purpose behind the surrogacy arrangement and the men's wish to make their fatherhood a joint experience, no matter which of them is the children's genetic father.[34] The affair is complicated by the children having U.S. nationality by virtue of their birth in California, which means that, in advance of the rights of their gay fathers being established in English law, their ability to acquire British citizenship and even enter the United Kingdom is in doubt. The girls were allowed temporary entry with their fathers, and the Home Office in the end decided to give them unlimited leave to stay in the United Kindgdom "outside normal immigration law."[35] What the two fathers rights are as parents have yet to be determined—but may never become a live legal issue.

B. Example 2: Succession to a Tenancy on Death

1. *Background*

The earlier article[36] considered the case-law in which gay men and lesbians living with a tenant of residential property who had died have claimed statutory rights. In the version which applies to private sector rented

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32. *See* Frances Gibb, *Gay Couple Will Be the Legal Parents of Twins*, TIMES (London), Oct. 28, 1999.

33. The Human Fertilisation and Embryology Act 1990, ch. 37. For the English law on surrogacy, see CRETNEY & MASSON, *supra* note 20, at 939-49.

34. DNA tests have been done to establish who the biological father is, but the two have refused to make the results public. *See* Gibb, *supra* note 32.

35. *See* Adrian Lee, *Straw to Decide on Gay Couple's Surrogate Twins*, TIMES (London), Jan. 3, 2000, at 9; *Gay Couple's Twins Win Right to Stay*, GUARDIAN, Jan. 26, 2000, at 9; Gold, *supra* note 26.

36. *See* Britton, *supra* note 2, at 280-86.

accommodations, someone living with the deceased "as his or her wife or husband" or who was "a member of the deceased tenant's family" living with the deceased can succeed to that tenancy.[37] If successful, such a claim gives the survivor the status of tenant by operation of law; this may carry with it a status of irremovability, except on limited statutory grounds, as well as forms of rent control.[38]

In the latest case, *Fitzpatrick v. Sterling Housing Association*,[39] the gay survivor of a deceased tenant failed both at first instance in the County Court and in the Court of Appeal to convince the judges that either of these statutory formulae could now be interpreted to cover him, no reported case having yet applied them to the survivor of a same-sex couple. However, all of the Court of Appeal judges recognized the injustice of this result and its discriminatory effect; Lord Justice Ward, in a powerful dissent relying on North American case-law authorities,[40] argued that Martin Fitzpatrick should be held to qualify to succeed to the tenancy, primarily as a person living with the deceased John Thompson "as his wife or husband," but if he failed on that ground, Lord Justice Ward would have been equally ready to find Martin to be a member of John's family. Martin Fitzpatrick took the case on a further and final appeal to the House of Lords, the highest court in the English legal system, which announced its decision in October of 1999.[41]

2. *Decision of the House of Lords*

All five Law Lords viewed the issues as purely ones of statutory interpretation, rather than as raising questions about gay rights or about reversing legally sanctioned discrimination. The split between majority and

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37. The legislation also imposes two distinct time conditions: all would-be successors must have been living with the deceased in the tenanted property immediately before the death, but a person claiming to succeed as a surviving member of the deceased tenant's family (rather than as a spouse or equivalent) additionally has to show two years' residence up to the date of death. Rent Act 1977, ch. 42, Sched. 1, paras. 2-3, as amended by Housing Act 1988, ch. 51, § 76. Martin Fitzpatrick clearly fulfilled both tests, as he lived with John Thompson uninterruptedly between 1976 and John's death in 1994, caring for him full-time since an accident in 1986.

38. The surviving spouse (or person assimilated to a surviving spouse) steps into the shoes of the deceased tenant exactly, and one further succession from that person to a third is legally possible; a survivor who succeeds "as a member of the original tenant's family" gets a tenancy with fewer statutory protections than the deceased tenant had and such survivors have nothing that can be passed on further. Rent Act 1977, ch. 42, Sched. 1, as amended by the Housing Act 1980, ch. 51, § 76. Nothing turned on this distinction in the *Fitzpatrick* case.

39. Fitzpatrick v. Sterling Hous. Ass'n Ltd., [1997] 4 All E.R. 991 (C.A.). The first-instance County Court judgment is not reported.

40. Britton, *supra* note 2, at 285-86 nn.83-85.

41. Now reported as Fitzpatrick v. Sterling Hous. Ass'n Ltd., [1999] 3 W.L.R. 1113 and [1999] 4 All E.R. 705 (H.L.).

minority was thus fundamentally about the legitimacy of interpreting the relevant statutory rules in one way rather than another and the proper scope for judicial creativity, set against the powers and position of Parliament. This may of course simply reflect the way in which the case was argued in the House of Lords; it also allowed the judges to refuse to grapple directly with any wider questions of principle.

Echoing the previous case-law for tenancies from public sector landlords,[42] the judges were unanimous that Martin Fitzpatrick could not succeed as equivalent to a spouse, holding that the words in the statute which talk of "as his or her wife or husband"[43] are gender-specific and so apply only to a heterosexual unmarried couple. If Parliament had wanted same-sex survivors to be capable of qualifying under this head, it would have used a different—and clearer—form of words. Since these words were added as recently as 1988,[44] there was no room for argument that this was a phrase whose meaning could be said to have changed since its adoption. As will be obvious already, there was no broader or higher principle available in law which could be brought in to argue that such gender specificity was unjustifiably discriminatory against gay and lesbian couples. As it was, the most that could be said was that these words could reasonably bear a meaning wide enough to include a same-sex survivor. However, no member of the House of Lords was willing to go so far.

By contrast, on Martin Fitzpatrick's alternative claim, that he was a member of John Thompson's family and should succeed to the tenancy on that basis, the Lords held by a 3-2 majority that he did satisfy this statutory test. That was his personal victory and the vehicle for a significant extension of rights to gay men and lesbians.

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42. Harrogate Borough Council v. Simpson, 17 Hous. L. Rep. 205 (C.A. 1984), discussed by Britton, *supra* note 2, at 280-81.

43. The same words are also used in the Inheritance (Provision for Family and Dependants) Act 1975, ch. 63, § 1A, inserted by the Law Reform (Succession) Act 1995, ch. 41, § 2, under which a de facto spouse living with a person who has died may ask the court for provision out of the estate without proof of dependency. *See* Britton, *supra* note 2, at 263 n. 9. Same-sex survivors are presumably excluded, in the same way that the House of Lords refused Martin Fitzpatrick the right to succeed under the "spouse" rules for tenancies. For another statutory example and proposals for reform, see *infra* notes 83-85 and accompanying text.

44. *See* Housing Act 1988, ch. 51, § 76.

3. *The "Member of the Family" Issue: The Majority*

Since each judge who found in Martin Fitzpatrick's favor (Lords Slynn, Nicholls, and Clyde) gave an individual speech,[45] there are divergences of approach between them, though there are many points in common. Each chose to consider the circumstances in which it is legitimate for the judges to apply an unchanging statutory formula to new circumstances. Lord Slynn took the view that where, as here, the statute is itself not clear either that the formula is to be given a wide scope or that it is to be given a narrow scope, the judges must simply interpret the words in their statutory context: "To do so is not to usurp Parliament's function; not to do so would be to abdicate the judicial function. If Parliament takes the view that the result is not what is wanted, it will change the legislation."[46]

Lord Slynn clearly dealt with the question of Parliament's intention in 1920—the original source of the rules about succession to tenancies—as follows:

> It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been "No." That is not the right question. The first question is what were the characteristics of a family in the Act of 1920 and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word "family."[47]

Answering his own questions, Lord Slynn said that the hallmarks of those relationships recognized in the existing case-law[48] as satisfying the test of "family" were: a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support.[49] And current public attitudes were relevant in applying the test. As a matter of law it was now acceptable to hold that same-sex survivors could satisfy the test, but it was a question of fact (easily satisfied by Martin Fitzpatrick) whether an individual actually did.

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45. Because the House of Lords in its judicial capacity is technically also a committee of the upper house of Parliament, convention dictates adherence to the pretense that the prepared and pre-printed judgments of the Law Lords are delivered orally and extempore: which is why they are properly called speeches, though functionally they are judgments.

46. Fitzpatrick, [1999] 3 W.L.R. at 1117H-1118A.

47. *Id.* at 1119B.

48. For a summary of the cases, see Britton, *supra* note 2, at 282 n.74. Three cases omitted from that summary are Chios Property Investment Co. v. Lopez, 20 Housing L. Rep. 120 (C.A. 1987); Hawes v. Evenden, [1953] 1 W.L.R. 1169 (C.A.); Jones v. Whitehill, [1950] 2 K.B. 204 (C.A.).

49. Fitzpatrick, [1999] 3 W.L.R. at 1122C.

Posing the problem in those terms made it possible to say that the meaning itself of the word "family" had not changed; it was those who could satisfy the statutory test who had.

Lords Clyde and Nicholls echoed Lord Slynn's flexible approach to the meaning of the word "family." Lord Clyde referred to the adoption cases discussed above and in the earlier article[50] as showing that the concept of the family has already undergone a transformation recognized by the law. Lord Nicholls came close to using the language of non-discrimination:

> [T]he courts have given a wide and elastic meaning to family in the present context. Rightly so, because the legislation would fail to cover the whole of the target intended to be protected if family were given a narrow or rigid meaning. Such a meaning would fail to reflect the diverse ways people, in a multicultural society, live together in family units.... A man and a woman living together in a permanent and stable sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women.[51]

As this extract shows, the route by which gay and lesbian relationships in this case acquire legal parity with unmarried heterosexual relationships is by sharing characteristics in common with those heterosexual couple relationships which already attract the protection of survivorship under the statute. Sexual activity,[52] love, affection, and a long-term commitment appear to be essential; however, it is less clear what degrees of economic interdependence and sexual exclusivity between the partners are also necessary.

4. *The "Member of the Family" Issue: The Minority*

The dissenters (Lords Hutton and Hobhouse) took their stand on two main points, both technical (some might say legalistic) in nature. First, they regarded the House of Lords as bound by existing case-law on the meaning of

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50. *See supra* Part II.A.1; Britton, *supra* note 2, at 277-80.

51. Fitzpatrick, [1999] 3 W.L.R. at 1127G-H.

52. As the facts of the case illustrate, the relationship does not have to be continuously sexual, nor sexual at the moment of the partner's death; but if it is enough for it once to have been sexual (or sexual at the start of the cohabitation), this gives former sexual partners preferential treatment over non-sexual friends, which it is hard to justify in principle.

"family,"[53] according to which a relationship of marriage, blood, or adoption—or a link broadly recognizable as creating, de facto, such a relationship—was necessary. This was a test which a same-sex partner could never satisfy. Second, they thought that the meaning of "family" had to be defined by reference to what Parliament had in mind in 1920, which would not have included a same-sex couple. Lord Hutton put it like this:

> In 1920 the fact of homosexuals living together in permanent relationships was known to Parliament, and if a homosexual couple was not intended by Parliament to come within the term "family" at that date I do not consider that changed public attitudes towards homosexuality mean that a new state of affairs has come into existence which extends the meaning of the term.[54]

According to this approach, the courts had no authority to change the meaning of the term "family"; only Parliament could do so. This was also appropriate since there were policy choices involved in deciding which types of relationships should give a right to survivorship, which the courts were in no position to weigh and decide. If same-sex couples were to be included, then why not non-sexual cohabitive relationships, based on friendship, as well?

5. *Comments*

Despite the narrow terms in which the speeches of the majority are framed, the outcome does establish a point of principle which undoubtedly improves the legal position of gay men and lesbians in the specific context of rented housing but perhaps also more widely. It was given extensive press coverage as such.[55] References to "family" and "members of a family" occur

53. *See* Joram Developments v. Sharratt, [1979] 1 W.L.R. 928 (H.L.), where Lord Diplock in his speech incorporated with approval part of the judgment to this effect of Lord Justice Russell in Ross v. Collins, [1994] 1 W.L.R. 425 (C.A.). Even if this were binding, the House of Lords could of course decide to exercise its power to depart from existing authority, if a good enough case were shown, under the powers it accorded itself under the Practice Statement (Judicial Precedent) of 1966, [1966] 1 W.L.R. 1234 (H.L.).

54. Fitzpatrick, [1999] 3 W.L.R. at 1147D.

55. *See, e.g., Gay Couples' Rights Are Strengthened*, GUARDIAN, Nov. 6, 1999.

in many other statutes,[56] and although a court will always have to bear the specific statutory context in mind, the lead given by the House of Lords will undoubtedly influence judges in later cases where similar questions of the legal position of a same-sex partner are raised.

Negatively, the case suggests that, in a statute, the term "living . . . as his or her wife or husband"[57] (*a fortiori* "husband," "wife," "spouse," "widow," or "widower") cannot yet be interpreted to cover an unmarried same-sex partner or the survivor of one. For this to change, the most direct route would be new primary legislation: that might introduce a general principle of equality between heterosexual and gay and lesbian relationships; or it could extend the concept of marriage to cover all couple relationships; or, along the recent French lines, it could create a new kind of legal status available to same-sex couples which would have most or all of the same consequences as marriage.[58] Given that none of these is at present politically unimaginable, the only available ways forward towards that goal are (a) by looking to legislation from the European Union;[59] and (b) by applying to existing English law the evolving principles of the right to family life and protection against discrimination in the European Human Rights Convention, which will be available as an integral part of English law once the Human Rights Act 1998

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56. *See, e.g.*, Social Security Contributions and Benefits Act 1992, ch. 4, § 137(1), which defines family by using the words "couple" and "household," then going on to define couple as "a man and woman." STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES (5th ed. 1986 & Supp. 12 1997) under the entry "family" quotes Vice-Chancellor Kindersley as saying that the word "is itself a word of most loose and flexible description." Green v. Marsden, 1 W.R. 512, 513.

57. For other statutory examples of virtually the same phrase, see *supra* note 43 and *infra* note 85.

58. Charles Bremner, *France Makes Unwedded Bliss Official*, TIMES (London), Dec. 18, 1999, at 9 (discussing the legislation which adds the *pacte civil de solidarité* (PACS) into the French Civil Code as a new Title XII in Book I). Law No. 99-944 makes this new status available to couples who choose to opt into it via a formal contract jointly registered at their local court. Law No. 99-944 of November 15, 1999, J.O., Nov. 15-16, 1999, p. 16959. A PACS is available only to couples, neither of whom is currently married and who are not so closely related that they could not marry, but the law expressly includes same-sex couples. The consequences of registering a PACS are primarily financial and fiscal, relating to liability for each other's debts, community of property, the tax treatment of gifts between the partners and of their individual incomes and capital, their position in social security, their right to inherit the estate and to succeed to a tenancy on the death of a partner. In all these areas the couple will be treated almost identically to a married couple. In England, the Law Society (the statutory body regulating and representing 70,000 solicitors) has unexpectedly backed proposals from its own Family Law Committee to give cohabitants a new legal status short of marriage. *See* Frances Gibb, *Law Society to Support Gay Reforms*, TIMES (London), Sept. 20, 1999, at 2.

59. *See infra* Part III.B.3.

comes into force.[60] Note in this connection Lord Nicholls's disclaimer at the end of his speech:

> The decision [in this case] leaves untouched questions such as whether persons of the same sex should be able to marry, and whether a stable homosexual relationship is within the scope of the right to respect for family life in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [the European Human Rights Convention].[61]

The relevance of European law, and of authorities from other legal systems, is therefore a significant theme in the case. Despite wanting to see the issues as purely of statutory interpretation, the majority had to confront the unhelpful fact that, by mid-1999, neither European Union law nor the law of the European Human Rights Convention had recognized gay men and lesbians as being entitled to equal treatment within employment law;[62] nor were same-sex relationships entitled to equality with heterosexual relationships as a matter of European law more generally.[63] Lord Nicholls, as the quotation above suggests, avoided the issue entirely and did not refer to any European material in his speech. Lord Slynn, having discussed the state of European law, chose to write it off as "in an early stage of development . . . attitudes may change as to what is acceptable throughout Europe."[64]

Lord Clyde, having similarly considered the European authorities, found that some recognition of same-sex relationships had already been attained and that to interpret "family" in English law as including same-sex partners would not be in conflict with European law. Like Lord Justice Ward in the Court of Appeal, Lords Slynn and Clyde were happy to follow in the footsteps of the New York Court of Appeals in *Braschi v. Stahl Associates*[65] and other similar judgments. Unsurprisingly, for the dissenting minority the current state of

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60. *See infra* Part III.A.5.

61. Fitzpatrick, [1999] 3 W.L.R. at 1130F. For the text of Article 8, see *infra* note 90.

62. Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-636, discussed *infra* Part II.B.2; *but see infra* Part III.A.3 (discussing the European Court of Human Rights judgment in *Lustig-Prean and Beckett v. United Kingdom*, handed down after the oral hearings in the House of Lords in the *Fitzpatrick* case).

63. A.D.T. v. United Kingdom, 47 Eur. Comm'n H.R. 274 (1985); *but see also* X., Y. and Z. v. United Kingdom, 4 Eur. Ct. H.R. Rep. at 143 (1997). Both are discussed by Britton, *supra* note 2, at 294-95.

64. Fitzpatrick, [1999] 3 W.L.R. at 1123H-1124A. It may be relevant to note that Lord Slynn is also a former Advocate General and judge of the European Court of Justice, the only Law Lord ever to have served in Luxembourg.

65. Braschi v. Stahl Associates, 544 N.Y.S.2d 784, 788-89 (N.Y. 1989), in which the majority held that "family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Id.*

play at the European level supported their unwillingness to extend the meaning of "family" to cover same-sex survivors: Lords Hutton and Hobhouse refused to follow *Braschi*, regarding it as inconsistent with English authorities binding on the House of Lords.

Finally, despite the apparent progressiveness of the majority in the House of Lords, it is worth bearing in mind that not all cohabitive gay or lesbian relationships yet qualify the survivor for residential protection, when the partner who was the tenant dies. First of all, the rules for survivorship where the landlord is a local authority or other public body effectively exclude a gay or lesbian partner, by giving a limited definition of those relationships which the law recognizes as making a person a member of the deceased tenant's family;[66] so the new rights recognized in *Fitzpatrick* are in practice available only in cases where the landlord is in the private or semi-public sectors.[67] Even there, a same-sex survivor can qualify only if the tenant who has died was a "protected tenant," which is a specific and increasingly rare category;[68] same-sex survivors must also satisfy the residence test[69] and then go on successfully to claim to be a "member of the deceased tenant's family." The *Fitzpatrick* case shows that there are significant hurdles to be overcome in completing this last step, not all of which will become clear until further cases involving same-sex survivors are litigated and reported. From the guidance so far available, the longer, the more committed, and the more dyadic the relationship, the better the chances the court will recognize it for these purposes. It should also be remembered that the right of succession available to surviving family members is still a lesser form of protection than that given to surviving spouses and their heterosexual equivalents.[70] To call

66. The Housing Act 1985, ch. 68, §§ 87, 113, now restated and slightly modified in the Housing Act 1996, ch. 52, § 62, gives a closed list of those who can qualify for survivorship to the deceased person's tenancy as a member of that person's family. The only category potentially applicable to same-sex couples is "liv[ing] together as husband and wife," which *Harrogate Borough Council v. Simpson*, 17 Hous. L. Rep. 205 (C.A. 1985), now approved in *Fitzpatrick*, has held applies only to heterosexual couples.

67. "Semi-public" covers non-profit-making organizations supported with public funds, like the Housing Association which was the landlord in the *Fitzpatrick* case.

68. *See* ANDREW ARDEN & CAROLINE HUNTER, MANUAL OF HOUSING LAW chs. 3-5 (6th ed. 1997).

69. *See supra* note 37.

70. *See supra* note 38. In his speech, Lord Slynn recognized that for the law to give greater rights or opportunities to heterosexual couples than to same-sex couples could be said to be discriminatory against same-sex couples. This might therefore be challengeable in England on the basis of Article 8 of the European Human Rights Convention, under the Human Rights Act 1998—but only when the Act entered into force. Fitzpatrick, [1999] 3 W.L.R. at 1118F. For the text of Article 8, *see infra* note 90; *see also infra* Part III.A.5.

1999 "the year that same-sex couples win equal rights"[71] is therefore an obvious exaggeration.

C. *Example 3: Harassment of Gay Men at Work*

Smith v. Gardner Merchant Ltd.,[72] which reached the Court of Appeal in July 1998 via the Employment Appeal Tribunal,[73] raised the question whether English law at present gives any protection against discrimination and harassment of a gay or lesbian employee by reason of their sexual orientation. Paul Smith claimed that he had been fired from his job as a barman because he was gay. His employer had chosen to believe the version of an incident of threatening and aggressive behavior told by a woman fellow-employee, who in turn previously had been hostile and critical to him because of his sexuality. He had not been in the job long enough to complain of unfair dismissal, so he brought a complaint under the Sex Discrimination Act 1975.

The principal plank in Paul Smith's argument was that, though the Act spoke only of treating someone less favorably "on ground of his sex"[74] and did not mention sexual orientation at all, he had been treated less favorably than a lesbian would have been. The comparator was therefore a gay person of the opposite gender. Thus he had been discriminated against because he was a (gay) man. The judges in the Court of Appeal were willing to accept that the negative treatment which he claimed he had suffered was because he was gay, but that was the nub of the legal difficulty. As Lord Justice Ward put it, "there is a difference between discrimination on the ground of sex and discrimination on the ground of sexual orientation."[75] For Paul Smith to succeed under English law as it is, he had to show that he had been treated less favorably *because he was a man*. The Employment Appeal Tribunal, though correctly saying that discrimination based on sexual orientation was not of itself illegal, had not gone on to consider whether the acts alleged had come about because of Paul Smith's gender, for which the right comparator was indeed a lesbian. This issue was therefore remitted back for a further hearing, though Lord Justice Beldam reached the same outcome without agreeing on the comparator point. (Paul Smith's additional arguments from European Community law were closed off because of the decision of the European Court of Justice in *Grant v. South-West Trains Ltd.*[76])

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71. Martin Bowley QC, *The Year that Same-Sex Couples Win Equal Rights*, TIMES (London), Jan. 11, 2000, Law Supp. at 9.

72. Smith v. Gardner Merchant Ltd., [1998] 3 All E.R. 852 (C.A.).

73. Smith v. Gardner Merchant Ltd., [1996] I.C.R. 790 (E.A.T.).

74. Sex Discrimination Act 1975, ch. 65, § 1(1).

75. Gardner Merchant Ltd., [1998] 3 All E.R. at 863e.

76. *See infra* Part III.B.2.

This judgment breaks new ground in accepting for the first time that negative treatment of a person, based around their sexuality, can constitute discrimination based on sex. However, it falls far short of a general legal protection against harassment or negative treatment by reason of sexual orientation, and in many situations making a comparison with a gay person of the other gender will make little sense.

D. *Reform of English Law*

1. *By Legislation*

Since the earlier article, the main focus of attempts to improve the legal position of gay men and lesbians through legislation has remained twofold: to reduce the age of consent for sex between men to sixteen and to repeal section 28 of the Local Government Act 1988, which 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 presented family relationship."[77] Additional goals have been to acquire protection for gay men and lesbians against discrimination in employment and pensions, though attempts to add these to relevant Bills in Parliament have not yet been successful.

The idea of legislating to reduce the age of consent for sex between men has been driven by European pressure under the Human Rights Convention and is therefore discussed in that connection.[78] The repeal of section 28 similarly requires primary legislation, but achieving this is complicated by the fact that, since the earlier article, the Scotland Act 1998[79] has been passed and implemented, bringing the Scottish Parliament into existence as a working legislature in Edinburgh. The devolved powers given to the new Parliament are limited, so that, for example, Scotland cannot go its own way on the law affecting employment or equal opportunities, which is defined to include the prevention or elimination of discrimination on grounds of sexual orientation.[80] These areas, among many others, remain "reserved matters" within the

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77. Local Government Act 1988, ch. 9, § 28, which inserted § 2A into the Local Government Act 1986, ch. 10. "Maintained school" has a different meaning in England and Wales and in Scotland. *Id.* § 2A(4). For the background to its enactment, *see* Britton, *supra* note 2, at 271.

78. *See infra* Part III.A.2.

79. Scotland Act 1998, ch. 46. For the background, see Britton, *supra* note 2, at 306-07; Alexandra Frean, *Return for Gay Family Book if Section 28 Goes*, TIMES (London), Jan. 26, 2000, at 4.

80. *See* Scotland Act 1998, ch. 46, § 30 and Sched. 5, Part II, Sections H1 and L2. Under § 28(7), Westminster retains the power to legislate for Scotland, even in matters not reserved to it by § 30. However, the Scottish Parliament may need to assent. *See infra* note 100 and accompanying text.

exclusive power of Westminster to legislate. However, section 28 of the 1988 Act principally looks to the powers of local authorities, which in Scotland are clearly within the competence of the Scottish Parliament. There are now therefore parallel campaigns going on north and south of the border to encourage the two legislatures to repeal the same words.

For England and Wales, a Local Government Bill is now before the Parliament in Westminster, which includes as its clause 68 the repeal of section 28 of the 1988 Act. In tactics reminiscent of the age of consent issue, Baroness Young and allies in the House of Lords successfully tabled amendments to strike this clause from the Bill (and it seems as if the Conservative Party, after initial hesitation, is now officially against repeal). Meanwhile, in Scotland, where the Ethical Standards in Public Life Bill does the same, Cardinal Winning, Catholic Archbishop of Glasgow, has spoken publicly against repeal, supported by the Anglican Bishop of Liverpool.[81] A fighting fund to oppose reform has been supported with £500,000 from one of Scotland's wealthiest businessmen, Brian Souter of Stagecoach, who is the major funder for a private referendum in Scotland taking place in May 2000.[82] Since this has developed into a major news story, it is hard to predict what the outcome will be, though a compromise may be imaginable in which section 28 is repealed but replaced by new legal guidelines for schools on bullying and on issues of sexuality and personal relationships. Only the detail of these guidelines, if adopted by Parliament, will show whether the result takes the law forward or backward.

Other reforms likely to be legislated come from a report of the Law Commission, the permanent statutory law reform body of England and Wales, on the rights of survivors of wrongful death. As described in the earlier article,[83] the Commission has been considering the tests which allow a person to claim damages for loss on the death of another person. Their provisional views were confirmed in 1999 in the definitive report, *Claims for Wrongful Death*.[84] This proposes extending the definition of "dependant" in the Fatal Accidents Act 1976;[85] at present, relatives by blood and marriage apart, this limits the right to damages for financial loss to those living in the same household as the deceased as his or her husband or wife for the two years preceding the death. This test is almost identical to the "spouse" test in

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81. *See* Jason Allardyce, *Cardinal Calls for Action Against Gay Law*, TIMES (London), Jan. 18, 2000, at 1, 2, 6; James Meek, *Straight-Talking Bishop*, GUARDIAN, Jan. 25, 2000, § G2, at 5.

82. *See* Allardyce, *supra* note 81, at 6; Mark Nicholson, *Section 28 Poll Starts for Scots*, FIN. TIMES (London), May 3, 2000, at 7.

83. *See* Britton, *supra* note 2, at 309.

84. Law Commission, *Claims for Wrongful Death* (Law Com No. 263, HC 807) (1999). The report is available on the Law Commission website at <http://www.lawcom.gov.uk> (visited May 8, 2000).

85. Fatal Accidents Act 1976, ch. 30, § 1(3)(b).

Fitzpatrick, which the House of Lords said only the survivor of a heterosexual couple could satisfy.[86] Under the proposals, there would be an additional factual test of dependency, which a same-sex partner could satisfy. The Law Commission further proposes that the class of those who qualify for "bereavement damages"—a statutorily-fixed sum for the distress of a wrongful death—should be extended specifically to include a same-sex cohabitee, if that person would qualify under the "spouse" test, but for their being of the same gender as the deceased. This spells it out clearly: a gay or lesbian survivor living with the deceased for the two years before the death will come within the new class. The record of implementation of reports of the Law Commission is good, though it does depend on a sponsoring Government department getting space in what is usually a crowded legislative timetable. The report discussed above is one of a series on aspects of the law of damages, five of which are awaiting legislation, all including draft Bills ready for presentation to Parliament.

2. *By Administrative Changes*

As noted in the earlier article,[87] in 1997, a major change was made to immigration policy to allow, for the first time, the same-sex partners of those already settled in the United Kingdom a right to join and live with them. In June, 1999, following an internal review, the Home Office announced further relaxation of the conditions under which a same-sex partner can benefit from this right. Instead of having to show four years of cohabitation before entry into the United Kingdom, two years is now sufficient to give a right of entry to join the partner, but the length of the initial probationary period has been doubled from one to two years, during which the arriving partner will have the right to work and other rights of a lawful immigrant. Once the probationary period is over, the partner can apply for the status of permanent resident; the partner may even gain that status earlier, if the relationship ends on the death of the other partner or by reason of domestic violence. The rules apply identically to all unmarried couples—heterosexual, gay, or lesbian—and have immediate effect, including to those who may have entered the country illegally.[88]

86. *See supra* Part II.B.2.
87. *See* Britton, *supra* note 2, at 308.
88. *See Immigration Victories*, 8(1) STONEWALL (July 1999), at 4.

III. EUROPEAN LAW

A. *The Law of the European Human Rights Convention*

1. *Background*

The earlier article explained the key features of the international system of judicial protection of human rights and fundamental freedoms centered on the European Court of Human Rights in Strasbourg.[89] Under it, an individual affected can start legal action against any signatory State or States, alleging a violation of any of the rights and freedoms protected by the original Convention of 1950, or any of the linked additional Protocols. This legal action can lead, following an investigative stage, then written and/or oral procedures before a bench of internationally-appointed but independent judges, to a binding and final judgment, publicly announced, against the State in question. The judgment determines whether a violation of one of the protected rights has occurred and may also award compensation to a successful applicant against the State concerned.

Issues involving gay men, lesbians, and transsexuals have been featured regularly in the case-law of the European Court of Human Rights, principally under Article 8 of the Convention, which establishes the right to private life and to family life.[90] Many of these cases have been actions brought against the United Kingdom,[91] and every outcome favorable to an applicant has been important in forcing the U.K. Government to change its law or administrative practice to bring it into conformity with the Convention, as interpreted by the Strasbourg court.

2. *Implementation: The Age of Consent*

The first (investigative) stage of *Sutherland v. United Kingdom* was decided in Strasbourg in October 1997, shortly before the earlier article was

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89. *See* Britton, *supra* note 2, at 287-89.

90. Article 8 reads:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221.

91. *See* Britton, *supra* note 2, at 293-95.

completed.[92] Here Euan Sutherland, a gay man over sixteen (the age of consent for heterosexual sexual activity) but under eighteen (the current age of consent for sexual activity between men) challenged this disparity between English criminal law's treatment of sexual activity by young adults. He alleged a violation of both his right to private life under Article 8[93] and his right to protection against discrimination under Article 14.[94] His success on both grounds was enough for the United Kingdom Government to propose legislating, on the basis of a free vote in the House of Commons, to equalize the age of consent at sixteen; in reliance on this undertaking, the gay rights pressure group, Stonewall, that was supporting Sutherland, agreed not to move the case toward its judicial phase in Strasbourg, though it, and a similar case brought by Chris Morris, remain on the Court roll.

Implementing this undertaking has proved a struggle for the Government, largely because of opposition from the political and Christian Right in the House of Lords. At the first attempt in 1998, via a clause in the Home Secretary's Crime and Disorder Bill, the clause was passed by the Commons, but rejected via an amendment proposed by Baroness Young in the House of Lords, which was passed by a majority of 169. Rather than risk losing the whole Bill, the Government dropped the clause, promising to bring in a new and amended proposal in due course. This then materialized in 1999 as a separate Sexual Offences (Amendment) Bill; the essential clauses were as before, but in response to concerns about adult sexual exploitation of young men, the new Bill also included provisions criminalizing the making of sexual advances to sixteen and seventeen year-olds by those in a position of authority.[95] The Bill was passed in the Commons by 313 votes to 130, but was lost in the Lords again, 222 peers (of whom 120 were hereditary) voting for

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92. Sutherland v. United Kingdom, App. No. 25186/94, 24 Eur. H.R. Rep. 22 (1997) (Commission report). The decision here was of the European Commission of Human Rights, a body separate from the Court which formerly undertook a preliminary investigative review of each new application under the Convention; its work has, since November 1, 1998, been transferred to an expanded and restructured Court under Protocol 11 to the Convention. *See* DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 91-92, 441-42 (1996).

93. For the text of Article 8, see *supra* note 90.

94. Article 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221.

95. *See* Jill Sherman, *Ministers Add Safeguards to Gay Sex Bill*, TIMES (London), Nov. 6, 1998, at 2. A similar addition to the central proposals had been proposed by Joe Ashton MP— but not accepted—in the Commons earlier; he said that he was happy with the additional clauses. *See* Philip Webster, *MP Agrees Age of Consent Deal*, TIMES (London), Jan. 25, 1999.

Baroness Young's amendment and 146 against (a majority of 76).[96] Under the bicameral system of the Westminster Parliament, the elected Commons is able to overrule the unelected Lords as a matter of legal right only under the Parliament Acts 1911 and 1949.[97] These Acts allow the Commons to pass a second time a Bill introduced in the Commons and then rejected by the Lords, but only after a year's delay since its original Second Reading in the Commons, and if necessary to make the Bill law without the Lords' approval. This means that the Sexual Offences (Amendment) Bill could be reintroduced on or after January 25, 2000 and be virtually guaranteed to become law. Easing its passage further, the first phase of the Government's plan to reform the House of Lords has now taken effect: under the House of Lords Act 1999,[98] only ninety hereditary peers remain members of the House of Lords with voting rights. As the figures above show, removing all or most of the hereditary peers would have allowed the Bill lowering the age of consent for gay men to pass in 1999. In April 2000 the Conservative group in the Lords decided not to oppose the retabled Sexual Offences (Amendment) Bill in principle, but to attack it clause by clause, so its passing may need the extra support of the Parliament Acts.[99] The delay has added one procedural innovation: because criminal law for Scotland has been devolved to the Scottish Parliament,[100] legislation from Westminster changing criminal law in Scotland requires the formal assent by the Parliament in Edinburgh. It was initially uncertain whether a majority could be found at Edinburgh, the Scottish National Party MSP[101] resenting legislative intervention from Westminster, but the necessary assent has now been given.

3. *Cases Newly Decided in Strasbourg*

Pending when the earlier article was completed in February 1998, two significant groups of cases from the United Kingdom have now reached final judgment. In the first pair, *Sheffield and Horsham v. United Kingdom*[102] in

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96. The quotation from Lord Alli in the Introduction of this Article is from the debate in the House of Lords on Baroness Young's amendment, on the second attempt to change the law.

97. *See* JOHN F. MCELDOWNEY, PUBLIC LAW 57-59 (2d ed. 1998).

98. House of Lords Act 1999, ch. 34. Under the second stage, the whole composition of the House will be restructured, a Royal Commission under the chairmanship of Lord Wakeham having in January, 2000 proposed a mixture of appointed and elected members. *A House for the Future*, Cm. 4534 (2000). Legislation to implement the second stage is not expected until after the next general election.

99. *See Tory Peers Vow to Stall Gay Age of Consent Bill*, TIMES (London), Apr. 12, 2000, at 16.

100. *See supra* notes 79-80 and accompanying text.

101. This designates Members of the Scottish Parliament.

102. Sheffield and Horsham v. United Kingdom (Case no. 31-32/1997/815-816/1018-1019) 27 Eur. H.R. Rep. 163 (1999). *See also* Frances Gibb, *Sex Change Pair Lose Their Fight for Recognition*, TIMES (London), July 31, 1998.

July, 1998, the European Court of Human Rights held eleven votes to nine that for English law to refuse a new birth certificate to a post-operative transsexual, hence to require for some official purposes disclosure of the person's pre-operative birth gender, was not an actionable breach of the right to respect for a private life under Article 8 of the European Human Rights Convention.[103] The Court went on to hold unanimously that there was no violation of the protection against discrimination in Article 14[104] and to decide eighteen to two that signatory States may legitimately restrict marriage to unions between two partners whose biological origins are male and female, respectively. Therefore, there was no violation of Article 12 (right to marry and found a family).[105] It is this last finding which is of special importance to gay men and lesbians, for it fails to provide any support for arguments that same-sex couples should be treated on an equal legal basis with heterosexual married couples. The Court did however warn all signatory States to keep the area under close review; three other transsexual cases from the United Kingdom are waiting in line in Strasbourg.

In the second two pairs of cases, in September 1999, *Lustig-Prean and Beckett v. United Kingdom*[106] and *Smith and Grady v. United Kingdom*,[107] the Court found a violation of Article 8 in the policy and practice of the armed forces of the United Kingdom in relation to four applicants, three gay men and a lesbian. This is the dramatic sequel to an unsuccessful attempt by the same four applicants, all of whom had been administratively discharged from the Army and Navy by reason only of their sexual orientation, to challenge this by a public law action for judicial review in the English courts.[108] Like Euan

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103. *See* Sheffield and Horsham, 27 Eur. H.R. Rep. at Judgment paras. 40-61, 71-77. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90.

104. *See* Sheffield and Horsham, 27 Eur. H.R. Rep. at Judgment paras. 71-77. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94 art. 14.

105. Article 12 reads: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 12, 213 U.N.T.S. 221.

106. Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 & 32377/96; judgment of the European Court of Human Rights dated September 27, 1999, available from the Court's website at <http://www.echr.coe.int> (visited Jan. 10, 2000).

107. Smith and Grady v. United Kingdom, App. Nos. 33985/96 & 33986/96; judgment of the European Court of Human Rights dated September 27, 1999, available from the Court's website at <http://www.echr.coe.int> (visited Jan. 10, 2000).

108. R. v. Ministry of Defence, *ex parte* Smith, Q.B. 517 (Q.B. and C.A. 1996), discussed by Britton, *supra* note 2, at 290-92, 299-300. After they had lost their case at the Court of Appeal, the applicants were refused leave to appeal to the House of Lords, which meant that they had exhausted domestic remedies and could then start a separate action in Strasbourg. In England, their action relied on grounds drawn from European Community law as well as the Human Rights Convention, which is why the procedure in Strasbourg was later suspended

Sutherland before them, their action in Strasbourg was made possible by support from gay and lesbian pressure groups, notably Stonewall[109] and Rank Outsiders, a group supported by Stonewall but specifically for gays and lesbians in or discharged from the military. Like Sutherland, they were relying on both Articles 8 and 14,[110] though Smith and Grady also relied on Articles 3 (inhuman and degrading treatment),[111] 10 (freedom of expression),[112] and 13 (absence of effective domestic remedy).[113]

In its judgments, the Third Section of the European Court of Human Rights noted how successful the careers of the four applicants had been and described the questioning they had undergone which led to their dismissals, as well as the Homosexuality Policy Assessment Team (HPAT), set up in 1996 by the Ministry of Defence to review the rationale for the general policy of automatically discharging all known gay men and lesbians from the service. The HPAT review concluded that operational effectiveness required the present policy to be continued and that homosexuality posed problems greater than that of gender and race (where the services already had a public commitment to equal opportunities and to prevent and punish harassment). These conclusions had in turn been approved by a Select Committee of the House of Commons in 1996, and the House, in a vote, rejected any change to the present policy.

The Court went on to find that the rights of all four applicants to a private life had been violated:

> [T]he investigations by the military police into the applicants homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of

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pending the E.C.J. ruling in the *Perkins* case. *See infra* note 158 and accompanying text.

109. Stonewall's Executive Director, Angela Mason, was awarded an O.B.E. (Order of the British Empire) by the Queen—on the proposal of the Prime Minister—in the New Year's Honours List 1999.

110. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90; for the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

111. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

112. *See id.* art. 10.

113. *See id.* art. 13.

> their sexual orientation also constituted an interference with that right . . . .[114]

The Court then went on to consider whether this interference was justified under paragraph 2 of Article 8, which meant assessing whether the interferences (a) were in accordance with the law; (b) had an aim legitimate under Article 8; and (c) were necessary to achieve that aim in a democratic society. The Court agreed that (a) and (b) were satisfied, at least to establish the sexual orientation of an individual,[115] since the policy was clear, public, and had been upheld by the English courts and was aiming to safeguard the services' operational effectiveness, which fell under "the interests of national security" and "the prevention of disorder" in paragraph 2 of Article 8. However, the Court was unconvinced that these aims justified such intrusive invasions into the applicants' intimate private lives and such disastrous consequences for their careers, which followed not from their conduct but from "innate personal characteristics"[116] (their sexual orientation). This was all the more true, since the risks to discipline and effectiveness of having gay men and lesbians in the armed services were asserted rather than proved and rested on the results of an internal review which gave determining weight to the existing negative attitudes of heterosexual service personnel against gay men and lesbians. As the measures already taken to deal with women and ethnic minorities in the services showed, it was possible to deal with prejudice, harassment, and bullying through clear statements of acceptable behavior backed by disciplinary sanction and training: gay men and lesbians were simply a comparable problem. The Court therefore held that the present policy and its implementation went outside the United Kingdom's "margin of appreciation" under the Convention and did not justify the breach of paragraph 1 of Article 8.[117] In *Lustig-Prean and Beckett*, the Court finally considered the linked claim under Article 14, holding that this ground was in effect a restatement of the complaint under Article 8, so gave rise to no separate legal issue.[118]

The Court came to the same conclusions on these issues in relation to *Smith and Grady*, but in the second pair of cases had to look at the additional Convention articles relied on. It rejected the claim on Article 3, holding the

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114. Lustig-Prean and Beckett, at Judgment para. 64.

115. The judgment doubted whether any further investigations, once sexual orientation had been established, could be justified, but in view of its ultimate conclusion did not finally decide this point. *See id.* Judgment paras. 99-103.

116. *See id.* Judgment para. 86.

117. Judge Loucaides dissented from this finding and gave a separate Opinion in both cases; he agreed with other aspects of both judgments, which were otherwise unanimous. *See* Lustig-Prean and Beckett.

118. *See id.* Judgment paras. 106-09.

way the homosexual applicants had been dealt with insufficiently severe to constitute a breach of the protection against inhuman or degrading treatment, and the Court refused to consider the claim based on Article 10, holding the real essence of the claim to be about private life.[119] On Article 13, however, the Court accepted the applicants' claim, holding that the scope open to the English courts for challenging public authorities through an action for judicial review was too limited to constitute an effective domestic remedy for violations of the Convention.[120] By placing the threshold of irrationality so high, the English rules prevented the courts from considering the issues relevant under the Convention to the question of justifying the policy under paragraph 2 of Article 8.[121]

Implementation of the main points of these two judgments has been swift and complete. On the day the judgments were announced, all current disciplinary action against service men and women on the basis of their sexual orientation was suspended[122] and work began, in consultation with the four successful applicants, on new rules for the services. In January 2000 the whole policy was formally reversed through an announcement by the Defence Secretary in the House of Commons. As a result, the rule barring gay men and lesbians from serving in the military has now been lifted.[123] Alongside, there is, as suggested by the Court in Strasbourg, a new code of conduct, which on the Australian model defines inappropriate sexual behavior and makes it a disciplinary offense. The short code makes clear that no harassment or bullying of individuals on grounds of gender, race, or sexual orientation will be tolerated and limits intervention in the personal lives of service personnel to situations where their actions or behavior have impacted or could impact the service's efficiency or effectiveness. Sexual orientation will not be required to be disclosed, nor will any consequences necessarily follow from individuals disclosing their sexual orientation. So unlike the American "Don't Ask, Don't Tell" approach, the new British stance is "Don't Ask, Can Tell."[124] There has even been talk of those dismissed under the old policy being encouraged to re-enlist; what the four applicants will certainly get from the

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119. *See* Smith and Grady, at Judgment paras. 117-28.

120. *See id.* at Judgment paras. 129-39.

121. For the the English litigation in question, see R. v. Ministry of Defence, *ex parte* Smith, Q.B. 517 (Q.B. and C.A. 1996), discussed by Britton, *supra* note 2, at 290-92, 299-300.

122. *See* Richard Norton-Taylor & Clare Dyer, *Historic Ruling Ends Services Gay Ban*, GUARDIAN, Sept. 28, 1999, at 3.

123. *See* Alexander Nicoll, *Military's Sexual Orientation Rules Set to Change*, FIN. TIMES, Jan. 12, 2000, at 3; Michael Evans, *Guthrie Regrets Gay Inquisition*, TIMES (London), Jan. 13, 2000, at 8.

124. These rules may acquire statutory force if they are included in the new Armed Forces Bill, due in 2001.

Ministry of Defence is an offer of compensation, which those dismissed recently from the services on identical grounds can also apply for.[125]

More broadly, the judgment clearly establishes, for public employment generally, that discrimination against gay men and lesbians is unlikely ever to be justified and that there is a need for recruitment and disciplinary codes in the rest of the public service to reflect the principles which have now been adopted by the military. And if public sector rules need tightening up, why not do the same for private sector employment? The Equal Opportunities Commission and Trades Union Congress[126] have said that the Government now needs to look urgently at extending the Sex Discrimination Act[127] to prevent discrimination based on sexual orientation.[128] If it did so, then four ex-servicemen and women would have been the catalyst for far-reaching improvements in the legal protection of gay men and lesbians. Also needing reform, following the Court's ruling on Article 13 in *Smith and Grady*, are the principles which govern challenges to administrative acts through applications for judicial review in the courts. In the Court's view, an applicant wishing to show irrationality in litigation within the United Kingdom should be more able to raise issues of the balance between rights and their restriction under the European Human Rights Convention than at present. It would be hard to draft legislation to achieve this, and such an isolated and limited statutory intervention into a purely case-law area would not necessarily work well. As it is, the Government is likely to take the view that all rights under the Convention are about to be directly enforceable in English law, including in proceedings for judicial review, via the Human Rights Act discussed immediately below. This "domestic remedy" problem should disappear with the change.

An even more recent judgment of the European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*,[129] from December, 1999, has considered the rights of gay and lesbian parents. It establishes that their rights as parents cannot be limited simply because either or both of them are gay or lesbian. The decision of the Lisbon Court of Appeal, which gave parental responsibility for the applicant's daughter to his ex-wife, did so mentioning as one of its reasons (but in fact with decisive force) that he was gay and now

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125. This includes the naval chef dismissed two days before the European Court of Human Rights judgment. *See* Richard Norton-Taylor, *Is This the Last Gay Man to Be Fired from the Forces?*, GUARDIAN, Sept. 25, 1999.

126. *See supra* note 8; Michael White, *Public Support "Growing" for Gay Worker Equality*, GUARDIAN, Apr. 19, 2000, at 11.

127. *See supra* note 7.

128. *See* Equal Opportunities Commission Press Release, *EOC Urges Government to Take This Opportunity to Create Equality for All*, Sept. 27, 1999, accessible via <http://www/eoc.org.uk./html/press_releases_1999_19.html> (visited Jan. 10, 2000).

129. Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96 (1999), available from the Court's website at <http://www.echr.coe.int> (visited Jan. 25, 2000).

living with a male partner. This limited his right to family life under Article 8: the Portuguese court was legitimately seeking to protect the interests of the child, but gave too much weight to the fact of his sexual orientation. Such discrimination was contrary to the Convention if it had no objective or reasonable justification, had no legitimate aim, or was disproportionate to the aim sought to be achieved. Because that was the case here, there was a violation of Article 8 taken together with Article 14.[130]

4. *Case Pending in Strasbourg*

In the case of *A.D.T. v. United Kingdom*,[131] a gay man challenged a criminal conviction which followed after police found videotapes at his house recording consensual sex between him and several other men in his bedroom. He argued unsuccessfully in the English court that these acts were covered by section 1 of the Sexual Offences Act 1967,[132] which decriminalized consensual sex between men. But the 1967 Act protects only sex between two men in private, defining "private" as to exclude situations where there is a third person taking part or present.[133] As a result, he was convicted of gross indecency under section 13 of the Sexual Offences Act 1956;[134] he then went to Strasbourg, arguing that English law did not respect his private life under Article 8 and that the law was discriminatory under Article 14 in applying this offense to him, which could not be used against lesbians or to heterosexual couples.[135] Though an earlier application to Strasbourg on similar grounds

130. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

131. A.D.T. v United Kingdom, App. No. 35765/97, summary by Court Registrar of hearing on Nov. 30, 1999, available from the Court's website at <http://www.echr.coe.int> (visited Jan. 25, 2000). The case was originally known as *S. v. United Kingdom*.

132. Sexual Offences Act, ch. 60. For the background to this legislative watershed, see Britton, *supra* note 2, at 266-70.

133. Sexual Offences Act 1967, ch. 60, § 1(2). Interpreted broadly, this provision means that a situation where two men have sex but a third person is elsewhere in the same building is not necessarily private, indicating that hotels and roommates may be subject to liability.

134. This is the modern incarnation (unchanged) of the Criminal Law Amendment Act 1885 § 11; *see* Britton, *supra* note 2, at 268 n.28. A group of gay men called the Bolton Seven have also been in the news following their convictions, on a similar basis, from a private videotape. After an unsuccessful appeal to the Court of Appeal (Criminal Division) in March 1999, one of the seven, Terry Connell, planned to start an action in Strasbourg but died in March 2000.

135. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

was rejected at the investigation stage,[136] in November, 1999, A.D.T.'s case had a hearing before the European Court of Human Rights;[137] judgment is now awaited.

5. *The European Convention in English Law: The Human Rights Act 1998*

This legislation, which comes into effect on October 2, 2000,[138] was only a bill at the time the earlier article was completed. It transforms the legal landscape of domestic English law by "incorporating" into it the law of the European Convention (meaning the positive treaty rules themselves which bind the United Kingdom, plus all relevant case-law, past and future, from the institutions in Strasbourg). This means that, under the Human Rights Act, all public authorities[139] are required to act in ways which respect the catalogue of rights in the Convention and its linked Protocols, with the judges required to interpret English law, as far as possible, in such a way as to be consistent with these rights.[140] Courts are to give redress (including awards of damages and the usual remedies against unlawful administrative action) and will do so both where an incidental question about a Convention right is raised within traditional litigation and where a separate action is brought under the Human Rights Act itself.[141]

However, in line with the traditions of the British Constitution, which hold that any Parliament can undo the work of any previous Parliament, the Act has no special standing in English law. It is not therefore like a Bill of Rights, which might have constitutional, superior, or entrenched status; under it, judges are not empowered to invalidate or to refuse to apply future primary legislation which violates any of the Convention rights which the Act

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136. *See* Johnson v. United Kingdom, App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 72 (1986).

137. *See* Julia Hartley-Brewer, *Gay Briton Goes to Europe in Fight over Indecency Charge*, GUARDIAN, Dec. 1, 1999.

138. The legislation is already in effect, in the sense that the "Convention rights" defined in the Human Rights Act 1998, ch. 42, § 1, provide one of the limits to the exercise of legislative and executive power by the newly-devolved bodies for Scotland (the Scottish Parliament and Scottish Executive), Wales (the National Assembly for Wales), and Northern Ireland (Northern Ireland Assembly). *See* Scotland Act 1998, ch. 46, §§ 29(2)(d), 57(2), 126(1); Government of Wales Act 1998, ch. 38, § 107; Northern Ireland Act 1998, ch. 47, §§ 6(2)(c), 24, 98(1). In Northern Ireland there is now a new Human Rights Commission, one of whose tasks is to review proposed local legislation for its conformity to the Convention and to take and support legal proceedings involving human rights questions. *See* Northern Ireland Act 1998, ch. 47, §§ 68-70.

139. Widely, but vaguely, defined, in of the Human Rights Act 1998, ch. 42, § 6.

140. *See id.* §§ 2-3.

141. *See id.* § 7.

protects,[142] nor does its introduction even affect pre-existing primary legislation which infringes a Convention right.[143] And where secondary legislation (rules adopted by Ministers or other Government bodies within a framework laid down by Parliament) is challenged on Convention grounds, it will be an absolute bar to such challenge that the secondary legislation was compelled to take the form it does by its empowering statute.[144] The most that judges in the higher courts can do in such situations is to make a "declaration of incompatibility" between the statute in question and one or more Convention rights, which has no legal effect either on the statute so impugned or on the parties in the case.[145] The only consequence is to empower (but not compel) the Government to ask Parliament for authorization to modify the offending legislation by regulation, without needing to go through the full Parliamentary process.[146]

Two immediate effects of this new legislation will be: (1) to save many litigants who want to raise points based on the Convention from wasting time and money by litigating through the English legal system, losing in the end, then starting a separate action against the United Kingdom in Strasbourg (but they will still be able to do so if they fail to get satisfaction domestically); and (2) to force English judges to be more aware of the accumulated interpretative material from Strasbourg than they have needed to be until now, but also to have to back their own judgment where such material provides no clear answer to a concrete case before them. In situations where the law of the Convention is in a state of evolution, however slow—the rights of sexual minorities are a good example—English judges will have to "take the temperature" of this evolution and even perhaps anticipate its next stages. To do this will require a radical shift of approach from the English judiciary, involving a focus on rights defined much more broadly than in the traditions of English law and a willingness to undertake the balancing of individual rights against State power. This new activity will bring judges into the spotlight by "judicializing" many disputes and areas of regulation which hitherto have been resolved purely by the political process or by legislation, over whose shape and principles the judges have traditionally had no control and in whose drafting they have little say. In that sense, the English judiciary and the common law will never be the same again. This extended role for the

142. But Ministers proposing legislation after the Act comes into force will have to certify to Parliament either their belief in the Bill's compatibility with the Convention rights or the Government's wish to proceed with the Bill despite its uncertainty on compatibility. *See id.* § 19.

143. *See id.* § 3(2).

144. *See id.* § 3(2)(c).

145. *Id.* § 4. Only the higher courts (High Court or above) can make such a declaration, and the Crown has the right to intervene, where a party requests the Court to make such a declaration. *See id.* § 5.

146. *See id.* § 10.

courts will create a new kind of dialogue (though an indirect one) between the judges of the European Court of Human Rights and those in the English courts, which will give each set of judges a new influence on the others and may accelerate the pace of legal change.

As far as gay men and lesbians and their rights are concerned, the Human Rights Act 1998 will have a real practical impact: the risk, cost, time, and effort at stake in order to raise issues of fundamental rights in court will all be dramatically reduced. Campaigning organizations may thus shift their focus from a concentration on persuading Government and Parliament to change the law through legislation towards a renewed strategy of encouraging and supporting carefully chosen test cases in the English courts. Such litigation will have as its eventual prize recognition of extended rights for gay men and lesbians linked to private life and family life under Article 8 of the Convention[147]—even perhaps rights linked to marriage and the founding of a family under Article 12[148]—and acceptance of a free-standing principle of non-discrimination between heterosexual and gay and lesbian people and relationships under Article 14.[149] Insofar as these contradict existing legislation, or the current interpretation of existing legislation—as in most part they do—then this will be a test both of the judiciary's willingness to embrace a European purposive approach to statutory interpretation and of the Government's willingness to use its powers under the Act to change the law quickly and simply, if it proves incompatible with rights under the Convention. To reduce the risk of being caught out in court, many Government departments have been undertaking a human rights audit of their rules and procedures;[150] this explains the long delay between the enactment of the new law and its entry into force, as does the training program for judges introduced by the Lord Chancellor's Department.

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147. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90.

148. For the text of Article 12, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 12, 213 U.N.T.S. 221, *supra* note 105.

149. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94. On the impact of the Human Rights Act on sexual minorities, see also Ian Karsten QC, *Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals*, EUR. HUM. RTS. L. REV. 195 (1999).

150. Other agencies have been involved in this process. For example the Law Commission, the permanent statutory law reform body for England and Wales, has been reviewing the English law on bail, to assess its compatibility with Article 5 of the Convention and the case-law under it, in order to avoid future actions under the Human Rights Act. The Commission's consultation paper, *Bail and the Human Rights Act 1998*, recommends changes in the law but also additional training and guidance for magistrates and judges. Consultation Paper No. 157 *Bail and the Human Rights Act 1998* (1999). The report is available on the Law Commission website at <http://www.lawcom.gov.uk> (visited May 8, 2000).

B. *The Law of the European Community*

1. *Background*

Community law has two features which make it specially attractive to gay and lesbian pressure groups seeking ways to improve the specific legal protections available within national legal systems. First, if European Community law has, or adopts, a rule affecting a situation across the Community, this rule may have "direct effect," meaning that judges in national courts are obliged to give effect to it and that individuals can rely on such a rule in national litigation. The doctrine of "direct effect" is a complex one, invented and refined by the European Court of Justice in Luxembourg, but it is a key weapon in the fight for legal uniformity in all member-states and for the efficacy of Community law as a legal order integrated into the legal systems of the member-states.[151] Second, and relatedly, Community law requires judges and courts within national legal systems to give priority to rules of Community law where they are in conflict with national rules, whatever the national constitutional position. This similarly is designed to ensure that no member-state (or national judge) has any excuse for failing to implement or respect rules whose source is in Community law. It follows, therefore, that any Community law rules which already exist, or could be legislated at Community level, and which improve the position of gay men and lesbians over the situation in English law, will in effect modify English law from without. Thus, there would be no need to persuade Government, Parliament, or judiciary of the good sense behind the changes because their European pedigree would short-circuit the whole debate.

2. *Case-Law on the Rights of Gay Men and Lesbians*

Decided as the earlier article was in the course of publication, *Grant v. South-West Trains Ltd.*[152] in the European Court of Justice (E.C.J.) was a major disappointment to gay and lesbian pressure groups in England, in particular, to Stonewall, which had supported the case. The Court refused to follow the proposals of its own Advocate General and to hold that discrimination based on sexual orientation in relation to pay in employment fell within the principle of equality under Article 119 of the Treaty of Rome.[153] Instead, the Court held that Article 119 protected only equality between women and men: to deny a lesbian employee's partner a financial

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151. STEPHEN WEATHERILL & PAUL BEAUMONT, EEC LAW 392-453 (3d ed. 1999).

152. Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-636. *See also* Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P. v. S. to Grant v. SWT*, 5 EUR. L.J. 63 (1999).

153. Now Article 141, since the entry into force of the Treaty of Amsterdam.

benefit because she was of the same sex as the employee was not discrimination "on grounds of sex," when the male partner of a gay male employee would have been treated in exactly the same way. This effectively put a stop to the movement which had been gathering force, encouraged by the European Court of Justice in *P. v. S. and Cornwall County Council*,[154] which held employment discrimination against a transsexual to be contrary to the Equal Treatment Directive,[155] leaving transsexuals with greater protection under Community law than lesbians and gay men. There were only two crumbs of comfort in *Grant*. First, the European Court specifically mentioned the European Human Rights Convention and the fact that discrimination against gay men and lesbians is not yet recognized as an automatic breach of the Convention (*a contrario*, were this to be the case, it would encourage the E.C.J. to look again at *Grant*); second, it mentioned the possibility of legislation at the European level, under Article 6(a) of the Treaty of Amsterdam.[156] Though Lisa Grant failed in her attempt to get travel privileges for her lover as a matter of law, the train operating companies in the United Kingdom have now agreed to a common policy of extending such privileges to same-sex partners.[157]

An immediate effect of the judgment in *Grant* was on a case pending at the time of the earlier article, *R. v. Secretary of State for Defence, ex parte Perkins*.[158] Terry Perkins, fired from his job in the Navy when his sexuality came to light, hoped to use the Equal Treatment Directive[159] to attack the discriminatory policy of the armed forces in the United Kingdom in discharging gay men and lesbians.[160] The Community law aspects of the issue had already been referred to the European Court of Justice by the Queen's

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154. Case C-13/94, P. v. S and Cornwall County Council, 1996 E.C.R. I-2143. For sources discussing this judgment, see Bell, *supra* note 152, at 63 n.2. Following the judgment, the Sex Discrimination (Gender Reassignment) Regulations were introduced for the United Kingdom (SI 1999/1102), extending the Sex Discrimination Act 1975, ch. 65, and giving the Equal Opportunities Commission the brief to develop Codes of Practice to assist employers in complying with their new responsibilities.

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

156. *See infra* Part III.B.3.

157. *See* Colin Blackstock, *Gays Win Rail Travel Perk*, GUARDIAN, Oct. 5, 1999.

158. R. v. Secretary of State for Defence *ex parte* Perkins, TIMES (London), Apr. 8, 1997 (Q.B.), discussed by Britton, *supra* note 2, at 302-03, 315.

159. *See* Council Directive No. 76/207, *supra* note 155.

160. For the successful use of the European Convention to achieve this result, see *supra* Part III.A.3. The proceedings in *Lustig-Prean and Beckett v. United Kingdom* were suspended in Strasbourg while the outcome of the *Perkins* case was awaited in Luxembourg and began again once the case was withdrawn from the roll there.

Bench Division in London when judgment was given in *Grant*.[161] In an unusual move, the European Court contacted Mr. Justice Lightman, the English judge who had made the reference in *Perkins*, suggesting that he should withdraw it, the implication being that *Grant* had now made the position clear. He did so, with reported reluctance, on July 13, 1998,[162] with the result that Terry Perkins's action could go no further and fell to be determined by English law alone, which was not willing to overturn the policy of the armed forces.[163]

3. *Implementation of Treaty of Amsterdam: Future Legislation*

The Treaty of Amsterdam was the tangible legal outcome of the Amsterdam meeting of heads of government of EU member-states in October 1997; after a typically lengthy ratification process in those countries where this was necessary,[164] the Treaty entered into force on May 1, 1999. Apart from integrating into one document, with virtually all Articles thus re-numbered, all the existing rules from the Treaty of Rome and those newly added, the Treaty of Amsterdam also brings in new principles and powers. Of these one is directly relevant to gay men and lesbians: Article 6(a) of the Treaty of Amsterdam (now Article 13 of the renumbered Treaty establishing the European Community) specifically makes provision for legislation at Community level:

> Without prejudice to other provisions of this Treaty and within the limits of powers conferred on it by the Community, the Council, acting unanimously on a proposal by the Commission, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[165]

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161. Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-636. *See also* Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P. v. S. to Grant v. SWT*, 5 EUR. L.J. 63 (1999).

162. *See* Stonewall Press Release, July 13, 1998.

163. *See* Bell, *supra* note 152, at 78-79. As Bell points out, factual distinctions could have been made between *Grant*, which was about benefits for an employee's partner, and *Perkins*, which was about the more fundamental right to work; but the European Court was clearly reluctant to re-open the debate around sexual orientation. *See id.*

164. In the United Kingdom, see the European Communities (Amendment) Act 1998, ch. 21.

165. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 6(a), O.J. C 340/1 (1997) (entered into force May 1, 1999).

This makes clear what had previously been in doubt—the Community's legislative competence in the area of discrimination—and also frees discrimination questions from the narrow field of employment, which is the context within which most cases about sexual orientation in Community law have so far been argued. In November 1999, the Commission announced plans for a Directive which will prohibit discrimination—including on grounds of sexual orientation—in employment, also a Directive prohibiting discrimination on grounds of race or ethnic origin in a wider range of areas. The setback of *Grant* and *Perkins* should therefore prove temporary, provided that the complex legislative machinery of the Community can be successfully mobilized to deliver new laws improving the protection given to gay people and lesbians.

IV. CONCLUSIONS—AND THE FUTURE

There are two opposing tendencies within the gay movement in England. In the first, whose origins lie in the radical gay liberation movement of the 1960s, there is acute mistrust of established institutions, which mirrors its rejection of conventional relationships and morality. For those at this end of the spectrum, concessions won from the heterosexual majority through reason and dialogue are dangerous illusions, masking the real, oppressive nature of the State and fear and hate of gay people. Direct action is what counts. The other tendency, by contrast, believes in the rationality of politicians, Ministers, and judges. It holds the law and its personnel capable of delivering real justice to gay men and lesbians in the long term, through a slow but sure process of incremental change fueled by persistent and skilled advocacy. Its members think that because the gay and lesbian cause is right, it must ultimately win over (in both senses) politicians and judges, and that it is appropriate to use the vocabulary and styles of argument of the law at every opportunity.

It will be obvious to anyone who has read this far that the victories recorded in this Article are those which campaigners of the second tendency just described would want to claim as theirs, and as vindicating their approach. But what do the judgments and changes recorded above really amount to? Readers from outside the English version of the common law tradition will certainly have noticed in the account of the English judgments in this Article how careful judges are *not* to engage with what might be thought the big questions of fairness, justice, equality, or discrimination. In that sense, they are not landmark cases, even though they do change the law. It is as if, having had food rationing in the Second World War, a hungry people still thought it socially unacceptable to enjoy talking about and eating food, even though it is now widely available: any bananas getting eaten do so in private and without any appreciative remarks.

This rhetoric of reticence in the English judiciary encourages those involved in the law—which includes gay and lesbian activists of the second tendency—to count as momentous events changes which to an outsider look like tinkering at the edges of the law as it affects gay men and lesbians. This might be said of both *Fitzpatrick*[166] and *Smith v. Gardner Merchant*,[167] though perhaps not of *Lustig-Prean and Beckett*.[168] In any event, change (however small) is always more visible than stasis, and the context of overwhelming detail, within which judges have to find the freedom to innovate, encourages observers to celebrate decisions which are remarkable only because of the narrow and unpromising context from which they spring. In that sense, English law encourages an obsession with the micro level and a collective forgetfulness that a more macro level exists at all.

It is Europe which forces us to remember the macro level, since the Continental legal tradition, which influences both European human rights law and European Community law, is happy to think in terms of generalities and principles—and the legal integration of the United Kingdom into Europe means that this tradition can no longer be ignored by British Governments or English judges. An understandable sense of bewilderment, in a landscape without recognizable landmarks, characterizes some English reactions to the prospect of the Human Rights Act 1998 entering into force;[169] this development may well be the most important this century (or next century, depending on how one counts, not only for gay men and lesbians but for the evolution, reasoning, and methods of English law.

If predictions were the name of the game, it would be safe to guess that the age of consent for gay sex will be reduced to sixteen in England and Wales (seventeen in Northern Ireland) and that section 28 of the Local Government Act 1988 will be repealed, in both England and Wales and Scotland, before the end of the year 2000. Whether, and when, English law will acquire a general principle of non-discrimination available to gay men and lesbians is harder to be sure about. Smaller victories, in the English style, are likely to precede it: greater rights for same-sex couples in property and inheritance and repeal or reform of some of the criminal offenses used against gay men. If no single conclusion about how English law deals with the claims of gay men and lesbians emerges at the end of this account of the last two years' activities and events, that is in itself significant. Where the law comes from and how it changes is too complex to allow for simple summaries. Like the gay men and lesbians who are its subjects, objects, clients, and consumers, the law does not speak with one voice. Nor, perhaps, should it.

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166. *See supra* Part II.B.
167. *See supra* Part II.C.
168. *See supra* Part III.A.3.
169. *See supra* Part III.A.5.

SECURING THE INDEPENDENCE OF THE JUDICIARY–THE INDIAN EXPERIENCE

M. P. Singh*

We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence.[1]

There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured.[2]

I. INTRODUCTION

An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.[3] The independence of the judiciary is normally assured through the constitution but it may also be assured through legislation, conventions, and other suitable norms and practices. Following the Constitution of the United States, almost all constitutions lay down at least the foundations, if not the entire edifices, of an

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1. Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, Speech to the Constituent Assembly of India preceding the motion to adopt the Constitution (Nov. 29, 1949), *in* 11 CONSTITUENT ASSEMBLY DEBATES 498.

2. Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949), *in* CONSTITUENT ASSEMBLY DEBATES, vol.VIII, 258.

3. *See* Philip S. Anderson, *Foreword* to Symposium, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 1, 2 (Summer 1998); Stephen G. Breyer, Comment, *Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3 (Summer 1998); *see also* K. T. Shah, CONSTITUENT ASSEMBLY DEBATES, vol. VIII, 218-19; preamble to UN Basic Principles on the Independence of the Judiciary; para. 1 of the Draft Universal Declaration on the Independence of the Justice, *reprinted in CIJL Bulletin*, No. 25-26, at 17, 39 (Apr.-Oct. 1990); ABIMBOLA A. OLOWOFOYEKU, SUING JUDGES 3 (1993); THE FEDERALIST, No.78, at 505 (Alexander Hamilton); Archibald Cox, *The Independence of Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996); *cf.* G. N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369, 398 (1992).

independent judiciary. The constitutions or the foundational laws on judiciary are, however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs, including the judiciary and the public opinion. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political, and economic conditions;[4] it is too fragile to be left unguarded.[5]

India has given to itself a liberal constitution in the Euro-American traditions which aims at establishing a free and democratic society. It also aims at the prosperity and stability of the society. Its makers believed that such a society could be created through the guarantee of fundamental rights and an independent judiciary to guard and enforce those rights. Therefore, the framers of India's Constitution dealt with these two aspects with maximum and identical idealism.[6]

A. *Meaning of the Independence of the Judiciary*

The independence of the judiciary is not a new concept but its meaning is still imprecise.[7] The starting and the central point of the concept is

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4. *See* SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 4 (1994) [hereinafter SHETREET, JUSTICE IN ISRAEL]. The independence of the judiciary and the protection of its constitutional position is not achieved in an instant act, but rather over a period of time by a continuous struggle which takes place within the framework of an ongoing and dynamic process. The judiciary, and the social forces which support it, must always be on guard to maintain the independence of the judiciary in the face of unexpected events and changing social, economic, or political circumstances. *See id.*

5. On the fragility of the independence of the judiciary see the recent controversy that arose in the United States on the judgment of Judge Harold Brier in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y 1996), *vacated on reconsideration*, United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996). Among many legal writings on the episode, see Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745 (1997); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges: A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729 (1997). For more instances see, Robert Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, 19 OXFORD J. LEGAL STUD. 365 & n.1(1999) [hereinafter Stevens, *A Loss of Innocence*].

6. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 26, 164. *See also* Mahendra P. Singh, *Constitutionality of Market Economy*, *in* LEGAL DIMENSIONS OF MARKET ECONOMY 1 (M.P. Singh et al. eds., 1997); H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2484, 2944 (4th ed. 1991-96).

7. "While there is widespread concerns on the obvious importance of the judiciary, the literature on it is meagre, and the concept itself has never been fully unpacked." ROBERT STEVENS, THE INDEPENDENCE OF THE JUDICIARY 3 (1993) [hereinafter STEVENS, THE INDEPENDENCE OF THE JUDICIARY]. *See also* ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 129 (1998) ("But it is unclear what independence of the judiciary really

apparently the doctrine of the separation of powers.[8] Therefore, primarily it means the independence of the judiciary from the executive and the legislature. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much. The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason the independence of the judiciary is the independence of each and every judge. But whether such independence will be ensured to the judge only as a member of an institution or irrespective of it is one of the important considerations in determining and understanding the meaning of the independence of the judiciary.[9]

In a comprehensive analysis based on the contributions of leading jurists and international bodies on the independence of the judiciary, Shetreet takes into account all of these considerations.[10] Explaining the expression "independence" and "judiciary" separately, he says that the judiciary is "the

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means."); Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 74 (Summer 1998) ("It may well turn out that judicial independence is easier to protect than to define.").

8. While the doctrine of separation of powers ensures liberty by preventing concentration of powers in one person or body and thereby puts a restraint on the executive and legislative, it also ensures the exercise of judicial power that is unhindered by the other two branches.

9. *See* Siracusa Draft Principles on the Independence of the Judiciary, *reprinted in* CIJL Bulletin No. 25-26, at 59 (Apr.-Oct.1990), which read:

> Independence of the judiciary means (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

Id. art 2. *See also* U.N. Basic Principles on the Independence of the Judiciary, paras. 1-7 and Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), paras. 2-8, *reprinted in* CIJL Bulletin No. 25-26, at 17, 38 (Apr.-Oct.1990). For some other relevant literature see Pat Polden, *Judicial Independence and Executive Responsibilities: The Lord Chancellors Department and the Country Court Judges*, 25 ANGLO-AM. L. REV. 133 (1996); Cox, *supra* note 3, at 566; Rosenberg, *supra* note 3, at 377; Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996); Dorean M. Koenig, *Independence of the Judiciary in Civil Cases and Executive Branch Interference in the United States: Violations of International Standards Involving Prisoners and Other Designed Groups*, 21 U. DAYTON L. REV. 719, 722 (1996).

10. Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 594 (Shimon Shetreet & Jules Deschênes eds., 1985) [hereinafter Shetreet, *Judicial Independence*]. Much reliance has been placed on this source for the following discussion on this issue.

organ of government not forming part of the executive or the legislative, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication."[11] Dealing with "independence," after citing a few definitions with which he does not fully agree,[12] he differentiates between the independence of the individual judges and the collective independence of the judiciary as a body which together constitute "independence." To Shetreet, independence of the individual judge consists of the judge's substantive and personal independence. The former means subjection of the judge to no authority other than the law in the making of judicial decisions and exercising other official duties, while the latter means adequate security of the judicial terms of office and tenure.[13] The independence of individual judges also includes independence from their judicial superiors and colleagues.[14]

Shetreet's treatment establishes that the independence of the judiciary means and includes the independence of the judiciary as a collective body or organ of the government from its two other organs as well as independence of each and every member of the judiciary—the judges—in the performance of their roles as judges. Without the former the latter cannot be secured and without the latter the former does not serve much purpose. Therefore, the two, even if separable, must be pursued together. A system which ignores one or the other cannot make much progress towards, much less achieve, the independence of the judiciary.

B. *Components of the Independence of the Judiciary*

"The independence of the judiciary and the protection of its constitutional position," contends Shetreet, "is not achieved in an instant act, but rather over a period of time by a continuous struggle which takes place within the framework of an ongoing and dynamic process."[15] Therefore, it may not be possible to lay down all the conditions in advance, either in the constitution or otherwise, which will secure and ensure perpetual independence of the judiciary. Such conditions will have to be checked and

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11. *Id.* at 597-98.

12. *Id.* at 594-95 ("[A] judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day.").

> [T]he organs administrating justice can only be subordinate to the law, and that only the law can influence the contents of the decisions made by these organs. No other state authority, not even the highest, is allowed to influence the decisions made by the judicial organs. This judicial independence is a guarantee for the fulfilment of the legal security of the individual.

Id. at 594-95, 659 n.11 (quoting Erkki Juhani Taipale).

13. *See id.* at 598.

14. *See id.* at 599.

15. SHETREET, JUSTICE IN ISRAEL, *supra* note 4, at 4.

revised from time to time. A few of the conditions are, however, so basic to the independence of the judiciary that without them judicial independence cannot exist. Some of them may be assigned to the collective independence of the judiciary as an institution, while others may be assigned to the independence of individual judges.

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides for the composition and powers of the executive and the legislature, it should also provide for the judiciary. If the constitution vests the judicial power in the judiciary, so much the better. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, terms of office, and tenure of the judges. The constitution must ensure a constitutional position of dignity to the judiciary. The constitution must also ensure administrative independence of the judiciary, such as supervision and control over administrative staff, preparation of its budget, and maintenance of court buildings. It must prohibit ad hoc tribunals and the diversion of cases from ordinary courts, ensure the natural judge principle, ordain respect for and enforcement by the other branches of the government of court decisions, provide for separation of judges from the civil services, and prohibit diminution of judges' service conditions.[16] Some of these matters may be entrusted to legislation; however, there must be enough assurance in the Indian Constitution to that effect so that the judiciary is able to command respect in the eyes of the people and is able to attract the ablest persons as judges.

Again, judicial tenure and appointment must be beyond the control of the executive. The best tenure is for life, but it may also be up to a particular age without any possibility of its abrupt termination. Extension beyond retirement is also inconsistent with the independence of the judiciary. Probationary appointments should not be allowed; part-time, ad hoc, and temporary appointments should be avoided and must be restricted to emergency situations. Moreover, the procedure for such appointments must be the same as for regular appointments. Judicial salaries must be beyond the executive and legislative reach with provision for automatic upward revision with changes in the price index or at least regular and timely adjustment of salaries with the passage of time. Salaries should not be subject to any ad hoc cut except perhaps in emergencies. Transfer of judges without their consent

16. In this regard provisions of the German Basic Law are worth noting. Article 92 vests the judicial power in the judges. GRUNDGESETZ [Constitution] [GG] art. 92. Article 97 provides that the judges shall be independent and subject only to the law, *see id.* art. 97, and that any disciplinary action against the judges under article 97(2) be read with Article 98 and be subject to judicial decision. *See id.* art. 98. Article 101 prohibits extraordinary courts and removal of any one from the jurisdiction of his lawful judge. *See id.* art. 101.

should not be permitted and in no case should such power be with the executive. If transfer is permitted at all, it must be in the hands of the judiciary and must be exercised by a collegial body or at least by more than one person.

Further, impartiality and freedom from irrelevant pressures must be ensured to the judges in all aspects of adjudication. The judges must be and appear to be unbiased and, therefore, should not be members of either the executive or the legislature or of political parties or business organizations, and should not participate in political activities. Similarly the judge should be predetermined. The judges must also fairly reflect the society. They should give due deference to the other branches of the government and refrain from deciding issues which squarely fall within the exclusive domain of the legislature or the executive. It is, however, doubtful whether the judges should resort to the political questions doctrine to deny access to the courts, particularly in matters of fundamental rights.[17]

Judges must also be independent from directives, guidelines, or any kind of pressures from fellow judges. The dominant role of the judges in the matter of appointments and promotions, the hierarchy within the judiciary, and the lack of power to write dissents may also have an adverse impact on the independence of the judges. Although accountability of the judiciary is a delicate and controversial issue, it goes hand in hand with its independence.[18]

II. CONSTITUTIONAL PROVISIONS AND PRACTICE

A. *Constitutional Provisions*

The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform. All powers of the state and its different organs have their source in it and must be exercised subject to the conditions and limitation laid down in it. The constitution provides for the parliamentary form of government which lacks strict separation between the executive and the legislature but maintains clear separation between them and the judiciary. The Indian Constitution specifically directs the state "to separate the judiciary from the executive in

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17. *See* Shetreet, *Judicial Independence*, *supra* note 10, at 636 (supporting the non-involvement of the courts in the political questions). *But see* BARENDT, *supra* note 7, at 147 (asserting a more active role for courts in deciding political questions).

18. "Accountability and independence are not mutually exclusive; most often we can have both." Lubet, *supra* note 5, at 65; Peter M. Shane, *Intrabranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 54; *see generally* Symposium, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS (Summer 1998) (conducting an in-depth examination of the interplay between judicial independence and accountability).

the public services of the State."[19] The Supreme Court has used this provision in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court.[20]

Although the nature of the Indian Constitution—whether it is federal or unitary—is doubtful, basically it provides for a federal structure of government consisting of the Union and the States. The Union and the States have their distinct powers and organs of governance given in the constitution. While the Union and States have separate legislatures and executives, they do not have a separate judiciary.[21] The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the High Courts.[22] The High Courts are basically under the regulative powers of the Union, subject to some involvement of the States in the appointment of judges and other staff and in the finances.[23] The Supreme Court is exclusively under

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19. INDIA CONST. art. 50.

