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AN ANALYTICAL APPRAISAL OF PUBLIC CHOICE VALUE SHIFTS FOR ENVIRONMENTAL PROTECTION IN THE UNITED STATES & MEXICO

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I. INTRODUCTION

This Article portrays the evolution of environmental protection institutions as symptomatic of value shifts in countries[1]—a position that incorporates the two dominant values that encompass the debate concerning *sustainable development*,[2] depicts the balancing of fundamental populace desires, and explains why attaining a higher level of environmental protection in many countries has been and still remains so difficult. The theme assumes that domestic populace value shifts regarding the desired balance between economic development and environmental protection in democracies persuade politicians' preferences and concomitantly precipitate domestic environmental regulatory changes. This causal correlation is compelling when appraising the political dynamics of environmental movements in countries but acknowledges that this domestic level political analysis has a vital interaction with international regimes.[3]

The United States, until the last three decades, and Mexico, until the last few years, were two countries that placed bourgeoning industrial development above competing societal desires, including a clean environment, despite a rather long-term and substantiated recognition by the governments of both countries that intense industrialization was increasingly deteriorating natural

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1. *See* RONALD INGLEHART, MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC AND POLITICAL CHANGE IN 43 COUNTRIES 180-88 (1997). Inglehart's analysis says that the level of economic development in a country is the primary variable that causes structural/institutional and cultural/value changes. *See id.*

2. Sustainable development assumes that environmental protection and industrialization that can deteriorate natural resources must be adequately balanced and is normally grounded on scientific evidence that supports preservation and/or the ability to regenerate natural resources so that long-term and permanent destruction of the environment will not occur. This term has a different connotative meaning for developing and highly industrialized countries since developing countries seek to attain a higher standard of living and often will sacrifice more on the environmental side to attain a higher level of economic development. Thus, to some degree it is a subjective term defined differently by values dominant in respective countries.

3. The importance of the interaction between domestic and international political relations has been described in terms of game theory. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT'L ORG. 427 (Summer 1988). For particular domestic-international level interaction of concern in this paper, between Mexico and the United States, and the effects of NAFTA on environmental protection in Mexico in the arena of dispute settlement, see David Lopez, *Dispute Resolution Under NAFTA: Lessons From the Early Experience*, 32 TEX. INT'L L. J. 163, 185-86 (1997).

resources and compromising air quality. The internal institutional responses to environmental concerns in these two countries have been dissimilar and will be analyzed by considering temporal environmental protection shifts consistent with levels of economic progress in the United States and by utilizing a hypothetical demographic, regional, and segmented interest public response toward environmental institutions in Mexico. The North American Free Trade Agreement (NAFTA), on the other hand, will demonstrate how an exogenous international influence provided the catalyst to impel the Mexican government to recast its environmental protection position and modify internal environmental protection institutions.

As the United States markedly increased its standard of living during the decades after World War II, society questioned the prudence of unrestrained industrial development so to better protect *quality of life* interests by enacting a fairly rigid environmental regulatory regime. While this preferred value of protecting the environment has remained earnest with elites, politicians, and the populace in the United States, a second value shift that challenged expansive and rigid regulatory structures materialized to question the effectiveness of austere environmental regulations and examine their consistency with due process protections. This perspective and period have been termed the *Deregulatory Era*, which for the environment, matured into a more moderate, cooperative, and market-oriented approach to environmental regulation in the United States.

By comparison, Mexico, a developing country, has been more concerned with attaining economic prosperity and a higher standard of living, even though economic progress has necessarily come at the expense of the environment. Mexico has had moderately high environmental protection standards for over a decade[4] but neglected to consistently and effectively enforce those standards. Mexico has only recently undergone a fairly impressive environmental regulatory restructuring in anticipation of and at the behest of an international agreement — the North American Free Trade Agreement [5] and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC) [6] — because of the realization that future economic benefits derived from NAFTA would be greater than projected levels of economic development without the agreement, despite that the accord contained terms that could potentially limit unbridled industrialization.

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4. *See* Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development*, 59 ALB. L. REV. 423, 459 (1995).

5. North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-U.S., 32 I.L.M. 289.

6. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, Canada-Mexico-U.S., 32 I.L.M. 1480.

II. VALUE SHIFTS, THE ADMINISTRATIVE STATE, AND ENVIRONMENTAL PROTECTION

A. *Values Most Pressing to the Populace*

The public choice argument employed herein assumes that the primary desires of a populace can shift over time based on what is currently most pressing in citizens' lives and that those wants can incite regulatory changes in democracies because representatives should be expected to act at the behest of constituents to implement those values into legislation. The theoretical framework employed dichotomizes competing values encompassing environmental regulation into two designations—modernization and postmodernization. The modernization/postmodernization value shift thesis is based on a *scarcity hypothesis,* which says that society will focus on desires that are in shortest supply[7] and are most pressing to people's lives.[8] In countries in early stages of economic development, where life is more exacting for the population and survival is not always completely certain, predominant values are characteristic of the *modernization* period, a time when people emphasize economic prosperity and stability over a higher quality of life[9] since these desires can either conflict with each other or necessitate trade-offs because of resource limitations.

All countries have progressed through, or are currently progressing through, similar economic and sociological stages, which makes temporal and comparative conflicts between social and industrial interests amenable to generalization. While assessing hypothetical value traits of the earliest forms of societal organization is not particularly apropos for themes intricately related to this article, the transition just beyond agrarian social orders is consequential since it is at this period in a country's history, when industrialization brings urbanization, new centers of power, and a tax base to finance government and administrative growth to provide stability to society, that social turbulence can ensue. Without government involvement, including the adoption of new regulations and social programs that might lessen disequilibriums among sectors of society that rapid growth often foments, societal and economic stability can be threatened. Some form of heightened

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7. *See* INGLEHART, *supra* note 1, at 33.

8. This ideal can be represented in psychology by Maslow's hierarchy of needs. At lower levels in Maslow's hierarchy, people *require* fulfillment of survival needs, which, in terms of this article, are more fully provided by economic development. At higher levels of the hierarchy of needs, people seek self-esteem and self-actualization, but only after survival needs are met. *See* ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 80-106 (1954). The concerns at higher levels are suggestive of desires that improve one's quality of life and individual liberty (i.e. representative of "postmodernization"), whereby one would be apt to place more emphasis on attaining a cleaner environment as well as seeking more freedom from paternalistic authority forms. *See id.*

9. *See* INGLEHART, *supra* note 1, at 8-19.

public interest within the populace commonly develops during this period of industrialization, often manifesting into government regulations to protect society and labor interests, but enactments generally do not enhance environmental protection even though detriments to nature and/or society could be readily recognized.

With consequent higher standards of living and a diminished concern over uncertainties of economic survival, industrial triumphs become relatively less imperative and other values are emphasized by the populace. The *postmodern* value shift befalls when the vast majority of the population attains a sufficiently high per capita GNP such that it no longer anguishes over economic stability and growth.[10] A postmodern value shift begets a society to become more concerned with greater participation in societal affairs, more individuality, quality of life, and enhanced freedom from bureaucratic authority.[11] While this quality of life attraction engenders a desire for a cleaner environment, declining respect for authority and increased emphasis on individual liberties[12] challenges encompassing government authority and its increased level of expenditures, and pervasive regulation.[13]

The assumptions underlying this relationship between value shifts and administrative state environmental protections are dependent on whether the prominence of new societal demand shifts actually do influence the functioning of and/or challenge agency functions.[14] On the one hand, there is a relatively clear nexus between the desires of constituents and their respective political representatives in consolidated democracies since politicians compete in electoral markets to remain as representatives[15] and would lose their elected positions if they indulged themselves at constituent expense[16] or otherwise maintained ideological perspectives that were

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10. Higher per capita GNP through economic development is a good general indicator to signify a higher level of economic development and population standard of living, while a government providing assistance through the welfare state likely also diminishes the importance of values characteristic during the modernization period because the populace is no longer as concerned with subsistence.

11. *See* INGLEHART, *supra* note 1, at 11.

12. *See id.* at 39.

13. Interestingly, in a study of forty countries, those that fall distinctly into the category of *postmodernist* have been said to favor economically conservative and socially liberal policies. *See* INGLEHART, *supra* note 1, at 315-20. This is consistent with both environmental protection (socially liberal) and increased freedom from pervasive government authority and spending (socially liberal and economically conservative). *See id.* This same value-based phenomenon has been described qualitatively as an emergence of "left-libertarian parties" in Western Europe. *See* Herbert P. Kitschett, *Left Libertarian Parties: Explaining Innovation in Competitive Party Systems*, 40(2) WORLD POLITICS 194 (1988).

14. This public choice influence assumes that primary desires in the population are eventually acted upon by government officials that will modify government institutions accordingly, which is a plausible assumption for a democracy.

15. *See* J. Mark Ramseyer, *Public Choice*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 101 (Eric A. Posner ed., 2000).

16. *See* Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical*

inconsistent with the majority of voters in their respective districts. Of course, this assumes that environmentalism becomes at least a moderately decisive platform issue on which politicians can be elected, or as incumbents are concerned, that public outcry favoring or opposing given environmental positions can erode the support of the incumbent politician and/or his/her party during a legislative session. If this public choice assumption about constituents influencing their respective representatives on environmental policy is more attenuated, probably because the issue of environmentalism is not significantly definitive to swing citizen voting habits, interest groups will presumably have influence to a degree out of proportion to the general populace,[17] meaning that politicians will support positions that are either pro-environment or pro-industry based on the influence of interest groups rather than constituent concern. This does not mean that public choice preferences will not be consistent with representative positions, but that the short-term impetus fundamentally causing political action is the advocacy of interest groups.

Since it is generally assumed that constituents do eventually influence policy positions in democracies, there is still a separation of powers hurdle to surmount when contending that environmental positions and the functioning of environmental protection institutions are the product of public choice initiatives since, comparatively speaking across countries, all three branches of government can to some degree be involved in environmental protection and enforcement. The public choice assumption is normally acceptable as legislators are concerned, but it can also be contended that there will be a derivative impact of citizen desires on administrative agencies and the judiciary, even though the officials of executive agencies are not directly accountable to the populace, and judiciaries are normally expected to remain free from political influences. Populace pressure can be placed on administrative agencies since such institutions are normally governed by the executive, which is an elected position, and because legislative authority can often influence administrative activities. This populace-based value might also be recognized in the judiciary whereas it too might have decision-making authority to rectify environmental disputes since it operates by interpreting legislation, enacted by constituent-influenced politicians and administrative regulations, and establishes precedent that evolves to some degree in a fashion consistent with needs and values in society.[18]

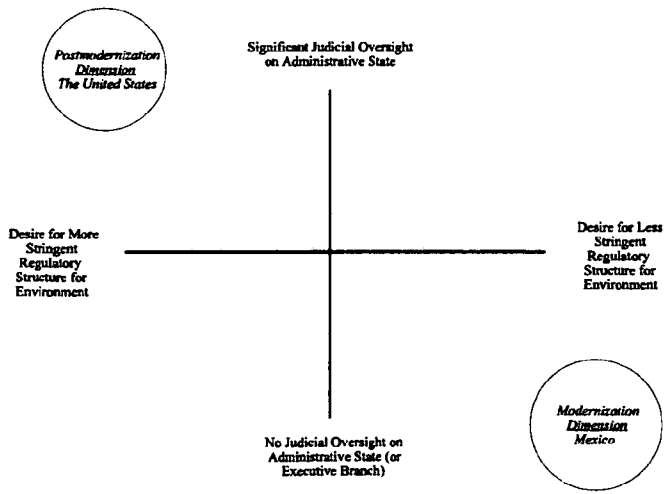
Review of the Literature, 87 PUBLIC CHOICE 67 (1996).

17. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION AND THE THEORY OF GROUPS (1965).

18. The extent to which this independent court prerogative is apparent will depend on the separation of powers institutionally established in the country and the relationship between lawmaking and judicial independence, or in other words, whether the judiciary has a right to make law and hold other branches of government accountable, which has been one of the general distinctions between common law (e.g. United States) and civil law (e.g. Mexico)

The postmodern value dynamic is also important because, when compared across countries, there is a nexus between it and government institutional separation of powers dispositions related to the executive and the judiciary since another key postmodern value is that of desiring more individuality and freedom from bureaucratic authority. While administrative agencies normally implement and enforce environmental protection emissions standards, the extent to which the judiciary is involved, by perhaps having the jurisdictional prerogative to provide due process protections to individuals regarding administrative agency actions or enforcing or balancing rights related to environmental protections, illustrates a degree of judicial oversight over the executive and that it can be the genuine defender of individual or social rights and values[19] vis-á-vis the executive. The extent to which the judiciary is active and has a jurisdictional competence or propensity to decide issues associated with the environment when balancing opposing rights in society is consistent with cultural influences and the relationship between the executive branch and judiciary. Enhanced judicial oversight of agency activities has been most conspicuous in postmodern societies (e.g. the United States), while lacking judicial power is more likely to be found in developing countries (e.g. Mexico), or those otherwise concerned with industrial modernization.[20] These institutional and cultural dimensions are illustrated below:

Figure 1



courts.

19. The proposition that the judiciary is the defender of individual rights and liberties is articulated soundly in: ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE SEPARATION OF POWERS (1996).

20. This conclusion is being drawn by the commonalities of key countries cited in two well-grounded theoretical studies. *See* INGLEHART, *supra* note 1; *see also* TATE & VALLINDER, *infra* note 25.

Employing this framework while returning to the substantive dynamics of the modernization-postmodernization classification, this quality of life public choice value dynamic may make a clean environment appear like a *luxury good*[21] that is demanded more by society in countries at higher levels of economic development because of the relative trade-off between an economically higher standard of living and heightened restrictions on pollutants. When aggregating citizen preferences in countries, it is logical to assume that in countries with higher levels of development, a cleaner environment will be valued over unrestrained industrialization. While countries still in stages of industrial modernization would be expected to rationally favor an uninhibited industrialization process and sacrifice a cleaner environment. Assuming that rigorous and stringent regulations can best restrict the discharge of pollutants and that countries have their own respective desired balance between economic development and environmental protection, the United States would naturally be anticipated to enact and enforce demanding environmental regulations, while Mexico, having a much lower standard of living, would be less apt to sanction and/or enforce stringent environmental regulations on industrial interests. In the case of the United States, the inauspicious trade-off propagates an ostensibly irreconcilable clash between competing postmodern values since increased government regulation can stymie individual liberties,[22] place more narrow parameters on individual action, and resonate into more encompassing bureaucratic control over society.

On the one hand, environmental regulation, and more stringent environmental regulation through rigorous control, has evolved only recently in the last three decades and has expectantly been strongest and deepest in industrialized countries of the world,[23] and if more stringent regulations ordinarily means significant interference with individual rights, and it normally does, then the postmodern cultural dynamic that desires greater freedom and supports individualism is undermined. As depicted in Figure 1, it has been the judicial branch that has accommodated the conflict between more assertive governments and individual rights.[24] This has been the institutional corollary to evidently remedy the backlash against intrusive

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21. Classifying a clean environment as a *luxury good* is somewhat irrational since the environment in its unsullied and natural state should probably be considered the norm of amenity from which to compare. However, somewhere in this historical process of industrialization, or the stages of modernization, higher standards of living and an easier lifestyle have, in some cases, become more valued than the environment.

22. This could have the reverse effect in developing countries that have not previously had strong liberal individual rights, democratic institutions, and higher levels of economic development. Regulations providing these rights could be enacted and provide more individual liberties than previously existed.

23. *See* U.N. ENVTL. PROGRAM, 1992 ANNUAL REPORT OF THE EXECUTIVE DIRECTOR—TWENTY YEARS SINCE STOCKHOLM 1 (1992).

24. *See* TATE & VALLINDER, *infra* note 25.

government during the postmodern transition—a strengthening of the judiciary as a check on executive branch action to enforce individual rights and liberties from what has been perceived as overly rigid regulatory functions of government agencies.[25] While the populace in postmodern countries desires less government control over society,[26] it also wants strong environmental protections, meaning that the natural evolution might be for the judiciary[27] to inherit a more prominent role in balancing individual and public rights in the environment. The legislative and structural framework from which the judiciary or an administrative tribunal evaluates these rights will be dependent on democratic public choice positions, as enacted into legislation, although rapidly evolving public choice positions may be somewhat stagnated by the way long-existing legal, political, and economic institutions interact with environmental protection.

B. A Closer Look at the Value—Institutional Conflict

This cultural-institutional dilemma, the degree to which environmental protection is emphasized, and balancing of individual versus public rights in a legal system, can be further expounded upon by a model conceived by the economists Mercuro and Ryan.[28] The model explains the emergence of an environmental consciousness and the implementation of institutions to support that consciousness. At the quintessence of the model is the issue of whether a societal decision has been made to protect the environment through an embodiment in a foundational source of law, like a constitution, which would structure the most essential principles of societal conduct to which the country is dedicated, and from which later legal enactments related to the environment would ensue. If environmental concerns became deeply embedded in a country's social, legal, and administrative institutions, the environment would more aptly take precedent over conflicting legal norms and interests,[29] like

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25. This power transfer to the judiciary has been described as the *judicialization of politics*. *See generally:* C. NEAL TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER 2 (1995). One aspect of this phenomenon has been that judges have more authority to make public policy that was previously only enacted by the executive and legislative branches. *See id.* While this book describes many possible causal factors for this expansion of judicial authority, the author of this article believes that the most important factor is that of value shifts in the population placing pressure on government institutions, which is logical given that the only countries that have undergone any tangible expansion of judicial power are postmodern countries, and while instilling such institutional changes have been attempted in developing countries, successful results have been negligible. *See id.*

26. *See* INGLEHART, *supra* note 1, at 11.

27. This has also included the use of judicial dispute settlement mechanisms in administrative agencies so to foster due process protections.

28. *See* NICHOLAS MERCURO, FRANKLIN A. LÓPEZ & KRISTIAN P. PRESTON, ECOLOGY, LAW AND ECONOMICS: THE SIMPLE ANALYTICS OF NATURAL RESOURCES AND ENVIRONMENTAL ECONOMICS 80 (1994).

29. *See* Ernst Brandl & Hartwin Brungert, *Constitutional Entrenchment of Environmental*

private property rights, since cultural and institutional variables tend to interact with and influence each other—meaning that long-lived and embedded institutions may influence the way culture evolves and interacts with environmental protection institutions. While not all industrialized countries, such as the United States, have incorporated principles that more aptly protect the environment into their constitutions, many countries have interpreted private property rights more leniently in foundational legal sources to compensate for and fortify societal regulatory structures for such public concerns.[30]

Failure to incorporate environmental protection into a foundational legal source from which all other norms will flow might occasion vacillation in the level of protection over time[31] and beget uncertainty in the structure, management, and functional rules by which the environment will be protected,[32] particularly if ideological political shifts ensue or there is an economic reassessment of environmental regulations that balance rights in the environment.[33] In very basic economic terms, the reevaluation of rights in legal institutions can be observed by considering germane shifts among the three primary systems of classifying resource allocations and property right controls—the market, the public sector, and the communal sector. The theoretical essence of any environmental protection regime should reflect some combination of these three property right controls.

In a perfect market sector, each individual owns goods and resources

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Protection: A Comparative Analysis of Experiences Abroad, 16 HARV. ENVTL. L. REV. 1, 4 (1992).

30. In the United States, more fully incorporating public rights into the legal system has arguably required a redefinition of fundamental rights in real property for environmental causes to be more fully legally accepted. Even if this has been the case, one should note that some say there has been a crusade back to protecting individual rights in property against government intrusions. *See* Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where it is Headed, in* LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 24 (Bruce Handle ed., 1995). If this means that a moderate move is occurring to more fully protect individual property rights vis-á-vis public uses of those rights, then there could also be a tempered shift in how environmental protection is defined in relation to private property and public uses. It is believed that this property rights movement began back in the 1980s and was "designed to protect private property interests from what property rights advocates view as the unbridled rampages of regulatory excess," which sallied forth attempts in the 1990s to legislate property rights at the national level. Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L. J. 527, 527 (Spring 2000).

31. As will be discussed in the U.S. section, one will notice a pivotal temporal change in the degree to which the judiciary has had authority for balancing property rights and/or protecting the environment when an environmental dispute arises. Lessening judicial authority for environmental dispute settlement gave way to a more efficient and stable source of law handled by administrative agencies, but the lack of a bedrock legal source on which to elevate the environmental protection cause may be another reason why there was an eventual re-empowerment in the courts since a court is the primary organ that balances individual rights, and individual rights are haled in the U.S. Constitution.

32. *See* MERCURO, ET AL., *supra* note 28, at 80.

33. *See id.*

and may transfer or enforce rights in these goods.[34] In a perfect public sector, resources are allocated by the state and are not transferrable.[35] In the communal sector, individuals decide collectively what resources will be owned by and will be available to all equally, and thus the resources are not legally transferrable.[36] Before more rigid environmental protections can be enacted and justified when societal interests and private property rights clash, environmental resource rights must at least partially be construed as falling within the public or communal classification, while elevating the first classification, the market, would be more apt to engender a balancing of rights in favor of private interests over public rights in the environment. Likewise, if a country has had a foundational institutional structure more supportive of individual property rights and an economy defined by a dedicated adherence to market mechanisms and such foundational political and economic institutions have not lost appeal over time, and are still the bases from which most other social regulatory regimes flow, including that of environmental protection, temporal legal enactments consistent with public choice value shifts will likely interact with and be influenced by these long-lived institutional market structures, and perhaps occasion a regulatory result that will require compromise with historical institutions.

From these classifications, the economic approach to environmental regulation, the persona of legal institutions, and even the branches of government responsible for settling disputes or regulating environmental protection, would be expected to shift over time with evolutions in societal values given premises about public choice in democracies, but could be influenced or even circumscribed by long-lived and embedded institutions and even exogenous international influences.

To illustrate this point and to provide a preface to the next Section, after the United States traversed through heavy industrial periods and regulation became rigid and public-sector dominant, the system later reverted back into an approach more consistent with the cardinal and long-lived ideology of capitalism and economic freedom in the private sector, making regulation more market-based.[37] Now there is more of a reliance in the United States on individual self-interested actors yielding citizen suits to enforce environmental regulations relative to the former primary approach of *government acting as*

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34. This is most characteristic of countries with stronger market economies and higher levels of private property right protections.

35. Because there is a balance between public and private sector activities in any country, a larger, deeper, and more expansive public sector might undermine the principle of freely distributable private property rights since government has an enhanced control over private sector actions.

36. If the environment and property are classified entirely within the communal sector, there should be no conflict in property ownership rights and environmental regulation because no individual societal rights are being disturbed.

37. *See infra* section III(D)—*The Environmental Deregulatory Era.*

plaintiff,[38] which is a transition that is consistent with market mechanisms, a historical institutional dominance of the private sector, and a legal framework that balances individual property rights, rather than a framework that permits government to wield inordinate public sector ultimatums that decisively trump private sector rights. By comparison, Mexico is a country that has had (and still has) an economic and political institutional system of governance that is executive branch dominant, based not necessarily on *complete* government monopolization of resource rights in society,[39] but certainly on relegating individual property rights to government agendas. These institutional differences would expectantly lead to dissimilar outcomes for public choice environmental policies.

If society presses for more substantial environmental regulation and mass demands are placed on government to modify foundational sources of law, then more sound environmental protection should flow from this source. While it is possible that such a change could be elite driven, even without mass support or values consistent with such a shift, especially if international influences place demands on government leaders, the efficacy of regulations or enforcement of those regulations may vacillate over time with regime changes and value shifts. It is this dynamic relationship between values, domestic institutions, and international influences that will be described by considering the history of environmental protection in the United States and Mexico, and the institutional framework tying these two countries together.

III. THE UNITED STATES

A. *Introduction*

Because the United States was one of the first industrial powers to attain unprecedented levels of economic development and provide a higher standard of living to the populace, it was also one of the first countries to enact fairly rigid environmental protection regulations. However, the way in which environmental protection, the assertion of rights related to property and the environment, and administrative environmental institutions have evolved is highly correlated to and consistent with shifting values during particular periods in American history. Essentially, primary societal desires at any given time either emphasized combating economic scarcity or enhancing quality of life, which correlates with government policies designed to stimulate

38. *See* Mark Spaulding, *Transparency of Environmental Regulation and Public Participation In the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1134 (1992).

39. *See* John Bailey, *Centralism and Political Change in Mexico: The Case of National Solidarity, in* TRANSFORMING STATE-SOCIETY RELATIONS IN MEXICO: THE NATIONAL SOLIDARITY STRATEGY 97-119 (Wayne Cornelius, Ann Craig & Jonathan Fox eds., 1994).

economic development or at least moderately curb unrestricted burgeoning industrialization with environmental institutional structures.

Environmental protection in the United States can be placed into three distinct categories. First, *local or non-centralized* environmental protection extended from the time industrialization dawned in the United States until the end of the 1960s. This period emphasized economic development, even if it deteriorated the environment or diminished the quality of life of citizens. While there were some strong local regulatory enactments, rigidity in regulation did not exist because there was no central or administrative agency at the federal level even though the size of the American regulatory state had grown intermittently for nearly a century in other areas of social concern, particularly during the Progressive and New Deal Eras.

The second stage is the *Rights Revolution*, which for the environment, began in the 1970s with the formation of the Environmental Protection Agency (EPA).[40] The EPA was endowed with strict enforcement powers to ensure environmental protection, even if that enforcement might be perceived as unduly harsh on the private sector or did not adequately evaluate benefits of the private sector use being restricted.[41] Societal values during this period tipped permanently in favor of long-term quality of life desires over unrestricted economic development.[42]

Third, the existence of new and rigid environmental legislation[43] and an overly-uncompromising EPA in relation to individual rights was arguably the impetus that caused the environmental *Deregulatory Era,* which downsized the EPA bureaucracy, lessened the rigidity of regulations, and eventually established market incentives in environmental regulation. This era demonstrates that there was a continuation of postmodern values in the populace emphasizing environmental protection to ensure that quality of life values were held above unyielding industrial development, but that a second postmodern shift emerged to augment private sector freedom from unquestioned bureaucratic authority and to remain consistent with historical economic and political institutional realities. The following chart, and the rest of this section, depict these shifts:

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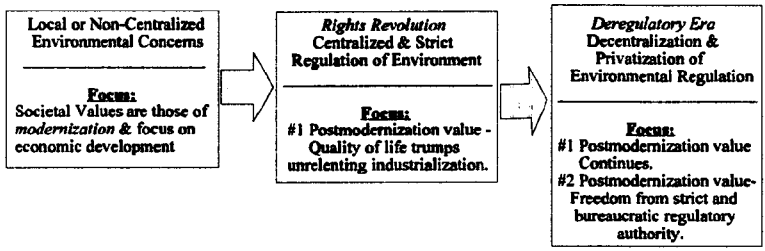
40. *See* REORGANIZATION PLAN No. 3 of 1970, 35 Fed. Reg. 15623, 42 U.S.C. 4321 (1970). The Environmental Protection Agency was created by President Nixon's Executive Order. *See id*

41. The public and market value of different industrial interests do vary and have dissimilar costs to the environment. The weighing of environmental costs at different pollution levels can be calculated into the market value of industrial products and services.

42. One of the chief opposing positions to this regulatory structure was that it undermined the competitiveness of American companies in the international arena. *See* Stanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 234 (1997).

43. *See* RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 225 (1996).

Figure 2



B. Local/Non-Centralized Environmental Authority

As populace value shifts are connoted as the primary variable that pressures domestic institutions to augment environmental protection and enforcement mechanisms and the assumption is that populace desires impact policy positions of politicians in a democracy, it is rational to first ponder the American cultural values that existed at the formation of the United States of America. It is this characteristic that is seemingly also intricately related to foundational legal principles in the United States. Samuel P. Huntington[44] describes American culture at the time of the formation of the Constitution as an *American Creed* consisting of liberal, individualistic, and democratic values instilled culturally and institutionally[45] as a backlash against the colonial experience of British rule. *American Creed* values of individual liberty, desire for less government, and distrust of government, challenge the legitimacy of hierarchy and consolidation of power and authority and explain why there has never been any mass appeal for government authority that is as extensive as that which typically exists in a socialist state. [46] Those values are a credible justification characterizing why the U.S. government was modeled with a decentralized and strong federalism institutional structure, and with a judicial branch dedicated and empowered to protect individual rights against overweening government authority.[47] Those values also support the notion that

44. *See* SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 14 (1981).

45. The Founding Fathers' fear of encroaching big government can be seen in the institutional structures of federalism and separation of powers depicted in the text of the Constitution.

46. *See* HUNTINGTON, *supra* note 44, at 14-23, 33-41.

47. It was not until 1803 that this institution was legitimately empowered to question law-

cultural prerogatives shape government institutions in a democracy. The United States emerged with a *foundational* institutional governance structure and culture that emphasized the paramount importance of individual property rights and restrictions on government power from interfering with those property rights.

Consistent with such a cultural and institutional foundation of limited government, the early common law period dealt with pollution concerns and disputes entirely on a case-by-case basis through the nuisance doctrine[48] and property law claims. Courts had the prerogative to resolve pollution disputes[49] by interpreting property rights since there was not yet an adequate societal demand (and perhaps even "ability") to establish an institutionalized enforcement regime at the national, state, or local level, that would provide environmental protection. This is predominately because environmental pollution was not as extensive as it is today, society was not cognizant of any future potential problem, localized pollution was not perceived as a problem affecting the nation at large, and emphasis was primarily placed on attaining a higher economic standard of living.

Local courts would prefer certain land uses over others, specifically those of greater utility to society,[50] and only grant injunctive relief to abate a factory's use when pollution was sufficiently serious. Except for local zoning ordinances and emissions standards in industrial centers[51] that controlled *where* certain industries could locate so to avoid an undue burden on others' use of their property, very few proactive mechanisms were employed by government to control pollution. During this modernization period, the populace favored economic development and increasing standards of living, and courts incorporated these societal preferences when balancing property uses and normally elevated economic benefits provided by factories over pollution costs to society and *less-productive* uses of real property.[52]

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making prerogatives and authority of government. *See* Marbury v. Madison, 5 U.S. 137 (1803).

48. *See generally* H. Marlow Green. *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future,* 30 CORNELL INT'L L.J. 541 (1997).

49. A typical dispute during this period would consist of property owners complaining that an adjacent polluting company is spewing odors, dust, or otherwise interfering with the rights of property owners to constitutionally use and enjoy their property. Courts would weigh the utility of the company's use of its property against the gravity of injury to local property owners and balance costs and benefits to society, while taking into consideration doctrines that might give one side an advantage over the other, such as: "moving to the nuisance" which would favor the pollutant, or "unreasonableness of defendant's conduct" which might give the complainant an edge.

50. *See* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution, in* LAW AND THE ENVIRONMENT 140 (Robert V. Percival & Dorthy C. Alevizatos eds., 1997).

51. *See* GARY C. BRYNER, BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 81(1993).

52. With the migration of people from rural areas to cities in search of employment and a higher standard of living came rapid shifts from agricultural economic bases to industry.

From 1877 to 1920, the *Progressive Era*, there was the first noteworthy expansion in national administrative capacities and growth in the administrative state to regulate industries and the economy.[53] Advocates of this federal government expansion sought extensive social, political, and economic reforms to off-set problems bred by rapid industrialization, urbanization, and immigration.[54] It was an institutional change criticized by many because government administration and regulatory control was taken from the political process and placed into the hands of individuals arguably independent of democratic influences[55] and somewhat usurped ad hoc common law approaches emphasized by courts to resolve certain societal problems. It was justified on the supposition that greater efficiency in government policy-making could be provided by an administration. Even though this new form of administrative control over society was encompassing in many arenas, there was no such growth in environmental protection and no regulatory authority for environmental protection because of the fear that strict regulations would hamper industrialization and economic prosperity.

The New Deal Era represents a period of further expansion in the size of the American administrative state and executive branch. The global depression in the late 1920s and early 1930s caused a twenty-five percent unemployment rate and resulted in the federal government undertaking a more expansive role in the nation's economy since laissez-faire market mechanisms were perceived to be failing. Once again, in holding devout to the nexus between constituent desires and policy-making by self-interested politicians,[56]

Facing local pressures that relied on industrialization, courts were hesitant to grant injunctions and people were required to endure increasing levels of pollution. This does not mean that economic interests *always* prevailed over environmental concerns throughout this period, since during the nineteenth century, there were times when courts abated a factory's use when air or water pollution was sufficiently serious and the source of the pollution could be readily identified. In such cases, courts did appear more proactive in protecting the environment, but their decisions were still primarily premised on a violation of the rights of adjacent property owners to use and enjoy property, even though sometimes such injunctions might have even appeared to be based on a larger societal right. While extensive pollution and grave harm to property rights could lead a court to grant an injunction, court analyses of "reasonableness of property use" varied profoundly in different areas and regions, but injunctions on factories were still relatively rare as courts and legislatures favored industrialization and economic development over environmental and quality of life concerns.

53. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPABILITIES, 1877-1920 (1982).

54. This can also be perceived as an introduction into what could be considered a more *active* state that attempts to proactively shape society, rather than a government that relies primarily on markets and the private sector as a means of providing stability, growth, and protection to society. *See* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 71-96 (1986).

55. *See* David H. Rosenbloom, *The Evolution of the Administrative State and the Transformation of Administrative Law*, *in* HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 6 (David H. Rosenbloom & Richard D. Schwartz eds., 1994).

56. *See* Ramseyer, *supra* note 15, at 101.

in such a time of economic scarcity, a majority of the populace might be said to have *desired* more government involvement in the economy if it was perceived that involvement would rectify the economic hardship plaguing the country, even though doing so might have been inconsistent with American values hesitant to rely on big government solutions to redress problems.[57] Congress and the President expanded federal regulation and the size of the bureaucracy by creating nearly sixty new administrative agencies in 1933-1934.[58] As in the Progressive Era, there was more growth in the federal government and an expansion of its regulatory authority, but there still was no federal environmental regulation because of the consternation that rigid environmental regulation would hinder economic recovery during a crisis period, and thus the common law/judicial property law approach to resolving ad hoc environmental disputes continued during this era.[59]

The precipitous rise of the administrative state and emergence of new arenas of regulation during this period is not surprising. Regulating economic activities and the market because of the expectation that it would provide economic stability would be very acceptable to a population if well articulated by political representatives given that such stability is the primary center of attention in societies dominated by aspirations to attain a higher standard of living and ensure against economic scarcity concerns.[60] However, the federal government's nearly unqualified promotion of economic development while neglecting the environment as industrialization increased eventually led to considerable dissent over environmental pollution as society evolved.