20. S.C. Advocates-on-Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268 [hereinafter Second Judges Case]. Seervai takes objection to the application of Article 50 to higher judiciary on the ground that the judges of the Supreme Court and High Courts are not members of public services. *See* SEERVAI, *supra* note 6, at 2930. While the objection may not appear to be baseless, the liberal interpretation for a laudable purpose taken by the Court is justified because in England, from where India derives much of the understanding of its law, the judiciary at all levels is treated as part of public service. *See* STEVENS, THE INDEPENDENCE OF THE JUDICIARY, *supra* note 7, at 179, 183-84. Even if Article 50 is confined to the lower or subordinate judiciary, provisions are made in the constitution to insulate higher judiciary from the legislature and the executive. Articles 102 and 191 specifically disqualify members of Parliament and State legislatures, respectively, from holding any office of profit under the Government of India or Government of any State, which will definitely include the office of a judge of the Supreme Court or of any High Court. *See* INDIA CONST. arts. 102, 191. Further, under Articles 75 and 164 members of the Union and the State executive, respectively, have to be members of Parliament or the State legislature; therefore, they cannot be judges. *See id.* arts. 75, 164. Again, perhaps with the sole exception of Justice Krishna Iyer who was a state legislator from 1952-56 and also a legislator and minister in another state from 1957-59 before he was appointed a judge of the Kerala High Court in 1968 and later of the Supreme Court in 1973, no other legislator or minister has ever been appointed a judge of a High Court or of the Supreme Court. It is notable that the constitution makers had rejected the proposal to bar the politicians from being appointed judges of the Supreme Court or of the High Courts. *See* 4 B. SHIVA RAO ET AL., THE FRAMING OF INDIA'S CONSTITUTION 144 (1968).

21. Although the Constitution includes the Supreme Court of India in the part dealing with the Union (entitled "The Union Judiciary") and includes the High Courts and subordinate courts in the part dealing with the States which arrangement has also been followed by Seervai, who considers Constitution of India to be federal. *See* SEERVAI, *supra* note 6, at 283. The constitution does not make a clear division between the Union and the State judiciary as it does with respect to the other two organs of the State. No court is designated the Union or the State court.

22. INDIA CONST. arts. 233-35.

23. *See id.* art. 229, sched. VII.

the regulative powers of the Union.[24] Subject to territorial limitations, all courts are competent to entertain and decide disputes both under the Union and the State laws.

The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence.[25]

1. *The Supreme Court*

The Supreme Court of India consists of a Chief Justice of India and twenty-five other Judges.[26] The judges are appointed by the President of India "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary."[27] For "the appointment of a Judge other than the Chief Justice, the Chief Justice of India [must] always be consulted."[28] Judges of the Supreme Court, including the Chief Justice, hold their offices until the age of sixty-five. They may resign or be removed from office earlier.[29] Removal can take place only on the grounds of proved misbehavior or incapacity of the judge or by an order of the President passed after a majority of the total membership and a majority of not less than two-thirds of the members present and voting in each House of Parliament present an address to the President in the same session for such removal.[30] The only attempt so far to remove a judge has been unsuccessful.[31] Before entering office judges take an oath, to, among other things, perform their duties without fear or favor, affection or ill will, and to uphold the constitution and the laws.[32]

Only a citizen of India who has been a judge of one or more High Courts for at least five years, or has been an advocate of one or more High Courts for at least ten years, or is a distinguished jurist in the opinion of the President, can be a judge of the Supreme Court.[33] Judges of the Supreme Court are

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24. *See id.* art. 146, sched. VII.

25. *See* AUSTIN, *supra* note 6, at 184-85.

26. *See* INDIA CONST. art. 124, §1; Act 22 of 1986. Initially the Indian Constitution had fixed the number of puisne judges at seven.

27. *Id.* art. 124, § 2.

28. *Id.* proviso.

29. *See id.* proviso.

30. *See id* art. 124, §§ 4 -5.

31. *See* Case of Justice V. Ramaswami in 1993. For details see MAHENDRA P. SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA 417 (9th ed. 1994). An earlier attempt to remove Justice J. C. Shah did not reach Parliament and could not even become public.

32. *See* INDIA CONST. art. 124, § 6 & sched. III.

33. *See id.* art 124, § 3.

prohibited from pleading or acting in any court or before any authority in India after retirement.[34] Every judge is entitled to salary and other allowances and privileges specified in the constitution, subject to upward, but not downward, revision by Parliament.[35] The constitution also makes provisions for the appointment of the acting Chief Justice of India and ad hoc judges, and for attendance of retired judges at the sittings of the Supreme Court.[36]

The Supreme Court is a court of record having, among other things, the power to punish for contempt.[37] It sits in Delhi though it may hold its sittings at other places.[38] It has incomparably wide original, appellate, and advisory jurisdictions.[39] The Supreme Court also has the following powers: to review its decisions; to make such order as is necessary for doing complete justice in any cause or matter; to enforce its decrees and orders; to order attendance, investigation, and discovery; to transfer cases to itself or from one High Court to another; and to regulate its practice and procedure.[40] Parliament may further enlarge the jurisdiction of the Supreme Court and may confer ancillary powers on it for more effective exercise of its jurisdiction.[41] The law declared by the Court is binding on all courts in India.[42] All civil and judicial authorities are required to act in its aid.[43]

The judgments and opinions of the Court are given in the open and with the approval of the majority of judges. The differing judges may write dissenting or separate opinions.[44] Officers and servants of the Court are appointed by the Chief Justice of India and are subject to any law made by Parliament, and their service conditions are regulated by the Chief Justice as well.[45] All administrative expenses of the Court, including the salaries, allowances, and pensions of the judges and other staff are charged on the Consolidated Fund of India, free from variation or alteration by Parliament.[46]

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34. *See id.* § 7.

35. *See id.* art. 125 & sched. II; Supreme Court Judges (Conditions of Service) Act, 1958. Article 125 had to be amended by the Constitutional (54th Amendment) Act, 1986 because the original Article 125 did not provide for upward revision of salary. During a financial emergency the salaries of the judges may, however, be reduced. *See* INDIA CONST. art. 360, § 4(b).

36. *See* INDIA CONST. arts. 126, 128.

37. *See id.* art. 129.

38. *See id.* art. 130.

39. *See id.* arts. 32, 131-36, 143.

40. *See id.* arts. 137, 139A, 142, 145.

41. *See id.* arts. 138-140.

42. *See id.* art. 141.

43. *See id.* art. 144.

44. *See id.* art. 145, §§ 4-5.

45. *See id.* art. 166, §§ 1-2.

46. *See id.* arts. 112, § 3(d)(i), 146, § 3.

Parliament and State legislatures are prohibited from any discussion with respect to the conduct of any judges of the Supreme Court or of a High Court in the discharge of their duties.[47]

2. *The High Courts*

The constitution provides for a High Court for each State, though Parliament is also authorized to establish a common High Court for two or more States or for two or more States and a Union Territory.[48] Every High Court is a court of record with power to punish for contempt.[49] The High Courts consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint.[50] High Court judges are appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court.[51] Unless judges resign or are removed or appointed to the Supreme Court, they hold office until the age of sixty-two.[52] They hold office during good behavior and can be removed only in the same manner as a judge of the Supreme Court.[53] Only a citizen of India who has held a judicial office for at least ten years or who has been an advocate for ten years can be appointed a judge.[54] Every judge of the High Court takes a similar oath as a judge of the Supreme Court.[55] High Court judges are prohibited from pleading or acting in any court or before any authority except the Supreme Court or a High Court in which they have not served.[56] The salaries, allowances, and other rights and privileges of the High Court judges are also specified in the constitution and are subject to only upward variation by Parliament.[57] The constitution also provides for the appointment of an acting Chief Justice, additional and acting judges, and retired judges at sittings of High Courts.[58]

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47. *See id.* art. 121.
48. *See id.* arts. 214, 231.
49. *See id.* art. 215.
50. *See id.* art. 216.
51. *See id.* art. 217(1).
52. *See id.* art. 217(1) & proviso. The age of retirement was raised from 60 to 62 years by the Constitutional (15th Amendment) Act, 1963.
53. *See* INDIA CONST. proviso & art. 218.
54. *See id.* art. 217, § 2.
55. *See id.* art. 219.
56. *See id.* art. 220.
57. *See id.* art. 221. Amended by the Constitutional (54th Amendment) Act, 1986 to provide for upward revision.
58. *See* INDIA CONST. arts. 223-224A. Article 224, providing for additional and acting judges, was introduced by the Constitutional (7th Amendment) Act, 1956 and the Constitution (15th Amendment) Act, 1963.

High Court judges may be transferred from one High Court to another.[59] The High Courts have wide original and appellate jurisdiction, including the jurisdiction to issue writs for the enforcement of the Fundamental Rights and for any other purpose.[60] Every High Court has power of superintendence over all courts and tribunals within its territorial jurisdiction[61] and of withdrawal of cases involving substantial questions of law relating to the interpretation of the constitution.[62] The Chief Justice of the High Court appoints officers and servants of the High Court and regulates their services.[63] The administrative expenses of the High Court, including the salaries and other allowances of the judges and other staff are charged on the Consolidated Fund of that State.[64]

3. *The Subordinate Courts*

The highest subordinate court is the court of the district judge. The Governor of a State, in consultation with the High Court of that State, appoints the district judges.[65] Only a person who is either already in the legal service of the Union or of the State or has been an advocate for at least seven years and is recommended by the High Court can be appointed a district judge.[66] Appointments to judicial service of the State below the rank of district judge are made by the Governor in accordance with the rules made after consultation with the State Public Service Commission and the High Court.[67] The control of district courts and courts below them, including the posting, promotion, and grant of leave to members of the judicial service vests in the High Court. The Governor of a State may apply these provisions even to the magistrates in that State.[68]

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59. *See* INDIA CONST. art. 222.
60. *See id.* arts. 225-26.
61. *See id.* art. 227.
62. *See id.* art. 228.
63. *See id.* art. 229.
64. *See id.* arts. 202 (3) (d), 229(3).
65. *See id.* art. 233(1).
66. *See id.* art. 233(2).
67. *See id.* art. 234.
68. *See id.* art. 237. Then there are some supplemental provisions such as Article 39A which requires the State to "secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and . . . to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." *Id.* art. 39A. For examples of similar supplemental provisions, see also *id.* art 312 (outlining all India judicial service); *id.* arts. 323A-323B (providing for certain tribunals which to some extent derogate with the powers of the ordinary courts); *id.* sched. II (discussing the salaries, allowances, and other privileges of the Supreme Court and High Court judges). The Supreme Court has invalidated the constitutional amendment which introduced Articles 323A and 323B to the extent it excludes the jurisdiction of the High Courts under Article 226 over the tribunals. *See* Chandra Kumar v. Union of India, A.I.R. 1997 S.C. 1125.

B. *Constitutional Practice*

The constitutional provisions summarized above appear to be the most exhaustive in any constitution. The Indian Constitution makers believed that they had done everything to secure the independence of the judiciary and hoped that those who had to work with the constitution would make its operation successful.[69] Their hopes have not been belied but the course has not always been easy. As will be noted, some of the difficulties arose soon after the commencement of the constitution while others have arisen later. Some of them have been resolved amicably and, hopefully, for good, but others persist. Noteworthy, however, is that the above constitutional scheme has stood the test of time and survived without any significant changes.[70]

The constitution assumes judicial review of legislative and executive acts and, therefore, from the initial litigation soon after the commencement of the constitution the courts started exercising it without anybody entertaining any doubts in this regard.[71] At the same time, from the very beginning invalidation of legislative and executive acts by the courts in some matters, particularly in matters of property expropriation, was not viewed sympathetically by the government.[72] Therefore, the constitution was frequently amended in its early stages.[73] This process was not healthy for the

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69. See *supra* text accompanying note 1 for Dr. Rajendra Prasad's perspective. Dr. Prasad continued:

> We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work there willingness to respect the viewpoints of others, capacity for compromise and accommodation. Many things, which cannot be written in a Constitution are done by convention. Let me hope that we shall show those capacities and develop those conventions.

Prasad, *supra* note 1.

70. The only aberration in this scheme brought by the controversial constitution, the 42d amendment during the emergency in 1976 that curtailed powers of the Supreme Court and the High Courts, was quickly removed by the constitution's 43d and 44th amendments in 1978. The other amendments in these provisions have rectified the situations not envisaged by the constitution makers, such as the conferment of power on Parliament for upward revision of the salaries of the Supreme Court and High Court Judges; restrictions on, as a matter of right, appeals to the Supreme Court; provision for the appointment of additional and acting judges in the High Court and raising of the age of retirement in High Courts from 60 to 62 years; provision for compensatory allowance to High Court Judges on transfer from one High Court to another, which in a way further strengthened the position of the judiciary to face the work load as well as to facilitate appointment of competent persons. Some incidental amendments were made on the reorganization of the States in 1956.

71. *See* A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27; Kameshwar Singh v. State of Bihar, A.I.R. 1951 Pat. 91.

72. *See* Kameshwar Singh, A.I.R. 1951 Pat. 91; State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 226.

73. *See* Constitution (1st Amendment) Act (1951) and subsequent amendments, particularly Article 31, since repealed. *See* INDIA CONST. art. 31. For the history of these amendments, see Singh, *supra* note 31, at 235.

independence of the judiciary because any of its decisions that were inconvenient to the government of the day could be easily overruled by constitutional amendment. In 1967 the Supreme Court restricted this trend by deciding that no amendment of the constitution could be made in the future which abridged or restricted the Fundamental Rights.[74] Later, in 1973, the Court overruled this decision and upheld the amendments abrogating it, but the Court laid down a much broader restriction on the power of amendment that the basic structure of the constitution could not be amended.[75] This continues to be the law and has been applied several times to invalidate amendments to the constitution.[76] The independence of the judiciary and judicial review have been held part of the basic structure or basic features of the Indian Constitution and, therefore, amendments which directly or even indirectly take away these features have been invalidated by the Court.[77] The Court has also invalidated a constitutional amendment which subjected the decision of a tribunal, which was not a court in the strict sense, to confirmation or rejection by the government.[78] Similarly, laws merely abrogating a judicial decision without retrospectively changing the legal basis of that decision have also been invalidated.[79] The courts have also expanded the scope of judicial review by liberalizing the requirement of *locus standi* and developing the concept of public interest litigation and by rejecting the concept of political questions.[80]

Through public interest and other litigation the courts have been liberally expanding their jurisdiction to enforce the Fundamental and other rights through suitable and effective remedies. The courts have also created or recognized new rights for the common people, especially for the poor, oppressed, and neglected, a fact which has earned respect for the courts from

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74. Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643.

75. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461. On this see, Dieter Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 *Indian Yearbook of International Affairs*, 375 (1966-67); *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6-7 DELHI L. REV. 1 (1977-78); *Basic Structure of the Constitution and Constitutional Principles*, 3 LAW AND JUSTICE, 99 (1996) *reprinted in* DIETER CONRAD, ZWISCHEN DEN TRADITIONEN: PROBLEME DES VERVASSUNGSRECHTS UND DER RECHTSKULTUR IN INDIEN UND PAKISTAN (Jürgen Luett & Mahendra P. Singh, eds., 1999).

76. *See* L. Chandra Kumar v. Union of India, A.I.R. 1997 S.C. 1125; Kihoto Hollohan v. Zachilhu, A.I.R. 1993 S.C. 412; P. Sambhamurthy v. State of Andhra Pradesh, A.I.R. 1987 S.C. 663; Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789; Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.

77. *See* L. Chandra Kumar, A.I.R. 1997 S.C. at 1125; *see also* S.C. Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268; S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

78. *See* P. Sambhamurthy v. State of Andhra Pradesh, A.I.R. 1987 S.C. 663.

79. *See, e.g.*, In the matter of Cauvery Water Disputes Tribunal, A.I.R. 1992 S.C. 522.

80. *See* S. P. Gupta v. Union of India, A.I.R. 1982 S.C. 149; State of Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361.

a wide section of Indian society.[81] The Supreme Court has also expanded its jurisdiction in undefined areas, such as its power to do "complete justice in any cause or matter pending before it."[82] The courts have denied the claim of act of state to the government vis-à-vis the citizens[83] and have subjected the power of pardon to judicial review.[84]

Judicial tenure stands on sound footing, and the only attempt to remove a Supreme Court judge against whom charges of corruption had been proved by a committee of judges failed.[85] Low salary and allowances of judges have been an issue because sometimes the best persons have not been available for the office of judge and sometimes even those who were appointed later resigned from it. From time to time, salaries have, however, been revised and even the constitution has been amended once to improve the situation.[86] Now salaries are considered to be at the satisfactory level with every possibility of upward revision.[87] Parliament and State legislatures abstain from discussing judicial behavior, though sometimes it is doubted whether the courts also show similar deference to the legislators in the exercise of their functions.[88]

From the very beginning governments have also shown due concern for the judiciary. As early as 1955 the Union government instituted the Law Commission to review the system of judicial administration in all its aspects and to suggest ways and means for improving it and making it speedy and less expensive. In 1958 the Commission produced its famous *Fourteenth Report* with a comprehensive study of all courts, from the lowest to the Supreme Court, and with wide-ranging recommendations for ensuring the independence, efficiency, and efficacy of the judiciary at all levels.[89] Since

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81. *See* Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S. C. 812; Nilbati Behra v. State of Orissa, A.I.R. 1993 S.C. 1960; M. C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086; Rudul Sah v. State of Bihar, A.I.R. 1983 S.C. 1086.

82. INDIA CONST. art. 142. For cases interpreting Article 142, see State of Punjab v. Bakshish Singh, (1998) 8 S.C.C. 222; Supreme Court Bar Ass'n v. Union of India, (1998) 4 S.C.C. 409; Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241; Delhi Judicial Service Ass'n v. State of Gujarat, (1991) 4 S.C.C. 406; Union Carbide Corp. v. Union of India, (1991) 4 S.C.C. 584.

83. *See* Jahangir M. Cursetji v. Secretary of State for India, 6 Bom. I.L.R. 131 (1904).

84. *See* Kehar Singh v. Union of India, A.I.R. 1989 S.C. 653, 661.

85. *See* Singh, *supra* note 31, at 417. An effort seems to have been made earlier to impeach Justice J. S. Shah, but the effort never reached Parliament. *See* N. K. Palkhivala, *Judiciary in Turmoil: Public Confidence Rudely Shaken*, 26 CIV. & MIL. L.J, 176, 178 (1990).

86. *See* Constitution (54th Amendment) Act (1986); INDIA CONST. arts. 125, 221.

87. *See* Supreme Court Judges (Conditions of Service) Act (1958).

88. See the controversies over the courts and legislative privileges under Articles 105 & 194 and particularly, Special Reference No. 1 of 1964, A.I.R. 1965 S.C. 745. *See also* P. V. Narsimha Rao v. State, (1998) 4 S.C.C. 626; Judges (Protection) Act, 1985 and the Judicial Officers Protection Act, 1985; P. C. Rao, *Use and Abuse of the Indian Constitution*, 58 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 799, 806 (1998).

89. *See* LAW COMMISSION OF INDIA, FOURTEENTH REPORT: REFORMS OF JUDICIAL ADMINISTRATION (1958).

then the exercise has been repeated several times concerning different aspects of administration of justice, including in particular appointment of judges and arrears in courts.[90] Unfortunately, not many of the results of these exercises have been put into practice.

The independence of the lower judiciary or subordinate courts has also been honored and strengthened. The lower judiciary has been separated from the executive almost all over the country and operates under administrative supervision of the High Court to which it is subordinate. Its supervision and control by the High Court vis-à-vis the executive has been expanded by holding that the district judges shall be appointed by the Governor of a state only from amongst the members of the judiciary and not from amongst the judicial officers who are part of the executive, and that they shall always be appointed only in consultation with the High Court and with no other body or authority.[91] Similarly, disciplinary action against the members of the lower judiciary, such as suspension and removal from job and matters such as *inter se* seniority are determined and decided by the High Court. Through a notable ruling the independence of the lower judiciary has been substantially secured and enhanced by the Supreme Court. It has held that for purposes of their service conditions that the members of the judiciary, even at the lowest level, are comparable to the members of the other two branches of the government, namely, the legislative and the executive, and not to the civil servants or administrative staff of the government. Emphasizing the importance of the independence of the judiciary and its uniform service condition, the Court directed the Union of India and the States to take steps for the creation of an all India judicial service; to prescribe minimum qualifications for recruitment to the lower judiciary with the assistance of the High Court; to fix the uniform age of retirement at sixty; to provide for payment of a library allowance, provision for conveyance or conveyance allowance, provision for suitable residential accommodation, uniform and better service conditions, and provision for training of judges.[92] In any case the salaries and allowances of

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90. *See, e.g.*, Report of the Study Team of the Administrative Reforms Commission on Centre-State Relations (1967); Administrative Reforms Commission Report (1969); High Courts Arrears Committee Report (1972); LAW COMMISSION OF INDIA: FIFTY-EIGHTH REPORT (1974); SEVENTY-SEVENTH REPORT (1978); SEVENTY-NINTH REPORT (1979); EIGHTIETH REPORT (1979); ONE HUNDRED-TWENTIETH–ONE HUNDRED TWENTY-SEVENTH REPORT (1987-1988).

91. *See* State of Kerala v. Lakshmikutty, A.I.R. 1987 S.C. 331; M.M. Gupta v. State of J&K, A.I.R. 1982 S.C. 1579; Chandra Mohan v. State of U.P., A.I.R. 1966 S.C. 1987. Government Counsel, who are also advocates, are, however, not disqualified for appointment. *See* Sushma Suri v. Govt. of National Capital Territory of Delhi, (1999) 1 S.C.C. 330; High Court of Rajasthan v. Ramesh Chand Paliwal, A.I.R. 1998 S.C. 1079. *See also* B. Sekar Hegde, *Independence of the Judiciary and the Supreme Court*, 9 J. INDIAN L. INST. 638 (1967).

92. All India Judges' Ass'n v. Union of India, A.I.R. 1992 S.C. 165; All India Judges' Ass'n v. Union of India, A.I.R. 1993 S.C. 2493.

the members are increased from time to time with the increase of salaries and allowances of other civil servants. To protect the honor of the lower courts the Supreme Court has also extended its contempt power to cover the contempt of the lowest court.[93]

From this description one, however, should not be led to form a rosy picture of the Indian judiciary all through and all over. The judiciary has been facing several serious problems, some of which have been indicated towards the end of this Article. But apart from those problems which are an indirect threat to the independence of the judiciary, a direct threat to it has been on the issues of appointment of the Supreme Court and High Court judges and the transfer of the latter from one High Court to another. These two issues have been persistently in the forefront of the debate on the independence of the judiciary. The following discussion concentrates on that debate.

III. CONTENTIOUS ISSUES: APPOINTMENT AND TRANSFER OF JUDGES

A. *The Background*

Appointment of judges to the higher judiciary has been the most recurrent theme in the history of the judiciary since independence and in the immediately preceding years. In view of the fact that before independence the British Crown, uninfluenced by the domestic politics, appointed judges to the higher judiciary, its exclusive discretion in such appointments was not questioned.[94] With independence it was apprehended that the situation would change, requiring remedial measures. Therefore, in 1945 the Sapru Committee recommended in its constitutional proposals that the "justices of the Supreme Court and the High Courts should be appointed by the head of state in consultation with the Chief Justice of the Supreme Court and, in the case of High Court judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned."[95] Soon after the Constituent Assembly started the process of constitution making at the beginning of 1947, the Ad Hoc Committee of the Union Constitution Committee of the Constituent Assembly, which was assigned the task of formulating the proposals on the Supreme Court, reported that it did not think it "expedient to

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93. *See* Income Tax Appellate Tribunal v. V. K. Aggarwal, (1999) 1 S.C.C. 16; In re Vinay Chandra Mishra, (1995) 2 S.C.C. 584; Delhi Judicial Service Ass'n v. State of Gujarat, (1991) 4 S.C.C 406.

94. See sections 200 and 220 of the Government of India Act (1935). However, there is a reference to a convention that such appointments were also made after referring the matter to the Chief Justice of India and obtaining his concurrence. *Memorandum Representing the Views of the Federal Court and of the Chief Justices of the High Courts*, *in* 4 B. SHIVA RAO ET AL., *supra* note 20, at 196. *See also* SEERVAI, *supra* note 6, at 2956.

95. AUSTIN, *supra* note 6, at 176. For the text of the Committee Report see T. B.SAPRU ET.AL., CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE (2d ed. 1946).

leave the power of appointing judges . . . to the unfettered discretion of the President" and recommended two alternative methods. One of these methods authorized the President to nominate a person for appointment of a judge of the Supreme Court, other than the Chief Justice, in consultation with the Chief Justice. The nomination was to be confirmed by a panel of seven to eleven members comprising Chief Justices of High Courts, members of Parliament, and law officers of the Union. The other method was that the President would appoint in consultation with the Chief Justice one of the three persons recommended by the above panel of eleven. The same procedure was to be followed for the appointment of the Chief Justice except that the Chief Justice was not to be consulted.[96]

In his memorandum on the Union Constitution, submitted a few days later, Sir B. N. Rau, the Constitutional Advisor, agreeing in principle, suggested that the appointment of judges should be made by the President with the approval of at least two-thirds of the Council of State which was proposed to advise the President in the exercise of the President's discretionary powers and of which the Chief Justice of the Supreme Court was an ex-officio member.[97] The Union Constitution Committee also did not agree with the Ad Hoc Committee and recommended that "a judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose."[98] The Provincial Constitution Committee made a similar recommendation for the appointment of judges of the High Courts: "[J]udges should be appointed by the President in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province (except when the Chief Justice of the High Court himself is to be appointed)."[99] In the Assembly the Chairman of the Committee stressed that the Committee had paid special attention to the appointment of judges of the High Courts which it considered "very important" for keeping the judiciary above "suspicion" and "party influences."[100] With incidental changes, these recommendations on the appointment of the Supreme Court and the High Court judges were

96. 2 B. SHIVA RAO ET AL., *supra* note 20, at 590 (1967).

97. *See* B. N. RAU, INDIA'S CONSTITUTION IN THE MAKING 72, 86 (1960). The report of the committee was submitted on May 21, 1947, while Rau's Memorandum was submitted on May 30, 1947. *See id.*

98. 2 B. SHIVA RAO ET AL., *supra* note 20, at 600.

99. *Id.* at 662.

100. *Id.* at 666.

incorporated in the Draft Constitution prepared by the Constitutional Advisor.[101] The recommendations were adopted as such in the Draft Constitution prepared by the Drafting Committee of the Assembly.[102]

The first reaction to these provisions came from the then Chief Justice of the Federal Court, Justice H. J. Kania, who confined his comments to the independence of the judiciary from the executive and particularly emphasized that in the appointment of High Court judges "the Governor and the High Court Chief Justice should be in direct contact so that the provincial Home Ministry would not be an intermediary in the proceedings."[103] Chief Justice Kania thought that exclusion of influence of local politics in the selection of judges was necessary for the independence of the judiciary. Later, in a meeting of the judges of the Federal Court and the Chief Justices of the High Courts, the provisions of the Draft Constitution on the judiciary were thoroughly examined and a memorandum was prepared.[104] Emphasizing the importance of the independence of the judiciary, the memorandum expressed concern over the "political, communal and party considerations" in the appointment of High Court judges since independence[105] and therefore suggested an amendment to the relevant provision under which the President shall appoint a High Court judge "on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the *concurrence* of the Chief Justice of India."[106] Such amendment, it was expected, would exclude provincial executive interference in the appointment of judges. The memorandum stated that it should also apply "*mutatis mutandis* to the appointment of the judges of the Supreme Court" and recommended dropping the words from the relevant draft article which obliged the President to consult the judges of the Supreme Court and High Courts in addition to the Chief Justice of India in the appointment of judges of the Supreme Court.[107] The memorandum also suggested inclusion of a provision disqualifying a person from becoming a judge of the Supreme Court or of a High Court if such person had held the post of a minister either at the

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101. 3 B. SHIVA RAO ET AL., *supra* note 20, at 36, 67 (1967). The Draft was prepared on the instructions of the Constituent Assembly and was based on the recommendations of various committees appointed by the Assembly and accepted by it. This Draft became the basis of the Draft Constitution prepared by the Drafting Committee of the Constituent Assembly that was chaired by Dr. B. R. Ambedkar.

102. *See id.* at 554, 584. The Draft Constitution was submitted to the President of the Assembly on February 21, 1948.

103. AUSTIN, *supra* note 6, at 179-80.

104. *See* 4 B. SHIVA RAO ET AL., *supra* note 20, at 193 .

105. Independence came on August 15, 1947 and the meeting was held on May 26-27, 1948. So, within about six months improper executive conduct, which had been absent until then, could be felt.

106. 4 B. SHIVA RAO ET AL., *supra* note 20, at 195 (emphasis added).

107. *See id.* at 196.

Centre or in any State.[108] Similar suggestions on the Draft Constitution were received from other quarters but none of them was found convincing enough by the Drafting Committee for introducing any change in the Draft Constitution.[109] The changes suggested in the memorandum were not accepted, respectively, for the reasons that they did not provide for the contingency of difference of opinion between the Chief Justice of India and the Chief Justice of the High Court that wider consultation was obligatory to minimize the chances of improper appointments and that merit was the only consideration for the appointment of judges and, therefore, no constitutional ban should stand in the way of merit being recognized.[110]

The Drafting Committee itself had, however, decided to move an amendment replacing the existing procedure for the appointment of the Supreme Court and High Court judges by one provided in the proposed Instrument of Instructions to be issued to the President. The Instrument contemplated appointment of Supreme Court judges by the President on the advice of an Advisory Board consisting of not less than fifteen members of Parliament. The advice of the Board was to be sought in respect of proposed appointees selected by the President after consultation with all the judges of the Supreme Court and the Chief Justices of the High Courts. In the case of appointment of the Chief Justice of India, the Chief Justice of India was not to be consulted. In the case of appointment of High Court judges, the President had to consult the Chief Justice of India, the Chief Justice of the High Court (except in the case of appointment of Chief Justice of High Court), and the Governor of the State. The President was not bound by the advice of the Board but in that case he had to place a memorandum before Parliament with reasons for not accepting the advice.[111] As the proposal for the Instrument of Instructions was later dropped, the Drafting Committee did not move the amendment and proceeded with the existing provisions.

In the Assembly basically two issues were raised and discussed on the appointment of judges. Some members proposed that the judges, other than the Chief Justice of India, must be appointed by the President with the concurrence of the Chief Justice of India, while some others proposed approval of Parliament or of its Upper House, the Council of states. Agreeing that the issues were of "greatest importance" and that the Assembly was unanimous that the judiciary must both be "independent of the executive" and "competent in itself," Dr. Ambedkar referred to the practice of appointment of judges in England, where they are appointed by the executive alone, and in

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108. *See id.* at 203.

109. *See id.* at 143 (requiring consultation with all judges of the Supreme Court and exclusion of consultation with High Court judges in the appointment of Supreme Court judges); *see id.* at 168 (requiring exclusion of the Governor in the appointment of High Court judges).

110. *See id.* at 144, 166.

111. *See id.* at 491, 499.

the United States, where they are appointed by the executive on the approval of the Senate. Dr. Ambedkar concluded:

> It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States [sic], it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature . . . .
>
> With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.[112]

The proposed amendments on the aforesaid two lines were, therefore, rejected by the Assembly.[113]

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112. 3 CONSTITUENT ASSEMBLY DEBATES, *supra* note 1, at 258.

113. *See id.* at 260. With respect to the High Courts see *id.* at 674.

B. *The Beginning of the Controversies*

Although no public controversies were raised for quite some time on the appointment of judges to the Supreme Court and the High Courts, dissatisfaction in this regard was expressed from almost the very beginning. Scholars have already noted the dissatisfaction expressed by the judges on the appointment of High Court judges within six months of independence under a procedure which was definitely different from the procedure provided under the constitution.[114] But within less than nine years of the commencement of the Indian Constitution greater dissatisfaction was expressed by the Law Commission of India with respect to the appointment of judges both to the Supreme Court as well as to the High Courts.[115] In respect of the High Courts, the Commission even recommended an amendment of the constitution exactly along the lines recommended by the judges in the Draft Constitution.[116]

The controversy seems to have arisen in another form even earlier when after the death of the first Chief Justice of India, the Union executive intended not to appoint the senior most puisne judge as the Chief Justice of India. It is said that the executive had to give up its plan because all the then judges of the Supreme Court threatened to resign en block if the executive did not appoint the senior most puisne judge as Chief Justice of India. The controversy did not become public because the senior most puisne judge was appointed the Chief Justice of India.[117] A similar situation arose and averted almost unnoticed in 1971 with respect to the appointment of the Chief Justice of India.[118] Earlier, in 1967 a Study Team on Centre-State Relations of the Administrative Reforms Commission reiterated the dissatisfaction expressed by the Law Commission in 1958 with respect to the appointment of the judges, particularly in the High Courts.[119]

The appointment of judges became a public issue in April 1973 when, in breach of an established convention, instead of appointing the senior most puisne judge of the Supreme Court, its Chief Justice on the retirement of the then Chief Justice, the Union executive appointed the fourth most senior judge as Chief Justice, superseding his three senior colleagues.[120] The three

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114. See also reference to a 1947 letter by the Chief Justice of the Madras High Court *in* LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, at 18.

115. *See* LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *supra* note 89, at 33, 69.

116. *See id.* at 106.

117. *See* LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90, at 4. Chief Justice Kania died in November 1951 and the senior most puisne judge was Justice Patanjali Shastri.

118. *See* M. Hidayatullah, *Unjustified Departure from Settled Convention, in* A JUDICIARY MADE TO MEASURE 10 (N. A. Palkhivala ed., 1973). It concerned the appointment of Justice J. C. Shah on the retirement of Chief Justice Hidayatullah. *See id.*

119. *See* LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, at 19.

120. The supersession took place on the retirement of Chief Justice S. M. Sikri on April

superseded judges resigned in protest. An intense public debate followed in which critics of executive action saw a clear design of undermining the independence of the judiciary while the supporters of the action defended it broadly on the ground of national need of a committed judiciary.[121] Hardly had the debate subsided when in the appointment of the next Chief Justice again the senior most judge was superseded in favor of the next most senior.[122] Again, the superseded judge resigned in protest. On both occasions apparently the superseded judges had given judgments inconvenient to the executive while the superseding judges had given judgements palatable to the executive.[123] This established a clear nexus between the independence of the judges and their appointment. Before the appointment of the next Chief Justice in 1978, in 1977 the Union Government changed. It referred the matter of appointment of the Chief Justice to the Law Commission of India. The Law Commission recommended that in the matter of appointment of the Chief Justice the convention of appointing the senior most judge should be followed.[124] Accordingly, the senior most puisne judge was appointed the next Chief Justice. Since then the practice is being followed without exception. The Commission also thoroughly examined the constitutional provisions, procedure, and practice for the appointment of judges in the Supreme Court and the High Courts. While it found the constitutional scheme for the appointment of judges "basically sound," it admitted several flaws in its operation and made several recommendations for ensuring the best and most expeditious appointments with more effective consultative process and elimination of political influence. In short, the Commission recommended a decisive role to the judiciary in the matter of appointments and transfers of judges through a collegial decision making process.

IV. JUDICIAL INTERVENTION

A. *Justice Sheth's Case*

A little after the first supersession under the same government, another threat to the independence of the judiciary was wielded through the mass

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26, 1973. The superseded judges were Justices J. M. Shelat, K. S. Hegde, and A. N. Grover. Justice A. N. Ray was appointed Chief Justice.

121. For the contemporary literature on the debate see SEERVAI, *supra* note 6, at 2405 n.57. *See also* A. R. ANTULAY, APPOINTMENT OF A CHIEF JUSTICE (1973).

122. Justice M. H. Beg was appointed, superseding Justice H. R. Khanna.

123. On the first occasion the superseded judges, among other things, had decided that the basic structure of the constitution is unamendable. *See* Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461. On the second occasion the Court held that suspension of Fundamental Rights during emergencies did not prevent the courts from examining the legality of a detention. *See* A.D.M. Jabalpur v. Shivakanta Shukla, A.I.R. 1976 S.C. 1207 (Khanna, J., dissenting).

124. *See* LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, at 3.

transfer of High Court judges, again apparently for the reason that these judges gave judgements inconvenient to the government during the internal emergency of 1975-77. These transfers brought the matter to the courts. One of the judges—Justice S. H. Sheth—who was transferred from the Gujarat High Court to the Andhra Pradesh High Court, challenged, among other things, the constitutionality of his transfer in the Gujarat High Court, on the grounds that it was without his consent and without consultation between the President and the Chief Justice of India.[125] The petition was allowed on the latter ground. One of the judges also allowed it on the former ground but the majority of two rejected. An appeal in the Supreme Court was disposed of in accordance with an assurance by the Union of India to withdraw the transfer.[126] However, a majority of three judges in the Supreme Court refused to accept consent of the transferred judge as a condition precedent for transfer and emphasized that transfers must be in the public interest and not as punishment. One judge found that consent was a necessary condition, while the fifth one held that transfer was a new appointment and, therefore, consent was necessary. The important point to be noted is that all the judges, both in the High Court as well as in the Supreme Court, unanimously proceeded on the assumption that the independence of the judiciary is a basic feature of the Indian Constitution and therefore the judiciary must be immune from the influence of the executive.

B. *The Judges Case*

For the second time the matter came before the Supreme Court in *S. P. Gupta v. Union of India*,[127] known as the *Judges Case*. In that case several writ petitions filed in different High Courts were disposed of by a bench of seven judges of the Supreme Court. Some of these petitions challenged the validity of a circular letter of the Union Law Minister addressed to the Chief Ministers of the States that asked them to obtain advance consent from the proposed appointees to the High Courts for transfer to other High Courts. This was sought "to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations."[128] Some petitions challenged the validity of the practice of appointing additional judges and of not appointing the named additional judges to the permanent positions even though permanent vacancies existed. Other petitions challenged the validity of certain transfers of judges from one High Court to another. The petitions were decided by a divided Court in

125. *See* S. H. Sheth v. Union of India, 1976 17 G.L.R. 1017.
126. *See* Union of India v. S. H. Sheth, A.I.R. 1977 S.C. 2328.
127. S. P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.
128. For the text of the letter, see *id.* at 178.

which every judge wrote a separate opinion. These opinions together set the record of being the longest in any single matter decided by the Court in its history. It is not necessary to examine these opinions particularly for the reason that in its material respects the *Judges Case* has been overruled. Mention of its most salient aspects is, however, instructive.[129]

The most relevant aspect of the case was the acknowledgment and reiteration of independence of the judiciary as a basic feature of the Indian Constitution. Otherwise the petitions were dismissed by the majority. The circular letter of the minister was upheld by a majority of four to three, but almost all judges agreed that transfer from one High Court to another could be made only in the public interest and not by way of punishment. Except for Justice Bhagwati, no other judge considered the consent of the concerned judge as a condition precedent for transfer. Appointment of additional judges was generally suspected as having the potential of infraction of judicial independence, but its bona fide application in accordance with the constitutional conditions was appreciated. Normally, an additional judge must be made permanent after the expiration of that judge's term as additional judge if a permanent vacancy existed in the High Court but the judge did not have a right to be so appointed. Similarly, the Court generally agreed that if the amount of work was consistently increasing in the High Courts, the number of permanent posts of the judges must proportionately be increased. Except for one judge, the rest of the Court found itself unable to issue any direction to the executive in this regard. Last, on the question of appointment of the judges, the Court reiterated its *Sankalchand* position that there must be effective consultation between all the constitutional functionaries. But the majority did not agree that the Chief Justice of India had any primacy or veto in this regard. The majority rather gave primacy to the executive so that it could appoint or not appoint any judge to the High Court or to the Supreme Court against the wishes of the Chief Justice of India or any other constitutional functionary. Incidentally, the Court also decided that it could look into the entire record concerning the appointment of judges and the government could not claim any privilege to withhold any of them.

The majority decision in the *Judges Case* was generally found unsatisfactory by the legal fraternity and was criticized in scholarly writings and opinions.[130] Seminars and conferences were held and academic writings appeared that advocated a change in the situation which gave primacy to the executive in the matter of appointment and transfer of judges. Overwhelmingly, they asked for the creation of a collegial body, with the

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129. For a succinct summary of the case, see Jill Cottrell, *The Indian Judges' Transfer Case*, 33 INT'L & COMP. L. Q. 1032 (1984).

130. *See*, SEERVAI, *supra* note 6, at 2275; Cottrell, *supra* note 129; LAW COMMISSION OF INDIAN ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90, ¶ 2.13, at 11, ¶ 4.2, at 24; ARUN SHOURIE, MRS. GANDHI'S SECOND REIGN (1983).

predominance of the judiciary, for the appointment and transfer of judges. The Law Commission of India also once again seized the opportunity to examine this issue. Unlike before, this time the Commission came to the conclusion that "experience would make it difficult to continue to subscribe to the view that the present constitutional scheme as to the method of appointment of Judges is basically sound or that it had on the whole worked satisfactorily and does not call for any radical change."[131] Recognizing in the light of global experience and development of law and practice the need of judicial primacy and wider consultation so as to induct the best persons in the judiciary, it recommended the creation of an eleven member National Judicial Service Commission chaired by the Chief Justice of India and a consequential constitutional amendment.[132]

C. *The Second Judges Case*

The dissatisfaction with the *Judges Case* led to the *Second Judges Case*[133] which arose from three petitions under Article 32 that demanded filling existing vacancies in the Supreme Court and various High Courts. In the course of hearing those petitions, a two-judge bench of the Court doubted the correctness of the majority view in the *Judges Case* and directed:

> The correctness of the opinion of the majority in S. P. Gupta's case . . . relating to the status and importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench.[134]

In the majority opinion of Justice J. S. Verma (who later became Chief Justice) for a nine-judge bench in the *Second Judges case,* these two issues were reformulated as follows:

> (1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Courts, and in regard to the transfers of High

131. LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90,¶ 3.17, at 20.

132. *See id.* at 40.

133. Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268 [hereinafter Second Judges Case].

134. Subhash Sharma v. Union of India, A.I.R. 1991 S.C. 631 (quoted in the Second Judges Case, A.I.R. 1994 S.C. at 360).

> Court Judges/Chief Justices; and
> (2) Justiciability of these matters, including the matter of fixation of the Judges strength in the High Courts.[135]

Out of the five opinions expressed in the *Second Judges Case,* Justice Verma spoke for himself and four of his colleagues with whom two other colleagues concurred in separate opinions. The two minority judges partly dissented and partly concurred with the majority. The bench was, however, unanimous in reiterating the independence of the judiciary as a basic feature of the Indian Constitution essential for upholding the rule of law which was also a basic feature of the constitution.

Briefly, the Court's opinion is dominated by the emphasis on "integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment" in which "all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise" in the matter of appointment of judges to the Supreme Court and the High Courts.[136] Outlining the operative norms for this purpose, the Court held that the proposal for the appointment of judges to the Supreme Court and the High Courts must be initiated by the Chief Justices of the respective courts. These proposals have to be submitted by the Chief Justice of India to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the Chief Justice of India has primacy. In the making of a recommendation, the Chief Justice of India represents the judiciary and does not act as an individual. So the Chief Justice's opinion is the opinion of the judiciary, "symbolised by the view of the Chief Justice of India."[137] To rule out any arbitrariness on the part of Chief Justice of India and to ensure observance of the rule of law, the opinion of the Chief Justice of India must be formed in the case of appointment to the Supreme Court by "taking into account the views of the two senior most Judges of the Supreme Court."[138] The Chief Justice "is also expected to ascertain the views of the senior most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise."[139] In the case of appointment to the High Courts the process of appointment shall be initiated by the Chief Justice of the concerned High

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135. Second Judges Case, A.I.R. 1994 S.C. at 420. Justice Verma spoke for himself and for Justices Dayal, Ray, Anand, and Bharucha.

136. *Id.* at 442.

137. *Id.*

138. *Id.* at 436.

139. *Id.*

Court who must form his opinion about an appointment "after ascertaining the views of at least two senior most Judges of the High Court."[140] In the formation of his opinion on the opinion of the Chief Justice of the High Court and of the Governor of the State, "the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court."[141] The Chief Justice of India may also consult one or more senior judges of that High Court. Greatest weight must be given to the opinion of the Chief Justice of the High Court, but the opinions of other constitutional functionaries must also be given due weight.[142] "The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity."[143] The seniority of judges in the High Court must be given due consideration in the matter of appointment to the Supreme Court because it is an important factor and it also constitutes a legitimate expectation. No appointment to the Supreme Court or a High Court shall be made except in conformity with the final opinion of the Chief Justice of India made in this manner. An appointment recommended by the Chief Justice of India may not be made if for strong objective reasons disclosed to the Chief Justice of India the person recommended is not suitable for appointment. "However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention."[144]

To avoid speculation and uncertainty the Court also suggested a time-bound, expeditious procedure for the appointment of the judges.[145]

Regarding the appointment of the Chief Justice of India, by convention the proposal is initiated by the outgoing Chief Justice of India for the appointment of "the senior most Judge of the Supreme Court considered fit to hold the office."[146] Consultation provided in Article 124(2) is required only "if there be any doubt about the fitness of the senior most Judge to hold the office, which alone may permit and justify a departure from the long standing convention."[147]

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140. *Id.* at 437.

141. *Id.* at 436.

142. *See id.* "The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated." *Id.*

143. *Id.* at 437.

144. *Id.* at 442.

145. *See id.* at 439.

146. *Id.* at 442.

147. *Id.* at 439.

Concerning transfers, the Court held that the opinion of the Chief Justice of India not only has primacy, but is determinative.[148] Consent of the concerned judge is not required for the initial or subsequent transfer.[149] In the formation of an opinion on a transfer, the Chief Justice of India is expected to take into account the views of the Chief Justice of the High Court from which the judge is to be transferred, any judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other Chief Justice of a High Court whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned judge—and that judge's response to the proposal—including the judge's preference of places of transfer, should be taken into account by the Chief Justice of India before forming an objective final opinion.[150] Any transfer so made is not to be deemed punitive and is not justiciable except to the extent that it has been made on the recommendation of the Chief Justice of India.[151]

On the question of fixation of judge strength in the High Courts, the Court held that the Chief Justice of India and the Chief Justice of the concerned High Court must undertake periodic review of such strength in the interest of effective administration of justice and the recommendation of the Chief Justice of India in this regard must be acted upon by the President with "due dispatch."[152] The courts may order the President to act if he fails to do so.[153]

One of the concurring judges made the additional suggestion that as representative of the people, the executive could also suggest names to the Chief Justice of India, although names of all potential appointees must come to the President from the Chief Justice of India.[154] "Though appointment of Judges to the superior judiciary," he added, "should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society."[155] The other concurring judge disagreed with the seniority alone rule in the matter of appointment of the Chief Justice of India and suggested that

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148. *See id.* at 442.
149. *See id.*
150. *See id.* at 440
151. *See id.* at 441. The Court said:
> Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision making.

Id.
152. *Id.* at 441.
153. *See id.* at 441-42.
154. *See id.* at 356 (Pandian, J., concurring).
155. *Id.*

the Chief Justice of India must be appointed on the basis of merit.[156] One of the minority judges, while agreeing with the primacy of the Chief Justice of India in the matter of appointment of judges to the Supreme Court and the High Courts, disagreed with the subjection of this primacy to the requirement of the Chief Justice acting as a body consisting of the Chief Justice and other judges.[157] Another minority judge agreed with the majority that in the matter of appointment that the views of the Chief Justice of India deserved highest respect but could not be given primacy under the present constitution.[158] On other issues such as transfers[159] and fixing the strength of judges, he agreed with the majority.[160]

The *Second Judges Case* was a gain for the judiciary vis-à-vis the executive in the matter of appointment and transfer of judges. However, the case was not universally hailed. H. M. Seervai, the celebrated author of the *Constitutional Law of India*, a staunch supporter of the independence of the judiciary and one of the strongest critics of the *Judges Case* who asked for its immediate overruling and for laying down the law almost exactly on the same lines as laid down in the *Second Judges Case*, has also criticized the *Second Judges Case*[161] and called it an amendment and reversal of the constitution.[162] Indications are available that the Union Government has thought more than once of introducing an amendment to the constitution that would either restore the previous position or provide a new mechanism for the appointment of judges.[163] No concrete step has, however, been taken so far in that direction.

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156. *See id.* at 417 (Kuldip Singh, J., concurring).

157. *See id.* at 453-54 (Punchhi, J., dissenting). Judge Punchhi noted:

> [T]he role of Chief Justice of India in the matter of appointment of the Judges of the Supreme Court is unique, singular and primal, but participatory vis-à-vis the Executive on a level of togetherness and mutuality, and neither he nor the executive can push through an appointment in derogation of the wishes of the other. S.P. Gupta's case . . . to that extent need be[,] and is hereby explained away[,] restoring the primacy of the Chief Justice.

Id. at 453.

158. *See id.* at 394 (Ahmadi, C.J., dissenting).

159. *See id.* at 395.

160. *See id.*

161. *See* SEERVAI, *supra* note 6, at 2706. The only important criticism of Seervai of the *Judges Case* that was not upheld in the *Second Judges Case* was his strong plea against transfer without the consent of the transferred judge. *See id.* Otherwise, he has supported the primacy of the opinion of the Chief Justice of India in the matter of appointment of judges, though, of course, he did not speak of a college in this or any other regard. *See id.*

162. *See id.* at 2927; Rao, *supra* note 88, at 837.

163. *See* Bal Krishna, *Move on Judges' Appointment Sparks Debate*, HINDUSTAN TIMES, Aug. 4, 1997, at 9; P. Patra, *The Case for a Judicial Commission*, HINDUSTAN TIMES, July 27, 1998, at 12; S. Mitra, *Nudge the Judges*, INDIA TODAY, May 4, 1998, at 46.

D. *The Third Judges Case*

At the operational level, it has been noted that the vacancies of the judges remain unfilled as before[164] and the transfers of judges from one High Court to another have not been free from controversy and have even resulted in litigation.[165] However, as between the executive and the judiciary, no controversy became public until towards the end of 1997 when the then Chief Justice of India failed to name his successor on time in terms of the *Second Judges Case*[166] and later in mid-1998, when the executive refused to appoint judges to the Supreme Court and to transfer Chief Justices of High Courts recommended by the Chief Justice of India.[167] While the first controversy was resolved by the Chief Justice of India by delayed nomination of his successor, the second led to an unsavory exchange of notes and letters between the Chief Justice of India and the executive and culminated in litigation.[168] The gravity of the situation led the President to refer to the Supreme Court to give its opinion in the matter known as the *Third Judges Case*.[169]

Referring to the decision in the *Second Judges Case* on the question of appointment and transfer of judges and to the doubts that had arisen with respect to its interpretation which required to be resolved in the public interest, the President's reference specified nine questions for the opinion of the Supreme Court.[170] The Court assembled a nine judge bench for deciding the reference. The bench stated that the nine questions referred to it related

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164. *See* M. J.Antony, *The Short-Staffed Judiciary*, BUS. STANDARD, Aug. 12, 1998; TIMES OF INDIA, June 11, July 1, and Sept. 28, 1999.

165. *See* K. Ashok Reddy v. Government of India, (1994) 2 S.C.C 303. TIMES OF INDIA, Sept. 18 1999.

166. Chief Justice J. S. Verma could not nominate his successor until January 3, 1998 while he himself was retiring on January 18, 1998. According to the *Second Judges Case* the senior-most puisne judge of the Supreme Court has to be appointed Chief Justice of India on the recommendation of the Chief Justice of India if found fit for service. The name of the succeeding Chief Justice must be announced one month before the retirement of the incumbent Chief Justice, and must be sent to the executive at least six weeks before such announcement. Accordingly, Chief Justice Verma should have sent the name of his successor by November 6, 1997. Perhaps he could have done so but for the serious charges made against the senior-most judge—Justice M. M. Punchhi—by a group of senior lawyers which charges Chief Justice Verma had apparently forwarded to the President.

167. Apparently at the beginning of May 1998, Chief Justice M. M. Punchhi recommended three appointments to the Supreme Court and the transfer of four Chief Justices of the High Courts. These appointments and transfers drew criticism both from some of the affected judges and a group of senior lawyers. The critics alleged lack of bona fides and required consultation in the action of the Chief Justice of India. *See* Mitra, *supra* note 163, at 46.

168. *See id.* At least two writ petitions were filed in the Supreme Court for appropriate directions to the executive to make the appointments. *See id.*

169. In re Presidential Reference, A.I.R. 1999 S.C. 1. See Appendix for Article 143, which authorizes the President to seek the opinion of the Supreme Court.

170. For the text of the reference along with the questions see *id.*

broadly to three aspects, namely, consultation between the Chief Justice of India and his fellow judges in the matter of appointments of Supreme Court and High Court judges and transfer of the latter; judicial review of transfers of judges; and the relevance of seniority in making appointments to the Supreme Court.[171]

The bench gave a unanimous opinion. It stated that according to the majority in the *Second Judges Case*, the opinion of the Chief Justice of India is to be made according to the norms laid down in that case. "It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon."[172] The Attorney-General drew the Court's attention to the fact that "at the latest selection of Judges appointed to the Supreme Court, the then Chief Justice of India had constituted a panel of himself and five of the then senior most puisne Judges" and submitted that this precedent should be treated as a convention and institutionalized.[173] The Court noted that "[p]resently, and for a long time now, that collegium consists of the two senior most puisne Judges of the Supreme Court."[174]

The Court also distinguished between the body that had to decide and the others who were to be consulted. Regarding to the terms of Article 124(2), the Court concluded:

> [A]s analysed in the majority judgement in the second Judges case, as also the precedent set by the then Chief Justice of India, as set out earlier, and having regard to the objective aforestated, we think it desirable that the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court.[175]

It clarified that in case none of the four puisne judges is going to succeed the Chief Justice of India by seniority, the successor Chief Justice of India must also be included in the collegium.[176] Further, the senior most judge in the Supreme Court from a High Court from where an appointment to the Supreme Court has to be made must be consulted, but such a judge cannot be made member of the collegium. If by chance the senior most judge does not know of the merits or demerits of a candidate, the next senior most judge must be

171. *See* In re Presidential Reference, A.I.R. 1999 S.C. at 7.
172. *Id.* at 16.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See id.*

consulted.[177] The opinions of the members of the collegium and of the senior most judge in the Supreme Court from that High Court must be in writing. The opinion of others, particularly of non-judges, whom the Chief Justice of India may decide to consult, may not be in writing, but a written memorandum must be prepared that should be conveyed to the Government of India.[178]

The collegium is expected to make its decision by consensus. "Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India."[179] If the Chief Justice of India favors an appointment but the majority of the collegium opposes it, the appointment must not be made. If an appointment recommended by Chief Justice of India is found unsuitable by the executive and comes for reconsideration to the Chief Justice of India, the Chief Justice of India will consider it in the whole collegium and if some members have retired in the meantime then in the reconstituted collegium. Only if the collegium unanimously reiterates the appointment must the appointment be made.[180] It is imperative that the number of judges of the Supreme Court who consider the reasons for non-appointment be as large as the number that had made the particular recommendation.[181] The Chief Justice of India may also ask for the response of the judge recommended by him and opposed by the government on the reasons given by the government. This response must be considered by the entire collegium.[182]

In making appointments from amongst the High Court judges, the Court reaffirmed the seniority principle but clarified that as merit is the predominant consideration in the matter of a candidate's appointment, meritorious persons may be appointed without regard to their seniority.[183] It is only in support of such candidates that the reasons have to be given and not about the judges who have been superseded.[184]

> When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example,

177. *See id.* at 17.
178. *See id.*
179. *Id.*
180. *See id.* at 18.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*

> the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.[185]

The decision-making collegium for appointment of judges to High Courts must consist of the Chief Justice of India and the two senior most judges who would consider the recommendation of the Chief Justice of the High Court and consult any other High Court judges and judges from the Supreme Court who may be conversant with that High Court.[186]

Judicial review of appointments or recommended appointments can be sought if any of the conditions of consultation and decision making as stated by the Court or of eligibility were not satisfied.[187]

Regarding the transfer of judges, including Chief Justices, from one High Court to another, the Chief Justice of India should consult the Chief Justice of that High Court as well as of the High Court where a judge is to be transferred and also one or more judges of the Supreme Court "who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place."[188] The views of these judges are to be obtained in writing as well as the response of the judge to be transferred should finally be placed before a collegium consisting of the Chief Justice of India and four senior most judges of the Supreme Court.[189] The views of each member of the collegium along with the views placed before the collegium "should be conveyed to the Government of India along with the proposal of transfer."[190] Thus, the conditions for transfer of a judge have been made even more demanding than the conditions for appointment. A transfer is also subject to judicial review on the petition of the transferred judge on the ground of lack of consultation and non-observance of the decision-making process.[191]

V. THE WORKING OF THE NEW FORMULA

After the above opinion of the Court one would have expected easier application for the process of appointments and transfers. But that did not happen. Following the norms laid down in the opinion four names were

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185. *Id.*
186. *See id.* at 19.
187. *See id.*.
188. *Id.* at 21.
189. *See id.*
190. *Id.*
191. *See id.* A petition regarding transfer of a High Court Judge has, however, been recently filed in the Rajasthan High Court on grounds of arbitrariness and discrimination. *See* TIMES OF INDIA, *supra* note 164.

recommended to the President of India for appointment in November 1998. While appointing the recommended persons the President made the following observation:

> I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. . . . Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle.[192]

After the law minister communicated these observations to the Chief Justice of India and the press came to know of them, they received divergent reactions.[193] The Chief Justice of India asserted "that merit alone has been the criterion for selection of judges and no discrimination has been done while making appointments."[194] He added: "Our Constitution envisages that merit alone is the criterion for all appointments to the Supreme Court and high courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy."[195]

Nobody seemed to have taken serious objection to the President's remarks which were found well within his domain. Some sections of the press gave an impression of a veiled attempt by the President to achieve reservations in favor of the Schedule Castes and Schedule Tribes and for the appointment of specific judges from the Schedule Castes.[196] But such impression has been stoutly refuted.[197] While nobody spoke against merit, almost everyone has supported the consideration of the diversity of the country and the principle of democratic representation of all sections of the society in all its institutions, including the judiciary. "Merit" was explained in that light,[198] and

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192. Prabhu Chawla, *Courting Controversy*, INDIA TODAY, Jan. 25, 1999, at 20-22.

193. *See id.*; SUNDAY PIONEER, (New Delhi), Jan. 17, 1999, at 1, 5; HINDUSTAN TIMES, Jan. 24, 1999, at 12; HINDUSTAN TIMES, Jan. 17, 1999, at 1; TIMES OF INDIA, Jan. 23, 1999, at 8; Rajeev Dhavan, *The President and the Judiciary*, HINDU, Jan. 29, 1999, at 10.

194. Chawla, *supra* note 192, at 22.

195. *Id.* at 23.

196. *See id.* at 22.

197. See *supra* note 193.

198. *See, e.g.*, Dhavan, *supra* note 193. "The criterion of 'merit' has never been founded on some skewed concept of knowledge of black letter law. . . . Legal competence is a baseline.

representation of different sections of the society, particularly of the Scheduled Castes, Scheduled Tribes, and women in the judiciary was supported and demanded.[199]

A. *Reflective Judiciary*

Apart from these quick responses from the legal fraternity in India, theory and practice of judicial appointments support and justify the President's remarks. The judiciary is one of the three organs of the government. In a democratic government, ideally speaking, the legislative and executive powers are representative of the society.[200] Such representation is necessary to justify the government of the people which rules them by their consent. Perhaps at some point in time long ago it could be have been argued that the judiciary does not rule but simply applies the law in a dispute between two private parties. But it is no more in dispute that the judiciary not only makes laws but also participates in policy making, particularly when handling matters concerning the government and its agencies. For the exercise of such

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Experience is not just judicial experience but a capacity to understand the 'felt necessities' of all people of this complex nation." *Id.* Elsewhere the President has said:

> Written into the concept of merit is the capacity to uphold interests of the disadvantaged. Hence to guarantee merit you need representation from weaker sections and social justice. Otherwise, merit is very elusive. . . . The President is reminding that appointments to the judiciary should take into account the social and plural diversity of the country—it bolsters faith in the judiciary.

R. Ramachandran, *The Conflict that Never Was*, HINDUSTAN TIMES, Jan. 24, 1999.

199. Another prominent lawyer, Venugopal, also supports merit when he says "every democracy, including the [United States], attempts to provide representation to all sections of society, especially the minorities, in the judiciary. 'Any suggestion regarding induction of unrepresented sections of the community, including women or minorities and weaker sections, is consistent with the democratic basis of the Constitution.'" Ramachandran, *supra* note 198. Other examples of minorities given by Judge Sukumaran include the representation of Muslims in Calcutta and Christians in Cochin. *See id.* Similarly, Nariman, admitting that "the President has a point," illustrates: "In the United States there has been a 'Jewish seat' in its Supreme Court, and in Australia there had been for many years a 'seat' in the High Court for a Judge professing the Catholic faith." *Id.* Senior Congress leader V. N. Gadgil, supporting the President's stand, said "[i]t [i]s only proper that fair representation is given to Dalits in the judiciary." *Id.* Also, the Communist Party of India (CPI) has pointed out that "the under representation of Scheduled Castes and Tribes in judiciary was 'very much a matter of concern.'" Supporting the President, Chandrabhan Prasad (Dalit Shiksa Andolan) commented: "At least one Dalit judge could be appointed to give a boost to the rest. It would help as a confidence-building measure." SUNDAY PIONEER, *supra* note 193. The idea seems to have been further appreciated by the lawyers when they felt that "the superior judiciary had little interaction with the people at the grass-roots level, hence judges were ignorant about the peoples' aspirations." TIMES OF INDIA, *supra* note 193. Nariman said that "the process of appointment of judges has to be more broad-based since it was not possible for the Supreme Court judges sitting in the Capital to know what was happening across the country." *Id.*

200. *See* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997).

powers in a democracy the judiciary must also have similar, if not the same, justification as the other two organs of the government. Therefore, it must also in some way represent the people. Otherwise the laws and the policies laid down by it will have no democratic basis. For that end it is not necessary or even desirable that the judiciary must be elected in the same way as the other two organs of the government. But it must in some way represent or, as Shetreet prefers, reflect the society in which it operates.[201] To quote Shetreet:

> An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on a doctrinal ground, which has been suggested: the principle of fair reflection. This doctrinal approach may be supported by additional arguments. The judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection. There are other grounds for ensuring well-balanced composition of the judiciary. First, the need to preserve public confidence in the courts. Secondly, the need to ensure balanced panels in appellate courts, particularly in cases with public or political overtones.[202]

Pursuing the same theme at another place Shetreet says:

> [J]udges decide cases upon background understanding based on fundamental values of the system. Those understandings are judge made and are based on the interpretation of the judge. If the judiciary is not reflective of society as a whole, the adjudication may be based on background understandings strongly coloured by a narrower set of values.[203]

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201. Shimon Shetreet, *Judging in Society: The Changing Role of Courts*, *in* THE ROLE OF COURTS IN SOCIETY 467, 479 (Shimon Shetreet ed., 1988) [hereinafter Shetreet, *Judging in Society*]. Shetreet remarked: "I preferred the term 'reflective' to the term 'representative,' since the judges, unlike legislators or elected executives, do not represent. Likewise, the courts should not be numerically representative; 'reflective,' therefore, is a more appropriate term to indicate this idea." *Id.*

202. Shetreet, *Judicial Independence*, *supra* note 10, at 635.

203. Shetreet, *Judging in Society*, *supra* note 201, at 480. Shetreet repeats that "the judiciary must be fairly reflective of the society it judges in terms of ideological inclinations, geographical distribution, cultural traditions and ethnic compositions." *Id* at 479. For similar views see also, MARTIN L. FRIEDLAND, A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA 246 (1995).

Studies on judicial behavior have long established that a judge's background plays an important role in that judge's decision making.[204] For the representation of the background, Shetreet is not suggesting a numerical or accurately proportional representation in the judiciary. He is asking only for a fair reflection of the society in it. He finds such reflection necessary for the independence of the judiciary.[205] He supports his view with examples of countries which lead in the independence of the judiciary such as United States, Canada, England, Germany, and several other countries practicing it either as a matter of statutory rule or convention.[206] Shetreet is not alone in this venture. He has actually summarized the views of many others, including those of some international bodies. Notable among the conclusions of the international bodies are the Singhvi and Montreal declarations on the independence of justice which in identical language state: "The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects."[207] "Balancing 'representation' on bases of religion, geography, race, and sex," tells Henry Abraham, "has also played a major role in presidential choice of Supreme Court nominees" in the United States.[208]

Such practice is not unknown in India. In pre-independent India the Judicial Committee of the Privy Council included as a matter of law judges from India.[209] Similarly, in pre-independence India representation was provided to certain communities in certain High Courts in view of the strength of those communities within the territorial limits of those High Courts.[210] To some extent these considerations have been taken into account since

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204. *See* BENJAMIN N. CORDOZO, THE NATURE OF THE JUDICIAL PROCESS (1941); HENRY J. ABRAHAM, THE JUDICIAL PROCESS (7th ed. 1998); TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE 261, 263 (1995).

205. Shetreet, *Judicial Independence*, *supra* note 10, at 633; *see also* John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L. J. 701, 710 (1998).

206. *See* Shetreet, *Judicial Independence*, *supra* note 10, at 633-34.

207. Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) ¶ 11(a), *reprinted in CILJ Bulletin No.* 25-26, at 38, 41 (Apr.-Oct. 1990); the Universal Declaration on the Independence of Justice (Montreal Declaration) ¶ 2.13, *reprinted in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE, *supra* note 10, at 447, 451.

208. ABRAHAM, *supra* note 204, at 67. The author states that a female, black, Jewish, and Roman Catholic seat, one each, is almost an unwritten rule in the court appointments. *See id.* For a similar demand in England see STEVENS, THE INDEPENDENCE OF THE JUDICIARY, *supra* note 7, at 177.

209. See the Judicial Committee Act 1833 providing for two Indian judges as assessors; the Appellate Jurisdiction Act 1908 providing for full members of the Judicial Committee up to two judges from India. For names of some of the Indian native judges who sat on the Judicial Committee of the Privy Council see MAHABIR P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY, 394 (3d ed. 1972).

210. See the examples of Calcutta and Cochin High Courts providing for representation to Muslims and Christians, respectively, *in* HINDUSTAN TIMES, Jan. 24, 1999, at 2.

independence and care is normally taken to give representation to major communities and regions in the Supreme Court. Although sometimes such practice has been criticized because it may come in the way of the ablest among the prospective candidates for judgeship in reaching the bench,[211] nobody seems to have ever alleged that such practice has in any way affected the independence of the judiciary. On the contrary, time and again the need and fact of representation of different regions and minorities in the appointment of judges, particularly in the Supreme Court, has been emphasized.[212]

Even though a reflective judiciary was not an issue either in the *Second Judges Case* or the *Third Judges Case,* one of the judges in the former case clearly spoke for it while the entire Court acknowledged its relevance in the latter case. Nowhere the Court has spoken against it in either of these two cases, though some of the judges have clearly spoken for it. Thus, in the *Second Judges Case,* Justice Pandian stated:

> It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or scheduled castes or scheduled tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group.[213]

Clarifying that he was not asking for a quota or reservation for anyone, Justice Pandian supported himself with examples of United States and United Kingdom and reiterated: "Though appointment of Judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society."[214]

Therefore, Justice Pandian also held that "the Government which is accountable to the people, should have the right of suggesting candidates to the concerned Chief Justice for consideration but the Government has no right to directly send the proposal for appointments by-passing the Chief Justice

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211. *See* LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *supra* note 89, ¶ 6, at 34, ¶ 52(1), at 55, ¶ 82(8), at 105. *See also* LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90 , ¶ 6.9, at 23.

212. *See Third Judges Case,* A.I.R. 1999 S.C. at 18; LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, ¶ 6.9, at 23, ¶ 7.10, at 30; LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY FIRST REPORT, *supra* note 90, ¶ 3.14, at 19.

213. Second Judges Case, A.I.R. 1994 S.C. 268 at 348.

214. *Id.*

concerned."[215] None of his colleagues on the bench has disagreed with these remarks. On the contrary, Jusitce Verma, who wrote the majority opinion, endorsed the opinion of Justice Pandian in these words: "I am grateful for your concurrence on the main points."[216]

Similarly in the *Third Judges Case,* after noting that merit is the "predominant" consideration in the appointment to the Supreme Court, the Court promulgated the following:

> When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, *for example,* the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench.[217]

It may be noted that representation or fair reflection of the society was not an issue before the Court in these cases. What would have been the reaction of the Court if it had been an issue before it is subject to speculation. But in view of India's constitutional provisions and practices which unmistakably provide for and observe representation of weaker sections—minorities and women—in legislative and executive bodies and also in the civil services and lower judiciary, it may reasonably be expected that if the issue is addressed to the Court it will support fair reflection of the society in the higher judiciary also.[218]

Returning to the President's and the Chief Justice's reactions to it, an impression was tried to be created as if the President were asking for ignoring the merit in favor of representation of certain sections of the society, while the Chief Justice was insisting on merit and ignoring the representation. Perhaps the divide between the views of the two was not as big as was projected. On a close examination one may find no opposition between representation and merit and, therefore, no opposition between the views of the President and the Chief Justice. Merit is not a fixed or set standard.[219] It may differ for

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215. *Id.*

216. *Id.*

217. Third Judges Case, A.I.R. 1999 S.C. at 18 (emphasis added).

218. The constitution specifically reserves seats in Parliament and State legislatures for Scheduled Castes and Scheduled Tribes, as well as for Anglo Indians and in the municipalities, and panchayats for women. It makes special provision for women, children, Scheduled Castes, Scheduled Tribes, and other sections of the society. *See* M. P. Singh, *Affirmative Protection of Minorities in India, in* THE LIVING LAW OF NATIONS 301 (Gudmundar Alfredsson & Peter Macalister-Smith eds., 1996).

219. For an insightful discussion on this issue see Christopher McCrudden, *Merit Principles,* 18 OXFORD J. OF LEGAL STUD. 543 (1998). The author notes and discusses five

different purposes and occasions. Therefore, merit for a judge in a pluralistic and diverse society cannot be the same as in a monolithic and homogenous society.[220] Even if one accepts, which is not the case, that the Court in the last two *Judges* cases has insisted on merit as the sole consideration for the appointment of judges, it has not defined or explained merit other than indicating certain qualities of a judge.[221] But there is no unanimity or finality on these qualities.[222] Even if one agrees on certain minimum qualities which every judge must possess, no objection should be raised to adding more to supplementing them according to the requirements of a society.

Nobody is asking or seems to have ever asked for quotas or reservations in the appointment of judges. Nor should that be demanded. The diversity of the Indian society, however, could not be ignored. How this diversity is to be dealt with is a complex and delicate issue on which opinions may sharply differ. But for the present purpose of achieving, maintaining, and improving the quality of justice administered by the courts and for reposing greater faith of the people in them and thereby ensuring the independence of the judiciary, the principle of reflection of the society should be observed. With the law established by the Court on the appointment of judges, greater justification lies for the observance of this principle. Earlier a representative executive was supposed to have a dominant role in the appointment of the judges while that role has now been taken over by the judges in whose appointments people have no direct or indirect role. A heavy responsibility, therefore, lies upon the judges to demonstrate that even though they are self-appointed, they represent their society and that they are not a closed group of people perpetuating their own rule. They must discharge that responsibility with sagacity and foresight and must encourage and invite suggestions for appointment of judges from

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different conceptions of merit. *See id.*

220. Speaking to the students of the Faculty of Law, University of Delhi in the spring of 1997, one of the most prominent former Chief Justices of India, Justice P. N. Bhagwati, narrated how his perception of the Indian Constitution and law took a turn after he visited some of the rural areas in Gujarat after becoming the Chief Justice of that High Court. Similarly, speaking to the same audience at another occasion, one of the most progressive former judges of the Supreme Court, Justice V. R. Krishna Iyer, narrated that when in a petition of a Naga tribal in the Supreme Court, opposite counsel raised the question of merit in the petition. Iyer's response was that the fact that the petitioner is a Naga and has come all the way to approach the Supreme Court for justice is itself a merit in the petition.

221. *See* Second Judges Case, A.I.R. 1994 S.C. 268 at 433. Jusitce Verma states that "[l]egal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge." *Id.*

222. *See infra* note 223; Singhvi Declaration, *supra* note 207, ¶ 9; Montreal Declaraion, *supra* note 207, ¶ 2.11 (stating that candidates for judicial office shall be individuals of integrity and ability, well-trained in the law). In the same vein, see different opinions in the *Judges Case*, *Second Judges Case*, and SEERVAI, *supra* note 6, ¶ 25.394, supplemented *supra* note 161 and accompanying text. *See also* ABRAHAM, *supra* note 204, at 56.

different sources, including the executive, the bar, and the legal luminaries. Now the responsibility primarily lies on the bench to create a judiciary which is not only independent of the executive and the legislature, but which is also competent to perform the unfinished task of social revolution which the Indian Constitution makers had envisaged.[223]

VI. CONCLUSION

From the foregoing account of the constitutional provisions, their history, interpretation, and application, the problems faced and the solutions suggested, several conclusions emerge. First, the constitution makers did not want to leave the appointment of judges exclusively to the executive. Second, doubts were expressed from the very beginning whether the formula adopted in the Indian Constitution would serve the purpose of establishing and maintaining an independent judiciary. Third, doubts were confirmed with respect to the High Courts even before the commencement of the constitution and soon after the commencement of the constitution even with respect to the Supreme Court. Fourth, though the constitution makers intended effective involvement of the judges, particularly of the Chief Justice of India and the Chief Justices of High Courts, they refused to permit the Chief Justice of India to have the last word. Fifth, the constitution makers did not agree to make the appointments subject to the recommendations of any panel or approval of the legislature. Sixth, the constitution makers sincerely believed that the arrangement they had made in the constitution was the most suitable and appropriate for India and hoped that the high constitutional functionaries involved in the process would discharge their constitutional obligation with full responsibility. Seventh, the consitution makers were not completely wrong in their assessment and, subject to occasional aberrations, the system has worked well.

Eighth, the judicial interpretation of giving primacy to the executive has gone against the expectations of the constitution makers and the independence of the judiciary. Ninth, until the *Judges Case*, which gave primacy to the executive, nobody had seriously entertained the idea of a judicial appointments commission or other similar body outside the scheme already laid down in the Indian Constitution. Tenth, the constitution provides for a consultative process among several constitutional functionaries and reasonably expects a consensual decision. Eleventh, practice of consultation by the Chief Justice of India and Chief Justices of the High Courts with their colleagues before making their recommendations was prevalent and

223. On this point see AUSTIN, *supra* note 6, at 164. Even the title of the chapter, "The Judiciary and the Social Revolution," is striking. On the revolutionary role of the judges, see BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

specifically recommended by the Law Commission to be observed as a rule. Finally, no clear consensus on the form and functions of the proposed National Judicial Appointments Commission and consequential amendment of the Indian Constitution was, or is, in sight.

In view of all these considerations, the solution given by the Supreme Court in the *Second Judges Case* as clarified and confirmed in the *Third Judges Case* appears to be the most appropriate and practical. Without offense to any provision of the constitution it affects and advances the intent of the constitution makers of providing an independent judiciary which could not be expressed in any better words. It does not bring back the concurrence of the Chief Justice of India which had been rejected by the constitution makers primarily because the Chief Justice of India, as an individual unaided by anyone, could also err.[224] Even under this solution, in appropriate cases the opinion of the Chief Justice of India may not be given effect. But that will happen only in consultation with the Chief Justice as a collegium, not at will. The error element which was present in the minds of the constitution makers has been resolved by the Court. Nothing is available in the history of the constitutional provisions that the solution to the error element given by the Court was ever suggested by anyone, much less considered by the Assembly or any of its members. What would have been the reaction of the constitution makers had it been suggested to them is speculative. But asking such questions is a legitimate method of determining the intent of lawmakers in deciding the difficult or hard cases.[225] This is much more so in the case of a constitution which has to endure itself indefinitely in changing times and situations. The Court does not bring back any of the alternatives considered and rejected by the Assembly. "In the appointment of Supreme Court and High Court justices," Austin notes, "the Assembly provided that the President should act neither in his discretion nor on the advice of his council of ministers but in consultation with the Chief Justice and other justices."[226] The Court restores that position.

The Court's interpretation is also justified by the purposive interpretation of the Indian Constitution.[227] It is universally accepted that the

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224. *See supra* text accompanying note 2 for Dr. Ambedkar's reply in the Assembly. Unlike the President of India who acts on the aid and advice of a Council of Ministers responsible to Parliament, the Chief Justice of India is not required to act on the aid and advice of anyone, and is also not accountable to anyone. For the view that the *Second Judges Case* brings back the "concurrence" of the Chief Justice of India which was rejected by the Assembly, see SEERVAI, *supra* note 6, at 2945, 2951; *see also* Rao, *supra* note 88.

225. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 9 (1986). Dworkin's counterfactual argument for determining the intentions of the law maker is particularly noteworthy. *See id.* at 119.

226. AUSTIN, *supra* note 6, at 129.

227. On the application of purposive interpretation of a constitution, see the decision of the court of Final Appeal of Hong Kong in Ng Ka-Ling & Others v. Director of Immigration

constitution does everything possible to ensure the independence of the judiciary. It is also accepted that the independence of the judiciary is a basic feature of the constitution. The independence of the judiciary is sought to be upheld not just for its sake, but for ensuring smooth functioning of the constitution and for the realization of its goal of a free, just, and democratic society. Any interpretation of the Indian Constitution which comes in the way of the independence of the judiciary is, therefore, not consistent with the constitution and is also not justifiable. The interpretation in the *Judges Case* giving primacy to the executive led to the appointment of at least some judges against the opinion of the Chief Justice of India within the short period of less than a decade.[228] This could not have been intended by the constitution makers because it was a clear threat to the independence of the judiciary. If such an interpretation receives widespread criticism and condemnation and the matter is again brought before the Court for reconsideration, the Court is under a duty to rectify the wrong and give an interpretation which is consistent with the purpose of the provision and is also not inconsistent with its language. The Court has done that job remarkably well in the *Second* and *Third Judges Cases*.

The same may be clearly said with respect to the seniority rule in the appointment of the Chief Justice of India. Apparently, in the two instances in which the seniority rule was broken, the superseded judges had given opinions inconvenient to the then executive. The constitution makers could have never intended that the judges must be calculating the pleasure or displeasure their decisions could bring to the executive of the day and that they could become Chief Justice of India any time or out of turn by giving opinions that pleased the executive or could loose that opportunity forever if they gave an opinion that displeased it. Such an interpretation would be an outright reversal of the intended independence of the judiciary. Of course, no judge of the Supreme Court has the claim to become the Chief Justice of India by seniority. But in view of the fact that they have always become Chief Justice by seniority except in two instances where they gave opinions not liked by the appointing authority makes out a justification for the rule of seniority, unless for objective reasons supportive of judicial independence, such as physical or mental disability or charges of corruption, participation in politics, or any other similar reason it may not be followed.

Similarly, with respect to transfers of judges, including Chief Justices, of the High Courts, the Court has evolved a formula which supports the

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[1999] 1 H.K.L.R.D. 315 (H.K.). For its application to the Constitution of India see SEERVAI, *supra* note 6, at 186.

228. According to an affidavit given by the Government of India in the *Second Judges Case*, between January 1, 1983 and April 10, 1993, out of 547 appointments to the Supreme Court and High Courts, seven—five in 1983, one in 1985, and one in 1991—were made against the opinion of the Chief Justice of India. The *Judges Case* was decided on December 30, 1981.

judicial independence and is in consonance with the provisions of the constitution. In principle the power to transfer a judge without that judge's consent is not consistent with the independence of the judiciary. But this power is given in the constitution and has been supported from time to time by different bodies, including the Law Commission of India. The way the power was exercised before the emergency of 1975-77 did not expose its potentiality of misuse. But the transfers during the emergency and later, including the ones recommended by the Chief Justice of India in 1998, have clearly exposed its potentiality of harming the independence of the judiciary. Reading the requirement of consent in the relevant provision would have gone against the well-established practice and precedents. At the same time, its potentiality of misuse had to be guarded. The Court has done that job well by making the transfer more cumbersome than a fresh appointment of a High Court judge. It has also indirectly introduced the element of consent by the requirement of asking and considering the views of the judge to be transferred.

Finally, though the solutions provided by the Court to the problems of appointments and transfers may not be ideal, perhaps they could not be improved upon in the circumstances. The constitution makers had expected that all constitutional functionaries will act in public interest in the independence of the judiciary uninfluenced by personal, political, or even ideological considerations that could harm that interest. Therefore, they did not put any additional checks that would have made the decision making process cumbersome or even unworkable. No problem arose so long as the constitutional functionaries acted on expected lines. As soon as those expectations were broken and the instances and possibilities of such breaches increased, the checks became imminent. Such checks could be created either by an amendment of the constitution or by an interpretation which could be justified under the constitution. As there was no clear move for the former,[229]

229. Apparently two Bills, one in March 1982, and another in May 1990, were introduced in Parliament to amend Articles 124(2) and 217(1), which provided for the appointment of Supreme Court and High Court judges on the recommendation of a judicial commission. These amendments were not pursued and passed.

there was no guarantee that it would have either succeeded or worked better because the considerations for which similar checks were rejected by the constitution makers apply even today.[230] Moreover, any moves to amend the constitution were almost on the same lines on which the Court has decided.[231]

Let us, therefore, make the best of the solution found by the Court. Even though the solution is justified in the circumstances, it may not be easy to implement unless all concerned are guided by the considerations expected of them by the constitution makers. Some of the difficulties in its implementation have already been noted, and others may arise in due course. There may be Chief Justices and other judges who may like to impose their will irrespective, or in disregard, of public interest and there may be executive heads and other members who may always find fault with the recommendation of the Chief Justice and other judges. There may also be genuine differences of opinion with respect to the public interest and the understanding of the constitution between the executive and the Chief Justice as, for example, happened between the President and the Chief Justice in respect of appointments and transfers after the *Third Judges Case.*

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230. It has been noted *supra* that proposals resembling a judicial appointment commission or approval of the legislature were considered and rejected by the constitution makers because they would make the procedure cumbersome and bring in immature politics. I do not think that those reasons have disappeared or lost their validity. On the contrary, jurists read of more difficulties in the appointment of judges in the United States because of the Senate's confirmation requirement. *See* NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS, Preface (1998). Neither has there ever been overwhelming support for the formation of a commission. It may also be noted that some of those like Griffith, who had earlier argued for a commission in England, do not see much reason to insist on it. *See* J. A. G. GRIFFITH, THE POLITICS OF THE JUDICIARY 275 (4th ed., 1991) (cited in STEVENS, THE INDEPENDENCE OF THE JUDICIARY, *supra* note 7, at 179-80). While Stevens leaves this issue open, in a recent article he hints towards the possibility of "some form of Judicial Appointments Committee." Stevens, *A Loss of Innocence*, *supra* note 5, at 401. Among the supporters of the Commission, see Shetreet, *Judicial Independence*, *supra* note 10, at 652; BARENDT, *supra* note 7, at 134; *see also* Surya Deva, Procedure for the Appointment of the Judges of Higher Judiciary: A Theoretical Perspective 88 (1998) (unpublished LL.M. dissertation, Faculty of Law, University of Delhi, India). Also note the statement of Ram Jethmalani, the Law Minister of India, favoring the establishment of a national judicial commission for appointment, transfer, and posting of judges. Jethmalani also stated that it could be done only by an amendment of the constitution which was not possible at the moment. *See* TIMES OF INDIA, June 11, 1999. The demand for the creation of a National Judicial Commission has also been made in a recently-held conference of lawyers in New Delhi. *See* TIMES OF INDIA, Sept. 23, 1999.

231. The constitution amendment bill introduced in 1982 had provided for a five-member commission consisting of distinguished jurists while the one introduced in 1990 provided for a commission consisting of the judges almost exactly on the lines of the *Second Judges Case. See* Second Judges Case A.I.R. 1994 S.C. at 385. The law laid down by the Court also comes close to the practice developed in England after the passage of the Courts Act 1971. *See* STEVENS, THE INDEPENDENCE OF THE JUDICIARY, *supra* note 7, at 181. The idea of the commission as recommended by the Law Commission seems to have been rejected by the Judges' Conference also.

But even if everything moves ideally, it may not be easy to implement the scheme and remove all the ills associated with the appointments and transfers of judges. A big backlog of vacancies is to be filled up. It is an enormous task for the Chief Justice and his collegium to fill these vacancies in accordance with the norms laid down in the two *Judges* cases. The creation of new vacancies is a continuous and unbroken phenomenon for which a continuous and unbroken exercise has to be undertaken, which again is a heavy demand on the time of the judges and other resources of the Court.[232] Let us hope the Chief Justice and his office will be able to cope up with this demand and that this demand will not create any permanent or fixed division among the members of the collegium. Nor shall collegium just follow the dictates of the Chief Justice.

Appointments and transfers of judges are crucial for the independence of the judiciary, but they are not the only issues about it.[233] There are other equally, if not more, serious issues and obstacles. One of them which has already been noted is the problem of arrears.[234] The *Second Judges Case* takes some care of it in so far as it authorizes the Court to direct the executive to create additional posts of judges if recommended by the Chief Justice of India in view of the increased work load and arrears. But that takes care only of the High Courts. The real and much more grave problem of arrears and delays lies in the lower courts where more than once it has been noted that under-trials have been languishing behind bars for indefinite periods in violation of their fundamental right to life and liberty.[235] The position in non-criminal litigation is even worse. This goes against the rule of law, which is one of the basic features of the Indian Constitution,[236] and shakes the faith of the common people in the effectiveness of the courts as guardians of their rights

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232. According to a statement of the Law Minister of India, as many as one vacancy in the Supreme Court and 136 vacancies in the High Courts existed on that date. *See* TIMES OF INDIA, June 11, 1999. The Law Minister also noted that 1000 posts of sessions judges and judicial magistrates were lying vacant in the country. *See id.* A petition for direction to the Central Government to fill these vacancies has also been filed in the Supreme Court. *See* TIMES OF INDIA, Sept. 28, 1999. It is interesting that the Court should issue notices to the Law Minister while the entire initiative for the appointment of judges now rests on the judges.

233. For the importance of appointments and dismissals, see BARENDT, *supra* note 7, at 131.

234. *See* RAJEEV DHAVAN, THE SUPREME COURT UNDER STRAIN: THE CHALLENGE OF ARREARS (1978); M. Shameem, *Expediting Justice*, 29 CIV. & MIL. L.J. 278 (1993). According to a petition filed in the Supreme Court for filling the existing vacancies and for creating more courts, 25 million cases, many of them for over 25-years-old, are pending in various courts in the country. *See* TIMES OF INDIA, Sept. 28, 1999.

235. *See, e.g.*, Hussainara Khatoon (I) to (VI) v. Home Secretary, Bihar, (1980) 1 S.C.C. 81, 91, 93, 98, 108, 115.

236. *See* DIETER CONRAD, *Die Zukunft des indischen Reschtsstaats, in* ERSTE HEIDELBERGER SÜDASIENGESPRÄCHE, 54 (D. Rothermund ed., 1990), reprinted in Conrad's collection of writings, *supra* note 75.

and lowers the courts' prestige in their eyes. The judiciary cannot earn or sustain its independence if it loses people's faith in it. Therefore, the problem of delays and arrears at all levels has to be attended on a war footing.[237]

The other factor which is eroding the faith of the people in the judiciary and constitutes a grave threat to its independence is the allegation of widespread corruption among the judges at all levels.[238] Independence and corruption in a judge or judiciary are self-contradictory and cannot coexist. If the judiciary has to be made and kept independent, effective measures need to be taken urgently to eradicate and prevent corruption among judges.

Post-retirement attraction of jobs for the judges handed out by the executive is another factor in the independence of the judges. Among other things, the Attorney General for India has recently called for eliminating this practice and has instead suggested raising of the age of retirement of the judges.[239] Similarly, the Chief Justice of India, among other requests, has asked for financial and functional autonomy of the courts for their effective and efficient functioning and for quick delivery of justice.[240]

A growing unease is also being felt and expressed about the accountability of the judiciary and its extensive and frequent intrusion into the supposedly executive and legislative domains. Although, as has already been noted, accountability of the judiciary and how far it should scrutinize the acts of the legislature and the executive are delicate and controversial issues, the judiciary should not be left totally unchecked.[241] If the independence of the judiciary is rooted in the separation of powers, which has been resorted to again and again by the judiciary in support of its independence from executive interference, the judiciary must also in turn respect the autonomy of the executive and the legislature. The judiciary should not get attracted or tempted towards correcting every wrong in the society, a role that society has never assigned to the judiciary and does not expect it to perform. At times the judiciary must be getting popular approbation of its intrusions into the domain

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237. A petition for direction to the Government of India to increase the ratio of judges from 10.5 per million people to 50 per million is also pending in the Supreme Court. *See* TIMES OF INDIA, Sept. 28, 1999.

238. *See* SEERVAI, *supra* note 6, at 2927, 2967; N. A. Palkhivala, *Judiciary in Turmoil: Public Confidence Rudely Shaken*, 26 CIV. & MIL. L.J. 299 (1990); A. N. Grover, *Fall in Values*, 27 CIV. & MIL. L.J. 163 (1991).

239. S. J. Sorabjee, *Judges Should Not Be Given Post-Retirement Assignments*, HINDUSTAN TIMES, Feb. 7, 1999, at 6. For other similar views see N. M. Ghatate, *Ensuring Independence of Judges*, 29 CIV. & MIL. L.J. 94, 96; PRATAP KUMAR GHOSH, THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED 240 (1966); LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *supra* note 89, at 45.

240. *CJI Calls for Financial Autonomy*, SUNDAY PIONEER, Jan. 17, 1999, at 5. *See also* RAJEEV DHAVAN, JUSTICE ON TRIAL 82 (1980).

241. On this issue, see generally 61 LAW & CONTEMP. PROBS. (1998) (providing extensive treatment on judicial independence and accountability).

of the legislature and the executive, but in the long run it may erode the very basis and justification of its own independence and endanger it.[242]

Let us conclude with an optimistic note. The constitution makers of India had a grand vision of a free and just society based on the rule of law. In the realization of that vision they had assigned a prominent role to the judiciary which it had to perform independently and uninfluenced by the other two branches of the government. By and large the expectations of the constitution makers have been respected, if not fulfilled, by all concerned. Among all the troubles and tribulations India has faced since the commencement of the constitution, the judiciary has performed its role fairly well. In its times of trouble with the executive, the judiciary has received the spontaneous and sustained support of a powerful legal community and of the people in general. Therefore, the judiciary has generally been able to maintain its independence and perform its role along the expected lines. I often wonder whether the largest democracy on earth, among all its adversities, has been able to sustain and effectively operate its constitution because of the constitution makers' vision of an independent judiciary and the sustenance of their vision by the people of India. In spite of many failings, it is no mean achievement for the people of India and their institutions that they have been able to sustain a democratic constitution where all others in similar or even more favorable circumstances have either not attempted or failed. The independence of the judiciary appears to be one of the most prominent factors in the occurrence of this phenomenon. Let us therefore, preserve, protect, and promote it.

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242. *See id*; *see also* Shetreet, *Judicial Independence*, *supra* note 10, at 635; Rao, *supra* note 88; STEVENS, THE INDEPENDENCE OF THE JUDICIARY, *supra* note 7, at 179. *Cf.* BARENDT, *supra* note 7, at 139.

SELF-DEFENSE OR SELF-DENIAL: THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

Major Michael Lacey*

I. INTRODUCTION

> AP News Service: November 3, 2000. Today, United States forces struck suspected nuclear weapons development sites deep inside North Korea. An anonymous source inside the Pentagon revealed that U.S. intelligence assets estimated North Korea was less than three months from testing a crude Hiroshima-type nuclear device. U.S. Secretary of State, Madeleine Albright, appearing at a press conference immediately after the strike, stated that the United States acted in accordance with international law and only under the auspices of self-defense.[1]

The above fictional news account could well be tomorrow's headlines. The United States has recently used military force to strike both at targets of terrorism and at centers where weapons of mass destruction are under development.[2] Given the proliferation of weapons of mass destruction and terrorist cells in Third World countries, the use of force in the future is a foregone conclusion.

Troubling, however, is the failure of United States policy makers to articulate an accurate legal justification for the use of such force. The current self-defense doctrine is not only weak on its face, but it is unsupported by

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1. Fictional news account.

2. Sandra Sobeiraj, *Clinton Orders Strikes on Afghan, Sudanese Terrorist Sites* (visited Sept. 5, 1998) <http://www.foxnews.com/js_index.sml?context=news/national/0820/d_ap_08 20_98>.

international law. The elasticity of the doctrine of self-defense can only stretch so far. For the world's only remaining superpower to claim the necessity of self-defense against a band of Islamic terrorists, armed with little more than small arms, over seven thousand miles away from U.S. borders, stretches the doctrine past logic and into fantasy. State actors should, indeed must, continue to stop serious threats to their national security. Terrorist training camps harbored in other nations and terrorists seeking to develop weapons of mass destruction represent serious threats to the Western democracies. The threat to their indigenous populations is simply too great for such states not to act. The legal justification for this offensive action should then lie in that rationale: the idea that states have the inherent *juris ad vitae*[3] right prevents the random annihilation of their populations from weapons of mass destruction in the hands of unstable regimes or the murder of their citizens by rogue terrorist bands.

II. SELF-DEFENSE

On April 15, 1986, twenty-two United States combat aircraft attacked targets inside Libya which were suspected of supporting international terrorism.[4] On August 20, 1998, the United States launched seventy-five cruise missiles against suspected terrorist training camps in Afghanistan and a chemical weapons production facility in Sudan.[5] The United States acted unilaterally without the consent or knowledge of either the Security Council or the General Assembly of the United Nations.

The U.S. strikes against Libya were prompted by U.S. intelligence reports that Libya's leader, Muammar Qaddafi, sponsored the terrorist attack upon a West Berlin discotheque that killed one American and injured two hundred others.[6] The U.S. raid was carried out by over one hundred attack and support aircraft which hit five targets. All but one of the targets were part of Qaddafi's state sponsored terrorism network, the sole exception being the Libyan air base at Benina which based fighters capable of interdicting the raid.[7] In commenting on the strike, President Reagan stated, "[S]elf defense is not only our right, it is our duty. It is the purpose behind the mission . . . a mission fully consistent with Article 51 of the U.N. Charter."[8]

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3. "Right to Life," as translated in BLACK'S LAW DICTIONARY 854 (7th ed. 1999).

4. FEDERAL RESEARCH DIVISION, LIBYA: A COUNTRY STUDY 229 (1989).

5. Charles Aldinger, *U.S. Used Cruise Missiles* (visited Sept. 20, 1998) <http://204.202.137.144 /sections/world/daily news/strike_hardware 980821.html>.

6. Federation of American Scientists, *Operation El Dorado Canyon* (visited Nov. 21, 1998) <http://www.fas.org/man/dod-101/ops/el_dorado_canyon.html>.

7. *See id.*

8. *Id.*

U.S. foreign policy makers were quick to defend the lawfulness of the military action against Libya, Afghanistan, and Sudan. The theme of self-defense was claimed by U.S. officials as the legal justification for both the Libya and the Afghanistan and Sudan strikes. U.S. Secretary of State Madeleine Albright stated, "[I]f we had not taken this action, we would not have been exercising our right of self-defense. . . ."[9] Twelve years earlier, President Reagan had claimed self-defense as the legal justification for the attack on Libya.[10] Similarly, the United States has relied upon this concept of self-defense to justify intervention in Grenada in 1983 and support of the Contras in Nicaragua in the 1980s.[11]

Unfortunately, in all of the above cases, the United States failed to clear the high legal hurdle set for a nation acting under the guise of self-defense in international law. By incorrectly characterizing these actions as legal under a self-defense doctrine, the United States is opening the international door for abuse by other nations.[12]

In addition, by clinging to this inaccurate legal justification for the use of force against terrorist targets, the United States risks losing international support for an alternative legal theory of intervention; specifically, the affirmative responsibility of a nation-state to use force in order to protect its

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9. Secretary of State Madeleine K. Albright, Interview between Albright and CBS-TV Nightly News with Dan Rather Aug. 21, 1998 (visited Sept. 22, 1998) <http://secretary.state.gov/www/statements/1998/980821b.html>. The U.S. strikes against the targets in Afghanistan and the Sudan represent an attempt to strike at the heart of the Usama Bin Ladin Islamic terrorist group. Usama Bin Ladin, son of a wealthy Saudi Arabian business magnate, leads one of the most dangerous international terrorist organizations. Not only is the Bin Ladin group suspected of masterminding the attacks upon the United States' embassies in Kenya and Tanzania, but also of participating in the following attacks upon the international community:

1) 1992—Conspiring to kill U.S. servicemen who were participating in operation Restore Hope in Yemen.

2) 1995—Assisting an Egyptian terrorist in the assassination of President Mubarak.

3) 1995—Car bombings against the Egyptian embassy in Pakistan.

4) 1996—Plotting to blow up U.S. airliners over the Pacific.

5) 1996—Conspiring to kill Pope John Paul II and bombing a joint U.S.-Saudi training mission in Riyadh.

See id.; *see also Fact Sheet Usama Bin Ladin*, released by the Coordinator for Counterterrorism, Dept. of State (visited Sept. 22, 1998) <http://www.state.gov/www/regions/africa/ fs_bin_Ladin.html> (detailing other terrorist activities of the Usama Bin Ladin terrorist group).

10. *See* LOUIS HENKIN ET AL., RIGHT AND MIGHT 46 (1989).

11. JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 127-28, 165 (1990).

12. Not only is the United States setting a dangerous precedent by invoking the self-defense doctrine, but it is also eroding its international credibility. In condemning the Reagan administration's justification for the invasion of Grenada, one scholar wrote: "the clearer the system's rules for evaluating the legality of use of force and the more sophisticated the legal techniques for applying these rules, the more difficult it will become to maintain this Kantian-like cleavage between action as it really is, and as it is claimed to be." Abram Chayes, LAW AND FORCE IN THE NEW INTERNATIONAL ORDERS 21 (1991).

nationals from nuclear or biological weapons and international terrorists. The spread of weapons of mass destruction may well represent the most serious threat to the national security of the United States.[13] The United States must concentrate and develop an alternative legal theory for armed intervention, one based on the real rationale for the use of lethal force.

As previously discussed, U.S. policy makers have framed the action taken against Libya, Sudan, and Afghanistan as one of self-defense. Unfortunately, the current U.S. position is insupportable under both customary international law as well as under Article 51 of the United Nations Charter.

The earliest example of what constitutes the standard of self-defense under customary international law stems from the much-analyzed and cited *Caroline* case.[14] In 1837, British soldiers crossed into the United States and seized the *Caroline*, an American ship allegedly aiding Canadian insurrectionists.[15] Although the issue was eventually resolved through other diplomatic channels, U.S. Secretary of State Daniel Webster gave the quintessential definition of when a state may resort to armed force in self-defense:

> [R]espect for the inviolable character of the territory of independent states is the most essential foundation of civilization . . . . Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "*necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*"[16]

Even today, *Caroline* sets the standard for what constitutes anticipatory self-defense under customary international law. First, it clearly illustrates the problem with the United States' reliance upon the legal justification of self-defense for the recent attacks on terrorist targets. Most importantly, *Caroline* demands that the threat to the nation-state be imminent. The threat must be massing at the border before the state actor is released from its obligations to respect territorial integrity under international law.

It is difficult, if not impossible, for the United States to argue that the attacks launched on August 20, 1998 were against targets that required an

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13. *See* KATHLEEN C. BAILEY, DOOMSDAY WEAPONS IN THE HANDS OF MANY 6 (1991).
14. *See* WILLIAM W. BISHOP JR., INTERNATIONAL LAW 584 (1953).
15. *See id.*
16. *Id.* (citing 2 MOORE, INTERNATIONAL LAW 409-14 (1906)) (emphasis added).

"instant, overwhelming" response and that it had "no choice of means, and no moment for deliberation."[17]

Other states have attempted unsuccessfully to hide themselves in the *Caroline* cloak of self-defense. Japan initially sought to describe their invasion of Manchuria in 1931 in terms of self-defense.[18] The League of Nations quickly dismissed the Japanese argument as superficial and based it on self-interest. The final report by the League stated: "[T]he military operations carried on by Japan against China are out of all proportion to the incident that occasioned the conflict nor on that of the right of self-defense."[19]

During the Nuremberg trials, several German defendants proffered the defense "that Germany was compelled to attack Norway to forestall an allied invasion, and her actions was therefore preventive."[20] Significantly, there were Allied plans to seize Norway in order to interrupt German iron ore shipments from Sweden. In dismissing the German defense, the Nuremberg Tribunal actually quoted *Caroline*, stating that "preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment of deliberation.'"[21]

The Nuremberg court rejected the defendants' pleas based on the lack of imminence of the possible Allied invasion.[22] Although the court found that there were plans for a Franco-British attack on Norway, at the time of the German invasion, such an Allied invasion was only a contingency and months away from fruition.[23] The Nuremberg Tribunal demanded that any nation seeking to utilize the legal justification of self-defense must wait until its proposed aggressor takes some affirmative hostile act in furtherance of the aggression.[24]

Other legal scholars have sought to explain the applicable customary international law standard for the invocation of self-defense as a reasonable standard commonly used in state court. Similar in analysis to the common law of torts, the doctrine queries whether a reasonable state would resort to force facing the perceived threat. If so, the use of armed force is legally justified to prevent the greater harm.[25]

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17. BISHOP, *supra* note 14.

18. LEAGUE OF NATIONS Doc. 1932 VII, 12, 71 (1932).

19. LEAGUE OF NATIONS O. J. Spec. Supp. 177, V1, at 42 (1933).

20. BISHOP, *supra* note 14, at 17.

21. Lawrence D. Egbert, *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 205 (1947) (quoting *The Caroline Case*, *in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)). *See also id.* at 206 (concerning the planned Allied invasion of Norway).

22. *See id.* at 206.

23. *Id.* at 206.

24. *See id.*

25. Robert H. Jackson, *U.S. Attorney General Address Before the Inter-American Bar Association, Havana, Cuba, Mar.27, 1941*, 35 AM. J. INT'L L. 1357 (1941). Other "reasonable"

Not only customary international law but also the United Nations Charter condemns the United States' legal rational as legal justification for the recent attacks upon Sudan and Afghanistan, and the 1986 attack upon Libya. One must begin with the very heart of the United Nations Charter, Article 2(4), to analyze any claim of national self-defense: "All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations."[26]

Article 51 of the Charter specifically deals with issue of a nation's use of self-defense. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."[27]

Article 51 recognizes that the imminence of the threat may preclude the target nation from seeking immediate permission or notification from the Security Council. It does demand, however, that the nation exercising this inherent right, as soon as reasonably possible, seek assistance from the

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states face the threat of international terrorism and are potential targets for weapons of mass destruction in the hands of unstable regimes or terrorist organizations. With the exception of Israel, none of these states have chosen to launch pre-emptive strikes against possible targets. These states have shown no reluctance to act once terrorists have taken their nationals as hostages. Some examples include Belgium's intervention in the Congo in 1960, the French rescue of a busload of French children from Somalia in 1976, and the Israeli raid on Entebbe. *See* JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 148, 188 (1982). But these same states exercise restraint in the absence of an overtly-hostile act on the part of international terrorists. The counter to the above contention that other reasonable states have chosen not to strike international terrorists is the argument that no international actor except for the United States has the military ability to act. However, such a view is incorrect. Several major powers, including Britain, France, Germany, and Russia, possess the ability of power projection beyond their borders. *See* Jane's Armed Forces of the World, 1998. The stark reality is that these reasonable states apparently do not view the terrorist camps as legitimate targets for self-defense. Even the United Kingdom, which publicly supports such strikes, refused to join the United States in the attack against Libya in 1986.

26. U.N. CHARTER art. 2, para 4.

27. U.N. CHARTER, art. 51. Although the articles appear in direct contradiction to each other, most scholars correctly point out that they are not mutually exclusive. *See* HANS KELSON, THE LAW OF THE UNITED NATIONS 914 (1951). Of the two, however, Article 2(4) stands out as one of the base principles upon which the United Nations was founded. As the official commentary to Article 2(4) of the Charter states, "[A]s an organization established to maintain international peace and security, its success is obviously dependent on the extent to which its Members respect this basic principle." U.N. CHARTER, Commentary and Documents. It is crucial to understand the underpinnings of Article 51. The *raison d'être* of the United Nations Charter was to render the unilateral use of force, even in self-defense, subject to the control of the Security Council. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 273 (1963). Thus under Article 51, the right to self-defense can only be exercised "until the Security Council has taken measures necessary to maintain international peace and security . . . ." *Id.* at 274.

Security Council. Article 51 specifically requires that measures taken by states in exercise of this right of self-defense must immediately be reported to the Security Council. To date, the United States has not abided by this requirement of Article 51 with regard to the attack upon Libya, Afghanistan, and the Sudan. This is not the first time the United States has exhibited this particular failing under Article 51.[28]

Countless United Nations Security Council Resolutions have rejected nations' attempts to legally justify aggressive acts under Article 51. A common theme resounds throughout all of the decisions made by the United Nations in response to these attempts. Each decision, in the form of a United Nations Security Council Resolution, was that the high threshold required for a state to invoke self-defense was not met.[29]

The Security Council consistently denounces actions taken by a state seeking to invoke the theory of self-defense under Article 51. Although a clear international standard for first use of armed force in self-defense was not announced in these decisions, something equally important did evolve from them. States will often claim self-defense under Article 51 for shallow self-interest reasons in armed interventions. However, the international community will review such claims under a high standard and condemn those that are not justified. Once condemned, the nation seeking the invocation of Article 51 is left defending its illegal action.

Most international law commentators on Article 51 have set a similar high standard for any state's attempt to use armed force under the guise of self-defense. The commentators are best divided into two distinct groups, the restrictivist view of Article 51, and the expansionist view. The restrictivist standard is best epitomized by Professor Bert V. A. Roling. Roling sums up

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28. In *Nicaragua v. United States* the United States attempted to claim the right of self-defense on the part of El Salvador. The International Court of Justice addressed El Salvador's responsibility to report under Article 51: "[T]he United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defense." Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. the United States of America), Merits, Judgment, 1986 I.C.J. Reports 122.

29. Israel's attempt to invoke Article 51 when it launched armed incursions into Jordan in 1966 was rejected. The Security Council was quick to dismiss Israel's attempt to use Article 51 for selfish gain. U.N. SCOR 228 Nov. 25, 1966. Israel did so again after attacking Lebanon in 1974 in an attempt to destroy terrorist camps, which had served as staging bases for attacks into Israeli territory. The Security Council again denied the claim of self-defense. U.N. SCOR 347 April 24, 1974. Finally, Israel again invoked Article 51 as its legal justification for destroying the Iraqi nuclear reactor at Tamuz in 1981— with similar result from an enraged Security Council. U.N. SCOR 488 June 19, 1981. Portugal also claimed legal justification under Article 51 for shelling Senegal in 1969. U.N. SCOR 273 Dec. 9, 1969; as did the British for an armed intervention in Yemen in 1964. U.N. SCOR 188 Apr. 9, 1964. Finally, the former Soviet Union attempted to justify its invasion of Afghanistan in 1980 as self-defense. G.A. Res. 6/2 Jan. 14, 1980.

the restrictive view of Article 51: "Correspondingly, Art. 2(4) should be read as prohibiting the first use of military power: in resistance against an 'armed attack' the use of force is allowed by virtue of Art. 51, *but a State may not initiate the use of force.*"[30]

The standard set for self-defense under the restrictivist interpretation is clear, but perhaps unrealistic: under no circumstances may a state resort to the first use of force. The state must absorb the first blow and then may respond under Article 51. Obviously, under this standard the United States could not claim self-defense for the recent attacks on terrorist targets.

The more accepted expansionist view of Article 51 sets a lower standard for the first use of force by a nation in self-defense. This lower standard is best exemplified by Professor Julius Stone. Stone argues that Article 51 allows states to take pre-emptive armed action when an attack upon their sovereignty is imminent.[31] One need not wait for the enemy armored columns to begin crossing the border before attacking, if there exists unrefutable proof that the hammer is about to fall.[32]

A similar expansionist view for the use of force under Article 51 is held by Professor John Norton Moore. Moore states that the original drafters of the U.N. Charter were intent upon ensuring that each nation should have this inherent right of self-defense spelled out. The major players after the Second World War—the United States, Britain, France and the Soviet Union—wanted to ensure their ability to intervene in any schematic of collective self-defense.[33] The disasters involving Hitler's "absorbing" Austria in 1936 and Czechoslovakia in 1938 were still fresh in the minds of the major powers. They wanted to ensure that this new United Nations had a mechanism for allowing intervention in such a future case—intervention in the name of collective self-defense.[34]

In the international law realm, little case law exists to elaborate on principles stated in treaties or practiced as customary law. Both the *Corfu* and

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30. BERT V. A. ROLING, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 5 (1986) (emphasis added).

31. *See* JULIUS STONE, AGGRESSION AND WORLD ORDER 43 (1958).

32. *See* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 244 (1984).

33. Interview with Professor John Norton Moore, University of Virginia Law School, in Charlottesville, Va. (Oct. 22, 1998).

34. Although Professor Moore agreed that the imminence of the threat is an underlying assumption before the use of anticipatory self-defense, he felt that such a threshold had already been reached with regard for the U.S. attacks on Afghanistan and Sudan. Professor Moore's theory is that such terrorist organizations represent a continuing threat to the security of the United States—indeed Bin Ladin has allegedly declared war on the United States. Therefore, their attack upon U.S. security is a continuing one and the use of force against them is not so much self-defense as the United States' response in an ongoing war between terrorism and the United States. *See id.*

Nicaragua cases elaborate on the high standards required before a state may claim self-defense.[35]

The *Corfu* case stands as the first instance when the newly-formed International Court of Justice took on the issue of what constitutes self-defense as defined in Article 51 of the United Nations Charter. On October 22, 1946, warships of Great Britain were attempting an innocent passage through the Corfu Channel off Albania and struck mines.[36] Subsequently, on November 12, 1946, the British swept the Channel for mines without the consent of the Albanian government—in clear violation of the right of innocent passage. Although the channel was within the territorial waters of Albania and the British ships had a right under international law to travel the channel, they did not have the legal basis to sweep mines.[37]

The British sought to defend their violation of the territorial waters of Albania as an act of self-defense. The Court disagreed:

> Between independent states, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic notes are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[38]

The Court did not provide examples of what might rise to the level of an armed attack and therefore constitute a legitimate action for a nation to respond under the auspices of self-defense. What the Court did address was the overriding principles of respect for the territorial sovereignty of fellow nations. There has been much academic debate and discussion over the primacy between Article 2(4) (respect for sovereignty) and Article 51 (self-

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35. Both cases were heard by the International Court of Justice (I.C.J.). The I.C.J. was established under the Charter of the United Nations immediately after the Second World War. It consists of fifteen judges who are elected by the General Assembly and the Security Council. The Court was established to decide issues of international law between states. Today the I.C.J. stands as the principle authority and arbitrator of disputes between nations. MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 487 (1992).

36. Corfu Channel Case (Alb. v. Gr. Brit.), 1949 I.C.J. 3.

37. See United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 19, para. 2, U.N. Doc A/CONF.62/122 (1982) (entered into force Nov. 16, 1994).

38. *Corfu Case*, 1949 I.C.J. at 3.

defense) of the United Nations Charter. The *Corfu* case provides the International Court of Justice's view that, absent a clearly imminent threat to a nation's territorial integrity, Article 2(4) trumps a weak case for Article 51.[39]

On April 9, 1984, Nicaragua brought an action before the I.C.J. which included allegations that the United States was directly responsible for supporting insurgent groups seeking to overthrow the popularly elected Nicaraguan government.[40] The basis for the allegations was U.S. support of the Contras, a right-wing group operating out of El Salvador and conducting frequent raids into neighboring Nicaragua. [41]

In summary, the United States claimed the right of collective self-defense to justify this covert use of force against Nicaragua. The Court's opinion provides a useful definition of what constitutes an "armed attack" under Article 51 of the United Nations Charter:

> In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There now appears to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.[42]

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39. *See id.*

40. CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, 1981 DIGEST at 3326 (1981).

41. Before the Court's final ruling, the United States had sought to withdraw from the Court's compulsory jurisdiction (to which it had earlier consented). On November 26, 1984, by a vote of 11 to 5, the I.C.J. ruled against the U.S. position and determined that the I.C.J. did have jurisdiction over the dispute. The United States refused to acknowledge the I.C.J.'s ruling and the United States made no submissions on the merits in front of the Court. The U.S. position on the controversy was described by Abraham D. Sofaer, the Chief Legal Advisor for the Department of State. The U.S. legal justification for their support of the Contras was upon the basis of collective self-defense resulting from Nicaragua's use of force against neighboring El Salvador. Abraham D. Sofaer, Address Before the American Society of International Law (Apr. 22, 1988) *in* CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1988 DIGEST.

42. Nicaragua v. United States, 1986 I.C.J. 103. The opinion also provides an excellent quote directly applicable to the U.S. action against Afghanistan and Sudan:

> On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is expected that the conditions of the Charter be respected. Thus for the purposes of enquiry into the

Interestingly, the I.C.J.'s one positive finding for the U.S. position, in the Nicaraguan incident is contrary to the current U.S. claim of self-defense against the terrorists in Libya, Afghanistan, and Sudan: "As stated above, the court is unable to consider that, in customary international law, the provision of arms to the opposition in another State, constitutes an attack."[43] The United States, therefore, had not committed an armed attack upon Nicaragua by virtue of supplying arms and supplies to the Contras. Simply put, supplying arms to a faction bent upon hostile overthrow of a regime does not rise to the high level which would constitute an armed attack and thereby justify the invocation of self-defense. Mere preparation of the potentially hostile force is not enough. If this is the case, however, the current U.S. policy of self-defense is indefensible from an international legal standpoint. Certainly the United States was committing a more aggressive act towards Nicaragua by supplying arms and training the Contras than the nations harboring the suspected terrorists in Afghanistan, Sudan, and Libya committed toward the United States. Yet the I.C.J. specifically determined that the United States' conduct was not egregious enough to rise to the level of armed attack. Therefore, the lesser form of aggression practiced by the suspected terrorists in the above named countries (mere preparation), could not rise to the level of an armed attack upon the United States.

The weakness of the current U.S. position becomes even clearer when one analyzes the definition of self-defense used by the U.S. armed forces. Chairman of the Joint Chief of Staff Instruction (CJCSI) number 3121.01 contains the standing rules of engagement for U.S. forces. Enclosure A to CJCSI 3121.01 gives the official definition of when U.S. forces may respond with deadly force in self-defense. Specifically: "A commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend that commander's unit and other U.S. Forces in the vicinity from a *hostile act* or demonstrated *hostile intent*."[44]

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customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced it was acting in self-defense.

Id. at 105. The Court concludes that the condition sine qua non required for the exercise of collective self-defense was not met by the United States. *See id.*

43. *Id.* at 119.

44. Chairman of the Joint Chief of Staff Instruction, Enclosure A (A-4) 1994. Rules of Engagement are directives issued by competent military authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with other forces encountered. They are the means by which the National Command Authority (NCA) and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law. *See id.* (emphasis added).

Obviously, the definition of hostile act and of hostile intent is crucial if one is to clearly understand when one can act in self-defense. CJCSI 3121.01 provides both:

> Hostile Act: A hostile act is an attack other use of force by a foreign force or terrorist unit (organization or unit) against the United States, U.S. forces, and in certain circumstances, U.S. citizens, their property U.S. commercial assets, or other designated non-U.S. forces, foreign nationals and their property.[45]

The hostile act will have already occurred before U.S. forces have had the opportunity to use force. The definition of hostile intent gives the rules for first use of deadly force by U.S. forces:

> Hostile intent: Hostile intent is the threat of imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States, U.S. forces, and in certain circumstances, U.S. citizens, their property, U.S. commercial assets, or other designated non-U.S. forces, foreign nationals and their property.[46]

The definition of "hostile intent" is most useful in analyzing the U.S. position on what constitutes self-defense. Notice how the drafters of the standing rules of engagement demanded the threat to be imminent before U.S. forces may use deadly force. The flashback to the *Caroline* case, as well as Article 51 of the U.N. Charter, is apparent.

The hypocrisy of the current U.S. claim of self-defense is readily evident when viewed in contrast to the concrete rules provided to the United States armed forces. The rules provided to the U.S. military demand that any threat be close at hand before it is allowed to use deadly force. While no hard and fast rule for what amounts to imminence can be or should be promulgated, some examples are useful. A terrorist truck, full of explosives bearing down on a Marine sentry guarding a U.S. compound, would no doubt qualify as an imminent threat and justify the use of deadly force. It is difficult to view foreign nationals conducting terrorist training in a Third World country (Afghanistan) with the same degree of impending threat—especially terrorist forces which have not been declared a hostile force per CJCSI 3121.01.

There exists a hidden central theme behind the requirement for the immediacy of the threat prior to the use of force presented by *Caroline*

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45. *Id.* at A-5.
46. *Id.* at A-5.

(customary international law), Article 51, and the United States' own CJCSI 3121.01. That theme is that there exists no time to take any other measure—therefore one may resort to force. The soldiers are massed on the borders, the terrorist truck is bearing down on the sentry or a foreign national is pointing a weapon in the direction of U.S. soldiers. Diplomacy, counterintelligence, security measures, and other early warning systems have failed. The last resort is the stark reality of armed force.

Some legal scholars seek to equate the terrorist operating in Third World countries as the equivalent of a state actor. As previously discussed, Professor Moore represents this school of thought, arguing that the United States and such organizations are engaged in an ongoing struggle, so any use of force is legitimate.[47]

The advantage of granting the status of a state to a terrorist organization is obvious. Treaties and bilateral obligations only exist between state actors, not between organizations (such as terrorist groups) and states. If state status is granted to the terrorist organization, the case for self-defense becomes much stronger. Unfortunately, little real evidence exists to equate the Usuma Bin Ladin terrorist organization to the functional equivalent of a state.

Traditionally, for purposes of international law, a state should have the following criteria: a) a permanent population; b) a defined territory; c) a government; and d) the capacity to enter into relations with other states.[48] Membership in the United Nations is provided for in the Charter only for "peace loving states."[49]

Few, if any, terrorist groups can claim even one of the above criteria. Although a terrorist group may be composed of exclusively one nationality (such as the Irish Republican Army), it is by no means permanent, with terrorist members joining and leaving as they please. Significantly, when members of a terrorist organization leave the group they do not carry the designation as a former member abroad with them—as would the citizen of a nation-state.

Most terrorist organizations are constantly on the move, with no definite territory, and with cells in multiple countries. The coordinator for Counterterrorism for the United States Department of State describes the Bin Ladin network as "multi-national and as having established a worldwide presence."[50] There are currently Bin Ladin terrorist cells in Afghanistan, Bosnia, Chechnya, Tazikstan, Somalia, Yemen, and Kosovo.[51]

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47. Interview with Professor Moore, *supra* note 33.

48. WILLIAM W. BISHOP JR., INTERNATIONAL LAW 210 (1962).

49. U.N. CHARTER art. 4.

50. *Fact Sheet Usama Bin Ladin*—released by Coordinator for Counterterrorism, Department of State (visited Sept. 22, 1998) <www.state.gov/www/regions/ africa/fs_ bin_ Ladin.htlm>.

51. Arabic News, *U.S. Military Strikes Against Afghanistan and Sudan Targets in Self*

The terrorist organization has no traditional governmental apparatus as required for international recognition as a state. Its policies are usually dictated by either their financier (Bin Ladin) or by their state sponsor (Qaddafi).

Finally, the terrorist organization lacks the capacity to enter into legitimate agreements with other states. Certainly, some Islamic fundamentalist terrorist organizations do have informal agreements for financial and material support from their state sponsors (such as Libya, Syria, and Iran). However, these support agreements do not rise to the level of legitimate international agreements. The terrorist organization, in such circumstances, is not an independent actor, but is merely acting as an agent of the supporting state. While Iran may be capable of entering into an international agreement with the United States, the Hezbullah it supports in Lebanon cannot.

Given all of the above, the argument that the United States can equate the terrorist organization with a state actor is flawed. The United States is not willing to grant state status to Usama Bin Ladin's organization for the purpose of negotiation. To pretend that terrorists are the equivalent of a state for striking them in "self-defense" is hypocrisy.

Others argue that since the states from which they are operating permit the terrorist group to exist and train inside their borders, they accept the responsibility associated with it. This principle of international law is widely accepted and is known as vicarious state responsibility; however, a state is responsible vicariously for every act of its own forces, of the members of its government, of private citizens, and of aliens committed on its territory. Vicarious responsibility is limited to the duty to exercise reasonable care to prevent the commission of illegal acts against foreign states, and, if committed, to punish the wrongdoers and compel them to make whatever reparation possible.[52]

Unfortunately, once again the Bin Ladin group does not lend itself to a clean vicarious responsibility analysis. An argument that the government of Sudan sanctioned Bin Ladin terrorist activities is insupportable. Bin Ladin was expelled from Sudan by its government in 1996.[53] Interestingly, each of the above countries in which Bin Ladin has a terrorist cell is either involved in internal civil unrest or completely lacking any form of effective central government. With no central authority to either sanction or support the activities of the Bin Ladin movement, the vicarious responsibility argument for the use of force breaks down. Not only does the Bin Ladin organization

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Defense (visited Sept.29, 1998) <www.Arabicnews.com> [hereinafter *U.S. Military Strikes Against Afghanistan and Sudan Targets*].

52. *See* L. OPPENHEIM, INTERNATIONAL LAW 337-38 (1955).

53. *See Fact Sheet Usama Bin Ladin, supra* note 50.

fall short of assuming the identity of a state, but in most cases the "states" from which it operates lack many of the criteria of qualifying for international state status.

A good example is the presence of the Bin Ladin organization in Afghanistan. Those who would argue that the government of Afghanistan has permitted Bin Ladin's terrorists open access to their country fail to recognize the current fragmented nature of this war-torn nation. One of the many sects, religious and otherwise, battling for control of Afghanistan is the Taliban. "The Taliban force represent only one of the many factions competing for control in the on-going civil war for Afghanistan."[54] Currently, the Taliban control large sections of rural Afghanistan where Bin Ladin operates his terrorist camps. Ladin has been an ardent supporter of the Taliban since its guerrilla campaigns against the former Soviet Union.

However, even the Taliban has warned Bin Ladin not to attack any other state and even moved him from one location to another as "to keep a watchful eye on him."[55] To argue that the "state" of Afghanistan is offering covert support to the Bin Ladin movement and is therefore vicariously responsible for its violent actions is to ignore the chaotic status quo which currently exists there.[56]

The terrorists in Afghanistan, as well as the terrorist training camps the United States struck in Libya in 1986, represent a real threat to U.S. security. Such terrorists could have infiltrated the United States or struck other U.S. targets such as U.S. embassies in Kenya and Tanzania. Perhaps such an attack was scheduled to have occurred within weeks or even days of the U.S. attack. Still the high threshold of imminence was not met. There existed other institutional "self-defense" mechanisms which the terrorists would have had to breech (or at least attempt to breech) before the nature of their threat rose to the requisite level of imminence required for self-defense: security safeguards, such as U.S. Customs, various airport security measures, the U.S. anti-terrorist intelligence network and that of U.S. allies, as well as various diplomatic channels.

The desirability of striking such terrorist targets before they can reach such security safeguards is self-evident. However, the risk in doing so in the lack of any immediate impending attack is also patently obvious. In the absence of a clear immediate threat, explaining one state's violation of another state's territorial sovereignty can lead to some unsubstantiated claims. The former Soviet Union's invasion of Afghanistan in 1981 serves as the best example. The Soviet Union claimed that the Afghanistan government had

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54. *U.S. Military Strikes Against Afghanistan and Sudan Targets*, *supra* note 51.

55. Speech from Kenneth Katzman, Middle East and terrorism expert, (visited Oct. 2, 1998) <asia.gov/topical/pol/terror/ 98082404.ltm>.

56. Note that the author's above assertions concerning Usama Bin Ladin are all based upon unclassified facts and sources.

requested the Soviet intervention in 1979 pursuant to a treaty of friendship between the two states. The argument was one of collective self-defense.[57] Without the sine qua non of imminence, anticipatory self-defense becomes nothing more than a slippery slope of naked aggression. As one legal scholar said, "I accept the view that one has to be very careful in regard to anticipatory action and in principle exclude it in view of the risks involved."[58]

III. JURIS AD VITAE

If not self-defense, then what is the proper legal justification for the United States' use of force against terrorist targets or weapons of mass destruction in the hands of fanatical, dangerous regimes? Since the fall of the Soviet Union and the end of the Cold War, these dual devils represent the greatest threat to the security of the United States. To deny states the ability to strike such targets, because they have not met the high legal standards required by the international community for self-defense, is to give the Bin Ladins and Saddam Hussains permission to continue their lethal activities.

The answer for the legal justification lies in the real rationale for the use of lethal force against such targets. The United States has elected to use force against such targets not because of the threat they pose to the United States as a sovereign nation, but rather because of the threat they pose to U.S. nationals, both inside and outside of the United States. If this is the underlying reasoning for the use of such force, the legal justification should center upon that rationale.

The concept of *juris ad vitae*, literally the "right to life," focuses on a state's affirmative responsibility to protect its citizens both at home and abroad from lethal force. *Juris ad vitae* is far from being a novel concept in international law; it has its roots in the related concept of state responsibility. Many early political philosophers recognized the state's pro-active duty to safeguard its citizens.

The concept of a state's responsibility towards its citizens was first recognized by the early Greek philosophers Plato and Aristotle. Plato's *Republic* still stands as one of the premier ancient works on the interplay between the state and man. *The Republic* expanded on Plato's idea of the perfect state. The ultimate goal and reason for the existence of the state for Plato was for the positive furtherance of goodness.[59]

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57. *See* HILAIRE MCCOURBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 26-27 (1992).

58. MANFORD LACHS, THE DEVELOPMENT OF GENERAL TRENDS OF INTERNATIONAL LAW IN OUR TIME, 1980-1984 Recueil Des Cours 163.

59. *See* ROBERT H. MURRAY, THE HISTORY OF POLITICAL SCIENCE FROM PLATO TO THE PRESENT 1 (1925). Plato saw the perfect state as one where the citizens are joined in an indistinguishable union with their *polis*. *See id.* Both existed to serve the other. *See id.* The

Plato compared the concept of a state to the idea of an extended family—with rights and obligations flowing both ways. "He treated the City States as a mere enlarged household, and had spoke as if the master of slaves, the head of the household and the king or citizen ruler of a state only differed in the number of those they ruled."[60]

Plato argued that it was the affirmative duty of the state to seek out and eradicate any threat to its existence. One translation of a passage from *The Republic* states: "The action of the state may be positive or preventive. It may stimulate the good life or it may remove hindrances to it. As sickness is a symptom of the disease of the soul, so crime is a symptom of the disease of the body."[61]

For Plato, the state and the individual were joined in an inseparable union. The state is a moral and spiritual organism fitted to absorb the feelings and thoughts of its citizens.[62]

Plato's state and individual unity theory lays the foundation for the *juris ad vitae* legal justification for striking the terrorists targets—not under a theory of self-defense, but because of the affirmative obligation the state owes to its citizens. Indeed, Plato would argue that it was this correspondence of rights and duties (between the state and the citizen) that form the basis for the unity of state and man.

Aristotle's *Politics* stands as a further refinement of Plato's ideas, but yet offers his own unique perspective on what responsibilities the state owes its citizens. Aristotle considered the state as a product of human nature, "[t]he state comes into being for the sake of mere life, but exists (or continues to exist) for the sake of the good life . . . ."[63]

He also recognized the crucial responsibility of the state to provide protection to its citizens. For Aristotle, this was one of the *raison d'être* for the existence of the state. "The individual requires the state to give him a legal existence: apart from the state he has neither safety nor freedom."[64]

Interestingly, Aristotle directly addressed when a state, or city-state in ancient Greece, may retaliate for a wrong committed against the citizen. As one commentator on Aristotle's *Politics* noted: "Aristotle, referring to the Pythagorean doctrine that justice was served by a random retaliation on one's neighbors, criticizes this definition on the grounds that retaliation does not

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state's affirmative obligation was to protect the man and to raise him to a higher level of consciousness through philosophy, education, and the creation of great works of art; and the duty of the man was to serve his fellow man through service to the state. *See id.*

60. WILLIAM L. NEWMAN, THE POLITICS OF ARISTOTLE 28 (1887).

61. MURRAY, *supra* note 59, at 12.

62. *See id.* at 8.

63. ARISTOTLE, POLITICS iii. 9 §14, 1280 b.40, (William L. Newman, trans., Oxford, Clarendon Press 1887).

64. J. K. BLUNTSCHLI, THE THEORY OF THE STATE D2 (1885).

harmonize with the concept of either distributive justice or corrective justice, which he invokes as the essential criteria."[65]

In Aristotle's view, the reprisal was "justice served" only if the retaliation destroyed the original source of the amelioration—corrective justice. In other words, if five hundred Spartans raided Athens and killed one thousand innocent Athenian citizens, justice was not served by Athenians killing an equal number of innocent citizens of Sparta. However, if the original five hundred Spartans could be found and executed, then the original source of the harm was destroyed and corrective justice was accomplished.

The above principles provide an analytical, ancient foundation for the concept of *juris ad vitae*. Both Plato and Aristotle linked the individual and the state in a close symbiotic relationship. Both listed and defined the duties that the individual citizen owed the Greek *polis* or city-state. But both also recognized that the very origins and foundations of the state rested upon its most basic duty to its citizens—the preservation of their continued existence.

Turning from the ancient to the more modern, the great English political philosopher Thomas Hobbes also wrote about the state's responsibility to safeguard the lives of its citizens. Thomas Hobbes was the first philosopher to use the idea of a social contract to describe the relationship between the individual and the state.[66] For Hobbes, man's natural state was as a selfish, brutal, power-hungry creature.[67] The only way man could reach a state of peace in this "war of all against all" was to create a state to implement the rule of law.[68]

In *Leviathan,* Hobbes reiterates that because the basic state of nature of man is insecure, the principle goal of the contract between the individual and the state is to eliminate that insecurity.[69] Man relinquishes his individual

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65. COLMAN PHILLIPION, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 217 (1911). Aristotle's view of this corrective or distributive justice concept is a key to understanding his view of the responsibility of the state towards its citizens. For Aristotle, punishment was only just if it was directly related to the wrong suffered. Aristotle saw punishment as a scale—with the original wrong tipping the balance of the scale towards injustice. The only way to correct the inequity was to counterbalance the scale with punishment towards the original transgressor—this was corrective or distributive justice. This was a novel concept in ancient Greece where random acts of retaliation for acts of aggression were commonplace. Aristotle saw retaliation, regardless if done by either an individual or a state, as worse than useless, because it only served to tip another scale towards injustice. This then was the role of the state, to keep the scales balanced. Aristotle would see the modern day terrorist act as placing a weight on the scales—scales which can only be set right by a counteract (not retaliation) on the part of the state.

66. *See* KENT F. MOORS, AN INTRODUCTION TO THE STUDY OF POLITICS 10 (1992).

67. *See* NORBERTO BOBBIO, THOMAS HOBBES AND THE NATURAL LAW CONDITION 40-41 (1993).

68. Hobbes wrote: "The preliminary condition to attaining peace is thus a universal compact through which human beings can leave the state of nature and institute a state that will allow everyone to follow the dictates of right reason . . . ." *Id.* at 46-47.

69. *See* THOMAS HOBBES, LEVIATHAN XVII 227 (C. B. MacPherson ed., 1985).

freedom so that he may have the safety and security of the sovereign. For Hobbes, any outside threat to the society that would threaten to return that insecurity must be dealt with harshly by the sovereign. Failure to do so would invalidate the entire underlying principle between the state and the individual; namely, the individual gives up his freedom of action to gain the security and safety of a system of laws. Hobbes would view the *juris ad vitae* legal justification for attacks upon international terrorist targets as a mere fulfillment of the duty of the state to its citizens.

John Locke further elaborated on Hobbes's social contract theories, but added the idea of "natural law." Locke did not see the natural state of man as a chaotic pursuit of power, but instead man's reckless nature was regulated by natural laws from which man derived natural rights.[70] The supreme duty of the state was to protect these natural rights. Locke defines some of the most obvious natural rights as the right to life, food, family, and property.[71] For Locke, the laws of nature were given to man by God and were codified in the Christian Bible. Locke wrote that man's adherence to these natural laws would result in the perfect state of harmony and justice. But he also at the same time recognized that not all men would obey these natural laws, and that the state must take positive measures to enforce them.[72]

Under Locke's ideals, the individual was prohibited from taking any action to harm his fellow man. However, this prohibition did not apply to the state since it was tasked to uphold the natural laws from those who would disregard them. "The first power, of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require."[73]

Locke was no impractical idealist. He realized that not all men would adhere to the principles set forth in the natural laws. Locke's proposal is that the state, as the representative of every man, would force adherence to the natural laws. "The execution of the Law of Nature is in that the state, put into being by every man's hands, has the right to punish the transgressors of that law to such a degree, as it may hinder its violation."[74]

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70. *See* LEONARD TIVEY, THE NATION STATE 183 (1981).

71. *See id.* at 71-79.

72. One commentator wrote on Locke's theory:

> This does not mean that the state of nature is, in fact, a condition of peace and safety, but that is not the subject presently being considered. Rather, what Locke is attempting to show is that there is a moral standard that God has given to individuals in their natural condition . . . prohibiting them from taking any action that would harm another individual. Natural law obliges them to act in a manner that would preserve mankind in general.

RICHARD ASHCRAFT, LOCKE'S TWO TREATISES OF GOVERNMENT 101 (1987).

73. JOHN LOCKE, OF CIVIL GOVERNMENT 181 (New York, E. P. Dutton and Co. 1924).

74. *Id.* at 7.

Today, Locke would see such individuals as Usama Bin Ladin and Saddam Hussain as clear transgressors of one of the most sacred of all natural law principles—the preservation of and respect for life. Locke's natural law theory, hand-in-hand with the *juris ad vitae* formulation, supports the use of force against such targets. While the *juris ad vitae* theory rests upon the independent duty of the state towards its citizens, Locke described this relationship as the state's responsibility to enforce the natural rights handed down by God to man.

Jean Jacques Rousseau's political ideas were the foundation not only for the French Revolution, but also for much of the subsequent writings of America's Madison and Jefferson.[75] Rousseau's theories on mankind are at the opposite end of the spectrum from those of Hobbes. Rousseau saw man in his natural state as a kind and gentle creature. For Rousseau, the rise of the state introduced vice into the peaceful existence of man. Rousseau's famous quote "humans are born free, but everywhere we find them in chains" gives his opinion of the utility of the state.[76]

Rousseau's answer to those evils which result from man organizing into society was for the individual to be as free from governmental regulation and intrusion as possible. The state, therefore, should only perform those functions that are absolutely essential to the group. All other functions should remain with the citizens.

Despite his differences with Hobbes, Rousseau himself agrees with the origins of the state. Rousseau wrote that the social contract between the state and man is made at the point where "the strength of each individual is insufficient to overcome the resistance of the obstacles to his preservation."[77] In other words, men initially formed states for reasons of self-preservation. But once these states are formed the nature of man changes, "the passing from the state of nature to the civil state produces in man a very remarkable change, by substituting justice for instinct in his conduct and giving to his actions a moral character which they lacked before."[78]

Although Rousseau continued to describe his ideal state and the complex interplay between individual liberty and the necessity for the social order, at the very foundation of his analysis he recognized that states exist to ensure the security of their nationals.

All of the social contract theorists (Hobbes, Locke, and Rousseau) agreed that men contract out of the state of nature and into political bodies because of the threat posed to their existence by other organized groups of

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75. *See* MOORS, *supra* note 66, at 13.

76. *Id.* at 15 (quoting the SOCIAL CONTRACT, book 1, Chapter 1).

77. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 59 (Maurice Cranston trans., 1968).

78. *Id.* at 64.

individuals.[79] Plato, Aristotle, Hobbes, Locke, and Rousseau may all have had different theories on the nature of man and the best way in which he can govern himself and his fellow man, but all agreed on one basic premise: the state, at its most basic level, exists to protect the individual citizen from outside harm. This is the premise upon which *juris ad vitae* is based: the idea that, regardless of how international law describes the use of force against a terrorist target, a state will continue to fulfill its duties to its citizens. To do otherwise would void the very foundations for its existence.

This is not to suggest that Plato, Aristotle, Hobbes, Locke, and Rousseau contemplated international law theories of responsibility when espousing their great theories and ideas. Each philosopher focused on the unique relationship between the state and the citizen, inside the borders of the state. Arguing from analogy, however, their intra-state legal doctrines can readily take on international significance. If the state exists or evolved to give protection to its citizens, the fact that the threat exists outside of its recognized borders should not negate the reason for its existence.

The *juris ad vitae* justification for the use of force focuses on this affirmative obligation that the state owes to its citizens, as opposed to the responsibility one state may or may not owe to another state under the concept of state responsibility.[80]

Juris ad vitae may be better understood as representing the mirror image of the international law concept of vicarious responsibility previously discussed. The vicarious responsibility theory requires states to take affirmative responsibility to stop their private citizens from injuring another nation. However, obligations and responsibilities always flow in a two-way direction. For example, the lawyer's responsibility to his client to provide competent legal advice is offset by the client's obligation of prompt payment of the bill. Therefore, if the state has the international legal responsibility to protect other nations from its citizens, the converse must be true. The state must have the international legal responsibility of protecting not itself (self-

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79. BRIAN R. NELSON, WESTERN POLITICAL THOUGHT 194 (1982).

80. It is crucial not to confuse the related, but separate ideas, of a state responsibility towards another state and the *juris ad vitae* concepts. This concept of state responsibility has also been recognized by the judicial body organized by the League of Nations in the *Chorzow Factory* decision of 1928:

> Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence. This relationship is established between the subject to which the act is imputed, who must "respond" by making adequate reparation, and the subject who has a claim to reparation because of the breach of the duty. *International responsibility may be incurred by direct injury to the rights of a state and also by a wrongful act or omission which causes injury to an alien.*

Chorzow Factory Case, P.C.I.J. Series A, No. 9, 24-25 (1927) (emphasis added).

defense), but its citizens from serious harm—be it from another nation (weapons of mass destruction) or from the international terrorist who is bent upon slaughter of the innocent.[81]

IV. CONCLUSION

The international terrorist strikes not at the sovereignty or survival of the nation, but rather at the citizens that make up the state. They seek not to destroy the state, but to change or influence its policies. The legal justification of self-defense is insufficient in the context of combating terrorist threats because of this reason.

The doctrine of *juris ad vitae* lends itself well to the pre-emptive strikes against development centers for weapons of mass destruction controlled by unstable or dangerous regimes as well as the international terrorist. Although no imminent threat may exist (which could well justify a self-defense theory), the affirmative obligation of the state to its citizens provides adequate justification for the use of force. From the very origins of the nation-state, political philosophers have recognized the affirmative duty of the state towards its citizens.

Obviously, the above proposal presents a full spectrum of problems. What represents an unstable regime? To what extent may force be utilized? Can a purely civilian research center which could possibly be utilized for chemical weapons research be destroyed? What about weapons of mass destruction programs in their infancy? What action can governments take against semi-stable regimes, such as Iran in 1979, that appear headed for instability?

The above questions are those to be discussed and debated among the policy makers of the nation-state. Most are fact-specific, and like self-defense, will require substantive evidence before acceptance by the

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81. It is granted that neither the current domestic government theories nor the international law covering state versus state responsibility by themselves support the proposition that a state may intrude upon the sovereignty of another state to ensure the safety of its citizens abroad or at home. Domestically the United States has fulfilled its duty and passed laws against terrorism. Internationally, the United States has entered into several treaties concerning the proliferation of weapons of mass destruction and the punishment and extradition of terrorists. In addition, if the United States could prove that Libya or Sudan breached its international duty to the United States by allowing its citizens or others under their control to harm U.S. citizens, damages could be sought in the legal arena. Still the above framework for preventing terrorist violence and the spread of weapons of mass destruction has proved itself insufficient. With the international terrorist now operating on the outer fringes of war-torn states with no effective central government, the value of extradition treaties is slight. U.S. domestic laws can do little to punish the individuals whom destroyed the embassies in Kenya and Sudan. *Juris ad vitae* recognizes and seeks to provide a legal framework for the practical reality that states will not allow the random slaughter of their citizens, regardless of the location of the threat. It is a new name used to describe an age-old concept of state practice.

international community. Should that analysis and subsequent decision amount to a serious threat to the citizens of a nation, *juris ad vitae* provides legal justification for the use of force to eradicate the threat.

The international standard for what constitutes a state's valid use of force in self-defense has been clearly established. Case law, state practice under customary law, and the U.N. Charter all point to a clear international standard requiring imminence before the use of force in self-defense. While many states over the last one hundred years have challenged that standard and made the claim of self-defense, inevitably when the international community measured the states' assertions against the standard (be it at Nuremberg or in the Security Council) they were found wanting. *Juris ad vitae* originates from the very foundations of the modern democratic state. Above all else, the state exists to ensure the survival of its citizens.

IN QUEST OF GENDER-BIAS IN DEATH PENALTY CASES: ANALYZING THE ENGLISH SPEAKING CARIBBEAN EXPERIENCE

Leonard E. Birdsong*

I. INTRODUCTION

For many years I assumed that there was gender-bias with respect to the imposition and carrying out of the death penalty in the United States. The NAACP Legal Defense Fund reports that as of January 1, 1999, there were forty-nine women on death row in the United States. These forty-nine women constitute 1.4% of the total death row population in the United States.[1] The death sentencing rate and the death row population remain very small for

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1. *See* Women and the Death Penalty: Brief Facts and Figures, Death Penalty Information Center, *available in* LEXIS at 1.

women in comparison to that of men. The United States' total death row population is comprised of 3400 individuals, and there are 50,000 women in prison in the United States.[2]

However, Elizabeth Rapaport, writing for *Law & Society Review*,[3] maintains that such results are not evidence of gender-bias at work. Instead, she argues that women are represented on death row in numbers commensurate with the infrequency of female commission of those crimes that our society labels sufficiently reprehensible to merit capital punishment.[4] Ms. Rapaport contends that the death penalty under modern era law is only a dramatic symbol used for those predatory crimes that evoke our society's most extreme condemnation. These predatory crimes are usually committed by men against other men and sometimes by women against those who are not intimates or family members.[5] Women who kill while in the domestic sphere, killing husbands, lovers, or their children, usually kill out of anger, but not for predatory purposes.[6]

Statistics reveal that actual execution of female prisoners is quite rare, with only 533 documented instances beginning with the first in 1632. These female executions constitute less than three percent of the nineteen thousand confirmed executions in the United States since 1608.[7] Only four female offenders have been executed since 1976.[8] Death sentences and actual executions for female prisoners are rare in comparison to male offenders. It appears that women are more likely to be dropped out of the system the further the capital punishment system progresses. Again, statistics reveal that although women account for about one in eight of murder arrests (thirteen percent), they account for only one in fifty-three of the death sentences imposed at the trial level, or 1.9% of such sentences imposed.[9]

I came upon these interesting facts and figures concerning our female death row population while investigating the re-emergence of the use of the death penalty in the English-speaking Caribbean ("ESC").[10] These statistics

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2. *See id.* at 4.

3. *See* Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC'Y REV. 368 (1991)

4. *See id.* at 369.

5. *See id.*

6. *See id.* at 370.

7. *See id.* at 2.

8. The four executed female offenders are Betty Beets, Texas, February 2000; Judy Buenoano, Florida, March 1998; Karla Faye Tucker, Texas, February 1998; and Velma Barfield, North Carolina, November 1984. Prior to these executions, Elizabeth Ann Duncan was the last female executed in the United States. Duncan was executed in 1962 by the state of California. *See id.*

9. *See id.*

10. The ESC includes Jamaica, Trinidad and Tobago, Guyana, St. Lucia, St. Kitts and Nevis, Antigua and Barbuda, Grenada, St. Vincent and the Grenadines, Barbados, Dominica, Bahamas, and Suriname.

from the United States, contrasted with several cases of women on death row in Trinidad and Tobago, leads one to speculate that despite arguments to the contrary, there is gender-bias with respect to use of the death penalty on women that reflects an inherent reluctance to put women to death.

This is not necessarily a bad trend. I do not believe that civilized countries should continue to impose the death penalty on any of its citizens, whether male or female. However, many still do.

This Article will address the gender-bias question with respect to the female death penalty debate in Trinidad and Tobago, with special emphasis on the case of Indrawani Pamela Ramjattan. The Privy Council recently remanded her case to the Trinidad Court of Appeal. A decision in her favor may set a regional precedent which will, for the first time, allow women in the ESC to present defense evidence akin to Battered Spouse Syndrome.[11]

A review of the female death penalty debate in the ESC may encourage reflection on whether there should be gender limitations placed on the imposition of the use of the death penalty in the United States and other nations.[12]

II. A PERSPECTIVE ON THE DEATH PENALTY IN THE CARIBBEAN

A. *The Death Penalty Debate*

Amnesty International and other human rights groups report that over half the countries in the world have abolished the death penalty in law or practice. Specifically, Amnesty International reports that as of April 1998, sixty-three countries and territories have abolished the death penalty for all crimes, while ninety-one other countries, a number of which are in the ESC, retain and use the death penalty.[13] A number of human rights groups have decried what they believe to be a resurgence of the use of the death penalty in some of these ESC nations.[14] Many of these ESC nations have experienced

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11. A typical definition of "Battered Spouse Syndrome" is found in the laws of Maryland. The Maryland statute recognizes that "Battered Wife Syndrome" is a psychological condition where the victim is exposed to repeated physical and psychological abuse by a spouse, former spouse, cohabitant, or former cohabitant. This defense is also recognized in the scientific community as the "Battered Woman's Syndrome." MD. CODE ANN., [CTS. & JUD. PROC.] § 10-916(a)(2) (1999).

12. Although not an ESC nation, it is interesting to note that Cuba's amended criminal laws of 1994 forbid the imposition of the death penalty on pregnant women. *See* Ley No.62, Dodigo Penal, Modificada po el Decreto Ley No. 140, y el Decreto Ley No. 150, de 6 de Junio de 1994.

13. *See* Amnesty International Report 50/09/98, *Death Penalty: Facts and Figures on the Death Penalty,* April 1998.

14. Telephone Interview with Sarah DeCosse, an expert on the Caribbean for Human Rights Watch (Jan. 21, 1999). Ms. DeCosse reaffirmed that she believes that due process rights are being taken away from Caribbean death row prisoners. *See also* Shelly Emling, *Hangings*

a rise in crime rates over the past decade and it is believed that the death penalty will deter serious crime.[15]

Recently, death warrants were issued by Jamaica, the Bahamas, and Trinidad and Tobago for death row prisoners who still have applications pending before international bodies, such as the Inter-American Commission on Human Rights and the United Nations Human Rights Commission. The Bahamas was the first of these countries to carry out the death penalty in 1998, with the double execution of Trevor Fisher and Richard Woods on October 15, 1998—the first double hanging in the Bahamas since 1983.[16] The applications of Fisher and Woods are still pending before the Inter-American Commission on Human Rights.[17] Over a three day period in June 1999, Trinidad and Tobago hanged reputed drug lord and convicted murderer Dole Chadee and eight of his co-defendants in a murder conspiracy case. These were the first executions in Trinidad and Tobago since 1994 and only the second since 1979.[18]

Although I have not limited my research to the Amnesty International and the Human Rights Watch positions, I often refer to these organizations in this Article because they tend to be the most active and vocal in seeking the abolition of the death penalty everywhere in the world. For instance, Amnesty International contends that ESC nations now have 245 people on death row out of a population of approximately five million.[19] Amnesty International and other human rights groups believe that this rate is one of the highest in the world.[20] Amnesty International also reports that Trinidad and Tobago account for one hundred three cases, Jamaica is next with forty-seven cases, and the Bahamas has forty such cases.[21] In comparison, the death row rate of the Caribbean is almost four times that of the United States, which has 260 million people and 3400 awaiting execution.[22]

Resume in Caribbean, NEW ORLEANS TIMES-PICAYUNE, Sept. 27, 1998, at A20 (quoting Ms. DeCosse with respect to her position on capital punishment.

15. As of July 10, 1999, the Jamaican police reported 486 slayings for the year in that nation of 2.6 million people. *See Jamaicans Protest Extradition of a Suspect in 1,500 Deaths*, ORLANDO SENTINEL, July 10, 1999, at A9.

16. *See* Darold Miller, *Prison in Lock Down for Double Hanging*, EVENING JOURNAL (Bahamas), Oct. 13, 1998, at 1, 3.

17. *See* AMNESTY INTERNATIONAL, *Bahamas—Hanging Challenge International Human Rights Protection System*, M2 Presswire (London), Oct. 1998.

18. *See* Mark Wilson, *Trinidad Triple Hanging Defies EU Protest*, DAILY TELEGRAPH (London), June 5, 1999, Issue 147, *available in* LEXIS.

19. *See* AMNESTY INTERNATIONAL, *English Speaking Caribbean has 250 on Death Row*, American Embassy Nassau Report, Nov. 18, 1998 [hereinafter AMNESTY, *250 on Death Row*].

20. *See* Serge F. Kovaleski, *Jamaica Sets Hanging as Death Penalty Gains Favor in Caribbean*, WASH. POST, Sept. 1, 1998, at A13.

21. *See* AMNESTY, *250 on Death Row*, *supra* note 19.

22. *See id.*

Human Rights Watch and other human rights organizations view with alarm what they believe is a trend toward the increased popularity of hangings in the Caribbean, a vestige of British colonial rule.[23] They decry the fact that a number of governments in the Caribbean have undertaken controversial steps to change their justice systems and constitutions and sever ties with international appeals bodies, making it easier to carry out such executions.[24] An example was cited in 1998 by Human Rights Watch when Trinidad and Tobago partially withdrew from the U.N. International Covenant on Civil and Political Rights and also withdrew from the Inter-American Commission on Human Rights, both of which give individuals convicted of capital offenses an international avenue of appeal.[25]

Of course, many in the United States are not aware of the death penalty debate that is raging between human rights groups and the governments of many of the ESC nations. An examination of the background of the discussion is instructive. To do so, we must look at what has become known to both the proponents and opponents of the death penalty as the *Pratt and Morgan* cases.[26]

B. *Pratt and Morgan*

Pratt and Morgan, two consolidated death penalty cases from Jamaica, resulted in a 1993 landmark judgment of the Judicial Committee of the Privy Council, the British Court of last resort for many Caribbean nations. In essence, that judgment established the principle that both Pratt and Morgan, who had been prisoners on Jamaica's death row for a period exceeding five years, could be seen as victims of cruel and inhumane punishment if they were sent to the gallows and should, therefore, have their sentences commuted to

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23. *See* Kovaleski, *supra* note 20.

24. *See id.*

25. The American Convention On Human Rights, Pact of San Jose, Costa Rica, which established the Inter-American Commission on Human Rights provides: "Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority." *See* American Convention on Human Rights, Pact of San Jose, Costa Rica, Nov. 22, 1969, art. 4, para. 6., 1144 U.N.T.S. 144.

Similarly, the International Covenant on Civil and Political Rights of the United Nations provides: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." International Covenant on Civil and Political Rights, U.N. GAOR, 21st Sess., Part III, art. 6, para. 4., Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316.

26. *See* Pratt v. Attorney General for Jamaica, 2 App. Case 1 (1993).

life imprisonment.[27] The Privy Council also recommended that other prisoners on death row in the region for five years or more should also have their sentences commuted.[28]

The Privy Council in *Pratt and Morgan* reviewed the tortured chronology of the appellants' appeals process which included lost appeals applications, rulings denying their appeal with no written explanation, and Jamaica's failure to recognize the recommendations of the Inter-American Commission on Human Rights based on its review of the case.[29] Pratt and Morgan were arrested sixteen years earlier for an October 1977 murder and remained in jail from the date of their arrest. They were convicted of the crime and sentenced to death in January 1979.[30]

On appeal, Pratt and Morgan argued that to hang them after they had been held in prison under a sentence of death for so many years would be inhumane punishment, and thus, in breach of the Jamaica Constitution.

The Privy Council ruled that in any case in which execution is to take place more than five years after sentencing there would be strong grounds for believing that the delay is such as to constitute inhumane treatment or punishment as proscribed by the constitution.[31]

As a result of *Pratt and Morgan*, all prisoners in the Caribbean who had been on death row for longer then five years had their sentences commuted to life in prison. For those remaining, the *Pratt and Morgan* decision has set off a scramble to extend their appeals process beyond the five year limit. Before *Pratt and Morgan*, there were 450 prisoners on death row throughout the ESC. While only a handful of hangings have occurred in the region since *Pratt and Morgan*, the death row population is less than half of what it was in 1993—a direct consequence of the commutation of sentences.[32]

The murder rates in Jamaica, Trinidad, and the Bahamas have increased during the last decade.[33] Many citizens of these three nations believe that the imposition of the death penalty will deter crime.[34] In these countries, new administrations have recently been elected to office and have responded to public opinion to deter crime.[35] It appears, as a result of their actions in issuing death warrants, that the governments of Jamaica, Trinidad, and the Bahamas believe that their laws should be followed and executions of condemned death row prisoners be carried out before expiration of the five-

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27. *See id.* at 35.
28. See *id* at 35-36.
29. *See id.* at 33.
30. *See id.* at 19-27.
31. *See id.* at 34-35.
32. *See, e.g.*, USIA Press Summary Sent from American Embassy Nassau to U.S. Department of State, Washington, D.C., Oct. 15, 1998.
33. *See* Kovaleski, *supra* note 20.
34. *See id.*
35. *See id.*

year period mandated by *Pratt and Morgan*.[36] Meanwhile, human rights proponents fear due process will be trampled, especially if executions are carried out while death row prisoners have appeals pending before international bodies.[37]

My quest for answers to the gender-bias question in death penalty sentences led to a more recent Amnesty International survey of all of the death penalty cases in the Caribbean.[38] This report reveals that Trinidad and Tobago is the only ESC nation with women on death row. As of April 1999, seventy-six men and five women were on death row in Trinidad. Further, there are seven men on death row in Antigua, twenty-four men in the Bahamas, two men in Barbados, eight men in Belize, one man in Dominica, twenty-three men in Guyana, eight men in Grenada, forty-three men in Jamaica, three on St. Kitts and Nevis, nine men in St. Lucia, and three men in St. Vincent and the Grenadines.[39]

III. TRINIDAD, WOMEN ON DEATH ROW, AND RAMJATTAN

A. *Trinidad*

I recently traveled to Trinidad to learn more about the country and about the women on death row.[40] The ESC islands of Trinidad and Tobago (Trinidad) form a unitary state, with a parliamentary democracy modeled after the United Kingdom. The country is headed by a president who is elected by the parliament. There is an independent judiciary, but constitutional cases may be appealed to the Judicial Committee of the Privy Council.[41] The two islands host a population of 1.3 million people and comprise a land mass about 1.5 times the size of Rhode Island. The southernmost tip of Trinidad is only three miles from the Coast of Venezuela. Trinidad's ethnic population is comprised of people of East Indian descent (40.3%), followed closely by those of African descent (39.5%), then people of mixed nationality (18%), and those of European descent (0.6%). The country is endowed with rich deposits of oil and natural gas and in 1996 boasted a gross national product of $5.4 billion.[42]

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36. *See id.*

37. *See* Telephone Interview with Sarah DeCosse, *supra* note 14.

38. *See* JONATHAN O'DONOHUE, AMNESTY INTERNATIONAL, DEATH PENALTY CARIBBEAN, ESC NUMBERS ON DEATH ROW AND DATES OF LAST EXECUTIONS AS OF APRIL 1999 (London 1999).

39. *See id.*

40. The author visited Trinidad from June 18 through June 22, 1999.

41. *See* U.S. Dep't of State, *Background Notes: Trinidad and Tobago*, released by the Bureau of Inter-American Affairs (Mar. 1998).

42. *See id.*

B. *Women on Death Row*

In my research, I have learned about three of the five women on death row in Trinidad. There is Giselle Stafford who was sentenced to death in 1996 for the murder of a man. Angela Ramdeen was sentenced to be hanged in 1997 for the murder of her stepchildren. And then there is Indrawani Pamela Ramjattan who went to death row for the 1995 slaying of her common law husband, Alexander Jordan.[43]

No women have been executed in Trinidad since its independence from Great Britain in 1962.[44] Most of the women on death row are there as a result of some form of domestic violence. A number of women's groups, as well as Amnesty International, believe that domestic violence against women is a way of life in Trinidad. In 1998, twenty-seven women were murdered in domestic violence encounters.[45] In total there were 2282 reported cases of domestic violence in the same year.[46] Unfortunately, there are only six women's shelters in the entire nation and no legal aid exists for battered women. Further, the battered wife syndrome, recognized in United States courts as a defense to assault or homicide of a spouse is unknown in Trinidad. If presented in a Trinidad court, such evidence can only be used to show "diminished responsibility."[47]

C. *The Ramjattan Case*

Among the women on death row in Trinidad, Ms. Ramjattan's case is the most chronicled because of interest by women's groups and human rights activists. Despite Trinidad's Attorney General's zeal to carry out the death penalty within the *Pratt and Morgan* five-year limitation,[48] local speculation abounds that the government of Basdeo Panday will not execute women.

Indrawani Pamela Ramjattan, Haniff Hillaire, and Denny Baptiste were all convicted in 1995 in a joint trial for the murder of Ramjattan's common law husband, Alexander Jordan, at Cumuto, Trinidad. The facts of the case show that Ms. Ramjattan completed the equivalent of an eighth grade education. When Ms. Ramjattan was sixteen her parents accepted money from Jordan, a man in his thirties, for the privilege of making Ms. Ramjattan

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43. *See* Avian Joseph, *Trinidad and Tobago: To Hang or Not To Hang, The Debate Continues*, INTER PRESS SERV., Feb. 10, 1998.