After over a century of reliance on the common law judicial approach to controlling *unreasonable* pollution, which was only supplemented by some localized zoning regulations,[61] and arrival of a high level of economic development in the United States, the federal government and society acquired an increased cognizance that environmental pollution was not solely a localized problem but instead had adverse societal effects well beyond individual complaints of private property owners. Even though between 1955 and 1970 the federal government recognized that environmental pollution was a problem and became increasingly involved in funding state efforts to control pollution,[62] the need to attain uniformity in regulatory standards across the country did not meet requisite levels of acceptance until after the 1960s.

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57. *See* HUNTINGTON, *supra* note 44, at 14-23, 33-41.

58. *See* PAUL VANRIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 320 (1958).

59. *See* Versailles Borough v. McKeesport Coal & Coke Co., 83 PITTSBURGH LEGAL J. 379 (Pitt. Co. Ct. 1935).

60. Countries more concerned with sustenance, or even materialism, would be expected to have populations willing to place more confidence in their governments. *See* INGLEHART, *supra* note 1, at 299.

61. There were some comprehensive localized zoning laws that protected the environment. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 n. 94 (1996).

62. *See* BRYNER, *supra* note 51, at 81.

C. *The 1970s Environmental Rights Revolution*

The federal government became comprehensively involved in environmental regulation and protection shortly after the 1960s *Rights Revolution* since this was not only a period of additional government expansion but was also known for extending new substantive and procedural rights.[63] Rights that were formerly considered private and out of the reach of federal prerogatives and mandates now fell within the regulatory power of the federal government, and for the environment, this meant reclassifying property rights in a way that considered the spill-over public impact of one's use of individual property so that industrial uses of property could be more deeply regulated. It was a period that sought to foster social equality by not only enforcing new rights against given sectors in society but also against right infringements by the federal government.[64]

Through a decade of redefining rights in the 1960s, environmental pollution control was soon to be taken out of the private dispute settlement sphere of the judiciary and placed in the public sector. With significant post-World War II growth rates begetting a higher standard of living and economic stability, institutional characteristics more consistent with the postmodernization process began to manifest. Society began to assert new social rights, and for the environment, this meant slightly modifying legislatively how individual property rights were to be defined in relation to the environment so that pollution concerns could more readily be decreed a public matter that was a concern for all and not solely for holders of private property rights. While courts slowly began to recognize this large-scale public concern in the environment, there was also an acknowledged need to more effectively control air pollution to promote those public rights in the environment.[65]

Through public demands to increase environmental protection, and a President and Congress prepared to act on those demands, the Environmental Protection Agency (EPA) was born,[66] and the Clean Air Act was further amended in 1970.[67] Certainly other important environmental regulations were

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63. A good example of expanding rights during this period is the emergence of public law litigation claims in the court system. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

64. *See generally* Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

65. *See generally* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870 (N.Y. 1970).

66. *See* Jeffrey T. Renz, *The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?*, 43 MONT. L. REV. 197, 202 (1982).

67. The legal history is as follows. *See* Air Pollution Control Act of 1955, No. Pub. L. 84-145, 69 Stat. 322; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272 Stat. 992; Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

enacted in the following three decades, but because the deterioration of air quality transcended regional boundaries and consisted of intangible forms of pollution,[68] the Clean Air Act Amendment and the emergence of the EPA, as a pseudo-police enforcement institution, were probably the most instrumental undertakings.[69] The Act's purpose was "to protect and enhance the quality of the Nation's air resources so to promote the public health and welfare and productive capacity of its population,"[70] while the EPA employed its extensive authority to set and enforce those standards.[71] These enactments and undertakings were wholly consistent with postmodern societal demands to enhance quality of life standards in the environment, particularly since it arguably meant sacrificing a marginally higher growth rate by limiting industry because it required that a public choice be made between balancing competing desires.

What is claimed herein as debate consistent with issues involved in the second postmodern value shift began with central conflicts in segments of society in the mid-1970s, as defined by the advocacy of interest groups. One example is when Congress enacted a series of amendments to the Clean Air Act[72] to accommodate conflicting interest groups. On the one hand, there were advocates, such as the American auto industry that sought to delay implementation of higher air quality standards to avoid penalties from rigid regulations that were alleged to stifle economic growth and decrease competitiveness with foreign counterparts.[73] Of any of the new social programs, stringent environmental quality regulations imposed the highest costs of compliance on the private sector.[74] The opposing side was composed of environmental lobby groups advocating even higher levels of environmental pollution protection standards by framing their arguments around the general premise that the environment is a public good and that quality of life should not be sacrificed regardless of economic competition with foreign interests. Some form of accommodation was needed because even though there were strong values in society demanding high environmental quality, the regulatory structure was clearly not working to the satisfaction of both interest groups.

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68. To eventually define environmental concerns regarding intangible air pollutants as a public interest in the United States, when the early dispute settlement process of courts primarily emphasized the importance of property rights and generally excluded intangible harms without sufficiently weighing harm to larger societal needs, is a significant legal departure.

69. While many other statutes could prove illustrative for purposes of this article, the Clean Air Act will be employed because of its precedential value, impact on society in general, and important contribution to environmental protection.

70. 42 U.S.C. §7401(b)(1).

71. *See* The Clean Air Act §109.

72. Clean Air Act Amendments of 1977, Pub.L.No. 94-95, 91 Stat. 686; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

73. *See* Gaines, *supra* note 42.

74. *See* ARTHUR ANDERSEN CO., BUSINESS ROUNDTABLE: THE INCREMENTAL COSTS OF REGULATION (1979).

While the position of politicians and the EPA were primarily influenced by these two interest group polarities, opinion polls indicated that populace value concerns would eventually[75] hold the political system responsible if high environment standards were not kept.[76] Of course, there were those in the public that would identify themselves more with either the pro-environment or pro-business polarities depending on the felt sense of urgency to protect the environment, as portrayed through the media and other sources and the extent that this portion of the population perceived that an economic slowdown could occur or that it would otherwise personally lose financially[77] as a consequence of more stringent environmental regulations,[78] but the vast majority of the population was already content with its high standard of living and would be expected to willingly sacrifice *some* financial security[79] for a higher quality of life and a cleaner environment. An increasing per capita GNP led a higher percentage of the population into the postmodern categorization.[80]

The second postmodern value shift—desiring more freedom from rigid government regulation and individual liberties—can also be identified as an important consideration in these intermittent disputes in the context of the EPA agenda, and to some degree the administrative state generally, since segments of society and interest groups placed considerable pressure on policy-makers and bureaucrats to reform the institutional structure and procedural mechanisms of the EPA. Some of the more important considerations over the EPA's functioning, which are also issues that are at

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75. If citizens were very dissatisfied with the results of environmental regulatory reform, it would be expected that the importance of this issue would then be elevated at the next national election and that candidates advocating a position more consistent with constituent desires would have an advantage over their opponents. If the electoral body overwhelming supported one general environmental policy, e.g. "more protection," then both Democratic and Republican candidates would advocate the same position, which would mean that if environmental regimes, legislation, or policies, were not previously consistent with populace desires, they would almost surely have to become consistent during the next Congressional session given democratic assumptions about public choice influences.

76. In a poll taken in 1991, eight out of ten Americans considered themselves "environmentalists." *See* Rose Gutfield, *Shades of Green: Eight of 10 Americans Are Environmentalists, At Least So They Say*, WALL ST. J., Aug. 2, 1991, at A1.

77. For instance, in the automobile industry, both management and unions had a self-interest in lessening the rigidity of environmental regulations since it would mean preserving a stronger position vis-á-vis foreign competition and jobs in the United States, particularly since this was a period characterized by intense American automobile competition with imports and was prior to large-scale localized multinational investment in factories into the United States.

78. Within these two opposing concerns, one might consider the identification of modernization and postmodernization segments of society.

79. This assumes people identify a personal financial loss with more stringent regulatory standards, however, this may not be the ultimate consequence since one of the proposed characteristics of postmodernists is their decreased emphasis on monetary accumulation when there is already on adequately high standard of living. *See* INGLEHART, *supra* note 1, at 42-44.

80. This is an expected result based on the correlation between higher economic living standards and cultural traits characteristic of postmodern values. *See id.* at 180-87.

the essence of American culture,[81] were the level of participation permitted and due process protections in agency decisions. Adherence to democratic principles within the agency was a concern when the EPA was formed in 1970 as an executive agency with a mandate to ensure maximum control and expeditious action for environmental quality infringements through regulations and enforcement, which on their face, incorporated a process that might not be expected to provide the types of due process protections and participation requirements that a strong democracy demands. Early on, this was the case since many typical EPA actions did not conform to requisite participation and procedural mechanisms characteristic of democracy in the United States.[82] This compelled Congress to implement new participatory and due process protections[83] and endowed courts with the authority to become more involved in the review of EPA decisions. The ability to question EPA authority indicates that values in the United States and notions of individualism that have always questioned authority were resurrected to gradually support ever-increasing levels of postmodern values.

D. The Environmental Deregulatory Era

Into what have these purported postmodern shifts in populace desires regarding the environment—(1) strong protections for the environment and (2) assurances that individual liberties are adequately protected from government intrusions—climaxed? Environmental regulation, and more generally, the functioning of the administrative state, has dramatically evolved in recent years as postmodernization preferences of individualism and freedom from unduly involved government regulatory authority[84] have resulted in public choice assaults on government bureaucracy, deregulation, and delegation of regulatory and administrative authority to lower levels of government.[85] Public perceptions of the benefits provided by and confidence in the federal bureaucracy diminished from 1958 into the 1980s.[86] Two decades of rampant Congressional legislating and extensive authority granting to the EPA[87] did

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81. *See* HUNTINGTON, *supra* note 44.

82. *See* D. HENNING, ENVIRONMENTAL POLICY AND ADMINISTRATION (1978).

83. A clash between Fifth Amendment due process rights and EPA enforcement mechanisms has been a regular occurrence. *See* Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 444 (1988).

84. *See* INGLEHART, *supra* note 1, at 11-12.

85. While this has typically been a Republican led issue, politicians with both right and left-wing persuasions, including Democratic Vice President Al Gore, have advocated for extensive government reform. *See* Thomas J. Duesterberg, *Reforming the Welfare State*, 35 SOC'Y 44, 44 (1998); *see also* AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993).

86. *See generally* SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND (1983).

87. *See* HARRIS & MILKIS, supra note 43, at 225.

not bode well with a society desiring greater freedom from what had become overly stringent regulatory oversight. With a conflict between values that emphasized a cleaner environment and those that favored greater liberal freedoms from deep and encompassing government authority,[88] a compromise was needed to sustain both preferences without frustrating the other. All interests would be appeased if a methodology could be devised to stimulate more individual rights in the environmental dispute settlement, regulatory, and enforcement process in a manner that was consistent with postmodernization values and long-lived and consolidated market economy institutions in the United States.[89] This previously unreconcilable clash between regulatory methods and policies and free market mechanisms and capitalism has been mentioned as one of the most inherent tensions in the rise of environmental regulation since the 1970s.[90]

The regulatory pendulum shifted with such demands on government.[91] The most abrupt change to environmental regulation emanated from the Reagan administration, which curbed the EPA's growth, reduced the level of and delayed implementation of further stringent standards, and to some extent undermined the goals of particular regulatory structures, such as those of the Clean Air Act.[92] The changes seemingly went too far, such that a few years later the Bush administration and Congress had to compensate and take environmental regulation in a new direction. The 1990 Amendments to the Clean Air Act delegated responsibility for pollution control by expanding public rights claims, placed blame on certain regions of the country for heightened pollution levels and held them responsible. In addition, the Amendments set forth more detailed regulation specifications, goal-related

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88. This again assumes that more rigid environmental protections would beget a cleaner environment, even if the means of regulation are exceedingly austere on the private sector.

89. The recent move to increase market freedoms and the triumph of capitalism around the world might also be symptomatic of a postmodern backlash against big government interference in economies since a primary characteristic of postmodern values is desire for greater freedom from government authority. The stronger the private sector in a country is, the more power that is outside the prerogative of government.

90. *See* HARRIS & MILKIS, *supra* note 43, at 246.

91. The assumption is that this movement is consistent with populace value shifts since democratically elected representatives are acting on behalf of the constituents that elected them.

92. Because of the pervasiveness of EPA authority and because the political climate at the time was antagonistic toward social regulation, President Reagan undertook an extensive program that would deregulate environmental protection and reduce burdens on business. States were delegated more responsibility to protect the environment, more objective standards of "reliable scientific criteria" were enacted, agency costs were decreased, and there was a new ability to review overly-burdensome regulations. While the intended goal did appear initially to decimate the EPA and undermine its credibility, the most extensive of these changes did not have a lasting impact, and may have even had a greater reverse effect since it infuriated environmental groups and united their cause. *See id.* at 259. During this period, while there was deregulation, it was seemingly too extensive and abrupt, and thus a new approach was needed.

targets and review processes for the future.[93] States were endowed with the prerogative and flexibility to devise the means of implementing whatever mix of controls they deemed appropriate to meet EPA established National Ambient Air Quality Standards for individual pollutants.[94] While these were all attributes that lessened the rigidity of the Clean Air Act by delegating authority, this era's most novel and important innovation was the move toward a deregulated market approach to curb pollution levels. This was said to further remedy the overly stringent and under-implemented framework of the law[95] and decentralize court-based means of enforcement by permitting individual and organization complaints.[96] Specifically, market mechanisms were employed by providing pollution vouchers to the private sector, allowing the private sector to essentially regulate itself within parameters[97] and make government institutions and the economic impact of regulation more consistent with societal values.

IV. MEXICO

A. *Introduction*

While environmental conservation in Mexico is essential as it is one of the most biologically diverse countries on the planet, the protection of Mexico's natural resources has been lax because throughout its history priority has been placed on cultivating industrial development to combat poverty. Lacking a strong internal impetus to fortify environmental protection

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93. Clean Air Act Amendments of 1990, Pub.L.No. 101-549, 104 Stat. 2399. Ironically, President Bush, a conservative Republican amenable to capitalist interests, was also an environmentalist. Through political savvy, he gave both sides what they wanted. Business received meaningful freedom from rigid governmental control, and environmentalists received enhanced environmental protection. President Bush and the EPA were able to mesh a "love of the environment" and a "commitment to growth." HARRIS & MILKIS, supra note 43, at 337.

94. *See* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 230-33 (1999).

95. *See* BRYNER, *supra* note 51, at 151.

96. *See* Thomas O. McGarity, *Regulating Commuters to Clean the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L. J. 1521, 1521-23 (1996).

97. President Bush's approach was supported by a litany of scientific studies and assessed the level of environmental protection needed by employing methodologies from economics that appeased business. A cooperative model for environmental policy-making was created that was predicated on strong performance standards with a flexible regulatory process. Probably the most important result from this period was the establishment of pollution permits so that individual industries and companies could determine *how much* the right to pollute was worth by permitting private sector entities to buy and sell pollution rights that were allocated within emissions levels set by the federal government. Such a program is more consistent with postmodern values since control is placed within the prerogative of the private sector, with the *right to pollute* costing a premium but within the independent decision-making authority of firms such that environmental protection could now more easily be seen as a cost of doing business instead of a penalty imposed stringently by government.

efforts, an international dynamic, NAFTA has been fostering change within Mexico's environmental protection regime by annexing environmental concerns to Mexico's economic dependence on foreign trade and financial investment. Mexico ratified NAFTA to enjoy greater economic prosperity, but it is clear that its impact on environmental regulation in Mexico is becoming significant, even though many have opined that Mexico's environmental problem would be compounded by the treaty's incentives for United States factories to cross the border and relocate in Mexico where companies could obtain cheap labor and lax environmental enforcement.[98] However, this position was largely a relative and subjective conception as NAFTA has had an important impact on positively influencing environmental institutions in Mexico, particularly when assessing Mexico's historical record on environmental protection.

Based on the theme of this article and because Mexico is a democratic country, ideological competition on the posture of environmental regulations should be expected. But because it is considerably less developed than the United States with most of the population concerned with economic prosperity, those postures more readily favor less restricted industrialization. The position of these environmental institutions and the gumption to enforce them can, once again, be broadly characterized as a reflection of public choice considerations that appraise the relative trade-off between economic scarcity and quality of life proclivities within the Mexican population. Without a substantial increase in economic well-being begetting an emergence of quality of life preferences, it is not surprising that Mexico has had much less effective environmental protection institutions than those of the United States, although marginal shifts toward more effectual environmental protection regimes have been and are continuing to materialize.

Based on these premises and the assumption that Mexico has historically had and continues to have a long-term emphasis on economic modernization, a theoretical scenario will be contrived to illustrate probable sectoral public choice stances within the populace. Thus, the method of analyzing the cultural-institutional dynamics of Mexico in this section is structured differently than the temporal and stage-based assessment utilized for the United States Section. The appraisal assumes that modernization values still exist today in Mexico because sufficiently substantial shifts in economic well-being have not manifested for a majority of the population that would influence politicians and bureaucrats that would otherwise reform environmental protection institutions. This section will first hypothetically assess Mexico's public choice features in terms of value dynamics[99] and then

98. *See* Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1.

99. Note that while this analysis is hypothetical, it is based on attributes consistent with Inglehart's "quality of life" indicators and need not solely be seen as being specific to Mexico but is amenable to generalizations across developing countries. *See generally* INGLEHART, *supra*

historically analyze relevant institutional structures and how these institutions have been changing in Mexico, evidently not by internal encouragement of public choice initiatives, but by NAFTA.

B. Cultural/Value Dynamics

The Mexican government has historically reacted to its environmental crisis in a way that is consistent with expectations based on populace desires at its particular level of economic development. In an extensive investigation of Mexico's pollution crisis, environmentalists found that when visiting industrial parks and shantytowns and talking to mayors, business people, factory workers, and academics across the country, there was one universal opinion regarding why improving Mexico's environmental crisis has been so difficult—Mexico's economic crisis and need to develop *required* unrestricted industrialization.[100] Only by rapid economic development could Mexico counter its financial crisis and poverty, making the troublesome trade-off with environmental deterioration unfortunately inevitable. Mexican politicians, bureaucrats, and citizens have been fully cognizant of the environmental imbroglios that have plagued the country, but with democratic policy-making, whereby citizen desires penetrate political positions, the balance between a higher standard of living and more rigorous environmental protection expectantly tips more heavily toward a higher economic standard of living.

While one can legitimately debate the magnitude that mass desires truly influence politicians, given that Mexico's democracy has only recently functioned as such and that holding politicians responsible for actions not consistent with constituent positions arguably might not have genuinely existed. In any event, the functioning of Mexican environmental institutions has been consistent with the theme of this article. Those with policy or regulation making authority realized that for Mexico to progress economically, less rigorous environmental regulation and more industrialization would provide a larger tax base, more jobs, and an economic rippling effect to other sectors and regions of the economy—a position that best supports basic attributes of life that have been most important to constituents' lives. If a politician's region has economically benefitted by having lax environmental standards or not ensuring that standards are enforced, that politician would not likely advocate stringent standards or increased enforcement measures if constituents emphasized a higher economic standard of living over quality of life.[101] This differs from the national level, because regulations have been driven by the economic prosperity of industrial

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note 1.

100. *See* JOEL SIMON, ENDANGERED MEXICO: AN ENVIRONMENT ON THE EDGE 3 (1997).

101. Because of the centralized nature of Mexican politics, regional locales and politicians may have limited say in this matter but can still advocate at the national level.

centers, policy-makers have not historically goaded agency regulators to employ their discretionary powers in a manner that more fully ensures that environmental standards were upheld.

Assuming that there is at least a recognizable connection between constituent desires and political policy-making in Mexico, one can presume that citizens employed by polluting factories perceive their pecuniary benefit and do not wish to risk that benefit by supporting stringent environmental regulations that might close factories. Citizens that do not work in factories may even support this position because they realize that the local and national economies prosper from added income from more industrialization.[102] Those sectors of the population in closest proximity to factories are composed of citizens that must endure the most extensive environmental degeneration and suffer the most harm to their quality of life, but would also be expected to be those that are best able to identify with and are foremost connected to the economic benefits of the factory's production. On the other hand, those who are not in close proximity to the industrialization locale may not be benefitted as much by, or at least do not perceive that they are benefitted as much by, intensive industrialization but may also not be as impacted by environmental degradation, which would make them relatively less apt to complain about pollution.

This analysis can be represented by a hypothetical model that utilizes four mass categories based on cost-benefit analysis of dominant desires. For instance, in the categories of: (1) higher economic standard of living (logically attributable to industrialization) and a higher level of environmental deterioration, and (2) poverty stricken areas that are relatively free from environmental degeneration, there should be less mass support for enforcement of stringent regulatory standards. The sectors and regions more apt to complain of pollution and support elevated levels of environmental protection would include: (3) those areas that are less polluted but have higher income levels,[103] and (4) those areas that are more polluted but still have low incomes or do not perceive significant economic benefits eventuating from a higher level of industrialization. These four categorizations are represented graphically as follows:

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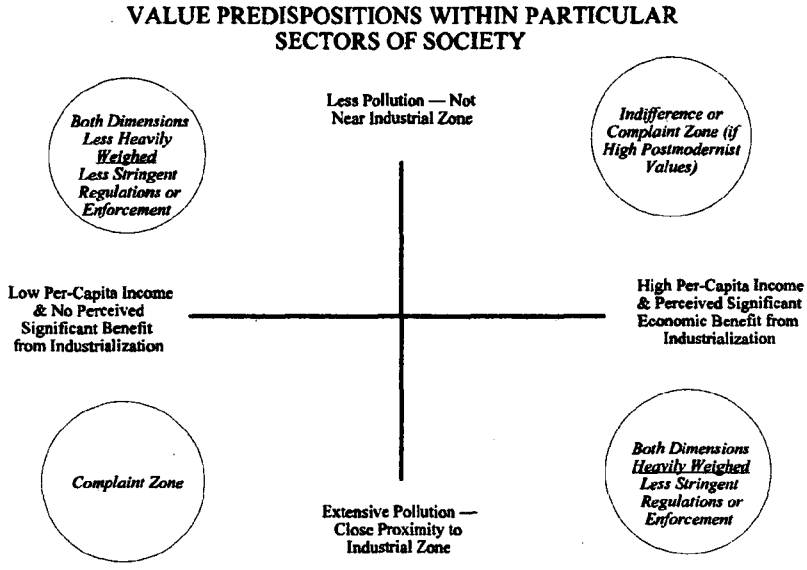
102. The trade-off and propensity to favor economic concerns would likely be most prominent in those Mexican sectors and regions that more readily identify that they are benefitting from increased industry.

103. These are sectors of society that probably have postmodern values and would willingly sacrifice some economic development for a cleaner environment.

Figure 3



However, even in those sectors of the public choice model where the population is more likely to complain of environmental deterioration, such complaints are unlikely to manifest for two reasons. First, Mexico as a whole still falls into a "developing country" category and has a level of economic development most apt to produce modernization preferences within the populace. Thus, the extent to which the theoretical categories (3) and (4) actually exist or have a populace size sufficiently appreciable to impact public choice alternatives that demand environmental protection regimes be fortified is questionable. For example, those in category (3) are those that are wealthiest and live in locales less affected by pollution, but they are also still likely to be capital owners or are otherwise pecuniarily benefitting most from higher levels of industrialization. Even if quality of life concerns are dominant within this segment, it is a small sector of the population that must have the self-interest and power to influence and advocate for higher levels of environmental regulation and enforcement.

Category (4) is also unlikely to advocate for or be successful in advocating for more stringent regulations and enforcement of those regulations for several reasons. People would be expected to recognize the correlation between increased economic development through lax environmental enforcement, and even if they may not currently perceive themselves as benefitting from increased industrialization, they may expect to

so benefit in the future. Also, regions of relatively lower per capita income and higher levels of economic deterioration are not likely to exist because wages would expectantly be higher where there is more industry. In a region with extensive industrialization, the populace will probably identify that it is benefitting through economic rippling effects even if a large percentage of the community is not directly working for a factory, while the poorest sectors of this population are unlikely to have the resources or knowledge to advocate for increased environmental regulation.

The second reason why the existence of hypothetical segments (3) and (4) of the population are not apt to result in public choice policy shifts in environmental protection is due to federalism and separation of powers in Mexico. Because Mexico has such a centralized and executive-dominant governance structure, with a weak judiciary, legislature, and lower levels of government, the public choice values that emerge into political positions (that influence enforcement) should be those most consistent with favoring industrial modernization. If this centralization did not exist in Mexico, regional interests might create schisms that could goad local politicians to enact new regulations and/or ensure enforcement of existing regulations based on preferences of the populace/constituent sectors established in the aforementioned chart or even permit another branch of government to challenge the federal-level executive position. However, with a centralized and executive-dominant government, one should not expect that localized interests would be satisfactorily addressed[104] if those desires are outside of the predominant aggregate modernization public choice values existent in Mexico.[105] Furthermore, even assuming that public choice values of constituents favoring modernization do not fully influence the political system, those in power may not have the self-interest to ensure that modernization policies incorporate environmental concerns when the political system is so centralized[106] and so much deference is granted to power-centers that manage and promote industrial interests.[107] The result of this hypothetical analysis is consistent with the foundational sources of law and the historical positions and actions of environmental institutions in Mexico.

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104. This was also cited as a problem in the NAFTA environmental side agreement, which has been said by some to provide almost no ability for local citizens or groups to complain of, intervene in, or even provide meaningful input in regional environmental enforcement. *See* Lynn Stanton, *A Comparative Analysis of the NAFTA's Environmental Side Agreement*, 2 HASTINGS W.— N.W. J. ENVTL. L. & POL'Y 71, 76-77 (1994).

105. Making *strong* assumptions about public choice analysis and populace desires fully affecting politicians in Mexico might be somewhat of a stretch. For an excellent article describing the weak state of democracy in Mexico and the concomitant difficulty of obtaining environmental protection, see Alberto Székely, *Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT'L L. 385 (1999).

106. *See* RICHARD R. FAGEN & WILLIAM S. TUOHY, POLITICS AND PRIVILEGE IN A MEXICAN CITY (1972).

107. *See* VICTORIA E. RODRIGUEZ, DECENTRALIZATION IN MEXICO 62 (1997).

C. *Actions of the Mexican Government and Its Institutional Structure*

For over a decade, Mexico has had relatively stringent environmental regulations, which have been posited by some to be even as demanding as those of the United States.[108] However, those regulatory standards have not been systematically enforced.[109] Only in recent years have progressive transformations in systematic enforcement of environmental violations occurred, and this was at the behest of an international source—NAFTA. Ostensibly, NAFTA placed pressure on Mexican government institutions to more fully respect the trade-off between economic development and environmental protection. While the notion of individual property rights during industrialization has been a factor in balancing the right to use one's property against societal/public environmental harm, as was the experience in the United States, the regulatory result has been dissimilar from that of the United States since monopolization and centralization of authority and property has been the approximate foundational legal norm in Mexico. A brief discussion of the history of this property law influence within the context of monopolization in power will demonstrate this point.

During the industrialization process in Mexico from the 1870s to the early 1900s, the national economy grew, with those in power seeking and attaining more land and resources to expand production. Those connected to and in government had the power to exercise legal property appropriations from individual property owners with little compensation. While some questioned these government supported actions by seeking local court remedies against the perpetrators, who were often seen as analogous with the government, such actions were to no avail as courts and the government apparatus supported those with power and resources.[110] Even at the impetus of Mexico's industrialization period, there was a clear monopolization of power in government to control land and resources.

It was not until the resolution of a clash between rural and city areas and a civil war that the 1917 Mexican Constitution was ratified. It professed to incorporate the foundation for major land and rights reform. The policy of the reform was to support a more equitable society where resources were more evenly distributed,[111] but even after this move most of the real property grants

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108. *See* Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC,as a model for Future Accords*, 25 ENVTL. L. 31, 35-40 (1995).

109. *See* Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 729 (1993).

110. *See* SIMON, *supra* note 100, at 30.

111. "A more equitable distribution of wealth" was provided for in Article 27 of the 1917 Mexican Constitution. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27.

were bestowed through corruptive influences since the central government normally used the promise of land reform to gain political and economic allegiance from potential land recipients. Because all political and legal authority was aggregated in the central government, it was able to control resources under the guise of holding it for the common good and maintain a political and economic monopoly for the next several decades because of the high level of societal reliance on government. Unlike in the United States during this period, where individual property rights were haled but still moderately balanced against social utilities and government policymaking sometimes undermined individual rights, a balancing of public versus private rights was normally absent in Mexico. Instead individual liberties were dominated by government agendas.

Even though Mexico has formally been called a *democracy* since the 1917 Constitution was ratified,[112] centralization of power permitted the government to operate like an authoritarian regime because extensive government control bred dependencies from society. For the past seven decades Mexico has been run by one party,[113] the PRI (Partido Revolucionario Institucional), which through a complete hold on all political and economic power, has dominated the executive branch, so much so that no other agency of government or societal actor was empowered to question its authority on public regulatory concerns, including on issues related to the environment. Because of this institutionalized centralization of power, the PRI has been able to neglect environmental concerns by emphasizing the benefit to the aggregate of Mexican society by promoting rapid economic development via higher levels of industrialization, which also assisted the PRI in winning elections, promoting its monopoly on resources, keeping various critical groups loyal, and preventing dissent on the dilemma of an increasingly deteriorating environment.

Similarly, the judiciary, the branch of government that in most countries protects individual liberties and limits government action, was then and still is a weak actor in Mexico[114] not only because of the central government's dominance and intolerance for challenges to its decision-making authority but also because there has not been a substantive move to expunge the judiciary from its traditional civil law origins.[115] When issues have been raised before

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112. *See* Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L. L. J. 1, 12 (1995).

113. In an historic election that ended seventy-one years of PRI rule, Vicente Fox, of the right-leaning PAN party, won the presidential election on July 2, 2000 over the PRI candidate. *See* Peter Fritsch, Jose de Cordoba, & Joel Millman, *Can Mexican Victor Prove That 'Change' Is More Than a Slogan?* WALL ST. J., July 5, 2000, at A1, A8.

114. For a discussion of Mexico's historically weak judiciary, but within the context of its new constitutional reforms, see Hector Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1 (1998).

115. Mexico has a traditional civil law legal system and an executive dominant government, an *active* state. *See* DAMASKA, *supra* note 54, at 71-96.

a court of law that dealt with social concerns, such as the environment, the likelihood that an independent and equitable decision would be made based on the individual rights of those involved, or whether a court would even be permitted to hold jurisdiction over any given case, has been dependent on whether that decision or grant of jurisdiction would be consistent with the desires and policies established by the central government.

An example of this central government dominance, inability of other institutions to provide any measurable degree of countervailing dissent domestically on a controversial environmental issue, and preference for industrialization over environmental concerns, can be illustrated by a factual instance related to the enactment of the 1965 Border Industrialization Plan (Plan), which permitted United States companies to establish "maquiladoras" (assembly plants) on the Mexican border.[116] The central government enacted the Plan to provide jobs and increase Mexico's economic development and standard of living. With over 2,000 maquiladors along the U.S.—Mexican border, profound economic benefits have been provided to Mexican society, but the program has also been said to produce some of the most considerable pollution problems and poor living conditions in the region.[117] One maquiladora region was said to have toxic waste dumped into wastewater drains (likely contaminating the ground-water) that streamed down the street. It was also comprised of unsanitary shanty "shacks" for worker living conditions and had companies systematically and flagrantly violating environmental regulations, perhaps by dumping pollutants locally as opposed to returning them to the United States, as required by treaty.[118] The region also suffered from smoke and pollution that caused serious respiratory problems and infections among the population.[119]

These facts would give rise to an actionable claim, perhaps by an administrative action or judicial intervention for brazen harm to public health under the law of most countries.[120] Such public harms were also in violation of Mexican law, but enforcement actions under such facts were normally not forthcoming. If enforcement or injunctive actions were more regularly brought, what would be the probable result? With a recognized trade-off between a higher standard of living provided by industrialization and more rigid environmental protections, society and government typically tolerated

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116. *See* Lawrence J. Rowe, *NAFTA, the Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 18 SUFFOLK TRANSNAT'L L. REV. 197, 198 (1995).

117. *See* Diego Ribadeneira, *SIDEBAR On Mexico's Border, 'Prosperity' Has an Ugly Side*, BOSTON GLOBE, July 12, 1994, at 10.

118. *See* Aimee L. Weiss, *An Analysis of the North American Agreement on Environmental Cooperation*, 5 ILSA J. INT'L & COMP. L. 185, 186 (1998/1999).

119. *See* SIMON, *supra* note 100, at 207-09.

120. It would be very unlikely that these harms would even manifest in countries with high levels of economic development and stronger environmental protections since preventive mechanisms would exist.

such pollution because the alternative, not having the factories, would foster higher unemployment levels and perhaps societal unrest since multinational companies might be less likely to invest in Mexico if environmental protections were more rigidly enforced.

The domestic regulatory structure for environmental protection and institutions in Mexico has taken an interesting twist since NAFTA was enacted even though the agreement does not usurp sovereignty on environmental issues[121] but instead permits the three Party governments to formulate their own environmental laws[122] and only penalizes Parties financially with trade concessions for persistent violations of their own laws.[123] Thus, since 1993, NAFTA,[124] its Commission on Environmental Cooperation (CEC),[125] and the Border Environmental Cooperation Commission (BECC),[126] injected an important international dimension into Mexico's environmental regulatory structure. The CEC not only provides information about NAFTA's potential environmental effects,[127] but also is NAFTA's investigative[128] and environmental enforcement body.[129] It is

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121. NAFTA does not impose environmental standards on the three Parties, but seeks to impel greater certainty and transparency in the functioning of domestic law.

122. *See* North American Agreement on Environmental Cooperation, *supra* note 6, art. 3.

123. *See id.* art. 36.

124. Specifically, it is the NAFTA environmental side agreement that is the institution that can be said to balance between economic development and environmental protection. *See generally* Angela Da Silva, *NAFTA and the Environmental Side Agreement: Dispute Resolution in the Cozumel Port Terminal Controversy*, 21 ENVIRONS ENVTL. L. & POL'Y J. 43 (1998).

125. *See* Richard H. Steinberg. *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories*, 91 AM. J. INT'L L. 231, 247 (1997).

126. Agreement Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, U.S.-Mex., 32 I.L.M. 1545. The BECC works with effected state and local governments to devise projects and implement solutions to environmental problems and is partially financed by the North American Development Bank. The BECC had certified twenty-four projects by mid-July 1998, costing an estimated $600 million. Ignacio S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, and the NAAEC, and Implications for the Future*, 12 TUL. ENVT'L. L. J. 405, 448-49 (1999).

127. COMM'N FOR ENVTL. COOPERATION, ASSESSING ENVIRONMENTAL EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA): AN ANALYTIC FRAMEWORK (PHASE II) AND ISSUE STUDIES 6, 27-36 (1999).

128. Some have complained about internal weaknesses in the CEC's investigative authority. *See* Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483 (1994). For compelling arguments describing why the CEC should not be more fully empowered, see Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31 (1995); *see also* Richard A. Johnson, *Commentary: Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT'L ENVTL. L. REV. 577 (1993).