44. Telephone Interview with Mark Mohammad, Director of Public Prosecutions for Trinidad and Tobago (June 21, 1999).

45. Telephone Interview with Jonathan O'Donohue, death penalty expert for Amnesty International (June 9, 1999).

46. *See id.*

47. *See id.*

48. *See* Linda Hutchinson, *Trinidad: Caribbean Question Privy Council Ruling*, CANA NEWS AGENCY (Trinidad), Jan. 28, 1999, released by OAS Department of Public Information.

his common law wife. Together, Jordan and Ramjattan lived in Cumuto, and had six children in a ten year period. During this same period Ms. Ramjattan suffered abuse at the hands of Jordan and in 1991 she left him. She took two of her children and went to the town of Sangre Grande and began living with her childhood sweetheart, Denny Baptiste. Shortly thereafter, Jordan tracked her down, forcibly broke down Baptiste's door, and took Ms. Ramjattan back to Cumuto. Upon arrival in Cumuto, Jordan beat Ramjattan unconscious.[49]

Shortly thereafter, Ms. Ramjattan wrote a letter to Baptiste and Hillaire, a friend of Baptiste who lived in the same housing complex, to come to Cumuto to rescue her. Ms. Ramjattan swore in a court affidavit that she did summon Baptiste and Hillaire but never asked them to kill her husband.[50] Nevertheless, late on the night of February 12, 1991, Ms. Ramjattan met Baptiste and Hillaire behind her house. She gave the two men a piece of wood and directed them to the area in the house where Jordan was sleeping. Baptiste and Hillaire entered the home and struck Jordan in the head several times with the piece of wood while he lay sleeping. They then rolled Jordan's body in a bed sheet, transported him to his van, and placed him inside. According to testimony, Ramjattan brought kerosene to Baptiste and Hillaire, who then sprinkled it on Jordan's body and set him and the van afire. An autopsy showed that Jordan had died from three blows to his head which fractured his skull. His body was also covered with first degree burns.[51]

Additionally, Ms. Ramjattan was pregnant by Baptiste when she was taken into custody after Jordan's murder. She did not speak to a lawyer until a year into her detention because she lacked money to hire a lawyer. The baby later died when prison officials refused to take her to the hospital when she went into labor.[52]

Following her conviction, Ramjattan's appeals were heard by the local courts and by the Privy Council which found that her case did not fit the statutory definition of provocation or unlawful force.[53] However, one of the Privy Council Judges, Lord Browne-Wilkinson, described the case as "tragic" as it was clear that Jordan had "beaten her mercilessly."[54] Ramjattan's plight gained the attention of the Coalition Against Domestic Violence in Trinidad and other women's groups in Kenya and throughout the world which contended that to hang Ramjattan would be an injustice given what they

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49. *See Their Chilling Journey to Death Row*, SUNDAY NEWSDAY (Trinidad), June 20, 1999, at A10.

50. *See* Mark Fineman, *The Case of the Death Row Widow*, LOS ANGELES TIMES, Jan. 27, 1999, at A1.

51. *See Their Chilling Journey to Death Row*, *supra* note 49.

52. *See* Wesley Gibbs, *Rights—Trinidad and Tobago: Merciless Murderer or Victim?*, INTER PRESS SERV. (Trinidad), Nov. 19, 1998.

53. *See id.*

54. *Id.*

believe to be her unstable mental state at the time of Jordan's death.[55] A new team of lawyers obtained expert evidence on her behalf to take to the Privy Council, and alleged that at the time of the murder, Ramjattan suffered emotional and cognitive distortions that would have rendered her psychologically incapable of understanding the consequences of her plan to have Jordan murdered.[56]

It is interesting to note that at the trial level Ms. Ramjattan's lawyer chose not to present evidence of her years of abuse. Rather, it was the prosecution that used the abuse evidence to reinforce the argument that Ramjattan had a strong motive to murder her husband. Similarly, Ramjattan's lawyers chose not to focus on the abuse in her first appeal to the Privy Council.[57]

D. *The Privy Council Ruling*

In late 1998, local attorneys and supporters of Ramjattan learned, through interviews with her on death row, the extent of Jordan's brutality over the years. These supporters hired Joanne Cross, a lawyer at a British law firm, to file a new appeal before the Privy Council.[58]

The new appeal asked the Privy Council to reconsider the case based on new evidence. The new evidence consisted of a seventeen-page psychiatric report on Ramjattan by a London-based expert on domestic abuse. Forensic psychiatrist Nigel Eastman of London's St. George's Hospital Medical School concluded that Ramjattan was a classic victim of "Battered Woman Syndrome."[59] The report also stated that Ramjattan suffered from:

> [R]epetitive physical violence, culminating in a most severe attack on [the] 4th [of] February, repeated rapes . . . enforced isolation . . . amounting ultimately to imprisonment as a hostage in the days leading up to the offense, threats to kill, attacks with weapons, threats with a shotgun, worsened violence if she protested, worsened violence when she escaped, humiliation and mental abuse[,] starving and beating their children [,]and refusing to allow them to go to school.[60]

Many hoped that the Privy Council would rule in Ramjattan's favor and set a precedent for the ESC which would provide that domestic abuse could

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55. *See id.*
56. *See id.*
57. *See* Fineman, *supra* note 50.
58. *See id.*
59. *See id.*
60. *Id.*

justify homicide in self-defense. On February 3, 1999, the Privy Council ~~did~~ ruled in Ramjattan's favor. However, the ruling did not go as far as her supporters hoped in setting a clear precedent concerning whether abuse can justify homicide in self-defense. The ruling did, in fact, send the case back to the Trinidad Court of Appeal, and perhaps, more importantly, provided Ramjattan an avenue to escape the gallows.

The Privy Council accepted Ramjattan's new evidence as adequate to support her allegation of diminished responsibility on the grounds that she had not previously had the financial resources to procure such evidence.[61] The Privy Council further held in relevant part:

> Their Lordships' Board has jurisdiction to hear further petitions in respect of the same matter notwithstanding the dismissal of earlier petitions. The jurisdiction will however only be exercised in exceptional cases where new grounds of appeal are raised of such a character and of sufficient merit to justify a second petition.
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> * * *
>
> The petitioner seeks leave to adduce new evidence, not previously relied upon, to support an allegation of diminished responsibility. If she can establish the facts required by s 4A of the Offences Against the Person Act 1925, she would have a defence to the charge of murder.
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>
> On this petition, their Lordships confined their consideration to the question whether a sufficient case had been made out for remission to the Court of Appeal. Having decided to remit, they did not enter upon the question whether the Court of Appeal should accept the new evidence nor what weight the Court of Appeal should give it nor whether it indeed justify the quashing of her conviction for murder and substituting a conviction for manslaughter or the ordering of a retrial. All of these are matters for the Court of Appeal to decide: they may choose to hear oral evidence: evidence in rebuttal of the new evidence may be adduced: what in the upshot the evidence proves and what its admissibility and relevance if called at the trial would have been will have to

61. *See* Ramjattan v. The State, slip op. (Privy Council Feb. 3, 1999).

> be assessed as will the petitioners explanation for not having adduced that evidence at trial.
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> * * *
>
> Their Lordships have after some hesitation decided that the evidence of Dr. Eastman does justify a remission to the Court of Appeal so that the Court of Appeal may reconsider the appeal of Indrawani Ramjattan taking into account that evidence. They do not overlook that there are still obstacles to be overcome before she can successfully challenge the jury's verdict.
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> * * *
>
> It should also be noted that their Lordships' Board have dismissed the petitions of Denny Baptiste and Haniff Hillaire.[62]

IV. BACK TO THE COURT OF APPEAL

A. *The Personal Interviews*

The Privy Council has firmly put the ball back in the court of the Trinidadian Court of Appeal. Arguments in the case had been set for July 8, 1999, but have been continued by the court of appeal to November 1999. It is not known how long it might take the court to rule after the arguments.[63]

While in Trinidad I spoke with Anthony Carmona, Chief Deputy Director of Public Prosecutions, who is writing the brief for the government in the Ramjattan case and with Rangee Dolsingh, Deputy Director of Public Prosecutions, who will argue the case for the government in the court of appeal.[64] After a review of the Privy Council ruling, Carmona and Dolsingh opined that the court of appeal, after hearing arguments, may issue one of three rulings: 1) find a miscarriage of justice in the case and order a retrial; 2) enter a substitution of verdict and reduce the conviction to manslaughter; or 3) find the psychological evidence not credible, dismiss the appeal, and reestablish the original death sentence.[65]

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62. *Id.*

63. Telephone Interview with Rangee Dolsingh, Deputy Director of Public Prosecutions, Trinidad and Tobago (July 15, 1999).

64. I interviewed these officials at the Office of Public Prosecutions, Port of Spain, Trinidad on June 21, 1999.

65. Interview with Anthony Carmona, Chief Deputy Director of Public Prosecutions, Port

Mr. Dolsingh indicated that he will argue forcefully that the death sentence should be upheld. He believes that Ramjattan is an intelligent woman who has exaggerated the amount of abuse that she suffered at the hands of her deceased husband. It is his personal belief that the imposition of the death penalty should be gender-neutral and that the death penalty should be carried out in Ms. Ramjattan's case, given the brutality of the crime. Nevertheless, Prosecutor Dolsingh confided that he believes that public policy in Trinidad will not allow a woman to be hanged.[66] This sentiment was echoed by Justice George A. Edoo, Ombudsman of Trinidad and Tobago, with whom I also met during my visit to the country. Mr. Justice Edoo, who during his career presided over numerous murder trials, stated simply that women should not be put to death. He maintains that it is his opinion, and he believes the opinion of the majority of Trinidadians, that to put a woman to death, any woman, would be like putting one's sister or mother to death; it is too unseemly to contemplate.[67] Perhaps Justice Edo has articulated the root of gender-bias in death penalty cases: the unseemly notion of, perhaps, putting our sisters or mothers to death.

I also had the opportunity to speak to others about the issue. Douglas Mendes is one of the attorneys who has worked on the brief for Ramjattan's case, as well as briefs for a number of other death penalty cases. Attorney Mendes resolutely does not believe that there should be gender equality in the death penalty because he believes there should be no death penalty anywhere in the world.[68] Further, Attorney Mendes refused to speculate as to how the court of appeal would rule respect to Ramjattan's case. Later, I had the opportunity to meet with Gaitry Pargass, local counsel for Ms. Ramjattan at the time of both her Privy Council appeals. Attorney Pargass believes the best ruling from the court of appeal would be the order of a new trial, thereby allowing counsel to present the very compelling Battered Spouse Syndrome evidence through expert and eyewitness testimony. She believes such evidence would lead to an acquittal. However, Attorney Pargass confided that Ms. Ramjattan has told her that she does not have the psychological wherewithal to endure a second trial. Attorney Pargass believes that if the court of appeal substituted a manslaughter conviction for the capital murder conviction, the trial team could then argue for her release on grounds that she had served adequate time for the crime.[69]

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of Spain, Trinidad (June 21, 1999).

66. Interview with Rangee Dolsingh, Deputy Director of Public Prosecutions, Trinidad and Tobago, Port of Spain, Trinidad (June 21, 1999).

67. Interview with Justice George A. Edoo, Office of the Ombudsman of Trinidad and Tobago, Port of Spain, Trinidad (June 21, 1999).

68. Interview with Attorney Douglas Mendes, Port of Spain, Trinidad (June 21, 1999).

69. Interview with Attorney Gaitry Pargass, Port of Spain, Trinidad (June 21, 1999).

One of my final interviews while in Trinidad was with Keith Renaud, the Assistant Superintendent of Police. Superintendent Renaud believes that there should not be the amount of crime that his small nation is facing. He believes that the death penalty is needed in Trinidad to send a signal to criminals that the law will be upheld. However, he predicts, given the politics of the country, Ramjattan will not be hanged. While the Panday government has shown itself tough on crime by hanging nine people in the Dole Chadee gang, it would prove unpopular with the electorate to put one woman to death. Superintendent Renaud believes that there would be a backlash against the government.[70] The irony, Renaud points out, is that the Prime Minister and his party, the United National Congress (UNC), represent the ethnic majority—those of East Indian descent (40.3% of the population). All nine of the men members of the Dole Chadee gang executed in June were of East Indian descent. This was seen by the public as a bold and popular move to eradicate crime. Yet Ramjattan is also of East Indian descent. The majority of people in the country do not believe a woman should be put to death. Such an execution would harm the goodwill that the Panday government has built. There certainly appears to be gender-bias with respect to the death penalty in Trinidad. I think this is a positive sign, perhaps a first step to the abolition of the death penalty altogether.

B. *The Approach in the United States*

It will be interesting to learn how the court of appeal will rule in the Ramjattan case. Trinidad has an opportunity to make new law in this area. I suggested to officials that if there is such a widespread feeling against putting women to death, legislation could be passed that would recognize and admit at trial evidence of "Battered Spouse Syndrome." This has been the approach of many states in the United States. Although the approaches taken by courts differ toward the admissibility of Battered Spouse Syndrome, a survey of recent decisions indicates that a majority of the states admit evidence of Battered Spouse Syndrome.[71]

Typically, Battered Spouse Syndrome evidence is offered in cases when the accused woman is charged with killing a man who abused her. Expert testimony is offered in support of her claim of self-defense. States such as Georgia, Kansas, Maine, New Hampshire, New York, Pennsylvania, and Washington have held expert testimony on the Battered Spouse Syndrome

70. Interview with Keith Renaud, Assistant Superintendent of Police, Port of Spain, Trinidad (June 21, 1999).

71. *See* Cynthia L. Coffee, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373, 396 (1986-87).

to be unconditionally admissible; others, such as Louisiana, Ohio, and Wyoming have not admitted evidence of this Syndrome.[72]

In recent years, the Florida Supreme Court has also ruled on various aspects of this issue. In *Florida v. Hickson*,[73] the court held that an expert can generally describe the Battered Spouse Syndrome, the characteristics of a person suffering from the Syndrome, and can express an opinion in response to hypothetical questions predicated on the facts in evidence, but cannot give an opinion based on an interview of the defendant as to applicability of the Syndrome to that defendant unless notice of reliance on such testimony is given and the state has the opportunity to have its expert examine the defendant.[74] In *Weiand v. Florida*,[75] the same court ruled that a battered spouse has no duty to retreat from her house which she shared with the co-occupant abuser. The *Weiand* court also held that exclusion of eyewitness testimony at trial to corroborate an assertion of prior abuse by the victim spouse was not harmless error, even where expert testimony had already been presented concerning Battered Spouse Syndrome.[76]

In 1996, the Maryland legislature specifically addressed the issue with an amendment allowing the state courts to admit Battered Spouse Syndrome evidence in trials where the defendant is charged with "(i) First degree murder, second degree murder, manslaughter, or attempt to commit any of these crimes; or (ii) Assault in the first degree."[77] The statute provides:

> (b) Admissibility of evidence. Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind or both, at the time of the commission of the alleged offense:
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> > (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual

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72. *See* Charles Bleil, *Evidence of Syndromes: No Need For a "Better Mousetrap,"* 32 S. TEX. L. REV. 37, 40 (1990).

73. Florida v. Hickson, 630 So. 2d 172 (Fla. 1994).

74. *See id.* at 173.

75. Weiand v. Florida, 732 So. 2d 1044, 1051 (Fla. 1999)

76. *See id.* at 1057.

77. MD. CODE ANN., [CTS. & JUD. PROC.] § 10-916 (a)(2) (1999).

> who is the victim of a crime for which the defendant has been charged; and
> (2) Expert testimony on the Battered Spouse Syndrome.[78]

Whether these observations on United States law concerning Battered Spouse Syndrome will guide the court in the Ramjattan case is open to conjecture. Ms. Ramjattan's case differs from many United States cases involving Battered Spouse Syndrome and does not fit neatly into the Maryland statute. First, Ms. Ramjattan did not deliver the blows that killed her husband. These were meted out by two male friends to whom she had turned for help. Throughout the trial she insisted that she called them merely to rescue her, not to kill her husband. The jury did not believe her.[79] She was convicted as an aider and abettor and was as guilty as the principals who struck the death blows. Second, at trial, Ms. Ramjattan did not once utter the words "battered spouse." Her strategy was simply to say that she was not a party to the violence that killed her husband.

However, as I understand the defense, Ramjattan's attorney will use the evidence of her battered state to show that she had a mental state that would have indicated "diminished responsibility" for the crime. That is, her actions as an aider and abettor were a product of the abuse she had suffered for so many years from her husband, and thereby had distorted her mind and mental processes.[80]

C. *The Reluctance to Put Women to Death*

Justice Edoo believes that Ramjattan's life will be spared because he believes that to execute a woman would be like killing a sister or a mother. Another way of expressing this thought may be that society prefers to think of women as passive, not powerful or aggressive. To execute a woman is to acknowledge that women can be violent.[81]

Leigh Beinen, a law professor who studies gender-bias in capital cases, contends the reason so few women face execution has to do with the symbolism that is central to the death penalty. She states that "[c]apital punishment is about portraying people as devils[,] [b]ut women are usually seen as less threatening."[82] Beinen believes that juries and judges tend to find

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78. *Id.*

79. *See* Tunku Varadarajan, *Battered but Not Yet Beaten*, TIMES (London), Oct. 13, 1998.

80. *See id.*

81. *See Every Woman Conversations: Readers Back Equality in Death Penalty*, PLAIN DEALER (Cleveland), Feb. 17, 1998, at 3E.

82. Thad Reuter, *Why Women Aren't Executed: Gender Bias and the Death Penalty*, 23 FALL HUM. RTS. 10 (1996).

more mitigating factors in capital cases involving women than in those involving men. She further maintains that women who kill spouses are often seen as victims.[83] Women are likely to kill someone they know without premeditation, which is considered less serious than killing a stranger.[84]

Rapaport, a previously-mentioned scholar who does not believe that there is inherent gender-bias with respect to the death penalty in the United States, argues that most murders, whether committed by men or women, are not sufficiently aggravated to tempt prosecutors to pursue a death penalty.[85] She also believes that an important reason why so few women are eligible for capital sentences is that women who kill are more likely than men to kill family and other intimates in anger than for a predatory purpose. Predatory murder is committed to gain some material or other advantage, in contrast to killing that appears to be stimulated by powerful emotion. Felony and other predatory murders are most often committed against strangers and least often committed against family and other intimates.[86]

Rapaport also suggests that a majority of death penalty states treat a prior history of violence as a factor in aggravation of murder that, if not outweighed by mitigating factors, permits a jury to impose the death penalty.[87] Such factors as a prior felony conviction, a prior history of violence, and a prior conviction for murder express the condemnation of a history of violence common in the capital statutes.[88] In this regard, Rapaport found that twenty percent of male murderers but only five percent of female murderers convicted in state courts in 1986 had prior convictions for a violent felony.[89]

As a final factor, Rapaport cites that some theorize that women are often spared the death penalty because they are viewed by prosecutors and juries to be mere accomplices of dominant males,[90] and hence less culpable.

If we apply the theories of Beinen and Rapaport to the three women executed in the United States since 1976, one can believe that these women were put to death because their crimes were predatory ones and not simply domestic. In the case of Velma Barfield, prosecutors revealed evidence to show that she was a serial poisoner who was finally convicted for slipping roach killer into her fiancé's beer.[91] Such crimes appear to be predatory.

Then there is the well-known case of Karla Faye Tucker. Evidence from her case revealed that while under the influence of drugs, she and her

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83. *See id.*
84. *See id.*
85. *See* Rapaport, *supra* note 3, at 370.
86. *See id.* at 371.
87. *See id.*
88. *See id.* at 372.
89. *See id.*
90. *See id* at 373.
91. *See To Kill A Woman: Gender Fuels Debate in Death Penalty Case*, NEWSDAY, Jan. 12, 1998, at A17.

boyfriend robbed and killed two people by repeatedly assaulting them with a pick ax while the victims were still in their bed. Tucker allegedly boasted to confidants after the crime that she had experienced a surge of sexual pleasure every time she swung and hit her victim with the pick ax.[92] This certainly appears predatory.

Finally, Judy Buenoano, dubbed the "Black Widow" by Florida prosecutors, was sentenced to die for the 1971 arsenic poisoning death of her husband in Orlando. She had also been convicted of drowning her disabled nineteen-year-old son in a Santa Rosa County river in 1980, and for attempting to kill her fiancé with a car bomb in Pensacola in 1983.[93] Here were predatory crimes in conjunction with prior convictions.

Under the Beinen and Rapaport theories, it is understandable to see why these three women were put to death. Their crimes symbolized evil, the work of women who could only be "devils."[94]

Could such analysis be applied in Trinidad to the Ramjattan case or to the other women on death row? Perhaps Ms. Ramjattan will not be put to death because she is not much of a "devil." Perhaps she will not be put to death because her crime against her husband was not predatory, but had only grown out of a domestic situation gone awry. Also, Ms. Ramjattan has no prior criminal record. Of course, what may be viewed as non-predatory in the United States would not pass muster in Trinidad. The prosecutor will argue to the court of appeal that Ms. Ramjattan called the killers to her home, she provided them the murder weapon, and then gave them the kerosene with which to set her husband afire. Although seemingly cold-blooded, these do not appear to be predatory acts as defined by Rapaport. They were not performed for material gain. Instead, it appears that revenge was the motive. Yet, Mr. Dolsingh believes the acts of Ms. Ramjattan were as predatory and as cunning as those of an animal.[95]

V. CONCLUSION

Although we do not know what the outcome may be of the Indravani Pamela Ramjattan case, I am certain that the inherent gender-bias in sentencing women to death will prevail. It is possible that the Court of Appeal of Trinidad will rule in such a way as to establish Battered Spouse Syndrome as a legitimate defense in murder cases where there has been domestic violence. However, courts are usually conservative about forging new law

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92. *See* Sam Howe Verhovek, *Women On Death Row: Should Texas Kill Her?*, Sun-Sentinel (Ft. Lauderdale), Jan. 4, 1998, at 3A.

93. *See Equity On Death Row*, SARASOTA HERALD-TRIBUNE (Florida), Mar. 21, 1998, at A18.

94. *See* Reuter, *supra* note 82, at 10.

95. *See* Interview with Rangee Dolsingh, *supra* note 66.

and would rather await input from the legislature. If the court of appeal does not decide to overturn the death penalty for Ramjattan, it is possible that the President or the Prime Minister could commute the death sentence to a life sentence. This is not without precedent and may make for a compromise for the country.

Many remember the actions of two Governors, Richard Celeste of Ohio and William Donald Schaefer of Maryland, in 1990 and 1991. In December 1990, Celeste, then the outgoing Governor of Ohio, commuted the sentences of twenty-five women who had been convicted of killing or assaulting abusive mates.[96] During the next month, Governor Celeste commuted to life in prison the sentences for all four women who were on Ohio's death row. Several months later, Maryland Governor Schaefer commuted the sentences of eight battered women. As a result, both governors became the focus of intense media debate that invoked opposing views of justice, mercy, and gender roles.[97]

The Panday government, faced with the inherent gender-bias of the death penalty, should follow the lead of former Governor Celeste and commute to life imprisonment the death sentences of the five women on Trinidad's death row. The Panday government could use the justifications of both Governor Celeste and Governor Schaefer: that Ramjattan and the other women pose no threat to the community; that the women had been trapped in their battering relationships; that the women had served enough time for their crimes; and that commutation was the right thing to do and served the public interest.[98]

Of course, the Panday government can also do nothing; that is, if the court of appeal sustains Ramjattan's original death sentence, the Panday government can hold off issuing her death warrant. After September 2000, five years will have elapsed since her original conviction and the death sentence will automatically be stayed because of *Pratt and Morgan*. This, I believe, will be the ultimate way out for Ms. Ramjattan. In the end *Pratt and Morgan* may be the double-edged sword that allows the government to perpetuate gender-bias with respect to the death penalty in the ESC.

The author intends to continue following the development of the Ramjattan case in Trinidad, as well as the continuing debate concerning the use of the death penalty in the ESC. Hopefully, as a result of gender-bias with respect to the death penalty, ESC nations like Trinidad will ban imposing the death penalty on women. This could be one small step on the way to abolishing the death penalty in the ESC altogether.

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96. *See* Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 704 (1994).

97. *See id.*

98. *See id.* at 743.

VI. POSTSCRIPT

Although writing a post script to a law review article is a novel concept, unexpected events that arose in this case dictated that I do so. Shortly after the foregoing Article was accepted for publication in its original form by this journal[99] the Court of Appeal in Trinidad stunned the ESC legal community by ruling in favor of Ramjattan, even before oral arguments could be heard.[100] Although oral arguments had been set for November 18, 1999,[101] on October 8, 1999, the court of appeal voided Ramjattan's murder conviction and substituted one of manslaughter.[102] Chief Justice Michael de la Bastide, in an oral opinion, overturned Ramjattan's death sentence, stated that she had suffered from battered wife syndrome, and as a result suffered "diminished responsibility" for the killing of her husband Alexander Jordan.[103]

In reducing the charges against her, the judge then sentenced Ramjattan to five years in prison, in addition to the eight years she had already endured since first being arrested for the crime.[104] In essence, a precedent was set: for the first time in the ESC, battered wife syndrome was ruled a legitimate defense to a first-degree murder charge. However, to some the victory is a hollow one because of the five additional years Ramjattan must spend in prison. A Trinidadian newspaper aired the sentiment of many who have followed the Ramjattan case when it opined:

> The removal of Indravani Pamela Ramjattan, 36, from death row was inadequate. She could have been set free given the brutality she endured which led to her crime. . . . While it is understandable that the courts would not want to send a signal to abused wives that conspiring to kill their husbands is a way out, the years Ramjattan has already spent on Death Row should have been taken into consideration in passing sentence.[105]

Again, I sought the insight of Rangee Dolsingh as to the turn of events with respect to the actions of the court of appeal. Mr. Dolsingh, who was to argue the case on behalf of the government on November 18, 1999, was also

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99. A copyright and publishing agreement was signed by the author and the Indiana International & Comparative Law Review on Sept. 10, 1999.

100. *See Battered-Wife Defense Wins in Trinidad Court*, ORLANDO SENTINEL, Oct. 9,1999, at A12 [hereinafter *Battered-Wife*].

101. *See* Telephone Interview with Rangee Dolsingh, *supra* note 63.

102. *See* Editorial, *The Abuse Continues*, TRINIDAD EXPRESS, Oct. 10, 1999.

103. *Battered-Wife*, *supra* note 100.

104. *See The Abuse Continues*, *supra* note 102.

105. *Id.*

bewildered by the turn of events. He indicated that he still has not learned why the court of appeal made the decision to overturn the murder conviction without further argument. Further, Mr. Dolsingh indicated that he believed it was the psychiatric report of Dr. Nigel Eastman that convinced the court of appeal that there was ample evidence in the record of diminished responsibility because of the amount of abuse and battering suffered by Ramjattan.[106] Mr. Dolsingh believes that the case is not over yet. He maintains that Ramjattan has every right to, once again, go to the Privy Council in an effort to have her sentenced reduced to time served.[107]

What we can say with some degree of certainty is that my prediction rang true. The inherent gender-bias with respect to putting women to death saved Ramjattan from the gallows in the English-speaking Carribean.

106. Telephone Interview with Rangee Dolsingh, Deputy Director of Public Prosecutions, Trinidad and Tobago (Oct. 19, 1999).

107. *See id.*

ORGAN DONOR LAWS IN THE U.S. AND THE U.K.: THE NEED FOR REFORM AND THE PROMISE OF XENOTRANSPLANTATION

"Ultimately the potential for organ transplantation will depend not only on advanced medical technology, but also on the progress in the legal technology of organ donation."[1]

I. INTRODUCTION

It is a mother's worst fear. Standing at the bedside of her child, who is lying there so peacefully, sleeping quietly while a vicious disease infects his liver. The doctors come, but the news is not good. All these months on the waiting list have produced nothing. Without a miracle, this precious life will not continue.

Too many mothers face this heartbreaking tragedy every day. Their children need life-saving surgeries, but no organs can be found. This suffering spans the globe and touches the lives of people in many nations. Legislators scramble to enact one organ procurement law after another, but the demand for organs is too great. Studies indicate that nothing they can do can retrieve enough organs to bring supply and demand into balance.[2] Something else will have to be done. That something else is xenotransplantation.

Xenotransplantation is the transfer of tissue or organs from one species to another.[3] It has been attempted several times in the past, but survival rates were poor.[4] The advent of new drugs that control the body's rejection of foreign substances and the ability to genetically alter potential animal donors to make their organs more compatible with humans, coupled with the desperate need for more transplantable organs, have caused a renewal of interest in the field of xenotransplantation.[5] Scientists predict that successful xenotransplantations can occur within two to five years.[6] However, laws lag

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1. Bernard M. Dickens et al., *Legislation on Organ and Tissue Donation, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 95 (Jeremy R. Chapman et al. eds., 1997) (quoting W.N. Gerson, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 J. INT'L L & POL. 1013-32 (1987)).

2. *See infra* note 333.

3. *See* Committee on Xenograft Transplantation, INSTITUTE OF MEDICINE, XENOTRANSPLANTATION: SCIENCE, ETHICS, AND PUBLIC POLICY, 1 (1996).

4. *See infra* notes 219-226 and accompanying text.

5. *See* Charles Marwick, *British, American Reports on Xenotransplantation*, JAMA, Aug. 28, 1996, at 589.

6. *See* Andy Coghlan, *Heartening*, NEW SCIENTIST, Aug. 28, 1999, at 20.

behind science and hinder the advancement of the technology by their failure to provide authorization for human xenograft clinical trials.

Part II of this Note discusses the history of organ donation and explains the world's shortage of usable organs. It proceeds to discuss expressed consent and presumed consent as two legal systems of organ procurement that can be implemented to decrease this shortage. The problems and promises of each system are considered in the context of some of the nations that currently employ each. Part III of this Note looks at organ procurement laws in the United States; specifically, the Uniform Anatomical Gift Act and its revisions, as well as the National Organ Transplant Act. The major provisions of each piece of legislation are addressed and reasons why the Acts have failed to live up to their potential are examined. Part IV looks at organ procurement laws in Britain, namely, the Human Tissue Act of 1961 and the Human Organ Transplants Act of 1989. Again, the major provisions are reviewed and explanations are provided for their failure to sufficiently increase the supply of organs. Part V introduces the concept of xenotransplantation, noting its history and the ethical considerations involved in transplanting animal tissues and organs into humans. It also looks at the efforts of the United States and Britain to regulate xenotransplantation trials and advances some reasons why Britain is hesitant to proceed with human xenograft clinical trials. Part VI concludes the Note by proposing that, in light of recent findings that diseases are not as large a threat as originally anticipated, Britain should loosen its stance on xenotransplantation by lifting the moratorium on clinical trials. Finally, the Note suggests that Britain should not switch to a system of presumed consent but should expand the laws that it currently has in force to accommodate xenotransplantation.

II. ORGAN DONATION

A. *History of Organ Donation*

The ability to transplant organs developed around the turn of the twentieth century.[7] History indicates, however, that medical science has literally been moving toward organ transplantation for millenniums. More than five thousand years ago, the ancient Egyptians used transplanted tissues to reconstruct the noses of syphilis victims.[8] Scientists have made a variety of attempts at transplantation since that time. In the 1760s, scientists transplanted the teeth of female servants into the mouths of "fine ladies."[9]

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7. *See* Juliana S. Moore, *The Gift of Life: New Laws, Old Dilemmas, and the Future of Organ Procurement*, 21 AKRON L. REV. 443, 455 (1988).

8. *See id.*

9. *See id.* John Hunter, the "father of scientific surgery," with the help of a dentist, obtained teeth from maidservants and transplanted them into the mouths of more distinguished

The late 1800s brought the transplantation of skin.[10] Finally, in 1954, the first successful[11] solid organ[12] transplant was performed.[13] This breakthrough brought hope to many suffering from end stage organ failure.

Rejection[14] of the transplanted organs by the recipients overshadowed the promise of organ transplantation.[15] It was not until the development of the anti-rejection drug cyclosporine[16] in 1983 that the number of organ transplants

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ladies. *See* J. Englebert Dunphy, M.D., *The Story of Organ Transplantation*, 21 HASTINGS L.J. 67 (1969).

10. *See* Moore, *supra* note 7, at 455.

11. The American Council on Transplantation considers a transplant "successful" if the organ functions normally one year after the transplantation. *See* Theodore Cooper, *Survey of Development, Current Status, and Future Prospects for Organ Transplantation, in* HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 18 (Dale H. Cowan et al. eds., 1987).

12. Those in the transplant community distinguish solid organs from tissues. Interestingly, however, not all countries categorize organs and tissues in the same way. Generally, solid organs include the kidneys, heart, liver, pancreas, and lungs, while corneas, bone marrow, skin, and blood constitute tissues. *See generally* Bernard M. Dickens et al., *Legislation on Organ and Tissue Donation, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 95, 97 (Jeremy R. Chapman et al. eds., 1997).

13. This procedure took place at Peter Bent Brigham Hospital in Boston and involved the transplantation of a kidney between identical twins. *See* Cooper, *supra* note 11, at 18. The transplant was successful under the definition put forth by the American Council on Transplantation because the kidney functioned for nine years following the procedure. *See id.*

14. Rejection occurs as a response to the body's identification and elimination of a foreign organism or tissue. *See* Michael A. DeVita et al., *History of Organ Donation by Patients with Cardiac Death, in* PROCURING ORGANS FOR TRANSPLANT: THE DEBATE OVER NON-HEART-BEATING CADAVER PROTOCOLS 15, 17 (Robert M. Arnold, M.D. et al. eds., 1995). It is triggered when any organ is transplanted except those from an identical twin. *See* Howard S. Schwartz, *Bioethical and Legal Considerations in Increasing the Supply of Transplantable Organs: From UAGA to "Baby Fae,"* 10 AM. J.L. & MED. 397, 399 (1985). The immune system, which is responsible for this defensive function, is both sensitive and powerful. *See* DeVita et al., *supra* at 17. It can identify and eliminate a single foreign bacteria, as well as reject an entire organ in a few hours. *See id.* In order for the transplanted organ to be accepted, it must have the same genetic markers as the recipient. *See id.* This is one of the problems associated with xenotransplantation. Because the organs involved in the xenotransplantation procedure come from a donor of another species, the genetic markers do not match and rejection occurs. Technology now provides scientists the opportunity to "fool" the human body into accepting an animal organ by allowing them to inject human proteins into the organ, causing it to be identified as a human organ. For more information regarding this technology see *infra* note 260.

15. *See* Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 252 (1995).

16. Cyclosporine is an immunosuppressive drug discovered in 1972 by J.F. Borel at the Sandoz Pharmaceutical Corporation. *See* RENEE C. FOX & JUDITH P. SWAZEY, SPARE PARTS 3-6 (1992). The F.D.A. gave its approval for the marketing of cyclosporine in 1983. *See id.* By 1989, it was given alone or in combination with other drugs to almost every individual receiving a transplanted organ and was recognized as one of the key factors contributing to the "boom" in organ transplantation from the early 1980s through 1990. *See id.* Notwithstanding its promise for organ transplantation, the use of cyclosporine came into question beginning in 1991 after the medical community began to question the possible long-term effects of using the drug.

increased significantly.[17] Since then, the number of organ transplants performed in the United States each year has mushroomed,[18] and now everything from livers to corneas is being transplanted.[19]

The success of organ transplantation created problems that people in the medical community, as well as legislators, attempted to resolve. The increased viability of organ transplants led to a greater demand for usable organs.[20] This, in turn, resulted in an inadequate supply of organs available for

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See id. *See also* Nancy L. Ascher, *The Pros and Cons of Cyclosporine, in* ORGAN SUBSTITUTION TECHNOLOGY: ETHICAL, LEGAL, AND PUBLIC POLICY ISSUES 306, 307 (Deborah Mathieu ed., 1988) (noting that cyclosporine has three major drawbacks: its expense, its toxic effect on kidneys, and the chance that one of its long-term side effects might be lymphoma). Nevertheless, cyclosporine remains "the cornerstone of clinical immunosuppression for renal transplantation." Paul A. Keown, *Molecular and Clinical Therapeutics of Cyclosporine in Transplantation, in* IMMUNOSUPPRESSION IN TRANSPLANTATION 1, 10 (Leo C. Ginns, et al. eds., 1999). Cyclosporine has decreased the incidence of rejection. The University of Pittsburgh reported that the one-year survival rates for liver transplants conducted there increased from 32% to 69% following the introduction of cyclosporine; the one-year survival rates for heart transplants increased from 62% to 76%. *See* Schwartz, *supra* note 14, at 400. Evidence exists that indicates that cyclosporine, used in combination with other agents, will allow immunosuppression in organ transplantation to achieve the following goals within the next decade: "patient survival greater than 95%, graft survival greater than 90%, rejection rates less than 10%, incidence of infection less than 10%, and incidence of lymphoma less than 1%." *See* Keown, *supra,* at 10.

17. *See* Anderson, *supra* note 15, at 252. The growth in transplantation was especially large between 1988 and 1997, when the number of transplant recipients increased 49% (from 12,786 in 1988 to 20,672 in 1997). *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ("OECD"), XENOTRANSPLANTATION: INTERNATIONAL POLICY ISSUES 15 (1999).

18. *See* Anderson, *supra* note 15, at 252.

19. *See* Moore, *supra* note 7, at 455. The solid organs being transplanted in the United States and the success rates of these procedures from October 1987 to December 1995 are as follows:

Organ	# Trnsplnts	Survival	1Yr. Survival	2 Yr. Survival	4 Yr. Survival
Cadaveric Kidney	64, 346	Graft	81.9%	76.5%	66.0%
		Patient	93.6%	90.8%	84.8%
Living Kidney	20,236	Graft	91.7%	88.5%	80.9%
		Patient	97.3%	96.0%	92.8%
Liver	23,957	Graft	71.2%	66.6%	60.6%
		Patient	80.6%	76.9%	71.8%
Pancreas	4,963	Graft	75.2%	69.8%	60.6%
		Patient	91.3%	88.2%	82.7%
Heart	17,138	Graft	82.1%	77.8%	70.0%
		Patient	83.0%	78.9%	71.7%
Lung	3,537	Graft	72.5%	63.1%	45.8%
		Patient	74.0%	65.3%	48.8%
Heart/Lung	500	Graft	64.0%	54.9%	45.4%
		Patient	64.5%	56.0%	46.7%

See OECD, *supra* note 17 at 21.

20. *See* Chad D. Naylor, *The Role of the Family in Cadaveric Organ Procurement*, 65 IND. L. J. 167, 167 (1989).

transplant.[21] As of September 22, 1999, the number of organs needed by patients on the United Network for Organ Sharing (UNOS) waiting list was 65,686.[22] This number represents three times the number of transplants that actually occurred in the United States during 1998.[23] Statistics show that more than one-third of potential liver transplant patients die while waiting for a liver.[24] Well over fifty percent of children born with heart or liver deformities die without a transplant.[25] As of 1994, 150,000 Americans relied on renal

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21. *See id.*

22. This number reflects the number of organs needed rather than the number of patients on the list because there are some patients waiting for multiple organ transplants. *See* United Network for Organ Sharing, *U.S. Facts About Transplantation* (visited Oct. 1, 1999) <http://www.unos.org/Newsroom/critdata_main.htm> [hereinafter UNOS, *U.S. Facts*]. In 1993 the number of potential recipients (rather than the number of organs needed) was roughly 30,000. *See* Robert M. Arnold et al., *Introduction: Back to the Future: Obtaining Organs from Non-Heart-Beating Cadaver Donors, in* PROCURING ORGANS FOR TRANSPLANT: THE DEBATE OVER NON-HEART-BEATING CADAVER PROTOCOLS 1, 1 (Robert M. Arnold, M.D. et al. eds., 1995). The number of potential recipients more than doubled from 1988 to 1994 as well. *See* UNOS, *The Transplantation Miracle Confronts a Lack of Organs* (visited Sept. 8, 1999) <http://whyfiles.news.wisc.edu/007transplant/need.html> [hereinafter UNOS, *Transplantation*]. The approximate numbers on the waiting list for that period are as follows:

Year	Number on the Waiting List (approx.)
1988	16,000
1989	19,500
1990	22,000
1991	25,000
1992	30,000
1993	35,000
1994	37,500

Id. The list of patients awaiting organ transplants in the United States increases every 16 minutes as another name is added. *See* Arlene Judith Klotzko, *Mankind's New Best Friend*, CHI. TRIB., Aug. 22, 1999, at 1.

23. The actual number of organ transplants performed in the United States during 1998 include:

Type of Transplant	Number	
kidney-pancreas transplants	965	
kidney alone transplants	11,990	(4,016 living donors)
pancreas alone transplants	253	
liver transplants	4,450	
heart transplants	2,340	
heart-lung transplants	45	
lung transplants	849	
intestine transplants	69	
TOTAL	20,961	

See UNOS, *U.S. Facts, supra* note 22. Records indicate that almost 5000 people died in the United States during 1998 before receiving an organ transplant. *See* Klotzko, *supra* note 22, at 1.

24. *See* Arthur L. Caplan, *Humans Should Be Allowed to Receive Animal Organ Transplants, in* BIOMEDICAL ETHICS OPPOSING VIEWPOINTS 223, 224 (Terry O'Neill ed., 1994) [hereinafter Caplan, *Humans Should Be Allowed*].

25. *See id.* Statistics from Great Britain indicate that survival rates of infants who have

dialysis for their survival when kidney transplants would have proved less expensive[26] and would have given them a better quality of life.[27]

Rather than searching for ways to decrease demand, the focus has been on increasing the supply of transplantable organs.[28] One way to accomplish this is by creating legislation aimed at increasing the number of organ donors. Two sources of human organs for transplantation exist—living donors and cadavers.[29] Because living donors can only donate those organs or tissues that they can live without,[30] the potential supply from living donors is limited.[31] Since deceased donors provide a larger number of organs, cadavers represent the primary source of organs for transplant.[32] Each year, approximately 4500 cadaveric organs are procured and used in transplant procedures, a number far below the demand.[33] Experts expect this number to remain static, while the demand will continue to grow as survival rates increase, thus causing a more

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undergone liver transplants range from 75-78% for a five year period while those who have undergone heart transplants average about 70% survival for two years. *See* Deirdre Kelly & A.D. Mayer, *Paediatric Transplantation Comes of Age: The Main Problem Now is Shortage of Donors*, BRIT. MED. J, Oct. 3, 1998, at 897.

26. In 1988, the cost of treatment for Americans with kidney failure exceeded five billion dollars. *See* Caplan, *Humans Should Be Allowed, supra* note 24, at 225. It has been estimated that the Medicare system alone would save more than $150 million over a five-year period of time if all patients awaiting kidney transplants received one because successful kidney transplants save as much as $60,000 per patient for each five-year period. *See* Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 179 (1997).

27. *See* Caplan, *Humans Should Be Allowed, supra* note 24, at 225.

28. *See* Anderson, *supra* note 15, at 255. Efforts to reduce the demand for organs would involve a broad array of public health efforts such as decreasing the risks of heart disease through proper diet and exercise, treating the hepatitis virus, and preventing alcoholism and drug abuse in order to avoid liver damage. *See* Jack M. Kress, *Xenotransplantation: Ethics and Economics*, 53 FOOD & DRUG L. J. 353, 360 (1998). While such efforts should be undertaken, evidence suggests that they would achieve only limited success. *See id.*

29. *See* Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1022 (1999). *See also* Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 TOURO INT'L L. REV. 161, 163 (1994) (stating that live donors contribute nearly one-third of the organs donated in the United States and Great Britian. The World Health Organization, however, fears corruption resulting from the taking of organs from live persons and thus looks unfavorably upon live organ donation).

30. These include, for example, one kidney, blood, and bone marrow. *See* Robinson, *supra* note 29, at 1023.

31. *See id.*

32. *See id.*

33. *See* David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 624 (1998).

severe discrepancy between supply and demand.[34] Because one donor's organs can help as many as nine recipients,[35] each potential donor is significantly important.

B. *Types of Organ Donor Laws*

Legislation aimed at increasing the number of organ donors takes two forms: encouraged volunteerism and presumed consent. While different countries accept and reject different specific underlying concepts, most have laws encompassing one of these two systems.

1. *Volunteerism and Expressed Consent*

Expressed consent represents the first approach to organ procurement. The idea that individuals voluntarily donate their organs by expressing prior consent to their removal underlies the system of expressed consent.[36] Consent may be expressed in various ways, including orally, by will,[37] by donor card, or by driver's license.[38] There are also indications that some non-traditional means, such as tattoos, constitute a valid consent for the harvesting of organs.[39]

Expressed consent laws exist in Canada, the United Kingdom, the Netherlands, and Turkey.[40] The United States employs a variation of expressed consent called required request.[41] Under expressed consent laws, organ donors may not receive compensation for their donations other than to

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34. *See id.*

35. The organs that can be taken from a single donor include the heart, lungs, kidneys, liver, pancreas, corneas and small intestine. *See* Kelly & Mayer, *supra* note 25, at 897 and Moore, *supra* note 7, at 455. *See also* REG GREEN, THE NICHOLAS EFFECT: A BOY'S GIFT TO THE WORLD 23 (1999) (telling the story of a young boy from California who was killed on an Italian highway during a family vacation. His parents elected to donate his organs and seven individuals benefited from their generosity).

36. *See* Christian Williams, *Combatting the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L L. 315, 333 (1994).

37. In the United States, gifts of organs made by will are effective immediately upon the death of the donor without waiting for probate. *See* Uniform Anatomical Gift Act, §4 (a-b), *reprinted in* MANSON, *infra* note 108, at 5; Melissa N. Kurnit, *Organ Donation in the United States: Can We Learn From Successes Abroad?*, 17 B.C. INT'L & COMP. L. REV. 405, 411 (1994).

38. *See* Altman, *supra* note 29, at 164.

39. *See id.*

40. *See* OECD, *supra* note 17, at 18.

41. Required request laws mandate that hospitals and doctors inform patients or their families about the possibility of organ donation. *See id.; see infra* note 52 and accompanying text.

have their expenses paid.[42] Therefore, the motivation for organ donation under these laws lies elsewhere. Altruism,[43] coercion, and moral obligation signify reasons why an individual might donate his organs.[44] Of these, altruism represents the primary incentive.[45]

An underlying assumption of expressed consent is that something resembling a property right exists in the body that survives even after an individual's death. This explains, to some degree, why some nations might choose expressed consent over other systems of organ procurement. A nation, such as the United States, with a history of support for individual rights,[46] might find those organ donor laws that stress the individual's right to choose what happens to his body fit more closely with the nation's social conscience.

In theory, expressed consent laws allow doctors to proceed with organ harvesting upon recognition of some form of donor consent.[47] In practice, however, medical personnel in most countries usually do not act without the consent of the donor's family as well.[48] Common law recognizes that the family of the deceased has certain rights to his remains that are enforceable by an action in damages.[49] Modern statutes limit this right by extending protection from liability to a physician acting in good faith. [50]

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42. *See* Williams, *supra* note 36, at 333; *infra* notes 51-60 and accompanying text.

43. Altruism is the "consideration for other people without any thought of self as a principle of conduct." WEBSTER'S ENCYCLOPEDIC DICTIONARY 27 (2d ed. 1990).

44. *See* Williams, *supra* note 36, at 333.

45. Altruism provides social benefits not existent in other forms of donation. *See* Ann McIntosh, *Regulating the "Gift of Life"—The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 178 (1990). "Organ donation affirms socially valued human interactions. The donor's experience in enhancing or saving another's life brings the social community together." *Id.*

46. For discussion of an individual's right to make decisions regarding his body see Roe v. Wade, 93 S.Ct. 705 (1973)(affirming a woman's right to have an abortion); Moore v. Regents of the University of California, 793 P.2d 479 (1990) (stating that a man had no property rights to his spleen after it was removed by doctors in a surgical procedure). *But see* Washington v. Glucksberg, 117 S.Ct. 2302 (1997) (denying an individual's right to assistance in committing suicide). Interestingly, the United States, while adopting an organ donation system based on the individual's right to determine for himself whether to donate, actually limits individual rights in certain ways. Richard A. Epstein, University of Chicago law professor, argues that the failure of the United States to allow a market in organs (The National Organ Transplants Act of 1984 forbids the commercialization of organs in the United States. *See infra* note 147 and accompanying text.) abrogates the rights of the individual donor to select the recipient of his body parts. *See* Kress, *supra* note 28, at 358.

47. *See* Altman, *supra* note 29, at 164.

48. *See id.* at 165.

49. These property rights, however, do not allow the donation of organs for commercial purposes. *See* EUGENE B. BRODY, BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS 102 (1993). In Ireland, the Netherlands and Spain, the family not only has rights to the body of their relative, but the wishes of the family regarding donation of his organs take priority over the wishes of the individual donor. *See* DAVID LAMB, ORGAN TRANSPLANTS AND ETHICS 145 (1990).

50. The Uniform Anatomical Gift Act (UAGA) states in section 7(c): "A person who acts in good faith in accord with the terms of this Act or with the anatomical gift laws of another

state [or foreign country] is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act." UAGA, *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 7 (R. Hunter Manson ed., 2d ed. 1986). Some states have expressly adopted the UAGA, while others have substantially adopted it: Alabama (Ala. Code §22-19-47(c) (1984)); Alaska (ALASKA STAT. §13.50.060(c) (1972)); Arizona (ARIZ. REV. STAT. ANN. §36-847(c) (1974)); Arkansas (ARK. STAT. ANN. §82-410.11(c) (1976)); California (CAL. HEALTH & SAFETY CODE §7155.5(d-e) (1984) (Supp. 1986))) [California omits reference to liability for acting in accord with gift laws of other states or foreign countries and makes reference to gifts on drivers' licenses]; Colorado (COLO. REV. STAT. §12-34-108(3) (1985)); Connecticut (CONN. GEN. STAT. ANN. §19a-278(c) (1986)) [Connecticut makes no reference to acting under the gift laws of another state or foreign nation]; Deleware (DEL. CODE ANN. tit. 24 §1786 (c) (1981)); District of Columbia (D.C. CODE ANN. §2-1507(c) (1981)) [D.C. omits reference to acting under the laws of a foreign nation]; Florida (FLA. STAT. ANN. §732.917(3) (1976 & Supp. 1984)) [Florida adds a provision to its statute that says that a person who acts without negligence in accord with UAGA is not civilly or criminally liable]; Georgia (GA. CODE ANN. §44-5-148(c) (1982)) [Georgia omits reference to acting under other state or foreign laws]; Hawaii (Hawaii Rev. Stat. §327-7(c) (1976 & Supp. 1984)); Idaho (IDAHO CODE §39-3407(3) (1977)); Illinois (ILL. ANN. STAT. ch. 110 1/2 §308(c) (Smith-Hurd 1978 & Supp. 1984)); Indiana (IND. CODE ANN. §29-2-16-4(g) (Burns Supp. 1986)) [Indiana requires that the doctors act without actual notice of revocation and limits protection to civil liability]; Iowa (IOWA CODE ANN. §142A.7(3) (1972 & Supp. 1984)) [Iowa omits reference to acting under laws of a foreign nation]; Kansas (KAN. STAT. ANN. §65-3215(c) (1980)); Kentucky (KY. REV. STAT. ANN. §311.225(3) (Bobbs-Merrill 1983)) [Kentucky omits reference to acting under the laws of a foreign nation]; Louisiana (LA. REV. STAT. ANN. §17:2357(c) (West 1982)) [Louisiana protects persons from both civil and criminal liability if they act in good faith and without actual knowledge of revocation and in accord with the Louisiana UAGA or the laws of the state in which the gift document was executed]; Maine (ME. REV. STAT. ANN. tit. 22, §2907(3) (1980)); Maryland (MD. EST. & TRUSTS CODE ANN. §4-508(b) (1974)); Massachusetts (MASS. GEN. LAWS ANN. ch. 113, §13(c) (West 1983); Michigan (MICH. COMP. LAWS ANN. §333.10108(3) (West1980)); Minnesota (MINN. STAT. ANN. §525.927(3) (West1975)) [Minnesota adds that a person must also comply with the drivers' license gift laws in order to escape liability]; Mississippi (MISS. CODE ANN. §41-39-45 (1981)) [Mississippi makes no mention of acting in accordance with the laws of another state or foreign nation and protects the actor only from liability for civil damages]; Missouri (MO. ANN. STAT. §194.270(3) (Vernon's 1983)) [Missouri also requires that a person act without negligence in order to escape liability]; Montana [Montana makes no provision for non-liability]; Nebraska (NEB. REV. STAT. §71-4807(3) (1981)) [Nebraska does not mention acting in accord with the laws of a foreign country]; Nevada (NEV. REV. STAT. §451.580(3) (1985)) [Nevada substitutes "the state of Nevada" for "another state or foreign country."]; New Hampshire (N.H. REV. STAT. ANN. §291-A:7(III) (1978)) [New Hampshire omits reference to acting in accord with the laws of another state or foreign country]; New Jersey (N.J. STAT. ANN. §26:6-63(c) (West Supp. 1984)); New Mexico (N.M. STAT. ANN. 24-6-7(C) (1981)) [New Mexico does not make reference to the gift laws of a foreign country]; New York (N.Y. PUB. HEALTH LAW §4306(3) (McKinney1985)) [New York omits reference to acting under the laws of a foreign country]; North Carolina (N.C. GEN. STAT. §130A-409(c) (Supp. 1983)) [North Carolina omits reference to acting under the laws of a foreign country and substitutes the words "with due care" for acting "in good faith."]; North Dakota (N.D. CENT. CODE 23-06.1-07(3) (Supp. 1983)); Ohio (OHIO REV. CODE ANN. §2108.08 (Page 1976)) [Ohio omits reference to acting under the laws of a foreign country]; Oklahoma (OKLA. STAT. ANN. tit. 63, §2208(c) (West 1984)); Oregon (OR. REV. STAT. §97.290(3) (1983)) [Oregon substitutes acting "with probable cause" for acting "in good faith."]; Pennsylvania (20 PA. CONS. STAT. ANN. §8607(c) (Purdon 1975)); Rhode Island (R.I. GEN. LAWS §23-18.5-7(c) (1985)); South Carolina (S.C. CODE ANN. §44-43-380(c) (Law. Co-op. 1985)) [South Carolina

Some nations with laws based on expressed consent find that the system does not increase the number of available organs for transplant. These countries have changed from their systems of volunteerism to either presumed consent or systems of required request and routine inquiry.[51] Required request and routine inquiry resemble volunteerism in that an individual may still donate his organs and his family has the ability to consent to such donation as well. The focus of these two systems, however, shifts from one relying on altruism to one that takes a proactive approach to organ procurement by involving the direct action of hospitals and medical personnel.

Under routine inquiry, hospitals must inform the family of the opportunity to donate the organs,[52] and then let the family make the decision about whether that is what it wants to do. Required request places the burden on the hospitals to expressly request that the deceased's family donate his organs.[53]

Some suggest that routine inquiry and required request represent a better alternative to encouraged volunteerism for a number of reasons. First, those most closely associated with the potential donor are his family members. These people most likely know the wishes of the individual regarding the taking of his organs, the existence and location of a donor card, and if any other written directives exist that indicate a desire to donate the individual's organs.[54] Second, the inquiry made under these systems would come to be expected by the public and consent to the donation of organs would be less suspect because the family has had time to discuss the options together beforehand rather than being confronted with it during the family's time of

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omits reference to a foreign country and provides that civil immunity shall not extend to cases of "provable malpractice"]; South Dakota (S.D. CODIFIED LAWS ANN. §34-26-39 (1977)); Tennessee (TENN. CODE ANN. §68-30-108 (c) (1983)); Texas (TEX. STAT. ANN. art. 4590-2 §8(c) (Vernon 1976)) [Texas protects individuals acting under the Texas UAGA if the prerequisites for an anatomical gift have been met under the laws in effect when the gift was made]; Utah (UTAH CODE ANN. §26-28-5 (1984)); [Utah requires that doctors have actual notice of revocation in order to be held liable and specifies only that such doctors shall not be liable in damages]; Vermont (VT. STAT. ANN. tit. 18, §5237(c) (Supp. 1984)); Virginia (VA. CODE §32.1-295(D) (1985)); Washington (WASH. REV. CODE ANN. §68.08.560(3) (Supp. 1984-85)); West Virginia (W. VA. CODE §16-19-7(c) (1979)); Wisconsin (WIS. STAT. ANN. §155.06(7)(c) (West 1974 & Supp. 1984)); and Wyoming (WYO. STAT. §35-5-107(c) (1977)). All of these statutes are reprinted in STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES (R. Hunter Manson ed., 2d ed. 1986).

51. *See* Kurnit, *supra* note 37, at 406. The United States is an example of a country that employs a system of required request.

52. *See* Kurnit, *supra* note 37, at 412.

53. *See id.*

54. *See* Arthur L. Caplan, *Obtaining and Allocating Organs for Transplantation, in* HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 5, 15-16 (Dale H. Cowan, M.D., J.D. et al. eds., 1987) [hereinafter Caplan, *Obtaining and Allocating Organs*].

grief.[55] Third, these systems may have the desired effect of increasing the number of available organs because they still respect the rights of individuals to decide not to donate their organs, they do not jeopardize the right of the individual to leave a written or oral statement about his wishes, and they actually protect the individual's wishes by attempting to involve his relatives who can speak for the deceased.[56] The respect for the individual's right to choose whether or not to donate constitutes the most important aspect of these systems.[57] This is extremely important in a system that depends upon altruism for organ procurement.[58] People are unlikely to donate their organs on their own.[59] By adopting a system that requires hospital personnel to ask for donation and that brings the public to expect questioning about organ donation, altruism is encouraged and the supply of organs is increased.[60]

2. *Presumed Consent*

Presumed consent offers an alternative to expressed consent. Unlike expressed consent, this system operates under the presumption that an individual desires to donate his organs unless he affirmatively acts to register his opposition.[61] Once registered, the individual carries a card indicating his objection to the procedure.[62]

Presumed consent laws exist in seventeen different countries[63] and in some U.S. states.[64] Although all are based on the presumption that an individual wishes to donate his organs, the statutes vary from nation to nation

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55. By making the inquiry routine, the request would be more easily accepted, as in the case of autopsies performed when death occurs under suspicious circumstances and reports that are completed when a person dies for any reason. *See id.* at 16.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.* at 16-17.

61. *See* Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 IOWA J. CORP. L. 69, 83 (1994).

62. *See id.*

63. Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Greece, Israel, Italy, Japan, Norway, Poland, Singapore, Spain, Sweden, and Switzerland. *See id.* In January 1998, Brazil also adopted a system of presumed consent. *See* Andrea McDaniels, *Brazil Mandates Organ 'Donation' for Transplants,* CHRISTIAN SCIENCE MONITOR, Jan. 16, 1998, at 1. Nations that employ presumed consent have seen no clear-cut relationship between the laws and high donation rates. *See* OECD, *supra* note 17, at 19. In fact, some nations that operate under presumed consent (such as Switzerland (14.3 cadaveric donors per million population (pmp)), Greece (3.7 cadaveric donors pmp), and Italy (11.6 cadaveric donors pmp)) actually suffer from lower donor rates than some nations using expressed consent (United Kingdom (14.5 cadaveric donors pmp), United States (21.3 cadaveric donors pmp), and Canada (14.5 cadaveric donors pmp)). *See id.* at 17. Recently, the trend in Europe has been away from presumed consent and toward opt-in legislation. *See id.* at 19.

64. *See* LAMB, *supra* note 49, at 140.

in both their scope and application. Presumed consent statutes take one of two forms: one of strong presumed consent, and one of weak presumed consent.[65] Under a system of strong presumed consent, the presumption of consent may be rebutted only by the express wishes of the decedent.[66] A system of weak presumed consent, on the other hand, allows the decedent's family to oppose the donation.[67] Presumed consent in the United States takes the form of weak presumed consent.[68] Those U.S. states that have adopted the system allow for the removal of the corneas and the pituitary gland, but do not permit doctors to take solid organs from the donors.[69] Before removal of the corneas, however, many of the states require that the medical personnel make "a reasonable search" to determine whether the individual donor or his family objects.[70] Similarly, doctors in Finland, Greece, Italy, Japan, Norway, and Spain ask the donor's family for objections to the procedure.[71] Laws in Austria, Czechoslovakia, Denmark, France, Israel, Poland, Singapore, and Switzerland, however, allow for the removal of all organs if the doctor finds no recorded objection, but in practice, doctors seldom proceed without the approval of family members.[72]

Critics of presumed consent argue that the system essentially gives the state a right of eminent domain over the body parts of a potential donor.[73] Nations that take this approach have been denounced as historically lacking respect for human rights.[74] Some argue that "if the body is essential to the individual's identity, in a society that values personal integrity and freedom, it must be the individual's first of all to control after . . . life is gone as well. If it is to be made available to others . . . it must be a gift."[75]

Theoretically, a system of presumed consent should result in a greater number of organs for transplant than would a system of expressed consent.

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65. *See* MacDonald, *supra* note 26, at 181.

66. *See id.*

67. *See id.*

68. *See* Cate, *supra* note 61, at 83-84.

69. *See* LAMB, *supra* note 49, at 140. *See also* Cate, *supra* note 61, at 84 (indicating that twenty-one states have presumed consent laws that allow for the removal of corneas and seventeen states allow for the removal of pituitary glands).

70. *See* Cate, *supra* note 61, at 84.

71. *See id.* at 83.

72. *See id.*

73. *See* BRODY, *supra* note 49, at 102. In Ontario, Canada, the State has the authority to turn unclaimed bodies over to medical schools to use for research. *See* Altman, *supra* note 29, at 167. John Locke made a statement with regard to the rights of individuals to make determinations about their own bodies that is used as a basic criticism against a system of presumed consent. He said that "every man has a property in his own person; this nobody has a right to but himself." *See* Andrew Trew, *Regulating Life and Death: The Modification and Commodification of Nature*, 29 U. TOL. L. REV. 271, 277 (1998).

74. *See* BRODY, *supra* note 49, at 102.

75. *Id.* (quoting R. VEATCH, DEATH, DYING AND THE BIOLOGICAL REVOLUTION. OUR LAST QUEST FOR RESPONSIBILITY 213 (1989)).

Generally, this is not so. Several nations that have adopted presumed consent are finding that presumed consent provides only a slight advantage over expressed consent in the number of organs procured.

a. *Presumed Consent in France*

France adopted presumed consent in 1976 when the Caillavet Law[76] was passed. This law allows a person to "opt out" of organ donation by signing a writing that expresses his wishes not to donate.[77] It further provides that should a person choose not to donate he, or anyone witnessing his objection, may register that objection at the hospital.[78] Upon the death of the individual, the physician must check the hospital register for an objection to organ harvesting before proceeding.[79] Knowledge of an objection obtained from a third party, even absent a registered objection by the patient, bars the physician from taking the organs.[80] The system of presumed consent in France works like a system of expressed consent in that it requires the doctor to put forth a reasonable effort to find out the decedent's wishes; however, it does not require that the doctor put forth such effort to determine the wishes of the next of kin.[81] Most doctors do make that effort, however, as research shows that in 90.7% of cases, doctors in France notify the deceased's family before removing the organs.[82]

Presumed consent in France has not achieved the goal of meeting the demand for transplantable organs.[83] After twelve years of presumed consent, the nation still experienced a shortage in each area of organ demand.[84]

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76. The Caillavet Law was named after its sponsor and signed into law December 22, 1976 by French President Giscard d'Estaing. *See* William N. Gerson, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 NYU J. INT'L L. & POL. 1013, 1022 (1987). "It states that 'organ procurement may be done for therapeutic or scientific ends on the cadaver of a person who had not made known his objection to such procurement during his lifetime.'" *Id.*

77. *See* Jefferies, *supra* note 33, at 636; Williams, *supra* note 36, at 338-39.

78. *See* Jefferies, *supra* note 33, at 636; Kurnit, *supra* note 37, at 421-22.

79. *See* Jefferies, *supra* note 33, at 636.

80. *See id.*

81. *See id.*

82. *See id.* at 637; Kurnit, *supra* note 37, at 443.

83. The failure of organ supply to increase commensurate with demand may be attributed to the fact that doctors in France continue to consult with family members before harvesting the organs. *See* Jami H. Levine, *The Organ Procurement Dilemma: Altruism v. Commercialism*, 2 KAN. J. L. & PUB. POL'Y 113, 117 (1992).

84. Transplants performed in France and the number of patients remaining on waiting lists in 1988:

Organs	Transplants performed in 1988	Number remaining on waiting list
Kidneys	1,808	4,075
Heart	555	523
Liver	409	189

b. *Presumed Consent in Belgium*

The results in Belgium resemble those in France. Belgium adopted presumed consent in 1987.[85] The law provided for a computerized central Health Authority registry that tracks all individuals objecting to the harvesting of their organs.[86] If doctors find no objections noted on the registry, they may legally proceed though, as in France, Belgian doctors usually seek the consent of family members first.[87]

The success of presumed consent in Belgium is questionable. While the number of organs procured and transplanted appears to have increased,[88] scholars debate whether this increase is attributable to the adoption of presumed consent or the fact that more hospitals now engage in organ procurement.[89] Regardless of this increase, however, a significant gap still exists between the number of transplants that occur and the number of patients waiting to undergo the procedure.[90]

Lung	67	163
Pancreas	43	16
TOTAL	2,882	4,966

See Jefferies, *supra* note 33, at 637.

85. Some suggest that presumed consent has actually been practiced in Belgium since 1965 when Professor R. Dierkens, Secretary-General of the World Association for Medical Law, introduced a regulation in the teaching hospital of the University of Ghent. *See* J. A. Farfor, *Organs for Transplant: Courageous Legislation*, BMJ, Feb. 19, 1977, at 497, 498.

86. *See* Kumit, *supra* note 37, at 422-23.

87. *See id.*

88. A study performed in 1990 found that cadaveric kidney procurement increased 86%, organ procurement on the whole increased 183%, and the total number of organ transplants increased 140%. Another study completed in 1991 showed the increase in cadaveric kidney procurement to be 119% and even greater for multi-organ procurement. *See id.* at 444.

89. *See id.* Those experts who believe that the increases are due to the enactment of presumed consent laws discuss their beliefs in the following: L. Roels et al., *Three Years Experience With a 'Presumed Consent' Legislation in Belgium: Its Impact on Multi-Organ Donation in Comparison with Other European Countries*, 23 TRANSPLANTATION PROC. 903, 904 (1991); L. Roels et al., *Effect of Presumed Consent Law of Organ Retrieval in Belgium*, 22 TRANSPLANTATION PROC. 2078, 2079 (1990).

90. Transplants performed in Belgium and the number of patients on the waiting list in 1988:

Organs	Transplants performed in 1988	Number remaining on waiting list
Kidneys	342	803
Heart	96	34
Liver	123	35
Lung	4	4
Pancreas	5	12
TOTAL	570	888

See Jefferies, *supra* note 33, at 638.

c. *Presumed Consent in Austria*

Austria is the only country to operate under a "pure" system of presumed consent.[91] Such a system eliminates the role of the family in consenting to organ donation, making it possible for doctors to proceed without obtaining the family's approval.[92] Austrian law requires a written statement of an individual's objection to organ donation in order for the objection to be legally binding.[93] Unlike other nations, however, physicians in Austria have no affirmative duty to make reasonable efforts to locate documents that indicate consent or nonconsent.[94] Furthermore, when doubt exists about the wishes of the decedent, doctors may legally proceed with organ removal.[95]

Austria enjoys a higher rate of cadaveric organ donors than any other country as a whole.[96] It has been alleged, however, that if this success were attributable to the presumed consent laws, then donor rates in each category of organs covered by the law would be higher than donor rates in other countries.[97] Statistics show otherwise. Austrian procurement rates for livers exceed similar rates in France and Belgium only slightly, and procurement rates for hearts fall below those in France and Belgium.[98] Success in Austria, therefore, may result more from its two very active transplant teams located in Innsbruck and Vienna than from its adoption of presumed consent.[99] Whatever the source of Austria's success in increasing the number of procured organs, demand for usable organs still greatly exceeds supply.[100]

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91. *See* Kurnit, *supra* note 37, at 423.

92. *See id.*

93. *See* W. Land & B. Cohen, *Postmortem and Living Organ Donation in Europe: Transplant Laws and Activities*, 24 TRANSPLANTATION PROC. 2165, 2165 (1992).

94. *See* Kurnit, *supra* note 37, at 423.

95. *See id.*

96. *See* Land & Cohen, *supra* note 93, at 2166; *see also* Williams, *supra* note 36, at 340 (stating that, in Austria, there are 60 cadaveric kidneys retrieved for every one million individuals. This rate is twice that of the United States and most other European countries).

97. *See* Kurnit, *supra* note 37, at 445.

98. *See id.*

99. *See id.*

100. Transplants occurring in Austria and the number of patients on the waiting list in 1988:

Organs	Transplants occurring in 1988	Patients remaining on waiting list
Kidney	270	1,116
Heart	46	15
Liver	32	10
Lung	3	8
Pancreas	8	12
TOTAL	359	1,161

See Jefferies, *supra* note 33, at 639.

III. ORGAN DONATION LAWS IN THE UNITED STATES

Organ donation regulation in the United States takes its roots in the English common law belief that no one has a property interest in a dead body.[101] While maintaining this basic premise, state courts began to interpret the regulations as granting a "quasi-property right" to the family of the deceased, which allowed them to gain control of the body following death for the purpose of providing it a proper burial.[102] As organ transplantation technology developed and the need for donors increased, the limitations of these laws were tested. As a result, statutes began springing up in the states that allowed an individual and his next of kin to donate.[103] These laws were often confusing and contradictory.[104] To remedy this, the National Conference of Commissioners on Uniform State Laws (NCCUSL) met in 1968 and drafted the Uniform Anatomical Gift Act (UAGA)[105] Together with the National Organ Transplant Act (NOTA) which followed in 1984, the UAGA provides the foundation for organ donation in the United States.

A. *The Uniform Anatomical Gift Act*

In order to arrive at a comprehensive plan for the procurement of organs, the drafters of the Uniform Anatomical Gift Act (UAGA) faced the challenging task of balancing several important competing interests.[106] These interests included protecting the wishes of the potential donor, respecting the wishes of the donor's family, and recognizing that the state needed to execute successful organ procurement procedures to meet society's demand for usable organs.[107] The UAGA addressed these concerns by attempting to answer twelve legal questions ranging from who may donate his organs to whether a physician should be precluded from taking part in the transplant because of his interest in preserving the donor's life.[108] On the whole, the UAGA has

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101. *See* Daphne D. Sipes, *Does It Matter Whether There is Public Policy or Presumed Consent in Organ Transplantation?*, 12 WHITTIER L. REV. 505, 508 (1991).

102. *See id. See also* Andrew J. Love, *Replacing Our Current System of Organ Procurement with a Futures Market: Will Organ Supply be Maximized?*, 37 JURIMETRICS J. 167, 172 (1997). *See, e.g.*, State v. Powell, 497 So.2d 1188, 1192 (Fla. 1986).

103. *See* Sipes, *supra* note 101, at 509; Cate, *supra* note 61, at 71. The first state to enact a statute allowing an individual to donate his organs was New York. *See* David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA L. REV. 357, 401 (1968).

104. *See* Sipes, *supra* note 101, at 509.

105. *See id.*

106. *See* Moore, *supra* note 7, at 444.

107. *See id.*

108. The 12 questions are as follows:

1. Who may during his/her lifetime make a legally effective gift of his body or a part thereof?

addressed these questions; however, scholars point out that medical technology was not the same in 1968 as it is today, so the UAGA should not be looked at as an inflexible document, but one requiring regular modifications.[109]

The UAGA received a warm welcome from the states. By 1972, four years after adoption by the NCCUSL, every state and the District of Columbia enacted some version of it into their laws.[110]

The UAGA provides that any eighteen-year-old who possesses a sound mind may, upon his death, donate all or part of his body.[111] Absent an indication of the donor's wishes, certain others receive the right to determine

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2. What is the right of the next-of-kin, either to set aside the decedent's expressed wishes, or themselves to make the anatomical gifts from the dead body?
3. Who may legally become donees of the anatomical gift?
4. For what purposes may such gifts be made?
5. How may gifts be made, such as by will, by writing, by a card carried on the person, or by the telegraphic or recorded telephonic communications?
6. How may a gift be revoked by the donor during his lifetime?
7. What are the rights of survivors in the body after removal of the donated parts?
8. What protection from legal liability should be afforded to surgeons and others involved in carrying out anatomical gifts?
9. Should such protection be afforded regardless of the state in which the document of gift is executed?
10. What should the effect of an anatomical gift be in case of conflict with laws concerning autopsies?
11. Should the time of death be defined by law in any way?
12. Should the interest in preserving life by the physician in charge of a decedent preclude him from participating in the transplant procedure by which the donated tissue or organ is transferred to a new host?

Uniform Anatomical Gift Act (Introduction), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES v, v (R. Hunter Manson ed., 2d ed. 1986).

109. Wayne L. Anderson & Janolyn D. Copeland, *Legal Intricacies of Organ Transplantation: Regulations and Liability*, 50 J. MO. B. 139, 140(1994).

110. *See* Cate, *supra* note 61, at 71. The UAGA has undergone minor modification in some states. Of the modifications made, the most apparent today relate to defining death, outlining procurement protocol, and prohibiting the sale of organs. *See* Moore, *supra* note 7, at 445. For example, Illinois has added subsection (g) to section 1 defining death as "the irreversible cessation of total brain function, according to usual and customary standards of medical practice." *See* ILL. ANN. STAT. ch. 110 1/2, §302 (Smith-Hurd 1978), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 139 (R. Hunter Manson ed., 2d ed. 1986). California added a section entitled "Determination of Nonavailability" which outlines the procedures for a hospital to perform while making a diligent search for the persons who are to give consent for the use of a donor's organs. *See* CAL. HEALTH & SAFETY CODE §7151.6 (West Supp. 1984), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 47 (R. Hunter Manson ed., 2d ed. 1986). West Virginia supplemented its law in 1987 to include a provision making it unlawful "for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation." *See* W. VA. CODE §16-19-7a (Supp. 1987), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 192 (Nell M. King ed., Supp. 1987).

111. *See* Uniform Anatomical Gift Act, §2 (a), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 4 (R. Hunter Manson ed., 2d ed. 1986).

whether to donate the decedent's organs.[112] Donation may be indicated in a will or other written document,[113] and may be directed to a specific recipient.[114] The donor may, at any time before death, amend or revoke the document expressing his desire to donate, even if delivery of the document to the specific recipient occurred.[115] When organ donation actually occurs, the UAGA requires that the person taking the organs do so in a way that avoids mutilating the body before turning the body over to the family for disposal.[116] Finally, the UAGA provides protection from civil and criminal liability for any person who acts in good faith under any anatomical gift law, whether it be the UAGA, a state law, or the laws of a foreign nation.[117]

Opponents of the UAGA criticize the Act on three main grounds. The first concerns the donor card system. Studies show that while the American public, generally, favors organ donation,[118] most do not carry donor cards.[119] Furthermore, even in the presence of a signed donor card, removal of organs

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112. The people who may make the decision on behalf of the donor are listed in order of priority: "the spouse, an adult son or daughter, either parent, an adult brother or sister, a guardian of the person of the decedent at the time of his death, any other person authorized or under obligation to dispose of the body." *See id.*, §2 (b), at 4.

113. Should the donor choose to express his desire to donate in a will, the gift becomes effective at the death of the donor, without having to go through probate. *See id.* §4(a-b), at 5. If the will is not probated, or if the court holds it to be invalid for testamentary reasons, the gift is still valid if it was made in good faith. *See id.* Should the donor choose to express his desire to donate by way of other documents, the document must be signed by the donor in the presence of two witnesses who must also sign the document in his presence. *See id.* Today, the requirement of two witnesses no longer applies unless the donor expresses his intent to donate orally. *See* Cate, *supra* note 61, at 73.

114. *See* Uniform Anatomical Gift Act, *supra* note 111, §4 (c), at 5-6.

115. If the donor has designated a specific recipient and has delivered the document to the donee, he may revoke the gift by (1) delivering to the donee a signed statement, (2) making an oral statement in the presence of two witnesses that is communicated to the donee, (3) making a statement to an attending physician during a time of terminal illness or injury that is communicated to the donee, or (4) signing a card or other document that can be found on his person or in his effects. *See id.*, §6(a), at 6-7. If the document has not been delivered to the donee, the donor may do any of these four steps or cancel the gift by destruction, cancellation, or mutilation of the document and any existing copies. *See id.* §6(b), at 7. If the donor made the gift by will, he may amend or revoke the gift using any of the four steps outlined above, or by doing so as provided in the laws regulating the amendment and revocation of will. *See id.* §6(c), at 7.

116. *See id.* §7(a), at 7.

117. *See id.* §7(c), at 7. *See also supra* note 50 (describing each state's position with regard to the liability of physicians engaged in transplantation).

118. A Gallup poll conducted in 1990 indicates that, at that time, 94% of Americans were aware of organ transplants, 84% percent believed that transplants were successful in prolonging and improving the quality of life, and 89% percent said that they would respect their relative's request to donate his organs. *See* Cate, *supra* note 61, at 81. A similar poll taken in 1993 indicates that 85% percent of Americans are in favor of organ donation. *See* MacDonald, *supra* note 26, at 180.

119. *See* MacDonald, *supra* note 26, at 180.

usually does not occur without the consent of the family.[120] The doctor's fear of becoming caught up in conflicts with family members over the removal of the donor's organs, despite provisions in the UAGA releasing a doctor acting in good faith from liability, represents the primary reason for the doctor's failure to proceed with organ removal.[121]

The failure to sufficiently define the time of death constitutes a second criticism of the UAGA. Section 7(b) of the UAGA says only that death shall be determined by the attending physician.[122] To alleviate fears that a physician will have conflicting interests in helping his patient survive and in procuring organs for transplant, the UAGA provides that the attending physician shall have no part in obtaining the organs.[123]

At common law, the cessation of cardiac and respiratory function constituted death.[124] In 1968, Black's Law Dictionary defined death as "[t]he cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."[125] With the advent of routine organ transplantation and the ability to artificially maintain the heart and lungs, a definition of death focusing on the cessation of brain activity became more appropriate.[126] The Uniform Determination of Death

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120. *See* Moore, *supra* note 7, at 446.

121. *See id.* The Uniform Anatomical Gift Act States that "A person who acts in good faith in accord with the terms of this Act or with the anatomical gift laws of another state [or a foreign country] is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act." Uniform Anatomical Gift Act §7(c), *supra* note 111, at 7. For information regarding the position of each state on this issue, see *supra* note 50. For cases in which suit has been brought against the doctor in an organ procurement situation, see Williams v. Hoffman, 233 N.W.2d 844, 847 (1974) (stating that the UAGA does not apply to "treatment of the donor prior to death" and that its liability protection did not extend to doctors in a wrongful conduct case in which a woman was sustained on life support so that her kidneys could be removed after her husband had been told that she was dead); Colton v. New York Hospital, 414 N.Y.S. 2d 866, 876 (1979) (extending liability protection to a doctor involved in a situation where a living donor suffered deafness as a result of a kidney transplant, after having signed a release form. The court in that case also stated that the wife did have a cause of action against the doctors for loss of consortium because she was not a party to the release.).

122. *See* Uniform Anatomical Gift Act §7(b), *supra* note 111, at 7.

123. *See id.*

124. *See* Schwartz, *supra* note 14, at 416.

125. BLACK'S LAW DICTIONARY 488 (4th ed. 1951). A more recent version of BLACK'S defined death as "The cessation of life; permanent cessations of all vital functions and signs." BLACK'S LAW DICTIONARY 400 (6th ed. 1990). That version further indicates that statutory definitions of death have been adopted in numerous states that embrace a definition of death as including brain-related criteria. *Id.*

126. *See* Schwartz, *supra* note 14, at 416.

Act states that death occurs when an individual sustains "either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem. . . ."[127]

The third criticism of the UAGA involves its failure to substantially increase the number of available organs.[128] The reasons offered for this failure include a general lack of public awareness about organ donation; an unwillingness to donate organs; primarily for religious reasons; and for the fear of death.[129]

Inadequacies such as these led to the drafting of a new UAGA. It was adopted by the NCCUSL in 1987 and by the American Bar Association in 1988.[130] The 1987 UAGA adopts the system of routine inquiry and required request. This requires hospitals to ask each entering patient whether he is a donor and request a copy of the document authorizing the gift, or discuss organ donation with the patient.[131]

The 1987 UAGA also requires law enforcement officers, firemen, paramedics, other emergency rescuers, and hospital personnel to make a reasonable effort to find information indicating the individual's wishes.[132] Failure to conduct a reasonable search results in administrative sanctions rather than criminal or civil penalties.[133]

Finally, the 1987 UAGA forbids the commercialization of organs by disallowing the purchase or sale of body parts for "valuable consideration . . . if the removal of the part is intended to occur after the death of the decedent."[134] Valuable consideration, within the meaning of the Act, includes "reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part."[135] States have not been as receptive to the 1987 UAGA as they were to its 1968

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127. *See Defining Death: A Report on the Medical, Legal, and Ethical Issues in the Determination of Death, in* HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES, app. C, 407 (Dale H. Cowan et. al. eds., 1987).

128. *See* Moore, *supra* note 7, at 447.

129. *See id.* This lack of awareness concerns the organ donor programs in general. *See* David E. Chapman, *Retailing Human Organs Under the Uniform Commercial Code*, 16 JOHN MARSHALL L. REV. 393,400 (1983). In recent years, public awareness about organ donor programs has increased. *See supra* note 118. While religious objections have been stated as a reason for low donor rates, approximately 30 world religions support organ donation. *See* RAYMOND S. EDGE & JOHN RANDALL GROVES, ETHICS OF HEALTH CARE: A GUIDE FOR CLINICAL PRACTICE, app. C, at 292 (2d ed. 1999); Stan Simbal, *Does My Religion Approve of Organ Donation?* (visited Sept. 8, 1999) <http://www.transweb.org/qa/qa_txp/faq_ religion.html>.

130. *See* Cate, *supra* note 61, at 73.

131. *See id.*

132. *See* Uniform Anatomical Gift Act (1987), §5(c), 8A U.L.A. 19, 47 (1993).

133. *See id.* §5(f), at 47.

134. *Id.*, §10(a), at 58.

135. *Id.*, §10(b), at 58.

counterpart. To date, only fifteen states have adopted the Act.[136] Some attribute this lack of enthusiasm to the inclusion of the required request provision and possibly the prohibition on organ sales.[137]

B. *The National Organ Transplant Act*

Regulation of organ transplantation exists on the federal level as the National Organ Transplant Act (NOTA). The Act, adopted by Congress and signed into law by President Reagan in 1984, constitutes the primary federal regulation of organ donation in the United States.[138] Congress enacted NOTA in order to alleviate the shortage of organs and to improve the matching of donors and recipients by using a national system for organ procurement and distribution.[139]

There are six basic components to NOTA:

1) to establish a task force on Organ Procurement and Transplantation that is comprised of twenty-five members who study a broad range of medical, legal, ethical, economic, and social issues related to organ procurement and transplantation;[140]

2) to require the Secretary of Health and Human Services to convene a conference on the feasibility of establishing a national registry of voluntary bone marrow donors;[141]

3) to create the Division of Organ Transplantation;[142]

4) to empower the Secretary to make grants for the planning, creation, initial operation, and expansion of organ procurement organizations;[143]

5) to require the Secretary to contract for an Organ Procurement and Transplantation network and a Scientific Registry;[144] and

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136. The 1987 UAGA has been adopted in Arkansas, California, Connecticut, Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* Table of Jurisdictions Wherein Act Has Been Adopted, Uniform Anatomical Gift Act (1987), 8A U.L.A. 19 (1993).

137. *See* Robinson, *supra* note 29, at 1027-28.

138. *See* Lisa E. Douglass, *Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law*, 65 UMKC L. REV. 201, 207 (1996). Secondary federal legislation affecting organ donation in the United States includes: The Public Health Service Act (42 U.S.C. 262), The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), The Social Security Act (42 U.S.C. 1320b-8), The Animal Welfare Act (7 U.S.C. 2131), and The Omnibus Budget Reconciliation Act of 1986 (Pub. L. No. 99-509, §9318, 100 Stat. 1874, 2009-2010) (amending the Social Security Act).

139. *See* Douglass, *supra* note 138, at 207.

140. National Organ Transplantation Act of 1984, Public Law 98-507 (codified in scattered sections of 42 U.S.C.) at §101 (b)(1)(A)).

141. *See id.* § 401(a).

142. *See id.* § 375.

143. *See id.* § 371.

144. *See id.* § 372.

6) to prohibit the purchase and sale of human organs for valuable consideration.[145]

NOTA symbolizes an important piece of legislation in the United States for a number of reasons.[146] By prohibiting the sale of human organs in interstate commerce,[147] Congress relieved the fears that indigent members of U.S. society and the Third World would be preyed upon as a source of organs.[148] Further, the Task Force on Organ Transplantation (Task Force) created under the Act, recommended that hospitals in the United States adopt a system of routine inquiry and required request to help identify potential donors and provide the next-of-kin with the opportunity to donate on behalf of their relative.[149] Congress accepted this recommendation in the Omnibus Budget Reconciliation Act of 1986 (OBRA).[150] As a result, hospitals failing to establish "written protocols for the identification of potential donors" may lose their Medicare and Medicaid funding.[151] While this provision of OBRA appears to grant a great degree of power over the hospitals to the federal government, inadequate supervision of the system hinders the realization of any increase in available organs.[152]

NOTA also established the framework for organ procurement and distribution in the United States.[153] The Act created the Organ Procurement

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145. *See id.* § 301.

146. *See* Robinson, *supra* note 29, at 1028.

147. Anyone caught in the purchase or sale of organs commits a felony punishable by a fine of $50,000 and/or five years imprisonment. *See* National Organ Transplantation Act of 1984, *supra* note 140, at §301.

148. It seems these fears were justified. Evidence of a commercial market for organs in the United States prompted Congress to pass NOTA. *See* Robinson, *supra* note 29, at 1028. This evidence consisted of a plan by Dr. H. Barry Jacobs to broker human kidneys from live donors. *See id.* at 1036. He established an organization named the "International Kidney Exchange Ltd." for the purpose of procuring kidneys from indigent Third World residents. *See id.* The potential organ donors would set the price for the purchase of their kidneys under Jacobs' plan, and Jacobs would collect $2000 to $5000 for his brokerage services. *See id.*

149. *See id.* at 1029. Some believe that NOTA has failed because it gave too much discretion to the task force to study those issues it (the task force) deemed important, allowing the problem of finding solutions to the organ deficit to be neglected. This lack of direction seems to show that Congress' efforts were really aimed at expanding the role of the federal government in organ procurement rather than increasing the number of available organs. *See* Moore, *supra* note 7, at 450.

150. *See* Public L. No. 99-509, 100 Stat. 1874, 2009 (1986) (codified at 42 U.S.C. §1320b-8 (1994)), *reprinted in* STATUTORY REGULATION OF ORGAN DONATION IN THE UNITED STATES 215 (Nell M. King ed. Supp. 1987).

151. *See* 42 U.S.C. §1320b-8(a)(1)(A)(i)-(iii) (1994). These protocols should: "(i) assure that families of potential donors are made aware of the option of organ or tissue donation and their option to decline; (ii) encourage discretion and sensitivity with respect to the circumstances, views, and beliefs of such families; and (iii) require that an organ procurement agency designated by the Secretary pursuant to subsections (b) (1) (F) of this section be notified of potential organ donors. . . ." *Id.*

152. *See* Douglass, *supra* note 138, at 211.

153. *See* Robinson, *supra* note 29, at 1030.

and Transplantation Network (OPTN) to supervise the allocation of organs throughout the country.[154] The United Network for Organ Sharing (UNOS), which already exists as a central registry of potential kidney recipients, administers the OPTN.[155]

NOTA also authorized the establishment of regional organ procurement organizations (OPO).[156] These organizations find and transport the donor organ under the NOTA requirements that the OPO "engage in a systematic effort to acquire all usable organs from potential donors, preserve these organs, and arrange to transport them to transplant centers within the OPO's area."[157]

While admirable, the efforts of the UAGA and the NOTA are not enough. Despite their thirty years of regulation of organ donation in the United States, the Acts simply fail to sufficiently solve the organ deficit.[158] The United States must look to other ways of addressing the shortage of organs available for transplant.

IV. ORGAN DONATION LAWS IN BRITAIN

Government regulation of transplantation occurred in Britain sixteen years before the Uniform Anatomical Gift Act provided a model for U.S. state laws and thirty-two years before the United States adopted its own federal legislation—the National Organ Transplant Act. In 1952, Parliament passed the Corneal Grafting Act, the first statute to directly address tissue transplantation.[159] This Act was repealed nine years later as the need for a more general law dealing with other tissues and organs became necessary.[160]

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154. *See id.*

155. *See id.* The Department of Health and Human Services, in April 1998, proposed regulations that would insure that UNOS "develop an organ allocation system that functions on a 'national' rather than a 'local-regional' basis and gives preference to the most medically urgent patients, defined as those who are very ill but who, according to their physician, have a reasonable likelihood of post-transplant survival." Gail L. Daubert, *Politics, Policies, and Problems with Organ Transplantation: Government Regulation needed to Ration Organs Equitably,* 50 ADMIN. L. REV. 459, 465, 487 (1998).

156. *See* 42 U.S.C.A. §273 (1994); Robinson, *supra* note 29, at 1030.

157. Robinson, *supra* note 29, at 1030 (quoting Charles K. Hawley, *Antitrust Problems and Solutions to Meet the Demand for Transplantable Organs,* 1991 U. ILL. L. REV. 1101, 1104 (1991)).

158. *See supra* note 23 and accompanying text.

159. *See* LAMB, *supra* note 49, at 145. The Corneal Grafting Act was "[a]n Act to make provision with respect to the use of eyes of deceased persons for therapeutic purposes." Corneal Grafting Act, 1952, 15 & 16 Geo. 6 & I Eliz., 2 ch. 28 (Eng.). This Act provided that an individual, a person in possession of the body, or the person in control of the hospital may request that the donor's eyes be used for therapeutic purposes after his death. *See id.* at §1.

160. *See* LAMB, *supra* note 49, at 145.

Today, two statutes govern organ and tissue transplantation in Britain—the Human Tissue Act and the Human Organ Transplants Act.[161]

A. *Human Tissue Act of 1961*

The Human Tissue Act of 1961 provides the United Kingdom with statutory regulation that governs cadaveric transplants without specific reference to particular tissues or organs.[162] The provisions of the Act resemble the Uniform Anatomical Gift Act that exists in the United States.[163] Like the UAGA, the Human Tissue Act creates a system of expressed consent or volunteerism based on the individual's right to determine for himself whether to donate his organs.[164]

Section 1(1) allows an individual to request the donation of his organs following his death for the purposes of therapy, education, or research.[165] Individuals donate organs by executing a written document or making an oral request for donation in the presence of two witnesses.[166] Section 1(2) indicates that, absent a request for donation, the person in possession of the body may authorize donation after making a reasonable attempt to insure that neither the donor nor his relatives objected to the donation.[167]

Some criticize the ambiguity of the Human Tissue Act.[168] One area of ambiguity concerns the sufficiency of donor cards. Citizens easily obtain donor cards in Britain,[169] and opinion polls repeatedly indicate support for

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161. *See* Siobhan Deehan, *The Gift of Life*, NEW L.J., Aug. 12, 1994, at 1143 [hereinafter Deehan, *The Gift*].

162. *See* LAMB, *supra* note 49, at 145.

163. *See* Schwartz, *supra* note 14, at 420.

164. *See id.* at 420-21. Prior to 1961, it was illegal for an individual in Britain to dispose of his own body. This changed with the adoption of the 1961 Suicide Act. *See* Trew, *supra* note 73, at 277.

165. *See* Human Tissue Act, 1961, 9 & 10 Eliz 2, ch. 54 (Eng.).

166. *See id.*

167. *See id.*

168. *See* LAMB, *supra* note 49, at 145.

169. *See id.* When people in the United States think of making an anatomical gift, they generally think of making note of their desires on their driver's licenses. Indeed, some U.S. states, such as Colorado, require individuals to say yes or no to organ donation at the time they apply for or renew their licenses. *See* Schwartz, *supra* note 14, at 420. All fifty U.S. states and the District of Columbia have a way for donors to indicate their intent on the license. Furthermore, approximately twenty states maintain registries through the Motor Vehicle Association that indicate a driver's choice regarding donation. *See* Karen L. Smith & Judith B. Braslow, *Public Attitudes Toward Organ and Tissue Donation, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 34, 42-43 (Jeremy R. Chapman et al. eds., 1997). The opportunities for completing organ donor cards are much greater in Britain, where there is more publication of the need for donors. In 1988, British Telecom mailed four million donor cards with its telephone bills in the London area. Donor cards were also distributed to spectators at a basketball game involving special teams made up of heart transplant patients from the United States. A proposal made in Britain was "transplant days," which would be held once a year, and

organ donation.[170] Despite this support, however, the majority of the public does not carry donor cards.[171] Even if it did, questions arise as to whether the donor cards satisfy the requirement that organ donation requests occur in an "authorised form."[172]

A second area of ambiguity concerns section 1(2) of the Act. This section provides for the person in possession of the body to authorize donation when no known request for donation exists and reasonable efforts to determine whether the donor or his surviving relatives have any objection to the procedure.[173] No clear authority indicates who constitutes the person "lawfully in possession of the body."[174] Furthermore, the Act fails to define "surviving relative" and "reasonable enquiries."[175] The question arises as to what happens when death occurs? Who asks permission to harvest the organs, and from whom does that person seek consent?

The concern for saving time in the transplantation process renders these questions significant. After death, doctors have a limited amount of time to retrieve a potential donor's organs before they become unusable.[176] Knowing prior to death who is responsible for seeking and giving consent to donation saves time otherwise lost.

Finally, critics find the Act ambiguous because it fails to provide a definition of death.[177] Doctors and lawyers have attempted to clarify the

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would allow the public to actually meet transplant surgeons and organ recipients. *See* LAMB, *supra* note 49, at 149-150.

170. A Gallup poll conducted on December 30, 1988 showed that 85% of those polled favored organ transplants. Another poll conducted that same year by the British Kidney Patients Association found that 70% of the people responding were willing to donate. *See* LAMB, *supra* note 49, at 147.

171. In the poll conducted by the British Kidney Patients Association in 1988, only 29% of those responding to the survey said that they possessed donor cards. *See id.* A later survey again found that 70% of the population favored donating their organs after death, but only 27% possessed donor cards. Of that number, only two-thirds (19% of the total population) usually carried the cards with them. *See* Deehan, *The Gift, supra* note 161, at 1143.

172. *Id.*

173. *See* Human Tissue Act, 1961, 9 & 10 Eliz 2, ch. 54 (Eng.).

174. *See* Deehan, *The Gift, supra* note 161, at 1143.

175. *See id.*

176. Body tissue deteriorates rapidly. *See* Thomas D. Overcast, *Legal Aspects of Death and Informed Consent in Organ Transplantation, in* HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 55, 62 (Dale H. Cowan et al. eds., 1987). Without a constant supply of blood, human organs lose their viability. That is why it is important for organ harvesting to be performed soon after death, or for the individual to be maintained on artificial life support until the harvesting can occur. *See* Schwartz, *supra* note 14, at 416. The time in which an organ or tissue remains viable differs from organ to organ. Livers and hearts endure for only hours, while kidneys may last approximately one and one-half days. *See id.* at 399. The "banking" of these organs is not feasible as it is for blood, which can be stored for up to twenty-one days. *See id.*

177. *See* Deehan, *The Gift, supra* note 161, at 1143.

meaning of death within the context of the Human Tissue Act.[178] The Conference of Medical Royal Colleges and their faculties issued statements in 1976 and in 1979 recognizing brainstem death as the criteria for death in the United Kingdom.[179] Nevertheless, confusion and fear of organ harvest before actual death occurs remain to the point that an aversion to organ donation exists.[180]

Despite these shortcomings, the Human Tissue Act of 1961 still plays a large role in the regulation of organ donation and transplantation in Britain. Approximately ninety percent of all organs used for transplants in that country are obtained from deceased donors.[181] All of these fall under the province of the Human Tissue Act, the governing legislation for cadaveric organ procurement and transplantation in Britain. Unfortunately, the Human Tissue Act has failed to achieve equality between the number of organs needed and the number available.[182]

B. *Human Organ Transplant Act of 1989*

The Human Organ Transplant Act of 1989 (HOTA) comprises the second piece of legislation concerning organ procurement and transplantation in Britain. While the Human Tissue Act of 1961 addressed the procurement of cadaveric organs, HOTA focuses on procuring organs from live donors.[183]

Controversy surrounding the marketing of organs in Britain gave birth to HOTA. The triggering event occurred when allegations made against doctors accused of transplanting the kidneys of Turkish peasants into wealthy

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178. *See id.*.

179. The brainstem is defined as "the vertebrate brain excluding the cerebellum and cerebrum." WEBSTER'S ENCYCLOPEDIC DICTIONARY 116 (1990). Brainstem death requires only death of the brainstem, whereas brain death implies death of the brainstem and cerebral death. *See* Ian Y. Pearson, *Brain Death, in* ORGAN AND TISSUE DONATION FOR TRANSPLANATION 69, 78 (Jeremy R. Chapman et al. eds., 1997). Medical professionals used to rely on brain death rather than brainstem death for determining the point at which death of an individual actually occurred. Its characteristics included coma, absent brainstem and tendon reflexes and an electrically silent brain. *See* LAMB, *supra* note 49, at 31-32. Through the work of Mohandas and Chou in Minneapolis in 1971, it was found that, once irreversible damage to the brainstem occurred, there was no chance of survival. *See id.*, at 34. It was not until the 1980s, however, that the gradual realization that the death of the brainstem was synonymous with the death of the individual actually occurred. *See id.* at 36.

180. A study conducted in Britain in the early 1990s indicated that 30 % of the families refused when asked about donating their relative's organs. *See* Deehan, *The Gift, supra* note 161, at 1143.

181. *See id.*

182. *See* Siobhan Deehan, *New Labour, New Laws?*, NEW L.J., July 31, 1998, at 1138 [hereinafter Deehan, *New Labour*].

183. A donor is generally defined in HOTA as being a person, either living or dead from whom it is proposed to remove an organ. *See* Human Organ Transplants Act, 1989, ch. 31, §1(1)(a) (Eng.).

Indian and Pakistani recipients became public.[184] Soon after this case, Parliament passed the Human Organ Transplants Act of 1989.[185]

HOTA resembles the National Organ Transplant Act that exists in the United States in that it prohibits the sale or purchase of human organs.[186] It forbids soliciting an organ to buy, negotiating or initiating negotiations for the purchase of an organ, and advertising the sale or purchase of an organ.[187] Furthermore, in an effort to eliminate the commercialization of organ procurement, HOTA prohibits the transplantation of organs from living donors into non-genetically-related recipients[188] unless certain regulations are met, including evidence that no compensation has been made for the organ.[189]

Criticisms of HOTA tend to focus on the provision against non-related transplants. Questions exist as to why HOTA requires the approval of ULTRA before allowing non-related persons to receive organs but not related individuals.[190] While related individuals may not be as likely to be involved in the transplant for compensation, the possibility exists that emotional

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184. *See* BRODY, *supra* note 49, at 115. The allegations against the doctors resulted in the suspension from private practice of Dr. Maurice Bewick, a prominent kidney transplant surgeon, who was found to have transplanted a kidney that had been purchased for $4000 from one Turkish man to another. *See* Ronald Bailey, *The Buying and Selling of Organs Saves Lives*, *in* BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS 73, 78 (Terry O'Neill ed., 1994). Supposedly, the two men traveled to Britain together for the purpose of carrying out the procedure. *See id.* At the time the transplant occurred, the sale of organs in Britain was not illegal, however there were guidelines established by the British Transplantation Society that looked at such transactions with disfavor. *See id.*

185. *See* Bailey, *supra* note 184, at 78.

186. *See* Human Organ Transplants Act, 1989, ch. 31, §1 (Eng.).

187. *See id.*

188. An individual is genetically related to:

1. his natural parents and children;
2. his brothers and sisters of the whole or halfblood;
3. the brothers and sisters of the whole or halfblood of either of his natural parents; and
4. the natural children of his brothers and sisters of the whole or halfblood or of the brothers and sisters of the whole or halfblood of either of his natural parents;

Id. One of these relationships must be proven as specified in regulations made by the Secretary of State. *See id.*

189. The Human Organ Transplants Regulations SI 1989 No. 2480 establish a regulatory authority to oversee the transplantation of organs from a living donor into a non-genetically related recipient. *See* David Price & Ronnie Mackay, *The Trade in Human Organs*, NEW L.J., Sept. 27, 1991, at 1307. It is called the Unrelated Live Transplant Regulatory Authority (ULTRA) and it consists of a chairman and seven to eleven other members. *See id.* At least three of these members must be registered doctors, and at least four must be non-registered doctors. *See id.* In order for a transplant between non-related persons to be approved, ULTRA must be satisfied that compensation is not involved in the transaction, and the doctor referring the case to ULTRA has clinical responsibility for the donor. *See id.* Furthermore, if the removal of the organ is not for the medical treatment of the donor, ULTRA must be convinced that the donor has been made aware of the risks involved, understands the nature and scope of the procedure, and consents to its performance. *See id.*

190. *See* Deehan, *The Gift*, *supra* note 161, at 1143.

coercion may influence the family member's decision to donate.[191] Furthermore, by focusing on genetic relations, HOTA overlooks the opportunity of spouses and cohabitees[192] to donate organs.[193]

HOTA also requires the satisfaction of other regulations separately created by the Secretary of State in order for the procedure to occur.[194] One of these regulations dictates that the donor voluntarily consent to the procedure upon fully understanding the risks involved.[195] This particular regulation appears extreme in that it requires more of a non-related organ donor than English law imposes in common informed consent cases.[196] The necessity of the regulation also appears questionable because the motivation for the donor to make the gift is the psychological and spiritual benefits involved.[197] Certainly, no physical benefit to the donor occurs from the procedure.[198]

A final criticism of HOTA rests in the assertion that its provisions negatively affect donor rates. By making certain forms of organ donation illegal, HOTA contributes to a general public aversion to donation and enlarges the problem of organ scarcity.[199] Organs remain scarce in Britain, despite the efforts of the Human Tissue Act and the Human Organ Transplants Act.[200] Notwithstanding the good intentions behind these initiatives, such poorly drafted, outdated, and restrictive legislation does not produce more organs for transplantation.[201]

Recognizing that the current system of organ procurement fails to achieve the goal of equalizing supply and demand, reformists in Britain began to push for a change. Sir John Biggs-Davison[202] proposed an amendment to the Human Tissue Act of 1961 that would revamp existing regulation by making organ donation a matter of "opting out" rather than "opting in."[203] In

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191. *See id.*

192. "Cohabit" means "to live together, esp[ecially] as husband and wife when not married." WEBSTER'S ENCYCLOPEDIC DICTIONARY 190 (1990). A "cohabitee," therefore, would be an individual who resides with the potential recipient.

193. *See* Deehan, *The Gift*, *supra* note 161, at 1143.

194. *See* Human Organ Transplants Act, 1989, ch. 31, §2 (Eng.).

195. *See* Price & Mackay, *supra* note 189, at 1307.

196. *See id.* English informed consent laws follow the case of *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, 1 All E.R. 643 (H.L. 1985).

197. *See* Price & Mackay, *supra* note 189, at 1307.

198. *See id.*

199. *See* Deehan, *The Gift*, *supra* note 161, at 1143.

200. *See id.*

201. *See id.*

202. Sir John Biggs-Davison is a conservative member of Parliament from Epping Forest. *See* Ruth Redmond-Cooper, *Transplants Opting Out or In—the Implications*, NEW L.J., Aug. 3, 1984, at 648.

203. *See id.* Two polls conducted in Britain indicated that the public was evenly divided on the issue of presumed consent. A follow-up poll that clearly and simply explained presumed

1993, the Advisory Council on Science and Technology (Council) published a recommendation that the Government study the feasibility of introducing such a system.[204] Dr. Peter Doyle, the chairman of the Council, believes that Britain should adopt presumed consent for two reasons.[205] First, the reliance on donor cards to contract into donation clearly fails to satisfy the demand for organs.[206] Second, in those countries using a presumed consent system, very few people registered their objections to the harvesting of their organs.[207]

Presumed consent has not yet been adopted in Britain. The failure of the British Medical Association (BMA) to support the system constitutes the primary reason for the reluctance of the country to change.[208] The reason for the BMA's lack of enthusiasm toward presumed consent is a fear that many of society's disadvantaged would not understand the mechanics of the legislation and would not know how to register their objections to organ donation.[209]

Some argue that this fear can be relieved by allowing revocation of the registration and by guaranteeing that, absent an indication that the donor did not want to donate his organs, the doctors would be barred from proceeding without the prior consent of the patient's family.[210] The studies of presumed

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consent resulted in twice as many citizens supporting presumed consent than opposing it. *See* Paul Michielsen, *Informed or Presumed Consent Legislative Models, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 344, 356 (Jeremy R. Chapman et al. eds., 1997).

204. *See* Deehan, *New Labour*, *supra* note 182, at 1138.

205. *See id.*

206. Dr. Doyle observed that in 1990, there were no kidneys used in transplantation that had been taken from someone carrying a donor card. *See id.*

207. *See id.* It has been argued that, in some nations, the government has made it difficult to register. Therefore, the statistics indicating that people in presumed consent countries do not register their objections may not be accurate. Furthermore, there is no clear-cut evidence that high donation rates result from presumed consent laws. *See* OECD, *supra* note 17, at 19. In fact, some nations that employ presumed consent actually have lower donor rates than some nations with expressed consent laws. *See supra* note 63 and accompanying text.

208. *See* Deehan, *New Labour*, *supra* note 182, at 1138. Depending upon the position of a particular doctor, his attitude toward presumed consent may vary. Approximately 40% of British doctors working in the area of transplantation support presumed consent, while 31% of those same doctors favor expressed consent. *See* Michielsen, *supra* note 203, at 357. A large majority of doctors in the ICUs, however, oppose presumed consent. *See id.* Studies also show that presumed consent is not favored by the British public. In 1998, surveys showed that only 25% of the people in the United Kingdom favored mandatory donation. *See* OECD, *supra* note 17, at 18.

209. *See* Deehan, *New Labour*, *supra* note 182, at 1138. This argument is similar to that made against the commercialization of organ procurement in Britain. In fact, the Human Organ Transplants Act of 1989 was adopted in response to the very situation where the poorer segments of society were being taken advantage of. *See supra* note 184 and accompanying text. It seems that the BMA is afraid that if presumed consent is embraced, the lower classes of society might unwillingly become organ donors because they have less knowledge about what must be done to register their objections.

210. *See* Deehan, *New Labour*, *supra* note 182, at 1138.

consent in France and Belgium[211] show, however, that requiring consent of the family weakens the presumed consent system, causing it to behave as a system of expressed consent.

Perhaps another reason why Britain has not yet embraced presumed consent is that a majority of the general public dislikes it. Surveys conducted by Miranda and Matesanze in 1998 indicate that only twenty-five percent of the population of the United Kingdom supports a system of mandatory organ donation.[212] Should presumed consent ever be adopted in Britain, the lack of public support would surely reduce its effectiveness and probably erase any advantage that presumed consent might have over the current British system of volunteerism.

Another, perhaps more likely, reason for the BMA's unwillingness to support presumed consent is that it legally shifts the decision about organ donation from the family to doctors themselves.[213] Fear of litigation causes the doctors to be more hesitant about embracing a system that exposes them to possible liability. Again, the study of other nations emphasizes that even though doctors may escape liability if they act according to the law, they are usually very reluctant to proceed with organ harvesting without gaining the consent of the family.[214]

Given the failure of existing organ procurement regulations to increase the number of organs available for transplant and the reluctance of the medical community, as well as the public, to accept a system of presumed consent, it becomes necessary to look to other ways of increasing the supply of transplantable organs. Xenotransplantation offers an alternative that appears to overcome many of the shortfalls of existing law while potentially bringing an end to the organ supply crisis.

V. XENOTRANSPLANTATION

Xenotransplantation is not a new phenomenon; however, the term itself is so new that many non-medical dictionaries do not list it.[215] Generally, "xenotransplantation" refers to the replacement, usually by a surgical operation, of a damaged or diseased human organ with a comparable healthy organ from an animal.[216]

The first hint of xenotransplantation, animal-human transfusions, occurred in the mid-1660s, shortly after the realization that blood circulated

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211. *See supra* notes 76-90 and accompanying text.

212. *See* OECD, *supra* note 17, at 18.

213. *See* Michielsen, *supra* note 203, at 357.

214. *See supra* note 48 and accompanying text.

215. *See* Kress, *supra* note 28, at 353.

216. *See id.* The word is actually derived from the Greek word "xeno" meaning different. Thus, xenotransplantation means the transplantation of organs from different species.

throughout the body.[217] Dr. Richard Lower conducted the first authenticated transfusion in which he injected lamb's blood into the veins of a 'mildly melancholic' man in 1667, apparently with no resulting harm.[218] Jean Baptiste Denys, a French philosopher, conducted four similar transfusions in experimental procedures.[219] Three of the patients survived the transfusions; however, the fourth died, causing the philosopher to be charged with murder.[220] The court exonerated him, but a subsequent decree limited further transfusions.[221]

Three hundred years later, scientists performed the first somewhat successful animal-human organ transplants. In the 1960s, several primate-human kidney transplantations occurred.[222] A gentleman in Mississippi received a chimpanzee heart in 1964; however, he survived only ninety minutes following the operation.[223] In a subsequent attempt, a man lived for three days after receiving a chimpanzee's heart in 1977.[224] The famous case of "Baby Fae" occurred in 1984 at Loma Linda, California. It involved the transplantation of a baboon heart into a fourteen day old baby.[225] Baby Fae survived two and one-half weeks.[226]

As these examples indicate, low survival rates plagued early efforts at xenotransplantation. The development of immunosuppressive drugs, however, made the likelihood of longer survival rates following

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217. *See* LAMB, *supra* note 49, at 111.

218. *See id.*

219. *See id.*

220. *See id.*

221. Perhaps one reason that the decree was issued was the statement that Denys gave describing the results of the transfusion of incompatible blood. It stated:

> As soon as the blood entered into his Veins, he felt the same heat all along his arm and in the Armpits which he had done before. His Pulse was forthwith raised, and a while after we observed a great Sweat sprinkeled all over his face. His pulse, at this moment was very much altered; and he complained of a great Pain and Illness in his Stomach and that he should be presently choaked, unless we would let him go . . . By and by he was laid on his bed, and after he had for two hours sustained much violence, vomited up divers liquors which had disturbed his Stomach, he fell into a profound sleep about ten a clock, and slept all that night without intermission till eight a clock the next day . . . When he awakened he seemed wonderfully composed and in his right mind, expressing the Pain and universal weariness he felt in all his members. He pist a large glass full of such black Urine that you would have said it has been mixed with soot.

Id. at 111-112.

222. *See id.* at 112.

223. *See id.* For medical information regarding this procedure, see James D. Hardy, M.D. et al., *Heart Transplant in Man*, JAMA 1132-40 (1964).

224. *See* LAMB, *supra* note 49, at 112.

225. *See* Schwartz, *supra* note 14, at 431. For medical information regarding this procedure see Thomasine Kushner & Raymond Belliotti, *Baby Fae: A Beastly Business*, 11 J. MED. ETHICS 178-83 (1985).

226. *See* Schwartz, *supra* note 14, at 431.

xenotransplantation procedures possible.[227] Coupled with the fact that current legislation fails to meet the demand for usable organs,[228] increased survival indicates that xenotransplantation represents a real possibility in the effort to eliminate the organ shortage.[229]

Xenotransplantation offers several advantages over traditional cadaveric organ transplantation.[230] Perhaps the most important is the availability of organs for transplant.[231] Scientists agree that the animal of choice for xenotransplantation purposes is the pig. Unlike the non-human primates, some of which are on the endangered species list,[232] pigs, generally, are healthier than primates, which often harbor many viruses that might eventually manifest themselves in the human organ recipients.[233] Furthermore, pigs breed easily and often have larger litters than primates,[234] thus producing a greater number of potential organs.

The ability to make transplants elective procedures constitutes a second advantage of xenotransplantation.[235] A successful transplant depends greatly

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227. Monkey hearts transplanted into baboon functioned an average of 296 days in experiments using daily treatments that combine cyclosporine, prednisone, and Mycophenolate Mofetil (MMF). *See* Stephen C. Rayhill & Hans W. Sollinger, *Mycophenolate Mofetil: Experimental and Clinical Experience*, *in* IMMUNOSUPPRESSION IN TRANSPLANTATION 47, 54 (Leo C. Ginns et al. eds., 1999). Treatments with immunosuppressive drugs occur with allotransplantation (human-human transplantation) as well. In fact, almost all transplant recipients remain on immunosuppressive drugs for the rest of their lives. *See* Kress, *supra* note 28, at 354.

228. Demand for organs is increasing as more medical centers are able to perform transplantation surgery and improvements are made in the techniques for managing rejection and infection. The laws simply are not adequate to meet the demand for organs. Even if policies are changed, better access to care, the AIDS epidemic, public ambivalence toward cadaveric organ donation and public health measures such as seat belt laws, higher ages for purchasing alcohol and tougher drunk driving laws all make it unlikely that the number of organs donated will increase. *See* ARTHUR L. CAPLAN, AM I MY BROTHER'S KEEPER? 104 (1997) [hereinafter CAPLAN, BROTHER'S KEEPER].

229. Xenotransplantation is being promoted as an alternative to current organ procurement methods because "it has the most realistic present-day potential for alleviating a certain shortage of organs, thus possibly saving tens of thousands of human lives each year in the United States alone." Kress, *supra* note 28, at 381.

230. *See* Donald V. Cramer & Leonard Makowka, *The Use of Xenografts in Experimental Transplantation*, *in* HANDBOOK OF ANIMAL MODELS IN TRANSPLANTATION RESEARCH 299 (Donald V. Cramer et al. eds., 1994).

231. The authors note that the greatest limit on the pool of organ recipients is the current shortage of organs. If availability of organs were to increase, then the number of transplants performed would also increase, as would the number of people who would benefit from the procedure. *See id.*

232. Chimpanzees are an endangered species, with approximately 100,000 left in the world. Their survival would be impossible if they were used as a source of organs. *See* LAMB, *supra* note 49, at 113.

233. Rebecca D. Williams, *Organ Transplants from Animals: Examining the Possibilities* (visited Sept. 8, 1999) <http://www.fda.gov/fdac/features/596_xeno.html>.

234. *See id.*

235. *See* Cramer & Makowka, *supra* note 230, at 299-300.

on the timing of the procedure. Indeed, timing is essential to a good outcome and an improved graft survival.[236] Advanced planning of surgery improves the chance of the patient's overall better health at the time of the operation because of the shorter wait for an organ and the decreased progression of the patient's disease.[237] The patient's better health at the time of surgery ultimately leaves him stronger during the recovery period.[238]

Xenotransplantation also allows a better size match between organs and recipients.[239] Currently, difficulty exists in obtaining organs for small adults and children.[240] Xenotransplantation offers a larger selection of organs from which to choose in matching donor organs with patients requiring them, and thus serves a broader spectrum of patients.

People object to xenotransplantation on a number of ethical grounds. Some argue that God divided humans and animals and that man should not cross that barrier.[241] A group of distinguished theologians disagreed with this religious argument when asked by the President's Commission for the Study of Ethical Problems in Medicine if Christian theology or Jewish law contains a prohibition against crossing species.[242] This objection also fails when one considers that a number of medical procedures currently use animal "parts" as replacements for comparable human body parts—surgical sutures come from sheep intestines, cow bones and tendons replace human bones and tendons damaged in accidents, and heart valves from pigs replace human heart valves.[243] Furthermore, the dramatically successful polio vaccine originates from monkey kidney cells.[244]

Proponents of animal rights provide another argument against xenotransplantation. They argue that it is unethical to kill animals for human purposes and to use animals that are on the endangered species list as sources for organs.[245] Those supporting xenotransplantation point out, however, that, while animals may have traits that entitle them to moral consideration and respect, treating them as equals in matters regarding human life and death

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236. *See id.* at 300.

237. *See* Williams, *supra* note 23.

238. *See id.*

239. *See* Cramer & Makowka, *supra* note 230, at 300.

240. *See id.* The shortage of organs is so severe that 30% to 50% of children under age two whose names appear on transplant waiting lists die prior to an organ becoming available. *See* John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL'Y 197, 197-98 (1994).

241. *See* Albert R. Jonsen, *Ethical Issues in Organ Transplantation, in* MED. ETHICS 251, 253 (Robert M. Veatch ed. 1997).

242. *See id.*

243. *See* LAMB, *supra* note 49, at 112. In 1988, Britain used approximately 1500 heart valves from pigs in humans with heart valve disease. *See id.* at 113.

244. *See* Kress, *supra* note 28, at 365.

245. *See* Jonsen, *supra* note 241, at 254.

overlooks what differentiates us from them.[246] One author suggests that animals raised as organ donors "will be among the healthiest and happiest creatures on the globe."[247] Because recipients want assurances of healthy animals, mistreatment or poor maintenance appears unlikely.[248] The International Transplantation Society, through its Ethics Committee, embraced xenotransplantation as ethical under controlled circumstances and made recommendations for the study of the procedure that were adopted in 1993.[249]

The transmission of infectious agents to humans through transplanted organs represents another significant concern of xenotransplantation.[250] Virus

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246. *See* CAPLAN, *supra* note 228, at 114. Perhaps killing pigs for breakfast raises legitimate questions of ethical concern, but breeding pigs specifically for the purpose of saving a human life makes moral sense. *Id.* In an article in the Journal of Medical Ethics, John Martin wrote that:

> Because of the clear distinction drawn between the nature of man and animals, if there is conflict between the well-being of one and the other then man's well-being must automatically come first. The application of such a philosophical approach to the problem of animal experimentation for medical need is helpful in a situation where emotions again give us opposing signals: a desire to cure . . . human disease and a desire not to harm animals. [This] approach clearly justifies that animal experimentation was done in the kindest way possible to help promote kindness towards man in the world.

Reprinted in Arthur L. Caplan, *Humans Should Be Allowed to Receive Animal Organ Transplants, in* BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS 223, 227 (Terry O'Neill ed., 1994).

247. *See* CAPLAN, BROTHER'S KEEPER, *supra* note 228, at 113.

248. *See id.*

249. The Ethics Committee's recommendations include:

1. The feasibility of human xenotransplantation should have been demonstrated before clinical trials by demonstrable success in an appropriate non-rodent animal xenograft model.
2. The clinical trials should be carried out:
   (a) by groups with a fully co-ordinated preclinical and clinical programme;
   (b) with local institutional and/or State or National Ethics Review Board approval;
   (c) with informed recipient consent.
3. The care and humane treatment of animals must always be of the highest standards.
4. All animal studies in transplantation must be approved by an institutional and/or State or National Ethics Review Board.
5. Endangered species must not be used.
6. Animals bred for the purpose of transplantation are the preferred source.
7. Research designed to diminish the need for use of animals in experimentation is to be encouraged.

Ethics Committee of the Transplantation Society, *Recommendations on Human Xenotransplantation from the Ethics Committee of the Transplantation Society (1993), reprinted in* Sir Roy Calne, *Ethics in Organ Donation and Transplantation: The Position of the Transplantation Society (1996), in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 62, 64 (Jeremy R. Chapman et al. eds., 1997). The Council of the Transplantation Society adopted these recommendations on May 28, 1993. *Id.*

250. Michael Crichton wrote of medical activities that reached across species and unleashed new diseases of epidemic proportions in his book, THE ANDROMEDA STRAIN.

transmission becomes especially likely considering that patients receiving the xenograft must take drugs that purposely suppress their immune systems.[251] The fear of such viruses spreading throughout the population caused Britain to issue a moratorium on xenotransplantation until scientists know more about the risks involved.[252] There is hope that raising animals for xenotransplantation in pathogen-free environments, with limited exposure to infectious agents, will minimize the risks.[253]

The potential for a decrease in the number of human organs donated represents a final concern with xenotransplantation. Scientists foresee the publicity surrounding the success of xenotransplantation persuading the public that human organs are no longer needed.[254] This may lead to a new shortage of transplantable organs.[255]

Scientists are apprehensive that a similar, though less catastrophic event, could occur. *See* Kress, *supra* note 28, at 365, 377. History provides several examples of diseases that have jumped the species barrier: the Ebola virus in Africa during the 1970s and the 1990s, the cercopithecine herpes virus 1 from macaques, Creutzfeldt-Jakob Disease ("mad cow disease") in Great Britain, and the disease in Hong Kong that caused the country to slaughter millions of chickens. *See id.* at 377-78. Additionally, evidence suggests that HIV-2 may have originated in chimpanzees, macaques, or red-capped mangabeys. *See id.* at 378.

251. *See* Kress, *supra* note 28, at 376.

252. Rachel Arrundale, the official in the U.K. Department of Health responsible for the nation's xenotransplantation policy, interprets the position of her government as one of caution. *See id.* at 382. She indicates that xenotransplantation will not occur now, but will proceed once "sufficient evidence of safety has been advanced." *See id.* Instituted in January 1997, Britain's stance has been referred to as a moratorium and has been strongly supported by prominent xenotransplantation researchers. *See id. See generally Britain Plays It Cautious on Animal-Human Transplants*, NATURE, Jan. 23, 1997, at 285 (indicating that a moratorium has been issued in the United Kingdom because of the fear of infectious disease); Peter J. Morris, *Pig Transplants Postponed: Until We Know More About Graft Rejection, Physiology, and Infectivity*, 314 BRIT.MED.J. 242 (Jan. 25, 1997) (stating that the Nuffield Bioethics Committee has concluded that xenotransplantation trials are not appropriate given the insufficient knowledge of cross-species infection); John Warden, *Xenotransplantation Moves Ahead in UK*, 317 BRIT. MED. J. 365 (Aug. 8, 1998) (discussing Health Secretary, Frank Dobson's, statement that xenotransplantation trials will only be allowed when he is satisfied that the risks are acceptable).

253. Cloning offers promise for the opportunity to minimize infection risks prior to any risk presentation. *See* Jodi K. Fredrickson, *He's All Heart . . . And a Little Pig Too: A Look at the FDA Draft Xenotransplant Guideline*, 52 FOOD & DRUG L. J. 429, 451 (1997). Recent successes in that area may allow scientists to breed and raise animals in environments that are almost entirely pathogen-free. *See id.* at 450.

254. *See* Kress, *supra* note 28, at 361.

255. Xenotransplantation probably will result in a decrease in cadaveric organ donation because of negative media, revulsion, fear of technology, and a perception that a viable alternative exists which makes donation unnecessary. *See* A.S. Daar, M.D., Ph.D., *Ethics of Xenotransplantation: Animal Issues, Consent, and Likely Transformation of Transplant Ethics*, 21 WORLD J. SURGERY, Nov./Dec. 1997, 975, 978-79. Similarly, the current shortage of organs is exacerbated by public health and safety efforts that attempt to reduce the number of gunshot victims and individuals who die in automobile accidents from whom many hearts are obtained for transplant. *See* Kress, *supra* note 28, at 361. Economists refer sarcastically to this

Scientifically, rejection of animal organs by the human body presents the greatest obstacle to the success of xenotransplantation.[256] Rejection involved in xenotransplantation takes two forms—concordant and discordant.[257] Concordant rejection usually takes a number of days to occur and involves closely related species combinations such as baboons to man.[258] Discordant rejection, on the other hand, usually occurs within minutes following the procedure and involves distantly related species combinations such as pigs to man.[259]

The strategy for decreasing the rejection rates of discordant species involves genetically altering the species in order to make its organs more acceptable to the human body.[260] The British biotechnology company, Imutran, claims that it can inject human genetic material into pig embryos so that the pig organs carry genetic codes similar to those of humans.[261] By carrying the genetic code for human regulator proteins, the pig organs trick the human body into recognizing the xenotransplant as a human organ and avoid rejection of the organ.[262]

Xenotransplantation offers hope to many who may otherwise suffer the consequences of inadequate organ procurement legislation. While the technology for this procedure continues to develop at seemingly rapid rates, the legal aspects of xenotransplantation lag behind, due primarily to a quest for certainty of the unknown. The United States and the United Kingdom

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phenomenon as deriving from the "Law of Unintended Consequences." *See id.*

256. *See* David J.G. White, *Xenotransplantation—A Solution to the Donor Organ Shortage, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 446, 447 (Jeremy R. Chapman et al. eds., 1997).

257. *See id.* at 448.

258. Although concordant animal donors such as baboons are preferable from the standpoint that rejection does not occur as quickly, non-human primates are not favored because of the possibility that they are on the endangered species list and because their level of intelligence and social structure lead to questions regarding the ethics of their use. *See id.*

259. *See id.* Discordant rejection is sometimes referred to by people in the medical community as "hyper-acute" rejection. *See id.* Discordant xenotransplantation offers the greatest hope for the future of organ transplantation. *See id.* at 449. Pigs, a discordant species, are the animal of choice for xenotransplantation because their use as a food source makes them more acceptable as organ donors, they breed well, produce large litters, grow quickly and are easily cared for. *See id.*

260. Transgenic modification involves injecting a foreign gene (transgene) into the cells of an animal. *See generally* White, *supra* note 256 at 449-454 (discussing the scientific aspects of creating transgenic pigs for organ transplantation); INSTITUTE OF MEDICINE, *supra* note 3, at 30-32 (discussing the history and process of creating transgenic animals for organ donation).

261. *See* Fredrickson, *supra* note 253, at 435. The first transgenic pig was developed at Imutran by Dr. David White, research director, in 1992, when he injected human genetic material into pig embryos. *See* Klotzko, *supra* note 22, at 1. Imutran transplanted pig hearts "humanised" in this way into monkeys without the occurrence of hyper-acute rejection. *See* Kelly Morris, *No Early Rejection of Animal Organs in UK*, 349 LANCET 257 (Jan. 25, 1997).

262. *See id.*

both recognize the possibility of xenotransplantation, but each takes a different approach to the actual implementation of clinical human xenotransplanation trials.

A. *Xenotransplantation in the United States*

Xenotransplantation in the United States enjoys a reemergence of sorts. During the 1960s and 1970s, doctors in this nation performed approximately twenty xenotransplanation procedures.[263] The failure of these procedures,[264] as well as the advent of renal dialysis, caused the transplant community to invoke a voluntary moratorium on xenotransplantation.[265] However, the desperate need for organs, accompanied by the introduction of new immunosuppressants, led to the end of the moratorium in the 1980s.[266]

Some describe the United States' approach to xenotransplantation as aggressive.[267] Unlike other nations, such as the United Kingdom, the United States moves forward with caution, evaluating the risks along the way.[268] The Public Health Service Guideline, published in 1996, represents this permissive governmental attitude. This Guideline places the responsibility for the coordination of xenotransplantation, including clinical trials, in the hands of the already existing Food and Drug Administration (FDA) and the Center for Disease Control (CDC).[269] Coupled with the 1999 Amendments to the Public Health Service Act, this Guideline forms a framework for the study and use of xenotransplantation in the United States.

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263. In 1963 and 1964, doctors at Tulane University transplanted chimpanzee kidneys into six patients. *See* INSTITUTE OF MEDICINE, *supra* note 3, at 6. Twenty procedures, including experimental surgeries performed at the University of Pittsburgh, occurred in the United States by 1974. *See id.*

264. One of the patients receiving a chimpanzee kidney at Tulane University survived nine months after the procedure. *See id.* While the other grafts appeared to function normally, patients eventually died from graft rejection or infection resulting from large doses of immunosuppressive drugs. *See id.*

265. Other nations, including Sweden, China, and Hungary, proceeded to participate in xenotransplant trials during this time. *See id.* at 6-7. Even during the 1990s, when the United States and many European nations failed to engage in active clinical trials, several countries including Russia, China and other Eastern European nations, continued their efforts. *See id.* at 7. Poor patient documentation, follow-up, and publication leave the efficacy of these trials unknown. *See id.* at 7-8.

266. *See id.* at 7. One of these new immunosuppressants was cyclosporine, discussed *supra* note 16.

267. *See* Daar, *supra* note 255, at 980.

268. *See id.*

269. *See id.* This is very different from the United Kingdom, which established a new national committee to regulate xenotransplantation issues. *See infra* note 313 and accompanying text.

1. *Public Health Service Draft Guideline on Xenotransplantation*

In an effort to minimize the spread of infectious disease from animals to organ recipients and the general public, the United States Public Health Service (USPHS) published a guideline[270] in 1996[271] that addresses the issue of public health risks associated with xenotransplantation.[272] Inquiries from institutional review boards (IRBs) regarding the treatment of applications for the research and performance of xenotransplants prompted the development of the Guideline.[273] The Public Health Service Draft Guideline on Xenotransplantation (Guideline) attempts to achieve the goal of minimizing the spread of infectious disease by xenotransplantation through provisions that range from detailing the function of the transplant team to creating a centralized database for long term safety data.[274]

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270. The Guideline is non-binding, but is considered the minimum standard of care necessary in the performance of xenotransplantation. *See* Fredrickson, *supra* note 253, at 443. The decision to implement the Guideline rather than binding regulations exemplifies the FDA's policy of allowing greater flexibility to a developing industry while providing insight into the FDA's views. *See id.*

271. For a list of critical events leading to the publication of the Guideline see Food and Drug Administration, *Fact Sheet on Xenotransplantation* (visited Sept. 8, 1999) <http://www.fda.gov/opacom/backgrounders/xeno.html>. Just prior to the publication of these Guidelines, the Institute of Medicine published a report concluding that the benefits of xenotransplantation justified taking the risks of infection and calling for clinical trials to proceed. *See* Daar, *supra* note 255, at 980. The report also called for a national committee to coordinate xenotransplantation research and trials. *See id.*

272. *See* Daar, *supra* note 255, at 980.

273. *See* Fredrickson, *supra* note 253, at 433. The FDA was without the expertise to provide guidance on xenotransplantation so it sponsored a study on xenotransplantation, conducted by the Institute of Medicine (IOM), which ultimately resulted in the Guidelines. *See id.* The IOM, in its report to the FDA, made five recommendations to address the possibility of xenotransplantation clinical trials: 1) the establishment of guidelines that address the screening of donor animals, surveillance of recipients and those close to them, creation of tissue banks for animal sources and recipients, and the creation of national registeries; 2) the requirement that all physicians and hospitals adhere to certain national guidelines; 3) that the ethical considerations involved in xenotransplanation be investigated; 4) that the bodies responsible for establishing the guidelines be coordinated; and 5) that xenotransplantation be permitted when scientific support exists. *See id.* at 433-434. These recommendations were substantially incorporated into the Guidelines. *See id.* at 434.

274. The Public Health Service document:

> 1. Outlines the composition and function of the xenotransplant team in order that appropriate technical expertise can be applied and that adequate data management, tissue storage, and surveillance procedures can be established.
>
> 2. Discusses aspects of the clinical protocol, clinical center and the informed consent relevant to public health concerns regarding infections associated with xenotransplantation.
>
> 3. Provides a framework for pretransplantation animal source screening to minimize the potential for cross-species transmission of known and unknown zoonotic agents.
>
> 4. Recommends approaches for postxenotransplantation surveillance to monitor for the potential transmission to the recipient and health care workers of infectious agents,

Under Section 2 of the Guideline, the transplant team involved in the xenotransplantation procedure must include, in addition to the transplant surgeons, individuals such as physicians specializing in infectious disease with experience in zoonoses,[275] transplantation, and microbiology; veterinarians; transplant immunologists; hospital infection control specialists; and directors of clinical microbiology laboratories.[276] All clinical centers involved in xenotransplantation must be associated with an accredited virology and microbiology laboratory whose Biosafety Committee, Institutional Animal Care and Use Committee, and Institutional Review Board review the protocol for xenotransplantation.[277] The protocol must detail the methods for screening for known infectious diseases and outline the steps taken in surveillance of the herd, as well as include a history of the source animals.[278] Finally, those persons obtaining consent from the recipient should adhere to good clinical practices and ethical principles.[279]

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including unlikely or previously unrecognized agents.

5. Recommends hospital infection control practices to reduce the risk of nosocomial transmission of xenogeneic infectious agents.

6. Recommends the archiving of biologic samples, (including sera, plasma, leukocytes, and tissues), from the source animal and the transplant recipient for the potential investigation of infectious diseases arising from xenotransplantation which could impact upon the public health.

7. Recommends the creation of a centralized database. This database will address the need for long term safety data required for public health investigations.

Draft Public Health Service (PHS) Guideline on Infectious Disease Issues in Xenotransplantation, §1.3, 61 Fed. Reg. 49,920, 49,922 (1996).

275. "Zoonoses" is defined as "diseases and infections that naturally transmitted from vertebrate animals to human beings." WEBSTER'S ENCYCLOPEDIC DICTIONARY 1148 (1990).

276. *See* Draft Public Health Service (PHS) Guideline on Infectious Disease Issues in Xenotransplantation, §2.1, 61 Fed. Reg. 49,920; 49,922 (1996).

277. The FDA must still review and approve the proposed action before the procedure is performed. Draft Public Health Service (PHS) Guideline on Infectious Disease Issues in Xenotransplantation, §§2.2-2.3, 61 Fed. Reg. 49,920, 49,922-49,923 (1996). The FDA has given its approval to some of these xenotransplantation protocols. One clinical trial that received a great deal of publicity involved the 1995 transplantation of a baboon's bone marrow into a patient suffering with acquired immunodeficiency syndrome (AIDS). *See* Daar, *supra* note 255, at 980-981. The FDA has also approved studies including "perfusing fetal pig liver for acute liver failure, transplantation of pig neural tissue intopatients with Parkinson's disease, and use of pig islets in patients with diabetes." *Id.*, at 981.

278. *See* Draft Public Health Service (PHS) Guideline on Infectious Disease Issues in Xenotransplantation, §2.4, 61 Fed. Reg. 49,920; 49,923 (1996).

279. The Guideline suggests that information provided to the organ recipient address the following points:

1. The potential for infection from zoonotic agents known to be associated with the donor species.

2. The potential for transmission of unknown xenogeneic infectious agents to the recipient. The patient should be informed of the uncertainty regarding these risks, the possibility that infections with these agents may not be recognized for some time, and that the nature of clinical diseases that these agents may cause are unknown.

3. The potential risk for transmission of xenogeneic infectious agents to the recipient's

Section 3 of the Guideline requires that animals used in xenotransplantation come from closed herds.[280] It expressly forbids the use of wild and imported animals, and allows the use of captive free-ranging animals only when suitable for a given procedure.[281] Section 3 also addresses issues regarding the record-keeping, the screening of animals for infectious disease, the qualifications for animals, and the archiving of animal medical records and specimens at the animal facility.[282]

In Section 4, the Guideline addresses the clinical issues related to xenotransplantation. These include procedures for surveillance of the recipient following the transplantation procedure as well as for informing those closest to the recipient of the possibility of xenogeneic infections.[283] The Guideline also explains the requirements of the hospital and the health-care team with regard to their ability to identify both known and unknown infectious diseases and to collect and store samples for investigation of possible infections.[284]

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family or close contacts, especially sexual contacts. Close contacts are defined as household members and others with whom the recipient participates in activities that could result in exchanges of body fluids. The recipient should be informed that transmission of these agents may be minimized by the use of barriers during sexual intercourse and that infants, pregnant women, elderly, and chronically ill or immunosuppressed persons may be at increased risk for infection from zoonotic or opportunistic agents.

4. Any need for isolation procedures during hospitalization (including the estimated duration of such confinement), and any specialized precautions (e.g., dietary, travel) following hospital discharge.

5. The need to comply with long-term or potentially life-long surveillance necessitating routine physical evaluations with archiving of tissue and/or serum specimens. The schedule for clinical and laboratory monitoring should be provided to the extent possible. The patient should be informed that any serious or unexplained illness in themselves or their contacts should be reported to their physicians immediately.

6. The need for the subject to inform the investigator or his/her designee of any change in address or telephone number in order to maintain accurate data for long-term health surveillance.

7. Discussion with the patient regarding performance of a complete autopsy. Joint discussion with the recipient and his/her family concerning the need to conduct an autopsy is also encouraged in order to communicate the recipient's intent.

8. Access by the appropriate public health agencies to all medical records. To the extent permitted by applicable laws and/or regulations, the confidentiality of medical records will be maintained.

9. Consent forms should state clearly that xenograft recipients should never, subsequent to receiving the transplant, donate whole Blood, blood components, Source Plasma, Source Leukocytes, tissues, breast milk, ova, sperm, or any other body parts for use in humans.

Id. §2.5.

280. *See id.* §3.1.

281. *See id.*

282. *See id.* §§3.2-3.7.

283. *See id.* §§4.1-4.2.

284. *See id.* §§4.3-4.4.

The final section of the Guideline suggests the establishment of a national registry that allows for the rapid identification of common features among xenograft recipients and provides a data base for monitoring safety.[285] Furthermore, the Guideline calls for the storage of sera, plasma, leukocytes, and tissue of both the source animal and the recipient to be stored for investigation purposes.[286]

The Guideline invites applause, especially for its treatment of the issue of informed consent in xenotransplantation. One author supports the Guideline's efforts in handling the "unique issues necessitated by the nature of xenotransplant research."[287] She believes that the Guideline, in requiring more information to be given to the patient, recognizes the significant risks involved in xenotransplantation and takes the appropriate steps to assure that the individuals involved are fully aware of their undertaking.[288] The shortcoming of the Guideline in this area, however, rests in the lack of informed consent owed to those closest to the recipient.[289] Some suggest that the present scheme ultimately puts the public at risk of infection because it leaves close contacts ignorant of the implications of xenotransplantation.[290] This area requires further reform so those closest to the xenotransplant recipient can protect themselves.[291]

A criticism of the Guideline addresses its efforts to control infectious disease. While the Guideline adequately speaks to the process of searching for and minimizing known infections, it lacks initiative when it comes to those diseases that are presently unknown.[292] Change in this area should involve the development of clear illustrations of the methods used in the identification of unknown agents and further research into how to minimize the risks of infection.[293]

The Guideline provides an excellent starting point for the regulation of xenotransplantation in the United States.[294] Efforts to learn more of xenotransplantation continue, however, and the law attempts to aid in these

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285. *See id.* §5.1.

286. *See id.* §5.2.

287. Fredrickson, *supra* note 253, at 446.

288. *See id.*

289. *See id.* at 447.

290. *See id.*

291. *See id.*

292. *See id.* at 451. During the comment period for the Guidelines which ended in December 1996, Jonathon Allan of San Antonio, Texas, sent a letter signed by 44 scientists to the Center for Disease Control expressing their concerns that the Guidelines did not adequately address the possibility of infectious disease resulting from xenotransplantation. *See* Daar, *supra* note 255, at 980.

293. *See* Fredrickson, *supra* note 253, at 451.

294. *See id.*

labors. Congress's proposal for the 1999 Amendments to the Public Health Service Act indicates the government's commitment to increasing knowledge about xenotransplanation.

2. *1999 Amendments to the Public Health Service Act*

Members of the House of Representatives introduced HR 2418 on July 1, 1999.[295] Known as the "Organ Procurement and Transplantation Network Amendments of 1999" (Amendments), this legislation amends the Public Health Service Act in an attempt "to revise and extend programs relating to organ procurement and transplantation."[296]

The primary feature of the proposed legislation is its creation of an Organ Procurement and Transplantation Network that establishes and operates a national matching system for donors and recipients, establishes and maintains lists of individuals in need of transplants, establishes medical criteria for allocating organs, establishes a twenty-four-hour phone and computer service to aid in organ matching, establishes standards for the acquisition and transportation of organs, prepares and distributes samples of blood sera from individuals having difficulty receiving organs because of their immune systems, and actively works to increase the supply of donated organs.[297] Its efforts to increase the supply of organs include projects to increase transplantation among groups with special needs or limited access to transplantation and to study the impact of xenotransplantation.[298]

The Amendments have been heralded on three main points.[299] First, they reinforce the original intent of NOTA by restating that the private sector

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295. The bill was introduced by Rep. Bilirakis for himself, Rep. Green of Texas and Rep. Pallone. *See* H.R. 2418, 106th Cong. (1999). The history of the bill to date is as follows:

July 1, 1999 Referred to the House Committee on Commerce
July 21, 1999 Referred to the Subcommittee on Health and Environment
Sept. 30, 1999 Subcommittee Consideration and Mark-up Session Held
Forwarded by Subcommittee to Full Committee by Voice Vote
Oct. 13, 1999 Committee Consideration and Mark-up Session Held
Ordered to be Reported by Voice Vote
Nov. 1, 1999 Placed on Union Calendar, Calendar No. 250

See Bill Summary & Status for the 106th Congress, H.R. 2418 (visited Nov. 22, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:1:./temp/~bdbUYs:@@@X|/.../d106query.html>.

296. H.R. 2418, 106th Cong. (1999).

297. *See id.*

298. *See id.*

299. These points were discussed by Dr. William W. Payne, President of UNOS, liver transplant surgeon, and Director of the Liver Transplant Program at the University of Minnesota during his testimony before the House Commerce Committee Subcommittee on Health and the Environment on September 22, 1999. *See* UNOS News Bureau, *UNOS President Testifies in Support of H.R. 2418* (visited 10/1/99) <http://www.unos.org/newsroom/archive_newsrelease_19990922_nota.htm>.

and the medical community should have the responsibility for developing, establishing, and maintaining the medical criteria and standards for organ procurement and transplantation.[300] Second, they provide new direction in the areas of enforcement, accountability, and patient confidentiality.[301] Finally, the Amendments represent Congress' commitment to help the medical community increase the number of organs available for transplant.[302]

The Amendments' importance for xenotransplantation rests in the fact that they provide for the study of xenotransplantation at the local level,[303] freeing it from the confines of inhibiting federal regulations.[304] As one author points out, regulations provide less flexibility as technology progresses and cannot easily be changed.[305]

The Amendments represent continuing efforts in the United States to make xenotransplantation a real possibility. Given the increasing need for life saving organs, the significance of these efforts cannot be underestimated.

B. *Xenotransplantation In the United Kingdom*

British lawmakers take a more conservative approach to the regulation of xenotransplantation than do their American counterparts.[306] Rachel Arrundale, a U.K. Department of Health official, described the British stance on xenotransplantation as one of "no, but. . .," meaning that xenotransplantation may not proceed now, but will go forward once the government receives sufficient evidence of its safety.[307] Currently, a moratorium exists in Britain that forbids clinical xenotransplantation.[308]

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300. *See id.*

301. *See id.*

302. *See id.*

303. The study of xenotransplantation will be conducted by groups established under and regulated by the Organ Procurement and Transplantation Network, which is a private entity. *See* H.R. 2418, 106th Cong. § 2 (1999).

304. The Organisation for Economic Co-operation and Development (OECD) recognizes that, while extensive regulations generally insure the equitable distribution of acquired organs, laws and regulations may also make the procurement of organs more difficult. *See* OECD, *supra* note 17, at 18.

305. Regulations must comply with notice-and-comment procedures when first established and whenever substantive changes need to be made. *See* Fredrickson, *supra* note 253, at 443.

306. The British stance on xenotransplantation rests in the "precautionary principle." *See* Daar, *supra* note 255, at 980. This principle suggests that the government institute precautinary measures to avoid risks well ahead of any certainty about the natures of those risks, placing the burden of proof on those involved in developing the technology. *See id.*

307. *See* Kress, *supra* note 28, at 382. Dr. Amy P. Patterson, who chairs the FDA's Working Group on Xenotransplantation, alternately describes the United States position on xenotransplantation as one of "yes, if. . .," meaning that xenotransplantation may proceed in the United States if very strict rules are followed to insure safety. *See id.* at 381-82.

308. This moratorium began in January 1997, following the report of the British Department of Health's Advisory Group on the Ethics of Xenotransplantation. *See id.*

Frank Dobson, U.K. Health Secretary, indicates that this moratorium will continue until he believes that the risks are acceptable.[309]

Xenotransplantation regulation in Britain rests in the recommendations[310] of the Advisory Group on the Ethics of

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309. *See* Warden, *supra* note 252, at 365.

310. These recommendations are made in ADVISORY GROUP ON THE ETHICS OF XENOTRANSPLANTATION: ANIMAL TISSUE INTO HUMANS (1996) and are referred to as the "Kennedy Report." *See* Daar, *supra* note 255, at 979. The conclusions and recommendations made in the report include:

1. Xenotransplantation is a valid supplement; if alternative found, will require reassessment.
2. Ethically acceptable to consider using pigs for xenotransplantation for currently envisaged procedures
3. Ethically acceptable to manipulate genes (limits exist)
4. Not ethically acceptable to use subhuman primates as source animals except for limited research (minimize)
5. Evidence overall is too limited to proceed to clinical trials; further research needed (i.e. effective embargo at present)
6. Risk of infection with fungi, parasites, bacteria, prions acceptable when control mechanisms in place
7. Not enough known about porcine viruses to proceed to clinical trials
8. Standard of animal care to be defined; mechanisms to be put in place; minimize harm
9. Sequential removal of organs unethical
10. When ready to proceed to therapy, national body needed to commission allocation of resources.
11. Current allotransplant donation may be affected by xenotransplantation; need public education; need efforts to increase donation and prevent organ failure in the first place.
12. No need to change to presumed consent (which remains unacceptable) at present for cadaveric organ retrieval
13. Xenotransplant clinical trials will become ethically acceptable when all conditions met; but conditions are necessary, not necessarily sufficient, and do not imply progression to therapy
14. National Standing Committee to be established to set standards, coordinate, assess, license, approve research, and decide when trials should start; when clinical trials allowed:
    a. Children and incapacitated not to be subjects of research
    b. Consent and legal and ethical issues extraordinarily complex, but current principles should apply; independent counsel provided for recipient
    c. Psychosocial effects to be monitored
    d. Conscientious objectors not to be penalized in the current organ allocation criteria and waiting lists
15. Train veterinary technicians, nurses now; allow them conscientious objection privilege
16. Hospitals for transplantation to be assessed now
17. Biosecure movement of tissue to be controlled, documented
18. Xenograft tissues to be brought under same regulatory controls as established for drugs and medical devices
19. If private sector to do xenotransplants: to come under same regulatory framework
20. International cooperation important
21. National standing committee to guide/work with local research ethics committees

Id.

Xenotransplantation (Advisory Group),[311] a body responsible for reviewing the acceptability of xenotransplantation and studying the ethical framework in which it may be undertaken.[312] The Advisory Group found it ethical to genetically alter pigs for use in xenotransplantation but warned against proceeding with clinical trials until the government established a National Standing Committee[313] to supervise research, develop mechanisms to protect the public and patients, oversee the welfare of the animals, and determine when clinical trials should begin.[314]

The British government responded to the Advisory Group's recommendations by establishing the United Kingdom Xenotranplantation Interim Regulatory Authority (UKXIRA)[315] to approve experiments and monitor progress in xenotransplantation until the recommended statutory regulation[316] emerges.[317] In addition, the government requested more information regarding the unacceptability of using subhuman primates and the conclusion that insufficient information existed about the immunological response, physiology and risk of zoonosis to proceed with clinical human trials.[318]

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311. The Department of Health commissioned this Advisory Group which was chaired by Ian Kennedy, professor of medical law and ethics. *See* Marie Fox & Jean McHale, *Regulating Xenotransplantation*, 147 NEW L.J., Jan. 31, 1997, at 139; Morris, *supra* note 252, at 242.

312. *See id.* The report of the Advisory Group mirrors the conservative attitude of the Nuffield Council on Bioethics, which published a similar report in 1996. *See* Daar, *supra* note 255, at 979. For more information regarding this report see NUFFIELD COUNCIL ON BIOETHICS, ANIMAL-TO-HUMAN TRANSPLANTS: THE ETHICS OF XENOTRANSPLANTATION (1996).

313. Interestingly, the Advisory Group called for a committee to regulate xenotransplanation in Britain, whereas the Institute of Medicine in the United States, in a similar report published in July 1996 called for a national committee to coordinate xenotransplanation. *See* Daar, *supra* note 255, at 980.

314. *See* Daar, *supra* note 255, at 980.

315. This group consisted of a chairman (Lord Habgood) and eight appointed members drawn from diverse disciplines who were also meant to represent the general public. *See id.*

316. The Advisory Group recommended that this legislation include a provision allowing for the conscientious objection of health professionals who viewed xenotransplantation as unethical. *See id.* Under such a statute, these health professionals could opt out of participation in a xenotransplantation procedure without resulting prejudice to their careers. *See* Fox & McHale, *supra* note 311, at 139. Only two other statutes in Britain provide for conscientious objection by health professionals: Section 4 of the Abortion Act of 1967 and Section 38 of the Human Fertilisation and Embryology Act of 1990. *See id.* It appears that physicians in Britain may favor xenotransplantation. John Dark, who runs one of the United Kingdom's four heart transplant units, states that he sees "'no ethical problems in breeding pigs and using their hearts. We already use about 1,500 pigs' valves a year in humans with heart valve disease.'" *See* LAMB, *supra* note 49 at 112-113. Other surgeons at Columbia-Presbyterian have been conducting heart transplants from monkeys to baboons since 1984 and were ready to develop a program involving primate-to-human transplants by 1990. *See id.* at 113.

317. *See* Fox & McHale, *supra* note 311, at 139.

318. *See* Daar, *supra* note 255, at 980.

The UKXIRA released its criteria for handling applications to proceed with xenotransplantation during the summer of 1998.[319] These guidelines require that the secretary of state grant approval prior to any treatments.[320] The UKXIRA must consider any application made for clinical trials and may submit the proposal to other state bodies for approval prior to granting authorization.[321] The attention of UKXIRA now focuses on establishing standards of tissue quality, as well as developing a system to monitor xenotransplant recipients.[322]

British biologists comprise one group that strongly supports xenotransplantation. In a response to the Advisory Group's recommendations, the Institute of Biology (IOB)[323] issued a statement indicating its belief that xenotransplantation will eventually be required in order to meet the transplant demand.[324] The IOB confirmed that the demand for organs in the United Kingdom continues to grow at a rate of five percent per year, and that a seemingly more effective system of organ procurement, such as presumed consent, would most likely fail to keep up with demand in the long run.[325] The IOB also states that, while initial media attention may cause some degree of public scrutiny, the overall success of xenotransplantation will insure public acceptance of the procedure.[326]

Significant achievements in xenotransplantation were announced during the summer of 1999 that suggest that Britain's moratorium on xenotransplanation may soon end.[327] Imutran released the results of its study of 160[328] patients from eight countries who had been exposed to pig tissue

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319. *See* Warden, *supra* note 252, at 365.

320. *See id.*

321. *See id.* Once submitted to UKXIRA, a team of approximately six referees will scrutinize each proposal then forward it to other state bodies as needed. *See id.*

322. *See id.*

323. The Institute of Biology acts as an independent and charitable body empowered by Royal Charter to represent biologists and biology in the United Kingdom. *See* Institute of Biology (1996) *Response to the Advisory Group on the Ethics of Xenotransplantation, Made to the Department of Health* (visited Oct. 1, 1999) <http://www.primex.co.uk/iob/d13.html>. Individual membership in the Institute of Biology numbers approximately 15,000, with roughly 70 affiliated specialist biological societies participating as well. *See id.*

324. *See id.*

325. *See id.* The IOB attributes this continued increase in demand to the aging of the U.K. population. *See id.* It states that the increasing number of elderly in the nation require more organs than potential young donors can provide. *See id.* The increasing health and safety of Britain's younger population, from whom the most viable transplant materials are likely, act to decrease further the number of organs available for transplant. *See id.*

326. *See id.*

327. The media asserts that the findings of this study will bring an end to the moratorium on animal-to-human transplants. *See* Peter Gorner, *Study: Transplants from Animals Hold Promise for People*, NEWS & OBSERVER, Aug. 21, 1999, at A1.

328. The study included 36 patients deemed high risk who were suffering from weakened immune systems. *See id.*

during the previous eight years.[329] These results showed an absence of the pig virus "Perv" in all of the patients.[330] Moreover, the studies indicated a potential survival of the pig cells inside the human body of at least eight years.[331] These results offer hope that transgenic pig organs could overcome rejection by the human body and function for years.[332]

Government officials in Britain state that their policy regarding clinical human trials will change when they gather sufficient information to help them make knowledgeable decisions about the risks inherent in xenotransplantation. Perhaps the results of the Imutran study will provide the impetus for this change and bring an end to Britain's moratorium on xenotransplanation.

VI. CONCLUSION

Current legislation in both the United States and Britain proves inadequate to meet the demand of transplantable organs. Unfortunately, studies suggest that nothing can be done under the current systems of expressed consent and presumed consent that will ever provide enough organs.[333] Therefore, medical specialists must look elsewhere for viable alternatives to organ transplantation, and legislators must keep pace with new technology by providing efficient regulations for the procurement and transplantation of these alternatives.

The United States sets the pace for the regulation of xenografts in human clinical trials. Now that scientific studies dispel some of the fears that infectious disease will shift from pig tissue into the human recipients, Britain should end its moratorium on xenograft trials and focus Parliamentary efforts on relaxing the regulation of clinical human xenograft trials.

Britain has concerns over its organ shortage problem, but changing to a system of presumed consent will provide minimal relief at best. The goal

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329. *See id.*

330. *See* Roger Highfield, *Transplant Pig Cells 'Survive Eight Years,'* DAILY TELEGRAPH (London), Aug. 20, 1999, at 4.

331. *See id.*

332. *See id.*

333. It is estimated that the maximum number of potential cadaveric donors per million population in the United Kingdom could never exceed fifty, regardless of the circumstances. *See* Jeremy R. Chapman & Bill New, *Transplantation, in* ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 1, 8 (Jeremy R. Chapman et al. eds., 1997). As of 1995, the number of transplants performed per million population in the United Kingdom totaled 59 (28.9 kidneys, 11.3 liver, 5.6 heart, 0.9 heart/lung, 1.8 lung, and 0.5 pancreas). *See id.* at 16. *See also* CAPLAN, BROTHER'S KEEPER, *supra* note 228, at 104 (stating that even if all human cadaver organs were available for transplant, supply would never meet the potential demand).

of providing every needy patient with an organ would be better served by making the organ donor laws more inclusive and by allowing organs to come from sources other than humans.

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EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE IN THE UNITED STATES AND THE NETHERLANDS: PARADIGMS COMPARED

I. INTRODUCTION

The Supreme Court recently held in *Washington v. Glucksberg*[1] that assistance in committing suicide is not a fundamental right protected by the Due Process Clause of the Constitution.[2] The Court distinguished assisted suicide from the withdrawal of lifesaving treatment, recognizing the difference between the two as a rational, if not always easily discernable, dividing line.[3] The Court's decision rested in part on a Due Process analysis of the nation's relevant history and traditions concluding that there is a "commitment to the protection and preservation of all human life."[4] Chief Justice Rehnquist also stated that the debate on assisted suicide in America should continue.[5]

Currently, physician assisted suicide (PAS) is legal in only one state, Oregon.[6] However, an act of Congress may soon overrule that law. On October 27, 1999, the House of Representatives approved legislation[7] that would outlaw physician-assisted suicide as well as alleviate barriers to physicians providing aggressive palliative care.[8] Palliative care involves allowing physicians to regularly administer pain control medication (such as narcotics) to prevent pain rather than waiting for pain to manifest before treating it.[9] The Pain Relief Promotion Act has broad bipartisan support.[10]

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1. Washington v. Glucksberg, 521 U.S. 702 (1997).

2. *See id.* at 706.

3. *See id.* at 725-26.

4. *Id.* at 710. *See also* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.")

5. Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

6. *See* OR. REV. STAT. §§ 127.800-127.897 (1998).

7. *See* Pain Relief Promotion Act of 1999, H.R. 2260, 106th Cong. § 1 (1999). The act is designed "[t]o amend the Controlled Substances Act to promote pain management and palliative care without permitting assisted suicide and euthanasia. . ." *Id.* The Bill is not expected to reach the Senate until sometime after the first of the year (2000) due to the rush to adjourn. *See* David Hess, *Assisted Suicide Targeted By House,* INDIANAPOLIS STAR, Oct. 28, 1999, at A1. President Clinton is opposed to PAS so it is likely that he will sign the Bill into law if it passes the Senate. *See* Steve Woodward, *Oregon Looks Again to Netherlands,* THE OREGONIAN, Mar. 6, 1998, at D1. *See also* Washington v. Glucksberg, 521 U.S. 702, 718 (1997) (noting that President Clinton signed the Federal Assisted Suicide Funding Restriction Act on April 30, 1997).

8. *See* Hess, *supra* note 7.

9. *See* ANNE MUNLEY, THE HOSPICE ALTERNATIVE 21 (1983).

10. *See* Wesley J. Smith, *Don't Kill the Pain Relief Bill,* WALL ST. J., Nov. 4, 1999, *available in* 1999 WL-WSJ 24920685. In the House, 71 Democrats voted for the bill. *See id.* In the Senate, the bill's sponsors include Joe Lieberman (D., Conn.), Chris Dodd (D., Conn.),

The Supreme Court distinguished aggressive palliative care with the intent to alleviate pain from the prescription of drugs with the primary intention of causing death in *Vacco v. Quill*.[11]

It is important to distinguish between withdrawal of lifesaving treatment and euthanasia. Dr. Herbert Hendin, a psychiatrist, cautions that those who fail to draw this distinction confuse causation (the physician directly causes the death) with culpability (the physician allows the patient to die).[12] Dr. Hendin also emphasizes that protecting physicians who prescribe pain medication to ensure their patients' comfort when nearing the end of life does not legitimize legalizing euthanasia.[13] There is a significant difference between gradually administering pain medication to ensure that a patient is as comfortable as possible and prescribing a drug overdose.[14]

This Note compares the development of the laws concerning euthanasia[15] and PAS in both the United States and the Netherlands. Part II focuses on the background of the ethical debate concerning euthanasia and PAS. Part III chronicles the history and tradition of euthanasia law in the United States, and Part IV provides background and analysis of euthanasia and the law in the Netherlands. Part V concludes that the arguments against euthanasia outweigh the arguments in favor. Legalizing either euthanasia or

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and Evan Bayh (D., Ind.). *See id.*

11. Vacco v. Quill, 521 U.S. 793, 802 (1997). *Quill* is the companion case to *Washington v. Glucksberg*. The Supreme Court held that a New York statute prohibiting assisted suicide did not violate the Equal Protection Clause. *Id.* at 797. The New York Court of Appeals equated withdrawal of life-sustaining treatment with assisted suicide and held that patients have a right to hasten death regardless of the means used. *See id.* at 800. The Supreme Court's rationale for reversing this decision was based in part on the difference between refusing treatment (patient dies from the "underlying fatal disease or pathology") and ingesting a lethal substance (patient dies from the medication). *Id.* at 801. The Court also relied on the American Medical Association's emphasis on the "fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment." *Id.* at 801 & n.6 (quoting *American Medical Association, Council on Ethical and Judicial Affairs, Physician-Assisted Suicide*, 10 ISSUES LAW & MED. 91, 93 (1994)).