129. Consultations over potential violations and enforcement matters are specifically authorized. *See* North American Agreement on Environmental Cooperation, *supra* note 6, arts. 14 & 22.

empowered to react if one of the three signatory countries is engaged in a "persistent and sustained pattern" of non-enforcement of its environmental laws[130] and will only make recommendations for concerns that are not technically violations of environmental laws.[131] While this agency has not yet had unparalleled impact on enforcement measures, and the environmental side agreement has been criticized for its ineffectiveness,[132] the agreement and related institutions have still introduced a form of *hard* international law whereby the Mexican government has an external obligation to abide by treaty terms. This is an important influence considering that an environmental agreement as an annex to trade was not something Mexico wanted because imposing such a requirement was perceived as an exercise of cultural and developmental dominance.[133] The offer of considerable financial incentives however dispensed a leveraging force to attain Mexico's acceptance of the total package.[134] This demonstrates how the political debate in the United States, requiring a *green agreement* before NAFTA would be ratified in the Senate, influenced domestic Mexican politics and institutional structures. One might even claim that the values dominant in the citizenry in the United States,[135] through domestic treaty ratification procedures that required participation by United States politicians (as influenced by constituents and interest groups),[136] were the impetus for the Mexican government's domestic environmental regulatory restructuring and fortification.

The environmental institutional changes at the behest of NAFTA have been impressive and will likely be profound in the long-term, particularly when considering the relative position from which Mexico began.[137] Even though Mexico did not enact a comprehensive federal environmental law until

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130. *See* Steinberg, *supra* note 125, at 247.

131. *See* North American Agreement on Environmental Cooperation, *supra* note 6, art. 13.

132. *See* RALPH H. FOLSOM, MICHAEL WALLACE GORDON & DAVID LOPEZ, NAFTA: A PROBLEM ORIENTED COURSEBOOK 683 (2000).

133. *See* Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment* 15 STAN. ENVTL. L J. 61, 87 (1996). Mexico has also voiced resentment against the CEC: "The Perception that the CEC was designed mainly to watch over Mexico has not faded. . . . A perception of institutional imbalance persists and is difficult to shake. INDEP. REVIEW COMM., FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE, ¶ 3.1 (June 1998), *available at* http://www.cec.org/.

134. *See* Robert Housman, *The North American Free Trade Agreement's Lesson for Reconciling Trade and the Environment,* 30 STAN. J. INT'L L. 379, 421 (1994).

135. The values dominant in the United States are postmodern values, as described in the previous section.

136. *See* Raustiala, *supra* note 108.

137. For the environment, the enactment of new administrative agencies normally signifies a movement from a focus on individual property rights to an identification of the issue in a manner more amenable to elevate social concerns, but if an agency is created but is not empowered or is not aggressive in its enforcement activities, then environmental social issues often are not truly dealt with in a satisfactory manner.

1988,[138] domestic environmental regulatory agencies in Mexico have long existed but have been weak because power was diversified across the jurisdiction of several different agencies. For instance, the first environmental agency, the Subsecretariat of Environmental Improvement (SMA), was created in 1972 as part of the Secretariat of Health. Environmental protection responsibility was later transferred to the Housing Secretariat, then to Urban Development, and finally to Social Development (Sedesol).[139] With a systematic transferring of environmental authority as a subsidiary function in what were arguably unrelated institutions, no truly fortified environmental protection regime existed until after the enactment of NAFTA.

President Ernesto Zedillo took Sedesol, the environmental prosecutor's office (PROFEPA), and the National Ecology Institute (INE), and created one superministry that would have ultimate responsibility for the environment—the Secretariat of Environment, Natural Resources, and Fisheries. This agency has utilized new procedures and safeguards, including implementing advanced scientific techniques such as that of conducting "Environmental Risk Assessment,"[140] something that had not previously been employed in Mexico. It is clear that the institutional progression toward and the empowerment of an agency solely responsible for environmental protection has primarily been caused by NAFTA,[141] but the question then becomes to what degree this institutional framework will lead to a higher level of environmental protection enforcement in the future. While even the head of this environmental organization, Julia Carabias, previously expressed skepticism over the extent of expected improvement in the near future as she acknowledged that Mexico's primary concern is still one of economic development,[142] others more recently have been relatively more positive and have cited evidence of significant improvements in inspection and enforcement activities.[143]

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138. *The General Law of Ecological Balance and Environmental Protection*, LEXIS, Environ Library, MXENV File (1996).

139. *See* SIMON, *supra* note 100, at 236.

140. Hector Herrera, *Mexican Environmental Legal Framework*, 2 SAN DIEGO JUST. J. 31, 33 (1994).

141. *See* Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 159 (1994).

142. *See* SIMON, *supra* note 100, at 238-89. Others have also been critical of the NAFTA framework and have been quick to point out its weaknesses. For a description of the procedure that influences NAFTA governments, see David Lopez, *Dispute Resolution Under the NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L. J. 163, 185-87 (1997).

143. *See* Ignacia S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L. J. 405, 433 (1999); Beatriz Bugeda, *Is NAFTA Up to its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591 (1999); David Schiller, *Great Expectations: The North American Commission on Environmental Cooperation in Review of the Cozumel Pier*

Thus, even if new environmental thresholds are established, the key is to ensure that enforcement is forthcoming by an objective and independent entity.[144] Likewise, with a new awareness of legal rights and protections related to the environment in Mexico, there is still the issue of the extent that dominant values favoring industrialization will permeate enforcement mechanisms. Mexico's legal system has not been prone to litigate environmental pollution disputes,[145] and when they have occured, they have always been rectified through internal negotiations within the agency, with enforcement actions being left to the discretion of the agency.[146] Since economic development is the primary concern in Mexico, there may still be a propensity for inspectors to favor industry and development[147] to the detriment of quality of life.

V. SUMMARY & CONCLUSION

The environmental regulatory framework in the United States, or lack thereof in its early history, has undergone far-reaching shifts temporally coinciding with levels of economic development and concomitant societal values. With courts pursuant to the early common law approach only providing relief for environmental concerns that unreasonably interfered with the right to own and enjoy private property, emphasis was placed on fostering economic development and haling private property rights with minimal concern for broader societal interests in a clean environment. Except for localized regulations applied by zoning requirements, an approach that predominated well beyond the Progressive and New Deal Eras, there was no centralized administrative source that regulated the environment. The lack of such a regime was largely the consequence of a populace, politicians, and elites concerned more with economic growth than the environment.

A higher standard of living provided by extensive economic growth after World War II induced postmodern value shifts in the populace, which, when combined with media exposure and scientific evidence of environmental harm, favored quality of life attributes over unrestricted industrial growth. By the

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Submission, 28 U. MIAMI INTER-AM. L. REV. 437 (1997).

144. Mexico's domestic institutions will certainly improve in this regard over time. Others have said that the CEC, as an international entity, should be providing a more extensive enforcement role, but that this institution does lack independence. *See* Christopher Bolinger, *Assessing the CEC on its Record to Date*, 28 LAW & POL'Y INT'L BUS. 1107 (1997).

145. *See* SIMON, *supra* note 100, at 239.

146. Between 1991 and 1993, the number of inspectors tripled and the number of factory shutdowns quadrupled. *See* Stenzel, *supra* note 4, at 452.

147. Closing down companies or severely fining them for environmental violations (which is in the prerogative of the agency) may lead other multinational companies to refrain from locating in Mexico, and thus fewer jobs would be available than otherwise would exist with more industry.

1970s, environmental pollution became nearly universally accepted as a societal concern that should no longer be defined only as a problem for private property owners. The next decade witnessed a substantial growth in environmental regulation and bureaucratic control to administer that regulation, and an eventual clash with another chief postmodern value — that of independence and freedom from rigid government regulation over the private sector and society. This was the value that Ronald Reagan espoused to its fullest but which ostensibly conflicted with societal desires because he did not give significant credence to the other postmodern concern of quality of life.

The deregulatory era of environmental protection eventually evolved into a market approach to environmental regulation so that both postmodern values were recognized—the need to protect the environment and also the desire for private sector freedom from rigid government control—by allowing industries and individual companies to determine how much the *right* to pollute was valued via permitting these individual actors to make cost-benefit decisions within the context of a given level of environmental standards. The market approach is a direct backlash against anti-capitalist arguments set forth by environmentalists in 1970. It is an approach that treats environmental pollution as it arguably should be treated in the private sector—a cost of doing business that can be logically and rationally calculated like any other market expense—but one that still upholds important environmental standards and mandates set forth by the federal government. It is an approach that makes environmental regulation more distant and seemingly less rigid by giving the private sector more freedom of choice at given production levels.[148]

This temporal shift in the United States is similar to environmental movements witnessed by other highly industrialized countries, but Mexico is a country that has not traversed high levels of economic development, such that its primary public choice desires have been most consistent with institutions that placed economic development and scarcity concerns above environmental protection. Even though a segmented proportion of the Mexican population should theoretically have stronger postmodern preferences, it is a very small proportion of the population, and with a centralized government that has made decisions for all in the aggregate without much consideration for regional concerns, the domestic democratic impetus for enacting more stringent regulatory standards and enforcing the standards has not previously existed.

International influences through the consummation of NAFTA have provided the incentive to restructure government institutions that enforce domestic standards for environmental protection even though modernization

148. This approach has remedied the inherent clash between the two postmodern values of respect for the environment and greater freedom from government control to protect individual rights and liberties.

values in Mexico are still dominant. The Mexican government has recently established fairly empowered institutions at the behest of international influences, even though the enforcement mechanism may be partially hindered by the value dimension. This is interesting considering that international influences, such as trade agreements, have often been criticized for accomplishing nothing to strengthen environmental protection.[149] This is not the case with NAFTA, as Mexico's acceptance of NAFTA undoubtedly has led to a higher level of environmental protection than existed prior to its enactment, even though Mexican politicians and elites accepted the agreement by primarily considering the economic benefits that would accrue by consummating the total package.

The importance of public choice initiatives should not be underestimated. If citizens must make a choice between potentially conflicting wants—a higher economic standard of living versus a higher quality of life—they will expectantly choose what is most pressing to their lives.[150] The highly industrialized countries of the world should continue to recognize this trade-off and provide moderate leniency to developing countries when international economic integration agreements are negotiated. Certainly, there is an important interaction between value shifts and institutional responses to environmental protection, such that each can influence the other— values can influence institutions and institutions can influence values—which can mean that seeming ultimatums from more wealthy countries can reform environmental legal institutions in less wealthy countries, but as long as countries differ in their levels of economic development, or at least until substantially more environmentally friendly production technology emerges at a competitive cost, the international debate over the level of appropriate protection provided by any given country will remain.

Governments will continue to have incongruous environmental positions based on predominant societal values at the domestic level influencing those positions, as has been the case with the United States and Mexico, which requires a moderated contractual "meeting of the minds" at the international level when these two dimensions converge. NAFTA and its environmental protection provisions will provide a meaningful example to other regions of the world seeking to more fully unite domestic economic systems, despite the existing disparities between national positions[151] that might otherwise more

149. *See* Jack I. Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERK. J. INT'L L. 245, 252 (1997).

150. In a world where more transparent media attention is placed on grave environmental harms, it is possible that when one considers the balancing of predominant values in a society, such value shifts will be more receptive to more heavily weighing the costs of higher levels of industrialization, even though economic scarcity is still a pressing concern.

151. As described in this article, the degree to which populace values do permeate policy positions of those in power in developing democracies is a relative and difficult question to

freely implement international economic integration agreements that hasten development without respect for environmentalism and those that soundly respect the needed balance that should be struck on environmental protection. Balancing predominant domestic preferences and somewhat compromising positions will be the expected result of future international economic integration agreements and their annexed environmental protection agendas.

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answer with certainty since often institutional characteristics to support this nexus may not seem to exist. For instance, one could take opinion polls over time within a population and measure value shifts in comparison to actual legislative changes. However numerous problems can arise in developing countries, such as whether truly informed decisions are being made within the populace when opinions are recorded, and whether samples are representative of a larger segment of the population.

FREE SPEECH MEETS FREE ENTERPRISE IN THE UNITED STATES AND GERMANY*

Thomas Lundmark**

INTRODUCTION

Society finds itself in a state of fundamental transformation, of progression to a new epoch. Futurists, as they call themselves nowadays, talk of a new "paradigm" in which the institution of the nation-state is in decline.[1] Society is evolving. New values and new hierarchies are being ushered in. In this process, the influence of government is waning and that of private or "free" enterprise is waxing.

This Article seeks to expose and analyze this process or "paradigm shift." This exposition is peppered with examples, that is, with evidence that is suggestive rather than conclusive. This is so because the process is evolutionary, not revolutionary; the victory of a society and legal order focused on enterprise, over one centered on nation-states, is not yet assured. Nevertheless, if society does indeed continue to progress as imagined in this Article, then certain values of the existing order will be pitted against those of the new. And the confrontation will make itself felt in general in every aspect of public life and in the legal order and regime in particular.[2]

The confrontation between the old and new hierarchies is investigated in this article by the collision between two representative core values. The core value chosen to epitomize the present governmental hierarchy is the constitutional right of free speech, without which democratic government is

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1. *See generally, e.g.*, JOSEPH A. CAMILLERI & JAMES FALK, THE END OF SOVEREIGNTY? (1992); PAUL KENNEDY, PREPARING FOR THE TWENTY-FIRST CENTURY (1993); RAYMOND VERNON, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES (1998); Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993); *An Agenda for Peace: Report of the Secretary-General on the Work of the Organisation*, U.N. GAOR & U.N. SCOR, 47th Sess., Agenda Item 10 of the Preliminary List, U.N. Doc. A/47/277-S/2411 (1992).

2. Care has been taken in this article not to suggest that the developments here depicted and predicted are "for the good" in any philosophical, moral, or other sense.

unimaginable. The value selected to represent private enterprise is competition or, more specifically, competition's corollary, the prohibition against unfair competition. Without (free) competition, private enterprise cannot exist. To employ the terminology of our statist society, the right to free competition is fundamental and necessary to the new paradigm and in this sense is "constitutional."

The choice of the two countries examined here is accidental rather than deliberate. This article began as a comparative study of the law on political boycotts in the United States and Germany on the celebration of the fiftieth anniversary of the German constitution.[3] In the course of this study the author determined that the decisions of the highest courts of the respective countries revealed a remarkable similarity in holdings and often in analysis and justification, although there is virtually no statutory law on the point. While the similarity might be purely coincidental, it seems more likely that other factors and forces are at work. One factor is the familiarity of German judges with U.S. Supreme Court precedent.[4] But these precedents would not be cited, much less followed, unless the legal milieus of the two countries were roughly comparable. This "rough comparability" is therefore both a conclusion of this study and an assumption. If true, then the global forces of commercialization have penetrated German and American legal sensibilities to a roughly equivalent degree, providing two stations at which to sound the rising tide of commercialization.

The terms employed so far—society, hierarchy, and influence—require a short explanation. The term "society" is used instead of more familiar terms such as "citizens," "people," or "population." This is due in part because these more familiar terms have less relevance today than they once did. The recent amendment to the German citizenship law and the embryonic European citizenship are just two examples.[5] According to the new German citizenship law, children born in Germany of foreign nationals may become German citizens, and may retain German citizenship until age twenty-three without relinquishing their foreign citizenship.[6] Both of these developments indicate

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3. This article is based on a speech delivered by the author at the Faculty of Law of the University of Münster in a series of lectures celebrating the fiftieth anniversary of the German Basic law. *See* VERFASSUNGSRECHT UND SOZIALE WIRKLICHKEIT IN WECHSELWIRKUNG 209-29 (Boro Pieroth ed., 2000).

4. See, e.g., the reference to *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), by the German Federal Constitutional Court in the *Lüth* case, quoted at footnote 41, *infra*. On the influence of precedents on the European Continent, see INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997) and Thomas Lundmark, *Stare Decisis vor dem Bundesverfassungsgericht*, 28 RECHTSTHEORIE 315 (1997).

5. *See* Treaty Establishing the European Community (as amended) Art. 8 (1): "Citizenship in the Union is hereby established." *See generally*, EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998).

6. *See* § 4 (3) Staatsangehörigkeitsgesetz, (BGBL. I 1618), *construed in* Heinrich Bornhofen, *Prüfung und Dokumentation des ius-soli-Erwerbs der deutschen*

an erosion of the traditional association of citizenship and nationality.

The word "society" is relatively neutral, at least to lawyers, and it offers the advantage of allowing one to speak simultaneously of Germany and the United States. The United States and Germany have much in common from a traditional constitutional standpoint in that they belong to one western, essentially European, democratic political and economic society. However, it would stretch the political vocabulary to speak of Germany and the United States as having common citizenship and government, even though corporate ownership and control and much else in economic society do not respect political boundaries.

The term "hierarchy" is employed instead of "paradigm" or even "institution." This is not because "hierarchy" denotes the entirety of society's present or future. "Paradigm" might be better for this purpose. The word "hierarchy" does not, for example, capture the complexity and beauty of a constitutional order dedicated to the pursuit of liberty and equality. Nor does the word "hierarchy" do justice to the richness and simplicity of free enterprise and the unabashed pursuit of wealth and happiness. Rather, speaking in terms of "hierarchy" allows one to see more clearly that societal norms and values can be relegated to different positions relative to each other. Use of the term "hierarchy" thus permits a readier comparison between the relative importance within German and American society of the values of speech and competition.

Finally, this article prefers the term "influence" over other terminology often employed in constitutional scholarship, such as "power," "regulate," and "control," because these concepts imply the threat or use of force. As such, these terms are not subtle enough to explain the extent to which commerce permeates our society and is replacing traditional institutions and values.

The broad brush "influence" is particularly apropos for this article's first and third parts. The first part describes in general terms the transformation of epochs—the "paradigm shift"—while the third part consults historical antecedents to divine perspectives on the future. These two parts are impressionistic in nature, somewhat like a painting by Claude Monet. The second part of this article scrutinizes decisions of the highest courts in the United States and Germany dealing with political boycotts. The comparisons made in this second part describe in a somewhat legalistic fashion the relevant legal norms and their relative positions in the constitutional value systems of the United States and Germany. To remain with the metaphor of painting, the second part would resemble a pen and ink drawing by Albrecht Dürer.

Staatsangehörigkeit durch den Standesbeamten, 52 DAS STANDESAMT 257 (1999). For a recent overview of similar measures throughout Europe, see Fritz Sturm, *Europa auf dem Weg zur mehrfachen Staatsangehörigkeit*, 52 DAS STANDESAMT 225 (1999).

I. CHANGE IN EPOCHS: THE EPOCH OF PRIVATE ENTERPRISE

In order to provide a general context for what follows, the first part of this article chronicles in cursory fashion the commercialization of society, of the law, and of the state. As noted above, this process is gradual. Nevertheless, examples from all three sectors—society in general, law, and the state—demonstrate a relative increase in the influence of commerce and a concomitant decline in that of the state.

A. Commercialization of Society

The commercialization of society surrounds us. Commercial advertisements await us in the mailbox, on the doorknob, on walls, on busses, on television, in newspapers, in E-mail, and sometimes written in the sky itself. We hear commercial advertisements on the radio, on the telephone, from loudspeakers, and from merchants hawking their wares. Perfumed advertising flyers fall from magazines to assault our noses. Over and above the commercial assault on our pocketbooks is the more subtle suggestion to our psyches that anything expensive is good, whether food, clothing, transportation, housing, carpeting, vacation, or education. The free market has become the yardstick for society. The desirability and status of a position are measured by its salary. The prominence and importance of authors, artists, and athletes are measured by what they earn or what their art pieces and manuscripts bring at auction.

Just a few years ago, professional athletes were not allowed to compete in the Olympic Games. Athletes were supposed to represent their nation-states, not themselves or petty commercial interests.[7] Commercialism was considered common and base. It had no place among the high virtues exemplified by the Olympic spirit. Today, such considerations appear outdated, even cynical and hypocritical, considering the commercial exploits of the Olympic committee members.[8]

B. Commercialization of the Law

People do not trust the government to organize their lives and affairs as they once did. For example, prenuptial agreements are replacing statutory and common law marriage laws. Fewer and fewer people rely on the laws of intestate succession. Adoptions are opened as people bypass state strictures.

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7. *See* James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 493 (1992).

8. *See Die olympische Reinigung vollzieht sich im Schonwaschgang*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 24, 1999, at 19.

A sign of the changing times is the Law and Economics movement,[9] with its preference for private law and private enterprise solutions and with its leveling principle of efficiency. Twenty-five years ago, an early adherent of this movement told law students that in twenty years there would no longer be law faculties, only departments of economics. Legal language is strewn with commercial terms: the court did not "buy" a particular argument,[10] or free speech is important in the "marketplace of ideas."[11]

Even public law is becoming commercialized. The German Constitution, which just celebrated its fiftieth anniversary, explicitly guarantees the right to practice a profession.[12] All of the Four Freedoms—free movement of goods, workers, services, and capital—of the European Community or Union, formerly called the European Economic Community, are commercially motivated. Environmental law, to cite just one example, employs economic instruments.[13] The principle of efficiency has spread to administrative law.[14]

Deregulation is symptomatic of the changing epoch, for behind deregulation stands the conviction that private enterprise will serve the public, if not exactly the public welfare, better without interference from the antiquated state. The catch-word is privatization, which literally entails the relinquishment of particular obligations by the state to private actors, even if these actors are often still subject to state regulation. Privatization of public tasks necessarily means a loss of the state's influence.[15] At the state universities in Germany, people debate whether to charge tuition or perhaps impose fees for bar review courses offered by professors. The discussion regarding tuition revolves around the concept of the fee state, a kind of university post office for students.[16] Almost all German law students attend expensive private bar review courses for a year after completing their

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9. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 109-13 (4th ed. 1992).

10. One of many examples is found in Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L. J. 349, 355 (1997).

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. GRUNDGESETZ [GG] [Constitution] art. 12 (F.R.G.).

13. A German-American comparative discussion is found in Thomas Lundmark, *Systemizing Environmental Law on a German Model*, 7 DICK. J. ENV'T. L. & POL'Y 1, 39-43 (1998).

14. *See generally* EFFIZIENZ ALS HERAUSFORDERUNG AN DAS VERWALTUNGSRECHT (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1998); Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 ARIZ. ST. L.J. 175 (1998); Paul R. Verkuil, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221 (1994).

15. In a direct challenge to Canada's government-run health system, the province of Alberta announced that it will turn to private, for-profit hospitals to provide some services. *See Alberta to Permit Private Hospitals*, INT'L HERALD TRIB., Nov. 19, 1999, at 5.

16. The German postal authority has already been privatized, as has the railway, even though both private companies are closely bound up with the machinery of the state.

university course work. As in the United States, the state does not even regulate who can offer these courses, even though the courses train students to pass the examination which is a state prerequisite to admission to the bar. The state seems unwilling if not unable to respond to the forces of commercialization.

Through its membership in the European Union, the German state is losing exclusive control over admission of lawyers to practice law. A "race to the bottom," which is decried in the environmental arena,[17] is also perceptible in the education of lawyers.[18] Another development, perhaps even more momentous and ominous, is the appearance of foreign legal advisors who counsel their clients on foreign or global law. Large CPA firms in the United States are employing lawyers in large numbers. Many contend that they are not practicing law and as such are not subject to state regulation.

C. *Commercialization of Government*

In the present political climate, government apparently cannot be trusted to run post offices, schools, prisons,[19] or even police forces. Private police officers outnumber public officers in most western countries.[20] In the United States, business executives are transforming large portions of a fragmented, cottage industry of independent, non-profit institutions into consolidated, professionally managed, moneymaking businesses.[21] Even state universities and public elementary schools[22] have become commercial ventures, while the states are reduced to running lotteries to support local schools. Public primary schools were once thought to exist to train good citizens.[23] But recently, the

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17. *See generally* REINER SCHMIDT & HELMUT MÜLLER, EINFÜHRUNG IN DAS UMWELTRECHT XXVII (5th ed. 1999); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the- Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

18. *See, e.g.*, Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 7 (1998) (noting that competition with other European countries is fueling the debate to shorten the German legal education).

19. *See, e.g.*, RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (1999).

20. *See Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21. *See generally* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

21. *See* Edward Wyatt, *The Profits of Education; Investors Look To Make Schools Big Business*, INT'L HERALD TRIB., Nov. 5, 1999, at 1. The author also makes the point, relevant to the discussion in Part III below, that institutions of learning grew out of religious institutions.

22. *See infra* notes 23 - 25.

23. *See Scientific American: 50, 100, and 150 Years Ago*, Nov. 1999, *at* http://www.sciam.com/1999/1199issue/119950100.html (last visited April 16, 2001).

> The question of Free Schools is be decided at the coming election. We have conversed with thousands of our mechanics and yeoman upon this subject, and in general they are in favor of it. No man can be a fit citizen of the Republic,

President of the United States, a majority in Congress, and four out of nine judges of the U.S. Supreme Court determined that primary school education was so "inextricably intertwined with the Nation's economy"[24] that Congress could regulate guns on school grounds under its commerce power.[25]

Private home owners' associations make quasi-governmental decisions for their members. Unions do the same thing in Germany, but on a much larger scale. American lawyers spend huge amounts of money to manipulate legislation in their commercial self-interest.[26]

The new hierarchy of private enterprise has long been in the process of founding its own courts, consisting of arbitrators, rent-a-judges, and the like. International courts of arbitration are sometimes staffed by "judges" who never studied law or served as a judge in any particular jurisdiction. In this way the state is losing its traditional influence over the resolution of disputes, and simultaneously over the development of the common law.[27] Companies and conglomerates on the international level increasingly subject themselves to their own *lex mercatoria*,[28] which is not subject to the legislative jurisdiction of any particular state.[29]

The very institution of democracy appears to be threatened by commercialization[30] and thus by free enterprise. Political campaigns have become marketing campaigns in which the most influential positions in the body politic are up for sale to the highest bidder. The results of elections can

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unless he reads the opinions of our Statesmen upon different questions.

Id.

24. United States v. Lopez, 514 U.S. 549, 620. (1995). The Court found the federal legislation unconstitutional. *Id.* For a discussion of this case, see Thomas Lundmark, *Guns and Commerce in Dialectical Perspective*, 11 BYU J. PUB. L. 183 (1997).

25. The dissenters (Justices Breyer, Stevens, Souter, and Ginsburg) even confessed not to have been surprised to learn "that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools." *Lopez*, 514 U.S. at 622.

26. *See Who speaks for Main Street?*, ECONOMIST, June 26, 1999, at 87. According to the table published with this article, lawyers in the United States contributed $40 million to election funds in the period January 1, 1997 through June 30, 1998, which was more than labor's contribution.

27. It should perhaps be stressed that none of the developments sketched in this article is necessarily bad, just as the Church's loss of influence over the equity courts was not necessarily bad. On the loss of influence of the Christian Church over the equity court, see generally Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U.L. REV. 483 (1997).

28. *See, e.g.*, Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 N.W. U. L. REV. 453 (1999); Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 814 (1981).

29. In this way it bears some resemblance to the early development of the common law, which was largely beyond parliamentarian control.

30. *See generally* ULRICH BECK, DEMOCRACY WITHOUT ENEMIES (Mark Ritter trans., 1998); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997).

be predicted—perhaps made superfluous—by private political polls. Voter turnouts are at historic lows, as was recently witnessed for the elections to the European Parliament.[31] The cause of lower voter turnout is not apathy, but rather the superfluousness of the state,[32] since the influence of the state and its politics on the individual has been diminishing rapidly. As is graphically said, people vote with their feet. Nowadays they vote with their wallets, as often as they like. One euro, or one dollar, one vote.

The principle of equality is giving way to the principle of competition, which only concerns itself with equality of opportunity, not results. The notion that conditions should be the same for everyone in society appears ludicrous when judged by this principle, for competition necessarily implies both winners and losers. The losers in this new hierarchy, such as those on welfare, will favor the traditional state with its welfare system. The winners will see the welfare state at best as a necessary evil, an institution that must be funded, lest civil unrest result.

The hierarchies of the traditional state are relatively stable and quite transparent. Those of the new society are multilateral and mostly inscrutable.[33] Every week, newspapers report mergers between major competitors and the acquisition of one company by another. The state feels understandably threatened by this concentration of power and influence inside and outside of its boundaries. Governments attack with their antitrust laws, for, even if antitrust theory does not ordinarily account for this phenomenon,[34] the states are waging a battle for their continued existence. In this battle, states react unreasonably, even emotionally. They do businesses' bidding by waging a commercial "banana war."[35] People seem almost relieved if a war is waged, as in Kosovo, for other than economic purposes, such as protection of oil reserves. Prosecutors and judges try unsuccessfully to rein in Bill Gates

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31. The European elections of 1999 had by far the lowest voter turnout of any nationwide election in Germany. *See Waehler halten Union fuer wirtschaftspolitisch kompetenter*, FRANKFURTER ALLGEMEINE ZEITUNG, June 15, 1999, Politik, at 4.

32. The United Census Bureau reported that whereas 64% of those listed as immigrants to the United States had obtained citizenship in 1970, in 1997 it was only 35%. The drop is attributed in part to an apparent lack of interest in citizenship by many immigrants. Philip P. Pan, *U.S. Naturalization Rate Drops; 35% of Nation's Foreign-Born are Citizens, the Least This Century*, WASH. POST, Oct. 15, 1999, at A01, *available at* WL 23309220.

33. Thus, Professors Falk and Strauss call for a Global People's Assembly. *See* Richard Falk and Andrew Strauss, *Globalization Needs a Dose of Democracy*, INT'L HERALD TRIB., Oct. 5, 1999, at 8.

34. *See, e.g.*, E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 *et seq.* (1992). However, the antitrust theory does sometimes receive brief mention. *See, e.g.*, INGO SCHMIDT, WETTBEWERBSPOLITIK UND KARTELLRECHT 30-31 (5th ed. 1996).

35. Michael M. Weinstein, *The Banana War Between the United States and Europe is More Than a Trivial Spat*, N.Y. TIMES, Dec. 24, 1998, at C2; *see also* Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533 (1997).

and company,[36] who fight back by lobbying Congress to reduce funding for antitrust enforcement.[37]

The motor driving this development is private enterprise. Lawyers who cling to an old-fashioned notion of the state are being left behind.

II. CONFRONTATION BETWEEN HIERARCHIES: POLITICAL BOYCOTTS

One way to trace the evolution from a constitutional governmental hierarchy to a private enterprise society is to describe the gradual alterations in institutions. One could, for example, examine the confrontation between these two hierarchical systems by comparing the judicial systems of the states to the dispute resolution tribunals of arbitration and mediation. Or, one could compare principles of democracy with those of private enterprise. Antitrust law contains much of the institutional law of the hierarchy of the future in rudimentary form. One could compare the constitutional principle of separation of powers to the prohibition against horizontal monopolization, for example. The principle of federalism and its corollary, subsidiarity, can be glimpsed in antitrust's prohibition against vertical monopolization. For purposes of this article, however, the study will address the area of civil rights, specifically, the right of free speech versus the right of free competition as seen in the judicial decisions of Germany and the Unites States regarding calls for political boycotts. In Germany, constitutional rights for the most part are listed in the catalogue of rights in the German Constitution or "Basic Law." In the U.S. Constitution, most are found in the amendments. Private enterprise does not yet possess a similar catalogue.[38] But many norms analogous to civil rights can be found in the law of unfair competition.

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36. *See* Daniel J. Gifford, *Java and Microsoft: How Does the Antitrust Story Unfold?*, 44 VILL. L. REV. 67 (1999).

37. *See* Dan Morgan & Juliet Eilperin, *Microsoft Prods Congress To Cut Antitrust Funding*, INT'L HERALD TRIB., Oct. 16, 1999, at 1. To much the same effect *see also* Rajiv Chandrasekaran, *Microsoft's Big Lobbying Pays Off in Washington; Supporters in Congress Rally Around Company*, INT'L HERALD TRIB., Nov. 12, 1999, at 15; Joel Brinkley, *Microsoft Curries Favor With Bush; Firm Hires Consultant to Lobby in Opposition to the Antitrust Case*, INT'L HERALD TRIB., Apr. 12, 2000, at 3.

38. Some maintain that the treaties making up the European Union constitute an economic constitution. *See* Pieter VerLoren van Themaat, *Die Aufgabenverteilung zwischen dem Gesetzgeber und dem Europäischen Gerichtshof bei der Gestaltung der Wirtschaftsverfassung der Europäischen Gemeinschaften, in* EINE ORDNUNGSPOLITIK FÜR EUROPA: FESTSCHRIFT FÜR HANS VON DER GROEBEN ZU SEINEM 80. GEBURTSTAG 425 (Ernst Joachim Mestmäcker, Hans Möller, & Hans Peter Schwartz eds., 1987); Pieter VerLoren van Themaat, *Einige Bemerkungen zu dem Verhältnis zwischen den Begriffen Gemeinsamer Markt, Wirtschaftsunion, Währungsunion, Politische Union und Souveränität, in* EUROPARECHT, ENERGIERECHT, WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR BODO BORNER ZUM 70. GEBURTSTAG (Jürgen F. Baur, Peter Christian Müller-Graf, & Manfred Zuleeg eds., 1992); Wolf Sauter, *The Economic Constitution of the European Union*, 4 COL. J. OF EUR. L. 27 (1998).

A. *Political Boycotts in Perspective*

If one were to choose one single constitutional right to typify and define the democratic state, it would be freedom of speech. This freedom is protected in the Fifth Article[39] of the German Constitution and in the First Amendment[40] to the U.S. Constitution. A liberal democratic state would be unimaginable if freedom of speech were not protected. As the German Federal Constitutional Court stated in its *Lüth* case:

[The right of free speech] is absolutely necessary to liberal democracy because it makes possible the constant intellectual exchange, the battle of opinions, which is its life's blood. In a certain sense it is the foundation of every liberty, "the matrix, the indispensable condition of nearly every other form of freedom" (Cardozo).[41]

For purposes of this Article, it is not necessary to delve into the intricacies of various constitutional protections and to make differentiations in Germany between freedom of press, opinion,[42] assembly, and association,[43] or in the United States between freedom of speech, press, association, and petition, as expressed in the First Amendment. This study is concerned with the priority enjoyed by freedom of speech (using the more inclusive American terminology) relative to rights of private enterprise. It attempts to ascertain whether, and to what extent, rights of private enterprise diminish freedom of speech. In other words, which principle[44] is entitled to more respect?

Free competition is the free speech of the free enterprise system. It is the policy that is the most important; the most fundamental to private enterprise is perhaps that of competition. For competition to be free, it must be fair. Underhanded, false, or otherwise unfair competition clouds comparisons and distorts the market.

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39. Paragraph (1) of Article V of the German Constitution, GRUNDGESETZ [GG][Constitution] art. 5. (F.R.G), sometimes translated as "Basic Law," states: "Each person possesses the right freely to express and disseminate her opinion in speech, writing, and illustrations, and to inform herself without hindrance from generally accessible sources. Freedom of the press and freedom to report in broadcasts and film are guaranteed. There shall be no censorship."

40. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

41. 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVerfGE) 7, 198, 208 (1958), citing Palko v. Connecticut., 302 U.S. 319, 327 (1937)(citation omitted).

42. Freedom of speech and of the press are protected by paragraph (1) of Article 5 of the German Constitution. GRUNDGESETZ [GG][Constitution] art. 5, ¶ 1 (F.R.G).

43. Freedom of assembly is guaranteed by Article 8 of the German Constitution and freedom of association by Article 9. GRUNDGESETZ [GG][Constitution] arts. 8, 9 (F.R.G).

44. In this article the terms principle, value, and policy are used interchangeably unless the context indicates otherwise.

Prohibitions against unfair trade practices are found in statutory and common law. In Germany, the statutes most relevant to the cases digested below are §826 of the Civil Code,[45] which imposes liability for intentional, immoral activities, and §1 of the Law Against Unfair Trade Practices,[46] which accords a right to compensatory and injunctive relief against one who violates moral standards of business for purposes of trade competition. Comparable causes of action in the United States include the following: (1) §1 of the Sherman Act,[47] prohibiting combinations and conspiracies in restraint of trade; (2) §8(b)(4) of the National Labor Relations Act,[48] prohibiting secondary boycotts; (3) tortious interference with business relationships[49]; (4) trade or "product disparagement" pursuant to §623A[50] of the Restatement (Second) of the Law of Torts[51]; and (5) "food slander laws," discussed below,[52] that are on

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45. Section 826 of the BÜRGERLICHES GESETZBUCH (BGB) (German Civil Code) states: "One who intentionally injures another in a way that offends good morals is liable to make compensation for that injury."

46. Section 1 of the GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB (UWG) states: "Injunctive and compensatory relief are available against one who, for competitive purposes, undertakes activities in business intercourse that offend good morals."

47. 15 U.S.C. § 1 (2001).

48. 29 U.S.C. § 158(b)(4)(4) (2001).

49. *See* RESTATEMENT (SECOND) OF TORTS §§ 767 and 766B (1977), *discussed in* Joel E. Smith, *Liability of Third Party for Interference with Prospective Contractual Relationship Between Two Other Parties*, 6 A.L.R. 4th 195 (1981). These causes of action are generally traceable to a tort cause of action, first recognized in Lumley v. Gye, 118 Eng. Rep. 749 (1853), for inducing a breach of contract. *See generally* MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 1140 *et seq.* (1996).

50. The RESTATEMENT (SECOND) OF TORTS § 623A (1977) states:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

51. This is cited and discussed in, for example, David J. Bederman, Scott M. Christensen, & Scott Dean Quesenberry, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997); David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191 (1998); Lisa Dobson Gould, *Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech*, 73 WASH. L. REV. 1019 (1998); J. Brent Hagy, *Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act*, 29 TEX. TECH L. REV. 851 (1998); Julie K. Harders, *Iowa's Proposed Agricultural Food Products Act and Similar Veggie Libel Laws*, 3 DRAKE J. AGRIC. L. 251 (1998); Kevin A. Isern, *When is Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233 (1998); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403 (1995-96); Julie J. Srochi, *Must Peaches Be Preserved at All Costs? Questioning the Validity of Georgia's*

the books in approximately a dozen American states.

The United States Supreme Court follows a uniform approach to cases involving freedom of speech when they involve "matters of public concern."[53] According to this approach, statements of opinion are absolutely protected regardless of how vicious or malicious. Regardless of their effect, statements of fact enjoy equivalent protection only if they are true, or at least not demonstrably false. Even false statements of fact are protected under the U.S. approach if they have been uttered in good faith, that is, they were not published with reckless disregard for their truth or falsity.[54] To put it into the vernacular, according to the Supreme Court, the First Amendment protects the most outrageous statements of opinion on matters of public concern, and also protects fools who are even negligently ignorant of the facts; however, it does not protect outright liars.

By contrast, the German Federal Constitutional Court has never expressly accorded priority to freedom of speech above privacy rights and other values, although it recognizes that expressions uttered on a matter of substantial public moment (*eine die Öffentlichkeit wesentlich berührende Frage*) are entitled to a presumption of protection under the Fifth Article.[55] According to the German Federal Constitutional Court, the rights of the speaker must always be weighed against those of the person being injured by his speech; however, in undertaking this balance, the court accords wider latitude to statements of opinion than it does to false statements of fact.[56] As

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Perishable Product Disparagement Law, 12 GA. ST. U. L. REV. 1223 (1996); Eric M. Stahl, *Can Generic Products Be Disparaged?*, 71 WASH. L. REV. 517 (1996).

52. See *infra* note 84.

53. The statement in the text may be overly optimistic, for the Supreme Court has not yet been confronted with a case arising under a food slander statute. In the single case reaching the Court in which the right of free speech was raised in a product disparagement case, the Supreme Court only implicitly approved a decision of the Court of Appeals which had employed *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in this context. *See also* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984).

54. *See New York Times Co.* 376 U.S. at 279-80.

55. Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, NEUE JURISTISCHE WOCHENZEITSCHRIFT 1697, 1703 (1995). For other comparative views, see Georg Nolte, *Falwell vs. Strauß: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik*, 88 EUROPÄISCHE GRUNDRECHTE 253 (1988) and Guido C. Zöllner, *Ehrenschutz in den Vereinigten Staaten von Amerika - Vorbild für Deutschland?*, 22 DAJV-NEWSLETTER 111 (1997).

56. Grimm, *supra* note 55, at 1702. *See* Rudolf Wendt, in INGO VON MÜNCH & PHILIP KUNIG, GRUNDGESETZ-KOMMENTAR, art. 5, para. 10 (4th ed. 1992). *But see* Lars Weihe, *Freedom of speech - Freiheit ohne Grenzen, Eine rechtsvergleichende Untersuchung zur Meinungsfreiheit in den USA und Deutschland*, 24 DAJV-NEWSLETTER 46, 51 (1999)(citing examples of balancing in Supreme Court opinions). Compare the following statement from Lüth, "In cases concerning the formation of public opinion on an issue of importance to society, private interests of the individual, particularly those of a commercial nature, must generally give way." BVerfGE 7, 198, 219. *See also* Rüdiger Zuck, *Anmerkung zu BVerfG Beschluß vom 10.10.1995* ['Soldiers are Murderers' Case], JURISTENZEITUNG 364, 365 (1996).

in the United States, lies are also not protected.[57]

In order to narrow the subject of this study,[58] and hopefully to make the comparison more interesting, the discussion below concentrates on political boycotts, that is, boycotts that do not confer a direct commercial advantage on the person calling for the boycott.[59] For purposes of this study, political boycott is defined as any statement addressed to the public by someone who is not in competition with the subject of the boycott and which has as its purpose the impairment of the business of another.[60] By restricting the discussion to boycotts that meet this definition, it is hoped that democratic, political interests on the one hand, and commercial interests on the other, can be brought into closer focus. The definition intentionally excludes critical comments made by competitors in the marketplace, whether or not these comments be factual in nature, or merely opinions, and whether or not the statements be true or false. This is done in order to heighten the conflict between the values of democracy and those of commerce. To repeat, to constitute a call for political boycott under the definition employed in this study, there must be (1) a statement of fact or opinion; (2) directed to the public; (3) by one who is not in competition with the subject of the boycott; and (4) which has as its purpose the impairment of the business of the subject of the boycott, particularly by persuading others not to buy the products or use the services of that person.[61]

Two examples illustrate the application of this definition: Greenpeace and OprahWinfrey.[62] Some years ago, Greenpeace in Great Britain called for

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57. Holocaust Denial Case, BVerfGE 90, 241 (1994), *discussed in* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 889-90 and 892-94 (1997). *See also* BverfGE 54, 208, (219) (stating "[I]ncorrect information is not worthy of protection.").

58. Limiting the discussion to political boycotts also serves to exclude consideration of the extent of the protection of commercial speech.

59. For an early but perceptive view of the German case law, see Lerche, *Zur verfassungsgerichtlichen Deutung der Meinungsfreiheit (insbesondere im Bereich des Boykotts)*, FESTSCHRIFT FÜR GEBHART MÜLLER 197 (1970).

60. Compare the demarcation undertaken by Wendt, *supra* note 56, art. 5, ¶14, which states,

> Most would agree . . . that boycotts are in general entitled to a high degree of protection under the freedoms of speech and of the press, or perhaps that they even enjoy priority over the rights of the person being boycotted, as long as the boycott 'is not based on commercial self-interest but rather on concern for political, commercial, social, or cultural interests of the public' and as such serves 'to inform public opinion.'

Id.

61. The practice of boycotting was named after Captain Charles Cunningham Boycott, an English land agent in Ireland who was so ruthless in evicting tenants that his employees refused all cooperation with him and his family. See THE NEW COLUMBIA ENCYCLOPEDIA 349 (William H. Harris & Judith S. Levey eds., 1975).

62. A third recent example is the McDonald's case, a libel action brought by the fast food

worldwide boycott of Shell Oil in the Brent Spar affair. The statements made by the environmental group Greenpeace were statements of fact and opinion.[63] They were directed to the public by an organization (Greenpeace) which was not in competition with Shell. The purpose of the action was to impair Shell's business by dissuading people from buying Shell's products, particularly gasoline. Greenpeace was successful, but the matter never reached the courts. The second example is from the United States. That was the case of the American beef industry against television hostess Oprah Winfrey. Discussion of that case is deferred until after a comparison of the basic principles from case law in the United States and Germany relative to political boycotts.

The cases discussed below concern an area of law in which constitutional protections are extended to what appear to be private transactions. In Germany, this extension is known as *Drittwirkung*.[64] In the United States, this topic is ordinarily addressed under the "state action doctrine," although *Drittwirkung* is a broader concept.[65] According to explicit textual provisions in the constitutions of both countries, constitutional rights are designed to protect people only against the state, and not against private actors. However, there are many exceptions to this doctrine, as can be seen from the following comparisons.

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chain McDonald's against two pamphleteers who criticized the employment policies and the food served at McDonald's. Although this case is legally and historically quite interesting, it occurred in England and as such is beyond the scope of this paper. *See generally* JOHN VIDAL, MCLIBEL: BURGER CULTURE ON TRIAL (1997).

63. *See* Peter J. Spiro, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957 (1996).

64. *See* BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE STAATSRECHT 11, 49, para. 173 (14th ed. 1998). *Drittwirkung* literally means "third (party) effect." Professor Markesinis also refers to it as "horizontal effect." *See also* Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 LAW Q. REV. 47 (1999).

65. For an overview of the law in the United States, see William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437 (1998). For German-American comparisons, see Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 182-87 (1994); Eberle, *supra* note 57, at 811; Markesinis, *supra* note 64, at 80-84.

Comparisons are difficult not only because the United States recognizes common law, which is directly developed and reviewed by courts, as a source of law, but also because all American judges, not just those of a constitutional court, as in Germany, review the constitutionality of legislation. *See e.g.*, U.S. CONST. art. VI, § 2; Martin v. Hunter's Lessee, 14 U.S. 304 (1816). For an article that tackles some of these subtleties, see William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437 (1998).

B. *The Superiority of Political Speech*

Research of both German laws and the laws of the United States reveals that political speech (i.e., speech on a matter of public concern by a commercially disinterested person), that is not demonstrably false, enjoys superiority over claims of commercial harm. This superiority is seen most clearly in the *Lüth* and *NOW* cases discussed below. The discussion in this section will also address the Oprah Winfrey case, which illustrates the difficulty in distinguishing between opinion on matters of public concern, which is always protected, and statements of fact, which are entitled to less protection if they are not true.

1. *Germany*

The seminal case in Germany on the meaning and extent of the constitutional protection of speech is the so-called *Lüth* case, decided by the Federal Constitutional Court in 1958.[66] In that case, Herr Lüth, president of the Hamburg Press Club,[67] addressed an audience of film distributors and producers at the opening of the "Week of the German Film" in Hamburg. In his speech, he pleaded with film distributors and theater owners to boycott an innocuous romantic film *Unsterbliche Geliebte* ("Immortal Beloved") because the film had been directed by the leading director of National Socialist films, Viet Harlan. In calling for the boycott, Herr Lüth said, among other things:

> [The director and writer of the anti-Semitic film *Jud Süß* ("The Jew 'Sweet'")[68] is] the least capable person of all to restore [the moral reputation of the German film industry]. . . . His not-guilty verdict in Hamburg [where he had stood trial for crimes against humanity] was purely formal in nature. The written judgment of the court is morally damning.[69]

The film's producer, who stood to lose the most by a boycott, demanded a retraction. Herr Lüth responded by sending an open letter to the press:

> The court [in Hamburg] did nothing to disprove that Viet Harlan was the "Nazi film director No. 1" for a long period

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66. BVerfGE 7, 198 *discussed in* Eberle, *supra* note 57, 808.

67. Herr Lüth was also chief of the City of Hamburg's Press Office at the time, but the opinion stresses that he was speaking in his private capacity. *See id.*

68. BGHSt 19, 63. This historical drama, based roughly on the life of Suess ("Sweet") Oppenheimer, was later held by the Supreme Court for Criminal Matters to be anti-constitutional (*verfassungsfeindlich*) and, therefore, confiscatable. *See id.*

69. BVerfGE 7, 198 (198-99).

> of time during the Hitler regime and that his film *Jud Süß* made him one of the most important exponents of the murderous anti-Semitism of the Nazis.[70]

In fact, these statements by Herr Lüth were not quite accurate, for the not-guilty verdict was not "purely formal" in nature. In finding Viet Harlan not guilty, the court in Hamburg concluded that, had he refused to work on the film *Jud Süß*, he probably would have suffered bodily harm or even death. Accordingly, Viet Harlan was found not guilty because he had acted under duress. Nevertheless, despite the inaccuracies in Herr Lüth's report, his statements were found to enjoy the protection of the German Constitution. The court held that:

> [b]y summarizing his impression of the content of the judgment of the court in the words "formal acquittal" and "morally damning," [Herr Lüth] was not, in the opinion of the Federal Constitutional Court, exceeding the allowable boundary for public discussion of a topic of serious substance. It would constitute an unreasonable limitation of freedom of speech in a liberal democracy to demand . . . that [Herr Lüth], who is not a lawyer, should use the care of a "reader schooled in the criminal law," which would have led him to eschew the characterization "formal acquittal," because that term is [technically] only permissible when the court finds a lack of the objective prerequisites to criminal punishment. The descriptions chosen by [Herr Lüth] are not statements of fact whose truth or falsity could be proven; indeed, "formal acquittal" does not describe unambiguous findings of fact. What we are faced with is a conclusory, judgmental characterization of the content of the entire judgment. This must be accepted as proper because it is neither injurious in form nor so contrary to the facts as necessarily to cause misunderstandings of the content of the judgment in his listeners and readers. This might, for example, be the case if one were to speak without further explanation of someone who had been found not guilty as having been "convicted". . . . The statement of [Herr Lüth] can therefore not be likened to cases in which one calls for a boycott by spreading a short description of a factual situation which cannot be properly understood by those to whom it is addressed.[71]

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70. BVerfGE 7, 198 (200).

71. *Id.*

To summarize *Lüth*, the case concerned a call for a political boycott that was entitled to constitutional protection. The call included both statements of opinion and statements of fact. The court had no trouble recognizing an absolute right to utter one's opinions ("Herr Harlan is the least capable person imaginable to help restore the moral reputation of the German film industry.") However, the court was troubled by factual inaccuracies. Still it apparently allowed these because they were either inextricably mixed with elements of opinion[72] ("The judgment was morally damning."), or because they were not seriously misleading ("The verdict of not guilty was purely formal in nature.") The Federal Constitutional Court seems to imply that Herr Lüth's call for a boycott would not have been protected if he had seriously misled his readers and listeners by a misstatement of material fact.

2. *United States*

When researching American case law, clear boundaries must be set to avoid losing one's way in a forest of court decisions. The large number of cases in this field is due in large measure to the large number of legislative bodies, specifically the legislatures of the fifty states, that are actively involved in regulating commerce. The large number of cases is also due in part to the jurisdiction enjoyed by all courts, even state trial courts, to hear constitutional arguments and to strike down laws as unconstitutional.[73] In Germany, by contrast, the power to hold statutes unconstitutional resides solely in the German Federal Constitutional Court.[74]

Rather than attempt to collect every reported decision involving the conflict between free speech and free enterprise in the United States,[75] this article restricts itself primarily to the federal law of antitrust and unfair trade practices, where the federal courts enjoy exclusive jurisdiction.[76] Accordingly, this article limits itself to decisions of the federal courts, primarily to those of the U.S. Supreme Court. The most important decisions of that Court are discussed first.

The American case that compares most closely to the facts of the *Lüth* decision is *Missouri v. National Organization for Women* (NOW).[77] At issue

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72. *See* PIEROTH & SCHLINK, *supra* note 64, at 153, *citing* BVerfGE 61, 1.

73. *See* U.S. CONST. art. VI, § 2; *see also* Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

74. *See* GRUNDGESETZ [GG][Constitution] art. 100 (F.R.G.).

75. For an early case arising out of a labor dispute, see Truax v. Corrigan, 257 U.S. 312 (1921). Congress exempted calls for boycotts by labor groups from the reach of the antitrust laws in § 21 of the Clayton Act. 15 U.S.C. § 52. *See* WERNER Z. HIRSCH, LAW AND ECONOMICS 322 (2d ed. 1988); Daralyn Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757 (1992).

76. 28 U.S.C. §1337(a).

77. Missouri v. National Organization for Women (NOW), 467 F. Supp. 289 (W.D. Mo.

was a boycott that was purely political in nature, that is, where the group calling for the boycott was not in competition with the industry at which the boycott was aimed, and where the matter was one of public concern.

In 1977, NOW joined a number of other organizations by lobbying its members and other like-minded organizations not to hold conventions and meetings in states that had not yet ratified the Equal Rights Amendment. The State of Missouri filed an action in federal court under §1 of the Sherman Act alleging an unlawful combination to restrain trade. The district court ruled that the boycott was politically motivated and thus enjoyed the protection of the First Amendment. The Court of Appeals affirmed, and the Supreme Court denied review, letting the decision stand.[78] Comparing U.S. and German case law as sketched to this point, calls for boycotts are protected in both countries where the group or person calling for the boycott is not in competition with the group or person at which the boycott is aimed, and where the grounds for the boycott is a matter of public concern.

Before turning to a discussion of boycotts called for by competitors, what of the disparate treatment of statements of fact and statements of opinion? For example, in the *Lüth* case, the German Federal Constitutional Court said of the statements of Herr Lüth: "The descriptions chosen by [Herr Lüth] are not statements of fact whose truth or falsity could be proven [but rather] a conclusory, judgmental characterization."[79]

This demarcation between statements of fact and of opinion is employed by both the U.S. Supreme Court and the German Federal Constitutional Court.[80] And it is criticized by legal scholars in both countries.[81] The primary criticism is that the differentiation between statements of fact and statements of "mere" opinion is often impossible or nearly impossible to make. Nevertheless, in the United States even false statements of fact are protected

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1979).

78. Missouri v. Nat'l Org. for Women (NOW), 620 F.2d 1301 (8th Cir.), *cert. den'd*, 449 U.S. 842 (1980).

79. BVerfGE 7, 198 (200).

80. BVerfGE 85, 1 (14-15) "[Opinions] enjoy constitutional protection regardless of whether the comment is it valuable or valueless, true or false, well-grounded or not, emotional or rational." *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (stating that "The constitutional protection . . . 'does not turn upon the truth, popularity, or social utility of the ideas'."). The German Constitution does not explicitly protect speech, but expression of opinion instead. GRUNDGESETZ [GG][Constitution] art. 5 (F.R.G.). On the fact/opinion distinction in Germany, see SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 201-06 (1999).

81. On the difficulty of separating statements of fact from statements of opinion, see Rupert Scholz & Karlheinz Konrad, *Meinungsfreiheit und allgemeines Persönlichkeitsrecht: Zur Rechtsprechung des Bundesverfassungsgerichts*, 60 ARCHIV FÜR ÖFFENTLICHES RECHT 119 (1998) and Robert L. Spellman, *Fact or Opinion: Where to Draw the Line*, 9 COMM. & L. 45 (1987) and authorities cited. At least one judge considers the case decisions confusing. *See, e.g.*, Ollman v. Evans, 740 F.2d 970 (D.C. Cir. 1984)(en banc)(Edwards, J., stating, "When you read the [fact/opinion] cases, they are a mess.").

by the Constitution if they are not intentionally false, or if the speaker has not intentionally failed to investigate their truth or falsity.[82] Thus, even when calling for a boycott that is purely political, if the group calling for the boycott intentionally makes false factual statements that are material to the boycott, that particular speech is not protected by the Constitution. If, however, the facts though false are uttered by someone who is merely negligent in ascertaining the truth, the utterance is protected by the Constitution. As described above, the decision in the *Lüth* case comes to the same conclusion, even though it employs different reasoning. In other words, the holdings of the case decisions of the two courts concerning political boycotts are identical in their result if not their reasoning.

The difficulties encountered in the fact/opinion distinction are illustrated by the famous case against Oprah Winfrey,[83] in which the well-known television star and her network were sued for criticizing the safety of beef.

Before reviewing the facts of the case, some background information may be necessary. Twelve American states, including Texas, have enacted "food slander" legislation that in one form or another forbids the publication of false information on agricultural products.[84] This legislation is traceable to an episode of the *60 Minutes* in 1989 which reported that a substance (daminozide) sprayed on apples in the State of Washington was a potential carcinogen.[85] An organization of Washington apple producers sued CBS, the network that broadcasts *60 Minutes*, alleging that their products had been disparaged. According to the common law product-disparagement cause of action, the organization had to prove that the network knowingly published false information in order to impair the business of the apple growers. The organization of apple growers lost the case, in part because it could not prove that the network knew the report to be false.

In reaction to this decision, the legislatures of a number of American states enacted legislation to allow the recovery of damages in cases of agricultural disparagement even where publication was not knowingly false. Oprah Winfrey was claimed to have violated such a law when she said on camera in Texas that "[This information] has just stopped me cold from eating another hamburger. I'm stopped."[86] She said this after she had been informed

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82. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

83. Texas Beef Group v. Oprah Winfrey, 1998 U.S. Dist. Lexis 3559 at 10 (N.D. Tex. Feb. 26, 1998).

84. *See* Hagy, *supra* note 51, at 858. The states that have enacted legislation are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Ohio, Oklahoma, South Dakota, and Texas.

85. Auvil v. CBS *60 Minutes*, et al., 836 F. Supp. 740, 743, (E.D. Wash. 1993), *aff'd without opinion*, 67 F.3d 816 (9th Cir. 1995).

86. David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 218 (1998) (quoting Ms. Winfrey).

by a vegetarian and "food advocate" about the risk of Kreuzfeldt-Jakob infection from eating beef.

Even if not familiar with the case, one can imagine the result: the consumption and therefore sale of beef dropped dramatically. But where is the legal problem? According to the American beef industry, the legal problem lay in the fact that there had not been a single case in the United States in which Kreuzfeldt-Jakob disease was found to have been transmitted from beef to human beings. The actual risk of infection was therefore virtually zero.[87]

Should Oprah Winfrey's statement be considered a statement of fact or of opinion? If considered a statement of opinion, then it is entitled to absolute constitutional protection in the United States even if it had been uttered maliciously with intent to harm the beef industry, because the quality of food is a matter of public concern. However, if the statement is considered one of fact (that is, that beef is so dangerous that the consumption of a single hamburger represents an immediate risk of death), then the statement is false, and Oprah would have to defend herself by adducing evidence that she acted without knowledge of its falsity but rather negligently, for she cannot be held liable for negligent misstatements of fact under the case decisions of the U.S. Supreme Court.

The Oprah Winfrey case is not as far afield from the topic of political boycotts as might first appear, for the statement of Oprah Winfrey—whether factual or opinion—fits the definition of a political, that is, non-commercial, call for a boycott. Perhaps the element of intent is missing, but one could imagine a similar situation in which Oprah Winfrey says: "Do yourself and your family a favor, don't eat beef in any way, shape, or form!"

There is no decision of the highest court of either the United States or Germany which could be found to shed light on making the fact/opinion distinction in the area of political boycotts. Oprah prevailed before a jury, but the reasons for the decision are somewhat difficult to discern.[88]

To this point, this analysis has made several general findings: First, the case decisions of both countries are in agreement as long as the politically motivated call for a boycott is restricted to the use of rhetoric that is not provably false. Next, statements of opinion are, by their nature, impossible to prove true or false, and are for that reason protected.[89] Also, false statements

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87. Lawrence K. Altman, *F.D.A. Proposal Would Ban Using Animal Tissue in Feed*, N.Y. TIMES, Jan. 3, 1997, at A14.

88. Oprah probably won because it could not be proven that she intentionally misstated the facts. *See* Kuran & Sunstein, *supra* note 51, at 749. The judge named a number of reasons for her decision and for that of the jury. *See* Texas Beef Group v. Oprah Winfrey, 1998 U.S. Dist. Lexis 3559 at 10 (N.D. Tex. Feb. 26, 1998).

89. *See* BVerfGE, 90. 241(247) (1994) (stating that "[An opinion] cannot be proven right or wrong."); *see also* Gertz v. Welch, 418 U.S. 323, 340 (1974) (stating that "[T]here is no such thing as a false idea.").

of fact are protected in Germany as well as in the United States as long as they are entwined with political opinion. Furthermore, false statements are protected in the United States—perhaps not in Germany—as long as they are merely negligent in nature. Finally, intentionally false statements of fact enjoy constitutional protection in neither country.

C. *Competitors' Speech Distinguished*

The discussion thus far has examined calls for boycotts on matters of public concern by persons or groups who are not in competition with the subject of the boycott and who therefore do not stand to gain directly from the boycott. This Article refers to these boycotts as "political." As described above, they are entitled to protection as long as they are truthful. But what of boycotts called for by competitors? Are their utterances unprotected because of their commercial stake? Or does democratic governance compel protection even of competitors' opinions and truthful statements on matters of public concern?

The German Federal Constitutional Court faced these issues in the so-called "Reminder Notice" case[90] at the end of the 1970s. A trade organization for small retail stores was concerned about competition from large chain stores. The trade organization had been informed that certain manufacturers were selling their products to chain stores at reduced prices even though the manufacturers had promised to deal exclusively with the small retail stores. In reaction, the trade organization called for what amounted to a boycott. It included a "Reminder Notice" in a mailing to its members that asked members to list the names of offending manufacturers. It also suggested that the member stores stop carrying products from these manufacturers.

One supermarket chain challenged this action by the trade organization. The chain promptly obtained an injunction on the basis that the action constituted an unfair trade practice. The appellate court upheld the grant of injunction, whereupon the trade organization petitioned to the Federal Constitutional Court, claiming that its free speech rights had been violated.

The Federal Constitutional Court denied the petition, ruling that the action of the trade organization was not entitled to constitutional protection because the boycott had been for commercial, not political purposes. Truth of the factual assertions was therefore no defense. The court stressed that the trade organization had gone beyond merely informing its members by suggesting the boycott. It found that there was an underlying threat that those specialty stores that did not take part in the boycott would be barred from membership in the trade organization. Further, the court noted that the call for a boycott was not aimed at the public in general, but rather at specialty stores who constituted members of the trade organization. In short, the action

90. BVerfGE 62, 230 (1982).

was merely a commercial combination by one branch of retail stores against another, and as such was subject to prohibition. Those involved in enterprise cannot automatically invoke the protections afforded those involved in democratic government.

The case of *Eastern Railroad Presidents' Conference v. Noerr Motor Freight*[91] similarly concerned less of a political boycott than a battle by one branch of the transportation sector against another to protect or expand market share. It was, therefore, a commercial and not a political struggle. However, the commercial (non-political) speakers were nonetheless entitled to First Amendment protection.

The case concerned a political battle between the railroads and the trucking industry. Fearing bankruptcy, members of the railway industry banded together and hired a public relations firm to conduct a campaign against the trucking industry. The campaign was directed at the public, to encourage the public to ship by rail rather than by truck, and also at legislators, to influence them to change the law. There was no direct use of market power, as in the *Blinkfüer* case, discussed below,[92] nor was there any threat of the use of market power. Further, the railway industry occupied a decidedly subordinate position in the market. Thus, even though the battle was in the last analysis commercial, it was one that confined itself basically to the political arena. In response to the publicity campaign and the lobbying of the railway industry, the trucking industry brought an action under Section 1 of the Sherman Act,[93] claiming that the railroads were employing an unfair trade practice. Specifically, they claimed that the contract they had entered into with the public relations firm was a contract in restraint of trade.

The U.S. Supreme Court ruled against the trucking industry by finding the actions of the railroad companies to be protected by the First Amendment.[94] The Court held that, in order for democracy to work, the public and their representatives must be aware if a commercial branch is in desperate straits, even when being made aware of the financial situation might have adverse commercial consequences for competitors.[95] Later decisions make clear that not every kind of public relations action is protected by the First Amendment, rather, only those that are primarily designed to inform the public—particularly those that have as their primary purpose bringing about a change in the law.[96] While no comparable decision could be found in

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91. Eastern Railroad Presidents' Conference v. Noerr Motor Frieght, 365 U.S. 127 (1961).

92. *See infra* notes 95 - 97.

93. 15 U.S.C. § 1.

94. Eastern Railroad President's Conference, 365 U.S. 127. If an industry which stands to benefit from a boycott or other political action enjoys First Amendment protection, then a disinterested member of the public should *a fortiori* enjoy protection.

95. *Id.*

96. *See generally*, United Mine Workers v. Pennington, 381 U.S. 657 (1965) (finding that

Germany, there is sufficient reason to infer that German industry would be entitled to similar protection. For example, in the *Blinkfüer* case, the trade organization would have been within its rights to have sought protective legislation, and to have conducted a (truthful) public awareness campaign to this end.

To compare the case decisions from Germany with those from the United States digested to this point, it appears that politically motivated calls for boycott on a matter of public concern are protected in the United States as well as in Germany as long as they contain no misstatements of material fact and as long as the group calling for the boycott does not compete in the market with the subject of the boycott. Still open is the question whether use of economic or other means to support a boycott enjoys protection when the economic means are not exercised by one who stands to benefit from the boycott.

D. Coercive Means

This section collects cases in which otherwise protected calls for boycotts lost or potentially lost that constitutional protection. As will be shown, the common thread is the use or threat of use of physical or economic force to coerce others to participate in the boycott.

1. Germany

The last German case considered in this study is the so-called *Blinkfüer* case,[97] decided by the German Federal Constitutional Court in 1969. As in the "Reminder Notice" case, the underlying boycott did not meet the definition of political boycott employed in this article. The decision is nevertheless interesting because it involved political issues.

The controversy arose immediately following the building of the Berlin Wall in 1961. Before the Wall was built, publishers in both East and West Germany published magazines similar to *TV Guide* that listed the television and radio programs from East and West Germany. After the erection of the Wall, radio and television programs from the German Democratic Republic took on an even greater propaganda function. Much of this propaganda was aimed at Germans living in West Germany, including West Berlin. To protest the construction of the Berlin Wall, and the politicization of radio and television, the Axel Springer publishing conglomerate, which published a large number of popular magazines, called on stores and newsstands in

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agreements to persuade public authorities are not proscribed by the Sherman Act) and California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (finding that impeding a competitor's access to court does violate the Sherman Act). *See also* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992).

97. BVerfGE 25, 256 (1969), *discussed in* Eberle, *supra* note 57, at 830.

Western Germany and West Berlin not to sell publications that listed radio and television programs from the German Democratic Republic.

If the case had progressed no further than this, or if the Axel Springer conglomerate had merely called for a boycott by readers,[98] then Springer may or may not have run afoul of unfair trade practice laws. Even though it was calling for a boycott for political purposes, the publisher stood to gain, more or less directly, from a boycott, because its magazines, which did not list East German programs, would presumably have been purchased in place of the magazines of publishers who did list these programs. Indeed, however, the Axel Springer conglomerate went one step further: it threatened not to deliver its magazines to stores and newsstands that carried publications that listed East German programs.

Blinkfüer was such a magazine, a competitor of the Axel Springer conglomerate, whose sales fell off dramatically after Springer's announcement. *Blinkfüer* filed suit and lost because the Federal Supreme Court, the highest civil court, ruled that freedom of speech protected the action of Springer.

The German Federal Constitutional Court reversed. In doing so, it made clear that the right to call for a boycott is only enjoyed by someone who limits himself or herself to the use of arguments, not to the use or threat of the use of economic force against those who refuse to join in. Distinguishing the *Lüth* case, the Federal Constitutional Court stated that there the call for a boycott had confined itself to an appeal to the conscience and to moral considerations of those to whom it was addressed. No force, economic or otherwise, was threatened. The decision on whether or not to take part in the boycott was consequently free of compulsion. By contrast, the threat of the Springer conglomerate to stop delivery of its popular publications constituted, in light of the market strength of the conglomerate, a threat which many dealers could withstand only if they were willing to go out of business. The Court found the following:

> A call for a boycott will not be protected by freedom of speech if it does not confine itself to intellectual arguments, such as the use of the persuasive powers of representations, descriptions, and considerations, but rather employs such means that threaten to deprive those to whom it is addressed of the possibility of reaching a decision in full inner freedom without commercial pressure.[99]

According to the reasoning of this decision, it would follow that one who enjoys dominant market strength may not bolster his or her political

98. Markesinis, *supra* note 64, at 55.
99. BVerfGE 25, 256 (264).

convictions by the threat of the use of commercial compulsion. At most, the Springer conglomerate might have been able to call for such a boycott, but could not have taken part in the boycott itself. However, for purposes of charting the dividing line between freedom of speech and free enterprise this decision is of limited assistance, because it does not present a clear confrontation between the values of political democracy and those of private enterprise. It belongs more properly to the class of cases in which political and economic interests coincide.

2. *United States*

In 1966, the National Association for the Advancement of Colored People (NAACP)[100] called for a nonviolent boycott of stores owned by whites in Claiborne County, Mississippi, until the county had met nineteen demands for justice and equal protection.[101] The boycott was successful, in part because violence and threats of violence had been employed by some in support of the boycott.

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100. In another action, the NAACP has recently urged vacationers and groups seeking convention sites to boycott the state of South Carolina unless the legislature discontinues flying what many believe is a racist symbol, the confederate battle flag, over the state's capitol. *See* Sue Anne Pressley, *Boycott Aims to Bring Flag Down; NAACP Targets South Carolina Tourism to Rid Capitol of 'Symbol of Slavery,'* WASH. POST, Aug. 2, 1999, at A03, *available at* WL 17017188.