12. *See* HERBERT HENDIN, M.D., SEDUCED BY DEATH 160-62 (1997).

13. *See id.*

14. Another physician, Dr. Kenneth Praeger, points out that the danger of "blurring the distinction between mercy killing and the merciful use of drugs that may unintentionally hasten death" is that it desensitizes society to the logical distinction between the two. *Id.* at 162.

15. Euthanasia is defined as: "The mercy-killing of another for the purpose of ending the other's intolerable and incurable suffering: euthanasia is [usually] regarded by the law as second-degree murder, manslaughter, or criminally negligent homicide." BLACK'S LAW DICTIONARY 234 (1996).

Involuntary euthanasia is defined as: "Euthanasia of a competent, nonconsenting person." *Id.*

Nonvoluntary euthanasia is defined as: "Euthanasia of an incompetent, thus nonconsenting person." *Id.*

PAS or both violates the Americans With Disabilities Act[16] as well as the Fourteenth Amendment to the U.S. Constitution.[17]

II. BACKGROUND: THE ETHICAL DEBATE ON EUTHANASIA

A. *Arguments in Favor of Euthanasia and PAS*

The argument in favor of euthanasia rests, in part, on the presumption that the individual's right to self-determination outweighs the state's interest in preserving life.[18] Advocates of euthanasia argue that individuals should be able to control the manner in which their lives end.[19] The right to privacy is thought to outweigh the state's interest in preserving life.[20] One problem with this argument is that proposals for legalizing euthanasia and PAS advocate allowing only those with physical afflictions to make a determination to end their lives.[21] If the issue is truly one of autonomy and privacy from governmental intrusion, then the right should be extended to individuals who suffer from extreme mental pain as well as those who suffer from physical pain.[22] For example, it is conceivable that individuals who lose their spouses and children to fatal car accidents suffer unbearable mental anguish. Therefore, according to the autonomy rationale, the state should extend the right to die to these individuals as well.[23]

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16. 42 U.S.C. § 12101(a)(7)(1999): "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . ." *Id.*

17. U.S. CONST. art. XIV, § 1.

18. *See* Julie A. DiCamillo, Note, *A Comparative Analysis of the Right to Die in the Netherlands and the United States after Cruzan: Reassessing the Right of Self-Determination*, 7 AM. U.J. INT'L L. & POL'Y 807, 838-39 (1992).

19. *See id.* Note, however, that the autonomy argument is problematic because it misconstrues the doctor-patient relationship. *See* HENDIN, *supra* note 12, at 163. A patient cannot insist that a doctor administer a treatment that "is not consistent with sound medical practice." *Id.* For example, if a patient adheres to the medieval practice of bleeding to purify the body, the patient does not have the right to insist that the doctor perform according to this belief.

20. *See* DiCamillo, *supra* note 18, at 839.

21. *See* OR. REV. STAT. §127.805 (1998). Section 127.805 reads: "An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a *terminal disease*, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897." *Id.* (emphasis added).

22. *See* Not Dead Yet Homepage (visited Sept. 18, 1999) <http://acils.com/NotDeadYet/ndyscnr.html>.

23. *See id.*

Advocates of euthanasia also rely on the principle of beneficence.[24] Basically, the idea is that there is a merciful duty to prevent or alleviate pain and suffering.[25] This principle is used as an independent basis for legalizing euthanasia as well as a basis for supporting the aforementioned autonomy argument.[26] The issue of preventing unnecessary pain and suffering is addressed in part by the right[27] to refuse unwanted lifesaving medical treatment.[28] In addition, the Bill currently before Congress allows aggressive pain treatment "even if the use of (narcotics) to do so unintentionally hasten[s] death."[29] This aggressive treatment of pain is known as palliative care and is distinguishable from euthanasia because, although gradually increasing pain medication may accelerate death, the intent is not to cause death but rather to ease pain and ensure that the patient is as comfortable as possible during the process of dying.

Some advocates of PAS urge legitimizing the practice because they fear physicians will be exposed to liability for overmedicating narcotics and other pain relievers to ensure patients' comfort.[30] Dr. Timothy E. Quill points out that physicians receive inadequate education for effectively practicing palliative care and sometimes delay or discourage its use.[31] Because he

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24. *See* JOHN GRIFFITHS ET AL., EUTHANASIA AND LAW IN THE NETHERLANDS 172 (1998) [hereinafter GRIFFITHS ET AL.].

25. *See id.*

26. *See id.* The principle of beneficence is often used in response to the effects that recent medical developments have had, e.g. when continuing medical treatment may actually do more harm than good. *See id.* at 173. *But see* M. SCOTT PECK, M.D., DENIAL OF THE SOUL 7-10 (1997) (pointing out that determining whether or not continuing medical treatment is beneficial or harmful is often impracticable).

27. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997). "We have also assumed, and strongly suggested that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Id.*

28. *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278-79 (1990).

29. Hess, *supra* note 7, at A2. (quoting Representative Tom Coburn, who is also a physician).

30. *See* Joe Rojas-Burke, *Oregon Residents, Groups Divided on House Suicide Vote Some See the Action as Meddling in the State's Affairs; Others Say It Protects Caregivers and Patients*, THE OREGONIAN, Oct. 28, 1999, *available in* 1999 WL 28270476. *See also* TIMOTHY E. QUILL, M.D., DEATH AND DIGNITY MAKING CHOICES AND TAKING CHARGE 90-91 (1993) (addressing colleagues' concerns about liability for prescribing high doses of pain medication). *But see* Rojas-Burke, *supra*. Dr. Greg Hamilton, president of Physicians for Compassionate Care disagrees and thinks the distinction is easily made: When you prescribe 90 barbiturate tablets and an anti-nausea medication, there is no other purpose than to kill the patient." *Id.*

31. *See* QUILL, *supra* note 30, at 99-101. Once patients begin receiving palliative (or comfort) care, medical students no longer see them. The rationale for this is that there is no longer anything the medical student can do for the patient. *See id.* at 99. This is problematic because it means medical students lack training in communicating with and relating to dying patients. *See id.* at 99. Also, many physicians under-medicate even dying patients because pharmacology training emphasizes the dangers of addiction more than the need to effectively combat pain. *See id.* at 100. Dr. Quill wrote of his experience of assisting a patient commit

believes patients have a right to help with ending their lives once they "reach a point where they would rather die than continue living under the conditions imposed by their illness," Dr. Quill advocates legalizing PAS.[32] Dr. Quill advocates legalizing PAS but not euthanasia because he thinks euthanasia gives the physician excessive power and potential for coercion.[33]

On the other hand, ethicist Peter Singer[34] advocates both voluntary and non-voluntary euthanasia.[35] In his book, *Practical Ethics*, Singer states his belief that killing a disabled infant[36] is not morally wrong.[37] The rationale for this argument is that there is no logical difference between allowing a parent to abort a disabled child and killing it after it is born.[38] Singer uses hemophilia as an example of the type of disability that he argues justifies infanticide.[39] Essentially, the argument is based on the utilitarian idea that the morality of human actions is derived solely from the consequences. Utilitarian bio-

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suicide in the *New England Journal of Medicine*. *See* Timothy E. Quill, *A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691-694, March 7, 1991. Dr. Quill was also a plaintiff in a suit challenging the constitutionality of New York's prohibition of assisted suicide. *See* Vacco v. Quill, 521 U.S. 793 (1997).

32. QUILL, *supra* note 30, at 156.

33. *See id.* at 160. *But see* Erin Hoover Barnett, *Laws Separate Euthanasia and Assisted Suicide*, THE OREGONIAN, April 14, 1999, *available in* 1999 WL 5334292. The line between euthanasia and PAS is not easily drawn. *See id.* Some patients desiring death may be unable to self-administer the lethal overdose and may become catalysts for legalizing euthanasia. *See id.*

34. *See* Lori Hinnant, *Professor Says Euthanasia OK for Disabled Infants*, THE INDIANAPOLIS STAR, October 2, 1999 at A1. Singer was recently appointed as a tenured bio-ethics professor at Princeton University's Center for Human Values. His appointment sparked vigorous protests with as many as 250 protestors (many in wheelchairs) barricading the administration building and demanding Princeton rescind its offer. *See id.* Steve Forbes, Princeton alumnus, stated that he will no longer donate money to the school as long as Singer continues to teach there. *Id.* at A1-A2.

35. *See* PETER SINGER, PRACTICAL ETHICS 191 (1993).

36. Infanticide is defined as "[t]he act of killing a newborn child" or "the practice of killing newborn children". BLACK'S LAW DICTIONARY 313 (1996).

37. *See* SINGER, *supra* note 35.

38. *See id.*

39. *See id.* Singer states: "[T]he main point is clear: killing a disabled infant is not morally equivalent to killing a person. Very often it is not wrong at all." *Id.* Singer also believes that because a baby is not per se self-conscious its life has less value "than the life of a pig, a dog, or a chimpanzee." *Id.* at 169. The professor goes on to say that, "[t]he grounds for not killing persons do not apply to newborn infants." *Id.* at 171. Singer believes that because newborns are not autonomous, and, therefore, that killing them does not "violate the principle of autonomy," killing them is acceptable. *Id.* Further, he concurs with Jeremy Bentham's statement that infanticide is "of a nature not to give the slightest inquietude to the most timid imagination" because those who are old enough to understand infanticide are too old to be its victims. *Id.* (quoting Jeremy Bentham's *Theory of Legislation* 264). *Compare with* HENRY FRIEDLANDER, THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION 39 (1995) (describing how, prior to the Holocaust, Hitler initiated a program authorizing the killing of physically and mentally disabled children).

ethicists, such as Singer, believe that there is no distinction between allowing someone to die (withholding heroic measures) and actively killing them.[40] Applying this principle to the infant with hemophilia, Singer argues that the ends of allowing the parents to have another child that would possibly be healthier justifies the means of killing the first infant.[41]

B. *Arguments Against Euthanasia and PAS*

Legalizing euthanasia and PAS is problematic because it is difficult to determine whether an individual actually desires death because of intense pain and impending death or whether the person is suffering from treatable symptoms, such as depression.[42] Also, even with seriously ill patients, physicians cannot accurately predict how long a patient will live and whether or not the illness is actually terminal.[43] Legalizing assisted suicide would result in the deaths of many patients with mental disorders.[44] Many times these individuals cannot make a competent decision based on careful reflection.[45] One-third of physicians surveyed in Oregon said that they were unsure whether they could determine if a request to die was due to depression.[46] The causal connection between pain and euthanasia is extremely weak.[47] The two prevailing factors in a patient's choosing euthanasia or PAS were depression and fear of becoming a burden to loved ones.[48]

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40. *See* EUTHANASIA EXAMINED 128-29 (John Keown ed., Cambridge University Press 1st ed. 1995)[hereinafter EUTHANASIA EXAMINED].

41. *See* SINGER, *supra* note 35 at 191. However, arbitrarily determining that one life is of lesser value than another demeans the value of all lives. *See* Luke Gormally, *Walton, Davies, Boyd and the Legalization of Euthanasia, in* EUTHANASIA EXAMINED, *supra* note 40, at 113, 128. "Once it is accepted that one may justify the killing of a human being on the grounds that he lacks a worthwhile life, one has in effect repudiated recognition of the ineliminable dignity and worth of every human being. And with that repudiation goes repudiation of the indispensable foundation of justice in society." *Id.*

42. *See* David A. Pratt, *Too Many Physicians: Physician-Assisted Suicide After Glucksberg/Quill,* 9 ALB. L.J. SCI. & TECH. 161 (1999). The number of depressed elderly Americans not being treated is estimated at 90%. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* Ezekiel J. Emanuel, *The Future of Euthanasia and Physician-Assisted Suicide: Beyond Rights Talk to Informed Public Policy,* 82 MINN. L. REV. 983, 997 (1998). The data from the Oregon Health Division's report on the first year of legalized PAS show that only 7% of the people (one out of fifteen patients) who chose PAS were concerned with inadequate pain control. *See* Oregon's Death With Dignity Act: The First Year's Experience (Dep't of Human Resources Oregon Health Division February 18, 1999)[hereinafter OHD Report].

48. *See* Emanuel, *supra* note 47, at 999. This article analyzes four studies, three from Holland and one from the United States, conducted by doctors who have performed PAS or euthanasia. *See id.*

Legalizing euthanasia also engenders discrimination against disabled people.[49] Because people with disabilities and poor physical health are singled out, a double standard is created for whether or not someone should be allowed to die.[50] The advocacy group, Not Dead Yet, points out that if the decision to die is merely an autonomy issue, then anyone who desires death should be able to choose it, not just the disabled or incurably ill.[51]

The danger of discrimination through singling out those who are disabled or otherwise physically afflicted is quite real.[52] Hitler stated:

> The völkisch state must see to it that only the healthy beget children. . . . Here the state must act as the guardian of a millennial future. . . . It must put the most modern medical means in the service of this knowledge. It must declare as unfit for propagation all who are in any way visibly sick or who have inherited a disease and can therefore pass it on.[53]

Under Hitler's reign, persons with retardation, brain damage, or psychiatric disorders were characterized as *Ballastexistenzen* (human ballast) and as "empty shells of human beings."[54] Alfred Hoche[55] said killing such people "is

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49. *See generally Not Dead Yet Homepage, supra* note 22 (explaining how legalized euthanasia and PAS discriminate against disabled individuals); Diane Coleman, J.D., *Withdrawing Life-Sustaining Treatment from People with Severe Disabilities Who Request It: Equal Protection Considerations,* 8 ISSUES IN LAW AND MEDICINE 55, 62-3 (1992) (determining that a disabled individual is not suicidal and therefore not entitled to suicide intervention based solely on physical limitations without addressing whether or not the individual is suffering from treatable depression is discrimination).

50. The Americans with Disabilities Act was enacted "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment..., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(a)(7)(1999).

51. Not Dead Yet is a national organization comprised of people with disabilities. *See Not Dead Yet Homepage, supra* note 22.

52. Hugh Gregory Gallagher, a historian and severely disabled polio quadriplegic, writes with the intention of enlightening the reader regarding the evil that can arise from discriminating against the disabled. The Nazi euthanasia killing program evolved from Western scientific theories such as Social Darwinism. Hitler used the application of these genetic principles regarding human evolution as justification for his euthanasia campaigns against the disabled, the diseased and the insane. *See* Hugh Gregory Gallagher, *"Slapping Up Spastics": The Persistence of Social Attitudes Toward People with Disabilities,* 10 ISSUES LAW & MED. 401 (Spring 1995).

53. ROBERT J. LIFTON, THE NAZI DOCTORS 22 (1986).

54. *Id.* at 47.

55. Hoche was a psychiatrist who along with lawyer Karl Binding wrote the book *The Destruction of Life Devoid of Value* which greatly influenced Hitler. *See* KARL BINDING & ALFRED HOCHE, DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS: IHR MASS UND IHRE FORM (1920). These men, regarded as reputable professors, advocated those who were retarded, deformed, terminally ill, and mentally sound but severely damaged by disease or

not to be equated with other types of killing . . . but [is] an *allowable, useful act.*"[56] In order to prevent abuse of human dignity and discrimination against the disabled in the United States, heeding the lessons of history is imperative.[57]

Another dimension of the problem is that allowing voluntary euthanasia inevitably leads to non-voluntary euthanasia.[58] Evidence of this derives from the Remmelink Commission Survey[59] which indicates that "cardinal safeguards—requiring a request which is free and voluntary; well-informed; and durable and persistent—have been widely disregarded. Doctors have killed with impunity."[60] However, the situation in the Netherlands differs from that in the United States because Holland's medical system is socialized to the extent that doctors are unable to profit from the practice of euthanasia.[61] With the current health care system in the United States and the emphasis on managed care, insurance companies and bureaucrats could easily encourage euthanasia as a cost-effective solution.[62] Thus, the slope could well prove even more slippery in the United States than in the Netherlands.[63]

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accident should be put to death. LIFTON, *supra* note 53, at 46.

56. LIFTON, *supra* note 53 at 47 (quoting Alfred Hoche, *Ärtzliche Bemerkungen*, 3 FREIGABE 46-47, 54-58).

57. President Theodore Roosevelt once said: "Someday we will realize that the prime duty, the inescapable duty, of the good citizen of the right type is to leave his or her blood behind him in the world; and that *we have no business to permit the perpetuation of the wrong type.*" Gallagher, *supra* note 52, at 406 (emphasis added) (quoting MARK A. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 42 (1963)).

58. *See generally* John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 448 (1995) (analyzing euthanasia statistics from the Netherlands).

59. The Remmelink Commission Survey is a governmental study that was conducted in response to concerns that Dutch doctors were generally not reporting euthanasia. *See* HENDIN, *supra* note 12, at 49. The attorney general of the Dutch Supreme Court, Professor Jan Remmelink, supervised a study of the problem in conjunction with investigators at Erasmus University. *See id.* The attorney general granted participating physicians immunity from prosecution in exchange for candid information. *See id.* The study revealed that euthanasia was the cause of death in at least two percent of all deaths. *See id.* More than 50% of doctors reported performing euthanasia that year. *See id.* Just 60% kept a written record of these cases, and only 29% reported honestly filling out the death certificates in cases involving euthanasia. *See id.*

60. *See* Keown, *supra* note 58, at 437.

61. *See* PECK, *supra* note 26, at 228.

62. *See id.* at 227. The idea is that legalized euthanasia and PAS risk harm to those in poverty who lack access to good medical care, especially the elderly and stigmatized groups such as minorities. *See* HENDIN, *supra* note 12, at 179. This explains why, although a slight majority of whites favor PAS and euthanasia, African-Americans oppose the practices by more than two to one. *See id.* at 180.

63. Even Dutch advocates of euthanasia, such as Herbert Cohen and René Diekstra question the wisdom of implementing euthanasia and PAS in the United States. *See* HENDIN, *supra* note 12, at 180. The danger of legalizing euthanasia and PAS in the United States arises both from the profit motivations as well as "the litigious tendency of American patients" which "would make euthanasia a nightmare for physicians". *Id.* Proponents of euthanasia, such as

Finally, euthanasia endangers the practice and development of palliative care, also known as 'comfort care.'[64] Hospice[65] care involves both "controlling pain" and "creating supportive social environments."[66] The primary concern of hospice care is making the patient more comfortable and secure at the end of life.[67] "[L]egalization of euthanasia would be nothing more than a cheap, expedient solution to the problem of terminal care at the expense of the patient's best welfare."[68] Hospice advocates[69] argue that a request for euthanasia indicates that society or one of its members failed in some way to support the person making the request.[70]

In the Netherlands, the motivation to improve palliative care has all but evaporated.[71] The issue of caring for the terminally ill is dealt with by debating who will be eligible for euthanasia as the acceptance of death as a solution encompasses more groups of patients.[72] Euthanasia becomes a way to "ignore the genuine needs of terminally ill people."[73]

Derek Humphry, co-founder of the Hemlock Society, actually list cutting health care costs as a fringe benefit of legalizing euthanasia and PAS. *See International Anti-Euthanasia Task Force Update*, Vol. 13, No. 1 (January-March 1999)(visited November 16, 1999) <http://www.iaetf.org/iua16.htm.>[hereinafter *IAETF Update*]. Humphry believes that "a rational argument can be made for allowing [assisted suicide] in order to offset the amount society and family spend on the ill, as long as it is the voluntary wish of the mentally competent, terminally ill adult. . . . The hastened demise of people with only a short time left would free up resources for others. Hundreds of billions of dollars could benefit those patients who not only can be cured but who want to live." *Id.* at 11 (quoting DEREK HUMPHRY & MARY CLEMENT, FREEDOM TO DIE—PEOPLE, POLITICS, AND THE RIGHT-TO-DIE MOVEMENT).

64. *See* HENDIN *supra* note 12, at 214-15.

65. English physician Dame Cicely Saunders founded the hospice movement. *See IAETF Update, supra* note 63, at 9.

66. MUNLEY, *supra* note 9, at 275.

67. *See id.*

68. *Id.* D.J. Bakker, a Dutch surgeon, warns: "Euthanasia is then chosen as the wrong solution for a wrong development in medicine. A medical science that is in need of euthanasia has to be changed as soon as possible to a medicine that cares beyond cure." HENDIN *supra* note 12, at 163.

69. Some right-to-die advocates argue that hospice care may not be enough when patients linger in agony. *See* QUILL *supra* note 32, at 106. Dr. Quill argues that doctors should not turn their backs on these suffering patients. *See id.* at 108. However, he later points out that the possibility of successful prosecution in these cases is remote. *See id.* at 158.

70. *See* HENDIN, *supra* note 12, at 163.

71. *See id.* at 214-15.

72. *See id.*

73. *Id.* at 214.

III. EUTHANASIA AND PAS LAW IN THE UNITED STATES

A. *State Statutes and Recent Cases*

The law in the United States traditionally regards euthanasia and PAS as crimes.[74] Euthanasia is illegal throughout the United States,[75] and thirty-seven states criminalize assisted suicide by statute.[76] Assisted suicide is a common law crime in six states and the District of Columbia,[77] while in six states, the law is unclear.[78] Oregon's Death With Dignity Act[79] legalized PAS in that state.[80]

However, an act of Congress may soon overrule the Death With Dignity Act. On October 27, 1999, the House of Representatives passed legislation[81] that would make PAS and euthanasia federal crimes.[82] The Bill also appropriates five million dollars to medical schools and hospices for development of training programs for doctors on pain control for dying

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74. *See generally* Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (regarding bans on assisted suicide as "expressions of the States' commitment to the protection and preservation of all human life").

75. *See* QUILL, *supra* note 32, at 158.

76. The thirty-seven states are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, and Wisconsin. *See The Hemlock Society Homepage* (visited Sept. 9, 1999) <http://www.hemlock.org//comm/states_12.html>.

77. The six states are Alabama, Idaho, Maryland, Massachusetts, Nevada, and West Virginia. *See id.*.

78. The six states are North Carolina, Ohio, Utah, Vermont, Virginia, and Wyoming. *See id.*.

79. OR. REV. STAT. §§ 127.800-127.897 (1998).

80. Since Oregon legalized assisted-suicide, many other states have, thus far, failed in attempts to legalize PAS. *See* Washington v. Glucksberg, 521 U.S. 702, 717 (1997). *See e.g.* Alaska H.B. 371 (1996); Ariz. S.B. 1007 (1996); Cal. A.B. 1080, A.B. 1310 (1995); Colo. H.B. 1185 (1996); Colo. H.B. 1308 (1995); Conn. H.B. 6298 (1995); Ill. H.B. 691, S.B. 948 (1997); Me. H.P. 663 (1997); Me. H.P. 552 (1995); Md. H.B. 474 (1996); Md. H.B. 933 (1995); Mass. H.B. 3173 (1995); Mich. H.B. 6205 (1996); Mich. S.B. 556 (1996); Mich. H.B. 4134 (1995); Miss. H.B. 1023 (1996); N.H.H.B. 339 (1995); N.M.S.B. 446 (1995); N.Y.S.B. 5024 (1995); N.Y.A.B. 6333 (1995); Neb. L.B. 406 (1997); Neb. L.B. 1259 (1996); R.I.S. 2985 (1996); Vt. H.B. 109 (1997); Vt. H.B. 335 (1995); Wash. S.B. 5596 (1995); Wis. A.B. 174, S.B. 90 (1995) *See* Washington v. Glucksberg, 521 U.S. 702 at n.15.

81. The legislation passed by a 271-156 vote. *See* Hess, *supra* note 7.

82. *See id.* Attorney General Janet Reno determined that Oregon was exempt from the Controlled Substances Act of 1970 and thus Oregon is not subject to the Drug Enforcement Agency's jurisdiction. *See id.* The attorney general made this determination after DEA Chief Thomas Constantine wrote to several congressmen that he believed the Controlled Substances Act forbids doctors from writing lethal prescriptions. *See* Woodward, *supra* note 7.

patients.[83] The American Medical Association endorses the Bill[84] as does Oregon's largest newspaper, *The Oregonian.*[85]

Other recent developments include the conviction of Dr. Jack Kevorkian in March, 1999.[86] A jury convicted Kevorkian of the second-degree murder of Thomas Youk.[87] The conviction related to a *60 Minutes* broadcast months earlier showing Kevorkian lethally injecting Thomas Youk.[88] In three previous trials, juries acquitted Kevorkian, and this time Kevorkian challenged prosecutors to charge him during the broadcast.[89] This time, the jury found him guilty on two counts, second-degree murder and delivery of a controlled substance without a license.[90]

In the *Glucksberg* case, the Supreme Court held that there is no constitutional right to assisted suicide.[91] The Court rejected Plaintiffs'

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83. *See* Hess, *supra* note 7, at A2.

84. *See id.*

85. *See* Congress (visited Nov. 3, 1999) < http://www.congress.gov>.

86. Kevorkian is a Michigan doctor who has participated in over 130 assisted suicides. *See* James A. McClear & Mark Truby, *Judge 'Stops' Kevorkian with Jail. He Gets 10 to 25 Years in Prison in Death of Thomas Youk, But Could Get Parole in Six*, THE DETROIT NEWS, April 14, 1999, at A1. Kevorkian first became known as Dr. Death in 1956 when he was completing his medical residency because of his fascination with photographing the eyes of patients at the moment of death. *See* Herbert Hendin, *Kevorkian on Trial* (January-March 1999) (visited November 16, 1999) <http://www.iaetf.org/iua16.htm>. Later, Kevorkian advocated that death row inmates be anesthetized rather than executed so that their living bodies could be utilized for medical experiments lasting up to several months then finally given a lethal overdose. *See id. See also* JACK KEVORKIAN, PRESCRIPTION: MEDICIDE THE GOODNESS OF PLANNED DEATH 28 (1991)(explaining the author's plan for submitting condemned criminals to medical experimentation with the use of anesthesia). Because of his unorthodox views, the medical community ostracized Kevorkian. *See* Hendin, *supra.* This cost Kevorkian an academic appointment at the University of Michigan. *See id.* He responded by accelerating his efforts to legitimize euthanasia. *See id.*

87. *See 60 Minutes* (CBS television broadcast, Nov. 27, 1998) (airing a videotape of Dr. Kevorkian administering a lethal injection to Thomas Youk, age 52, who had Lou Gehrig's disease). Prior to administering the lethal injection, Kevorkian asked only questions requiring one or two word answers. Youk's family and Kevorkian consistently spoke for him. *See* Hendin, *supra* note 86. Just as Kevorkian inserts the needle, Youk tried to speak, but Kevorkian apparently did not notice and continued the injection. Youk's hospice nurse, Marianne Potter, told television interviewers that she thinks she heard a "w" sound. *See IAETF Update, supra* note 63. Potter further laments, "I hope and pray that he wasn't saying 'wait'... My heart goes out because even if he wasn't saying 'wait', why wasn't he given the courtesy of figuring out what he was saying?" *Id.*

88. *See* McClear & Truby, *supra* note 86.

89. *See id.*

90. *See* Hendin, *supra* note 86. The Michigan Board of Medicine revoked Kevorkian's license to practice medicine in 1991. *See id.* Note also that Michigan voters rejected a ballot initiative to legalize PAS in November, 1998, by a 70% to 30% vote. *See* Pratt, *supra* note 42, at n.22.

91. Washington v. Glucksberg, 521 U.S. 702, 706 (1997). *But cf.* at 734, n. 24 (Stevens, J., concurring) (stating that plaintiffs' claim is a facial challenge to the constitutionality of Washington's prohibition of PAS and that the statute might not survive a more particular

argument that *Cruzan*[92] was premised upon concepts of personal autonomy, instead asserting that the decision in that case was based largely on the common law rule regarding forced medication as a battery.[93] Therefore, the Court in *Glucksberg* determined that the right to refuse medical treatment could not "be somehow transmuted into a right to assistance in committing suicide."[94] Thus, there is no fundamental Due Process right to assisted suicide. The Court determined that the Washington statute[95] prohibiting PAS did not violate the Fourteenth Amendment either facially or as applied.[96]

The focus now turns to Oregon, the only state in the Union in which PAS is currently legal.[97] Some right to die advocates see legalized PAS as the first step to legalizing euthanasia.[98] Oregon's Death With Dignity Act has been in effect for two years.[99] Whether or not that law will stand depends in part on whether or not the Pain Relief Promotion Act[100] becomes law.

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challenge).

92. *See* Cruzan v. Director, 497 U.S. 261 (1990).

93. Washington v. Glucksberg, 521 U.S. 702, 725 (1997).

94. *Id.* at 725-26.

95. *See* WASH. REV. CODE § 9A36.060(1)(1994).

96. *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that the statute does not violate the Fourteenth Amendment "*as applied* to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.") (emphasis added).

97. *See* OHD Report, *supra* note 47. It is important to note that Oregon is the only place in the world where PAS is technically legal. *See id.* at 7. The Northern Territory of Australia legalized PAS for a short time (from July 1996 through March 1997). *See id.* In the Netherlands, PAS is often practiced without prosecution, although it is not technically legal. *See id.*

98. *See* Barnett, *supra* note 33, at A11. Derek Humphry, one of the founders of the Hemlock Society, sees PAS as the initial step to legalized euthanasia. *See id.* In Washington in 1991 and California in 1992, voters rejected initiatives that would have legalized euthanasia. *See id.* These rejections help explain why the Oregon initiative introduced PAS and not euthanasia. *See id.* Dr. Greg Hamilton, president of Physicians for Compassionate care (a group that opposes euthanasia and PAS) believes that "the line between assisted suicide and euthanasia is a false one, drawn for political purpose." *Id.*

99. *See* Hess, *supra* note 7, at A1-A2.

100. *See* Pain Relief Promotion Act H.R. 2260, 106th Cong. § 1 (1999). Note that some PAS advocates are already trying to find ways to circumvent the law should it become effective. *See* Erin Hoover Barnett, *Activists Turn Inventive to Aid Suicide Option,* THE OREGONIAN, November 12, 1999 at A1. Right-to-die activists convened at a Seattle hotel and presented suicide devices that do not involve the use of controlled substances. *See id.*

B. *Oregon's Death With Dignity Act*

1. *Background: Implementing the Act*

PAS became legal[101] in Oregon on October 27, 1997.[102] In 1998, at least fifteen people died[103] from taking lethal medications prescribed by their physicians.[104] The Death With Dignity Act has been and continues to be challenged.[105] In *Lee v. Oregon,* a coalition of terminally ill patients, their physicians, and several nursing homes challenged the constitutionality of the Act.[106] The Ninth Circuit Court of Appeals rejected Plaintiffs' claim that the Act violated the Equal Protection Clause of the Fourteenth Amendment on the grounds that the Plaintiffs did not have standing because there was no "injury in fact."[107] The court's rationale was that an injury could not be based on the *possibility* of patients taking their lives "against their true intent."[108]

Apparently, a patient would already have to be dead in order to have standing in the Ninth Circuit. Thus, the court did not decide the merits of the case; it merely ruled that the federal courts did not have jurisdiction because the plaintiffs did not have the proper standing.[109] Therefore, whether or not the Death With Dignity Act violates the Equal Protection Clause remains undecided.

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101. Although the Act was originally passed by Oregon voters (on a 51% to 49% vote) as a citizen's initiative, the Act was not immediately implemented due to a legal injunction. *See* OHD Report, *supra* note 47.

102. The statutes legalizing PAS are also known as the Death With Dignity Act. OR. REV. STAT. §§ 127.800-127.897 (1998).

103. *See* Arthur E. Chin, et al., *Legalized Physician-Assisted Suicide in Oregon—the First Year's Experience,* 340 THE NEW ENGLAND JOURNAL OF MEDICINE (February 18, 1999) <http://www.nejm.org/content/1999/0340/007/0577.asp>.

104. It is important to note that although fifteen people died from taking the lethal prescriptions, a reported total of twenty-three people received prescriptions for lethal medications. *See id.* This information was provided to the Oregon Health Division. *Id.* Of the twenty-three patients, fifteen died from the lethal medication, six from their actual illnesses, and two remained alive as of January 1, 1999. *See id.*

105. *See* Lee v. Oregon, 107 F.3d 1382 (1997).

106. *See id.* at 1392.

107. *Id.* at 1390. (overturning the ruling of the court below that granted summary judgment for Plaintiffs and permanently enjoined the Act's enforcement on August 3, 1995) *See id.* at 1386. *See also* Lee v. Oregon, 891 F.Supp. 1439 (1995) (issuing permanent injunction); Lee v. Oregon, 891 F.Supp. 1429 (holding that the Act violated the Equal Protection Clause because it did not adequately protect incompetent, or depressed, terminally-ill adults).

108. Lee v. Oregon, 107 F.3d 1382, 1388 (1997).

109. Note that the court also held that the doctors of these patients have no standing to bring suit on their behalf. *See id.* at 1390.

2. Death With Dignity Act violates Equal Protection and the ADA

An Equal Protection analysis of the Death With Dignity Act suggests that the Act violates the Fourteenth Amendment.[110] Of the fifteen people who legally committed suicide in 1998 with the assistance of their physicians, none of the choices resulted from "intractable pain or suffering".[111] The primary reason these patients chose to die was because they feared loss of independence.[112] Accepting worries about potential need for living assistance as a legitimate reason for doctors helping patients commit suicide places disabled and elderly people at lethal risk.[113] This insidious thinking engenders a patronizing attitude toward the disabled that is demoralizing and demeaning. "The dehumanizing message is that society regards such lives as undignified and not worth living."[114] This explains why nine disability-rights organizations oppose legalizing PAS, while none support it.[115]

The Death With Dignity Act gives terminally ill individuals a license to kill themselves.[116] By sanctioning death for these individuals while extending suicide protections to other individuals, Oregon denies the former individuals equal protection of the laws.[117] Because Oregon's law applies suicide policies in an unequal manner, it thereby implicates strict scrutiny analysis.[118] Further,

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110. *See* Wesley Smith, *Oregon Releases Information on Reported Assisted Suicide Death,* WALL ST. J., Feb. 25, 1999 (visited Oct. 8, 1999) < http://iaetf.org/orr299.htm>.

111. *Id.* Diagnosis of a terminal disease often leads to depression which may involve seeing things in black or white. *See* HENDIN *supra* note 12 at 24. "When a patient finds a doctor who shares the view that life is worth living only if certain conditions are met, the patient's rigidity is reinforced." *Id.*

112. *See* Smith, *supra* note 110. The fear of losing independence includes fears of needing help with going to the toilet, performing daily activities and bathing. *See id.* These concerns involve a much larger number of disabled people than terminally ill people. Also, the fear of dependency concerns people who are not yet dependent, and, similar to other difficulties in life, people adjust to it with time. *See id.*

113. *See id.*

114. *Id.*

115. *See id.* Diane Coleman, attorney and organizer of the advocacy group Not Dead Yet, as well as a wheelchair user since age eleven, points out that courts have relied on the liberty and equal protection clauses of the Fourteenth Amendment to support allowing assisted suicide for disabled people "while ignoring the possibility that such assistance may itself violate equal protection." Diane Coleman, *Withdrawing Life-Sustaining Treatment From People With Severe Disabilities Who Request It: Equal Protection Considerations,* 8 ISSUES LAW & MED. 55, 71-2, (1992).

116. *See* OR. REV. STAT. §§ 127.800-127.897 (1998).

117. *See* Coleman, *supra* note 115, at 57. Equal protection means "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

118. *See* Coleman, *supra* note 115, at 76. *See generally* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (applying heightened scrutiny to discrimination against

recent federal legislation intimates that disabled individuals constitute a suspect class suggesting that heightened scrutiny applies.[119]

In addition to Fourteenth Amendment Equal Protection concerns, the Act also violates the Americans With Disabilities Act (ADA).[120] The ADA seeks, in part, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities".[121] The report on Oregon's Death With Dignity Act specifically states that ending life according to the Act is *"not suicide"* then goes on to state that it will nevertheless be referred to as physician-assisted suicide because that is the term commonly used by both the public and the medical community.[122] Arbitrarily renaming the act of intentionally swallowing a lethal overdose as "not suicide" is egregious doublespeak. The point is that an act of suicide does not transmute into an acceptable solution merely because the actor has a terminal illness or condition.[123] By applying a different standard to individuals

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class with immutable trait).

119. *See* 42 U.S.C. §12101 (a)(7). "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." *Id.*

120. 42 U.S.C. § 12101 (a)(5). "The Congress finds that . . . individuals with disabilities continually encounter various forms of discrimination, including *outright intentional exclusion . . . exclusionary qualification standards and criteria*, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.* (emphasis added). By excluding disabled individuals from the protection of laws against suicide, the Death With Dignity Act unlawfully discriminates against them. *See* OHD Report, *supra* note 47, at 1 (stating that ending life in compliance with the Act does not constitute suicide).

121. 42 U.S.C. § 12101 (b)(1) (1999).

122. *See* OHD Report, *supra* note 47, at 1. It is important to note that the report is based only on data collected from doctors who prescribed lethal overdoses. The authors of the report did not collect data from family members of the decedents nor did they collect information from patients prior to their deaths. *See id.* at 3. Another interesting point is that of the twenty-three patients who requested lethal prescriptions, the report's authors collected data from only the fifteen who died from the overdoses, not from the six who died from their underlying illnesses or from the two who were still alive as of January 1, 1999. *See id.* at 3-4.

123. *See* Carol J. Gill, *Suicide Intervention For People With Disabilities: A Lesson in Inequality*, 8 ISSUES LAW & MED. 37, 49-51 (1992). "In a society that fears and rejects life with disability, people with disabilities need laws and the courts to safeguard their equal access to suicide prevention." *Id.* at 51. A suicide request from a disabled person should be "explored as rigorously and objectively as it would be for anyone else, including the specific reasons behind it and possible solutions." *Id.* at 50. Consider the case of Elizabeth Bouvia, a California woman with cerebral palsy who brought suit to procure a right to die in 1983. *See id.* at 42. Bouvia expressed a desire to die at age twenty-six after several traumatic events, including a miscarriage, a marital separation, and the loss of financial support. *See* Coleman, *supra* note 115, at 55-56. Despite these traumatic experiences, the court, the ACLU attorneys (who sued seeking a court-ordered right-to-die for Bouvia), the psychiatric professionals, and the media

with terminal conditions, the Death With Dignity Act unlawfully discriminates against them.[124]

America does not put discrimination up for a majority vote.[125] The Death With Dignity Act conflicts with the Americans With Disabilities Act, and federal law trumps state law.[126] Therefore, the former must fall. The Death With Dignity Act creates "the ultimate form of discrimination, legalizing lethal overdoses based on the health status of the victim."[127]

3. *Death with Dignity Act's Safeguards Failed*

The Death With Dignity Act addresses the problem of determining whether or not suicide requests are the result of underlying mental distress by suggesting that physicians who believe their patients are suffering from depression or a psychological disorder refer their patients to counseling.[128] However, it is important to note that referral is based on the physician's opinion and is not mandatory.[129] This provision may prove a rather poor prophylactic measure, especially in cases where the doctor and patient do not have a well-established relationship.[130] In addition, in cases where the patient is disabled to some extent, underlying and perhaps even subconscious

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simply assumed the rationality of Bouvia's death wish. *See id.* at 56. They never questioned whether depression was a factor. *See id.* By the time the judicial proceedings finished, Bouvia's crisis had passed and she no longer desired death. *See id.* at 56.

124. *See* Coleman, *supra* note 115, at 56.

125. *See Hearing on the Lethal Drug Abuse Prevention Act Before the House Judiciary Subcomm. on the Constitution* (1998)(statement of Diane Coleman, Attorney and Organizer, Not Dead Yet)[hereinafter Coleman's testimony].

126. *See id.*

127. *Id.*

128. *See* OR. REV. STAT. §127.825 § 3.03 (1998). The statute reads:

> If in the opinion of the attending physician or the consulting physician a patient may be suffering from a psychiatric or psychological disorder, or depression causing impaired judgment, either physician shall refer the patient for counseling. No medication to end a patient's life in a humane and dignified manner shall be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder, or depression causing impaired judgment.

Id.

129. *See id.*

130. The first woman to commit physician-assisted suicide under the Death With Dignity Act had a two-and-a-half week relationship with her doctor, to whom she was referred by an advocacy group after her own doctor refused to assist her, as did another doctor (who diagnosed her with depression). Six of the people who died from PAS tried to obtain lethal prescriptions from two or more doctors. *See* Wesley J. Smith, International Anti-Euthanasia Task Force Oregon Releases Information on Reported Assisted Suicide Deaths, (visited Oct. 8, 1999) <http://iaetf.org/orr299.htm>. *See also* QUILL, *supra* note 30, at 162-163 (admonishing the need for a well-established relationship not based solely on an assisted-suicide request).

prejudices may preclude the physician from looking further into the possible psychological motivations, such as depression, for the patient's request for suicide.[131]

As a means of policing the practice of PAS, the Death With Dignity Act requires that physicians file reports each time they write a prescription for lethal medication.[132] The documentation must include: (1) all requests for lethal prescriptions (both oral and written); (2) the physician's diagnosis and determination that the request is voluntary; (3) the verification of the consulting physician; (4) a report of the outcome of any [optional] counseling; (5) offer to rescind a second oral request; and (6) paperwork verifying that all the requirements of the statute were met.[133] Physicians who prescribed lethal medications submitted this data which was available to the Oregon Health Division when it published its first annual report.[134]

However, the authors of the report chose not to include the data from the six patients who received but did not take the lethal medication in their analysis.[135] The remarkably oblique reason for not doing so is stated in the report: "We did not [sic] conduct similar analyses of persons who received lethal medications, but chose not to use them, because of the small number of patients [six] in this group."[136]

This is a curious rationale because the six people make up roughly twenty-eight percent of the entire group, and therefore the data from the six patients is statistically significant.[137] Further, by disregarding data on subjects who differ from the norm, the scientific validity of the study is lost.[138] The

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131. Diane Coleman testified on Capitol Hill: "I wish that this civil rights violation were as obvious to everyone as it would be if assisted suicide were legalized based on gender or race. Policymakers have completely ignored the ADA violations inherent in assisted suicide laws." *See* Coleman's testimony, *supra* note 125, at 3.

132. OR. REV. STAT. 127.855 § 3.09 (1998).

133. *See id.*

134. *See* OHD Report, *supra* note 47, at 2.

135. *See id.* at 3.

136. *Id.*

137. *See* JEFFERSON HANE WEAVER, CONQUERING STATISTICS 41 (1997). The example the book gives is a sampling of 200 students who took shop class out of a total student population of 800 students. *See id.* Because the 200 students constitute 25% of the entire student body, the 200 student sampling is very significant. *See id.* Thus, it follows that a sample, such as the six patients who did not ingest the lethal medications, constituting nearly 28% of the total group, is even more statistically significant. *See id.*

138. *See id.* at 157. Conveniently discarding negative results suggests "a certain lack of scientific integrity to the entire . . . process." *See id.* Also, consider the statement of Dr. Kenneth R. Stevens, chairman of the department of radiation oncology at Oregon Health Sciences University: "They [the administrative rules on data collection] are analogous to doctors performing an experiment of giving instructions and instruments to patients for them to remove their own gallbladders at home, with the only monitoring being the number of gallbladders received by the Oregon Health Division." Patrick O'Neill, *Testimony Differs on How Much Information the Oregon Health Division Should Collect on Physician-Assisted*

data from these six patients, how it compares to the data from the other fifteen, and why these six people decided not to take the lethal medication are all relevant factors.[139] The authors claim to be neutral on the issue of assisted suicide.[140] Making the information collected available to the public is one of the Act's requirements.[141] But if only part of the information is made public, then an assertion of neutrality is misrepresentative. The authors go on to say that future reports may not contain as much detail as the 1998 report.[142]

In addition to concerns about complete and accurate data reporting, the Death With Dignity Act is problematic because it provides no punishment for doctors who do not comply with the reporting requirements.[143] However, according to the doctors[144] who drafted the 1998 report, the Act requires the Oregon Health Division report noncompliance to the Oregon Board of Medical Examiners.[145] But this requirement became inconsequential when state medical examiner Dr. Larry Newman announced in March, 1998, that his office will not investigate assisted suicide deaths.[146]

Suicide and What Then Should Be Done With the Data, THE OREGONIAN, March 21, 1998, *available in* 1998 WL 4191996.

139. *See id.* Dr. Kenneth R. Stevens, Jr. advised the Health Division to evaluate the data in a scientific way. *See id.* Health division officials said, "[I]t isn't the state's job to do research into the effectiveness of the suicide law. The main purpose of the record-gathering requirement is to make sure that the law's safeguards are working." *Id.* Barbara Coombs Lee, a key advocate of the Act, believes academic researchers, rather than the Health Division, should conduct research on how well the law works. *See id. Compare* Julie Belian, Note, *Deference to Doctors in Dutch Euthanasia Law,* 10 EMORY INT'L L. REV. 255, 257 (explaining how the Dutch judiciary gave oversight of euthanasia to the medical community, an extra-governmental body).

140. *See* OHD Report, *supra* note 47, at 10.

141. *See* OR. REV. STAT. 127.865 § 3.11 (3) (1998). "The Health Division shall generate and make available to the public an annual statistical report of information collected under subsection (2) of this section." *Id.*

142. *See* OHD Report, *supra* note 47, at 10.

143. *See* OR. REV. STAT. §§ 127.800-127.897 (1998).

144. The Act itself states only that "[t]he Health Division shall annually review a sample of records maintained pursuant to ORS 127.800 - 127.897." OR. REV. STAT. 127.865 § 3.11(1) (1998). Section 3.11(2) gives the Oregon Health Division rulemaking power over the collection of the data. *See* OR. REV. STAT. 127.865 §3.11(2) (1998).

145. *See* Arthur E. Chin, et al., *Legalized Physician-Assisted Suicide in Oregon—the First Year's Experience,* 340 NEW ENG. J. MED. 577-583, February 18, 1999. The authors of this article are the same doctors who drafted *Oregon's Death With Dignity Act—The First Year's Experience. See* OHD Report, *supra* note 47.

146. *See* O'Neill, *supra* note 138, at 162-63. Dr. Newman announced this in a newsletter. *See id.* The governor's office convened a panel consisting of public officials, the medical examiner, the state attorney general's office, the Oregon State Police, the Health Division, and various licensing boards. *See id.* The panel made the decision not to investigate the deaths. *Id. Compare* Belian, *supra* note 139, at 255-57 (explaining how the courts in Holland conceded control of euthanasia law to the medical community).

However, *The Oregonian* reported that the medical examiner's office investigated the March 10, 1999 death of Patrick Matheny[147] at the request of Paul Burgett, Coos County, Oregon district attorney. Because Matheny was almost completely paralyzed from his disease, his brother-in-law, who was alone with him in his trailer at the time, helped Matheny commit suicide.[148] The nurse who conducted the inquiry[149] did not question the brother-in-law, so exactly how the death took place remains unclear.[150] The district attorney concluded that the brother-in-law's assistance was a legal act and that "a person who is disabled should have the right to physician-assisted suicide, as long as they are otherwise qualified."[151] This case demonstrates that there is no bright line between PAS and euthanasia.[152]

Consider, as further evidence that the safeguards are inadequate, the case of Kate Cheney.[153] After doctors diagnosed Kate with inoperable stomach cancer at age eighty-five, she sought a lethal prescription.[154] The first doctor did not prescribe a lethal overdose, so Kate went to a second doctor, who recommended a psychiatric evaluation.[155] Upon evaluating the patient, the psychiatrist determined that she suffered from dementia and did not have the mental capacity required for making a voluntary decision, and, therefore, the doctors denied the request for a lethal prescription.[156] After three doctors

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147. *See* Erin Hoover Barnett, *Coos County Drops Assisted-Suicide Inquiry,* THE OREGONIAN, March 17, 1999, *available in* 1999 WL 5326260. Patrick Matheny, 43, had Lou Gehrig's disease. *See id.*

148. *See id.*

149. The examiner was Kris Kracher, R.N. and assistant to the Coos County chief deputy medical examiner. *See id.*

150. *See id.* The examiner did speak with the decedent's father who told her that the brother-in-law told him that he held a chocolate drink mixed with lethal medication so that his son could drink from a straw. *See id.*

151. *See id.*

152. *See* Barnett, *supra* note 33. Dr. Greg Hamilton, president of Physicians for Compassionate Care, said: "It's very clear to anyone who knows a lot about assisted suicide and euthanasia that the line between assisted suicide and euthanasia is a false one, drawn for political purpose." *Id.*

153. *See* Erin Hoover Barnett, *A Family Struggle: Is Mom Capable of Choosing to Die?,* THE OREGONIAN, October 17, 1999, *available in* 1999 WL 28267694. Kate Cheney and her family voluntarily shared their story so that they could assist people in better understanding Oregon's PAS law. *See id.* They initiated the contact with a letter to the editor opining that the legal safeguards of the Death With Dignity Act were "roadblocks to Kate's right to a lethal prescription." *Id.*

154. *See id.*

155. *See id.* Kate's daughter, Erika (who was caring for her at the time), thought the first doctor was "dismissive", and it was she who requested a second doctor. *Id.* at 5. Arranging a psychiatric evaluation is the standard operating procedure of Kaiser Permanente, Kate's HMO. *See id.*

156. *See id.* During the evaluation, which occurred in the patient's home, her daughter "coached her a few times, even after the psychiatrist asked her not to." *Id.* The psychiatrist also noted that Kate's daughter became angry at the assessment, whereas the patient herself accepted

declined approval of her assisted-suicide request, Kate sought another competency evaluation, this time with a clinical psychologist.[157] The psychologist concluded that "there was no severe impairment that would limit Kate's ability to make a medical decision."[158] Faced with contradicting competency evaluations, Dr. Robert Richardson, director of Kaiser Permanente's ethics department, met personally with Kate and determined that she was competent and her decision was voluntary.[159] Kate received her lethal prescription from Kaiser's pharmacy,[160] and she then killed herself on August 29, 1999.[161]

This case demonstrates the failure of the Death With Dignity Act's safeguards.[162] The first psychiatrist determined the patient was cognitively impaired and subject to coercion by family members, then "a single HMO official ended up making the decision and Kaiser Permanente is a fully capitated HMO with a profit-sharing plan for its doctors."[163] This case clearly indicates that "once assisted suicide is legalized, there is no way to protect the vulnerable and mentally ill."[164]

IV. EUTHANASIA AND PAS IN THE NETHERLANDS

A. *The History of Euthanasia and PAS in the Netherlands*

Euthanasia is not technically legal in the Netherlands.[165] Articles 293 and 294 of the Dutch Criminal Code prohibit euthanasia and PAS.[166] Killing a person upon request by that person is prohibited by Article 293.[167] However,

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it. *See id.* The psychiatrist also noted that the patient "does not seem to be explicitly pushing for this". *Id.* at 5-6.

157. *See id.* The psychologist noted that Kate's choices "*may be influenced by her family's wishes and her daughter, Erika, may be somewhat coercive.*" *Id.* at 7 (emphasis added). Erika herself stated,"I realize I sound real aggressive and assertive." *Id.*at 7. She also said, "I realize I've been standing up on the roof with a banner and Mom's been standing behind with a little flag." *Id.* at 7.

158. *See id.*

159. *See id.* Consider this question: "Would an HMO call for a second opinion if the first psychiatrist deemed a patient competent to request assisted suicide?" David Reinhard, *In the Dark Shadows of Measure 16,* THE OREGONIAN, Oct. 31, 1999, *available in* 1999 WL 28271446.

160. See Barnett, *supra* note 153, at 8.

161. *See* Steve Duin, *Kate Cheney Still Doesn't Rest in Peace,* THE OREGONIAN, Nov. 11, 1999, *available in* 1999 WL 28274623.

162. *See* Reinhard, *supra* note 159.

163. *Id.*

164. *Id.* (quoting Dr. Gregory Hamilton of Physicians for Compassionate Care).

165. *See* GRIFFITHS, *supra* note 24, at 18.

166. *See id.*

167. *See id.*

suicide itself is not illegal.[168] Over eighty percent of Dutch citizens favor legalized euthanasia as an available choice.[169] Although euthanasia and PAS are forbidden by law, the truth is that the exception has essentially swallowed the rule. The exception is Article 40, and it allows doctors charged under Articles 293 and 294 to make a *defense* of justification.[170] The defense of justification is that one who commits "an offense due to a force he could not be expected to resist [*overmacht*] is not criminally liable."[171]

The Dutch Penal Code has explicitly prohibited assisted suicide and euthanasia since 1886.[172] However, the Dutch courts began to tolerate PAS and euthanasia for competent terminally ill patients in the 1970s.[173] The judiciary in the Netherlands basically allowed the medical community to police itself.[174] The Royal Dutch Medical Society, the Koninklijke Nederlandsche Maatschappij tot beverdering der Geneeskunst (KNMG), was primarily responsible for crafting methods of prosecution and punishment regarding euthanasia.[175]

In 1984, the Dutch Supreme Court issued a landmark decision upholding the 1983 acquittal[176] of a doctor who argued the defense of justification.[177] The court determined that the defense of justification due to necessity could be

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168. *See id.*

169. *See* HENDIN, *supra* note 12, at 98. As an example of public opinion in the United States, consider an opinion poll done in California that showed that 68% of the population of that state favored medical aid in dying. *See* EUTHANASIA EXAMINED, *supra* note 40, at 87. When exposed to examples of the abuse that doctors would have discretion to impose, the poll numbers dropped to 49% in favor. *See id.*

170. *See* GRIFFITHS, *supra* note 24, at 326.

171. *Id.*

172. *See* CHARLES T. CANADY, PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN THE NETHERLANDS: A REPORT TO THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION (2d. Sess. 1996), *reprinted in* 14 ISSUES LAW & MED. 301 (1998).

173. *See id.* Public discussion of euthanasia and PAS in the Netherlands accelerated in 1973 when the criminal court at Leeuwarden sentenced a doctor to one week (suspended sentence) for lethally injecting her mother. This case is demonstrative of the legal tolerance for euthanasia in the Netherlands. *See id.* at 306-307. See also GRIFFITHS, *supra* note 24, at 52-53 (explaining how euthanasia began gaining acceptance in the Netherlands).

174. *See* Belian, *supra* note 139, at 257.

175. *See id.* "In its acceptance of the KNMG guidelines and the defense of "necessity" the judiciary has, for all practical purposes, deferred to a completely extra-governmental body: the medical community." *Id.*

176. *Schoonheim* was the first case where a physician was acquitted using the Article 40 defense of justification. *See* GRIFFITHS, *supra* note 24, at 19.

177. *See id.* at 18-19. *See also* CANADY, *supra* note 172, at 301 (explaining that the 1984 decision regarding the defense of justification expanded the acceptance of euthanasia and PAS to chronically ill elderly adults who were not terminal).

used even when the patient is not terminal.[178] Since the Dutch Supreme Court handed down this decision, euthanasia and PAS are very rarely prosecuted in the Netherlands.[179]

The implication of the Dutch Supreme Court's decision is that although technically illegal, euthanasia and PAS are routinely practiced with a virtual guarantee of immunity. In 1986, the Dutch medical association and the nurses association promulgated *Guidelines for Euthanasia*.[180] The current requirements that must be met before the Article 40 defense of justification can be used are as follows:

> 1. The request for euthanasia must come only from the patient and must be entirely free and voluntary.
> 2. The patient's request must be well considered, durable and persistent.
> 3. The patient must be experiencing intolerable (but not necessarily physical) suffering, with no prospect of improvement.
> 4. Euthanasia must be a last resort. Other alternatives to alleviate the person's situation must have been considered and found wanting.
> 5. Euthanasia must be performed by a physician.
> 6. The physician must consult with an independent physician colleague who has experience in this field.[181]

Despite these guidelines, the criteria remain vague and a great deal of discretion is given to physicians.[182]

In 1986, the Dutch Supreme Court held the necessity defense was available to doctors for necessity in the sense of "psychological compulsion" on the part of the doctor.[183] The Court's decision demonstrates its unwillingness to impose a request by the patient or unbearable suffering as prerequisites for the necessity defense since the defendant doctor's argument

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178. *See* GRIFFITHS, *supra* note 24.

179. *See id.* at 19.

180. *See* CANADY, *supra* note 172.

181. Facsimile from Clémence Ross-VanDorp, member of the Dutch Parliament, to Nico Foppen. (September 28, 1999) (copy on file with author).

182. *See* CANADY, *supra* note 172, at 301-02. It is important to note that the guidelines, while stating that patients' requests to end their lives must be voluntary, do not prevent the doctor from making a strong recommendation of euthanasia. *See* John Keown, *On Regulating Death; Dying Well? A Colloquy on Euthanasia and Assisted Suicide*, 22 HASTINGS CTR. REP. 39 (1992).

183. *Id.* (quoting Netherlandse jurisprudentie, 607 (1987): 2129).

was merely that he was overcome with psychological pressure [*psychische overmacht*].[184] The ramification of this is that doctors who experience an overwhelming desire to end the lives of their patients may very likely escape punishment and prosecution entirely. In 1990, the Minister of Justice informed prosecutors not to request police investigations of euthanasia unless they had reason to suspect noncompliance with the criteria.[185] Since it is unlikely that a physician would voluntarily report noncompliance with the guidelines in these situations, and the patient is no longer alive to convey the tale to the police, the probability that the police will have reason to suspect is practically nonexistent.

The Dutch Supreme Court broadened the defense of justification in June, 1994, when it convicted, *without punishment*, a psychiatrist, Dr. Doudewijn Chabot, for helping a patient,[186] who was physically healthy but suffered from a depressive disorder, commit suicide.[187] The Supreme Court rejected the prosecutor's argument that euthanasia and PAS are not justified without physical suffering or impending death.[188] However, the court found Dr. Chabot guilty because he did not get a valid second opinion since none of the physicians he consulted with actually saw the patient and there was "insufficient proof to support the defense of necessity" which is the normal mitigating factor in such cases.[189] This case is problematic because there is a question as to whether or not a person with a mental disorder can truly make a voluntary request.[190] Although the Court held the defense of justification did

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184. *See id.*

185. *See id.*

186. The patient was Hillie Hasscher, a fifty-year-old Dutch woman who was not terminally ill. However, she was suffering from the aftermath of a divorce, and had recently lost her two sons, one to cancer and the other to suicide. She was despondent and desired death as a solution. Her psychiatrist eventually provided her with twenty barbiturates dissolved in a glass of syrup which she consumed and then died listening to Bach. *See* William Drozdiak, *Dutch Seek Freer Mercy Killing; Court Could Ease Limits on Assisted Suicide,* THE WASH. POST, October 29, 1993 at A29. Ms. Hasscher was referred to Dr. Chabot by the Association for Voluntary Euthanasia. Dr. Chabot decided to grant her request upon determination that "her long-term psychic suffering. . .was unbearable and hopeless for her, and her request for assistance was well-considered." GRIFFITHS, *supra* note 24 at 81. Dr. Chabot also consulted with no fewer than seven of his colleagues, most of whom agreed with his decision, and none of whom thought it necessary to examine the patient. *See id.*

187. *See* Alan D. Ogilvie & S.G. Potts, *Assisted Suicide for Depression: The Slippery Slope in Action? Implications of a Case in the Netherlands in which a Physician Aided the Suicide of a Physically Healthy Patient with a Depressive Disorder,* 309 BRIT. MED. J. 492 (1994).

188. *See id.* The court said: "[A] doctor may be in a situation of necessity if he has to choose between the duty to preserve life and the duty as a doctor to do everything possible to relieve the unbearable and hopeless suffering of a patient committed to his care." *See* GRIFFITHS, *supra* note 24, at 81 (quoting Nederlandse Jurisprudentie 1994, no. 656:3154).

189. *See* GRIFFITHS, *supra* note 24, at 81.

190. This concern is voiced by one of the minority parties, the Christian Democrats, who

not apply in this particular case, it did state "that the wish to die of a person whose suffering is psychic can be based on an autonomous judgment."[191]

Thus, it seems that the court's decision violates the first of the six aforementioned criteria.[192] Essentially, the exceptions have swallowed the rule; therefore, it is no surprise that many people believe euthanasia is legal in the Netherlands.[193] Currently, the Dutch parliament is considering a proposal[194] that would not technically legalize euthanasia, but would further broaden its application and the exceptions for which it is allowed.[195]

B. *Preparations to Further Sanction Euthanasia in the Netherlands*

The proposed legislation set to come before Parliament states that euthanasia will remain technically illegal, but that doctors will not be prosecuted as long as they comply with the guidelines.[196] The proposal also states that cases where Article 40 (justification defense) is invoked will not have to be tried before a judge but may instead be tried before the commissions that monitor the procedures.[197] In addition, the proposal states that children as young as twelve will have the right to request euthanasia.[198] The proposal would not require parental consent.[199] The minister proposing this legislation plans to propose additional legislation allowing euthanasia on people who are unable to express their will sometime in the near future.[200]

The Royal Dutch Medical Association approves of the proposed legislation.[201] The expectation is that the legislation will pass smoothly through the Dutch Parliament, backed by the three government parties.[202] Otto

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are opposed to expanding the euthanasia laws. *See* Facsimile from Clémence Ross-VanDorp, *supra* note 181.

191. GRIFFITHS, *supra* note 24, at 81.

192. *See id.*

193. *See* GRIFFITHS, *supra* note 24.

194. De toetsing van levensbeëindiging op verzoek en hulp bij zelfdoding en tot wijziging van het Wetboek van Strafrecht en van de Wet op de lijkbezorging (Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding), Tweede Kamer, vergaderjaar 1998-1999, 26 691, nr. 3.

195. *See* Facsimile from Clémence Ross-VanDorp, *supra* note 181. The proposal is given by Minister Borst. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See* Charles Trueheart, *Holland Prepares Bill Legalizing Euthanasia,* THE WASH. POST, August 15, 1999, at A19.

202. *See Mercy Killing by Law; Holland Prepares to Approve Voluntary Euthanasia—Even for Children Aged 12,* LONDON DAILY MAIL, Aug. 11, 1999 at 24 [hereinafter *Mercy Killing by Law*]. *See also Dutch Move to Legalize Mercy Killing Parliamentary Approval Expected,* THE INDIANAPOLIS NEWS, Aug. 11, 1999, at A7.

P.G. Vos, Member of Parliament states, "There comes a moment when the jurisprudence has to be brought into the law."[203] Basically, Mr. Vos is saying everybody's doing it anyway so we may as well make it legal. This is not exactly a compelling argument for legalizing something as egregiously heinous as allowing children to be put to death without their parents' consent.

Opposition to the proposal comes from a rugged minority of Dutch, most of whom are practicing Christians.[204] The minority parties opposed to the legislation include the Christian Democrats and some small Calvinist parties.[205] Clémence Ross-VanDorp, Member of Parliament and a Christian Democrat, argues that "every single case of euthanasia must be judged by the court of law"[206] and that the proposal's provision for allowing euthanasia to be performed without parental consent is unconscionable.[207] The Christian Democrats also opposed the 1994 decision that allowed euthanasia and PAS for mental disorders. [208] Ross-VanDorp realizes that the minority parties have an uphill battle in parliament due to the majority parties'[209] backing of the expansion of the euthanasia laws.[210] However, she remains resolved to keep up the fight: "[A]s Churchill once said, 'Let them do their worst, we will do our best!'"[211]

C. *Statistics on Euthanasia and PAS in the Netherlands*

The first report on euthanasia was ordered by the Dutch government and was carried out by the Remmelink Committee in 1990 then published in 1991 (this study is commonly referred to as the Remmelink Report).[212] A second study was commissioned, again at the request of the government, in 1995 as a follow-up study and published on November 26, 1996.[213] The 1995 study

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203. Trueheart, *supra* note 201.

204. *See id.*

205. *See Mercy Killing by Law*, *supra* note 202, at 24.

206. Facsimile from Clémence Ross-VanDorp, *supra* note 181. In 1995, 1466 cases of euthanasia were reported. *See* Richard Fenigsen, *Dutch Euthanasia Revisited*, 13 ISSUES L. & MED. 301 (1997). The public prosecutors dismissed 1430 of these cases. *See id.* Only 36 cases were referred to the Attorney General's assembly. A mere five cases were tried in the courts. *See id.*

207. *See* Facsimile from Clémence Ross-VanDorp, *supra* note 181.

208. *See id.*

209. The majority government parties are Liberals and Social Democrats who form a coalition government. *See id.*

210. *See id.*

211. Letter from Clémence Ross-Van Dorp, member of the Dutch Parliament, to Cynthia Bumgardner, J.D. Candidate 2001 and member of the Indiana International & Comparative Law Review (October 5, 1999).

212. *See* Fenigsen, *supra* note 206, at 301.

213. *See id.* The study was published first in Dutch, and two days later *The New England Journal of Medicine* published the English summaries. *See also* 335 NEW ENG. J. MED. 1706

includes two groups that were mentioned in the 1990 study but not investigated, newborns and psychiatric patients.[214] The 1995 study is also distinguishable from the 1990 study because it places a greater emphasis on the "notification procedure."[215]

One particularly alarming statistic from the 1995 study is that forty-five percent of neo-natologists and thirty-one percent of general pediatricians reported that they "actively terminated a newborn's life" at some point in their careers.[216] The 1995 study shows that fifteen newborns died from their doctors' lethal injections that year.[217] An estimated 596 cases involved the withholding or termination of life-sustaining treatment.[218] In eighty-four of the 428 cases, the doctor administered drugs intended to hasten death.[219] Pediatricians cut off non-futile medical treatment "*without consulting the parents*" in twenty-three percent of the cases.[220]

Overall results from the comparison of the 1990 and 1995 studies illustrate an increase in euthanasia over time.[221] The 1990 study, the Remmelink Report, predicted this result.[222] The number of physician-assisted suicides was the same for both years: four hundred.[223] According to the studies, there were one thousand reported acts of involuntary euthanasia in 1990 and nine hundred in 1995.[224]

Scholars have found some significant discrepancies between the Dutch version of the Remmelink Report and the English-language synopsis of the report.[225] One notable omission from the English version of the Report was of the 0.8% of all euthanasia deaths (totaling one thousand) that were not the result of a voluntary decision by the patient.[226] The synopsis also omitted

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(1996).

214. *See* Fenigsen, *supra* note 206.

215. *Id.* The procedure, sanctioned by Parliament in 1994, requires that physicians who perform euthanasia upon or without the patient's request report their actions to the prosecutor who then has discretion to begin an investigation. *See id.*

216. *Id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *Id.* (emphasis added).

221. *See* GRIFFITHS, *supra* note 24, at 210.

222. *See id.* at 211.

223. *See id.* at 210. The significantly lower number of PASs may reflect a cultural difference between Dutch and American views on euthanasia and assisted suicide. Whereas the issue in the United States is framed largely as one of autonomy and self-determination, the push for euthanasia in the Netherlands came mainly from doctors insisting that it was a valid medical procedure. *See id.* at 111.

224. *See id.* at 210.

225. *See* EUTHANASIA EXAMINED, *supra* note 40, at 161.

226. *See id.* Note that although these numbers were not mentioned in the English-language synopsis, they were mentioned in subsequent commentaries on the subject such as the Griffiths book. *See, eg.* GRIFFITHS, *supra note* 24.

statistics regarding intentional drug overdoses with the intent to kill.[227] One implication of these omissions is that they are an attempt to hide the truth from the rest of the world.

The Remmelink Report[228] surveys posed no specific question regarding whether or not a patient's request for euthanasia or PAS was voluntary.[229] In sixty percent of the cases, the patient's request was purely oral.[230] Therefore, there is no way to determine the accuracy of doctors' statements regarding their patients' requests.[231] The Remmelink Report also shows that in a majority of the 10,558 cases (fifty-two percent) where a doctor intended to hasten death the patient made no explicit request.[232]

The Commission defends the one thousand cases of involuntary euthanasia on the assertion that the doctor's intervention was unavoidable because the patient suffered from "death agony."[233] This is the Commission's rationale for regarding these cases as physicians caring for the dying.[234] However, this line of reasoning is inherently problematic because the physicians "did not list 'agony' as a reason for killing these patients."[235] Rather, they listed no hope for improvement (60%), futility of medical treatment (39%), avoiding "needless prolongation" (33%), family coping difficulties (32%), "low quality of life" (31%), and least of all, pain or suffering (30%).[236] Regarding the last category, it seems curious that the deaths were not categorized under the category of alleviating pain rather than euthanasia without explicit request if the intent of the physician was truly to alleviate pain or agony.[237] The intent to promote merciful death is hardly served by extinguishing life without the patient's request because the doctor makes an arbitrary and inherently subjective decision regarding the illusive estimate of agony suffered.

Even cases where the physician claims the patient made a voluntary request become questionable when the patient has a psychiatric or mental disorder that very likely precludes a voluntary decision on the part of the patient. Five hundred and twenty-two psychiatrists responded to a questionnaire regarding assisted suicide in psychiatric practice.[238] Thirty-one percent believed that doctors should not grant requests for assisted suicide to

227. *See* EUTHANASIA EXAMINED, *supra* note 40, at 161.
228. The Report results were gleaned from surveys answered by physicians. *See id.* at 266.
229. *See id.* at 275.
230. *See id.*
231. *See id.*
232. *See id.*
233. *Id.* at 276.
234. *See id.*
235. *Id.*
236. *Id.*
237. *See id.*
238. *See* Fenigsen, *supra* note 206.

psychiatric patients.[239] Twelve psychiatrists reported that they assisted a psychiatric patient commit suicide within the past year.[240]

A comprehensive report on the 1990 and 1995 studies presents five conclusions:[241] (1) The majority of euthanasia and PAS cases and almost all non-voluntary euthanasia cases are not reported. Therefore, control by legal authorities is nearly impossible. (2) Euthanasia makes up about 3.4-6% of all deaths. The percentage increases to 4.9-8.6% of deaths occurring with a doctor in attendance. (3) Incompetent patients, usually severely handicapped newborns,[242] are intentionally killed with the acceptance of the courts. (4) The Netherlands has a shortage of palliative care facilities, i.e. hospice care. The report concludes that this is due to the use of euthanasia as a "substitute for palliative care."[243] (5) "The Dutch experiment of trying to regulate euthanasia while at the same time keeping it under control has failed."[244]

The finding that widespread acceptance of euthanasia proves detrimental to palliative care leads to the conclusion that euthanasia is "usually avoidable."[245] Dutch palliative care physician Dr. Ben Zylicz told the House of Lords that euthanasia is often unnecessary and is "proving detrimental to the practice of medicine."[246] Dr. Zylicz also warns that the practice of non-voluntary euthanasia is becoming prevalent in the Netherlands and that the 1984 guidelines are often breached.[247] Dr. Zylicz admonished the House of Lords, "If you accept euthanasia as a solution to difficult and unresolved problems in palliative care, you will never learn anything."[248] Professor Lord McColl of the House of Lords concluded that "[E]uthanasia is impossible to police and will be abused."[249]

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239. *See id.*

240. *See id.*

241. *See* Prepared Statement of H. Jochemsen, Ph.D., Director of the Lindeboom Institute, the Netherlands, Testimony Before the House Commerce Committee Health and Environment Subcommittee (March 6, 1997), *reprinted in* Federal News Service, *available in* LEXIS, News Library, Netherlands File. [hereinafter Prepared Statement of H. Jochemsen].

242. Note that public opinion polls show that 71% of the Dutch people believe it is acceptable for a doctor to lethally inject a "severely defective newborn baby" with the consent of the parents. Fourteen percent of the population opposes this. *See* GRIFFITHS, *supra* note 24, at 200. The term "severely defective newborn" seems inherently biased and may have affected the outcome of the poll. The label "defective" stigmatizes the disabled infant.

243. Prepared Statement of H. Jochemsen, supra note 241.

244. *Id.*

245. Hugh Matthews, *Better Palliative Care Could Cut Euthanasia*, 317 BRIT. MED. J. 1613 (1998).

246. *Id.*

247. *See id.*

248. *Id.*

249. *Id.*

Perhaps the most alarming statistic of all regards the opinion of elderly Dutch citizens. A survey of randomly selected elderly citizens[250] shows that 66% of those living independently were opposed to government-sanctioned euthanasia, and *95% of the nursing home residents were opposed.*[251] The obvious implication of these statistics is that nursing home residents fear for their lives.[252]

V. CONCLUSION AND PROPOSALS

Arguments against euthanasia and PAS far outweigh arguments in favor. Holland's current legal situation illustrates the dangers that result when the government sanctions euthanasia and PAS. Discrimination against the disabled, the elderly, and the mentally ill inevitably results from the practices of euthanasia and PAS. Therefore, any state law attempting to authorize PAS, euthanasia, or both, violates the Americans With Disabilities Act. The *Lee* decision does not preclude this determination because its holding was limited to the fact that Plaintiffs did not have standing. A plaintiff with proper standing could have the Death With Dignity Act overruled. The Act also violates the Equal Protection Clause of the Fourteenth Amendment. Alternatively, Congress should pass the Pain Relief Promotion Act, and the President should sign it. Future generations should recognize as self-evident truths that all Americans, not merely the strong and the healthy, are entitled to life, liberty, and the pursuit of happiness.

The Supreme Court correctly maintains the rational distinction between removal of life-saving treatment and the active termination of life. The Court should stand firm on this distinction and not carve out exceptions that would pave the way for a general right to die. The proverbial saying 'hard cases make bad law' rings especially true here.

Because the issues concerning PAS and its implementation involve matters of life and death, future reports should contain more rather than less

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250. The survey was based on interviews with 132 citizens living both independently and in nursing homes. Seventy-six of the respondents were living independently and 56 lived in various nursing homes. *See* EUTHANASIA EXAMINED, *supra* note 40, at 155.

251. *See id.* (emphasis added).

252. The comments given by those interviewed in response to the question, "Do you have anything further to say in connection with these question?" is indicative of the predicament. *See id.* (*quoted in* J.H. Segers, *Elderly Persons on the Subject of Euthanasia,* 3 ISSUES L. & MED. 407-424 (1988)). These comments include the following: "The unnecessary stretching of human life is inhumane."; "I hope that people will have a change of heart, the Netherlands is leading the way, that is frightening."; "When government officials get older, they will get their turn."; "If euthanasia is passed, then things can become difficult for believers."; "We still want to live long and happily."; "See to it that someone comes by once again."; "Older people are shoved into a corner, they certainly have a right to live."; "There is a great danger that euthanasia will be misused."; and "What are we up to?" *Id.* at 157. (Note that these statistics were reported in 1988).

information. In order to prevent potential abuses, understanding why some patients who received lethal medications did not take them is vital. So long as Oregon's assisted-suicide law remains in effect, future reports should analyze the complete set of data, including that of the patients who do not take the lethal prescriptions. The law requires that doctors record all requests for lethal medication as well as prognosis and competency determination; therefore this data is available. Scientifically valid conclusions require analysis of all the data.

There is no bright line between PAS and euthanasia, as the case of Patrick Matheny clearly illuminates. Therefore, if Oregon's law remains effective it will eventually result in an increasing number euthanasia cases. This further endangers many vulnerable individuals such as the disabled and the elderly who may be depressed and subject to coercive family members. Justice demands that the law protect these individuals.

Hospice care provides a viable alternative to legalized euthanasia or PAS. Medical schools should emphasize palliative care, as the Pain Relief Promotion Act indicates. This calls for reevaluation of existing policies. By denying contact with hospice patients, medical schools deprive future physicians of a valuable educational opportunity. Further, the practice of euthanasia undermines palliative care—the Dutch experience evidences this conclusion.

Finally, the Dutch Parliament should reject the proposal further expanding the boundaries of the already licentious euthanasia laws. Although the Parliament will not likely reject the legislation due to the majority coalition's support of the proposal, rejection is the best course of action. Further sanctioning euthanasia will ultimately result in an increase in the number of euthanasia cases, both voluntary and involuntary. The current policy already permits an alarming number of involuntary cases, including those where the doctor kills an infant without parental consent. There is no justification for infanticide. Finally, the proposed law allowing doctors to perform euthanasia on children as young as twelve without parental consent has no place in a civilized society.

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CAN THE OPTIONAL PROTOCOL FOR THE CONVENTION ON THE RIGHTS OF THE CHILD PROTECT THE UGANDAN CHILD SOLDIER?

I. INTRODUCTION

> *Me and my brothers and cousins were playing football. Five rebels came and took all six of us, my three brothers, two cousins and myself. They tied us with ropes around our waists and gave us heavy loads to carry. [They led us to a larger group.] There were about eighty rebels and fifty abductees in the group. At night, we stopped to rest, and they beat us—they used a bicycle chain to beat us. The next morning we came to the government soldiers when we were walking. They were firing at us. We ran with the luggage. My eldest brother escaped but the rebels caught him and they killed him. They beat him on the back of the head with a club. I watched him being killed. His tipu (spirit) came to me and covered me and told me, "Today, I am dead." I was in shock. . . . My other two brothers and I were allowed to stay together but we were told that if any of us escaped, one of us would be killed.*[1]

Children suffer as war rages on around the world. This problem, however, permeates further than many would think. It is generally believed, by those not versed in the severity of such atrocities, that the children suffer as a result of being displaced, losing family members or friends, and having their towns or villages being "accidentally" targeted by stray artillery. Not discounting the grievousness of these issues and problems, however, many children are effected much more severely.

Most children located near warring localities are subject to recruitment and are often required to participate in the armed conflicts (internal or international).[2] As many as 300,000 children under the age of eighteen are

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1. *Human Rights Watch, Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, reprinted in Human Rights Watch: Uganda* (visited Oct. 8, 1999) <http://www.hrw.org/hrw/pubweb/Webcat-102.htm>. The quote was found in Section II. This quote is from a fourteen-year-old child that had been abducted by an armed military group in Africa. His story was given to a correspondent of Amnesty International and it was ultimately relayed to the authors of this work, *The Scars of Death*.

2. *See* ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 23-31 (1994). Participation can include almost anything, from carrying food and water to fighting on the front lines as a human shield for the adults who have recruited them. *See id.* Fourteen-year-old Timothy, from Uganda, recounts his experience:

> I went for several battles in Sudan. . . . The commanders . . . would tell us to run straight into gunfire. The commanders would stay behind and would beat those of us

currently used in such hostilities.[3] Estimates reveal that the number of African children used in armed combat has reached nearly 120,000.[4] The number of children that have been killed as a result of participation in armed conflicts is estimated at approximately twenty million.[5] To be noted, however, this figure only includes those children killed since 1945. The areas most effected by the use of children in armed conflicts include "Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, Sudan, and Uganda."[6]

This Note illuminates the current trend of exploiting children in armed conflicts, specifically in Uganda, by discussing the current international standards regarding the protection of children in armed conflicts. More specifically, the new Optional Protocol on the Rights of the Child (Optional

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> who would not run forward. . . . I remember the first time I was in the front line. The other side started firing, and the commander ordered us to run towards the bullets. I panicked. I saw others falling down dead around me. The commanders were beating us for not running, for trying to crouch down. I don't know why we were fighting. . . . We were just ordered to fight.

Uganda: Child Victims of Rebels— Abduction and Killing of Children by Ugandan Rebel Group (visited Oct. 11, 1999) <http://www.africapolicy.org/docs97/ugan9710.htm>.

3. *See* Thalif Deen, *Children: NGO Groups Seek Tougher U.N. Stand on Child Conscripts*, INTER PRESS SERVICE, Aug. 29, 1999, *available in* LEXIS, News Library. *See also Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103, reprinted in* <http://www.hrw.org/hrw/hrw/campaings/crp/congress.htm> (discussing U.S. Congressional findings for Fiscal Year 1999). It was reported that children as young as seven or eight are being abducted and forced to participate in armed combat. *See* A. GLENN MOWER, JR., THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN 42 (1997).

4. *See U.S.A. Support Needed for International Campaign to Stop the Use of Child Soldiers* (last modified May 28, 1999) <http://africapolicy.org/docs99/chil9905.htm>. This document was re-posted by the Africa Policy Home Page. It is an action alert from the Washington Office on Africa, and it basically sets forth the plight of the child soldier in Africa. It is based upon an outcry from South Africa's First Lady Graca Machel (she is also the chosen expert of the Secretary General for the United Nations) and the Africa Conference on the Use of Children as Soldiers, which was held in Mozambique in April 1999. The conference called for international support to raise the internationally recognized age limit of fifteen to eighteen to participate in armed conflicts. *See id.*

5. *See* Susan O'Rourke von Struensee, Lead Articles: *Violence, Exploitation, and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 621 (1995). "In the past ten years alone, more than 1.5 million children have died from war-related injuries." *Id.*

6. *More Than 120,000 Child Soldiers Fighting in Africa* (last modified April 19, 1999) <http://www.hrw.org/press/1999/apr/cs0419.htm>. This list is only representative of the areas that are most effected by the use of child soldiers. There are many other areas in the world that are dealing with the use of children in armed forces and armed conflicts, including the United States which allows seventeen-year-olds to volunteer for recruitment into the United States armed forces. *See Africa-At-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, AFRICA NEWS, June 15, 1999, *available in* LEXIS, World News Library.

Protocol) will be presented and discussed.[7] The Optional Protocol, recently drafted, will increase the minimum age for recruitment and participation of children in armed conflicts (both internationally and domestically) from the age of fifteen to eighteen, and it will increase the recruitment age to sixteen. The most important aspect of the discussion, though, is the practical potential for success of the protocol and its effects.

Ultimately, the Optional Protocol for the Convention on the Rights of the Child is a much-needed addition to international humanitarian law, because the current international humanitarian standards do not protect children from recruitment and participation in armed conflicts. However, the practicality of enforcement of the Optional Protocol and the reality of changing the plight of the Ugandan child soldier remains doubtful unless further developments occur in the acceptability and enforceability of international humanitarian law.[8]

Part II of this Note discusses the general background of child soldiers with particular attention regarding the current situation in Uganda. Part III discusses the current international laws and standards regarding children and war, as well as international law in general as it applies to the child soldier. Part IV presents the Optional Protocol to the Convention on the Rights of the Child. Part IV also discusses the opposition to any change in current international laws regarding the recruitment and participation of children in armed hostilities. In addition, Part IV provides a discussion of the possible success of the Optional Protocol in general and with regard to providing additional protections for Ugandan child soldiers. The final part of this Note includes concluding remarks regarding the Optional Protocol and the Ugandan Child Soldier.

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7. There are actually two different Optional Protocols being drafted: one entitled the Draft Optional Protocol to the Convention on the Rights of The Child on the Sale of Children, Child Prostitution and Child Pornography, and the other entitled the Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts. The one that this note is addressing is the Optional Protocol relating to the involvement of children in armed conflicts. *See* SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 723-37 (1999).

8. An example is for the policies in the Optional Protocol (and the Convention on the Rights of the Child, generally) to become customary international law, which would create a greater obligation for the international community as a whole. *See* Jonathan I. Charney, Article, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

II. CURRENT SITUATION

A. *General Background*

The international community has discussed the plight of the child soldier for many years. As a result of the continued concern, the Forty-Eighth session of the General Assembly for the United Nations adopted Resolution 48/157. This resolution led Graca Machel, a child soldiers expert, to issue a report regarding the impact of armed conflict on children.[9] Included in the study was a discussion of the impact on children actively participating in armed conflicts as well as recommendations to prevent the travesty.[10] It is important to note that in this report, Ms. Machel used the term "child," as defined by Article 1 of the Convention on the Rights of the Child, as "every human being below the age of eighteen years . . . ."[11] This is essential to note because statutory protection of a child is often defined in terms of the child's age. Establishing a "norm" of eighteen for each and every nation is important for the long-term protection of children involved in armed conflicts. It is also essential to create a standard definition for a "child" as all those under the age of eighteen, because each and every nation will be better able to interpret international standards (which set forth protections for "children") without question or ambiguity.

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9. *See Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by the Secretary General,* U.N., 51st Sess., Provisional Agenda Item 108, at paragraph 9, U.N. Doc. A/51/306 (1996). The Secretary General submitted the report prepared by Graca Machel (the chosen expert on child soldiers) upon request by the General Assembly (Resolution 48/157 (1993)). Her report was extremely extensive and has greatly impacted both the United Nations and the rest of the international community. Two examples include: European Parliament Resolution B4-1078 (passed December 17, 1998, which made several far reaching decisions based in part on Graca Machel's report. *See generally, European Parliament: Resolution B4-1078, Passed 17 December 1998* (visited Oct. 8, 1999) <http://www.hrw.org/hrw/hrw/campaigns/crp/euro-parl.htm>. *See also Report of a Canadian Action Roundtable on Child Soldiers: Ottawa, Ontario, March 23, 1998* (visited Sept. 30, 1999) <http://www.dfait-maeci.gc.ca/peacebuilding/children-e.asp>. (The Report of a Canadian Action Roundtable on Child Soldiers, held in March 1998 was hosted by the Department of Foreign Affairs and International Trade. The Roundtable made several conclusions based upon, in part, the Graca Machel Report. The conclusions included a request for the minimum age for recruitment and participation of children to be increased to eighteen and that the Optional Protocol be passed with a "straight eighteen" approach).

10. *See* Anders Ronquist, *United Nations Action on Children's Rights*, 4 LOY. POVERTY L. J. 229, 233 (1998). The study also included recommendations regarding: the need to end the use of children under the age of eighteen years as soldiers and to ensure their demobilization and reintegration into society; to increase efforts at prohibiting anti-personnel mines; and to contribute to mine-clearance efforts. The report also addresses the importance of measures to prevent conflicts and the need to integrate into military programs instruction on military responsibilities towards women and children. *Id.*

11. *The Convention on the Rights of the Child, reprinted in* DETRICK, *supra* note 7, at xxiii.

In Machel's report, she notes that the increased use of children in armed conflicts can be attributed to, inter alia, "the proliferation of inexpensive light weapons."[12] Moreover, leaders in the various conflicts note that using children as soldiers makes their control of the armed group easier, because the children are "more obedient, do not question orders and are easier to manipulate than adult soldiers."[13] In addition, "children are uniquely vulnerable to military recruitment because of their emotional and physical immaturity, are easily manipulated, and can be drawn into violence that they are too young to resist or understand."[14] The unique nature of children creates an atmosphere which encourages abuse of the children by warring groups.

Often the "recruitment" of these children is forced or compulsory; however, there are some children that are said to join voluntarily.[15] Both government and armed opposition groups practice forced recruitment. The use of or the threat of force by these groups makes it virtually impossible for children to avoid recruitment. Often, children are rounded up in schoolyards,[16] market places,[17] and even churches.[18] Once the child is forcibly recruited, children are threatened and/or compelled to kill or observe the killing of someone they know in order for the military leaders to gain greater

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12. *Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by the Secretary General*, *supra* note 9, paragraph 27. The weapons given to children are light and so elementary that young children can dismantle and reassemble them quickly and easily. *See id.*

13. *Id.* at paragraph 34. The increased use of children in combat reveals the notion that military leaders have discovered that children are good soldiers because they have a higher tendency to obey orders without question. *See* MOWER, *supra* note 3, at 163.

14. *Appropriations for the Department of Defense for Fiscal Year 1999, Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 3.

> In 1986, Human Rights Watch (HRW) described the war being waged by the Soviet occupying forces and the Mujahedin resistance fighters for the allegiance of Afghan children. Thousands were being sent to the Soviet Union for long-term indoctrination or training as spies, saboteurs and assassins. A resistance commander explained: '[The Soviets] saw that they couldn't conquer us and they realized that there was no way to change the people. That's when they decided to take the children, because they think that they have 'empty brains.'

COHN & GOODWIN-GILL, *supra* note 2, at 37.

15. *See* COHN & GOODWIN-GILL, *supra* note 2, at 24.

16. *See Uganda: Child Victims of Rebels—Abduction and Killing of Children by Ugandan Rebel Group* (visited Oct. 11, 1999) <http://www.africapolicy.org/docs97/ugan9710.htm>.

17. *See* COHN & GOODWIN-GILL, *supra* note 2, at 24.

18. *See id.*

control over the child.[19] Such tactics are part of "brutal induction ceremonies" which many, if not all, of the children must undergo.[20]

Voluntary recruitment is actually more of a term of art. Children 'volunteer' for service in armed military groups for a variety of reasons: religious beliefs, social and community values, peer pressure, feelings of helplessness, feelings of vulnerability, a desire for revenge, and identity formation.[21] Ms. Machel reports, though, that the most common reason a child volunteers is because of economic reasons.[22]

Once children are recruited, either voluntarily or forcibly, into a military regime, they are forced to fight, kill, steal food, and even forced into sexual submission. The children are either eventually killed or released from duty (as a result of an international request or an end to the conflict). Ultimately, the impact of the combat and violence on children is severe. "Former child

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19. *See id.* at 27. Such tactics take "place in such a way that the community [knows] that he had killed, thus effectively closing the door to the child ever returning to his village." *Id.* By removing any chance for children to return home, they must turn to the only other way of remaining alive: to follow and obey those that have abducted them.

20. *See Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by Secretary General, supra* note 9, paragraph 44. "The children undergo a brutal initiation into rebel life: they are forced to participate in acts of extreme violence, often being compelled to help beat or hack to death fellow child captives who have attempted to escape." *Abduction and Killing of Children by Ugandan Rebel Group, supra* note 2.

21. *See* COHN & GOODWIN-GILL, *supra* note 2, at 37-43.

> Anecdotal evidence supports the supposition that many young people voluntarily join armed groups or forces because of their personal experiences and circumstances, and in light of their subjective appraisal of the decision to volunteer. Children's subjective understanding of reality is influenced by their social milieu or what has come to be called children's ecologies, and by developmental processes. The ecologies of children's lives—their parents, families, peer groups, schools, religious communities and other community based institutions—might exert pressures or send messages that lead children to participate in hostilities. Members of children's ecologies may also influence how a youth appraises the choice to participate in hostilities or not. Developmental processes, or stages children pass through at different ages, that influence a child's understanding of objective experiences can induce a child to respond to circumstances by joining an armed group. Developmental stage will also affect a child's perception of the decision to join. Children's expectations and feelings of empowerment and competence, both before and during war, have an impact on their decision to take up arms. Differences in children's 'attributional styles' are equally at work.... As adolescents enter the identity formation stage, the meaning they attach to the roles that conflict offers, such as combatant, victim, hero, or leader, may influence their decision to join an armed group. At this developmental stage, the ability to project a meaningful future for themselves is also powerfully and intimately tied up with their role in the conflict.

Id. at 30-31.

22. *See Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by Secretary General, supra* note 9, paragraph 39.

soldiers have grown up away from their families and have been deprived of many of the normal opportunities for physical, emotional and intellectual development."[23]

Child soldiers that are finally freed from "bondage," often exhibit symptoms of post traumatic stress disorder (PTSD).[24] "Symptoms of PTSD and related stress reactions common in children include: avoidance/numbing, ... insomnia, inability to concentrate, 'intrusive re-experiencing'..., lethargy, confusion, fear, aggressive behavior, social isolation, . . . hopelessness in relation to the future, and hyper-arousal as evidenced in hyper-vigilance and exaggerated startle responses."[25] Normal children face a variety of challenges in their development; however, armed conflict is considered to be extremely detrimental to healthy physical and emotional development.[26]

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23. *Id.* at paragraph 50.

24. *See Edward C. Green & Alcinda Honwana, Africa: War-Affected Children—Indigenous Healing of War-Affected Children in Africa* (last updated July 22, 1999) <http://www.africapolicy.org/docs99/viol9907.htm>.

25. *Id.* "[C]hildren in conflict areas demonstrate that they 'lose their sense of safety, acquire a high tolerance for violence, are haunted by terrifying memories, are mistrusting and cautious of others, and have a pessimistic view of the future.'" MOWER, *supra* note 3, at 163.

26. *See* Stuart Maslen, *Symposium: Implementation of the United Nations Convention on the Rights of the Child: II. Implementation and International Bodies: Relevance of the Convention on the Rights of the Child to Children in Armed Conflict*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 329, 331 & n. 2 (1996). Stuart Maslen is:

> [A] consultant for the United Nations Children's Fund (UNICEF). He was formerly the Research Officer to the United Nations Study on the Impact of Armed Conflict on Children, a study requested by the Committee on the Rights of the Child in 1993 in accordance with Article 45(c) of the Convention on the Rights of the Child.

Id. at 329. In addition, it has been reported that "many more children are wounded psychologically, emotionally, or culturally than are wounded physically. The widest impact of armed conflict on children is, therefore, on normal childhood development. This impact extends far beyond the immediate battle zone." *Id.* at 332.

B. *Child Soldiers in Uganda*[27]

The use of child soldiers is rampant in Uganda.[28] According to a United Nations Report from the Secretary-General, for the past thirteen years Uganda has been struggling through an internal war.[29] As a result, more than ten thousand children have been abducted, for participation in the armed conflict, by the Lord's Resistance Army (LRA).[30] Many of the children abducted are fourteen to sixteen years old; however, many are as young as eight or nine.[31]

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27. The general background information given above is also applicable to the following specific description of the plight of the Ugandan child soldier.

28. *See Abduction and Killing of Children by Ugandan Rebel Groups*, *supra* note 2. *See also Rights of the Child: Abduction of Children from Northern Uganda, Report of the Secretary-General*, U.N. Economic and Social Council, Commission on Human Rights, 55th Sess., Provisional Agenda Item 13, at paragraph 4, U.N. Doc. E/CN.4/1999/69 (1999). "[O]ne of the most egregious examples of the use of child soldiers is the abduction of some 10,000 children, some as young as eight years of age, by the Lord's Resistance Army in northern Uganda." *Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 6. These human rights violations are occurring both at the hand of the armed opposition group (the LRA) and by the Ugandan Government Forces. *See Amnesty International—News Release—AFR 59/05/99: Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War* (last modified Mar. 17, 1999) <http://www.amnesty.org/news/1999/15900599.htm>.

29. The war described is "a complex war that pits the LRA, backed by the Sudanese government, against units of the rebel Sudan People's Liberation Army (SPLA) on the one hand, and against the Ugandan army on the other." *Confessions of Uganda's Child Soldiers* (last modified April 21, 1998) <http://www.mg.co.za/mg/news/98apr2/21apr-uganda.html>. The areas affected by the conflict include Kitgum, Arua, Adjumani, Gulu, Moyo, Apac, and Lira (all cities or towns in and around Uganda). *See id.*

30. *See Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 6. The LRA alone has abducted approximately 10,000 children since 1986, 5,000 to 8,000 since 1995 alone. *See Rights of the Child: Abduction of Children from Northern Uganda—Report of the Secretary-General*, *supra* note 28, paragraph 4. Guerrilla factions consist of as much as 80% children. *See Africa: Africa's Child Soldier Fight Well, Eat Little*, CHILDREN OF WAR (A Newsletter on Child Soldiers From Radda Barnen) Oct. 1999, at 5. An additional note: the LRA is an armed opposition group opposing the Ugandan government. The LRA is often referred to as the "Koney Rebels" because the leader's last name is Kony. It routinely abducts children and adults to fight against the Ugandan Army and the Sudan People's Liberation Army. As the LRA works to overthrow the Ugandan government, it routinely strikes civilian areas, killing and looting as it moves through. *See Scars of Death*, *supra* note 1. "The LRA is headed by herbalist Joseph Kony, whose goal is to rule Uganda on the basis of the 10 Biblical Commandments. It began its fight against Museveni's government in 1987, shortly after the defeat of a rebellion by the Holy Spirit Movement, led by Kony's cousin Alice Lakwena." *Confessions of Uganda's Child Soldiers*, *supra* note 29.

31. *See Scars of Death*, *supra* note 1. *See also Abduction and Killing of Children by Ugandan Rebel Groups*, *supra* note 2 *and Rights of the Child – Abduction of Children from northern Uganda—Report of the Secretary General*, *supra* note 28, paragraph 4 (Discussion of the abduction and forced recruitment of children in Uganda).

Once abducted, the children are forced to march the fifty to one hundred miles to the Sudan, where they are placed in camps and taught to fight and use weapons.[32] The children are then forced to fight, steal, and do chores, such as carry large loads of supplies from one torched city to another. Often, young girls are forced to become the "wives" of commanders.[33] In recent years, the LRA's most common recruitment tactic has been child abduction.[34] The atrocities against children however, are not only taking place at the hands of the armed opposition groups. The Ugandan Government Army is also participating in this action.[35]

Children who have escaped, are released, or are removed from captivity, are said to be given amnesty by the Ugandan Government.[36] At a Counseling Center for Children in Gulu,[37] recently freed child soldiers are given food,

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32. *See Rights of the Child—Abduction of Children from northern Uganda—Report of the Secretary General, supra* note 28, paragraphs 5-6. During their long march, children are forced to carry supplies through the brush in the hot climate. If a child attempts to escape, he is killed and if the escapee is successful, any relative remaining in the group may be killed. If the children are not killed in this fashion, they may simply die from the trek itself. *See id.* A fourteen-year-old child, Odur Leko, was abducted from his Primary School in Kitgum (a town on the border of the Sudan) and he had this to report from his training to use weapons: "At the camp we were trained to use guns. Those who disobeyed had their ears and fingers cut off. I didn't want to participate in the killing, but they threatened to shoot me if I refused to do it." Comment by fourteen-year-old Odur Leko, *Confessions of Uganda's Child Soldiers, supra* note 29.

33. *See Abduction and Killing of Children by Ugandan Rebel Group, supra* note 2. *See also Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103, supra* note 3, paragraph 8. Many of the soldiers seem to practice bigamy because they often have multiple wives. Such practices gave rise to epidemics of sexually transmitted diseases and unwanted pregnancies. *See Rights of the Child: Abduction of Children from Northern Uganda, Report of the Secretary-General, supra* note 28, paragraph 5.

34. *See Amnesty International—Report—AFR 59/01/97: Uganda: "Breaking God's Commands": The Destruction of Childhood by the Lord's Resistance Army* (visited Oct. 11, 1999) <http://www.amnesty.org/ailib/aipub/1997/AFR/15900197.htm>.

35. *See id. See also Amnesty International—News Release—AFR 59/05/9: Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War, supra* note 28. The participation of the Ugandan Government in the abuse of children during the hostilities is not necessarily of the same type, but they are nonetheless contributing to the abuse.

> In March 1998, 30 children who had been abducted by the LRA were shot dead by government soldiers at Ogole in Kitgum. The UPDF opened fire within 10 metres of their targets. The children had been bound together and many became tangled up as they ran in panic. There has been no investigation—the army has simply denied that children were killed.

Id.

36. *See Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General, supra* note 28, paragraphs 17-29.

37. "Gulu, the main town in northern Uganda, is situated some 200 kilometres north of the capital Kampala." *Confessions of Uganda's Child Soldiers, supra* note 29, para. 4.

clothing, and counseling. Many are even reunited with their families and able to return to school.[38]

The impact of such conflict on the children gives rise to great concern in the United Nations and around the world. The Special Representative of the Secretary-General on the Impact of Armed Conflict on Children, Olara Otunnu, met with both Sudanese and Ugandan officials to discuss the ongoing armed conflict. These talks included discussions regarding the "issue of abducted children, . . . the plight of traumatized victims of rape, child mothers, displaced, maimed or abandoned children."[39] However, the officials accomplished nothing substantial because children are still being abducted and forced to participate in armed combat even today.

Many of the countries in Africa have already set the minimum age for recruitment of children into armed forces at eighteen years of age.[40] There are, however, a few exceptions: Angola allows children to be conscripted[41] into the military at age seventeen, and Uganda "appears to allow children over 13 years of age to enlist in certain circumstances."[42] After such a discussion, it would seem appropriate to ask, "where are the laws regarding the use of

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38. *See Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General, supra* note 28, paragraphs 17-28. It should be noted, however, that this information (reported by the Secretary-General) was provided by the Ugandan Government itself. This raises questions of consistency and completeness in the assistance that is said to be provided by the Ugandan government for these children. It should also be noted that many children are not able to be reunited with their families because they have been displaced or they have been killed during the fighting. Odur Leko (a fourteen-year-old abductee) reported that "he has lost hope in rejoining his family or school. 'I know I'm on my own now. My family may not want to see me again, because of the terrible things I did,' he says." *Confessions of Uganda's Child Soldiers, supra* note 29. According to a UNICEF report, "The State of the World's Children 1996," the past ten years has given rise to millions of dead, disabled, and homeless children. As well as another million "*unable to locate their parents.*" *See* MOWER, *supra* note 3, at 163.

39. *Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General, supra* note 28, paragraphs 19. *See also Abduction and Killing of Children by Ugandan Rebel Groups, supra* note 2.

40. *See Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Second Session,* U.N. Economic and Social Council, Commission on Human Rights, 52d Sess., Provisional Agenda Item 20 of paragraph 22, U.N. Doc. E/CN.4/1996/102 (1996). Not only do many of Africa's nations already espouse 18 as the minimum ages for recruitment and participation in armed conflicts, but, in a 1996 United Nations Report, it was reported that 70 out of 99 countries already had 18 or more already set as their minimum age. *See id.*

41. The definition of conscript is "to enroll for compulsory military service." THE POCKET WEBSTER SCHOOL & OFFICE DICTIONARY 169 (1990).

42. *More than 120,000 Child Soldiers Fighting in Africa, supra* note 6. The "certain circumstances" described was not defined, however, it seems that certain circumstances means whenever there is a need for soldiers and there are no other adults that are available for recruitment. Moreover, the 'certain circumstances' seem to represent (to some degree) the whim of those actively searching for "recruits."

child soldiers?" The answer is long, vague, and saddening. Moreover, even though well-intended solutions exist, such as the Optional Protocol to the Convention on the Rights of the Child, the likelihood that it will be successful remains questionable.

III. CURRENT INTERNATIONAL STANDARDS

There are a variety of international legal standards which, at first glance, seem to give some direction and guidance to nations with regard to age requirements for recruitment and participation of persons in armed conflicts. First and foremost is the Convention on the Rights of the Child, specifically Articles 38 and 39.[43] Other international standards regarding humanitarian law (some addressing child soldiers and their rights specifically) include: Article 77 of the Additional Protocol I to the 1949 Geneva Conventions,[44] Article 4 of the Additional Protocol II to the 1949 Geneva Conventions,[45] and the African Charter on the Rights and Welfare of the Child.[46] These and other important international agreements are discussed below.

A. *International Human Rights Instruments Directly Pertaining to Children*

1. *The Convention on the Rights of the Child*

The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) on November 20, 1989.[47] It was the culmination of many years of dedicated work to establish a document applicable to all children. The final document encompassed forty rights specifically applicable to children.[48] Four "hot topics" surfaced during the drafting of the CRC; one

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43. *See Convention on the Rights of the Child*, U.N. Doc. A/RES/44/736 (1989), *reprinted in* MARIA RITA SAULLE & FLAMINIA KOJANEC EDS., THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS 9 (1995).

44. *See Additional Protocol I to the Geneva Conventions of 1949, Art. 77, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 725.

45. See *Additional Protocol II to the Geneva Conventions of 1949, Art. 4, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 729.

46. *See Charter on the Rights and Welfare of the African Child*, Organization of African Unity, Addis Ababa, *reprinted in* SAULLE & KOJANEC, *supra* note 43, at 759.

47. *See United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989).

48. *See id.* at 1450. The rights included in and of themselves were not extraordinary. What made this document special was the fact that it was directed at children. *See id.* The rights enumerated in the CRC include protections from violence, abuse, abduction, and from hazardous employment and exploitation. The CRC also includes a right to adequate nutrition; free compulsory primary education; adequate health care; and equal treatment regardless of gender, race or culture. Moreover, it provides a right to express opinions and freedom of thought in matters affecting the child. The drafters also seemed to recognize the fact that these

of which was the minimum age for participation in armed conflicts.[49] That issue, addressed by Article 38, remained one of the most difficult issues to resolve until the final draft of the treaty was complete.[50] The minimum age of eighteen was supported by many of the working group for the CRC; however, the United States (the most vocal protestor) steadfastly opposed establishing eighteen as the minimum age for recruitment and participation of children in armed conflicts. Ultimately, the only agreement that could be reached was the age of fifteen for recruitment and participation in armed conflicts.[51]

Despite these difficulties, the CRC has been ratified by 191 of the 193 participating nations. More important, though, it has been ratified at "record-breaking rates; no other specialized United Nations human rights treaty has entered into force so quickly and been ratified by so many states in such a short period of time."[52] Burma, China, and Cuba, which are not parties to the

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were children that they were talking about and also included provisions for safe access to leisure, play, culture, and the arts. *See UNICEF*USA: United Nations Convention on the Rights of the Child—Frequently Asked Questions* (visited Sept. 10, 1999) <http://www.unicefusa.org/infoactiv/rights.html>. The protections provided under the CRC are arranged thematically with interrelated provisions under individual headings. Such an approach "reflect[s] the CRC's holistic perspective of children's rights: that they are indivisible and interrelated; that equal importance should be attached to each and every right recognized in the CRC because each one is fundamental to the dignity of the child; and that the implementation of each right should take into account the implementation of or respect for all the other rights." DETRICK, *supra* note 7, at 22.

49. *See United Nations: Convention on the rights of the Child, supra* note 47, at 1450. The other three hot topics included "the rights of the unborn child, the right to foster care and adoption, [and] the freedom of religion..." *Id. See also* Karen A. McSweeney, Note, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP. L. REV. 467, 484 (1993).

50. *See United Nations: Convention on the Rights of the Child, supra* note 47, at 1450. At the outset of the drafting process, the precise age a person could participate in armed combat was not discussed because many nations assumed that the age would coincide with Article 1 of the CRC, which defined a child to be anyone under the age of eighteen. *See* LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS 150 (1995).

51. *See United Nations: Convention on the Rights of the Child, supra* note 47, at 1451. The United Nations decision making process is conducted by consensus. This procedure resulted in a "watering down" of the final provisions of the CRC. The United States was able to successfully push for the redefinition of the child under Article 38 (in contrast to Article 1 which defines a child as anyone under the age of eighteen) because of the consensus process. They argued that since Protocols I and II of the 1949 Geneva Conventions already mandated fifteen as the minimum age for recruitment and participation, this was not the time nor the place to alter existing international humanitarian standards. *See id.* Along with the United States, the United Kingdom, Canada and the Soviet Union also objected to eighteen as the minimum age. *See* LEBLANC, *supra* note 50, at 150. The argument which lost the debate was that by increasing the minimum age under Article 38, they would be advancing international law, not causing inconsistencies. *See id.* at 150-51.

52. LEBLANC, *supra* note 50, at 45. Though the United States signed the CRC in 1995, they have failed to ratify it. This failure can be credited to several misconceptions about the goals and beliefs espoused by the CRC. *See How to Help the US Ratify* (visited Sept. 16, 1999)

U.N. Covenants on Human Rights, have even signed and ratified the CRC.[53]

Despite the widespread acceptance of the CRC, several major defects remain which render it incapable of successfully protecting children involved in armed combat. First, one of the greatest inadequacies is the inconsistency between Article 1 and Article 38 of the CRC. Article 1 defines a child as everyone under the age of eighteen, while Article 38 specifically redefines the child for the purposes of participation in armed combat at age fifteen.[54] This inconsistency seems to portray child soldiers as less worthy of protection than all other children. On the contrary, these children are in need of even more protection. Ugandan children (as defined by Article 1) are being abducted, tortured, and killed. But because they are being used as "soldiers," they are afforded less protection.

Second, the CRC includes a large number of reservations. Such reservations weaken the sweeping requirements set forth in the CRC and work to lessen the protection of children.[55] Although the Commission on Human Rights, as well as many humanitarian organizations, have repeatedly requested that states remove their reservations, such requests have mostly been in vain.[56] There is simply little point in an international human rights law which provides those bound by it to pick and chose which provisions they will follow and which ones they will not follow.

Finally, "[t]he only international implementation mechanism provided for in the CRC is the system of period reporting by States parties to the relevant human rights treaty body, the Committee on the Rights of the Child."[57] Once the reports are received and reviewed, the Committee simply makes suggestions and other forms of constructive criticism to the state party.[58] This method of assuring compliance is "limited by the signatories' willingness to comply."[59] It does not actually punish noncompliance with the CRC or force compliance in the future, though compliance is "requested" by

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<http://www.unicef.org/crc/updates/us-how.htm>.

53. *See* Ronquist, *supra* note 10, at 230.

54. *See* DETRICK, *supra* note 7, at 22. *See also supra* note 48.

55. *See* Ronquist, *supra* note 10, at 230-32.

56. The main purpose of the Committee is to ensure state compliance with the CRC. Reports are submitted to the Committee by each state party after the first two years of ratification and then every five years thereafter. *See Convention on the Rights of the Child*, Article 44(1), *reprinted* in SAULLE & KOJANEC, *supra* note 43, at 26.

57. DETRICK, *supra* note 7, at 41.

58. *See Convention on the Rights of the Child*, Article 44(1), *reprinted in* SAULLE & KOJANEC, *supra* note 43, at 25-26. Each report is to contain a record of the measures that the state party has taken that will give "effect to the rights recognized . . . [in the CRC] and on the progress made on the enjoyment of those rights." *Id.* at 25.

59. O'Rourke von Struensee, *supra* note 5, at 590.

the Committee. Moreover, there is no provision that allows for complaints from third parties regarding violations of the CRC, whether by individuals or organizations within or outside of that state.

Despite these problems, the CRC was successful in recognizing the rights of children on an international level. It raised issues and concerns that were not addressed in the past or that were not adequately dealt with. However, the Ugandan child abducted and forced to fight in armed combat is not protected by the CRC.[60] Uganda has since signed and ratified the CRC but abductions of children for forced participation continues without abatement.[61] The CRC, as it currently stands, is not a viable solution for Ugandan child soldiers.

2. *The African Charter on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (African Charter) explicitly protects children involved in armed conflicts.[62] This Charter, though only a regional charter, is important for several reasons. First, it recognizes that the rights and welfare of the child are more important than the type of conflict in which the child is involved.[63] Second, is its definition of a child. The fact that it establishes a child as anyone under the age of eighteen (including those children involved in armed combat) advances current international humanitarian protections for children.[64] Last, Article 22(2) of the Charter states "[p]arties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities

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60. *See U.N. Convention on the Rights of the Child: 195 States Have Ratified the Convention on the Rights of the Child* (visited Oct. 8, 1999) <wysiwyg://207//http://www.freethechildren.org/ratify.htm> (listing the states and dates of ratification).

61. *See Army Captures 48 Child Soldiers From Lord's Resistance Army Rebels*, THE BRITISH BROADCASTING CORPORATION, Feb. 23, 2000, *found in* the LEXIS News Group File, Most Recent 60 Days. Most of the children that were recovered from the LRA were between the ages of eight and ten. However, there were several older children found as well, some ages fifteen or sixteen and even a couple as old as age twenty-two. *See id.*

62. *See* GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 332 (1995).

63. *See id.* Article 22(3) of the Charter reads:

> States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension or strife.

Charter on the Rights and Welfare of the African Child, Organization of African Unity, Addis Ababa, July 11, 1990, art. 2, *reprinted in* SAULLE & KOJANEC, *supra* note 43, at 768.

64. *See id.* at 760.

and refrain in particular, from recruiting any child."[65] The African Charter is broader than the CRC and the newly adopted Optional Protocol to the Convention on the Rights of the Child.[66]

In addition to acting as a compliment to the CRC, the African Charter also attempts to correct some of the problems found within the CRC.[67] Despite these good intentions, however, there are several shortfalls. The Charter has only recently become binding upon those African states which signed and ratified it. Therefore, though the states that did sign it may be bound, numerous others that have not signed or ratified it remain unaffected.[68] Second, Article 1(3) states that "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of [sic] such inconsistency be null and void."[69] Therefore, cultural or religious inconsistencies with the African Charter greatly increases the likelihood for noncompliance with the Charter.

The Charter may be extremely helpful for the Ugandan child soldier. In some respects, it may potentially be more effective than the Optional Protocol.[70] For instance, the monitoring function for the Charter resides within the same continent as an infraction to the Charter;[71] any violations by the Ugandan Government, or by any of the various rebel groups within the Ugandan borders, may be brought forward by various entities—not just

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65. *Id.* at 768, art. 22(2).

66. *See infra* notes 106-127 and accompanying text.

67. *See* B. Rwezuara, *The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURAL AND HUMAN RIGHTS 82-83 (Philip Alson ed., 1994) (reminding that the African Charter has only recently become effective.). The intent of the Charter was described to:

> [P]rovide[] for the establishment of an African Committee of Experts to promote the rights of the child, monitor implementation and ensure protection, and interpret the treaty's provisions. States are to report on their measures of implementation, and the Committee 'may receive communications from any group or non-governmental organization recognized by the Organization for African Unity or the United Nations relating to any mater covered by [the] Charter.' Moreover, the Committee has the power to investigate the alleged violations.

COHN & GOODWIN-GILL, *supra* note 2, at 159. It is important to note that at the time this book was written, the African Charter had not yet become effective.

68. *See The African Charter on the Rights and Welfare of the Child Entered into Force November 29, printed in* CHILDREN OF WAR: A NEWSLETTER ON CHILD SOLDIERS FROM RADDA BARNEN, No. 4/99, December 1999.

69. *African Charter on the Rights and Welfare of the Child, Organization of African Unity*, Addis Ababa, July 1990, Art. 1(3), *quoted in* ALSTON, *supra* note 67, at 100-101. Recognizing cultural differences that conflict with the intent of the Charter is important. In such cases, it must be determined whether the Charter should override such beliefs and if so, what considerations must be taken into account when making this decision.

70. *See infra* footnote 106 and accompanying text.

71. *See generally Part II of the African Charter on the Rights and Welfare of the Child, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 772-76.

through the reports submitted by Uganda to the oversight committee. Furthermore, the African Charter will create a greater obligation on the part of the Ugandan government in attempts to enforce the provisions within the Charter. Acceptance of the African Charter and of the Optional Protocol could supply double protection for the Ugandan child soldiers, provided enforcement and accountability of the provisions are upheld.

3. *The Declaration of Geneva, Council of the League of Nations Assembly, March 1924, and The Declaration on the Rights of the Child 1959*

The first attempt to recognize and protect children's rights came in the form of the Declaration of the Rights of the Child in 1924 (Declaration of 1924).[72] The intent of the declaration was evident even though the document did not include numerous provisions. It was geared toward the economic, psychological, and social needs of children. But more specifically, it guaranteed the child the best that mankind is able to offer.[73] This document paved the way for many future international efforts to protect the rights of children.[74]

The most distinct shortfall of the Declaration of 1924 is that it was too vague. The statement that "the child must be the first to receive relief in times of distress"[75] does not address exactly what a time of distress is or what kind of relief the child should receive. Moreover, there was no direct protection for children involved in armed conflicts. And last, there was little obligatory pressure for nations to enforce the beliefs set forth within this document.[76] An unbinding declaration really does nothing more for a child than pay lip service to their plight. It does even less for the child soldier.

Ultimately, the League of Nations, which created the Declaration of 1924, disbanded and the United Nations was formed. In order to continue the protection of children and their rights, the Declaration on the Rights of the Child (Declaration of 1959) was created.[77] This revised Declaration continued

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72. *See Declaration of Geneva, Council of the League of Nations Assembly, Geneva, March 1924, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 3. *See also*, VAN BUEREN, *supra* note 62. The Declaration of 1924 "owed its origins to the concern for children affected by armed conflicts in the Balkans, the only express provision provided that in times of distress children should be the first to receive relief." *Id.* at 329.

73. *See* VAN BUEREN, supra note 62, at 6-7. From the language of the document, it was evident that the children were "recipients of treatment rather than as the holders of specific rights." *Id.* at 7.

74. *See id.* at 8. This author also noted that the mere fact that this Declaration occurred in 1924 eliminated the notion that the interest in children's rights is a new concept. *See id.*

75. *Id.* at 7, art. 3.

76. *See id.* The preamble actually places the burden of accomplishing the provisions of the declaration upon the "men and women of all nations." *Id.*

77. "After the Second World War, which caused considerable suffering of children, immediate efforts were made by the General Assembly of the newly established United Nations

to use the basic format and nature of the original Declaration, however, it was agreed that it would have to be reinvented to some degree in order to comport with the new character of the United Nations.[78] The final draft of the Declaration of 1959 included a preamble and ten principles. This version was less vague because it made a better effort to particularize the protections of the child and it called for the States' parties to create appropriate legislation and other measures to ensure enforcement of the Declaration.[79]

Article 9 is the Declaration's attempt to protect children from neglect, cruelty, and exploitation as well as to prevent children from forced employment under an appropriate minimum age.[80] The Declaration makes no specific reference to children involved in armed combat. But with little debate, the use of a child in armed combat constitutes neglect, cruelty, and exploitation of children, but it also forces them to work in an environment which could endanger their health or education at a young age.

Regardless of the benefits of this declaration, there is still another shortcoming. The Declaration of 1959 does not define what is meant by the term "child." The absence of an established and agreed upon minimum age basically allows each nation to establish its own minimum age as long as it is supported by some purpose or reason. Allowing each State party to establish its own appropriate minimum age allows each state to retain the greatest amount of autonomy possible. But, it does little for the child of sixteen who is being forced to fight instead of attending school and earning an education for himself. In addition, even if some of the provisions in the Declaration of

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to adopt a revised declaration of the rights of the child." DETRICK, *supra* note 7, at 14.

78. *See* VAN BUEREN, *supra* note 62, at 9-10. Three different options were initially discussed regarding the nature and design of the new declaration. 1) "they could reaffirm the original Declaration of Geneva with a few minor textual alterations, [2)] they could maintain the form, structure, and contents of the Declaration, adding such amendments as would transform the document into a United Nations Declaration of the Rights of the Child, or [3)] they could prepare an entirely new Charter." *Id.* at 9 It was ultimately decided to follow the second suggestion. The initiative included twenty-one different governments working together to redevelop what is now the Declaration of 1959. *See id.* at 9-10.

79. *See* DETRICK, *supra* note 7, at 14. An important note is that this Declaration was intended to give the children rights rather than see the children as recipients of assistance. *See id.*

80. *See Declaration on the Rights of the Child, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 5. I believe that the title to the Declaration in the authors' book however contains a typographical error. It reads that the Declaration was adopted in 1989, but it was actually adopted in 1959. Principle 9 reads:

> The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.
>
> The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Id. Principle 9, at 7.

1959 would assist the Ugandan child, it is uncertain if the children affected are actually "covered" by the Declaration itself because the term "child" is never clearly defined.

Last, the Declaration of 1959 is no more binding than the Declaration of 1924.[81] Though Uganda has signed and ratified the Declaration, it is not enforceable unless it is considered customary international law.[82]

B. *International Human Rights Instruments Not Pertaining Directly to Children*

1. *The Four Geneva Conventions*

International humanitarian law of armed conflicts is encompassed in the four Geneva Conventions of 1949.[83] The purpose of the four Geneva

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81. *See* VAN BUEREN, *supra* note 62, at 12. Though the document is non-binding, it was adopted unanimously. This is significant because it is therefore believed that it is held with greater importance than other non-binding resolutions which are less than unanimously received. "At its lowest, a unanimous adoption by the General Assembly implies that the Declaration has a moral force because its principles have the approval of all the Member states of the United Nations." *Id.*

82. *See id. See also infra* note 98 and accompanying text discussing humanitarian international law as applied to internal conflicts.

83. *See The Four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Geneva Convention I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV) *cited in* Laura Lopez, Note, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, at n. 4 (1994). "In the second half of the nineteenth century, the laws of war, which, until then, had been derived almost entirely from international customary law, began to be codified and extended by treaties." DETRICK, *supra* note 7, at 648. Before the four Geneva Conventions of 1949, there were many treaties that codified customary law: the Geneva Conventions of 1864 and 1906, the three Hague Conventions of 1899, the thirteen Hague Conventions of 1907, the London Treaty of 1930 and its Protocol of 1936, and the Geneva Protocol of 1925. *See* DETRICK, *supra* note 7, at 648. After the 1949 Geneva Conventions, several others followed as well: the Hague Convention of 1954, Convention of 1972, Convention of 1976, the two additional Protocols of 1977 to the 1949 Geneva Conventions, and a Convention and three Protocols of 1981. *See* DETRICK, *supra* note 7, at 648. *See generally* Major Thomas J. Murphy, Article, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 13-18 (1984) (discussion of the creation of the four Geneva Conventions). The result of the 1949 Geneva Conventions yielded 429 articles that establish "a wide range of general principles and specific rules governing the treatment to be accorded to individuals, and in some circumstances to the whole of a region's population, in times of armed conflict." Murphy, at 3.

Conventions "is to provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts."[84] In simpler terms, the Geneva Conventions were intended to be guidelines for individuals and countries with regard to the treatment and protection of those impacted by armed conflict. However, this does not necessarily include the protection of those who participated directly in the armed conflict.[85] The completeness with which the Geneva Conventions has been received and accepted by the various nation states gives rise to the notion that almost every nation, even those who have not signed it, must comply with its provisions.[86]

The Geneva Conventions falter with respect to the protection of children, especially the use of child soldiers. Many of the provisions encompassed in the Geneva Conventions are applicable to only certain kinds of conflicts as well as to certain classes of people.[87] This limits those who may receive the benefit of the Conventions. The benefits are even more limited in that the Conventions do not specifically relate to children, but to "people" as defined within each class protected, not to children specifically within those protected classes.[88]

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84. Murphy, *supra* note 83, at 3.

85. *See id.*

86. *See id.* at 5.

87. *See* Murphy, *supra* note 83, at 23. Many of the provisions enumerated under the Geneva Conventions are applicable only to international types of conflicts. Common Article 3 is the location of specifications for application to conflicts which are not international in nature. Common Article 3 also encourages the various State parties to voluntarily agree to follow the other provisions (which are not applicable to internal conflicts) with regard to the internal conflict they are experiencing. *See id.* at 22-24. Each individual Convention lists those that it is intended to cover: Convention 1 protects wounded or sick combatants, while Convention 2 protects "wounded and sick combatants aboard ships and combatants who are shipwrecked from any cause, . . ." *Id.* at 23. Convention 3 protects prisoners of war, while Convention 4 protects civilian persons that are note members of the armed forces. *See id.* at 23-24.

88. In 1946, after the cessation of [World War II] . . . , a Draft Convention for the Protection of Children in the Event of International Conflict or Civil War was submitted by the Bolivian Red Cross to the Preliminary Conference of National Red Cross Societies for the Study of the Geneva Conventions. The resolution recommended that the provisions of the draft Convention should be incorporated into the future Geneva Convention on the Protection of Civilians in preference to an additional fifth treaty. In 1947 the Conference of Government Experts approved this decision, and the possibility of a separate Convention focussing on the particular vulnerabilities of children in armed conflicts was abandoned. As a result the international treaty law governing children who are caught up in armed conflicts is found either in general humanitarian treaties focussing [sic] on adults and children, or in global and regional treaties

The greatest problem with regard to the Geneva Convention and its applicability to child soldiers is that "the laws of war codified in the Geneva Conventions are increasingly irrelevant."[89] Most, if not all, of the conflicts occurring today are internal in nature.[90] Weak internal or domestic provisions regarding the laws of war have resulted in few safeguards in this area, especially with regard to the use and abuse of children in armed conflict.

The four Geneva Conventions cannot help the Ugandan child soldier for many reasons; the main reason is because the conflict that is enveloping the children is internal (and sometimes referred to as "low level") in nature. As stated earlier, the Geneva Conventions generally do not provide protections or sanctions for these kinds of hostilities. The child soldier in Uganda desperately needs something that is applicable to children specifically and which is applicable to those kinds of conflicts in which they are involved, otherwise protection will not be provided. Several years after the acceptance of the Geneva Conventions though, two additional protocols were drafted and ultimately accepted by many of those who were already a party to the four existing Geneva Conventions.[91]

2. *Protocol I and II to the 1949 Geneva Conventions*

The additional Protocols I and II of the 1949 Geneva Conventions were the result of several meetings in 1971-1972 by the International Committee of

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> which regulate states' behaviour [sic] in both peace and armed conflicts.

VAN BUEREN, *supra* note 62, at 329 (footnote omitted).

89. Lopez, *supra* note 83, at 916.

90. *See* COHN & GOODWIN-GILL, *supra* note 2, at 149. Significant figures in the international humanitarian law field have identified several types of human rights violations in internal conflicts that are not currently addressed by international humanitarian laws and standards, they include "summary and arbitrary execution; torture and inhumane treatment; disappearances; hostage-taking; terror and intimidation of civilian populations; deportation and forced relocation; abuse or lack of judicial process; large-scale and prolonged administrative detention; and collective punishment." *Id.* An additional violation is the use and abuse of children in armed conflict.

91. *See* Murphy, *supra* note 83, at 46-48. The adoption of the two additional protocols happened as a result of a variety of factors:

> Since the adoption of the four Geneva Conventions in 1949, a proliferation of new nations have entered the world community, a multitude of armed conflicts have taken place under a variety of conditions, and marked changes have occurred in the nature of both international and non-international hostilities. These factors led to widespread views that the body of traditional law for the protection of victims of armed conflicts, as embodied primarily in the Geneva Conventions of 1949, the Hague Conventions of 1907, and the customary law of nations, was not adequate to fulfill its purpose in the modern age.

Id. at 46.

the Red Cross and various other government experts.[92] Protocol I provides for the protection of victims of international armed conflict while Protocol II provides for the same protections except it is geared toward non-international armed conflicts.[93] Included in both Protocols are a few provisions which apply directly to children.[94] The two most relevant provisions include Article 77 to the Additional Protocol I and Article 4 of the Additional Protocol II.[95]

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92. *See* Sylvia Junod, Conference, *The American Red Cross—Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 31 (1983). Instead of two Protocols, many parties argued for only a single Protocol which would encompass all of the provisions set forth. They argued "that in the face of equal suffering, victims have the right to the same protection in all armed conflicts, whether internal or international." *Id.* at 33.

93. *See* Howard S. Levie, Article, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, n. 1 (1993-1994) and *see* Junod, *supra* note 92, at 29.

> Geneva Protocol I supplements the preexisting conventional humanitarian law provisions regarding their implementation and enforcement by extending protection of the humanitarian law to more persons, by enunciating new substantive norms in defining additional categories of grave breaches and in clarifying standards of responsibility, and by enumerating additional or supplemental enforcement and implementation measures.

Murphy, *supra* note 83, at 48. Protocol II

> applies to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

Junod, *supra* note 92, at 36.

94. Protocol I actually has several articles which are specifically relevant to children: Articles 8, 70, 74, 75(5), 77, and 78. Article 77 is the most significant. *See* VAN BUEREN, *supra* note 62, at 331.

95. *See Stop the Use of Child Soldiers! International Legal Standards Governing Child Soldiers* (visited Sept. 7, 1999) <http://www.hrw.org/campaigns/crp/int-law.htm>. Article 77 of Protocol I (which addresses the victims of international armed conflicts) seems to afford the most comprehensive protection. For example in Article 77(2), the protocol states that "Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces." *Protocol I of 1949 Geneva Convention, reprinted in* SAULLE & KOJANEC, *supra* note 43, Article 77(2), at 726. Moreover, subsection (5) of the same article provides that "the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed." *Id.* However, Article 4(3)(c) of Protocol II (which addresses victims of non-international armed conflicts) states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities." *Protocol II to the 1949 Geneva Conventions, reprinted in* SAULLE & KOJANEC, *supra* note 43, at 729-30. Protocol II is more comprehensive regarding the recruitment and participation of children in armed conflicts because it does not permit any recruitment or any kind of participation, where as Protocol I simply says that children should not take a direct part in the armed hostilities and that the recruiters should refrain from recruiting the children. However, Protocol I does provide for protection of the children after the conflict has come to

The additional protection provided in these provisions cannot be entirely dismissed. But their acceptance is not as wide spread as the four Geneva Conventions or the CRC, so the benefit is minimal.

Uganda has signed both, but to little avail for the Ugandan child soldier.[96] Article 77 of Protocol I prescribes fifteen as the minimum age for recruitment and participation in hostilities while Article 4 of Protocol II establishes similar requirements for domestic hostilities as well. This requirement for fifteen to be the established minimum age presents a problem in countries like Uganda. Proof of age is not an easy task in Uganda because many children are not registered at birth as they are supposed to be.[97] More protection is needed.

3. *Inadequacy of Current International Standards and the Limitations of International Humanitarian Laws to Internal Conflicts*

As evidenced by the preceding discussion, current international provisions, with the possible exclusion of the African Charter for the Rights and Welfare of Children, are simply inadequate protections for children who are being forced to participate in wartime activities. However, a discussion of international humanitarian law in relation to customary international law is necessary before proceeding to a discussion of the Optional Protocol and its probability of success.

International humanitarian law, which deals with the regulation of armed conflicts,[98] is similar to the traditional notions of law, in that it promotes "order, guiding, restraining, [and] regulating behavior."[99] It is created by the

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an end in its protection of them from capital punishment if they were found to be involved in the conflict. *See id.* at 726-30.

96. *See* COHN & GOODWIN-GILL, *supra* note 2, at 206. This information is included in a comprehensive chart that establishes the acceptance of various international human rights treaties among the many nations. Each nation is listed along with those human rights treaties in which it has signed and ratified, including: the CRC, the four Geneva Conventions of 1949, the additional Protocols to the 1949 Geneva Conventions, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. *See id.* at 186-208. This chart also includes each nations established voting age, military recruitment minimum age, and whether the nation participates in conscription of minors. *See id.*

97. The CRC and other humanitarian laws require the registration of children at birth. *See* Article 7 of the CRC, *reprinted in* DETRICK, *supra* note 7, at xxiv.

98. *See* VAN BUEREN, *supra* note 62, at 329. International humanitarian law is usually divided into two subcategories: international armed conflicts and non-international armed conflicts. Even the subcategory regarding non-international armed conflicts is limited in scope because it does not include provisions for smaller scale conflicts. *See id. See also* Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996).

99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U. S.: INTRODUCTORY

practices of the nations themselves (customary international law), through agreements (treaties, conventions, etc.) among and between the various nations, and/or from obtaining general principles that are common to the various legal systems in the world.[100] The problem with statutory international law is that it only binds those states that have signed and ratified the treaty or convention.[101]

The important point is the relation of customary international law with regard to child soldiers. Customary international law is believed by some to be binding upon all states, even those that are not signatories to the respective treaty.[102] In addition, the Restatement suggests "[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."[103] Even more interesting,

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NOTE § 1 (1987).

100. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U. S.: SOURCES OF INTERNATIONAL LAW § 102(1) (1987). Restatement (Third) Section 702 provides a list that establishes a basis for determining if a state violates international law.

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) § 702, *supra* note 8. Comment A goes further and states that this list is "not necessarily complete, and is not closed." *Id.* at cmt. A.

101. *See* Gary L. Scott & Craig L. Carr, Article: *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996). At first glance, this concept only seems fair. However, it leaves a large void where a nation does not agree to abide by the treaty or convention. The result is often a lack of regulation and control in the areas that seem to most need the regulation and control.

102. *See id. But see* Charney, *supra* note 8, at 971. It is believed by others, however, for example, the members of the International Court of Justice, that international agreements play a limited role in the development and identification of customary international law. *See Charney, supra* note 8, at 971-72. One author commented that "treaties such as the Geneva Conventions that are accepted by virtually the entire international community through formal and solemn acts have as strong a legal claim to observance as customary law, which by and large rests on the practice of a limited number of states." Theodor Meron, *The Geneva Conventions as Customary Law*, 81 A. J. I. L. 348, 349-50 (1987).

103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(3), *supra* note 100. It is noted in the Restatement's comments that the time frame needed for the creation of customary international law may actually be short in duration. *See id.* Moreover, the Restatement (Third) Section 702 states that:

> In general, a state is responsible for acts of officials or official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree or instruction.... The violations of human rights cited in this section, however, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy. A state is not responsible under this section for a violation of human rights by an official that was not authorized, encouraged, or condoned by the responsible

some multilateral agreements may become binding as customary international law on those states that do not actively protest during the formation and establishment of the treaty.[104]

If the important treaties regarding the use of child soldiers become recognized as customary international law, the enforcement and understanding of such practices may become more widespread. Arguably, it could be said that the policies in the CRC might already be considered customary international law, in light of the fact that it has been so widely recognized and accepted. However, the new Optional Protocol to the CRC might also become customary international law; binding upon more states than those who are signatories. This theory is of some hope only if the CRC is deemed to establish international customary law and if the Optional Protocol is seen as an amendment to the CRC rather than as an optional addition.[105]

The Ugandan child soldier might be afforded greater protection if customary international law prohibits children under the age of eighteen from being recruited for participation in hostilities. The change in the minimum age however, is not going to be accomplished through the current international laws. Discussion should now turn to the new Optional Protocol for the Convention on the Rights of the Child. Its goal is to increase protections for children involved in armed conflicts and it is discussed below.

IV. THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

A. *The Optional Protocol History and Provisions*

In the past several years, an interest arose to increase the minimum age for recruitment and participation of children in armed conflicts.[106] As

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governmental authorities of the state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, *supra* note 8, cmt. b.

104. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, *supra* note 100, cmt. i. "Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states." *Id.*

105. Some proponents of the Optional Protocol are requesting that it become an amendment instead of a voluntary addition to the Protocol. *See Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fifth Session*, Commission on Human Rights, 55th Sess., Agenda Item 13, paragraph 21, U.N. Doc. E/CN.4/73 (1999).

106. An historical note:

> In 1938 the International Committee of the Red Cross (ICRC) resolved, because of the low standard of international protection, to cooperate with the International Union for Child Welfare in producing a draft Convention for the Protection of Children in Emergency and Armed Conflict. On 12 January 1939 the ICRC, together with Save the

evidenced by the recent enactment of the African Charter and other current international initiatives,[107] current international humanitarian law is inadequate to address the special needs of child soldiers. Modification of international law was necessary in order to attempt to bring the law into accord with current sentiments. However, as discussed below, the resulting Optional Protocol may have fallen short of this desire.

The need to change current international law was identified by various groups including the Red Cross, the Red Crescent,[108] various non-governmental organizations (NGOs), and even many nation states. One of the major forces behind such identification is the inability of current standards to address problems found in the overwhelming amount of internal disputes currently raging.[109] The loop hole created by this inapplicability to internal strife created a necessity for the Optional Protocol.

Legal scholar Theodor Meron and others suggested that such an instrument should not include terms like "participant," "combatant," or "civilian," but should instead address general standards of humane treatment for children, irrespective of the type of conflict taking place.[110] Ultimately, it was decided that the necessary provisions would be compiled in an Optional Protocol to the Convention on the Rights of the Child (Optional Protocol).[111] As a result, the United Nations requested that the Committee on the Rights of the Child (Committee) address the issue.

Children Union, accepted the draft, but the work to secure its adoption was somewhat overtaken by events. With the outbreak of World War II the draft was taken no further. VAN BUEREN, *supra* note 62, at 329 (footnotes omitted). Such an early effort to give children this needed protection, especially in times of armed conflict, reveals that the concern has been, at least, on the 'back burner' of the international communities' minds for a very long time. *See id.*

107. *See infra* notes 136-54 and accompanying text.

108. The International Federation of the Red Cross and the Red Crescent (IFRCRC) is an international humanitarian organization. The mission of the IFRCRC is to "improve the situation of the world's most vulnerable people." *The International Federation: Action for the Most Vulnerable in 176 Countries Worldwide—Who We Are* (visited Nov. 15, 1999) <http://www.ifrc.org>. The goal of the Federation is to assist victims of natural and technological disasters, to assist refugees and to aid those in health emergencies. *See id.*

109. *See* COHN & GOODWIN-GILL, *supra* note 2, at 149.

110. *See id.* These phrases and others have been susceptible to misinterpretation and prejudicial distinctions. *See id.* Theodor Meron is one of the major authors in the area of international humanitarian law. An article of possible further interest includes Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

111. *See* COHN & GOODWIN-GILL, *supra* note 2, at 150. There was a debate over whether to issue the new standards by code, by declaration, or by an optional protocol. *See id.*

The Committee started discussions of the Optional Protocol at its second session in 1992.[112] By the third session, the Committee recommended that a comprehensive study "should be undertaken of the serious problem of children in armed conflict."[113] Ultimately, the U.N. Commission on Human Rights established an open-ended working group on the development of an additional protocol to the CRC, which would address the use and recruitment of children in armed conflicts.[114] "The purpose of the working group is to elaborate, as a matter of priority, a legal instrument in the form of a draft optional protocol to the Convention on the Rights of the Child, the aim being to achieve a universal agreement, on raising the minimum age for recruitment into armed forces and other groups as well as for participation in hostilities from the age of 15 years. . . ."[115]

Since 1994, the working group drafted and redrafted the Optional Protocol with due diligence.[116] In its most recent address to the United Nations, the working group requested that the states' parties to the CRC adopt and ratify the Optional Protocol without further delay.[117] Soon after this plea,

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112. *See id.* at 158. The Committee (which, inter alia, monitors and examines the reports issued by the CRC affiliated nations) decided to study the problem of child soldiers for the following reasons:

> [I]t believed that armed conflicts had important implications for the protection of children's rights in general. Second, it believed that many conflicts in the early 1990s had serious consequences for children, whether or not they were direct participants. . . . Third, the committee believed that several articles of the convention, not just Article 38, were relevant to the topic because armed conflicts had an impact on the physical and mental well-being of children. Fourth, ... the committee believed that it was important to give some thought to the ways and means of protecting children exposed to situations of armed conflict. . . .

LEBLANC, *supra* note 50, at 154.

113. COHN & GOODWIN-GILL, *supra* note 2, at 158. *See also* LEBLANC, *supra* note 50, at 155.

114. *See Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts on its First Session*, U.N. Doc. E/CN.4/1995/96 (1995), *noted in* DETRICK, *supra* note 7, at 658 n.66.

115. *Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on itsFifth Session*, *supra* note 105, para. 10 of the Annex. The need for a working group is also based upon the notion that current international standards regarding the protection of children in times of hostilities is inadequate. *See id.*

116. The drafting session of the working group included discussion regarding "the minimum age for participation in hostilities, the issue of direct or indirect involvement in hostilities, the age of recruitment, be it voluntary or compulsory, into armed forces, and the possibility of including a clause to prevent child recruitment by non-governmental armed groups." *Id.* at para. 15 of the Annex.

117. *See Comments on the Report of the Working Group: Report of the Secretary-General*, U.N. Economic and Social Council Commission on Human Rights, Inter-sessional Open-Ended Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, 5th Sess., U.N. Doc. E/CN.4/WG.13/2 (1999).

the various nations working on the draft came to an agreement which will be presented for adoption by the United Nations General Assembly this year.[118] The Provisional Draft Optional Protocol to the CRC on the Involvement of Children in Armed Conflict was intended to strictly forbid the recruitment and participation of children under the age of eighteen.[119] However, the recent agreement for the Optional Protocol accomplished less than the abovementioned goal.[120]

The United States, which steadfastly opposed the provision which prevented recruitment of children under the age of eighteen, has finally won. The committee ultimately agreed to set the minimum age for recruitment at sixteen while the minimum age for participation was raised to eighteen.[121] However, the Draft Protocol does not provide for reservations by any state party that chooses to adopt and ratify it.[122]

The specific wording of the Optional Protocol was the biggest issue of debate. Some states wanted the voluntary recruitment of children under the

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118. *See Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18's, M2 Presswire*, Jan. 25, 2000, *available in* LEXIS, News Library.

119. *See Provisional Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, reprinted in the Report of the Working Group* in its 5th Sess., *supra* note 117, art. 1 & 2.

120. *See Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18's, supra* note 118. The important provisions of the Optional Protocol which were agreed upon include:

> Establishes eighteen as the minimum age for conscription and for direct participation in hostilities;
>
> Requires governments to raise their minimum age for voluntary recruitment beyond the current minimum of fifteen, and to deposit a binding declaration stating the minimum age they will respect;
>
> Prohibits the recruitment or use in hostilities of children under the age of eighteen by rebel or other non-governmental armed groups, and requires states to criminalize such practices;
>
> Requires government measures to demobilize and rehabilitate former child soldiers, and reintegrate them into society.

Id.

121. *See id.* The United States is not the only nation that is breathing a sigh of relief (though it was the only nation lobbying for the lower age) in the decision to lower the age for recruitment of children in armed combat. The United States, the U.K., Canada, New Zealand, and the Netherlands all actively recruit children below the age of eighteen, though none of these nations has requested that it be able to use them in combat before the age of eighteen. *See World News: Anger at U.S. Stance on Child Soldiers*, FINANCIAL TIMES (LONDON), January 11, 2000, *available in* LEXIS, News Library, Major Newspapers; and *see Teen Recruits to Stay, Military Says*, THE TORONTO STAR, Jan. 17, 2000, *available in* LEXIS, News Library, Major Newspapers.

122. *See Draft Optional Protocol to the Convention on the Rights of the Child, reprinted in* DETRICK, *supra* note 7, Art. 4 at 733. At the time this Note was written, there was uncertainty as to whether the final version of the Optional Protocol includes a reservation clause since the agreed upon version has not yet been made available in printed form.

age of eighteen with parental permission while others wanted the age raised to only sixteen or seventeen, instead of eighteen.[123] The Optional Protocol, if adopted as drafted, would have eliminated all forms of recruitment of children under the age of eighteen into any military group (including the acceptance of volunteers under the age of eighteen). In addition, it called for state parties to the protocol to adopt measures that would make it a crime for anyone to recruit or to use children in its armed forces in any hostility (internal or international).[124] These changes would have totally reconciled Article 2 of the CRC with Article 38 of the CRC. However, these goals were not completley accomplished.

Many of the provisions of the Optional Protocol echo the findings made by Ms. Graca Machel.[125] She noted that the impact of such militaristic conflicts is extremely harmful to anyone, but especially so for children. The physical and emotional impact of war, which she studied, resulted in heinous findings.[126] As a result, she recommended that the minimum age for recruitment *and* participation be increased from fifteen to eighteen.[127] Her recommendations were not fully adhered to since voluntary recruitment can occur with children as young as sixteen.

As stated earlier, the revised Optional Protocol is considerably weaker than it was originally intended. But *a* document was finally agreed upon and it is a good starting place for change. Below is a discussion of the likelihood for success of the Optional Protocol and its application to the Ugandan child soldier.

B. *Likelihood for Success of the Optional Protocol*

1. *Possible Problems the Optional Protocol May Face*

There are a variety of possible problems that the Optional Protocol may face in the ensuing years. The first problem is its ability to become approved by the United Nations General Assembly and for its adoption and ratification by all nations states that are parties to the CRC.[128] It should be noted that

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123. *See id.* at 659-60.

124. *See generally Provisional Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, as reprinted in Comments on the Report of the Working Group, supra* note 117 .

125. *See generally* Impact of Armed Conflict on Children: Report of Graca Machel, Expert of the Secretary General of the United Nations—Selected Highlights, U.N. Dept. of Public Information Publication (1996).

126. *See generally id.* at 31.

127. *See id.*

128. An important aspect to be remembered is that a nation may only ratify the Optional Protocol if it has already ratified the CRC. *See Optional Protocol to the Convention on the Rights of the Child, reprinted in* DETRICK, *supra* note 7, art. 7, at 736.

during the drafting of the Optional Protocol, the drafting Committee was adamant in establishing a straight eighteen approach to the protection of children associated with armed conflicts.[129] There is a slight chance that the United Nations will refuse to adopt the resolution and make it available for ratification, since it does not comport with the desired straight eighteen (the age requirement for participation and recruitment) approach. But even if the United Nations does adopt the resolution, it will be greatly limited in effect if it is not adopted and ratified by enough countries to really give it much worth.

Another problem may be the enforcement of the Optional Protocol, especially in internal or domestic struggles. Currently, the standard set forth by the CRC (which establishes fifteen as the minimum age for recruitment and participation) is not enforceable.[130] There is little reason to believe that just because the age limit has been increased that there will be sudden compliance with the new provisions. The Optional Protocol itself does not provide for additional measures to ensure compliance other than those already set forth in the CRC. The only way enforcement of the provisions will actually take place is for the CRC to become better enforced, or to include additional enforcement measures within the Optional Protocol itself.

Further difficulties of the Optional Protocol include the lack of a definition for the term "voluntary." The Protocol allows children to be voluntarily recruited as young as the age of sixteen.[131] As described earlier in this note, voluntary recruitment is already a questionable tactic used by many government and rebel forces.[132] Until the term is defined, many of the same "voluntary" recruitment tactics and reasons that children "voluntarily" join will continue, thus affording children as little protection as the CRC.

In addition, the new Optional Protocol continues to promote two double standards: protecting all childern under almost any circumstance, except those involved in armed conflict, and prohibiting recruitment by non-governmental agencies while permitting governmental recruitment of sixteen- and seventeen-year-olds.

As discussed earlier, the CRC provides protection for all children under the age of eighteen. However, there is one caveat: the Optional Protocol stealthily redefines the child as one under the age of sixteen for purposes of

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129. *See Global Accord to End Use of Child Soldiers in Wars*, THE TORONTO STAR, Jan. 22, 2000, *available in* LEXIS, News Library, Major Newspapers.

130. This statement is evidenced by the fact that as recently as January, 2000, at least 48 children were recovered from the LRA. "[M]ost of the captives were between eight to 10 years, though some are 15 or 16 years, with about four aged 22." *Army Captures 48 Child Soldiers from Lord's Resistance Army Rebels*, THE BRITISH BROADCASTING CORPORATION, Feb. 23, 2000, *available in* LEXIS, News Group File.

131. *See generally Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18s*, *supra* note 118.

132. *See supra* text accompanying notes 12-15.

protection during times of armed conflict. This seemingly innocuous distinction actually provides less protection for children in the worst possible situation: a situation in which one would expect protection for children. This alteration simply states that children are important and should be protected unless there is a war and more manpower is needed to win.

Regarding the second double standard, during an internal civil war, generally the two or more warring factions are each vying for recognition as the government entity within that state. Each faction may consider itself the appropriate government entity and thus recruit 'volunteers' into their armed forces as young as fifteen. In addition, though, participation in war-time activities, whether on behalf of the government or on behalf of a non-governmental organization, is extremely detrimental to the child's well-being. Participation in the governmental army will not reduce the grave impact of conflict on the participating children.

And last, violations in internal strife are far more difficult to recognize than violations of the Optional Protocol in international conflicts. But it is even more difficult to hold the violator of an internal dispute accountable for wrongdoing. State sovereignty is often used as a defense from interference with internal control or other domestic issues, such as religion or culture. One argument for a restriction on interference with state sovereignty is that an international proclamation for the age of adulthood or childhood might interfere with various national beliefs and practices.[133] "On the contrary, taking cultural diversity seriously is the best way to combat such abuse by challenging its basis in the consciousness of the relevant constituencies."[134] One important note, though, is that humanitarian intervention has been regarded as the exception to the rule of total state sovereignty.[135] Without this exception to total state sovereignty, many kinds of domestic atrocities remain unchecked. However, the argument remains that it is still difficult to intrude upon another state's sovereignty without prior agreement and the CRC does not specifically provide for such intrusion.

The Optional Protocol has many hurdles to overcome before it will be successful in accomplishing everything it is intended to accomplish. The problems described above are not necessarily insurmountable. Much needs to be done to correct the problems so that these problems are just hurdles that can be overcome and not hopeless obstacles.

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133. For a general study on the comparative perspectives of the CRC on various cultural ideologies in various nations, see generally MICHAEL FREEMAN ED., CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE (1996).

134. Abdullahi An-na'im, *Cultural Transformation and Normative Consenus on the Best Interests of the Child, reprinted in* ALSTON, *supra* note 67, at 80.

135. *See* Michael Reppas, *The Lawfulness of Humanitarian Intervention*, 9 ST. THOMAS L. REV. 463 (1997).

2. *Positive Aspects of the Protocol Which May Assist in Its Success*

The best possible support for the success of the Optional Protocol is the almost universal support to eliminate the use of children in armed combat. Though the Optional Protocol does allow for the voluntary recruitment of children as young as sixteen, it strictly forbids the use of children in armed combat under the age of eighteen.[136] This provision was totally agreed upon and, therefore, it can be assumed that it will have a greater chance of compliance than if the provision was not totally agreed upon.

Recently, there has been an enormous amount of regional initiatives[137] which support the basic premise held in the Optional Protocol. The additional initiatives may create an added incentive for the various countries to comply with the standards espoused in the Optional Protocol, thus lending itself to further assisting in the success of the document as well. Increased awareness and support for banning children in combat will create an atmosphere where it is harder for any group to use the children. Violators may bring unwanted interest in their activities if they use children when they are not supposed to use them.

Another positive outlook for the Optional Protocol was created by the Rome Statute for the International Criminal Court (ICC).[138] The ICC will have jurisdiction to hear cases regarding the crimes enumerated within the

136. *See Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under 18's, supra* note 118.

137. *See infra* notes 141-156 and accompanying text for a discussion of the various regional initiatives.

138. The Rome Statute will not become effective until it has been signed and ratified by the requisite number of states (which is sixty). *See* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 42 (1999).

Rome Statute.[139] The final draft of the Rome Statute includes crimes that were a culmination of various international humanitarian treaties and other binding agreements.

Included in the Rome Statute is a provision that will give the ICC the jurisdiction to "prosecute the conscription or active use of children under the age of fifteen years in armed forces."[140] The inclusion of this provision is extremely important to the increased awareness and protection of children used in armed conflicts. It may be one of the major accountability procedures to provide enforcement of the protection of children in war.

The ICC will create a much-needed international court designed to enforce certain specific rules and regulations. However, if and when it becomes binding, a large loophole will be created in the protection of children involved in armed hostilities. As stated above, the protections afforded by the Rome Statute address only the use and recruitment of children under the age of fifteen. The Optional Protocol's provisions provide for protection of children as young as sixteen and as old as eighteen; however, there will be little to no enforcement of protection for children between the ages of sixteen and eighteen. Therefore, even if the Rome Statute is signed and ratified by the Ugandan government, the practice of recruiting children fifteen and older will be required to change, but not completely unless the Rome Statute is amended as well.

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139. Jurisdiction of the ICC was a topic of great discussion during the entire drafting period of the Rome Statute. Ultimately it was decided that, with respect to the Court's jurisdiction over war crimes, "the court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." *Id.* at 33. Articles 12-19 of the Rome Statute cover jurisdiction under the ICC. Arguments about the comprehensiveness of jurisdiction ensued during the drafting process. Included in the disagreements was the issue over automatic jurisdiction to hear certain enumerated crimes. Almost all parties agreed that the ICC should attain immediate jurisdiction over the crime of genocide. However, crimes against humanity, war crimes, and crimes of aggression were areas of concern and debate. It was agreed that jurisdiction over lesser crimes should come in a form of a consent regime. It was ultimately agreed that

> the court may exercise jurisdiction with respect to the crimes listed in the statute, if it has the consent of the state of the territory where the crime was committed or the consent of the state of nationality of the accused (Article 12). But this requirement does not apply if a situation is referred to the court by the Security Council. . . .

Id. at 26. Jurisdiction within the bounds of the ICC will also include the competence of the prosecutor to investigate allegations and crimes brought to the attention of the ICC. *See id.* The crimes included within the jurisdiction of the ICC include: genocide, war crimes, crimes against humanity, aggression, and other enumerated crimes. "The first four crimes were known as the four core crimes. *Id.* at 30.

140. *International Criminal Court to Prosecute Conscription and Use of Child Soldiers!!!* (visited Sept. 8, 1999) <http://www.hrw.org/campaigns/crp/icc-statute.htm>. The ICC will have jurisdiction over this crime in both the international and non-international realm of armed conflicts. *See* Art. 8(2)(b)(xxvi) and Art. 8(2)(e)(vii) of the Rome State, *discussed in* Arsanjani, *supra* note 138, at 34.

3. *Support for the Optional Protocol*

Recently, many regional initiatives to raise the minimum age for participation and recruitment of children have occurred. The following is a discussion of several of them and their possible implications in the success of the Optional Protocol.

In June 1998, an international campaign to stop the use of child soldiers launched the Coalition to Stop the Use of Child Soldiers (Coalition). It was formed as a response to the problems that arose during the United Nations Working Group negotiations for the establishment of the Optional Protocol to the CRC. A steering committee of ten regional and international NGOs head the coalition.[141] In addition, the goals of the Coalition coincide with the Plan of Action Concerning Children in Armed Conflict which was adopted by the International Red Cross and the Red Crescent Movement in 1995.[142]

The basic goal of the Coalition was to assist in the adoption and ratification of the Optional Protocol to the CRC. It was hoped that a "grass roots" movement would assist in the adoption of the Optional Protocol, similar to the result in the movement to ban the production and use of land mines, which was somewhat successful.[143] The Coalition has been extremely active in the drafting efforts of the working group; assisting in lobbying efforts of the Optional Protocol; and spreading concern for the child soldier around the world via news stories, the Internet, and almost any other type of available media. The Coalition also assisted in the organization of four different

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141. The NGOs' spearheading the Coalition include Amnesty International, Human Rights Watch, International Federation Terre DesHommes, International Save the Children Alliance (represented by Swedish Save the Children), Jesuit Refugee Service, Geneva, and Quaker U.N. Office, Geneva. *See Amnesty International News Release*—ACT 76/01/98—*International Campaign Launched Against the use of Child Soldiers* (visited Sept. 7, 1999) <http://www.amnesty.it/new/1998/A7600198.htm>. The steering committee consists of African Coalition to Stop the Use of Child Soldiers, Amnesty International, Defense for Children International, Human Rights Watch, International Federation Terre des Hommes, International Save the Children Alliance, Jesuit Refugee Service, Latin American Coalition to Stop the Use of Child Soldiers, Quaker United Nations Office, Geneva, and World Vision International. The steering committee meets four times a year to discuss and agree upon policy and strategy regarding the Use of Child Soldiers. *See News from the Coalition to Stop the Use of Child Soldiers*, CHILDREN OF WAR, *supra* note 30, at 3.

142. *See Amnesty International News Release*—ACT 76/01/98—*International Campaign Launched Against the Use of Child Soldiers*, *supra* note 141.

143. *See Coalition Decries Child Soldiers*, SAN ANTONIO EXPRESS-NEWS, July 4, 1998, B10, *available in* LEXIS, News Library. "Today, children in at least 68 countries live amid the threat of more than 110 million landmines still lodged in the ground, awaiting an unwary step." MACHEL, *supra* note 125, at 39. In 1992, the International Campaign to Ban Landmines, spearheaded by a coalition of NGO's, was created. Since its inception, "considerable progress has been made: the United Nations Secretary-General has advocated strongly for an end to the landmine scourge and a number of countries have already taken steps to ban the use, production, trade and stockpiling of such weapons." *Id.* at 40.

conferences which have requested a ban on the use and recruitment of children under the age of eighteen in armed conflicts (both on an international level and on a domestic level).

To date, three of the Conferences have taken place with what seems to be great success.[144] The results in the first three were essentially the same. Each welcomed the adoption of the Rome Statute for the International Criminal Court, each called for the cessation of the use and recruitment of children in armed conflicts, each called for the adoption of the Optional Protocol, and each called for the adherence to and further acceptance of the CRC. The conferences also called for nations to voluntarily raise their minimum age for recruitment and participation to the age of eighteen.[145]

Two of the Declarations, the Montevideo Declaration, and the Berlin Declaration, requested that its nation states to the Convention also adopt the ILO's Convention 182.[146] In addition, the Maputo Convention requested that

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144. *See generally The Home Page for Child Soldiers* (last modified Oct. 31, 1999) <http://www.child-soldiers.org/what's.htm>. This web page lists the most current happenings regarding the use of child soldiers. The most important references, however, are The African Conference on the Use of Children as Soldiers (the Maputo Convention and Declaration), the Latin American Conference on the Use of Children as Soldiers (the Montevideo Convention and Declaration), and most recently the European Conference on the Use of Children as Soldiers (The Berlin Convention and Declaration). *See id.* According to a report by the Human Rights Watch, there is to be a fourth Conference held in Asia in Spring 2000 as well, but there has been no final word on that convention to date. *See id.* The Maputo Convention was attended by 250 representatives of governments, NGOs, and U.N. Organizations. *See Maputo Conference Speaks Out Against Recruiting Child Soldiers*, AGENCE FRANCE PRESSE, Apr. 23, 1999, *available in* LEXIS, World News Library. The immense amount of support that this Convention was shown simply by the sheer number of attendees infers that the concern over the plight of the child soldier is not a figment of anyone's imagination. The support for change and the concern for the children's safety are real.

145. *See generally Stop the Use of Child Soldiers: Montevideo Declaration on the Use of Children as Soldiers* (July 8, 1999) (visited Sept. 8, 1999) <http://www.hrw.org/campaigns/crp/montedec.htm> *and Stop the Use of Child Soldiers: Maputo Declaration on the Use of Children as Soldiers* (Apr. 22, 1999) (visited Sept. 8, 1999) <http://www.hrw.org/campaigns/crp/maputo-declaration.htm>. The Berlin Declaration seems to be a bit more relaxed in the requirements called for. In the Berlin Declaration, the members have called for the cessation of the participation of those under the age of eighteen in hostilities, but they do not call for the cessation of recruitment for those under the age of eighteen. *See European Conference on the Use of Children as Soldiers: Berlin Declaration on the Use of Children as Soldiers* (last updated October 28, 1999) <http://www.child-soldiers.org/berlin_declaration.htm>. *See also Weekly Defense Monitor: Europeans Act on Child Soldiers Issues* (last modified Oct. 28, 1999) <http://www.cdi.org/weekly/1999/issue42.html>.

146. *See Stop the Use of Child Soldiers: Montevideo Declaration on the Use of Children as Soldiers, supra* note 145. This convention was established for Latin American and Caribbean nations to discuss the plight of the child soldier and to attempt to establish a regional document setting standards for such practices. The Maputo Declaration did not request acceptance of the ILO convention because the Maputo Convention took place before the ILO convention. *See also Weekly Defense Monitor: European Conference on the Use of Children as Soldiers: Berlin*

all African States adopt and adhere to the African Charter on the Rights and Welfare of the Child.[147]

In June, 1999, the International Labour Organization (ILO)[148] issued a report establishing the worst forms of child labor.[149] At its most recent labor convention,[150] the ILO's intention was to supplement and support the already existing international child labor standards that were established in 1973. The ILO stated that the Convention "seeks to prohibit anyone under the age of 18 from carrying out hazardous tasks . . . [that are] likely to jeopardise the health, safety or morals of young persons."[151] According to Article 2 of this convention, the ILO defines a child as all persons under the age of eighteen.[152]

Declaration on the Use of Children as Soldiers (last updated Oct. 28, 1999) <http://www.child-soldiers.org/berlin_declaration.htm>.