101. National Ass'n for the Advancement of Colored People v. Claiborne Hardware, 458 U.S. 886 (1982). From the hundreds of articles addressing this case, the most useful for the preparation of this article, in chronological order, were: Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983 (1982); Barbara J. Anderson, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984); Michael C. Harper, *The Consumer's Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Paul G. Mahoney, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 523 (1984); Donald L. Beschle, *Doing Well, Doing Good and Doing Noncommercial Boycotts Under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385 (1986); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 59 TEX. L. REV. 889 (1991); Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992); Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1 (1995); Jennifer L. Dauer, *Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se?*, 28 U.C. DAVIS L. REV. 1273 (1995); Michael Peter Waxman, *Threats of Foreign Group Boycotts of American Industry Made in Response to U.S. Government Trade Policy: Illegal Anticompetitive Activity or Protected Lobbying Under the Noerr-Pennington Doctrine?*, 29 GEO. WASH. J. INT'L L. & ECON. 659 (1996).

The violence and threats were contrary to the common law of Mississippi, and the NAACP denounced them. The Mississippi courts held that the violence so tainted the action as to render it illegal, but a unanimous U.S. Supreme Court reversed.[102] Nonviolent participation in the boycott, as well as calls for the boycott and continuation of the boycott themselves, were ruled to be protected by the First Amendment. Presumably the action would not have been protected if the NAACP supported or encouraged the coercive means.

The question of whether the threat of applying economic force, as in the *Blinkfüer* case, lies outside the protection of the First Amendment in the United States arose in a 1982 in a decision of the United States Supreme Court, *International Longshoremen's Association v. Allied International*,[103] involving a suit by an importer against a labor union. Reacting to news of the Soviet invasion of Afghanistan, the leadership of the International Longshoremen's Association ordered its members not to unload Russian products from ships in American ports. An American importer of Russian products sued the union, claiming that the action of the longshoremen constituted an illegal secondary boycott pursuant to Section 8(b)(4) of the National Labor Relations Act.[104] The trial court ruled that the union was validly exercising its constitutional rights. However, the Court of Appeals and the U.S. Supreme Court ruled against the union, even though the public actions of the union were of a purely political nature, the matter was of great public importance, and the union would not, directly or indirectly, benefit from the boycott.[105]

The reasoning of the Supreme Court bears a striking resemblance to that of the German Federal Constitutional Court in the *Blinkfüer* case.[106] The Court wrote, "Actions which have as their purpose not the use of communication but the use of compulsion are not protected by the First Amendment."[107] In effect, the importer was asserting the rights of the union membership, which had no choice but to honor the "boycott." Indeed, since the union had a monopoly, no one had a choice not to comply. Presumably, individual calls for a boycott and individual action by longshoremen not acting under union compulsion would both have been constitutionally protected.

To summarize, American and German law are identical on this issue: although a boycott itself envisages the application of economic force, the

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102. NAACP v. Claiborne Hardware, 458 U.S. 886.

103. International Longshoremen's Association v. Allied International, 456 U.S. 212 (1982).

104. 29 U.S.C. § 158(b)(4)(4).

105. International Longshoremen's Association, 456 U.S. at 225-26.

106. See quotation at *supra* note 99.

107. *See* International Longshoremen's Association., 456 U.S. at 226 (1982). The Court also stated "It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *See id.*

threat or use of economic or other force to coerce others to join a boycott is not constitutionally protected, regardless of whether the group calling for the boycott will benefit from it.

III. PERSPECTIVES ON THE FUTURE

To attempt to look into the future, it is sometimes useful to consider the past. In looking for evolutionary developments in which one hierarchy loses influence to another, in this case the state loses influence to private enterprise, it should be remembered that hierarchies consist merely of people, and that consequently no hierarchy can claim superiority in, much less a monopoly on, wisdom, justice, truth, public welfare, and social conscience.

The U.S. Constitution is a product of the Enlightenment. One substantial goal of the Enlightenment was to free society from the influence of a hierarchy which at the time predominated and allegedly suffocated the people: the Christian Church. By "freeing" people from the influence of the Christian Church, the revolutionaries of the Enlightenment hoped to enable people to decide for themselves.[108] At the time of the Enlightenment, societies had become more mobile, and citizens of different faiths were coming into contact with each other more and more often, especially in the colonies in North America. Churches were seen as inflexible, impractical, and old-fashioned. They divided people who wanted to be joined for non-religious reasons. Political mottoes, such as "Power to the People" and "Let the People Decide" are mottos that had the purpose and effect of freeing people from the influence of the Church. By freeing themselves from one hierarchy, the people established a new hierarchy: the democratic, liberal state. The institution of the Church was demoted in stature.[109]

Rather than set themselves in direct opposition to the churches, as did the Socialist states, the new liberal states of the United States of America and Weimar Germany, the constitutional precursor to the Federal Republic of Germany, created a special place for churches in the new constitutional order. This was a place inferior to that of the state, but a secure place nonetheless. It is thus no accident that the Bill of Rights of the American Constitution guarantees the separation of Church and State and guarantees freedom of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[110]

Article IV of the German Basic Law, in which freedom of speech is found, reads: "(1) Freedom of belief, of conscience, and freedom of religious

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108. In the words of Immanuel Kant: "Enlightenment is the exit of mankind out of his self-imposed inability to transact" (Aufklärung ist der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit). IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (1781).

109. The recent rise of religious politics might be seen as a reaction to the further erosion of ecclesiastic influence in society in favor of the political hierarchy.

110. U.S. CONST. amend. I.

and philosophical creeds are inviolable; (2) The undisturbed practice of religion is protected."[111] As demonstrated in studies,[112] and as known from experience, freedom of religion and belief enjoys very high protection in both the United States and Germany even though this freedom is arguably of little importance to the functioning of a democratic state.

Freedom of belief is to religion what freedom of speech is to democracy: an absolute necessity. For that reason, freedom of speech will be protected in the hierarchy of the future, the hierarchy of free enterprise. This has practical consequences. It means that, if one involved in international arbitration believes that his or her activities are protected by freedom of speech, the arbitrators will do their utmost to avoid a confrontation with the states and accordingly will protect freedom of speech. Freedom of speech will not be diminished in the new hierarchical structure of free enterprise as long as it is not used for competitive purposes. Indeed, when international arbitrators have progressed to the point that they have developed their own caselaw on political boycotts, this will constitute their "Dear John" letter to the states, and the states as we have known them will be in decline. State organizations will doubtless continue to exist, but not with the same influence. They will doubtless continue to secure public order, much as private police services do today; but they will do so haltingly and modestly as one sees churches of today dedicate themselves to spiritual and social matters and for the most part abstain from politics.

On the international stage, the United Nations is "out" and the World Trade Organization is "in." In the future the United Nations, which is the ultimate expression of the nation-states of the earth, will content itself with protecting the rights of airline passengers, guaranteeing basic "human rights" to animals, and similar matters. All the while the World Trade Organization, or perhaps some other commercially centered organization, will be deciding whether and in what manner products and animals may be genetically manipulated, whether education should be provided by the public or private sector,[113] and whether domestic markets must be open to foreign products.[114] In some sense western society is leaving the age of geopolitics behind and entering the age of econopolitics.

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111. GRUNDGESETZ [GG][Constitution] art. 4 (F.R.G).

112. *See e.g.*, P. C. JAIN, LAW AND RELIGION: A COMPARATIVE STUDY OF THE FREEDOM OF RELIGION IN INDIA AND THE UNITED STATES (1974).

113. Recently the French Education Minister accused the United States of trying to brainwash the world by including education among service industries to be liberalized by the World Trade Organization. INT'L HERALD TRIB., Nov. 24, 1999, at 10.

114. *See* Barry James, *Battle to Prove Beef Hormone Risk*, INT'L HERALD TRIB., Oct. 18, 1999, at 13 (indicating that the WTO has ordered the European Union to lift its 10-year ban on U.S. and Canadian beef); *see also* Sam Howe Verhovek, *Seattle's WTO Talks Draw Globalization Foes*, INT'L HERALD TRIB., Oct. 14, 1999, at 13 (indicating that the WTO has already been entangled in spats over Caribbean-grown bananas, gas refined in Venezuela, and Japanese imported liquor).

One hears it said that churches have done more harm than good. Similar statements are already being made about government: "Private enterprise can do it better." That is the bottom line.

"APRES MOI LE DELUGE"? JUDICIAL REVIEW IN HONG KONG SINCE BRITAIN RELINQUISHED SOVEREIGNTY

Tahirih V. Lee*

INTRODUCTION

One of the burning questions stemming from China's promise that the Hong Kong Special Administrative Region (HKSAR) would enjoy a "high degree of autonomy" is whether the HKSAR's courts would have the authority to review issues of constitutional magnitude and, if so, whether their decisions on these issues would stand free of interference by the People's Republic of China (PRC). The Sino-British Joint Declaration of 1984 promulgated in PRC law and international law a guaranty that implied a positive answer to this question: "the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication."[1] The PRC further promised in the Joint Declaration that the "[j]udicial power" that was to "be vested in the courts" of the SAR was to be exercised "independently and free from any interference."[2] The only limit upon the discretion of judicial decisions mentioned in the Joint Declaration was "the laws of the Hong Kong Special Administrative Region and [to a lesser extent] precedents in other common law jurisdictions."[3]

Despite these promises, however, most of the academic and popular discussion about Hong Kong's judiciary in the United States, and much of it in Hong Kong, during the several years leading up to the reversion to Chinese sovereignty, revolved around a fear about its decline after the reversion.[4] The

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-Ir.-P.R.C., §III. An English version can be found in PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 45, 49 (Andrew Byrnes et al. eds., 1993).

2. *Id.* at 49-50.

3. *Id.* at 50.

4. Several scholars in the United States predicted the demise of judicial review in Hong

source of concern was China's lack of respect for judicial independence and its predisposition against courts as enforcers of rights. Litigants may not challenge the constitutionality of legislation or administrative acts in the courts of the PRC and, under the Administrative Litigation Law, may under only limited circumstances challenge the legality of administrative acts in PRC courts. Only the National People's Congress (NPC) may interpret the PRC constitution.[5]

Britain's relative lack of concern for the people of Hong Kong in the years leading up to the transfer of sovereignty only compounded these fears. The British officials who governed Hong Kong during the last two decades of British colonial rule over the city did little to ensure that the PRC would maintain the scope of judicial review present in Hong Kong at the transfer of sovereignty. Nor did the United Kingdom do as much as it might have to include Hong Kong residents in the negotiations about the terms of the transition of power. The few dozen locals who participated in drafting the constitution for Hong Kong after the transfer were known to be carefully chosen by China's leaders, who considered loyalty to Beijing to be the paramount qualification for participation. Members of Hong Kong's

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Kong after June 30, 1997. *See* Jared Leung, *Concerns Over the Rule of Law and the Court of Final Appeal in Hong Kong*, 3 ILSA J. INT'L & COMP. L. 843 (1997); Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L. J. 335 (1997); David A. Jones, Jr. *A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgment of Individual Rights and Local Autonomy*, 12 YALE J. INT'L L. 250, 286-91 (1987); Donna Lee, Note, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. OF TRANSNAT'L L. 175 (1997). In her excellent studies of constitutional freedoms in the Hong Kong SAR, Frances H. Foster sounded a pessimistic note about their survival and suggested that the court system would not be an ideal place to launch defenses of those freedoms. *See* Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U.L.Q. 113, 143-45 (1998); Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 791-95 (1998).

For some English-language publications in the popular media that expressed fears about the fate of Hong Kong's judiciary after the retroversion, see Ute Dickerscheid, *Fears of Legal Vacuum in Hong Kong After 1997*, DEUTSCHE PRESSE-AGENTUR; Louise do Rosario, *No Appeal: Court Snagged Between Hong Kong and China*, Apr. 2, 1995, FAR EASTERN ECONOMIC REVIEW, May 18, 1995, at 22. Peter Stein, *Is China Backsliding on Hong Kong Court? Reports Indicate Beijing May Want Final Decisions to be Less Final*, ASIA WALL ST. J., May 5, 1995, at 1. Edward A. Gargan, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A1; William H. Overholt, *Twelve Tips for the Markets*, NEWSWEEK, May 19, 1997, at 48-50.

5. *See* Administrative Litigation Law of the People's Republic of China (adopted at the Second Session of the Seventh National People's Congress on April 4, 1989, promulgated by Order No. 16 of the President of the People's Republic of China on April 4, 1989, and effective as of October 1, 1990). English translation available in Volume 1 of LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (compiled by the Bureau of Legislative Affairs of the State Council of the PRC, published by the China Legal System Publishing House, Beijing, July 1991), at 349-59.

Democratic Party in particular feared that, without the input of a more rights-conscious group of Hong Kong citizens, conditions were ripe for China to take the power to review governmental acts from Hong Kong's judiciary. These Democrats criticized even Governor Christopher Patten's pro-democracy government for caving in to China on the terms of the judicial review for Hong Kong courts that the PRC enacted in 1995.[6] One American law student concluded in a law review note that, with limitations on judicial review enacted in the Basic Law and in the Hong Kong ordinance establishing Hong Kong's Court of Final Appeal, China eviscerated judicial review.[7]

Contrary to these dire predictions, however, judicial review in Hong Kong did not disappear after its transfer to China. It survived the transfer, though with uncertainty about its parameters. Uncertainty about such parameters is not unusual in legal systems and does not itself diminish the health of judicial review in the HKSAR. In fact, a state of uncertainty can lead to a state of flux which provides opportunities to enlarge the scope of judicial review. Just like much of the rest of Hong Kong society, the judiciary stands at a juncture of great possibility for defining the boundaries of judicial review. Now embarked on its fourth year under Chinese rule, Hong Kong is being shaken to its foundations as evidenced by academic freedom being questioned in protests and in the press, the reputation of the Chief Executive and the courts coming under attack, and forty-seven people being stabbed or injured by fire in a riot staged by about twenty mainland Chinese in Hong Kong's Immigration Department after they were refused local identity cards.[8] The situation, because of the change it invites, can just as easily bode well as ill.[9] The key for the judiciary of Hong Kong, if it wants to help move the trajectory toward well and away from ill, is prudence in the exercise of its review power.[10]

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6. According to constitutional doctrine in the United States, judicial review is defined as the invalidation by courts of decisions of the Executive and Legislative branches of government which the courts deem to violate the United States Constitution. *See* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 37 (3d ed. 1996); JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1 (1995).

7. *See* Lee, *supra* note 4, at 195, 209-10.

8. *See Gang Stab Officials, Set Fire in HK Residency Row*, REUTERS NEWS SERVICE, Aug. 1, 2000.

9. Scholars continue to be pessimistic about the fate of judicial review in Hong Kong. *See* Mark Elliott and Christopher Forsyth, *The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress*, ASIA PAC. L. REV. (2000).

10. The notion that judicial prudence helps court systems to survive where the foundations of their power are shaky is expressed eloquently in the writings of W. Michael Reisman. *See generally* W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988). "[T]he tendency of the international legal system [is]to remain minimally relevant by accommodating to the unyielding realities of effective power." *Id.* Reisman appeals to the benefits of prudence also when advocating for restraint on the part of U.S. Federal Courts in

Judicial review in Hong Kong's British tradition encompasses three types of authority. One is the power to invalidate statutes because they conflict with the constitution. In colonial Hong Kong, courts could invalidate Hong Kong statutes if they contravened British legislation and constitutional law for Hong Kong, namely, the Letters Patent and the Orders in Council. In the HKSAR, there are potentially two types of constitutional issues, those arising under the PRC constitution and those arising under the Basic Law. Another kind of judicial review is the power to declare administrative acts either contrary to the enabling statute or unconstitutional. In colonial Hong Kong, courts exercised this power, and they continue to do so under Chinese rule. However, today this power is complicated by the two-tiered structure of government in the HKSAR, in which Hong Kong is subject to the administrative decisions of both a local administration and a national administration, and it is unclear whether Hong Kong courts may review PRC administrative acts. A third type of judicial review is the power to review acts in general, or in other words, the jurisdiction of the court.[11]

Under this scheme, courts reach the zenith of their powers when they invalidate statutes because this puts them on a virtually equal footing with the legislature. Likewise, in a legal system where the executive is primarily responsible for the bills that the legislature enacts, as is the case in Hong Kong, this scheme puts courts on a virtually equal footing with the executive.[12] The clearest gauge, then, of whether judicial review lost ground in Hong Kong under Chinese rule is whether the Hong Kong courts lost the power to declare statutes unconstitutional. This Article argues that Hong Kong courts have not lost the power to declare local statutes unconstitutional. Rather, at the start of the fourth year of the HKSAR, its courts enjoy power to invalidate statutes that is encumbered by few legal constraints.

This argument follows four lines of reasoning. First, the National People's Congress Standing Committee (NPCSC), when it handed down the June 26, 1999 interpretation of the constitutional provisions at issue in the landmark constitutional cases *Ng Ka Ling v. Director of Immigration* [13] and *Chan Kam Nga v. Director of Immigration*,[14] did not restore the portions of

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cases involving foreign affairs matters. *See* W. Michael Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, AM. SOC'Y INT'L L. PROC. 182 (1977).

11. For a general description of the relationship between the judiciary and legislature in the United Kingdom, see A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 57-58 (10th ed. 1985), and for a general description of the difference between constitutional and administrative review, see *id.* at 6-10.

12. Bradley states that "the authoritative interpretation of that law is a matter for the courts....but in this task the judges must not seek to compete with the political authority of the legislature." *Id.* at 48.

13. Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999), *available at* www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm.

14. Chan Kam Nga (an infant) & Others v. Director of Immigration, 2 HKCFAR 82

the Hong Kong statute invalidated by the Court of Final Appeal for all affected parties. Thus, to the extent that this decision interfered with the Court of Final Appeal's power to invalidate local law, the degree of its interference was limited in its application. Second, the NPCSC did not nullify the power of Hong Kong courts to invalidate local statutes in that decision, nor did the Court of Final Appeal in its application of the decision nullify this power. While the NPCSC's decision restored the statute that the court declared unconstitutional, it refrained from vacating any of the court's language in these two opinions which asserted that the court had broad power to review constitutional issues.[15] Third, the Standing Committee decision did not necessarily set a precedent whereby constitutional review is not final in the HKSAR. Fourth, Hong Kong courts have not yet refused to take jurisdiction over any administrative act by either Hong Kong or PRC government bodies on the ground that these are acts of state which are not reviewable under Article 19 of the Basic Law. Therefore, the door is still open for Hong Kong courts to review the constitutionality not just of Hong Kong statutes but also of PRC statutes.

I. THE INVALIDATION OF LOCAL LAW

Thus far, when the Hong Kong SAR courts have invalidated statutory provisions, they have done so without interference by the PRC, and the rulings remained effective for the parties to the instant case and, most likely, will remain effective for some of those similarly situated. Since Hong Kong returned to Chinese sovereignty, there have been three instances of a court in Hong Kong invalidating a local statute. In two of these instances, the Court of Final Appeal, in *Ng Ka Ling v. Director of Immigration*[16] and *Chan Kam Nga v. Director of Immigration*,[17] invalidated portions of an amendment to the Immigration Ordinance made nine days after the handover by the Provisional Legislative Council. Section 2AA of the No. 3 Ordinance required Mainland Chinese who claimed the right of abode in Hong Kong to enter Hong Kong pursuant to certain procedures carried out by Guangdong Provincial authorities, while another provision excluded from the right of abode those Mainlanders whose parent became a permanent resident of Hong Kong after the Mainlander's birth.

The basis for the court's invalidation of these statutory provisions was Article 24(2)(3) of the Basic Law of the HKSAR.[18] This constitutional

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(HKSAR Court of Final Appeal, Jan. 29, 1999).

15. *See* Elliott and Forsyth, *supra* note 9.

16. *Ng Ka Ling*, 2 HKCFAR 141.

17. *Chan Kam Nga*, 2 HKCFAR 82.

18. Zhonghua renmin gongheguo xianggang tebie xingzhengqu jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China], promulgated on April 4, 1990, *entered into force* on July 1, 1997, art. 24(2)(3), published in both Chinese

provision is ambiguous about the timing of when the parent of the Mainland Chinese person eligible for the right of abode in Hong Kong gained permanent resident status. It does not say when the child had to be born to permanent residents of Hong Kong in order to qualify as a permanent resident under Article 24(2)(3) of the Basic Law–before or after the parent acquired permanent resident status, or only after the parent acquired permanent resident status. Nor does this provision specify any procedures which these immigrants must follow in order to obtain their right of abode under Article 24(2)(3).

The court rejected the HKSAR government's argument that Article 22 of the Basic Law required the applicants for right of abode status to follow the statutory procedures. Article 22 states that people from Mainland China have to apply for entry through immigration authorities if they want to go to Hong Kong. Britain and China, before the handover, negotiated an agreement in which the PRC government only gives out 150 one-way "exit permits" per day.[19] That is one reason they are difficult to get. Therefore, there is a conflict between Article 22 and 24. Either Article 24(2)(3) takes precedence, and the applicants need not apply for one-way permits like anybody else, or Article 22 takes precedence and applicants must apply for a one-way permit like anybody else.[20]

The appellate court below accepted the government's arguments on both issues. The court thus linked Basic Law Articles 22 and 24(2)(3) and used this link to resolve the question of the immigration procedures against the children who were seeking the right of abode without one-way exit permits that were valid at the time that they applied to the Director of Immigration for the right of abode.[21] In the case involving applicants whose parent became a permanent resident of Hong Kong after the applicants' birth, Chief Judge Chan, in his intermediate-level appellate decision, determined that the Basic Law had to provide that eligible Mainlanders be born of a parent who already was a permanent resident of Hong Kong, because the intention of the ordinance could not have been that entire family trees would automatically gain permanent residency status. The example he used was of a 70-year-old man with seven sons (each of whom also has a son) who comes to Hong Kong legally and lives for seven years and then gains the permanent resident status. At that moment, all seven of his sons gain permanent resident status, and then

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and English by the One Country Two Systems Research Institute, Ltd., Hong Kong (1992). [hereinafter Basic Law].

19. Basic Law, art. 22.

20. Interview with Martin Lee Chu-ming, Barrister, Member of the Legislative Council, and President of the Democratic Party of Hong Kong, in the Democratic Party headquarters (July 28, 2000) (explaining the system of entry permits).

21. *See* Cheng Lai Wah v. Director of Immigration, Ng Ka Ling, Ng Tan Tan v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Yeung Ni Ni v. Director of Immigration, 2 HKCFAR 4, 13-25 (HKSAR Court of Final Appeal, Apr. 2, 1998).

all seven of each of their sons gain permanent resident status. There are 1.6 million of these old men, according to Hong Kong government figures. Even if the figures are inflated, say by a factor of two, then there are still 800,000, and even if some of these permanent residents are in their forties and fifties, that is still a lot of people! Chief Judge Chan's rationale was that Hong Kong cannot house and school all of them. As for the argument about splitting the family, yes, it is sad, but it is not the ruling by the High Court that separates the permanent resident parent in Hong Kong from his or her children in the PRC. It is the parent's choice to split the family.[22]

The PRC did not intervene before the Court of Final Appeal issued its two rulings. Five months after the ruling, the NPCSC handed down a reinterpretation of the constitutional provisions at issue in those cases which restored those statutory provisions and essentially restored Chief Judge Chan's two rulings in the immigration cases. This reinterpretation left open, however, the question of who would be affected by that restoration. Specifically, which Mainlanders whose parent had achieved permanent resident status after their birth were now entitled to the right abode, and which Mainlanders who had entered Hong Kong without going through the procedures set out in the Ordinance were now entitled to the right of abode? By leaving this question open, the NPCSC allowed at least a portion of the invalidation of the statutory provisions by the Court of Final Appeal to stand and left the decision about how much of the invalidation would stand up to authorities in Hong Kong.

Whoever decides the effect of the NPCSC's reinterpretations exercises much of the authority to invalidate Hong Kong's statutes. Although the NPCSC itself, in its reinterpretation, imposed a limitation on its application, it did so only in broad terms which left open further questions about its application. To date, the NPCSC has stayed out of the resolution of those questions and has left it to the Hong Kong government and courts to resolve them. Chief Executive Tung Chee-hwa took the early lead in setting out guidelines for the application of the reinterpretation, but even he appears to be leaving the application of his guidelines up to the courts of Hong Kong.

Which questions about the reinterpretation's application are being resolved by Hong Kong's courts? The overarching question is who are "the parties concerned with the relevant legal proceedings?"[23] This is the Hong

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22. *See* Chan Kam Nga v. Director of Immigration (HKSAR Court of Final Appeal, May 20, 1998) (on file with the author); Interview with Chief Judge Chan (July 25, 2000), *infra* note 49.

23. "Quanguo renmin daibaio dahui changwu weiyuanhui guanyu 'Zhonghua renmin gongheguo xianggan tebie xingzhengqu jibenfa' diershi'ertiao disikuan he diershisitiao dierkuan disanxiang de jieyi (cao'an) (1999 nian 6 yue 26 ri dijiujie quanguo renmin daibiao dahui changwu weiyuanhui dishici huiyi tongguo)," [Draft Interpretation of the Standing Committee of the National People's Congress Concerning the PRC Hong Kong Special Administrative Region Basic Law Article 22(4) and Article 24(2)(3)], (issued June 26, 1999, Tenth Meeting of the Ninth Plenary Session of the NPC Standing Committee), published online

Kong government's translation of the language used in the NPCSC reinterpretation to set out an exception to its application. This language translates as follows: "This interpretation does not affect the right of abode in the Hong Kong Special Administrative Region that [the] parties in [the] relevant lawsuits acquired pursuant to the judgments of the Court of Final Appeal in the relevant cases dated January 29, 1999."[24]

This language does not explicitly limit its exemption to the four litigants in *Ng Ka Ling* and the eighty-one litigants in *Chan Kam Nga*. The language possibly encompasses this narrow reading but also, given the absence of explicitly restricting language, possibly encompasses more than just the named litigants in those two cases. This ambiguity is present in the original Chinese as well as in my English translation and in the English translation used in the Hong Kong courts, which uses a passive tense to express the right that was acquired. The Chinese term "*youguan*" is used twice to refer to both the lawsuits connected to the parties whose right of abode is not abrogated by the NPCSC decision and to the two judgments whose interpretations of the Basic Law the NPCSC revised in its June, 1999, decision. The term "*suo*" follows the word for parties, "*dangshiren*," and the courts are translating this as "parties concerned in the relevant legal proceedings." The placement of "*suo*" here constructs a passive relationship between the litigation and the parties.

Given the legal system in which it must be interpreted, namely, the common law system of the HKSAR which incorporated on July 1, 1997 something of the socialist and civil law system of the PRC, the language "parties in the relevant lawsuits" raises particularly difficult questions about the application of the NPCSC reinterpretation because it means something quite different in a common law context than it does in a civil law context. In a common law system, the rulings of courts apply to all similarly situated parties. In civil law systems, they do not. Therefore, there are typically many more parties concerned with the outcome of a lawsuit in a common law court than in a civil law court. Common law judgments may be limited to just the parties named in the instant case, but this is the exception and must explicitly be declared by the ruling court or the court superior to it if the ruling is challenged on appeal. Legislatures in common law legal systems do not have the power to declare this type of limitation on court judgments. All the legislatures can do is pass legislation which contradicts the holding, and when they do that, it is up to the courts to apply the legislation. This raises

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in the Jiujie quanguo renda changweihui dishici huiyi zhuanti baodao [Special Report on the Tenth Meeting of the Ninth Plenary Session of the National People's Congress Standing Committee], *available at* http://www.peopledaily.com.cn/.

24. *Id.* The Chinese is "Benjieyi buyingxiang xianggang tebie xingzhengqu zongshen fayuanzhang 1999 nian 1 yue 29 ri dui youguan anjian panjue de youguan susong dangshiren suo jiede de xianggang tebie xingshengqu juliuquan." *Id.* The English translation is my own. The words in brackets are possible but not necessary parts of the translation.

questions of retroactivity, which tend to be complex, and as courts wrestle their way through legislation, they almost never give any kind of retroactive application to such legislation.[25] Legislatures in the Anglo-American tradition rarely enact statutes with retroactive effect.[26]

According to pronouncements by the Chief Executive, a reading of the NPCSC language to cover more than just the named parties is warranted. The pronouncements indicate that the NPCSC decision does not affect either the parties in *Ng Ka Ling* and *Chan Kam Nga* or some other group of persons. The Chief Executive announced this policy on the day that the NPCSC released its decision to the public, as follows:

> Secondly, to comply with the principle that judgments previously rendered by the Court of Final Appeal shall not be affected by an interpretation of the National People's Congress Standing Committee, we will allow persons who arrived in Hong Kong between July 1, 1997 and January 29, 1999, and had claimed the right of abode, to have their status as permanent residents verified in accordance with the CFA decision. It is estimated that there are about 3,700 people in this category.
>
> Thirdly, for those who arrived after January 29, 1999, or I could put it in another way, thirdly, for any other persons, they will only be able to apply for the right of abode if they satisfy the terms of the interpretation given by the Standing Committee of the National People's Congress.[27]

The HKSAR government elaborated on this policy that day by asserting that 3700 people were exempted from the NPCSC reinterpretation.[28]

The Chinese version of the pronouncements, however, appears to make the timing of the claims important. The language which describes the people who are exempt from the decision's effect says that they are those who, between those dates, lodged claims for the right of abode in the relevant office in Hong Kong [" . . . *zaigang bing zeng xiang dangju shengcheng yongyou*

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25. *See* WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 267-77 (1988).

26. *See* Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 HASTINGS L.J. 77 (1977).

27. Press Release, Hong Kong Special Administrative Region Government, Transcript of Media Session on NPCSC Interpretation of Basic Law (June 26, 1999), *at* www.info.gov.hk/gia/general/199906/26/npc-e.htm.

28. *See* Press Release, Hong Kong Special Administrative Region Government, 3,700 ROA Claimants Not Affected by Interpretation (June 26, 1999), *at* www.info.gov.hk/gia/general199906/26/0626179.htm

juliuquan de renshi."].[29] The relevant office is not specified, but the location of this office in Hong Kong is clear. So it must be an office of the Hong Kong government. What is less than crystal clear is whether the claimant must be physically present in Hong Kong to lodge such a claim. Nor does the pronouncement explain more generally what constitutes a lodging of the claim that satisfies the government's criteria.

These pronouncements give rise to a number of questions of interpretation. The English version of these pronouncements made the time of arrival in Hong Kong the key evidentiary point and refrained from assigning significance to the timing of the claim. The Chinese language version assigned significance to the timing and possibly the location of lodging the claim. Therefore, one question is, did the pronouncement exempt from the reinterpretation any Mainlander who arrived before January 29, 1999 but lodged their application for right of abode status after that day, possibly even after the June 26, 1999 NPCSC reinterpretation. If no time limit was imposed on the filing of these applications, the figure 3700 is problematic because the number of claims with no time limit would always have the potential to grow. This possible inconsistency within the government's pronouncement posed a question for subsequent resolution.

Another question that remained unanswered was why the Hong Kong government's pronouncements excluded Mainlanders who had either arrived or lodged their claims between January 29 and June 26, 1999. If the decision of the NPCSC corrected an erroneous interpretation of Hong Kong's constitution, but, according to the decision itself, would not be applied retroactively, in conformity with the provision at the end of paragraph 3 of Article 158 of the Basic Law, did this not exempt all Mainlanders who lodged their claims before the decision on June 26, 1999? If the Hong Kong government was attempting to meet reasonable expectations with these pronouncements about what the law in Hong Kong was, did it not make sense to exclude from the decision's effect claims made before the law was changed?

Two days later, the government raised the issue of the timing of the claims and attempted to resolve it, but it did not address the question of why claims or arrivals between January 29 and June 26, 1999 were retroactively covered by the NPCSC decision. The government stated that the figure of 3700 referred to the number of people "set to gain the right of abode . . . "[30] implying that this number did not refer merely to the more narrowly defined group of those exempted from the reinterpretation, but to all entitled to gain the right of abode at that time. These people fell into three categories:

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29. Chen Weiwen et al v. The Director of Immigration at 39 (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with the author).

30. Press Release, Hong Kong Special Administrative Region Government, No Amnesty for Overstayers (June 28, 1999), *at* www.info.gov.hk/gia/general/199906/28/0628238.htm.

- those who were in Hong Kong between July 1 and 10, 1997, made right of abode claims, and have been covered by the Court of Final Appeal judgment on retrospectivity [that portion of *Ng Ka Ling* which invalidated the Immigration Amendments Ordinance provision for its retroactivity to July 1];
- those who were litigants themselves in respect of the two cases on which the Court of Final Appeal ruled on January 29, 1999; or
- those who are concerned parties to the legal proceedings of the aforesaid Court of Final Appeal cases by virtue of their claims for right of abode...laid whilst they were in Hong Kong with the Director of Immigration between July 11, 1997 and January 29, 1999.[31]

The government hereby solved two problems with the application of the NPCSC decision. It resolved the discrepancy in the Chinese and English versions of its June 26, 1999 pronouncement and determined that the timing of the filing of the claims was significant. The government also, presumably, recognized that portion of the ruling in *Ng Ka Ling* which invalidated that portion of the Immigration Amendments Ordinance enacted on July 11, 1999 which made it retroactive to July 1, and therefore, all applicants who lodged their applications between July 1 and July 11 were also exempt from the NPCSC decision.

In the same pronouncement, however, the government muddied the waters by suggesting that all applicants for right of abode who were similarly situated to those in *Ng Ka Ling* and *Chan Kam Nga* and who made their applications between July 1, 1997 and January 29, 1999 were exempt from the NPCSC decision. The government did not elaborate on the meaning of "similarly situated." Also in this pronouncement, the government added another wrinkle to the problem of applying the NPCSC decision which potentially shrunk the group which was exempt from it. It announced that it would not grant "amnesty" to mainland residents who are in Hong Kong illegally with expired entry permits, thereby possibly excluding such mainlanders who otherwise fell into one of the aforementioned three categories.[32] The issue that the pronouncement did not resolve was when the expiration of the entry permit was relevant to such an exclusion. All one-way permits issued by the Guangdong Province immigration authorities expire at some point. What if the applicant lodged the application for the right of abode

31. *Id.*
32. *See id.*

before the permit expired, but was still waiting for the Hong Kong immigration authorities to issue a Permanent Resident's card when the permit expired?

Five months after the Chief Executive's pronouncements, in the Hong Kong Court of Final Appeal's first, and to date only, application of the NPCSC reinterpretation, *Lau Kong Yung and The Director of Immigration*,[33] the Court ruled on the question of whether to uphold the order to remove seventeen applicants for right of abode who had arrived in Hong Kong and claimed right of abode prior to the Court of Final Appeal's decision in *Ng Ka Ling*.[34] Not only did the court uphold the order, it also declined to set out any categories of applicant that are exempted from the reinterpretation. Instead, the court deliberately refrained from deciding the question of who was not affected by the reinterpretation. The Court did rule, however, that the reinterpretation has retroactive effect back to July 1, 1997, because "[i]t declared what the law has always been."[35] In both conclusions, the court accepted the arguments of the Hong Kong government, although it refrained from explaining some of the most important consequences of these arguments.[36] For example, the court did not square its recognition of retroactive effect with the last sentence of paragraph three of Article 158 of the Basic Law which says that NPCSC interpretations will have no retroactive effect. Nor did the court explain how its conclusion that the reinterpretation dated back to the formal institution of the right of abode could leave any parties exempt from it. If no parties were exempt, the court refrained from explaining how its ruling was consistent with the Chief Executive's pronouncement of June 26, 1999 or with the court's own ruling which indicated that the question of who was not affected by the reinterpretation was still alive.

The language used in the pronouncements of the Hong Kong government and in the December 3, 1999 ruling by the Court of Final Appeal kept in play the question of the retroactivity of the NPCSC decision. The government said no "amnesty" would be granted to illegal overstayers, and the Court of Final Appeal ruled that the NPCSC decision was good law in Hong Kong starting on July 1, 1997. And yet, according to the government pronouncement of June 28, 1999, three categories of mainland citizens are

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33. Lau Kong Yung (an infant suing by his father and next friend Lau Yi To) and 16 Others v. Director of Immigration, 2 HKCFAR 300 (HKSAR Court of Final Appeal, Dec. 3, 1999), *available at* http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv 10 11 99.htm.

34. Cheng Lai Wah v. Director of Immigration, Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration,Tsui Kuen Nang v. Director of Immigration, Yeung Ni Ni v. Director of Immigration, 2 HKCFAR 4 (HKSAR Court of Final Appeal, Apr. 2, 1998), *available at* www.info.gov.hk/jud/guide2cs/html/cfa /judgmt/facv_14_16_98.htm.

35. *Lau Kong Yung*, 2 HKCFAR 300.

36. *See id.*

eligible for right of abode status, and these include "concerned parties to the legal proceedings of" *Ng Ka Ling* and *Chan Kam Nga*. In other words, parties who, because they did not comply with the procedural requirements of the Provisional Legislature's amendments in July of 1997 to the Immigration Ordinance or because their parent gained permanent resident status after their birth, are *not*, according to the NPCSC decision, entitled to right of abode status. All of this would seem to add up to a partial retroactivity of the NPCSC decision, but the extent of this retroactivity remained unclear.

These are the pronouncements thus far made by the highest court and the executive on the question of to whom the NPCSC decision applies, and they raise questions about which parties are exempt. Taking advantage of the lack of resolution of such questions, and of the generous grant of legal aid assistance by the Hong Kong government, between June 26, 1999 and May, 2000, 5308 people applied to the Court of First Instance for judicial review of actions taken by the Director of Immigration,[37] and slightly over 100 people petitioned the High Court to invalidate the Immigration Department's deportation orders and rejection of their applications for right of abode.[38] The courts in both sets of cases dismissed the applications using a narrow reading of the NPCSC's limiting language.

The applicants in the Court of First Instance were represented by ten selected from the pool of 5308. The ten representatives spanned the gamut of five fact patterns, each differing as to when the applicant arrived in Hong Kong. Some applicants arrived before July 1, 1997, the effective date of the Amendment to the Immigration Ordinance which imposed procedural requirements on those seeking right of abode under Article 24(2)(3). Some arrived after that date but before the date on which the Provisional Legislative Council actually passed that legislation. Yet others arrived after that date but before the *Ng Ka Ling* decision was handed down, while still others had entered Hong Kong for the first time after January 29, 1999, but had written either the Director of Immigration or the Legal Aid office or both during the period from July 1, 1997 to January 29, 1999 about their right of abode in Hong Kong under Article 24 of the Basic Law. In a lengthy written opinion, unusually long even for a Hong Kong appellate court, the Court of First Instance disagreed with the applicants' argument that they had reasonably presumed that *Ng Ka Ling* and *Chan Kam Nga* applied to all Mainland residents attempting to gain the right of abode in Hong Kong under Article 24 of the Basic Law and fairly relied upon statements by the HKSAR government both to the applicants individually about applying for right of abode and to the

37. Ng Siu Tung and others v. Director of Immigration; Li Shuk Fan v. Director of Immigration; Sin Hoi Chu and 42 Others v. Director of Immigration, 1999 HCAL 81 (HKSAR Court of First Instance, June 30, 2000) (on file with author).

38. Chen Wei wen et al. v. The Director of Immigration, Hong Kong High Court (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with author).

public that the judgments in *Ng Ka Ling* and *Chan Kam Nga* would be implemented.[39] The court concluded that the limiting clause in the NPCSC decision exempted only the named parties in those cases and others whose names were known to the Director of Immigration as applicants for right of abode or legal aid whose applications were denied pending the resolution of the two cases.[40] To get to this conclusion, the court relied heavily on the Court of Final Appeal's declaration in *Lau Kong Yung and The Director of Immigration* that its constitutional interpretations in *Ng Ka Ling* and *Chan Kam Nga* were never good law. The court seemed to presume that this reasoning took care of the problem of why the Hong Kong government's pronouncements excluded Mainlanders who had arrived and/or lodged their claims between January 29 and June 26, 1999,[41] but it did not. The court did not explain which other applicants known to the Director of Immigration were exempt. This problem was not explicitly raised here, but it lurked in the background and could be raised in subsequent litigation.

The court further decided that the applicants' expectation of universal application of the two cases was not legitimate. In reaching this conclusion, the court opined broadly on the effect of judicial decisions in Hong Kong's common law system. The court adopted a narrow view of this effect when it stated that, "[a]s a matter of law, non-parties can only take the benefit of these judgments if they can point to an agreement that they would be treated as parties, or if they can rely upon a legitimate expectation that they would be so treated."[42] The court also disagreed with the applicants' argument that they had the expectation that "anyone whose circumstances fell within the law as that law was, by the Court of Final Appeal, determined to be, would be treated accordingly."[43] The court did not reconcile this position with the doctrine of *stare decisis*, which permits, to varying degrees in common law systems, all similarly situated parties to take advantage of a judicial ruling. By avoiding this problem, the Court of First Instance left open a means of challenging its application of the NPCSC reinterpretation of June 26, 1999.

The applicants appealed, and on December 11, 2000 the High Court of Appeal dismissed them. To reach its result, the High Court followed the lead of the lower court and relied on the statements from *Lau Kong Yung* that the NPC Standing Committee has unfettered power to interpret the Basic Law, power derived from the PRC Constitution and reflected in Paragraph 1 of Basic Law Article 158, and that a result of this power is to bind all Hong Kong courts to the interpretations of the Basic Law by the NPC Standing Committee as if the interpretation had been made on July 1, 1997. The High Court did not delve into the problems of retroactivity or stare decisis, possibly

39. *See Ng Siu Tung*, 1999 HCAL 81 at 57-60, 78-99.
40. *See id.* at 63-65.
41. *See id.* at 92.
42. *Id.* at 75.
43. *Id.* at 76. *See generally id.* at 70-147.

because the *Lau Kong Yung* court and counsel to the applicants in the instant case focused upon the reliance by the applicants on statements by the Director of Immigration that they would enjoy the benefits of the litigation in *Ng Ka Ling* and *Chan Kam Nga* without being selected as the actual litigants in those cases, and that the Director would abide by the Court of Final Appeal's ruling in those cases.[44] In fact, the High Court seemed to leave even the issue of reliance up to the Court of Final Appeal. In the words of Judge Mayo, "I leave it to others to decide whether in those circumstances [where the applicants were not permitted to join in the *Ng Ka Ling* or *Chan Kam Nga* litigation] the applicants could really be said to have been treated unfairly."[45]

In the same ruling, the High Court addressed the question of which people were exempted from the NPC Standing Committee's reinterpretation by the Chief Executive's press release issued the day of that reinterpretation. The court concluded that, despite its ambiguities on this point, the press release did not exempt the applicants because the Chief Executive's policy on the right of abode, as expressed in that press release and others, was to require that, regardless of when they arrived in Hong Kong, the applicants had to make their original claim in Hong Kong to the Director of Immigration or to the Immigration Department while physically themselves in Hong Kong, even though the Director of Immigration had told them to return to the Mainland to make their claims.[46] The court's reference to the government's policy stopped short of characterizing it as aimed at staving off as long as possible the immigration of Mainland Chinese with the right of abode into Hong Kong, but this seems to have been the rationale that supported the court's conclusion on this point. The court also left unexplained why it was not unfair to not exempt these applicants: "I leave it to others to decide whether, in those circumstances, those persons whose cases fall on the wrong side of the policy can really be said to have been treated unfairly."[47] The High Court likewise concluded that its applicants, who also had arrived in Hong Kong for the first time after *Ng Ka Ling* and *Chan Kam Nga*, did not fall under the exemption stated in either the NPCSC decision or the Hong Kong government's pronouncements. The court ruled that all of the applicants fell outside the exemption because they arrived for the first time in Hong Kong *either* after the January 29, 1999 decisions by the Court of Final Appeal *or* the NPCSC decision of June 26, 1999. The court used a public policy basis for its conclusion. The court reasoned that to read the exemption to include these Mainlanders was to invite chaos into Hong Kong. Although the court acknowledged that applicants did not feel that the law was applied equally, it determined that the applicants must understand that, in the implemention of

44. *Id.* at 6-7, 16-20, 47-55.
45. *Id.* at 20.
46. *See id.* at 22-25.
47. *Id.* at 27.

policies, some people get more rights and benefits than others and mistakes are made, especially in democratic, open societies.[48]

Both decisions are being appealed and will reach the Court of Final Appeal within a year or so. What is more, in July, 2000, Mainland children were still filing claims alleging that they arrived in Hong Kong before the handover, between July 1, 1997 and January 29, 1999; others claimed that they arrived between January 29, 1999 and June 26, 1999; and still others that they arrived after June 26, 1999. How will Hong Kong's courts decide these claims? The First Instance Court's decision of May, 2000, and the High Court's decision of June, 2000, do not constitute authority sufficiently conclusive to predict dismissal of these claims by the Court of Final Appeal, most obviously because the Court of Final Appeal is not bound by these lower court decisions. But do they suggest such an outcome? At the moment, predicting the outcome is difficult.

According to the author of the intermediate-level appellate opinion in *Ng Ka Ling*, Patrick Chan, Chief Judge of the Hong Kong High Court and appointee to the Hong Kong Court of Final Appeal, even he did not know in July, 2000, more than half a year after the Court of Final Appeal application of the NPCSC decision, what remained of the ruling in *Ng Ka Ling*. He concluded that both the parties to the instant case and some future parties are exempt from the restoration of the statute. As to which parties are affected by the NPCSC decision, Chief Judge Chan had a sense of who they were, but seemed open to further clarification. "It's very doubtful that people arriving after *Ng Ka Ling* benefit [from the court's invalidation of the immigration statute]," he said, because they were not parties to the judgment.[49] In Chief Justice Chan's analysis, the validity of the claims depends on both when the claims were filed and when the applicants arrived in Hong Kong. He said that those who arrived after June 26, 1999, the date of the NPCSC decision, or who filed their claim after that date have no chance of being granted permanent resident status. However, Chief Justice Chan acknowledged that those parties who arrived before *Ng Ka Ling*, but filed their claims between *Ng Ka Ling* and the NPCSC decision are tough to figure out. Chief Justice Chan believed it could take a couple of years for all of these claims to wind their way through the courts.[50]

Then there is the question of which parties are similarly situated to those in *Ng Ka Ling*. In that case, the petitioner was a child from Mainland China who did not have a valid one-way permit issued by immigration authorities in Guangdong Province and affixed with "a certificate of entitlement." This documentation was required by the amendments to the Immigration Ordinance

48. *See* Chen Weiwen, et al. v. Director of Immigration, at 51-52 (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with author).

49. Interview with Patrick Chan, Chief Judge of the Hong Kong High Court, in chambers (July 25, 2000).

50. *See id.*

which the Provisional Legislature passed on July 11, 1999 and made retroactive to July 1, 1999.[51] Do "similarly situated parties" extend to parties similar to those in the companion case to *Ng Ka Ling, Chan Kam Nga v. Director of Immigration*, in which the Court of Final Appeal ruled on the same day, those whose parent became a permanent resident of Hong Kong after his or her birth? Do "similarly situated parties" extend to those who are citizens of Mainland China who were born in Hong Kong but whose parents are not permanent residents of Hong Kong? The First Instance Court in *Ng Siu Tung* decided that "similarly situated parties" do not benefit from the Court of Final Appeal's invalidation of the statutory provisions, except for those who had filed claims in Hong Kong before that invalidation.[52] But the First Instance Court's ruling does not bind the court that will decide this issue on final appeal. So this aspect of the reach of the NPCSC decision is currently unsettled in Hong Kong law.

Still unresolved is the question of whether the NPCSC decision's favorable reference to an interpretation of Article 24(2)(1) of the Basic Law by the Preparatory Committee, a body formed by the PRC government in 1996 and chaired by then PRC Foreign Minister Chen Qichen, is tantamount to making that interpretation binding on the Hong Kong courts. In *obiter dicta* in that decision, the NPCSC stated that the report of the Preparatory Committee's understanding of those portions of Article 24 not involved in *Ng Ka Ling* or *Chan Kam Nga*, which involved just the timing of the birth and the permanent resident status of the parent, was right.

Litigation which raises this question is currently winding its way through the Hong Kong courts. The decision of the High Court in *Chong Fung Yen v. Director of Immigration*,[53] announced on July 27, 2000, refused to adopt the interpretation of the Basic Law Article 24(2)(1) set out by the Preparatory Committee in its report before the handover. The applicant in this case was a child born in Hong Kong of a Mainland Chinese married couple while in Hong Kong on a two-way permit, which is easier to get and less desirable than the one-way permit and lets people stay in Hong Kong indefinitely and travel to other countries. When the permit expired and the couple faced deportation, they returned to the Mainland and left their child in

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51. *See* Immigration (Amendment) Ordinance (No. 5), Bill 1997, Part IB, Provisions Relating to Permanent Residents Under Paragraph 2(c) of Schedule 1, 2AA. The section entitled "Establishing Status of Permanent Resident Under Paragraph 2(c) of Schedule 1, Section (1)(a)" states: "A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be established by his holding of–(a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document."

52. Ng Siu Tung, et al. v. The Director of Immigration, 1999 HCAL 81 (HKSAR Court of Final Appeal, June 30, 1999) (on file with the author).

53. Chong Fung Yuen (an infant by his grandfather and next friend Chong Yiu Shing) v. Director of Immigration, 2001-1HKC 359, 1999 HKC Lexis 156 (Court of First Instance, Dec. 24, 1999).

Hong Kong with the grandfather. Does the baby have permanent resident status? The court ruled yes, under Basic Law Article 24(2)(1), thereby invalidating a provision in the Hong Kong Immigration Ordinance which required parents of Mainland children born in Hong Kong to be "settled or [to have] a right of abode in Hong Kong."[54]

The government of Hong Kong, who argued on behalf of the Director of Immigration, was afraid that Mainland Chinese would all have their children born in Hong Kong and would get two-way permits for that purpose. But Martin Lee says that only a few thousand came to Hong Kong to give birth over the last few years. The decision is important, Lee concludes, because it refuses to give effect to the language in the NPCSC decision which approves of the Preparatory Committee's interpretation of all of Article 24(2).[55] By refusing to agree with the government that the favorable reference to the Preparatory Committee's interpretation in the NPCSC decision was binding on Hong Kong courts, the Hong Kong High Court narrowed the scope of the NPCSC decision and reduced its impact on all issues related to the Mainland Chinese claiming right of abode under Article 24(2). This comes out in the following language from the court's opinion: "it is quite clear that the [NPCSC decision] was made pursuant to the 'Motion Regarding the Request for an Interpretation of Article 22(4) and Article 24(2)(3)...' and its binding effect is confined to the interpretation of these specific provisions of Article 22 and Article 24(2)(3)."[56]

The result in this case revolved around the legislative intent behind Basic Law Article 24(2), with both sides bringing conflicting evidence of legislative intent to bear on the question of whether the drafters of Article 24 intended that the parents of Mainland Chinese children born in Hong Kong be permanent residents of Hong Kong.[57] Legislative intent was not only a crucial part of this High Court decision, but its importance has grown as the right of abode cases made their way through the Hong Kong courts during the last three years. According to Martin Lee, when Article 24 was drafted, it was an attempt to define who is a Hong Kong citizen. The drafters' principal concern was to get people to come back to Hong Kong. It was drafted during the mid 1980s, when Hong Kong residents were fleeing to Australia and Canada in the wake of a free-falling Hong Kong dollar and a loss of confidence in Hong Kong's future under Chinese rule. The drafters were thinking of births in

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54. Hong Kong Immigration Ordinance, Sched. 1, ¶ 2(a) (amended July 16, 1999).

55. Martin Lee admits that he is in the same position as the baby because he was born while his mother was a tourist in Hong Kong. Lee's younger brother falls under paragraph 2 of Article 24. By illustrating the provisions with examples from his own family, Lee gives a sense of solidarity with the Mainland Chinese and a sense of how privileged current permanent residents of Hong Kong are–they are here because of accidents of timing, not because they are superior to Mainland Chinese. *See* Interview with Martin Lee, *supra* note 20.

56. On-line opinion of Hon. Leung, JA, at 23.

57. *See* on-line opinion of Hon. Mayo, VP, at 14, 20-21. [hereinafter Hon. Mayo].

Canada and Australia, not Mainland China.[58] The Preparatory Committee, however, a decade later, started to worry about Article 24, fearing that Mainland Chinese might invoke it and flood into Hong Kong. The Preparatory Committee then wrote in a report its understanding of all the parts of Article 24.[59]

How have the courts thus far resolved the problem of the effect of illegal entry on claims of right of abode? From the High Court's discussion in *Chong Fung Yuen*, it did not appear that the Hong Kong government argued that the baby has no permanent resident status simply because Article 24(2)(1), as supplemented by paragraph 2 of Schedule 1 of the Immigration Ordinance as amended in July of 1997, does not apply to those who are in Hong Kong illegally. The baby's parents overstayed the period allowed by their two-way permit, although that period had not yet expired when their baby was born. Although the government referred to the applicant's parents as "illegal immigrants," the government focused its arguments on how to correctly interpret Article 24(2) and the NPCSC decision of June 26, 1999 to read an additional requirement into Article 24(2)(1),[60] and this differs from arguing that illegal entry into Hong Kong precludes permanent resident status under Article 24(2).

However, the Hong Kong government could argue this distinction at some future, more opportune moment. Perhaps that moment will come in the appeal to the Court of Final Appeal of *Chong Fung Yuen* which, Martin Lee predicts, Minister of Justice Elsie Leung will surely authorize. Martin Lee disagrees on principle with the approach of denying right of abode to those who illegally immigrated to Hong Kong, saying that even if Mainland Chinese who are otherwise entitled to permanent resident status under Article 24 enter illegally, they are still entitled to become permanent residents — he likened it to breaking into ones own house. You go in because you have a right to. Therefore you should not be prosecuted for burglary if you smash a window simply because you left your only key locked inside your house.[61]

In sum, questions about the application of the NPCSC decision, which nullified the only attempts so far by the Hong Kong Court of Final Appeal to invalidate local statutory provisions, are not fully resolved, and to the extent that they are resolved, much of the invalidation of local law remains in effect. What is more, many of the unresolved issues are left to the courts of Hong Kong. The NPCSC has not attempted to resolve any of the questions of the application of its decision to reinterpret the Court of Final Appeal's interpretation of Article 24(2) of the Basic Law.

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58. *See* Ronald Skeldon, *Emigration and the Future of Hong Kong*, 63 PAC. AFF. 500-523 (1990-1991).

59. Interview with Martin Lee, *supra* note 20.

60. *See* Hon. Mayo, *supra* note 57, at 3.

61. *See* Interview with Martin Lee, *supra* note 20.

II. THE CONSTITUTIONAL AUTHORITY FOR INVALIDATING LOCAL STATUTES

The Basic Law gives Hong Kong's courts the power to interpret and review the constitutionality of statutes. The Court of Final Appeal on January 29, 1999 broadly construed this power. In its decision of June 26, 1999, the NPCSC did not declare that Hong Kong's courts lack the power to invalidate local statutes, nor did the Court of Final Appeal in its application of the decision in December of 1999 nullify this power. While the NPCSC decision restored the statute that the Court of Final Appeal had declared unconstitutional five months earlier, it refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues.[62] Neither the NPCSC, the Hong Kong government, nor the courts of Hong Kong, have in any other way nullified this power. As a testament to this state of judicial review in Hong Kong, at the end of July, 2000, Chief Judge Patrick Chan, author of the intermediate appellate opinion which was essentially restored by the NPCSC decision, believed that the language in *Ng Ka Ling* interpreting broadly the Hong Kong courts' power to interpret and review the constitutionality of statutes was still good law.[63]

It is well known in the legal community of Hong Kong that the Basic Law explicitly provides for constitutional review by local courts of statutes. The Basic Law, Article 158, provides: "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of the Law which are within the limits of the autonomy of the Region."[64]

This language sets out the jurisdiction of Hong Kong courts to interpret the Basic Law and frames it in terms of an authority delegated by the NPCSC. "Shall authorize" is ambiguous in the sense that it could refer either to a future act of delegation separate from the enactment of the Basic Law or to a mandatory delegation which is accomplished with the enactment of the Basic Law. The Chinese term, *caiquan*, has no verb tense and so might be translated as "hereby authorizes." This reading makes sense, since the NPCSC was instrumental in the enactment of the Basic Law. Among other things, the NPCSC submitted the final draft of the Basic Law to the plenary NPCSC for its formal enactment.[65] Petitioners in *Ma Wai Kwan* raised the argument about verb tense with respect to the "shall adopt" in Article 18, and the High Court, after examining the NPCSC Decision of February 23, 1997, which

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62. *See* Elliot and Forsyth, *supra* note 9, at 3.

63. Intereviw with Chief Judge Patrick Chan, *supra* note 49.

64. Basic Law, art. 158, ¶ 2.

65. *See* Ji Pengfei, *Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (draft)" and Its Related Documents, in* THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 71-78 (1992).

adopted the laws previously in force in Hong Kong, summarily dismissed the argument.[66] Such language has not been interpreted otherwise by the Court of Final Appeal.

Article 158 of the Basic Law further provides that Hong Kong courts may not interpret the Basic Law that concerns issues "which are the responsibility of the Central People's Government [of the PRC], or concerning the relationship between the Central Authorities and the Region."[67] The Hong Kong courts must, before they issue any final judgments which require the resolution of such issues, request an interpretation by the NPCSC of the relevant constitutional provision. The 1995 agreement between the PRC and the United Kingdom also provides an interpretation process which set up a Court of Final Appeal in Hong Kong to replace the Privy Council in London as the court of last resort for cases that come up through the Hong Kong courts.

So far, no Hong Kong court has requested an interpretation, even though courts have over a dozen times since the transfer of sovereignty interpreted provisions of the Basic Law. The Hong Kong High Court in *HKSAR v. David Ma Wai Kwan* faced a case of constitutional magnitude within days of the birth of the HKSAR. Although this case is hailed as the first landmark constitutional case of the HKSAR because it considered challenges to the validity of the common law legal system and the provisional legislature of Hong Kong, the High Court did not request an interpretation from the NPCSC of the constitutional provisions it interpreted to reach its judgment. Handing down its judgment on July 29, 1997, the High Court in *Ma Wai Kwan* grappled with the momentous process of interpreting for the first time the Basic Law's provisions on the very structure of Hong Kong's legal system, with the attendant risk of provoking a constitutional crisis. It expedited an interlocutory appeal in order to rule that the common law had survived the handover and that the Provisional Legislative Council, the body selected by a group of delegates approved by Beijing to replace the elected Legislative Council of Hong Kong at midnight of June 30, 1997, was validly constituted.[68]

The other cases in which the Hong Kong courts interpreted the Basic Law between July 1, 1997 and January 29, 1999 dealt with freedom of speech or immigration law. The editor of the *Oriental Daily News* raised freedom of speech as a defense against his conviction of contempt of court for printing editorials which threatened to "punish" and "wipe out" Hong Kong judges and referred to them as "dogs and bitches," "street rats," "scumbags," "British white ghosts," "white-skinned judges," "pigs," "centipedes," and "yellow-skinned canine adjudicators," and described them as being sexually deficient

66. HKSAR v. Ma Wai Kwan and Others, at 12-14 (HKSAR Court of Final Appeal, July 29, 1997) (on file with author).

67. Basic Law, art. 158, ¶ 2.

68. *Ma Wai Kwan and Others*, at 12-14 (HKSAR Court of Final Appeal, July 29, 1997) (on file with the author).

and plagued with "ringworm, scabies and syphilis."[69] The Court of First Instance, the Court of Appeals, and the Court of Final Appeal all concluded that Article 27 of the Basic Law, which provides for the rights of freedom of speech, press and publication, did not set these out as unlimited rights, and that the editorials in question did not constitute expression that was protected under that provision of the Basic Law or the corresponding provision of the Hong Kong Bill of Rights.[70] The reasoning of the Court of First Instance was the most fully expressed of the three courts that entertained this issue:

> Article 27 is in Ch III of the Basic Law, which is headed 'Fundamental Rights and Duties of the Residents.' Thus, Art. 27 merely identifies a particular group of fundamental rights and freedoms which the Basic Law guarantees. It does not purport to prevent the enactment of restrictions on those rights. The effect of Art. 39 [of the Basic Law] is to permit restrictions on the rights protected in Ch III, provided that those restrictions are provided by law (for example, Article 16(3) of the Bill of Rights) and are compatible with various international instruments, including the International Covenant on Civil and Political Rights.[71]

In several immigration cases during the period between July, 1997, and January, 1999, the Hong Kong courts issued decisions which included, if not turned on, interpretations of several articles of the Basic Law, yet no request for an interpretation of those provisions by the NPCSC were made. The Court of Final Appeal in July, 1998, in a challenge by Vietnamese refugees to their detention in Hong Kong, established that *habeas corpus* was consistent with Articles 28 and 41.[72] The *Ng Ka Ling* and *Chan Kam Nga* cases came up through the courts at this time, in a consolidated appeal of four cases of PRC children trying to obtain permanent residency status in the HKSAR under provisions of the Basic Law. The Court of Appeal ruled that two immigration ordinances did not violate the Basic Law in the sense that they were enacted by a validly constituted legislature, even though that legislature was not

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69. This description comes from the Court of Appeal in *Wong Yeung Ng v. Secretary for Justice*, 1999-2 HKC 24 (HKSAR Court of Final Appeal, Feb. 9, 1999), and the Court of First Instance in *Secretary for Justice v. Oriental Press Group Ltd. & Ors.*, 1998-2 HKC 627, 1998 HKC LEXIS 83, at 41-71 (HKSAR Court of First Instance 1998).

70. Wong Yeung Ng v. Secretary for Justice, 1999-2 HKC 24 (HKSAR Court of Appeal, Feb. 9, 1999); Wong Yeung Ng v. Secretary for Justice, 1999-3 HKC 143 (Appeal Committee of the Court of Final Appeal, June 23, 1999); Secretary for Justice v. Oriental Press Group Ltd & Ors., 1998-2 HKC 627, 1998 HKC LEXIS 83, at 109-16 (HKSAR Court of Final Appeal, June 30, 1998).

71. *Oriental Press Group Ltd. & Ors.*, 1998 HKC LEXIS 83, at 110-11.

72. *See* Thang Thieu Quyen & Ors v. Director of Immigration & Anor, 1998-3HKC 247 (HKSAR Court of Final Appeal, July 23, 1998).

elected in conformity with the provisions for electing the legislature in the Basic Law.[73]

The Court of Final Appeal's decision in *Ng Ka Ling* issued on January 29, 1999 was the most ambitious exercise of judicial review power in at least the first four years of the HKSAR. Despite interpreting three constitutional provisions to arrive at its ruling, the court did not request an interpretation of those provisions from the NPCSC. After this decision, it was as if the floodgates opened to constitutional issues in the Hong Kong courts. Until then, the only constitutional issues heard were in the first instance trial of the Oriental Press Group's free speech case and in several immigration cases. Thereafter, litigants invoked the Basic Law in their arguments not only about immigration and in two appellate airings of the Oriental Press Group's case, but also about voting rights issues, a property issue of constitutional magnitude, and criminal law issues. In none of these cases did the courts request an interpretation from the NPCSC.

Two voting rights cases came before the Hong Kong courts after January, 1999. In each, the plaintiff was a life-long resident of a village in the New Territories and claimed that a village rule prohibiting him from running for elected office or from voting in village-wide elections contravened Article 39 of the Basic Law and was therefore unlawful. In both cases the court agreed, reasoning that Article 39 incorporated Article 25 of the International Covenant of Civil and Political Rights into Hong Kong law and bestowed a broad "right to take part in the conduct of public affairs. There can be no doubt that the election or choice of a village representative is a public affair."[74]

Between January, 1999, and June, 1999, two criminal defendants raised a creative constitutional argument in an attempt to avoid conviction at the trial level. In both cases, the defendants argued that Articles 28 and 87 of the Basic Law and Article 5 of the Hong Kong Bill of Rights Ordinance changed the scope of intent sufficient to prove murder such that the evidence in each case was insufficient to convict or sentence the defendant. In each case, the court disagreed with the argument that the transfer of sovereignty changed the common law requirement of intent for murder in this way and its interpretation of the Basic Law was a part of its basis for rejecting the argument.

In one of these cases, the defendant argued that these provisions, plus Article 8, narrowed the scope of intent to include only the intent to kill or the intent to perform an act that endangers life, thereby excluding the additional

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73. *See* Cheung Lai Wah v. Director of Immigration; Ng Ka Ling & Anor v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Yeung Ni Ni v. Director of Immigration, 2 HKCFAR 4 (HKSAR Court of Appeal, Apr. 12, 1998).

74. Chan Wah v. Hang Hau Rural Committee & Anor 1999-2 HKC 160 (HKSAR Court of First Instance, Mar. 12, 1999). The other voting rights case is *Tse Kwan Sang v. Pat Heung Rural Committee*, 1999-3 HKC 457 (HKSAR Court of First Instance, June 29, 1999).

basis for common law murder, intent to cause grievous bodily harm, which was part of the law of colonial Hong Kong. The court reasoned that the Basic Law provision in Article 8 that the common law be maintained, combined with the language in Article 87 that the principles undergirding criminal proceedings before the transfer "shall be maintained," left no doubt that the substantive law of murder had not changed simply by virtue of the transfer of sovereignty.[75]

In the other case, the defendant argued that these provisions made arbitrary and unlawful punishment a sentence of life in prison for murder upon proving intent to cause really serious harm. Here the court determined that Articles 28 and 87 did not change the common law of murder to render life imprisonment unconstitutional for this type of murder conviction. Before it reached this conclusion, the court emphasized that "if any of those provisions have the effect of changing the common law, then it is open to a court to declare the law as it finds it after the change."[76]

In a consolidation of several appeals before the Lands Tribunal of Hong Kong from administrative decisions which set real estate tax rates owed by private owners of land to the government, the meaning of the term in Article 121 of the Basic Law "ratable value" was at issue. The tribunal considered two possible interpretations of the term, namely its "liability sense" and its "quantum sense." The former referred to the formula for calculating rates provided in the Government Rent (Assessment and Collection) Regulation of June 6, 1997, which was based on the last rate paid. The latter referred to the use by landlords and tenants, when they litigated claims before this tribunal, of rateable values as evidence of the going rate for rent. This latter sense was open to construction by the court and not constrained by the statute. The tribunal adopted this interpretation in order to avoid the absurd result that lands that had never been taxed, such as land newly slated for development, could never be taxed.[77]

The High Court in *Chong Fung Yuen v. Director of Immigration* interpreted Basic Law Article 24(2)(1) in order to reach its judgment dismissing the appeal and leaving intact the lower court's judgment that the applicant qualified for the right of abode under that provision, despite a local statutory requirement which disqualified the applicant. The court rejected the argument that the interpretation of the NPCSC issued on June 26, 1999 controlled the court's interpretation of Article 24(2)(1). The Director of Immigration did not argue that the court should request another interpretation

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75. *See* HKSAR v. Chan Chui Mei, 1999-3 HKC 502, 1999 HKC LEXIS 57 (HKSAR Court of First Instance, June 11, 1999).

76. HKSAR v. Pun Ganga Chandra & Ors., 1999-2 HKC 579, 1999 HKC LEXIS 16, at 7 (HKSAR Court of First Instance, June 1, 1999).

77. *See* Agrila Ltd. & Ors. v. Commissioner of Rating and Valuation, 1999-2 HKC 168, at ¶¶ 1, 2, and 20 (Lands Tribunal, Mar. 30, 1999).

from the NPCSC.[78] Neither the High Court in this appeal, nor the First Instance Court below, requested an interpretation of Article 24(2)(1).[79]

One explanation for why no courts in Hong Kong below the Court of Final Appeal have requested an interpretation is that the courts see such requests as appropriately made only by the Court of Final Appeal. Although neither the Basic Law nor the Court of Final Appeal Ordinance single out the Court of Final Appeal as the only court in Hong Kong to receive interpretations from the NPCSC, the administrative head of Hong Kong's High Court interprets paragraph 3 of Article 158 as singling out the Court of Final Appeal for one of two types of interpretations from the NPCSC. According to Chief Judge Chan, there are two kinds of requests that Hong Kong can make to the PRC, those where only the Court of Final Appeal can make the request, and those where anyone can make the request.[80] The former kind of request for an interpretation of the Basic Law is governed by the requirements set out in paragraph 3 of Article 158. These requests occur: (1) in adjudicating cases, (2) regarding affairs that involve the PRC or the relationship between the PRC and Hong Kong, (3) where the interpretation affects the judgment, and (4) the request is made before the final judgment. The specification that the request be made before the judgment limits this type of request to the Court of Final Appeal, according to Chief Judge Chan. Chief Judge Chan therefore concludes that he could not have made this kind of request because only the Court of Final Appeal could have made it.[81] This position solidifies the power of Hong Kong courts below the Court of Final Appeal to invalidate local statutes.

Why did the Court of Final Appeal not request an interpretation in *Ng Ka Ling*? Albert Chen, member of the Basic Law Committee and Dean of the Hong Kong University Law Faculty, notes that there is a "loophole" in the Basic Law about what should be done when the Court of Final Appeal fails to "strictly follow the review procedures" outlined in paragraph 3 of Article 158 for requesting an interpretation.[82] Both Dean Chen and Martin Lee agree that the Court of Final Appeal in *Ng Ka Ling* should have asked the NPCSC for an interpretation of Article 22(4) because it dealt with the relationship between Hong Kong and the PRC central government and because a

78. *See* High Court of the Hong Kong SAR, Civil Appeal No. 61 of 2000 (on appeal from HCAL 67/1999) (Judges Mayo, Leong, Rogers, July 27, 2000) (page 9, online pagination) (argument by Mr. Fok, attorney for the appellants).