147. *See Stop the Use of Child Soldiers: Maputo Declaration on the Use of Children as Soldiers, supra* note 146. This document was established at the African Conference on the Use of Children as Soldiers. Its purpose is to set forth principles governing the plight of the child soldier, especially since there currently is a vast amount of children being used in armed conflicts in Africa. Moreover, the conference attempted to assist in the acceptance and ratification of the African Charter on the Rights and Welfare on the Child and the Optional Protocol to the CRC. It was noted in a report by the Radda Barnen (the Swedish Save the Children organization) that there is disappointment expressed in the fact that few African nations have actually participated in the drafting of the Optional Protocol. *See STOP USING CHILD SOLDIERS!: African Conference on the Use of Children as Soldiers* (last visited Oct. 7, 1999) <http://www.rb.se/childwardatabase/docs/africanconf.htm>.

148. The ILO was established in 1919. Its purpose was to create and adopt international standards to cope with international labor condition problems. In 1944, the scope of the ILO was broadened to include concerns regarding social policy, human and civil rights matters, and the like. *See What Are International Labour Standards?* (last modified Aug. 2, 1999) <http://www.ilo.org/public/english/50normes/whatare/index.htm>.

149. *See International Labour Organization: C182 Worst Forms of Child Labour Convention*, 1999 (last modified June 17, 1999) <http://ilolex.ilo.ch:1567/scripts/convde.pl?C182>. It should be noted that the ILO standards have no force in international law unless governments sign and ratify the recommendations set forth by the convention. It is hoped, however, that the major nations will sign the treaty to avoid the embarrassment that other states will see those who do not ratify as supporting child labor. Robert Taylor, *Under 18s May be Barred from Forces*, FINANCIAL TIMES (LONDON), June 5, 1999, National News, pg. 8., *available in* Lexis, News Library.

150. ILO standards take the form of international labor Conventions and Recommendations. Each Convention is an international treaty that can be ratified by any member state to the ILO. However, each Recommendation is non-binding upon the member states. They are "suggestions" regarding guidelines which direct governments toward policy and action. At each annual ILO Convention, the members also discuss and agree upon less formal conventions and recommendations; usually referred to as codes of conduct, resolutions, and declarations. These standards are generally not considered to be a part of the ILO's system of international labor standards, however, the policies are intended for consideration by the member states. *See What Are International Labour Standards?*, *supra* note 148.

151. Taylor, *supra* note 149. It is easily argued that participating in armed conflicts can be considered likely to jeopardize the health, safety and morals of a young person.

152. *See International Labour Organization: C182 Worst Forms of Child Labour Convention, 1999*, *supra* note 149, art. 2.

In addition, it concluded that the terminology "the worst forms of child labour" means "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, *including forced or compulsory recruitment of children for use in armed conflict.*"[153] Though the Convention has not yet been entered into force, the message is clear: the use and recruitment of children under the age of eighteen is considered to be a form of child labor and should be discontinued immediately.[154]

Each of these recent developments[155] illustrates the changing sentiment of many of the nations around the world. The desire to protect all children is becoming a great force in the effort to change the minimum age for recruitment and participation of children in armed conflicts. An international

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153. *Id.* at art. 3 (emphasis added). The wording of this article was weakened at the strong insistence of the United States. The United States refused to support the ILO's convention if it contained a ban on recruitment of children under the age of eighteen, however, they would support such a measure if the wording was changed to include forced or compulsory recruitment. In order to obtain the support of the United States, a highly influential state (as seen by the effect of their opposition to the Optional Protocol), the ILO conceded and changed the wording. *Africa-at-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, *supra* note 6.

154. The convention was drafted and unanimously adopted by the member states of the ILO. It is assumed that those who assisted in the drafting and adoption of such a document must be in favor of the standards set forth. It should be noted however, that the definition of the use of child soldiers was restricted to the current standard because of the overwhelming pressure that the Untied States placed on the drafters. *See Africa-At-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, *supra* note 6. Shortly after the adoption of the Resolution by the ILO, President Clinton requested that the Senate consent to ratify the Convention. The United States is able to support this document because it only forbids forced recruitment of persons under the age of eighteen, not the use of volunteers under the age of eighteen. *See Clinton on Child Labor Treaty—Statement by the President* (visited Sept. 23, 1999) <http://usia.gov/regional/nea/sasia/topics/child806.htm>.

155. The recent positive changes do not stop at those listed, there are others as well. For example, on October 29, 1999, the Nordic Foreign Ministers Against the Use of Child Soldiers agreed upon and signed a declaration of the strictest nature. No child under the age of eighteen shall be recruited or shall participate in any kind of hostility, that states parties shall make sure that no armed group (governmental or not) shall participate in such recruitments, and that these regulations are relevant to both international and internal armed conflicts. The Nordic states include: Denmark, Finland, Iceland, Norway, and Sweden. *See Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers* (last modified Oct. 29, 1999) <http://www.child-soldiers.org/nordic%20declaration.htm>. Another example is the recent Hague Appeal for Peace Conference which took place May 11-15, 1999. This conference included over 10,000 participants, including activists, government representatives, and community leaders from over 100 countries. This convention was unique in that it was organized entirely by civil activists, and not by government parties. At this conference, seven initiatives were launched: the International Action Network on Small Arms, the Global Campaign for Peace Education, the Global Ratification Campaign for the International Criminal Court, the International Campaign to Ban Landmines, the Abolition of Nuclear Weapons, the Global Action to Prevent War, and support to the effort to Stop the Use of Child Soldiers. *See The Hague Appeal for Peace Conference: A Great Success* (last modified July 8, 1999) <http://www.haguepeace.org>.

desire to codify the internationally held standards (in the form of the Optional Protocol[156]) for the protection of children may result in what is known as international humanitarian law. But more over, it could eventually become customary international law and therefore become binding upon more than just the signatories to the Protocol.

B. *Application of the Optional Protocol for Ugandan Child Soldiers*

The effect of the Optional Protocol on Ugandan children remains uncertain. Uganda is already a party to the CRC which allows the recruitment of children as young as fifteen. The Ugandan government and the LRA are going beyond this threshold by recruiting children under the age of fifteen. Therefore, they are disobeying the CRC, even though Uganda ratified the document. Moreover, the CRC prohibits the abduction of any child, no matter how young or old, and yet this practice is still commonplace in Uganda as well. How will adding more international requirements, such as the Optional Protocol actually help?

The Optional Protocol itself will probably not stop the use and recruitment (or abduction) of the children for the reasons stated above. However, by adding this kind of provision to the CRC and international humanitarian law, there will be more checks on such practices. Nations in general are supposed to comply with the provisions of the Protocol. Ratification of the Optional Protocol would mean they have to attempt to alleviate such practices within their borders by making it a criminal act to allow children to participate in armed conflicts. By improving the laws and regulations regarding the use and recruitment of children in combat, nations and rebel groups will find it more difficult to engage in such practices. One Amnesty International Report added that "[t]he vicious circle of violence in Uganda's northern war zone will not be broken unless government forces confront their own largely hidden pattern of human rights violation . . ."[157]

However, the adoption of the Optional Protocol will also make it more difficult for Ugandan forces, both governmental and rebel, to recruit children by "accident" if they are not registered at birth and cannot prove their age.[158] The key to this kind of success, however, lies in the enforcement of these rules

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156. An international codification is the ultimate goal, but it seems that such laws should start in the domestic realm. *See generally Weekly Defense Monitor: Europeans Act on Child Soldiers Issue*, *supra* note 145.

157. *Amnesty International—News Release—AFR 59/05/99; Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War*, *supra* note 28.

158. According to Article 7 of the CRC, a "child shall be registered immediately after birth. . . ." *Convention on the Rights of the Child, reprinted in* DETRICK, *supra* note 7, at xxiv. It is evident that since many children are being "recruited" into various armed groups the State party to the CRC is not fulfilling their duty to uphold the provisions of the CRC. *See id.*

and in the ability to hold violating parties accountable for such actions; which, at this point, seems highly unlikely. Moreover, the principles in the Optional Protocol must become customary international law and the ICC must amend its current war crimes list to increase the minimum age from fifteen to eighteen in order for Ugandan children to truly have hope.

IV. CONCLUSION

One of the precursors of additional rights for children is the establishment that the person protected by the various international provisions is actually a child rather than an adult. This determination of "child" or "adult" is a social construction that may be difficult to define. However, in order to define specific rights (such as those established by the CRC and the Optional Protocol), the age for childhood and adulthood requires certainty. Remember, though, that much of the current international humanitarian rights laws regarding children already describes a child as any person under the age of eighteen.[159] But, the definition of a child does not extend to the child involved in armed conflict, which creates a need for this area of law to be updated and clarified.[160]

The CRC currently provides that a child is anyone under the age of eighteen. In addition, it protects all children regardless of race, color, or creed, except for those participating in armed conflicts. In cases such as these, the age for protection ends at sixteen under the Optional Protocol and fifteen under the ICC. This discrepancy allows a child (who in any other situation would be given any one of the enumerated protections under the CRC) to endure abuse, abduction, and even murder, simply because of their "participation" in armed combat.

In places like Uganda, many children are not registered at birth, and therefore, have little or no proof of age. This, in turn, creates an atmosphere in which children as young as twelve or thirteen are "recruited" into the armed forces[161] if the recruiter interprets the child's appearance to indicate that he or she is fifteen years old or older. This kind of activity can be evaded to some degree by maintaining that the age of a child is below eighteen and by reconciling the discrepancy in protections for children in general with those who are participating in armed conflicts. If the Optional Protocol was adopted as the drafters insisted (with the minimum age for recruitment or participation being age eighteen), then it might have prevented abductors or recruiters from "mistaking" children of twelve or thirteen for an adult of eighteen or older.

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159. *See* COHN & GOODWIN-GILL, *supra* note 2, at 177.

160. *See id.*

161. This recruitment (forced or compulsory) places children into armed forces of both the opposition (such as the LRA) and of the government of Uganda.

But the ability of a government group to recruit a sixteen-year-old is not far from allowing them to use the child in combat. It will be extremely tempting for a military leader to accidentally allow the new recruit to participate, especially in times of necessity.

Moreover, by establishing a clear minimum age for recruitment and participation as age eighteen, there can be no mistake as to which rights and protections a child of, say sixteen, might have if he or she is found to be participating in armed conflicts. For example, once a military disturbance is squelched (or even before), it is uncertain what should be done with the children on the losing side who were participating in the conflict. Often, the adults are arrested and imprisoned for things such as treason and other war crimes.[162] However, children who were forced to participate (or even those who volunteer) should not be subject to similar punishments.[163] It would be more simple and humane to proscribe such participation from the beginning and avoid such controversial issues.

One way to accomplish this would be to promote and adopt the Optional Protocol to the CRC as drafted. However, it was not adopted as drafted, since it was altered at the last minute because the United States protested long and hard enough. Despite acceptance of the revised document, adoption will not be enough. Increased enforcement of the established policies and increased awareness of the plight of the child soldier must occur. Accordingly, wide acceptance and international support of this policy should hopefully achieve the status of customary international law.

As a fifteen-year-old girl stated to an Amnesty International representative, "I would like to give you a message. Please do your best to tell the world what is happening to us, the children. So that other children don't have to pass through this violence."[164] Unfortunately, the Optional Protocol to the Convention on the Rights of the Child at this point in time, will probably not provide her, and the other children of which she speaks, with the needed relief.

Marsha L. Hackenberg[*]

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162. *See generally* Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflicts*, 28 COLUM. HUM. RTS. L. REV. 629 (1997).

163. "Abuses perpetrated by child soldiers may require rehabilitative responses, rather than retributive measures." COHN & GOODWIN-GILL, *supra* note 2, at 177. Rehabilitative services though require money, qualified personnel, and a vast array of other scarce resources. *See id.*

164. *Uganda: "Breaking God's Commands": The Destruction of Childhood by the Lord's Resistance Army*, Amnesty International—Report—AFR 59/01/97, *supra* note 34.

* J.D. Candidate, May 2001. This author would like to thank ALL of her family and friends for encouragement and support while writing this Note. This author would also like to give a special thanks to her husband, Dave, for being so supportive and understanding.

SISTERS IN MISERY: UTILIZING INTERNATIONAL LAW TO PROTECT UNITED STATES FEMALE PRISONERS FROM SEXUAL ABUSE

I. INTRODUCTION

> *[Robin's nightmare began on February 24, 1994, when the first-time offender] was halfway through a 33-month sentence for credit card fraud at the Federal Correctional Institution in Dublin, California. . . . She complained when the prison authorities put her and several other women in the men's "Secured Housing Unit (SHU)." But nothing happened to help her. Robin complained she was visible to male inmates and guards 24 hours a day, including when using the toilet and when she was in the shower. Still nothing happened. She complained that she was taunted because she was a lesbian: "Maybe we can change your mind." She fought off one attacker in her cell with a broomstick. Still the prison officials did nothing. She gave a sworn affidavit to the authorities naming a guard who sold entry to her cell to male inmates as well as one of her attackers. Still nothing was done to protect her. Some time after midnight on September 25, 1995, three male inmates unlocked the door to Robin's cell. She was handcuffed, then raped and sodomized, suffering severe injuries to her neck, arms, back, vaginal and anal areas. Her attackers called her a "snitch," told her to "keep her mouth shut," and threatened her with continued attacks if she kept complaining.*[1]

Among the major dilemmas facing incarcerated females in the United States prisons are sexual abuse, rape, and assault. "Few aspects of incarceration are more horrifying than the prospect of sexual exploitation and forcible rape within jail and prison walls. [Prison sexual abuse] is a subject to which society reacts with a combination of fear, disgust, and denial."[2] Many

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1. Amnesty International website, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody*, (Mar. 4, 1999) Factsheets, page 3 (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/fact sheets/discrimination.html>. This report focuses upon the prevalent sexual abuse and human rights violations committed against female prisoners in the United States.

2. Brief of Stop Prisoner Rape, Inc. at § A , Farmer v. Brennan, 511 U.S. 825 (1994), *available in Prisoner Assault is Widespread* (visited Oct. 30, 1999) <http://www.spr.org/docs/farmer/argument.html#a.> [hereinafter SPR Brief]. Stop Prisoner Rape, Inc. (SPR) is a small but growing national non-profit organization dedicated to combating the rape of male and female prisoners and to helping survivors of jailhouse rape.

women in United States prisons and jails are victims of sexual abuse by staff, including sexually offensive language, male staff touching inmates' breasts and genitals when conducting searches,[3] male staff watching inmates while they are naked,[4] and rape.[5] Despite these continual tortures and abuses, common law provides little or no remedy for these women. Instead, many female prisoners are threatened with additional violence if they complain to anyone about the abuse.[6] "Most officers will tell you, go ahead and tell—it's your word against mine. Who are they gonna believe? I'm an officer, I have a badge on, I'm in a superior position to you."[7]

Women serving sentences in federal and state prisons find that they are being required to give up much more than their freedom.[8] More than sixty-nine thousand women are prisoners in the United States, which is more than

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3. *See* Lisa Krim, Essay, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L. J. 85, 86 (Fall 1995).

4. *See* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); *but cf.* Canedy v. Boardman, 801 F. Supp. 254 (W.D. Wis. 1992), rev'd, 16 F.3d 183 (7th Cir. 1994) (stating that male inmates do not possess a privacy right protecting against being viewed while nude by guards of the opposite sex).

5. *See* HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, New York, Dec. 1996 [hereinafter *All Too Familiar*]. This report documents pervasive sexual abuse and privacy violations by guards and other correctional department employees in state prisons in California, the District of Columbia, Georgia, Illinois, Michigan and New York. *See id.* The report exposed states' failures to respond to sexual abuse and harassment. *See id. See Women Behind Bars: Female Prisoners*, AMERICA, May 1, 1999 [hereinafter *Women Behind Bars*].

6. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-25.html>; HUMAN RIGHTS WATCH, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, Vol. 10, No. 2(G) (1998) (visited Sept. 16, 1999) <http://www.hrw.org/reports98/women> (discussing intense retaliatory behavior by corrections guards and staff against female inmates in Michigan) [hereinafter *Nowhere to Hide*]. This report defined retaliation as "any act by a corrections officer, corrections employee, or official aimed at an inmate in order to punish her for having reported abuse or in order to keep her from reporting abuse." *Id.* at § III.

7. *See* Amnesty International website, *Stories* at 4 (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/stories/index.html>, reported by Elizabeth Bouchard speaking on the radio, by telephone from Framingham prison (WBUR (Boston University) broadcast, *Here and Now*, Oct. 16, 1998).

8. The continual sexual assault and surrender of female inmates to this type of abuse is becoming a "common law" part of their prison sentences. "Federal and state laws govern the establishment and administration of prisons . . . and the rights of inmates. [However, it is the same federal and state laws in place for their protection that are condemning them to abuse]." Legal Information Institute, *Prisons* and *Prisoner's Rights: An Overview* (visited Oct. 29, 1999) <http://www.law.cornell.edu/topics/prisoners_rights.html>. "[A female prisoner] does not have full constitutional rights, [however, s]he is protected by the constitution's prohibition of cruel and unusual punishment (see Amendment VIII)." *Id.* It has been determined that the Equal Protection Clause enumerated in 14th Amendment applies to prison inmates. *See id.*

a five hundred percent increase since the 1980s.[9] "And [along] with the increase in numbers has come a decrease in rights."[10] It is uncontested that female prisoners should lose some rights. However, the right to be treated with the respect and dignity owed to any human being, and the right not to be subject to torture or cruel, inhumane, or degrading treatment is unconditional.[11]

Human rights violations are becoming a daily part of life for female inmates across the country.[12] The lack of oversight and disciplinary actions on the part of those charged with the responsibility fuels the climate of sexual abuse by prison guards.[13] Singer and actress Michelle Philips, at an Amnesty International press conference stated:

> I cannot understand why female inmates are not protected from sexual assault in prison and why their jailers or male inmates often attack them. . . . My question to the U.S. government and the American people is how can we demand that other countries respect the human rights of their citizens when we don't respect them ourselves.[14]

The sexual assaults against imprisoned women continually increase despite

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9. *See* Bureau of Justice Statistics, Press Release, *The Nation's Prison Population Grew by 60,000 Inmates Last Year, the Largest Increase Since 1995*, Aug. 15, 1999. In 1998, the federal prison population grew by almost sixty thousand inmates. *See id.* The rate of women incarcerated increased 6.5%, exceeding that of men which increased only 4.7%. *See id. See* Bobbie Stein, *Sexual Abuse: Guards Let Rapists into Women's Cells*, THE PROGRESSIVE 23 (1996).

10. Stein, *supra* note 9.

11. *See* Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139 (1995). When the United Nations drafted the Universal Declaration of Human Rights, the Organization of American States adopted the American Declaration of the Rights and Duties of Man. *Id.* at 143. The American Declaration was not intended to be legally binding. *See id.* In pertaining to prisoners, the American Declaration provides that every individual has the right to humane treatment during custody and no accused is to receive cruel or unusual punishment. *See id.*

12. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/overview.html>. "Three international human rights groups have criticized our country for turning our women's prisons into peep shows and whorehouses." Geraldo Rivera, *Women in Prison: Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999) *available at* <http://www.msnbc.com/news/309802.asp>. Mr. Rivera explored the growing problems women face while serving time in prison, their rejection by United States courts, and the lack of medical care available. *See id.*

13. *See id.*

14. Media statement of Michelle Phillips at Amnesty International's *Not Part of My Sentence Press Conference* (Mar. 4, 1999) *available at* <http://www.amnesty-usa.org/rights forall/women/conference/michelle.html>.

extensive human rights legislation and laws proscribing such treatment both nationally and internationally.[15]

The international community extended its protection against cruel, inhumane, or degrading treatment or punishment, including sexual violations against women in prisons, by establishing the Universal Declaration of Human Rights and the Declaration on the Elimination of Violence against Women.[16] The United Nations (U.N.) Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[17]

International standards attempt worldwide consensus toward the preservation of human equality and dignity.[18] The United States and other nations began recognizing the need for international protection with the adoption of the Universal Declaration of Human Rights by the United Nations.[19] Consequently, "the attitude of the international community toward

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15. *See* Steven A. Holmes, *Rape of Women Prisoners Increasing: Groups Say They Try to Help Win Some Cases, but Prisons Often Say Sex Was Consensual*, DALLAS MORNING NEWS, Jan. 19, 1997, *available in* 1997 WL 2640195. This article reported an incident where a prison guard raped a female inmate and then tossed his used condom on the bed and told her to flush it down the toilet. *See also* Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It's . . . A 13-Year Nightmare*, LOS ANGELES TIMES, Dec. 30, 1992 (detailing incidences where guards not only photographed women engaged in sex acts, they took inmates off the grounds to work as prostitutes). The alleged abuses discussed in the article go back as far as 1979. *See id. See also* Beth Stephens, *Problems of Proving International Human Rights Law in U.S. Courts: Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191 (1996) (noting that international law has begun to recognize violence against women as a human rights violation).

16. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810, Dec. 10, 1948. The United Nations General Assembly unanimously adopted the Declaration, which articulated fundamental human rights for all and provided a worldwide standard for the preservation of human equality and dignity. *See* Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996) (stating that the Universal Declaration of Human Rights has become incorporated into customary international law binding on all states); Declaration on the Elimination of Violence Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. 46/A/34/46 (1980). The Declaration was entered into force on Sept. 3, 1981. *See id.* It created a reporting procedure requiring signatories to submit information about action taken concerning remedying discrimination against women. *See id.* The Declaration on the Elimination of Violence against Women was the first international human rights instrument which exclusively and explicitly addressed the issue of violence against women.

17. *See* Declaration on the Elimination of Violence Against Women, *supra* note 16, art. 1.

18. *See* Universal Declaration of Human Rights, *supra* note 16, art. 2.

19. *See id.* For a discussion on international human rights law and how these laws apply to American jurisprudence, see William D. Auman, *International Human Rights Law: A Development Overview and Domestic Application Within the U.S. Criminal Justice System*, 20 N.C. CENT. L.J. 1 (1992). A declaration is merely a general statement of intent or principle

the treatment of prisoners has evolved into a formal recognition of basic prisoners' rights."[20] The United States ratified international conventions and covenants[21] which can be used to protect women from sexual violence occurring in U.S. prisons.[22]

> In 1900, the United States Supreme Court clarified that it would enforce the dictates of international law, stating that: "International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."[23]

Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) and the International Covenant on Civil and Political Rights (ICCPR), the rape of a female prisoner by a correctional officer constitutes torture, and sexual abuse violates the right to be treated with respect for human dignity and the right to privacy.[24] The United States ratified the ICCPR in 1992 and the Convention Against Torture in 1994.[25] The United States must use international laws to its advantage by first recognizing the assault of female inmates as the human rights abuses they are and then drawing upon them for inmates' protection.

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declared by a group or organization. *See id.* at 7. It is not necessarily signed, ratified or adopted by individual nations. *See id.*

20. *See* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners,* 25 RUTGERS L.J. 759, 761 (1994).

21. Dissimilar to declarations, covenants or conventions legally bind governments who sign and ratify them. Auman, *supra* note 19, at 8. Therefore, a government which signs a convention or covenant only signifies an intention to ratify, but is not bound until the treaty's ratification. *See id.*

22. *See* Amnesty International website, *United States of America, Rights For All* (visited Nov. 12, 1999) <http://www.rightsforall-usa.org/info/report/r02-htm>. Since many human rights standards adopted by the international community are not treaties, they have little legal power. *See id.* However, since governments must first negotiate the treaties and then have the treaties adopted by their political bodies, the treaty is provided certain moral force. *See id.* Additionally, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also contains standards on how prisoners should be treated. *See id.*

23. Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement,* 1 YALE HUM. RTS. DEV. L.J. 2, ¶51 (1999) <http://diana.law.yale.edu/yhrdlj/vol02/keller_kathleen_note.htm#p051> (stating that customary international law is now considered a type of federal common law which is supreme over state law based on Article VI of the Constitution); *see also* The Paquete Habana, 175 U.S. 677 (1900) (holding that international law is a part of United States law).

24. *See* Amnesty International website, (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-01.html>.

25. *See* Amnesty International website (visited Sept. 1999) <http://www.amnesty-usa.org/rightsforall/women-002.html>.

Part II of this Note discusses the background of violence, retaliation, and pervasive sexual abuse aimed toward female inmates in U.S. prisons, citing prison statistics as well as discussing the background history of women prisoners. Part III explores why the sexual misconduct and abuse occurring in United States prisons constitute rape, torture and inhumane treatment, so as to fall within the purview of international law. Part IV chronicles the use of international human rights law to protect female inmates from sexual misconduct and abuse, specifically focusing on the Convention Against Torture and the IICPR, the United States' ratification of both laws, and the application of the international human rights issues to prisoners. Part IV further explores what role these international laws play in protecting United States female prisoners from rape, other sexual assault, sexual extortion, and groping during body searches. Part V discusses briefly the international human rights standards in China and its application of international human rights laws. Finally, Part VI details recommendations for solutions to the abuse problem in the United States.

II. A BACKGROUND OF FEMALE SEXUAL ABUSE IN UNITED STATES PRISONS

Each day, females incarcerated in United States prisons face rape, sexual assault, and other abuse.[26] "Rape in prison is hardly new—but with more and more women doing time, the Big House is being transformed into a veritable rape camp."[27] For many years, the United States court system neglected sexual abuse against female prisoners, refusing to recognize the serious human rights violations involved.[28]

Further, the extensive abuse of female prisoners rarely received national attention until seven or eight years ago.[29] Eventually, incidents of prison staff sexually molesting and assaulting female inmates started gaining attention.[30] "Numerous female inmates in three Washington, D.C. prison and jail facilities [described being] awakened at two or three in the morning for a [medical . . . or legal visit] only to be led into the kitchen, the clinic, the visiting hall, or a

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26. *See* Amnesty International website, *supra* note 25. Sexual abuse persists because women feel useless to complain. *See id.* The continued rapid growth of the female inmate population compounds the sexual abuse. *See id.*

27. Christopher D. Cook & Christian Parenti, *Rape Camp USA*, INSTITUTE FOR PUBLIC AFFAIRS 14, Dec. 27, 1998.

28. *See id.* The 1996 Prison Litigation Reform Act (PLRA) requires inmates to pay exorbitant court fees to file suit and imposes stiff penalties for sloppy lawsuits. *See id.* This law chills drastically the female inmates who attempt to combat sexual abuse and violence. *See id.*

29. *See* Nina Siegal, *Stopping Abuse in Prison: Widespread Sexual Abuse of Women Prisoners*, THE PROGRESSIVE, Apr. 1, 1999. Incidences of female inmates being molested by prison staff gained attention through human-rights groups, legal cases brought by the inmates and a shift in governmental policy. *See id.*

30. *See id.*

closet to [be raped]."[31] Additionally, facilities denying conjugal visits had inmates that still became pregnant.[32] "The sex involved not just correctional officers. It involved chaplains, administration, deputy wardens, contractors, and food service workers . . . [including] female staff."[33]

As the sexual abuse of female inmates raced to the forefront of America's consciousness, the female inmate population steadily increased.[34] Alarming statistics show approximately 138,000 women are currently incarcerated in United States jails and prisons.[35] Incarcerated females in United States prisons come from extremely diverse backgrounds, and they are confined for various criminal and civil offenses.[36] Most female inmates are incarcerated for nonviolent crimes and have minimal or no prior criminal history.[37] Occasionally, women enter correctional facilities pregnant and give birth while serving their sentences.[38]

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31. *Id.*

32. *See id.*

33. *Id.*

34. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Survey of State Prison Inmates, 1991*, NCJ-145321 (Mar. 1994) [hereinafter *Special Report, Survey*]. The Bureau of Justice Statistics conducted a 1991 survey of inmates in 277 state correctional facilities nationwide. *See id.*

35. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/factsheets/assault.html>. The number of women in state prisons grew 75% from year-end 1986 to year-end 1991, reaching almost 39,000 by June 1991. See *Special Report, Survey, supra* note 34. The number of men in prison increased only 53% during that same time. *See id.* About 71% of all state female prisoners had served a prior sentence to probation or incarceration, including 20% who had served a sentence as juveniles. *See id.*

36. *See id.* Women in state prisons in 1991 were most likely to be black (46%), age 25 to 34 (50%), unemployed at the time of arrest (53%), high school graduates, holders of a GED, or with some college (58%), and never married (45%). *See id.* The percentage of women in prison who had never married increased from 42% in 1986 to 45% in 1991. *See id.* About one-third of female inmates in both years were either separated or divorced. *See id.* Female prisoners who were tested for the human immunodeficiency virus (HIV), and reported the results, were more likely to test positive than male prisoners. *See id.*

37. *See id.* Women incarcerated for violent offenses included about three in ten female inmates in 1991, down from four in ten in 1986. *See id.* Despite this decrease in the proportion of violent female inmates, the number of women sentenced for a violent offense rose from 8,045 to 12,400 during a 5-year period. *See id.* About 28% of the women reported no previous sentences to incarceration or probation, compared to 19% of the men. *Id.* Four in ten women had a history of violence. *See id.* Nearly half of all women in prison were currently serving a sentence for a nonviolent offense and had only nonviolent offenses for prior convictions. *See id. See also* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/factsheets/drugs.html>.

38. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/factsheets/children.html>. Thirteen hundred babies were born to women in prison in 1997-1998. *See id.* In only a handful of states are inmates allowed to keep their children for limited time periods. *See id.* Frequently, the infant is removed soon after birth. *See id.* More than three-quarters of all women in prison had children, and two-thirds of the women had children under age 18. *See Special Report, Survey supra* note 34. Regardless of race, the children's grandparents were the single most common category of care givers. *See*

In addition, the majority of women are in prison for economic crimes. The most typical convictions include property crimes, such as check forgery and illegal credit card use.[39] However, many women are also incarcerated for drug related offenses.[40] Moreover, many women committing violent crimes were defending themselves or their children from abusive husbands, fathers, and lovers.[41] The women overcrowding United States prisons may remind us of ourselves, and are similar to mothers,[42] daughters, and sisters that we interact with every day who have found themselves in egregious situations.

Another equally alarming statistic indicates that seventy percent of the correctional officers in women's prisons are male.[43] As a result, male correctional officials often watch women undressing in the shower, or on the toilet.

No certain type of woman becomes the target for sexual assaults, but several factors, such as age, sexual orientation, and race play significant roles.[44] Particularly vulnerable, first-time, young, or mentally ill prisoners often suffer more sexual misconduct.[45] Lesbians and transgendered prisoners

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id. Nearly 10% of the women reported that their children were in a foster home, agency, or institution. *See id.* "Among the most egregious indignities to which pregnant women are subjected is that they are shackled while being transported to local hospitals to deliver their children . . . ." *Women Behind Bars*, *supra* note 5.

39. *See Special Report, Survey*, *supra* note 34. In 1991, 10% of female inmates were in prison for fraud (which includes forgery and embezzlement), down from 17% in 1986. *See id.*

40. *See* Amnesty International website, *supra* note 37. From 1986 to 1996 the number of women sentenced to state prison for drug crimes increased tenfold. *See id.* Nationally one-in-three women in prison and one-in-four women in jail are incarcerated for violating a drug law. *See id.* Nearly one-in-three female inmates were serving a sentence for drug offenses in 1991, compared to one-in-eight in 1986. *See Special Report, Survey*, *supra* note 34. This increase in sentenced drug offenders accounted for 55% of the increase in the female prison population between 1986 and 1991. *See id.*

41. *See* Amy Laderberg, *"The Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 (1998); Karen D. McDonald, Note, *Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women*, 44 WAYNE L. REV. 289 (1998); Report by the Bureau of Justice Statistics, Selected Findings, *Domestic Violence: Violence Between Inmates*, NCJ-149259, Nov. 1994 [hereinafter Selected Findings].

42. *See* Amnesty International website, *supra* note 38.

43. See Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/stories/elizabeth.html>. Since the Civil Rights Act of 1964, prohibitions have been placed on U.S. employers who attempt to deny a person a job based on gender. *All Too Familiar*, *supra* note 5, at 2. This created serious disparity resulting in male correctional officers numbering twice the number of female officers, and in some facilities the disparity is even greater. *See id.* *See generally* Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1 (1999) (exploring the reliance on gender to promote the employment opportunities of females).

44. *See* Jurado, *supra* note 43.

45. *See id.*

find themselves singled out by officers because of the prisoners' sexual preferences.[46] Prison staffs pressure female inmates into sexual relations by depriving them of necessary feminine needs, withholding privileges, and granting extra favors to those who cooperate.[47] Often, because the female prisoner completely depends upon the correctional officers for basic necessities, the threat of withholding these items leaves the inmate feeling that she has no other choice but sexual submission.[48]

A. *Retaliation*

The exact number of sexually assaulted female prisoners is unknown.[49] Generally, ongoing sexual assaults go unreported.[50] Human Rights Watch reported the Department of Justice's finding that fear of retaliation prompted female inmates not to report abuse.[51] One report states:

> There's a Bosnia-like epidemic of rape and psychosexual torture going on inside America's prisons. In public and private facilities across the United States, female inmates are routinely forced into performing strip teases, lap dances and sexual favors. They are raped regularly by guards, medical

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46. *See id. See also* Amnesty International website (visited Sept. 16, 1999) http://www.amnesty-usa.org/rightsforall/women/stories/robin.html> (describing the horrifying details of assault, sodomization, and rape which Robin, a homosexual female prisoner, experienced while incarcerated).

47. *See* Amnesty International website, *supra* note 46.

48. *See id.* "Even in those cases where an officer engages in sexual relations with a prisoner absent any form of pressure or exchange, he should still be liable for a serious criminal offense." *Id.* ¶ 13.

49. *See Women Behind Bars*, *supra* note 5; *Nowhere to Hide*, *supra* note 6; and Cook & Parenti, *supra* note 27.

50. *See* Cook & Parenti, *supra* note 27. *See also* Richard D. Vetstein, Note, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863 (1997) (explaining increased rampant nature of prison rape and deadly implications since female inmates fail to report assaults). Although this Note does not discuss male prison rape, some researchers estimate that of the forty-six million Americans entering the criminal justice system, ten million will be raped while in custody. *See id.* One expert testified that the actual number of rapes in prison may be five to six times greater than the number of reported assaults. *See id.* at 870.

51. *See Nowhere to Hide*, *supra* note 6. The Department of Justice concluded that the fear of retaliation and vulnerability prohibits inmates who would otherwise report sexual abuse and assaults. *See id.*

> staff and even male prisoners–who pay corrections officers for access to women inmates housed in adjoining prison wings.[52]

Female inmates are left to the mercy of the correctional officers once they decide to report an assault. Thus, inmates fear reporting assaults.[53] Often, the prisoner's allegations are not believed, and she simply returns to an environment where she faces retaliation from her abuser for speaking out.[54] This leads to many female inmates serving their sentences in silence and submission, merely perpetuating the abusive behavior.

Retaliation by a correctional officer can consist of verbal harassment,[55] intimidation, abusive pat-downs, denial of privileges,[56] rape, sodomization, and physical abuse. In many states, guards can access and are encouraged to review the inmates' personal history files. Inmates' files usually include complaints they reported against officers or other prison authorities.[57] "By leaking [this] private information . . . prison officials coerce women prisoners and staff into silence and insulate themselves from scrutiny."[58] In addition, allowing access and review of files creates a "chilling effect" on inmates reporting abuses.[59]

"As . . . guards wield near-absolute power over the women, retaliation can be devastating to the women's security, health, and psychological well-

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52. Cook & Parenti, *supra* note 27.

53. *See Nowhere to Hide*, *supra* note 6 § III. Heather Wells complained about sexual contact with a prison cook, which landed her in solitary confinement. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/stories/heather.html>. She was warned never to accuse staff or report sexual misconduct or she would again suffer the consequences. *See id.*

54. *See* Amnesty International website, *supra* note 7.

55. *See* Amnesty International website, *supra* note 6. In November 1998, Valley State Prison correction officials in California informed Amnesty delegates that prisoners' rights were specified in writing and retaliation was not a problem. *See id.* Contrary to Valley State reports, the prisoners continued to report that they suffered verbal abuse and repeatedly had their possessions searched for complaining. *See id.*

56. *See Nowhere to Hide*, *supra* note 6. Guards not only threaten the prisoner's children, but also threaten to revoke visitation rights as a means of silencing the women. *See id.*

57. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/assault.html>.

58. *Id.* Occasionally, correction officials punish inmates by segregation and security status change, which may prolong jail sentences. *See id.*

59. *See Nowhere to Hide*, *supra* note 6. This report discusses how correction officials make no attempt to keep the names of prisoners who file complaints away from the correctional officer committing the sexual assault. *See id.*

being."[60] The Human Rights Watch's[61] 1996 and 1998 reports[62] detailed the terrifying experience of being a female inmate in a U.S. prison.[63] The Human Rights Watch report discusses that a large number of women who complained experienced retaliation from the accused officers, their colleagues, or other inmates.[64] Additionally, the report stated that the Department of Justice should thoroughly investigate any complaints received by correction departments.[65]

The report further discussed retaliation methods, such as guards sexually and physically assaulting prisoners involved in legal action against the Department of Corrections and confiscating legal mail as contraband; guards subjecting prisoners to unnecessarily intrusive body searches; guards verbally harassing inmates and threatening them with physical or sexual abuse; and staff falsely reporting inmate misconduct.[66] An unfortunate consequence reported is that "[i]f a guard has been reported by an inmate for sexual abuse, he may turn to his colleagues for assistance in retaliating against her."[67] Retaliation of this nature creates difficulty for correctional facilities too since no link may exist between the retaliatory behavior of one guard and the actions of a separate guard carrying out his duties.[68]

Further, United States courts have treated sexual assaults against women prisoners with leniency;[69] thus, "correction[al] employees continue to engage in abuse because they believe they will rarely be held accountable, administratively, civilly, or criminally."[70] "Prisoner rape [and sexual assault]

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60. *Id.* ¶ 18.

61. Human Rights Watch is an organization dedicated to protecting the human rights of people around the world. The organization investigates and exposes human rights violations.

62. *See Nowhere to Hide, supra* note 6.

63. *See id.* The report found that "[i]f you are sexually abused, [in a women's correctional facility], you cannot escape from your abuser." *Id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *Id.*

68. *See id.*

69. *See* Downey v. Denton County, 119 F.3d 381 (5th Cir. 1997) (holding that inmate sexually assaulted and impregnated did not prove supervisor knew the substantial risk of harm); Carrigan v. Delaware, 957 F. Supp 1376 (D. Del. 1997)(finding that inmate raped and threatened by officer failed to give administration notice of the risk of harm); Adkins v. Rodriguez, 59 F.3d 1034 (10th Cir. 1995) (finding no constitutional violation against guard sexually harassing inmate); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997) (holding that the relationship between inmate and prison employee was consensual); Laderberg, *supra* note 41.

70. *All Too Familiar, supra* note 5 at 1. *See also* Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998) (discussing widespread leniency with which offending officers are treated); *but cf.* Laura Neergaard, *14 Are Indicted in Georgia Prison Sexual Abuse Case*, BOSTON GLOBE, Nov. 14, 1992, *available in* 1992 WL 4201362 (discussing that at least 100 inmates are under a protective court order to prevent retaliation by correctional

is aided and abetted by a legal system in which inmates are deemed incurable criminals, forever guilty until proven innocent."[71] The United States court system routinely places some of the responsibility and blame on the inmates themselves.[72] This leaves female inmates with further feelings of violation, guilt, fear, and shame.

This may lead to the question of why other correctional officers do not speak out about the retaliation and sexual abuse. Unfortunately, officers wishing to do so often face the prospects of losing their job, physical harm, or their supervisor setting them up and getting them fired.[73]

"By failing to monitor vigorously for retaliatory behavior and disciplin[ing] guards and employees who participate in retaliatory behavior, the correction's department sends a message to both the women and the guards that correction's employees may abuse, harass, threaten, and harm women with impunity."[74] Sadly, this leaves female inmates with no power over the correctional officers, and inmates continue to serve sentences suffering worse treatment and more severe abuse after reporting their attackers.

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officers or prison staff).

71. Cook & Parenti, *supra* note 27. "States' failure to uphold their own laws regarding custodial sexual misconduct reflects their reluctance to prosecute such crimes, largely because of an ingrained belief . . . that the prisoner was complicit in the sexual abuse committed against her." *Id.* *See* Stein, *supra* note 9.

72. *See* Amnesty International website (visited Sept. 16. 1999) <http://www.amnesty-usa.org/rightsforall/women/laws.html>. Amnesty International detailed a survey of statutes on custodial sexual contact. *See id.* The abusive nature of sexual relationships between guards and inmates needs to be recognized. *See id.* Consensual sex cannot exist behind bars based on the imbalance of power between inmates and guards. *See id.* Seven states do not possess laws criminalizing consensual sex between inmates and staff. *See id.* at <http://www.amnesty-usa.org/rightsforall/women/action.html>. They include Alabama, Massachusetts, Minnesota, Utah, Vermont, West Virginia, and Alaska. *See id.* Since Amnesty's report was released, Illinois, Montana, Nebraska, Virginia and Washington enacted laws protecting female inmates. *See id.*

73. *See Nowhere to Hide, supra* note 6 at <http://www.hrw.org/reports98/women/Mich-05.htm#P380_96183>. Officers wishing to report abuse are afraid the crooked officers might do something to them. *See id.* "A lot of [officers] know what's right and what's wrong, but they don't have the guts to put up with it on a daily basis . . . How are you going to protect [officers] . . . because there's no way they're going to be able to function [in the facility] afterwards." *Id.* (quoting the deposition of Michigan Correctional Officer Julie Kennedy-Carpenter on April 13, 1998).

74. *Nowhere to Hide, supra* note 6, at 4.

II. SEXUAL MISCONDUCT AND RAPE AS TORTURE

Rape occurs in every prison system in every state, every city, and every town.[75] Inmate rape victims are being denied potential legal protections and remedies that unincarcerated women possess. Rape is defined as the unlawful carnal knowledge of a woman by a man, forcibly and against her will, or without her consent.[76] Rape is primarily directed toward women; thus, women are acutely vulnerable.[77] Between June 1990 and October 1991, 1.3 million American women became victims of rape or attempted rape.[78] In 1990, the number of rapes rose faster than the rate of any other major crime.[79]

In most cases, men rape out of anger and a need to overpower, dominate, and humiliate.[80] However, correctional officers perpetrating sexual assault control daily nearly every aspect of the inmate's life.[81] "[Officers] have used their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so."[82] Regrettably, for female inmates, rape cannot always be avoided regardless of the precautions taken.[83]

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75. *See* Charlene Muehlenhard et al., *Definitions of Rape: Scientific and Political Implications*, 48 J. SOC. ISSUES, 23 (1992).

76. *See* 65 AM. JUR. 2D *Rape* § 1 (1972). The United States protects its citizens under laws such as the Eighth Amendment to the U.S. Constitution, which prohibits the unnecessary and wanton infliction of pain.

77. *See* Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197 (1992); Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996). "[R]ape is not primarily a sexual act . . . [r]ape is primarily an act of violence with sex as the weapon." *Id.* at 1920. "The view that rape is a private, sexual act may be one of the greatest obstacles to the classification of rape as torture." *Id.* at 1943.

78. *See id.* at 2198. Reports by the Bureau of Justice Statistics estimate 1.5 million women and 123,000 men were raped between 1973 and 1982. *See id.* at 2199.

79. *See id.*; *Special Report, Survey*, *supra* note 34; Holmes, *supra* note 15.

80. *See* Willis, *supra* note 77, at 2211. A woman's fear of rape acts as a constraint that ultimately defers her to the man's control. *See id.* at 2207. "Rape is not a natural product of the male sex drive, but rather an expression of sex discrimination." *Id.* at 2206.

81. *See* Cook & Parenti, *supra* note 27.

82. *Siegal, supra* note 29. *See* Holmes, *supra* note 15; and Cook & Parenti, *supra* note 27.

83. July 20, 1995: The air inside the D.C. jail is thick with humid heat. Jail staff have opened all the cells. Soul music bounces off the sticky concrete walls and steel bars. Down at the end of the tier the officer in charge, Yvonne Walker, starts dancing and inmates join in. Before long, one prisoner is undulating on a table, half-naked. Soon, Walker is partially disrobed, while another inmate is performing a sex trick with a lit cigarette. In a toxic blend of chaos and coercion, corrections officers begin calling for other inmates to strip. Sunday is a dancer, too, someone shouts, referring to inmate Sunday Daskalea, who is hiding in her open cell. A prison staffer dispatches a posse of

Women experience different conditions upon incarceration than men.[84] In *Jordan v. Gardner* the court stated women's reactions to rape and searches by male guards are different because most women have been sexually abused before coming to prison.[85] However, the majority of male rapes occur in prisons and other correctional facilities.[86]

Thus, women entering prison have a greater fear of being sexually assaulted since they are disproportionately victims of such crimes.[87] "Men are rarely victims of sexual assault, [and] may view sexual conduct in a vacuum without a full appreciation of the . . . underlying threats of violence that a woman may perceive."[88] Although many people argue that the causes of and

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three inmates to retrieve her. The guards, she is told, will be "mad" if she doesn't perform for the crowd.

Cook & Parenti, *supra* note 27.

84. *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993). Women are primarily the caretakers in the home and experience great anguish upon separation from children and family. *Women Behind Bars*, *supra* note 5. There is gross inequality between men and women in the home, the workplace, and on the streets because men have significant power over women. *See* Willis, *supra* note 73, at 2206. "Sexual assault is a class based violence committed by men against women." *Id.* at 2200. The Violence Against Women Act, introduced on January 14, 1991, protects victims of sexual violence and Title III of the Act provides the victims a federal civil rights remedy. *See id.* at 2201.

85. *See id.* at 1525-26, 1531-34. More than 4 in every 10 women reported that they had been abused at least once before their admission to prison. *See Special Report, Survey*, *supra* note 34. An estimated 34% of female inmates reported being physically abused, and 34% reported being sexually abused. *See id.* About 32% said the abuse had occurred before age 18, and 24% said they had been abused since age 18. *See id.* An estimated 50% of women in prison who reported abuse said they had experienced abuse at the hands of an inmate, compared to 3% of men. *See id.* For more information regarding female pre-incarceration abuse rates, see Lynn Smith, *Majority of State's Women Inmates Abused as Children, Warden Says,* LOS ANGELES TIMES (Mar. 19, 1992), *available* in WL 2937221(stating that the average female prisoner reports sexual abuse in original home). *See also* the Chicago Tribune's study, *Abuse Rates High Among Inmates,* Apr. 12, 1999 (noting that more than 36% of female state prison and jail inmates surveyed in 1996-1997 reported they were abused sexually or physically at age 17 or younger). *See id.*

86. *See* Willis, *supra* note 77, at 2225 (citing Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975)). The younger, weaker prison male is often raped and forced into playing the role typically assigned to women in the outside world. *See id.* Thus,"male on male rape generally occurs not as a result of animus toward men, but as a result of animus toward women or those assigned 'women's roles'." *Id. See also* SPR Brief, *supra* note 2 § F. The rape of male on male prisoners is an abuse of power. *See id.* "The issue . . . is not homosexuality but heterosexual brutality." *Id.* Many male on male prison rapists have wives and children but feel the need to practice "the customary sexual activity" of "penile penetration, by which most of them define their 'manhood'." *Id.*

87. *See* Jordan, *supra* note 84 (citing Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)). The majority of rape victims are women who live in a state of fear regarding sexual violence that men do not understand. *See id.* Police authorities frequently mock and victimize women reporting sexual crimes. *See* Willis, *supra* note 77, at 2199.

88. *Id.* at 1526.

reasons for rape remain deeply entrenched in America's social structure,[89] "[t]he time has come for international human rights law to recognize the pervasiveness and severity of rape and to punish, rather than forgive, the torturer and to compensate, rather than forget, the rape survivor."[90]

"Recent developments recognize rape as among the worst human rights violations."[91] Research demonstrates that rape victims regularly suffer from rape trauma syndrome,[92] which is similar to Post-Traumatic Stress Disorder (PTSD).[93] PTSD symptoms are similar to the psychological distress associated with many torture survivors' experiences.[94] The severe suffering caused by rape is comparable to that inflicted by torture, which would justify treating rape as torture under international law.[95]

Further, national classifications of torture fail to distinguish torture from what female inmates currently face.[96] When asked to explain the rape crisis, Jimmie Williams, Communications Director for the Washington, D.C. corrections department, accepts it as a part of prison life, responding: "I don't think anyone can answer that question. It happens in prisons all across

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89. *See* A. NICHOLAS GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 104-09 (1979); JEAN MACKELLAR, RAPE: THE BAIT AND THE TRAP 69 (1975).

90. Aswad, *supra* note 77, at 1943.

91. Berta Esperanza Hernandez-Truyol, *Article, Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 613 (1996).

92. *See* QueenDom.Com, *Mental and Emotional Health: Rape Trauma Syndrome* (visited Nov. 3, 1999) http://www.queendom.com/articles/rapeintr.html>. More than half of rape victims show some level of rape trauma. *See id.* "Some women express their feelings, showing fear, anxiety; they often cry and are tense. Other women try to control their expression, mask their feelings and they attempt to look calm." *Id.* After a traumatic rape encounter, the victim deals not only with the rape's impact on herself, but others' reactions to it as well. *See id.*

93. *See id.* *See also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994). "Until the 1970s, very few studies focused on the psychological aftermath of rape survivors." *See* Aswad, *supra* note 77, at 1931. Researchers identified "rape trauma syndrome" in 1974 as a condition from which many rape survivors suffer. *See id.* "PTSD is an anxiety disorder resulting from direct exposure to an 'extreme traumatic stressor.'" *Id.* at 1935.

94. "Most researchers agree with the APA's classification of rape trauma syndrome as a manifestation of PTSD." Aswad, *supra* note 77, at 1935. "Unlike other forms of torture, rape transforms an act that once symbolized unity and pleasure with another human into an act of combat." *Id.* at 1940. "Rape survivors also may relive their torture during future sexual contacts." *Id.*

95. *See* Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426-27 (1993). Rape constitutes a crime against humanity and is morally and legally wrong. *See* Aswad, *supra* note 77, at 1940.

96. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women-23.html>. The degrading, cruel, and inhumane treatment a female prisoner receives by being raped is no different than the experience of torture victims. *See id.*

America . . . sex is a normal part of prison life. . . . It's not proper, but it happens."[97] Dr. William F. Schultz, Executive Director of Amnesty International USA, disagreed, stating that "[s]exual abuse of women inmates is torture, plain and simple."[98]

The United Nations Special Rapporteur on Torture[99] recognizes that rape can constitute torture. The Rapporteur stated that "rape is a traumatic form of torture for the victim."[100] The Inter-American Commission on Human Rights[101] also recently recognized rape as a form of torture.

The abuse and punishment that female inmates face is far in excess of their state-imposed sentences. "[I]n a custodial setting, if a guard uses force . . . or other means of coercion to compel a prisoner to engage in sexual intercourse . . . including aggressively squeezing, groping, or prodding women's genitals or breasts . . . [these acts] amount to torture."[102]

III. INTERNATIONAL LAW AND THE PROTECTION OF FEMALE INMATES

A. *International Law: Treaties, Reservations, and Ratifications*

International law imposes upon nations certain duties with respect to individuals and incorporates rules and principles which govern the relationship between nations and how they deal with each other.[103] "The 1969 Vienna Convention on the Law of Treaties is the central source of

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97. Cook & Parenti, *supra* note 27.

98. Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/conference/bill.html>.

99. The position of the Rapporteur was created in 1985 to report to the United Nations Commission on Human Rights on matters relating to the prevalence of torture. In 1994, the Commission on Human Rights appointed a Special Rapporteur to specifically oversee issues dealing with violence against women.

100. *Question of the Human Rights of All* Persons *Subjected to Any Form of Detention or Imprisonment, In Particular: Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment.* Report of the Special Rapporteur, U.N. ESCOR Commission on Human Rights, 50th Sess., Provisional Agenda Item 10(a), para. 19, U.N. Doc. E/CN.4/1995/34 (1995). *See* Meron, *supra* note 95; Beth Stephens, *Women and the Atrocities of War,* 20 HUM. RTS. Q. 12, 13-15 (1993).

101. The Inter-American Commission on Human Rights publishes periodic reports on its visits to investigate allegations of human rights violations in various states. For one of the commission's reports, see The Inter-American Commission on Human Rights Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R. 43, MRE/RES 6/94 (1995).

102. *Nowhere to Hide*, *supra* note 6 § 60.

103. *See* Timothy F. Malloy, *Disentangling Treaty and Customary International Law*, 81 ASIL PROCEEDINGS 157 (1987); Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana,* 40 WM. & MARY L. REV. 1395 (1999).

international law on treaties."[104] The Vienna Convention codified language on how participating states should handle treaty application, observance, interpretation, reservations, and termination.[105]

However, states voluntarily sign and enter into treaties,[106] which do not become binding law until they are ratified.[107]

Once a state has signed and ratified a treaty, a problem may arise with some states reservations made within the treaty.[108] Section 2, Articles 19 through 23 of the Vienna Convention deals with treaty reservations.[109] One of the primary reasons for treaty reservations in human rights documents is states' domestic legislation and the treaty's international requirements.[110] Article 19 of the Vienna Convention provides that "[a] state may . . . formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."[111] United States' reservations to any treaty it has become a signator to should not restrict or lessen any fundamental human rights recognized or existing in a State.

B. *Standard Minimum Rules for the Treatment of Prisoners*

The international community has extended its protection against cruel, inhuman or degrading treatment or punishment, including sexual violations against women in prisons.[112] In 1957, the United Nations Economic and

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104. JOHN S. GIBSON, DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW 2 (1996). *See* Vienna Convention on the Law of Treaties, art. 26, U.N. Doc A/Conf. 39/27, May, 23, 1969 [hereinafter Vienna Convention]; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988).

105. *See* Vienna Convention, *supra* note 104.

106. One could argue that a state's voluntary signature on any treaty should be justification enough to bind the state to the treaty's articles.

107. "'[R]atification,' 'acceptance,''approval' and accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty." Vienna Convention, *supra* note 104 art. 2(1)(b). *See* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS (Richard B. Lillich ed., 1981).

108. "[R]eservation means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." *Id.* art. 2(1)(d).

109. *See id.* § 2, arts. 19-23.

110. *See* LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 77-88 (T.M.C. Asser Instituut ed., 1995). "This . . . can be explained by the fact that by their very nature human rights instruments intend to operate in a field in which the State used to be the sole legislator." *Id.* at 78.

111. Vienna Convention, *supra* note 104 art. 19(c).

112. *See* Universal Declaration of Human Rights, *supra* note 16; *Nowhere to Hide*, *supra* note 6; Amnesty International website, *supra* note 1.

Social Council[113] (ECOSOC) formally approved the United Nations Standard Minimum Rules for the Treatment of Prisoners[114] ("Standard Minimum Rules"), which constitute an international guide toward the treatment of prisoners. "The primary goal of establishing the Standard Minimum Rules was to encourage their enactment in national penal codes."[115]

The Standard Minimum Rules can be found in United States criminal laws under the 1962 Model Penal Code,[116] and in the correctional standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973.[117] "A few U.S. states have adopted the Rules as a 'Bill of Rights' for the treatment of prisoners."[118] Regrettably, these integrations of the Standard Minimum Rules achieve nothing if the United States does not ensure their implementation nationally in its prisons and jails.

The Standard Minimum Rules contain provisions specifically related to women.[119] Rule 53(2) provides that "[n]o male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer."[120] Rule 53(3) provides that "[w]omen prisoners shall be attended and supervised only by women officers . . . ."[121] Additionally, Rule 36(3) ensures

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113. The Economic and Social Council promotes universal respect and observes fundamental human rights and freedoms for all without regard to race, sex, language, or religion.

114. *See* Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) on May 13, 1977. *See* Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 454-57 (1975).

115. Bernard, *supra* note 20, at 771. The Standard Minimum Rules do not set out a detailed model for penal institutions to follow. *See id.* Instead they give a general consensus constituting the essential elements of an adequate correctional facility's treatment of prisoners. *See id.*

116. *See* Miller, *supra* note 11, at 148.

117. *See id.*

118. *Id.*

119. *See* Standard Minimum Rules, *supra* note 114. "Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate." *Id.* ¶ 8(a). "In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment." *Id.* ¶ 23(1). "Where nursing infants are allowed to remain in the institution with their mothers, provisions shall be made for a nursery staffed by qualified persons." *Id.* ¶ 23(2). "In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution." *Id.* ¶ 53(1). "No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer." *Id.* ¶ 53(2). "Women prisoners shall be attended and supervised only by women officers . . . ." *Id.* ¶ 53(3).

120. *Id.* at ¶ 53(2).

121. *Id.* at ¶ 53(3). "This [article of the Standard Minimum Rules] does not . . . preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women." *Id.*

prisoners the right to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority, or other proper authorities, through approved channels.[122]

The Standard Minimum Rules' protection can be interpreted to mean that the violation of one's human rights constitutes torture; thus, since the sexual abuse of women inmates is a human rights violation, it is also torture.[123] Furthermore, these standards and rules are derived from the idea of universal human rights and an international responsibility to ensure those rights.[124] However, the ECOSOC's rules do not bind the United States since they have no legislative authority.[125] Acceptance by the United Nations and approval by ECOSOC is insufficient to give the Standard Minimum Rules the force of law.[126]

C. *The Convention Against Torture*

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture") opened for signature in 1984.[127]

The Convention Against Torture significantly encompasses prisoners' rights, since most torture victims are imprisoned or otherwise detained.[128]

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122. *See id.* at ¶ 36(3). *See also Nowhere to Hide*, *supra* note 6, Part IV. Regulations and standards for the running of prisons fail without proper mechanisms for reporting violations. *See id.*

123. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-01.html>. Amnesty gathered and referenced this information from the United Nations Commission on Human Rights where the then United Nations Special Rapporteur on Torture, Professor Kooijmans noted that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." *Id.*

124. *See id.*

125. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-05.html>; Bernard, *supra* note 20, at 770.

126. *See id.*

127. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46,U.N. GAOR, 39th Sess., Supp. No. 51, 93rd mtg., U.N. Doc. A/Res/39/46 (1984). The right to be free from torture and cruel, inhuman, or degrading treatment or punishment is found not only in the Standard Minimum Rules and the Convention Against Torture, but also in the Universal Declaration of Human rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Declaration on the Rights and Duties of Man, and the American Convention on Human Rights. *See* Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 312 (1994).

128. Torture in this context does not refer to domestic or street violence. Rather, it is a process of brutal human degradation .... The World Medical Association, in its Declaration of Tokyo

Torture inflicts intense suffering, forcing individuals to act against their will.[129] The Convention Against Torture reaffirms all torture acts or other cruel, inhumane, or degrading treatment or punishment as offenses against human dignity.[130] The Convention Against Torture defines torture to be:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[131]

The Convention Against Torture requires governments to prohibit torture.[132] Typically, sanctions are used to enforce convention provisions. However, the Convention Against Torture uses "moral [per]suasion and exposure to adverse public opinion."[133] Initially, parties to the Convention Against Torture submit yearly reports, and then submission is required every four years. These reports detail countries' actions toward meeting obligations that the Convention Against Torture outlines.[134] Mandatory governmental investigation is required whenever reasonable grounds surface detailing that

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> (1975), defines it as follows: "Torture is . . . the deliberate, systematic, or wanton infliction of physical or mental suffering by one or more persons, acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason."

Harvey M. Weinstein, M.D., MPH; Laura Dansky, Ph.D.; and Vincent Iacopino, M.D., Ph.D., Torture and War Trauma Survivors in Primary Care Practice, 1650 WESTERN J. MED. 112-17, (Sept. 1996).

129. *See id.* at 112.

130. *See* Amnesty International website, *supra* note 22.

131. Convention Against Torture, *supra* note 127 art. I. *See* Aswad, *supra* note 77, at 1917. The Inter-American Convention to Prevent and Punish Torture, entered into force in 1987, uses the same definition of torture. *See id.*

132. *See* Amnesty International website, *supra* note 22 art. 4. Parties must ensure that abuse is investigated and punished. *See id.* The Convention Against Torture prohibits parties from returning or extraditing an individual to a country when there is a substantial belief the subject may be tortured. *See* Aswad, *supra* note 77, at 1917. "[P]arties to the [Convention Against Torture] must treat torture as an extraditable offense between each other and help each other pursue complaints of torture." *Id.*

133. Bernard, *supra* note 20, at 767; *see* Aswad, *supra* note 77.

134. *See* Aswad, *supra* note 77.

acts of torture are being committed.[135] "Unless the human rights of women, as defined by international human rights instruments, are fully recognized and effectively protected, applied, implemented and enforced in national law as well as in national practice . . . they will exist in name only."[136] The Convention requires that effective measures preventing torture from being inflicted be taken and forbids parties from justifying these acts.[137] The Convention Against Torture provides that raping an incarcerated female in United States prison is torture.[138]

The United States ratified the Convention Against Torture in October 1994, and the Convention entered into force for the United States on November 20, 1994.[139] However, the United States made a reservation to Article XVI[140] obligating itself only insofar as the Fourth,[141] Eighth,[142] and/or Fourteenth Amendments to the United States Constitution prohibit cruel,

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135. *See* Amnesty International website, *supra* note 22 chap. 7. The United States refused persons within its borders permission to bring complaints alleging human rights violations to international monitoring bodies. *See id.*

136. Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-001.html> (quoting the Beijing Declaration and Platform for Action report which was adopted at the Fourth World Conference on Women in 1953).

137. *See* Auman, *supra* note 19, at 10. One important feature of the Convention Against Torture is the creation of a committee authorized to investigate torture allegations by member nations. *See id.* Reports are made annually to all member states and to the U.N. General Assembly. *See id.*

138. *See* Amnesty International website, *supra* note 125.

139. *See* U.S. Department of State, *Initial Report of the United States of America to the UN Committee Against Torture* (visited Jan. 26 2000) <http://www.state.gov/www/ global/human_rights/torture_intro.html> [hereinafter *Initial Report*]. "The United States also ratified the International Convention on the Elimination of All Forms of Racial Discrimination at the same time as it ratified the Torture Convention." *Id.*

140. *See id.* part II. "In the view of the United States, it was necessary to limit U.S. undertakings under this article primarily because the meaning of the term "degrading treatment" is at best vague and ambiguous." *Id.* "One specific concern involved the possibly extensive reach of governmental obligations under this article, especially in light of the constraints imposed by the federal character of the U.S. system and the limitations of the state action doctrine." *Id.*

141. The Fourth Amendment guarantees the rights of privacy and personal integrity, prohibiting unreasonable search and seizure. Lower U.S. courts interpret this to prohibit male guards from strip-searching female prisoners, conducting intrusive pat-frisks, and engaging in inappropriate visual surveillance. *See* Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993); Cookish v. Powell, 945 F.2d 441 (1st Cir. 1991); Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982), *reh'g denied*, 696 F.2d 1007 (11th Cir. 1983); Smith v. Fairman, 678 F. 2d 52, 54 (7th Cir. 1982).

142. The Eighth Amendment, which bars cruel and unusual punishment, has been interpreted by U.S. courts to protect prisoners against rape and sexual assault that occurs as a result of deliberate indifference by corrections officials who knew, or should have known, of the substantial risk of assault. Farmer v. Brennan, 114 S.Ct. 1970 (1994). *See Initial Report*, *supra* note 139.

unusual, or inhumane treatment.[143] A United States Foreign Relations Committee report stated that "degrading treatment or punishment... has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. [Thus, the United States feels it is necessary to make sure that it] construes the phrase to be coextensive with its constitutional guarantees."[144] The Human Rights Watch report stated the opinion that in partially ratifying the Convention Against Torture, the United States "shirk[ed] its full international human rights obligations [and such action was] both bad policy and legally indefensible."[145] With this partial ratification, the United States falls far short of ensuring the protections provided under international law. The United States was due to report in 1995 on its implementation of the Treaty requirements to the Committee Against Torture,[146] which monitors implementation of the Convention Against Torture.[147] As of January 1999, it had not done so.[148]

The United States ratified the Convention Against Torture mainly due to its international position regarding human rights. However, the United States' reservation creates a loophole through which constant abuse and torture continue to occur in its prisons.[149]

D. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) is the principal international treaty setting out fundamental civil and political rights

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143. The term "torture" is defined in the Convention Against Torture but limitations exist since the treaty fails to define "cruel, inhuman, and degrading treatment." Bernard, *supra* note 20, at 766.

144. Miller, *supra* note 11, at 146 (quoting the Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S.Exec. Rep. No. 30, 101st Cong., 2d Sess. 26 (1990)). *See Initial Report*, *supra* note 139.

145. *All Too Familiar*, *supra* note 5, at 3.

146. The Committee Against Torture specifically supervises member states in order to protect against torture and other inhumane treatment.

147. *See* Amnesty International website, *supra* note 125.

148. *See id.*

149. By limiting its reservation and narrowing the torture definition, the United States effectively brings itself out of the Treaty's jurisdiction and limits the Treaty's enforcement for prisoner protection.

for all people.[150] The Treaty legally requires one hundred forty nations to protect the human rights of its citizens.[151]

Effective in 1976,[152] the ICCPR requires state parties to protect against slavery and cruel, inhuman, or degrading treatment.[153] The Covenant also protects individual privacy. Article 17 protects individuals against interference with their privacy and states, "[n]o one shall be subjected to arbitrary or unlawful interference with their privacy . . . ."[154] Therefore, subjecting female inmates to intrusive body searches and pat frisks by male guards violates Article 17.

The ICCPR provides implementation powers and is a strong vehicle advancing the concerns of women.[155] Article 19 states, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . ."[156] Punishing inmates for filing grievances against correctional employees is a freedom of expression violation, prohibited by the Covenant.[157] Additionally, Article 10 provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[158] Thus custodial sexual abuse, retaliation, or any degradation upon female inmates violates their right to be treated with respect, their right to privacy, and their right to be treated humanely.

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150. The International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 22d Sess., Supp. No. 16, 1496th mtg., U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. *See* Amnesty International website, *supra* note 24. The Covenant's governing body is the Human Rights Committee of the United Nations. *See* Auman, *supra* note 19, at 9. The Committee hears complaints submitted by member nations and requires periodic status reports. *See id.* For a discussion on the ICCPR, see PAUL R. WILLIAMS, TREATMENT OF DETAINEES: EXAMINATION OF ISSUES RELEVANT TO DETENTION BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 28-29, 35 (1990); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 369, 389 (1991).

151. Although this Covenant is non-binding, the signatories to it ensure its citizens and the citizens of its respective colonies that they will abide by these civil and political rights. Some of the provisions include the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7); the right of any detained person to be treated with humanity and with respect for the inherent dignity of the human person (Article 10); and the right to privacy without arbitrary or unlawful interference (Article 17).

152. *See* IICPR, *supra* note 150.

153. *See id. See* Michelle Lewis Liebeskind, Article, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights,* 63 REV. JUR. U.P.R. 645 (1994).

154. ICCPR, *supra* note 150 art. 17.

155. *See id.* "Targeting of women because of their race or ethnic identity violates their right against discrimination under the [Covenant]." Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-23.html>.

156. *Id.* art. 19.

157. *See Nowhere to Hide, supra* note 6.

158. ICCPR, *supra* note 150 art. 10(1).

The United States ratified the ICCPR on June 8, 1992,[159] but reserved implementing certain provisions or either restricting its application.[160] The Human Rights Committee[161] stated that the "United States reservation to Article 7 [was] incompatible with the object and purpose of the Covenant."[162] Under the Optional Protocol[163] to the ICCPR, the Human Rights Committee considers individual human rights complaints by governmental parties.[164] Ninety-two governments agreed to be Protocol participants.[165] The United States did not adopt the Optional Protocol.[166]

Sexual abuse violates the right to be treated with respect and the right to privacy. Those rights are protected by the ICCPR.[167] The United States must undertake an effort respecting female inmates' rights to privacy and dignity. The United States must ratify the Covenant completely and recognize that the abuse, rape, and torture situations female prisoners face constitute serious human rights violations.

E. *People's Republic of China*

The United States is not alone in its lack of protection for female prisoners. The People's Republic of China ("PRC") also falls short of the standards mandated by the Convention Against Torture.[168] The PRC adopted

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159. *See Initial Report, supra* note 139.

160. *See id.*

161. The Human Rights Committee is a body of experts established by the Political Covenant who provide authoritative guidance on the interpretation of its provisions and monitor government implementation.

162. Amnesty International website, *supra* note 25. Other countries disagree with the United States' reservation to Article 7 for similar reasons. *See id.* Under international law, an incompatible reservation is not valid and the relevant treaty provision is still considered binding. *See* Vienna Convention on the Law of Treaties art. 19(c).

163. *See id.* Member nations may be participants to the Optional Protocol, which binds the party to stricter enforcement. *See id.* A second protocol required member nations to take steps to abolish the death penalty. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See* Amnesty International website, *supra* note 24. "Sexual abuse also violates the right to be treated with respect for human dignity." *Id.*

168. *See* Sophia Woodman, Press Release Report, *Eight Years After Signing the Convention Against Torture, China has Failed to Incorporate its Standards into Chinese Law and Practice*, HUMAN RIGHTS IN CHINA (Apr. 8, 1996), *available at* <http://www.igc.apc.org/hric>. For a discussion regarding the violation of human rights in China, see China Rights Forum, *The Universal Declaration of Human Rights and China*, Fall 1998, *available at* <http://www.hrichina.org/crf/english/98fall/fa9803.htm>; AMNESTY INTERNATIONAL, *Human Rights Are Women's Right: Human Rights Violations Suffered by Women in China*, 1995; Ann Kent, *China and the International Human Rights Regime: A Case Study of Multilateral Monitoring 1989-1994*, 17 HUM. RTS. Q. 1 (1995).

its Prison Law in 1994.[169] The law provides that prison police shall not mistreat or subject prisoners to indignity without facing charges for commission of a crime.[170] While Chinese law stipulates that women must be supervised by women guards, some women's prisons employ both male and female guards.[171] During interrogations and other periods of incarceration, male guards often gain private access to female inmates.[172] Furthermore, Chinese women reported being sexually abused by male inmates who obtained the keys from guards.[173] Inmates reported that male guards frequented female holding areas despite the regulations.[174] The PRC ratified the Convention Against Torture in 1988[175] and has yet to ratify the ICCPR.[176] The PRC perceives torture much more narrowly than does the Convention Against Torture.[177] Human Rights in China[178] and other human rights organizations believe the Chinese government takes insufficient efforts to ensure the human rights of Chinese women.[179]

PRC representatives informed the Committee Against Torture that the PRC's domestic law lined up with the Convention Against Torture requirements.[180] However, the PRC's revised Criminal Procedure Law refuses

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169. *See* Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49, 67 (1999).

170. *See id.*

171. *See* China Rights Forum, *Women in China: Imprisoned and Abused for Dissent*, 1995 [hereinafter China Rights Forum, *Women in China*] (visited Nov. 15, 1999) <http://www.hrichina.org/crf/english/95fall/e7.html>.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See* China Rights Forum, *Words Without Substance: China's Implementation of the Convention Against Torture*, 1996 (visited Nov. 15, 1999) <http://www.hrichina.org/crf/english/96summer/e9.html> [hereinafter *Words Without Substance*]. *See also* United Nations High Commissioner for Human Rights, Treaties Bodies Database, *China* (visited Nov. 15, 1999) <http://www.unhchr.ch> (showing that China made reservations to Article 20 & Article 30 of the Convention Against Torture).

176. *See* Treaties Bodies Database, *supra* note 175. China signed the ICCPR on May 10, 1998, but has yet to ratify the Treaty. *See id.*; *China's Intention to Sign UN Rights Covenant a "Cheap Gesture,"* AGENCE FRANCE PRESSE, Mar. 12, 1998, *available in* LEXIS, News Library.

177. *See Words Without Substance*, *supra* note 175. There is no mention of psychological torture in Chinese law. *See id.* Chinese law refers to torture as (1) coercing a statement and (2) subjecting imprisoned persons to corporal punishment and abuse for the first purpose. *See id.*

178. Human Rights in China is an organization dedicated to investigating and reporting human rights abuses in the People's Republic of China.

179. Amnesty International and other human rights organizations firmly believe that serious human rights violations continue in China. *See* Amnesty International website, *supra* note 162.

180. *See Words Without Substance*, *supra* note 175. The Chinese government submitted a report to the Committee Against Torture in 1989 but provided no information regarding torture in its detention facilities. *See id.* Upon submitting a second report in 1995, China provided no information regarding the prevalence of torture or any studies conducted. *See id.*

to make evidence produced through torture inadmissible in court,[181] and female detainees continually face torture and sexual abuse with electric batons and sticks.[182] "Women are not protected by the gender of their assailants: both female and male wardens are reported to have committed such acts."[183] The Chinese media only recently recognized the sexual abuse and molestation perpetrated on female prisoners.[184]

Implementations of existing Chinese legal torture standards are severely hindered by: 1) political control of the judiciary;[185] 2) inadequate monitoring mechanisms and procedures; 3) evidence obtained through torture being admissible in courts; 4) denying defendants communication with family or lawyers before trial; 5) censoring the news media concerning legal matters and law enforcement; and 6) widespread use of administrative detention.[186]

Similar to implementation procedures needed in the United States, the Chinese government must implement legal standards and requirements protecting female detainees from abuse. Additionally, "[i]nstituting real protections for the human rights of Chinese women will require the establishment of an independent, impartial judicial and legal system."[187] Both the United States and Chinese governments continually fail to treat women's rights as human rights. Each country must affirmatively take steps to protect women against rape, sexual assault, and abuse in their detention facilities.

IV. RECOMMENDATIONS

Both sexual abuse committed by prison staff and retaliation against women who report abuses are clearly prohibited pursuant to U.S.

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181. China's legal and judiciary components tend to provide torturers leniency. *See id.*

182. *See* China Rights Forum, *Women in China*, *supra* note 171 . "Sonam Drolkar, a Tibetan woman was arrested on July 29, 1990, and held at Seitru Prison where she was tortured so badly that she was eventually hospitalized." *Id.* "She was stripped naked . . . [e]lectric batons were pushed into her vagina." *Id.* "By February 1991 she was vomiting and urinating blood every day . . . ." *Id.* Female inmates also reported being raped and abused by male cellmates in pre-trial detention centers in China's southern provinces. *See id.*

183. *See* China Rights Forum, *Women in China*, *supra* note 171.

184. *See id.*

185. "A principal reason for the failure of the Chinese legal system to prevent torture effectively is the lack of judicial independence and the relative lack of status of the judiciary in comparison to other state organs." *Words Without Substance*, *supra* note 175, at 2.

186. *See id.*

187. Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, Fall 1995.

Constitutional law and binding international treaty law.[188] Human Rights Watch made the following recommendations to Congress and the Department of Justice in its report:

To the U.S. Congress

1. [P]ass legislation that requires states, as a precondition to receiving federal funding for the construction and maintenance of state prisons and holding cells, to criminalize all sexual contact between corrections staff and prisoners and, as discussed below, to report annually to the [Department of Justice] regarding conditions of incarceration in their respective facilities.
2. [P]ass legislation that requires states to prohibit departments of corrections from hiring staff who have been convicted on criminal charges, or found liable in civil suits, for custodial sexual misconduct. The names and identifying information of such individuals should be maintained by each department of corrections in a database that must be checked prior to hiring any correctional staff. This information should be collected by the [Department of Justice] data collection office, discussed below, for use by all states.
3. [A]ppropriate the funds necessary to enable the [Department of Justice] to conduct increased and thorough investigations of custodial sexual misconduct . . . .

* * *

6. [W]ithdraw the restrictive reservations, declarations, and understandings that the [United States] has attached to the [International Covenant on Civil and Political Rights] and the [Convention Against Torture].
7. [I]ntroduce implementing legislation for the [International Covenant on Civil and Political Rights] and the [Convention Against Torture] such that persons in the United States could legally enforce the protections of these treaties in U.S. courts; or it should formally declare that both treaties are self-executing and thus capable of sustaining claims in U.S. courts without further legislation.

188. *Nowhere to Hide*, *supra* note 6 § IV.

To the U.S. Department of Justice (Civil Rights Division)

1. [A]s a necessary step toward improving its responsiveness to sexual misconduct and the quality of its information about same, should establish a secure, toll-free telephone hotline to receive complaints of sexual misconduct by correctional staff and publicize the existence of this service.

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6. [R]equire states, as a condition of continued federal assistance, to report annually to the Civil Rights Division regarding conditions of incarceration in their respective correctional facilities. Such reports should include, among other things, patterns of rape, sexual abuse, and other forms of violence against women. The [Department] should publish an annual report based upon this information.
7. [A]ppoint an attorney within its Special Litigation section responsible for overseeing all complaints of sexual misconduct lodged with the section.

To the U.S. Deptartment of Justice (National Institute of Corrections)

> [D]evelop standards akin to the U.N.'s Standard Minimum Rules, in order to provide national guidelines for the treatment of prisoners to ensure that state corrections procedure and practice comport with the international and constitutional protections.[189]

Additionally, Amnesty International made the following recommendations relating to international commitments and the protection of female inmates:

A. Only female officers should guard female inmates. Female officers should always accompany male staff who provide professional services in female facilities.
B. All staff and inmates should be informed that sexual abuse is prohibited and those inmates have a right to complain if they are abused. Staff has a duty to report if they know that an inmate has been abused.

189. *Id.*, Recommendations, §§ I-II.

C. Sexual abuse of inmates by staff should be expressly prohibited and action taken against staff who sexually abuse inmates. Sexual abuse should be widely defined to include sexual assault and threatened sexual assault; sexual contact, and sexually explicit language and gestures.

D. Authorities need to immediately recognize that sexual abuse constitutes torture or cruel, inhuman or degrading treatment or punishment.

E. Ratify in all forms without reservations, the human rights treaties that it has not yet ratified. In particular the Convention on the Elimination on All Forms of Discrimination Against Women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Woman and the American Convention on Human Rights

F. Submit to the international monitoring bodies the USA's overdue reports on its implementation of the Convention Against Torture

G. Inmates and staff who report abuses should be protected from retaliation by measures including: [I]nmates and staff must be informed that they have a right to protection from retaliation; as far as practicable, reports of abuse by inmates and staff should be treated in strict confidence; disciplinary and/or legal action, as appropriate, should be taken against any member of the staff who seeks to deter inmates and staff from reporting abuse or who, in any manner, harasses or intimidates inmates or staff who report abuses.[190]

V. CONCLUSION

Somewhere along the line, the boundaries between punishment and abuse to women behind bars became blurred. The prevalence of abuse in women's prisons mandates further needed protection. The United States has the opportunity to take a concentrated step toward protecting these women by ratifying both the Convention Against Torture and the Political Covenant without any reservations. However, even if the United States wholly ratifies these agreements, it must still take extra steps.

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190. *See* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/report/women-50.html>.

The United States must allow for some type of reporting mechanism for abused female inmates which precludes the possibility of retaliation by correctional officers. Otherwise, the behavior of those in complete authority over the powerless will remain insulated from the justice system's reach, and the system of torture will self-perpetuate. Also, both the United States federal system and state system that do not currently have laws against "consensual sexual contact" must realize that any sexual contact between correctional officers and prisoners constitutes abuse.

Amnesty International and Human Rights Watch recommend measures that establish a clear path for the United States to follow in protecting female inmates. The suggestions of these organizations set out the crucial steps the United States requires to enforce laws against correctional officers and others who continually violate women in our prisons. These women prisoners ask nothing less than their right to be treated like human beings—a God-given right. However, because these women have committed crimes and are imprisoned, they have somehow become less than human in the eyes of not only their abusers, but in the eyes of the criminal justice system as well.

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