79. *See* Chong Fung Yuen v. Director of Immigration, 2000-1 HKC 359, 1999 HKC LEXIS 156, at 19-20 (HKSAR Court of First Instance, Dec. 24, 1999). Attorney Fok made the same argument before the lower court, also refraining there from arguing that the court should request an interpretation from the NPCSC.

80. Interview With Chief Judge Chan *supra* note 49.

81. *See id.*

82. Interview with Dean Albert Chen, Hong Kong University Faculty of Law (July 27, 2000).

determination of Article 22(4) was central to the judgment in that case. Dennis Chang QC, on behalf of the applicants in *Ng Ka Ling*, argued that Article 24 was the predominant provision in the case and that it was about purely Hong Kong matters, namely about receiving people into Hong Kong. The applicants conceded, however, that Article 22 dealt with the PRC-Hong Kong relationship but said that this Article played merely a minor role in this case. As Martin Lee explains, the Court of Final Appeal bought that argument and used it to decide that it need not seek an interpretation of either Article 22 or Article 24.[83] But, Dean Chen maintains that there is no such theory about major or minor provisions in the Basic Law, and the Hong Kong government should have argued this in *Ng Ka Ling*.[84] Martin Lee concurs with this conclusion and explains that as soon as the court was faced with deciding whether it was Article 24 or Article 22 which controlled, Article 22 became central to the outcome. The logical argument, in Lee's view, is that both Articles 22 and 24 needed an interpretation from the NPCSC because to figure out a conflict between the two, in other words to determine which one to refer to in this case, you need to interpret both. Lee believes it is illogical to argue that either Article 22 or Article 24 is of greater importance.[85] Both Articles are of equal importance because they conflict.[86]

According to Martin Lee's account, it would appear that the Court of Final Appeal and the Hong Kong government were both swayed by the applicants' specious argument on this point. Lee explains that the Hong Kong government's position at the start of the appeal (it was a Friday) was that the court should refer both Article 22 and Article 24 to the NPCSC.[87] Both English and Chinese newspapers criticized the government's position. This pressure caused the government to retract its position and defer to the Court of Final Appeal to decide whether to refer. When the *Ng Ka Ling* hearings resumed, the court asked the government to clarify the government's position on this–is it that we should decide to interpret Articles 22 and 24, or should we decide whether to interpret Articles 22 and 24? The government said that its position was that it was for the Court of Final Appeal to decide whether it should interpret the Articles. Dennis Chang, the applicants' counsel, agreed.[88]

Martin Lee maintains that the Court of Final Appeal should have left it at that.[89] The court should have followed this course, agreed to by both parties. Dennis Chang should have left it at that, because the government conceded his position. Nonetheless, Chang continued to argue the point and offered a reason for the court to decide that it had the power to decide whether

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83. *See* Interview with Martin Lee *supra* note 20.
84. *See* Interview with Dean Albert Chen, *supra* note 82.
85. *See* Interview with Martin Lee, *supra* note 20.
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*

to interpret the Articles. Chang argued that all of Chapter III's Fundamental Rights provisions are purely Hong Kong law, including Article 24. Therefore, the court should not refer any of those Basic Law Provisions up to the NPCSC. However, he argued that the court should refer Article 22 to the NPCSC because it deals with conditions for Mainlanders to enter Hong Kong. Chang concluded that the court must decide which article is of paramount importance. Unfortunately, in Martin Lee's view, the Court of Final Appeal adopted this approach.[90]

Also unfortunate in Lee's eyes the Court of Final Appeal in *obiter dictum* overruled *Ma Wai Kwan*, because the applicants appealed the *obiter dictum* in that case that stated that the courts of Hong Kong do not have the jurisdiction to query acts of the sovereign.[91] But the Court of Final Appeal did not have to do this, because it was irrelevant to the holding in the case. It was this that angered Beijing, not the interpretation of Articles 22 and 24(2), Lee maintains. The Xinhua news service translated these paragraphs of the judgment into Chinese but did not get it exactly right and sent it to Beijing before the written judgment was issued by the court. This prompted the reinterpretation of the NPCSC.[92]

Notwithstanding any circuitousness or fortuitousness in the process which led to the NPCSC's reinterpretation, there appears to be a consensus among the leading jurists of Hong Kong that the Court of Final Appeal did not have the authority to invalidate those portions of the local immigration statute that it found contrary to Article 24. While the Court might have reached its conclusion under only slightly different circumstances, such an invalidation overreached its authority under Article 158 because Article 24, and Article 22 for that matter, covers the immigration of Mainland Chinese to Hong Kong. What could fall more clearly within the category of "concerning the relationship between the Central Authorities and the Region?"[93]

The fact that the NPCSC might very likely have left untouched the Court of Final Appeal's invalidation of portions of the local immigration statute shows that there is room in Hong Kong for a clever branch of government to assert itself and thereby stretch the boundaries of its authority, and that the courts are not left out of this. The events that led to the NPCSC's decision also show that the NPCSC's authority to issue interpretations of Hong Kong's Constitution does not necessarily encroach upon the judicial review power of Hong Kong's courts. In the case of *Ng Ka Ling*, the Court of Final Appeal invalidated the statutory provisions without interference from the NPCSC. It

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90. *See id. See also* Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Director of Immigration v. Cheung Lai Wah, 2 HKCFAR 4 (HKSAR Court of Final Appeal, Jan. 29, 1999), *available at* http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm

91. *See Ng Ka Ling, Ng Tan Tan*, 2 HKCFAR 4.

92. *See* Interview with Martin Lee, *supra* note 20.

93. Basic Law, art. 158.

was only after the court's judgment that the interpretation undid that invalidation. So, the power of the NPCSC here weakened not the power of the Hong Kong court to invalidate statutes, but rather it weakened the finality of such decisions.

Despite the concerns by some jurists both in Hong Kong and abroad,[94] it is settled in Hong Kong law that the NPCSC has the authority to issue interpretations after Hong Kong judgments. The NPCSC in its reinterpretation stated that it was acting pursuant to Article 67 paragraph 4 of the PRC Constitution and Article 158 paragraph 3 of the Basic Law.[95] The Court of Final Appeal accepted in its December 3, 1999 decision applying the NPCSC's reinterpretation that the Chief Executive of Hong Kong acted pursuant to Articles 43 and 48(2) of the Basic Law when he requested that the State Council of the PRC involve the central government of the PRC.[96] The Court of Final Appeal has not yet explained the relationship between the PRC Constitution and the Basic Law as sources of authority for reinterpretations of the Basic Law, nor has it squared Basic Law Article 158 with Articles 43 and 48(2) on the question of the Hong Kong government seeking reinterpretations. Nor has the highest court of Hong Kong elaborated on paragraph 1 as a basis for NPCSC's reinterpretations given the provision in paragraph 3 of Article 158 of the Basic Law which provides for NPCSC interpretations before the Hong Kong courts have issued their final judgments and the lack of provision for reinterpretations in the other parts of Article 158.

Chief Judge Chan could elaborate on paragraph 1 of Article 158 as a basis for NPCSC reinterpretations, however, he has not yet done so in a ruling. However, Chief Judge Chan finds in paragraph 1 of Article 158 a separate kind of interpretation which the NPCSC may issue, a kind that may be issued anytime, even outside the confines of adjudication and concludes that the procedure for this interpretation is not as clear as that for the first type of request, that made by the Court of Final Appeal, yet, he finds its existence to be "quite clear."[97] This type of interpretation coincides with the continental concept that the maker of the law is the ultimate interpreter of the law. This paragraph of Article 158 is not the common law system, he concludes. He suggested that the NPCSC decision of June 26, 1999 handed down this second type of interpretation.[98]

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94. Both Martin Lee and Albert Chen raised concerns about the lack of legal authority for the NPCSC decision. British jurists Mark Elliott and Christopher Forsyth conclude that the Basic Law does not provide any authority for the NPCSC to reinterpret the Court of Final Appeal's interpretations of the Basic Law. *See* Elliott and Forsyth, *supra* note 9, at 19-20.

95. *See* Special Report, *supra* note 23.

96. *See* Lau Kong Yung v. Director of Immigration (HKSAR Court of Final Appeal, Dec. 3, 1999) at 10, *available at* www.info.gov. hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm (on file with author).

97. *See* Interview with Chief Justice Patrick Chan, *supra* note 49.

98. *See id.*

This second type of interpretation is important in evaluating the argument of the *Ng Ka Ling* applicants that paragraphs 2 and 3 abrogated the NPCSC's right to interpret the Basic Law. Article 158 paragraph 1 provides "additional machinery" with which the NPC can respond to courts rather than passing another ordinance to invalidate a Hong Kong court decision.[99]

This reading of Article 158, by the administrative head of the penultimate court of Hong Kong, is similar to an argument about the power of the NPCSC to override Hong Kong court decisions that is gaining currency among top judges and lawyers. It is an argument which advances an implication of the severability of paragraphs 1 and 3 of Article 158 of the Basic Law. This implication is that PRC legal concepts can and should be introduced into Hong Kong through the regular process of adjudicating cases.

Martin Lee believes that this type of argument contravenes the structure and legislative intent of the Basic Law.[100] Lee is responsible for the Annex in the Basic Law listing exhaustively the PRC laws which apply to Hong Kong. The provisions in Article 18 which set out the procedures for introducing PRC law into Hong Kong are also there because of Lee's insistence. Secretary for Justice Elsie Leung was the first one who ignored these provisions and argued that PRC concepts should be introduced into Hong Kong. "It's very dangerous," Lee warns about this argument, because these concepts are opposed to the concepts in the common law and because this argument introduces uncertainty since Leung's meaning is unclear.[101] Justice Leung argues that the Basic Law is an "interface," Lee points out. It must mean only that the PRC system–"their system"–is coming into "ours," he said.[102] This includes philosophy. Secretary Leung believes that Hong Kong lawyers and judges should study the PRC constitution so they can better interpret the Basic Law. What this means is totally unclear, Lee laments. What PRC laws, other than those in the Annex and those introduced using the procedures in Article 18, which have not been used yet, apply to Hong Kong? Hong Kong needs certainty and predictability, Lee maintains.[103] His implication, then, is that the argument that HKSAR constitutional law is fundamentally PRC law is destabilizing.[104]

Lee's position on this is consistent with Lee's efforts while drafting the Basic Law to minimize the impact of the new sovereign. Lee was responsible for introducing the Court of Final Appeal to Hong Kong, and the Court of Final Appeal seemed to be a link to the world outside China to counter the link to China that was being strengthened with the change of sovereignty. The Court of Final Appeal, with its guaranteed number of judges from common

99. *See id.*
100. *See* Interview with Martin Lee, *supra* note 20.
101. *Id.*
102. *Id.*
103. *See id.*
104. *See id.*

law countries, seemed to be a way to maintain the common law and protect it against some kind of encroachment by Chinese law. [105]

So far, the Hong Kong courts have rejected this argument about the usefulness of PRC law when interpreting the Basic Law of the Hong Kong SAR. In *Chong Fung Yuen v. Director of Immigration*, the most important constitutional case in the Hong Kong courts in 2000, for example, the attorney for the Director of Immigration argued that:

> there were a number of interfaces between the Hong Kong Law and the Laws of the People's Republic of China and when this was taken in conjunction with the very definite opinion given by Professor Lian there were clearly grounds to support his contention that the additional requirements laid down in para. 2(a) of the Schedule to the Immigration Ordinance were in conformity with Article 24(2)(1) of the Basic Law.[106]

The gist of Professor Lian Xisheng's (of the Chinese University of Politics and Law in Beijing) argument was that the drafters of the Basic Law could not have meant to grant right of abode in Hong Kong to all Mainland Chinese born in Hong Kong. The High Court concluded that it could "not consider that much assistance can be derived from this" argument about legislative intent.[107] In even more dismissive language, the court stated that "[i]t is apparent from these Articles [18, 19, 8] that the scope for the application of the National Laws of the People's Republic of China is severely circumscribed."[108]

There is much at stake in this issue of how far PRC law intrudes into HKSAR law. Yet, it is not true that PRC law would exert only a cabining effect on judicial review in Hong Kong. There are protections within PRC law of the autonomy of Hong Kong's judicial system. While the PRC Constitution does not invest judges with the power to interpret the PRC Constitution[109] and effectively precludes them from it by investing the NPCSC with this power,[110] it opens the door to excluding Hong Kong judges from this

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105. *See id.* Lee's experience in this drafting process is documented in MARK ROBERTI, THE FALL OF HONG KONG: CHINA'S TRIUMPH AND BRITAIN'S BETRAYAL 141-77, 199-200, 204, 215-17 (1994).

106. Chong Fung Yuen (an infant by his grandfather and next friend Chong Yiu Shing) v. Director of Immigration, 2001-1HKC 359, 1999 HKC LEXIS 156 (HKSAR Court of First Instance, Dec. 24, 1999).

107. Chong Fung Yuen v. Director of Immigration, 2000-1 HKC at 10 (HKSAR Court of Final Appeal, Civil Appeal No. 61, July 27, 2000) (on appeal from HCAL 67/1999).

108. *Id.* at 16.

109. XIANFA arts. 123-128 (1982). For an English-language version of the Constitution of the People's Republic of China, see *supra* note 1, at 147-48.

110. *See id.* art. 67. For an English-language version of this, see *supra* note 1, at 136.

limitation providing for "systems" in SARs to be established within the PRC.[111] There is nothing in the PRC Constitution which defines the parameters of judicial review in the HKSAR left undefined by the Basic Law, but the elaboration of the constitution's "systems" in the "one country, two systems" formula in the Sino-British Joint Declaration and the Basic Law suggests that the constitutional arrangement between the NPCSC and the PRC courts does not fully apply to the division of powers between the NPCSC and the HKSAR courts.

The argument about the independence of paragraphs 1 and 3 of Basic Law Article 158 from one another supports the conclusion that the second part of the *Ng Ka Ling* decision, the part that invalidates the immigration statute, is no longer good law. Chief Judge Chan arrived at this analysis by applying the last line of paragraph 3 of Article 158. It seems the NPC is overriding *Ng Ka Ling* with legislation, Chief Judge Chan maintains, except that the last line of paragraph 3 provides that any such overriding does not affect prior judgments.[112] It would appear, then, that Judge Chan reads Article 158 as making it easier for the NPCSC to override Hong Kong court decisions. The NPCSC does not have to go to the trouble of passing legislation.

This reading of Article 158 overcomes the problem that neither the PRC Constitution, nor the Joint Declaration, nor the Basic Law provides for the PRC central government to intervene in a Hong Kong court decision after it has been handed down. This interpretation of Article158 also overcomes the additional problem that Article 158 of the Basic Law contains two passages which might prohibit the NPC Standing Committee from issuing its interpretations to Hong Kong courts after they hand down their final judgments. One such passage in the Article directs the Hong Kong courts to seek such interpretations "before making their final judgments," while the other assures that "judgments previously rendered shall not be affected."[113]

This reading of Article 158, in which paragraphs 1 and 3 are separate from one another, appears to have been adopted by the Court of Final Appeal and the NPCSC. In *Lau Kong Yung*, the Court of Final Appeal in December, 1999, stated that the "power [in Article 158 (1) to make the Interpretation] and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3)."[114] The NPCSC did not assert that paragraphs 1 and 3 must be read as independent from one another, but its decision of June 26, 1999 cited Article 158 paragraph 1 as a source of its authority to issue the decision, and

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111. *See id.* arts. 31 and 62(13). For an English-language version of this, see *supra* note 1, at 129, 134-35.

112. *See* Interview with Chief Justice Patrick Chan, *supra* note 49.

113. These are some of the problems raised by Elliott and Forsyth in their recent article. *See* Elliot and Forsyth, *supra* note 9, at 11-13.

114. Lau Kong Yung v. Director of Immigration, 2 HKCFAR 300 (HKSAR Court of Final Appeal, Dec. 3, 1999), *available at* www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm. at 13-14.

it further stated that the Court of Final Appeal did not comply with Article 158 paragraph 3 when it failed to request an interpretation of Article 22 and 24.[115]

This reading of Article 158 paragraph 1 as independent from paragraph 3 solidifies the position of the NPC as an interpreter of Hong Kong law applied in Hong Kong. Even though the Court of Final Appeal and the NPCSC appear to have adopted it, however, this reading does not diminish the power of Hong Kong courts staked out in *Ng Ka Ling* to be an interpreter of Hong Kong law in Hong Kong. This is because no law since then has whittled down that portion of *Ng Ka Ling*.

This broad role for Hong Kong courts in the interpretation of Hong Kong's constitution appears to remain intact to the present day. The NPC Standing Committee's interpretation of Article 22(4) and Article 24(2)(3) of the Basic Law appeared calculated to reverse the judgment in *Ng Ka Ling*. In this interpretation the Standing Committee cited Articles 67 and 158 of the Basic Law as the source of its authority to issue this interpretation but did not interpret those provisions to explain why. The gist of its interpretation was that it does not matter if the offspring of permanent residents of Hong Kong are born before or after the handover. When they are born, at least one parent must be a permanent resident of Hong Kong.[116] While the NPCSC decision restored the statute that the court declared unconstitutional, it refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues.[117] The interpretation did not include an extensive elaboration on the judicial review authority of the Hong Kong Court of Final Appeal or of all of the Hong Kong courts. It was prefaced by the following language: "The Court of Final Appeal did not rely on Paragraph 3 of Article 158 of the Basic Law and request the NPC Standing Committee to produce an interpretation . . . ."[118] This language maintains only that in this particular ruling, the Court of Final Appeal was not constrained by the limits placed upon its review power, but the language does not set out an explanation of this constraint.

On January 29, 1999, for the first time, the Court of Final Appeal of the Hong Kong SAR ruled on the question of which issues Hong Kong courts could consider independently, and which issues they could consider with guidance from the NPC Standing Committee. This set of rulings, in three consolidated appeals brought by Ng Ka Ling and others, ended the constraint of local judicial authority beyond that sanctioned by the sovereign. The ruling accomplished this by pronouncing any act of the PRC that affected Hong Kong as justiciable in Hong Kong courts.[119]

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115. *See* Special Report, *supra* note 23.

116. *Id.*

117. *See* Elliott & Forsyth, *supra* note 9.

118. Special Report, *supra* note 23.

119. *See* Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Director of Immigration

The court used language that presented the broadest possible reading of the authority given to Hong Kong judges in that positive law. The court stated that:

> It is for the courts of the Region [SAR] to determine questions of inconsistency [with the Basic Law] and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law.[120]

Not only did the court claim jurisdiction for all Hong Kong courts over acts of the NPC, but it claimed this right exclusively when conformity with the Basic Law was at issue. While the court does not explicitly state that the NPC Standing Committee does not have the authority to determine whether its acts conform to the Basic Law, this is the implication of the double use of "[I]t is [therefore] for the courts . . . ."[121] Furthermore, the court claimed for itself the sole power to determine when an interpretation from the NPCSC is needed: "In our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions [that the provisions concern the two excluded categories in Article 158 and that the interpretation of these provisions affect the judgment] are satisfied."[122]

The rationale for this assertion was that Article 31 of the PRC Constitution, empowering the NPC to set up Special Administrative Regions, provided the Hong Kong courts with the authority for this type of review, and that Article 158 of the Basic Law emphasized the independence of Hong Kong courts by using the words "on their own."[123] The court proceeded to fill in some of the gaps in the law on judicial review. The Court of Final Appeal specified that the limits placed upon it in Article 158 applied to only itself because of the words "final judgments." The court stated that it must seek an interpretation from the NPCSC only when the issue fell into one of the two categories set out in Article 158 and, then, only when that issue affected the outcome of the case; that it alone determined when an issue fell into one of those categories; and that it submitted for an interpretation to the NPCSC only the provisions of the Basic Law that the court had determined fell into one of those categories, "not the question of interpretation involved generally."[124] In

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v. Cheung Lai Wah (an infant suing by her father and next friend Cheung Miu Cheung), 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999), *available at* http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm.

120. *Id.* at 21 (online pagination).

121. *Id.*

122. *Id.*

123. Basic Law art. 158.

124. *Id.*

other words, not only were all other issues in the case, even those necessary for reaching a decision, not covered by the interpretation, but even those provisions of the Basic Law which the NPCSC interpreted for the court had to be applied to the issues by the court itself.[125]

The Court of Final Appeal here interprets several provisions in Article 158 to fill in the gaps in a way that maximizes the jurisdiction of the Hong Kong courts over constitutional issues. "[F]inal judgments," for example, need not mean only Court of Final Appeal cases. It could mean, alternatively, *all* courts before they issue their final judgments, that is anything immediately appealable. This is the common law definition of finality, which the court chose not to read into Article 158.

In sum, then, the broad powers to invalidate statutes, which the Court of Final Appeal staked out for all Hong Kong courts in *Ng Ka Ling*, remain good law. The Basic Law gives Hong Kong's courts the power to interpret and review the constitutionality of statutes. The Court of Final Appeal on January 29, 1999 broadly construed this power to include the invalidation of statutes. In its decision of June 26, 1999, the NPCSC refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues and legislation. Neither the NPCSC, the Hong Kong government, nor the courts of Hong Kong, have in any other way nullified this power.

III. THE FINALITY OF HONG KONG COURTS' INVALIDATION OF LOCAL STATUTES

The Standing Committee decision did not necessarily set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. One reason is that the process by which the Hong Kong government obtained the decision is not, in all likelihood, going to be a regular one. Another reason is that the procedures for requesting an interpretation of Hong Kong's constitution from the PRC's legislature are not yet formulated. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process significantly undermines the finality of the constitutional review of the courts of Hong Kong.

Albert Chen, a member of the Basic Law Committee that advised the NPCSC when it issued its decision of June 26, 1999, states in no uncertain terms that the interpretation issued by the NPCSC is a rare occurrence. The Basic Law Committee is authorized by the Basic Law to consult with the NPCSC when it formulates its constitutional interpretations under Article 158. Dean Chen also emphasizes that the Basic Law Committee is different from the Law Lords, the body that arrives at the judicial decisions of the House of Lords in the United Kingdom, in that it is not a regularly meeting body. It is

125. *See id.* at 16-23.

only under extremely rare circumstances that the Basic Law Committee meets, Chen says, or needs to consult with NPCSC, when such an issue arises. So far, the Basic Law Committee has met only once, to consult on the *Ng Ka Ling* case. What is more, Dean Chen maintains, the Hong Kong government decided that such a request to the NPCSC will only occur under exceptional circumstances. Secretary of Justice Elsie Leung announced this before a session of the Legislative Council in early March, 1999,[126] and both she and Albert Chen spoke to that effect at a conference in Hong Kong on the PRC Constitution in December, 1999. Chen's words were:

> I think this case is not a precedent for the proposition that the Standing Committee should and can intervene on any matter of interpretation of the Basic Law in which it is alleged that the courts of Hong Kong, including the Court of Final Appeal, have misconstrued the original intent.[127]

Secretary Leung's words on the subject at the conference were, "Time and again we have said the Government is not going to press for interpretations lightly, nor is the Standing Committee going to exercise the power lightly."[128]

There is room for interpretation in these remarks, about how rare an occurrence NPCSC reinterpretations might be. Martin Lee does not believe that these statements, and the others on the subject made by officials of the Hong Kong government, are explicit enough to reassure the Hong Kong courts that the government will rarely request reinterpretations after the judgments of the Court of Final Appeal. After the NPCSC decision, Martin Lee pressed Ministry of Justice Elsie Leung and Hong Kong Chief Executive Tung Chee Hwa to say publically that it was a rare situation, so that judges would not feel the Sword of Damocles hanging over them, to put the judges back into the frame of mind to do justice. Lee has been pressing the United States government to talk to Tung Chee Hwa to persuade him to announce that it is a rare situation. Lee does not believe that Justice Leung and Chief Executive Hwa have done so, however. He maintains that, "so far, all Leung and Tung have said is that they won't do it too often."[129]

If Hong Kong government pronouncements do not reassure the courts and the citizens of Hong Kong that the Hong Kong government will rarely seek an interpretation of the Basic Law by the NPCSC, the lack of any defined procedure for such a move should help reassure them of this. While the

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126. *See* Interview with Dean Albert Chen, *supra* note 82.

127. Cliff Buddle, *Intervention will be Rare: NPC Adviser*, SOUTH CHINA MORNING POST Dec. 6, 1999, at 1. For another of Secretary Leung's statements on the rarity of NPCSC interpretations of the Basic Law, see *Hong Kong Insists it Will Maintain Judicial Independence*, DEUTSCHE PRESSE-AGENTUR, Jan. 17, 2000.

128. *Id.*

129. Interview with Martin Lee, *supra* note 20.

authority of the NPCSC to issue its decision has been set out by the NPCSC in its decision, the NPCSC issued its decision outside of any process outlined in law. Albert Chen supports this view when he maintains that there is no provision in the Basic Law for the government to request such intervention.[130] The lack of specified procedures means that the decision did not go very far toward setting a precedent for future reinterpretations by the NPCSC. Why should a lack of process keep the procedural slate clean, rather than itself constituting a simple process to be followed in the future? It is because the Hong Kong courts and the NPCSC were in the middle of defining the procedures for NPCSC interpretations when the NPCSC issued its decision, and the courts plan to resume their working out of the procedures after the right of abode cases are all adjudicated.

Chief Judge Chan said that in 1998, seven months or so after the handover, he went to Beijing to visit the NPC Secretariat, and while he was there he saw a draft of the procedures for referring an issue up to the NPCSC, which four judges from Hong Kong had drafted. Chief Judge Chan said the people there were quite open about it, saying they would probably approve it, if only the judges told them what kind of case they had in mind. The delegation from Hong Kong could not tell them what kind of case these rules would first be applied to because the immigration cases were just beginning to wind their way through the courts. At that point these types of cases had either been tried at the first instance level or were about to be tried. Therefore, the Hong Kong judges put the procedural rules aside. The judges did not want to work them out while the immigration cases were pending because they were afraid the public or the international human rights advocates would use it against them, perhaps by claiming that the courts were developing the procedural rules at that time in order to try to influence the outcome of the immigration cases. Judge Chan figures that the immigration cases will take about one more year to complete their course through the Hong Kong courts. Then the Hong Kong judges will settle the procedural rules for referring a case.[131]

Basic Law Committee member Anthony Neoh informed the author eleven months after the handover that the Chief Justice of the Court of Final Appeal of the HKSAR had already decided that the parties who bring cases to that Court which potentially raise constitutional questions will each have a chance to frame the questions. The court will then accept or reject the framing of the questions. If it accepts a constitutional framing of the questions, the court then either passes them up to the NPCSC or rejects both parties' framing and frames its own questions to pass up to the NPCSC. The parties might have a chance to present arguments on those questions before

130. *See* Interview with Dean Albert Chen, *supra* note 82.

131. *See* Interview with Chief Judge Patrick Chan, *supra* note 49.

the questions are sent up.[132] There has not yet been an opportunity to try out this process. *Ng Ka Ling* came the closest to providing such an opportunity, except that the court decided not to pass anything up to the NPCSC.

The Basic Law envisions the Basic Law Committee as a source of legal advice when the National People's Congress of China hands down interpretations of the Basic Law for application in the Hong Kong courts as issues involving the PRC central government arise in adjudication. The Basic Law Committee does not communicate with Hong Kong courts, but instead it advises the NPCSC, which itself communicates binding government interpretations under Article 158 to the courts, or, Article 19 certificates to the courts through the Hong Kong government. The Basic Law itself does not set out the procedures that the NPC and the Committee will follow in such circumstances, and no procedures have yet been worked out. In 1998, Anthony Neoh envisioned the Basic Law playing the role played by the Law Lords Committee of the House of Lords in London. This Committee hears oral argument from the parties, decides the issues, then refers an opinion to the House of Lords, which then issues a judgment using the opinion as its rationale. He also hoped the hearings would be public, involve oral and written evidence, and be held in a courtroom setting.[133]

According to Albert Chen's description of the process by which the NPCSC decision of June 26, 1999 was created, Anthony Neoh's vision has not been realized. The process by which a bill is prepared was more legislative than judicial, says Chen. The NPCSC Legislative Affairs Commission prepared the draft of the decision. The Basic Law Committee discussed it, amended it in minor ways, detailed changes to the wording, and prepared a report on the legal issues which it sent to the plenary Standing Committee. The Standing Committee then adopted the draft but did not necessarily accept all the amendments.[134]

Even something as fundamental as the nature of the Basic Law Committee and the NPCSC when it is rendering interpretations of the Basic Law remains unsettled. Just as the Privy Council and House of Lords are really judicial bodies despite their location within Britain's Parliament, so too could the NPCSC play a judicial role even while located within the PRC's legislature. Former Legislative Counselor Christine Loh says that no one knows yet whether the NPCSC will be acting primarily as a court or a legislature when it issues its interpretations of the Basic Law.[135] There is little evidence that the NPCSC and the Basic Law Committee will function like judicial bodies when they issue interpretations of the Basic Law pursuant to a request by the Court of Final Appeal. When asked the question directly,

132. *See* Interview with Anthony Neoh, Hong Kong (June 4, 1998).

133. *See id.*

134. *See* Interview with Dean Albert Chen, *supra* note 82.

135. *See* Interview with Christine Loh, Legislative Council Offices, Hong Kong (July 20, 2000).

Albert Chen asserts that the Basic Law Committee is unlike the House of Lords' Law Lords Committee in that it rarely meets. The Basic Law Committee is not a judicial body, mainly because it hears no evidence and does not draft opinions. The Basic Law Committee merely takes the draft given it by the NPCSC and makes recommendations for editing the draft.[136] Nor did the NPCSC function like a court when it prepared the decision it issued on June 26, 1999. The NPCSC heard no arguments from parties, and it included little reasoning in its decision.

Some prominent jurists in Hong Kong, including Legislative Council member Margaret Ng, feared in 1997 that the Basic Law Committee would become a shadow constitutional court, preempting the paramount judicial authority of the Court of Final Appeal. Such a role is problematic because the Basic Law does not explicitly make the decisions of the Basic Law Committee subject to precedent or any kind of due process.[137] If the fear of a supreme but extra-legal judicial entity were to bear itself out, then Beijing would have created a kind of adjudication supervision committee for all the courts of Hong Kong. All courts in the PRC have attached to them such committees, whose purpose is to advise judges on the correct results in cases in light of the current policy of the Chinese Communist Party. It would appear that, at least at the end of the third year of the HKSAR, this fear has not yet been realized.

Both Dean Chen and Chief Judge Chan said that the Basic Law Committee did advise the NPCSC before it handed down its interpretation of June, 1999, but that the Basic Law Committee has not done anything else yet. Because the Basic Law Committee has not worked with the Court of Final Appeal yet (and it has not consulted with any Hong Kong court), no one knows the procedures yet. Chief Judge Chan thinks that the Court of Final Appeal will submit to the Basic Law Committee the Court of Final Appeal's summary of the facts, the issue(s) for interpretation, the possible outcomes, and the parties' submissions. Judge Chan is not sure in particular about whether the several different outcomes will indeed be presented, but he thinks that the Basic Law Committee prefers this because there are only a few lawyers on the twelve-member Basic Law Committee. The three of the six Hong Kong members who are lawyers are Albert Chen, Senior Counsel Anthony Neoh,[138] and former Barrister Maria Tam. Five of the six PRC members have some legislative drafting experience, but none of them are judges. The fact that not all the Basic Law Committee members are lawyers means, according to Albert Chen, that the committee's role is more legislative than judicial. The Basic Law Committee could not follow judicial

136. *See* Interview with Dean Albert Chen, *supra* note 87.

137. *See* Margaret Ng, *A Threat to the Basis of our Autonomy*, SOUTH CHINA MORNING POST, July 25, 1997, at 19.

138. The title of Senior Counsel is the new term in the HKSAR for the former status of Queens Counsel. This is the loftiest status for a lawyer in Hong Kong.

procedures, maintains Chen, in part because its members are not judges.[139]

Martin Lee sees the process of seeking an interpretation to be wide open, but permanently so, and in a way that maximizes the authority of the NPCSC to issue interpretations. The Court of Final Appeal accepted in its application of the NPCSC decision of June 26, 1999 that the court may request a reinterpretation at any time. A reinterpretation after trial contravenes the last sentence of paragraph 3 of Article 158, which says there will be no retrospective effect of NPCSC interpretations, but if paragraph 1 is freestanding, then the last sentence of paragraph 3 is nullified. Lee disagrees, however, with the reading of paragraphs 1 and 3 as severable and instead believes that these paragraphs refer to one another. According to Lee, the detail in paragraphs 2 and 3 elaborate on paragraph 1. The first paragraph is only introductory and is consistent with the PRC Constitution, which states that the power to interpret is "vested in" the PRC. The first paragraph of Article 158 is not free standing, but merely states a fact, a preexisting fact, a fact that existed before the Basic Law. "If paragraph 1 were free standing, why would you need paragraph 2?" Lee asks. Martin Lee laments that despite the logic of this, the Court of Final Appeal accepted that paragraph 1 is free standing in its application of the NPCSC's June 26, 1999 decision.

Legislative intent has played an increasingly important role in the right of abode cases, and it might play an important role in the resolution of the procedures for the NPCSC interpretations. The whole question, says Lee, for the PRC drafters, was how the NPCSC's power to interpret should be implemented or applied. Lee explained that the PRC drafters of Article 158, of whom he was one, decided that they did not want the Hong Kong courts to refer to the NPCSC in all issues that arise in Hong Kong courts, simply because the NPCSC would not have time to issue interpretations for all the issues that arise.[140]

Notwithstanding this legislative deference to practical constraints on the NPCSC, the drafters responded differently when Lee raised three questions with the PRC government about the NPCSC's power to issue interpretations. Lee asked who can request an interpretation, which Articles of the Basic Law could be the subject of such requests, and when may such requests be made? The PRC drafters responded that "everybody" may apply for an interpretation. They added, however, that the NPC need not accede to it, but if *Ng Ka Ling* applies, they surely will, concludes Lee sardonically. He believes that this type of open-ended formal equality in practice benefits just the powerful. As to which Articles may be interpreted by the NPCSC, the PRC drafter said "all." As to when, the PRC drafters said before, during, and

139. *See* Interview with Chief Judge Patrick Chan, *supra* note 60. *See also* Interview with Dean Albert Chen, *supra* note 82.

140. *See* Interview with Martin Lee, *supra* note 20.

after trial.[141] If this legislative history is used to formulate the procedures for the NPCSC's interpretations, then the NPCSC might become quite an active interpreter of the Hong Kong Basic Law. It is even possible to fit the June 26, 1999 decision into these loose parameters, and thus it could become a precedent.

This legislative history may not influence the procedures as much as the current political climate in Hong Kong will. The Hong Kong government has since the drafting of Article 158 made promises that it will rarely request an interpretation from the NPCSC, and that the NPCSC will rarely issue an interpretation. These promises put pressure on the leading judges of Hong Kong who will work out the procedural rules with the NPCSC to create constraints on the NPCSC that will limit its discretion in the process of issuing interpretations.

Article 158 itself affords the creators of the procedures a great deal of freedom, even while the text of this provision does not reflect much of the discussion of its drafters, as recounted by Martin Lee. Apart from specifying the need to request "an interpretation" from the NPCSC, Article 158 provides merely that the courts of the HKSAR interpret "the provisions of this [Basic] Law which are within the limits of the autonomy of the Region."[142] There is nothing explicit in the Basic Law which prohibits Hong Kong courts from determining whether the instant case calls for an interpretation of the Basic Law from the NPC Standing Committee. Nor is there anything explicit in the relevant Basic Law provisions which limits the Hong Kong courts' power to review any issue where the courts deem that no intervention of this type is needed. There is nothing that prohibits the Hong Kong courts from independently receiving constitutional questions as framed by the parties, or from recasting them themselves, and then engaging in *de novo* analysis and applying, with completely unfettered discretion, the provisions of the Basic Law that the court finds relevant to the instant issue. The language of the 1995 agreement on the Court of Final Appeal does not add detail to the procedure set out in the Basic Law, nor does it outline a different role for the Court of Final Appeal and the rest of the Hong Kong courts in this respect.

The promises of the Hong Kong government and the Basic Law Committee, combined with the imminent development of procedures for NPCSC interpretations of the Basic Law, go a long way toward ensuring that the Standing Committee's adjustment of the Court of Final Appeal's invalidation of local law did not set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process takes away review power from the courts of Hong Kong.

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141. *See id.*

142. Basic Law, art. 158.

IV. THE SCARCITY OF LAW LIMITING THE HONG KONG COURTS' INVALIDATION OF PRC STATUTES

While courts reach the zenith of their review power when they invalidate statutes, local courts exercise even more power when they invalidate national statutes rather than local statutes. The question of whether Hong Kong courts can invalidate the statutes of the PRC is, at least for the moment, settled in Hong Kong law. The Court of Final Appeal's only treatment of this question was discussed in *Ng Ka Ling*. The court stated in no uncertain terms that Hong Kong courts have this power. This statement came in dicta because the court did not address this question in ruling on that case. The NPCSC gave this statement its tacit approval, however, by refraining from overruling it in its June 26, 1999 decision, which corrected the court's interpretations of Basic Law Articles 22 and 24 found elsewhere in the *Ng Ka Ling* opinion. The relevant language in *Ng Ka Ling* is as follows:

> What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.
>
> It is for the courts of the Region [SAR] to determine questions of inconsistency [with the Basic Law] and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law. . . .[143]

The "act" referred to in *Ng Ka Ling* is any national statute of the PRC. The court refers to the legislature of the PRC, not to its administrative agencies, which fall under the leadership of the State Council. This dicta can be used to justify the argument that Hong Kong courts may invalidate PRC statutes for their failure to comply with Hong Kong's constitution. This review power would make them almost as powerful as state courts in the

143. Ng Ka Ling, Ng Tan Tan v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Chueng Lai Wah, 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999).

United States, which can declare federal statutes invalid because they do not conform to the United States Constitution.[144]

So far no Hong Kong court has invalidated a PRC statute. There appears to be no limit so far, however, to the discretion of the Hong Kong courts in applying PRC laws which do not mention Hong Kong. A notable example of this appeared in February, 1999, when the Hong Kong Court of Final Appeal reviewed a decision by the Court of Appeal in which both courts applied the Arbitration Rules of the PRC's international arbitral body and the PRC Civil Procedure Law without any guidance from the PRC in the form of a certificate or an interpretation.[145]

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144. State courts have invalidated federal laws. An example of one such decision which was denied certiorari by the United States Supreme Court is *In re Bridget R. v. Cindy R.* 41 Cal. App. 4th 1483 (1996) (finding that The Indian Child Welfare Act of 1978 could not, under the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, "invalidate a voluntary termination of parental rights respecting an Indian child who is domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." *Id.* at 1492.) Another example, which was reversed by the United States Supreme Court, 494 U.S. 715, is *Committee on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988) (Supreme Court of Appeals of West Virginia found that federal limits on attorneys' fees in black lung cases violated the due process clause of the Fifth Amendment to the United States Constitution).

State supreme courts have applied federal law when reviewing a state administrative action. In the early 1920s, Congress amended the federal Judicial Code to withdraw federal law and jurisdiction from cases of workmen's compensation claims by longshoremen. Challenges by insurance companies to two such workmen's compensation claims reached state supreme courts, that of Washington and that of California, on the ground that the state administrative agency's award was not valid because states had no jurisdiction to award workmen's compensation, notwithstanding the amendment to the federal statute. One court annulled the award in question and the other affirmed the trial court's dismissal of the claim. *See* Washington v. W.C. Dawson & Co, 211 P. 724 (Wash. 1922); *See also* James Rolph Co. v. Indus. Accident Comm'n of Cal., 220 P. 669 (Cal. 1923). The United States Supreme Court affirmed both decisions. *See* 264 U.S. 219 (1924).

State courts have also interpreted the United States Constitution to determine whether Congress could authorize institutions chartered by the state to transform themselves into federally chartered institutions. In *State ex rel. Cleary v. Hopkins Street Bldg. & Loan Ass'n*, 257 N.W. 684 (Wis. 1934), *aff'd* by the United States Supreme Court in *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), the Wisconsin Supreme Court decided that Congress could not authorize Savings and Loan Associations chartered by the State of Wisconsin to transform themselves into Federal Savings and Loan Associations.

State courts have decided that union dues violated the First and Fifth Amendments to the United States Constitution. *See, e.g.* Int'l Ass'n of Machinists v. S.B. Street, 108 S.E.2d 796 (Ga. 1959), *rev'd* by the United States Supreme Court in Int'l Ass'n of Machinists v. S.B. Street, 367 U.S. 740 (1961).

145. *See* Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., 2 HKC 205 (HKSAR Court of Final Appeal, Feb. 1999).

While the law in Hong Kong currently provides for its courts to invalidate PRC statutes if in their application in Hong Kong they run counter to the Basic Law, some leading jurists in Hong Kong see a change in the law on this interpretation in Hong Kong's future. Such a change, if it is ever introduced, will probably not occur until after the right of abode litigation has finished winding its way through Hong Kong's courts, however, simply because of the bad press this change would get and the instability this might cause. The right of abode litigation, with its pendulum swings between giving the right to and then taking it away from the same Mainlanders, has chipped away at the public's faith in its court system and in its new legal system. The Court of Final Appeal would not risk adding to this loss of faith until the confusion about the constitutional dimensions of the right of abode has subsided. In fact, the furor aroused by the right of abode cases might itself reduce the likelihood that the Court of Final Appeal or the NPCSC will explicitly deny that Hong Kong courts can legally invalidate PRC statutes.

The law which might support such a change can be found in the High Court's opinion in *Ma Wai Kwan*, a landmark constitutional case upholding the validity of the Provisional Legislature and the continuation of the common law in Article 19 of the Basic Law and in the act of state doctrine. As shown in this final section, if any of these potential sources of authority for rejecting the power of Hong Kong courts to invalidate PRC statutes is invoked by the Court of Final Appeal or the NPCSC, it will not likely go far to constrain the review power of Hong Kong courts.

HKSAR v. Ma Wai Kwan

The Court of Final Appeal's dicta that Hong Kong's courts have the authority to invalidate PRC statutes reversed the dicta by the High Court in *HKSAR v. Ma Wai Kwan* on this point. The High Court concluded that the Hong Kong courts do not have jurisdiction over questions about the compliance of any act by the PRC with the Basic Law. The relevant language was:

> [R]egional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong court could, while still under British rule, challenge the validity of an Act of Parliament passed in U.K. or an act of the Queen in Council which had effect on Hong Kong.[146]

146. HKSAR v. Ma Wai Kwan and Others at 23 (HKSAR Court of Final Appeal, July 29, 1997) (on file with author).

The statement of the court referred to Hong Kong courts as "regional courts" and was couched in language about the courts prior to the handover because the court was voicing its acceptance of the Solicitor General's arguments on the question of whether the court could review the constitutionality of the NPC's decision to approve the Provisional Legislature. The Solicitor General maintained that no colonial, federal, or "confederal" system permits regional courts' authority over the acts of the federal government. He also argued that the Basic Law did not permit the scope of judicial review in Hong Kong to expand after the handover, and that the scope before the handover had not extended to challenges against any act of Great Britain.[147]

Chief Judge Chan, the principal author of the *HKSAR v. Ma Wai Kwan* opinion, still believes that Hong Kong courts cannot invalidate PRC legislation. In that opinion, he stated that parties can challenge two kinds of NPC acts, that is, the existence of the NPC act, and the contents of the act. In a subsequent case, Judge Chan set out that parties can also, on rare occasions, challenge the NPC act as inconsistent with another act, including the Basic Law. For example, if the NPC did not follow its procedures and it affects Hong Kong. On the other hand, he explained, courts that do not affect Hong Kong "are none of [the Hong Kong courts'] business." Similar to the United States, federal laws can't be challenged in state courts, only in federal courts. To challenge a PRC act or law, one must go to a PRC court. Hong Kong colonial courts could not challenge English Parliament and, likewise, "municipal courts cannot challenge the ultimate source . . . . It's common sense."[148]

This position, arrived at three years after *HKSAR v. Ma Wai Kwan*, seems to be the culmination of much reasoned reflection about the issue. Judge Chan admitted ten months after he handed down the judgment in that case that his interpretation in that opinion of the scope of judicial review in Hong Kong was incorrect. Judge Chan seemed open to the notion that Hong Kong courts could review the effects of PRC acts in Hong Kong, although he indicated that there was no immediate plan at that time by the courts to alter the position on judicial review taken in *Ma Wai Kwan*. The doctrine of *stare decisis* prevented the Hong Kong courts from changing the interpretation. Judge Chan explained that he ruled the way he did because the NPC had issued a decision "before the Basic Law came into law" that there would be no "through-train." This was the "context" in which he reached his decision.[149] The "through-train" was the term used for the continuation in

147. For example, see the Solicitor General's brief in *HKSAR v. Ma Wai Kwan and Others*, argued in the Hong Kong SAR High Court, July 22-23, 1997 (on file with the author), at 17-19; and the Solicitor General's reply brief in *HKSAR v. Ma Wai Kwan and Others*, argued in the Hong Kong SAR High Court, July 22-23, 1997 (on file with the author), at 1-3.

148. Interview with Chief Judge Patrick Chan, *supra* note 49.

149. *See* Interview with Chief Judge Patrick Chan, Hong Kong (June 3, 1998). Chief

office of the members of Hong Kong's Legislative Council, who were all elected to four-year terms in 1995 and, therefore, were due to serve the second half of their terms after the handover.[150]

Yet, even Chief Judge Chan's position in 1998 on *Ma Wai Kwan* was consistent with the Solicitor General's argument largely adopted by the High Court in that opinion to justify its dismissal of the challenge to the validity of the Provisional Legislature. The argument went as follows. Article 68 of the Basic Law provided for election of the first Legislature without requiring democratic elections, while Annex II did not specify the method for the formation of the first Legislative Council. Although a decision issued by the National People's Congress did specify the method for its formation, it also specified an arrangement mutually agreed upon by China and the United Kingdom but from which British Governor, Christopher Patten, had deviated. Since Article 159 of the Basic Law made it impossible to amend the Basic Law before the handover, the Preparatory Committee to which the NPC had delegated the task of setting up the selection process for the first legislature of the HKSAR had no choice but to form an interim legislature outside the bounds of the Basic Law. The 1990 National People's Congress Decision gave the Preparatory Committee the power to do whatever necessary to form the new SAR government.[151]

A key ramification of this argument is that it avoided classifying the establishment of the Provisional Legislature as an "act of state" and therefore bypassed any interpretation of Basic Law Article 19. Article 19 provides for review by Hong Kong courts of "acts" except for "acts of state such as those involving defense or foreign affairs."[152] One reason for avoiding Article 19 might have been to preclude the need for the Hong Kong government to request a certificate from the PRC central government, which it would have had to do if the court had determined that the establishment of the Provisional Legislature had been an "act of state."

Ma Wai Kwan might have chilled the use of the Act of State doctrine and the invocation of Article 19, at least temporarily. No Hong Kong court has since agreed with any litigant that the issue raised involved anything classified as an act of state. In contrast to the dozen or so cases which have, through the first half of 2000, called upon the Hong Kong courts to interpret the Basic Law, the act of state doctrine in 1999 and 2000 appears to be on the wane from its earlier life in colonial Hong Kong. No litigants raised the issue between January, 1999, and January, 2000, and in one case which

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Judge Chan made a similar statement to journalist Cliff Buddle, in *Mainland Laws May be Open to HK Challenges*, SOUTH CHINA MORNING POST, May 21, 1998, at 2 and the SOUTH CHINA MORNING POST editorialized on it at 18.

150. *See* Interview with Chief Judge Patrick Chan, *supra* note 149.

151. *See* HONG KONG SPECIAL ADMINISTRATION REGION, SUBMISSIONS, at 19-24; HONG KONG SPECIAL ADMINISTRATION REGION, REPLY BRIEF, at 4-8.

152. Basic Law, art. 19.

presented an argument similar to that in the colonial case of *Ku Chu Chun v.Ting Lei Miao*,[153] the doctrine made no appearance, nor did any certificate from the government appear.[154]

Basic Law Article 19

There is no explicit reference made to the act of state doctrine in Article 19, yet jurists have vigorously debated this proposition.[155] The provision for a "certificate" from the PRC central government to be handed to the courts by the Hong Kong government is reminiscent of the mechanism for substituting the British government's "fact of state" for the court's discretion in the UK. The Hong Kong courts apply the facts in this certificate to the instant case in order to decide issues related to defense or foreign affairs. The qualifier "foreign affairs" might be construed as a reference to the act of state doctrine, but for its accompaniment by "defense" and "such as" both of which expand the scope of this exemption beyond what would be recognizable as the act of state doctrine. Thus, despite the qualifier "foreign affairs," the phrase "acts of state" may not be a reference to the narrow English, American, or international doctrines, but a generic term that carries no meaning beyond the words themselves.[156] Even Professor Wang Guiguo, who asserts that the drafters of the Basic Law "directly borrowed [the phrase] from the common law," does not conclude from this that interpreters of the phrase should limit themselves to the common law doctrine.[157]

If "acts of state" in Article 19 does not import the British doctrine into HKSAR law, it sets out a broader limitation on judicial review. The words "such as" in Article 19 that immediately follow "acts of state" and immediately precede "defense and foreign affairs" obscure the meaning of this category of issues that Hong Kong courts must decide with a certificate from Beijing, because they make two readings possible. Either this category is limited only to "defense and foreign affairs," or it includes other, unspecified issues. The Chinese version, which uses the words *guofang, waijiao deng* ["national defense, foreign affairs, etc."], does not diminish the ambiguity.

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153. Ku Chu Chun v. Ting Lei Miao, 1998-3 HKC 119, 1998 HKC LEXIS 95 (HKSAR Court of Final Appeal, July 2, 1998).

154. *See* CEF New Asia Co. Ltd v. Wong Kwong Yiu John, 1999-3 HKC 1, 1999 HKC LEXIS 28 (HKSAR Court of Appeal June 8, 1999).

155. *See, e.g.*, Lee *supra* note 4; Wang Guiguo, *A Comparative Study on the Act of State Doctrine–With Special Reference to the Hong Kong Court of Final Appeal, in* LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 249-93 (Wang Guiguo and Wei Zhenying eds., 1996).

156. *See* Interview with Wang Chenguang, faculty of law City University of Hong Kong, May, 1998.

157. *See* Guiguo, *supra* note 155, at 275.

There are other problems with the meaning of Article 19. It does not specify whether the "acts of state" exempted from judicial review might range from a lower level administrative decision all the way up to the enactment of a statute, an omission which, if filled in with all of these types of acts, similarly expands the scope of this exemption beyond that of the act of state doctrine. The procedures for requesting a certificate under this provision remain unclear. Accordingly, it is very difficult to discern the meaning of Basic Law Article 19.

Martin Lee, who helped draft Article 19, believes that municipal courts do have the right to review federal law and, in this way, squarely disagrees with Patrick Chan that municipal courts cannot challenge the source. Lee said "if you know they are wrong and inconsistent with the Basic Law, how can you be bound by it?"[158] Lee, who is also responsible for the provisions in Basic Law Articles 8 and 18 providing for the continuation of the common law and for the procedures in Article 18 for introducing PRC laws into Hong Kong, believes that Article 19 is "a time bomb." PRC drafters of the Basic Law asked Lee if there were any issues that fell outside the jurisdiction of Hong Kong courts. Lee gave them materials on the British acts (he used the plural) of state doctrine, but he said to the PRC side, "don't worry if you don't understand it, just don't say anything about it in the Basic Law because Article 18 already says that the common law continues." The PRC voiced concern that Hong Kong courts could get it wrong. Lee said, either Hong Kong has the right of final appeal or it does not (obviously meaning that Hong Kong courts cannot then, by definition, "get it wrong").[159]

But the PRC side would not relent, Lee recounts. So Lee tried to find a way to include the complicated act of state doctrine in the Basic Law. In Lee's original draft, Article 19 did not give the Hong Kong courts jurisdiction over acts of state. Then, in addition to British doctrine, there are "facts of state." As for facts of state, if anything like this should emerge, courts ask for a certificate from the executive which is binding on the courts. In the wake of Martin Lee's protests over the events in Tiananmen Square in 1989, he was removed from the drafting team. In his absence, the remaining drafters added two things to Article 19 that Lee considers unfortunate. Lee does not know if their addition was deliberate or not. The two phrases were "...such as defense and foreign affairs," and "on questions of fact concerning acts of state." The latter addition mixed up "acts of state" with "facts of state," he laments. He also saw to his dismay that Article 19 provided that the PRC central government, not the Hong Kong Executive, will issue a certificate.[160]

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158. Interview with Martin Lee, *supra* note 20.

159. *See id.* Lee told a journalist in Toronto six months earlier that Article 19 was a "ticking time bomb." Gord Barthos, *Chipping at Hong Kong's Liberty*, THE TORONTO STAR, Jan. 28, 2000.

160. *See* Interview with Martin Lee, *supra* note 20.

From Martin Lee's explanation of the drafting of Article 19, the effect of the two additions was to broaden "facts of state" too far to retain its original sense. Lee explains the confusion this way. In the British version of "acts of state," there is no certificate. Courts just decide whether there has been an act of state, and if so, they do not take jurisdiction over the issue. Acts of state doctrine is "limited," he said. An example might be a declaration of war or the signature of treaties. The court decides whether there is an act of state. It does not need evidence to arrive at this. It is a matter of law, not fact. If the court finds an act of state, it will not try the case. It is the court's right, not discretion, to decide whether there is an act of state. No one can stop the court from ruling if the court decides there is no act of state. Facts of state, on the other hand, require evidence in the form of a certificate from the executive (not from historians, for example, he said). For example, in 1990 whether Argentina was an enemy of Britain. The "fact of state" may not have anything to do with any act of state.[161]

"Fact of state" is narrower than "act of state" and involves less discretion for courts. Lee finally agreed that act of state in Chinese, in a generic sense, independent from the British doctrine, encompasses all government acts and, therefore, is much broader than the fact of state doctrine. When asked if it becomes a blanket sovereign immunity, he said yes, "a hole, but how big?"[162]

Lee also gave two examples of how Article 19 could take jurisdiction away from Hong Kong courts in cases over which they would have jurisdiction under the British version of act of state doctrine. In one example, the Bank of China gets a loan of $100 million from the Bank of America in Hong Kong for the Three Gorges Dam. The contract is signed in Hong Kong. The Bank of China does not pay it back. The Bank of America sues the Bank of China in Hong Kong court because the loan was taken out in Hong Kong. The Bank of China argues that the Hong Kong court has no jurisdiction because what it did in taking out the loan for the Dam project was an act of state. In the second example, the People's Liberation Army [PLA] arrests a Hong Kong citizen in Hong Kong and takes the citizen into the PRC. Because the PLA did it, this citizen when he sues the PLA in a Hong Kong court might hear from the PLA in response that what it did is an act of state such as "defense," since anything the PLA does is by definition a matter involving the defense of China.[163]

One final problem with Article 19, according to Lee, is that it was written into the Court of Final Appeal Statute, the Hong Kong ordinance enacted under the supervision of then-Governor Christopher Patten. This is problematic because it raises a question about whether the Act of State

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161. *Id.*

162. *Id.*

163. *See id.* Lee gave similar examples to a journalist in Toronto six months earlier. *See* Barthos, *supra* note 159.

doctrine applies in Hong Kong. So "Patten sold us down the river twice," Lee concluded.[164]

But it is up to the courts of Hong Kong to decide whether there is an act of state. The certificate that the PRC central government could hand down in such cases could tell the Hong Kong courts how to decide particular issues in pending cases, and even decide for the Hong Kong courts whether some of the facts of the case constituted an "act of state." But such certificates need not stop the courts from adjudicating these cases. There is nothing in Article 19 that prevents the courts of Hong Kong from deciding how to apply the certificates–how broad a scope to give them in the pending case.

Act of State Doctrine

Even if the act of state doctrine makes a comeback in Hong Kong, it will not likely do much to prevent Hong Kong courts from invalidating PRC statutes. A variety of doctrines call upon judges in the English system to refrain from reviewing certain issues, most notably "political" ones.[165] As one of these, the act of state doctrine applied a narrow sovereign immunity to set out what courts could not review and implied that virtually all else was reviewable. The doctrine, as summarized in the leading treatise on the common law, imposed a broader limitation on judicial review than the limitation imposed by the United States' act of state doctrine, which immunized foreign governments from United States' court jurisdiction as to acts by those governments in their home territories, but not to their extraterritorial activities.[166]

The British version of the act of state doctrine nonetheless excluded very little from consideration. Under that version, courts decline to review causes of action brought by aliens in which the alleged tort or breach of contract or infringement of property rights was performed by the British Crown outside the "dominions of the Crown" pursuant to "an exercise of political power." Although in several cases a British court recognized an act of state where a British subject sued for redress from the consequences of an act of state committed outside British territory,[167] the doctrine generally leaves to judicial review those acts of the Crown which affected British subjects or

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164. Interview with Martin Lee, *supra* note 20.

165. For an example of a court applying the political question doctrine to limit the issues it reviewed, see R v. Minister of Agri. Fisheries and Food, Queen's Bench Division (Crown Office List), CO/1132/92 (Nov. 11, 1994).

166. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) is the leading case. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (50th ed., 1998).

167. *See* Attorney-General and Nissan (House of Lords) A.C. 179, 191-205 [1970]; Salig Ram (Rajah) v. Secretary of State for India in Council (1872) L.R. Ind. App. Suppl. 119, 126, 127; Doss v. Secretary of State for India in Council (1875) L.R. 19 Eq. 509, 532-533; Cook v. Sprigg [1899] A.C. 572, 576, 577; West Rand Central Gold Mining Co. v. The King [1905] 2 K.B. 391, 393, 408.

which were "taking[s] of possession by the Crown under colour of a legal title."[168] "[F]riendly aliens resident within British territory" were treated as British subjects for the purpose of applying the doctrine, thereby narrowing the scope of the doctrine, while "British protected persons in British protectorates or British protected states" were treated as aliens for the purposes of applying the doctrine, thereby slightly expanding the scope of the doctrine. A significant sign that overall the doctrine imposed narrow limits on judicial review, however, was the fact that it was left to the courts to decide whether the act of state doctrine applied.

The malleability of the act of state doctrine weakens its power to constrain the discretion of judges. It is created by a series of common law judicial opinions which lack coherence when viewed as a package. According to British jurist Michael Singer, in an exhaustive study of the doctrine, or to inferences which can be drawn from his study, the doctrine's origin,[169] theoretical basis, and development are all plagued by serious ambiguities. It is unclear, for example, whether sovereign immunity, or a foreign affairs power growing out of constitutional sources, or a royal prerogative, or some kind of agency theory underpins the doctrines.[170] Nor is there agreement on how many strands of the doctrine exist, as is demonstrated by the debate over this question described in Singer's study,[171] and by the differing descriptions of it by English jurists.[172] The nature of act of state cases remains a puzzle. Singer asserts that such cases are primarily "contractual disputes,"[173] while, in my view, the issues seem remarkably similar to those found in eminent domain cases. It is unclear under which circumstances the state acts prevent a court from inquiring into the act and what effect the doctrine has on the court once invoked. Does it, in the words of some dicta on the matter, "prevent the courts from having cognizance of"[174] the state's act in question? If so, this makes little sense because the court's discretion is limited to the

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168. *See* Attorney-General and Nissan (House of Lords) A.C. 179, 191-205 [1970]; Salig Ram (Rajah) v. Secretary of State for India in Council (1872) L.R. Ind. App. Suppl. 119, 126, 127; Doss v. Secretary of State for India in Council (1875) L.R. 19 Eq. 509, 532-533; Cook v. Sprigg [1899] A.C. 572, 576, 577; West Rand Central Gold Mining Co. v. The King [1905] 2 K.B. 391, 393, 408.

169. *See* Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, With Comparisons to United States Practice*, 75 AM. J. INT'L L. 284 (1981).

170. *See id.* at 284-86.

171. *See id.* at 285.

172. The prominent English jurist and expert on Hong Kong law, Peter Wesley-Smith sets out seven different strands of the doctrine. *See* CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 91-92 (2d ed. 1994).

173. *See* Singer, *supra* note 168, at 283.

174. The language is taken by Singer from an argument by the British Crown in *Nissan* [1970] A.C. at 188D-E.

extent that it is forced to take cognizance of the act by adopting a particular interpretation of it.[175]

Another way the act of state doctrine does little to constrain judicial discretion is in the role played by "facts of state." Whether or not a court decides that the doctrine applies, anything which the executive branch of the government deems to be a "fact of state" which is relevant to the instant case is supposed to be decided by the government instead of by the court. The learned restatements of this doctrine lack a description of the process by which courts apply the doctrine, and it is in this process that the constraint of the doctrine breaks down.[176] Nowhere is it required that a judge request from the government a certificate of any fact, nor, once given such a document, is the judge's process of applying it to the facts of the case regulated by a prescribed procedure.

In his erudite discussion of the doctrine, Peter Wesley-Smith concludes that "[i]ntergovernmental acts of state are normally accompanied by a declaration or statement made by the Crown, in the form of an Order in Council or Proclamation, or for the purpose of particular judicial proceedings, an 'executive certificate.'"[177] Even this procedure has exceptions. If a certificate or Order in Council is lacking, "a colonial ordinance might be accepted as an authoritative statement by the Crown as to a matter of state."[178] And if all three are lacking, "the judicial approach to a matter of state will be determined by purely factual considerations."[179] This means that, as Wesley notes, "a certificate act of state is simply unchallengeable evidence, but not the sole kind of evidence, of an intergovernmental act of state."[180] In other words, judges may exercise the full extent of their discretion in determining the nature of an act of state even where the government has issued a certificate or enacted a law on the subject. The relevance of the document or law to the facts of the case needs to be determined, and the judge is free to do this as he sees fit.

The process leaves a great deal of discretion to the court to decide when to invite the government to decide a fact of state, and even when the court does do this, the government's response may leave open the central question for the court to decide. The court may or may not request a document, such as a certificate issued by the Foreign and Commonwealth Office or an Order in Council issued by the Privy Council or a statute, from the government articulating the fact of state. In the absence of such a document, the court may look at whatever evidence it chooses, and the court is free to determine a decision on any issue which is not expressly answered in the document.

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175. *See* Singer, *supra* note 168, at 288.
176. *See* 18 HALSBURY'S LAWS OF ENGLAND 725-30 (4th ed. 1977).
177. *See* Singer, *supra* note 168, at 99.
178. *Id.* at 100.
179. *Id.* at 100.
180. *Id.* at 101.

Whether or not it receives explicit guidance from the government, the court is constrained only to the extent that the common law constrains judicial discretion when it applies the fact of state to the facts of the instant case. So, according to the leading treatise on the subject, although the court in effect takes judicial notice of the fact of state by treating that information as

> . . . conclusive, the court retains the discretion to select the relevant aspects of the fact of state that binds the court, and the court is free to ignore the fact of state in cases where what is involved is the construction of some term in a commercial document, or an Act of Parliament.[181]

One example of the broad discretion enjoyed by British courts when applying certificates is on issues involving the recognition of foreign governments by the British government. The standing to sue or be sued is such an issue. As of 1980, the British government ceased to supply courts with certificates which clearly stated whether it recognized a particular government. Courts were free–indeed were forced–to decide on their own whether the British government recognized the government which was a party in a case before it. The parties were free to supply the court with evidence about the dealings between the British government and the government in question, from which the court could draw to arrive at such a decision.[182]

The act of state doctrine leaves British courts free to review acts of the United Kingdom's government inside the "dominions of the Crown," or where those acts involved British citizens. One case where both elements were present was *Commissioners of Crown Lands v. Page*,[183] in which two prominent British subjects, Lady Handley Page and Sir Frederick Handley Page, leased land in London from the Commissioners of Crown Lands in 1937, only to have the British government reclaim possession of the land in 1945 pursuant to the Emergency Powers (Defense) Act and the Supplies and Services (Transitional Powers) Act. The Court of Appeal dismissed an appeal from a judgment which held that "the requisitioning of the premises did not constitute an eviction" which would release the tenants from paying rent after the requisition. Before reaching its decision to dismiss, however, the court reviewed the government's reclamation of the land and applied landlord-tenant law because it governed evictions. So safely within its review power was the court, it did not once invoke the act of state doctrine in order to determine whether it had the power to review the case.[184]

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181. HALSBURY'S LAWS OF ENGLAND, *supra* note 176, at 1420.

182. *See* Ting Lei Miao v. Chen Li Hung & Anor., Hong Kong High Court, 1997-2 HKC 779; 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

183. Comm'rs of Crown Lands v. Page [1960] 2 All Eng. Rep. 726, 726-36.

184. *See id.*

It is no small gauge of the uncertainty surrounding the act of state doctrine in Hong Kong that the Solicitor General of the HKSAR and one of Hong Kong's foremost constitutional law scholars squarely disagreed about whether judges immediately after the handover had more or less power to review PRC acts than they did before. The first Solicitor General of the Hong Kong SAR, Daniel Fung, argued before the Court of Appeal on July 22, 1997 that courts in Hong Kong before the handover did not have the power to review any acts of the United Kingdom or to interpret the Letters Patent and the Royal Instructions, which made up the written portion of the Constitution of the United Kingdom. Yash Ghai, by contrast, argued that the Hong Kong courts could and did interpret these constitutional documents.[185]

The Hong Kong colonial courts did not set out the act of state doctrine limiting their power of review. The case law does not settle questions such as, were the UK government's acts within Hong Kong considered acts within the "realm" of the UK and therefore beyond the reach of the act of state doctrine? Were Hong Kong residents considered "friendly aliens resident within British territory" and therefore treated as British subjects for the purpose of applying the doctrine? Or were they considered "British protected persons in British protectorates or British protected states" and therefore treated as aliens for the purposes of applying the doctrine?

Because of ambiguities in Basic Law Article 19 and its incorporation into the Court of Final Appeal Statute, the force of the British act of state doctrine on the HKSAR courts is unclear. If, because the Basic Law provides for the continued force of colonial Hong Kong law, including the common law,[186] the procedures used in the Hong Kong colonial courts for reviewing the constitutionality of sovereign acts continues to exert precedential force upon the HKSAR courts, then the act of state doctrine might continue to be the central determinant of which sovereign acts Hong Kong judges could review and which acts they could not. Colonial doctrines, being similar to British ones on the subject, also serve as a possible source of borrowing by HKSAR judges and PRC law makers.

If so, Hong Kong judges are free to review PRC acts unless they find them to be "acts of state" or are handed a certificate from the Hong Kong government stating any facts that the courts had to judicially notice. On the three occasions where the courts in colonial Hong Kong reviewed acts of the Crown, they exercised quite a bit of discretion in arriving at their decisions. The certificate process did not bind the Hong Kong courts in these cases, and although the courts applied the act of state doctrine, the doctrine did only a little more to tie the hands of the courts than what a statute or a judicial precedent routinely does to guide the judicial process. Therefore, these cases

185. *See* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER 284 (1997) (explaining that Hong Kong SAR courts have more power to review than did Hong Kong colonial courts).

186. *See* Basic Law, arts. 8, 18.

could provide legal authority for broad discretion in the event that Hong Kong courts are faced with a question about the constitutionality or the legality of a PRC administrative act.

In one of these three cases, the Supreme Court of Hong Kong was asked to review the validity of a contract between Civil Air Transport and Central Air Transport Corporation, an aircraft company owned at the time of the signing by the Republic of China, but owned at the time of the litigation by the People's Republic of China. The Chinese company raised the issue of sovereign immunity in the Court of First Instance when the Civil Air Transport Company applied for an appointment of receivers for the assets of the Central Air Transport Corporation. The Hong Kong Court of Appeal reviewed the issue of whether the People's Republic of China was protected by sovereign immunity from any obligations a court might find it owed under the contract. The court then applied to the British government for answers to questions agreed to by the parties pertaining to whether the UK had recognized the new government of China. The answers stated that the British government recognized the "Central People's Government" of the People's Republic of China as "de facto ruler of large portions of China." Applying this, the court took as valid all the acts by the PRC government that attempted to assert control over the assets of the aircraft company which were located in Hong Kong and were the subject of the contract. This presumption of validity did not stop the court, however, from carefully inquiring into those acts to ascertain whether the PRC government was in possession of the assets that were the subject of the suit. The court set these facts out in detail, even to the extent of summarizing the extensive witness testimony that had been collected. The courts considering this case did not, however, request or receive a certificate which set out any "fact of state" as to whether the PRC government validly owned the assets in question. The courts resolved this issue on their own by applying "principles" set out in the case law cited by the parties to the facts developed by the evidence brought by the parties.[187]

In *Fung Yuen Mui v. Chan Kam Yee*, the Hong Kong High Court, without the benefit of a certificate from the Crown, effectively invalidated a British decree which applied to Hong Kong. The court considered the validity of two conflicting Crown laws, a British decree, or "Order in Council," which provided for Chinese jurisdiction over a portion of Hong Kong known as the Kowloon Walled City, and a British treaty with China which extended British jurisdiction over that area. The court decided that the treaty trumped the decree because "it was an agreement between China and Great Britain whereas the Order in Council was only a unilateral declaration by Great Britain."[188]

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187. *See* Civil Air Transp. Inc v. Chennault & Anor, 1950 HKC LEXIS 3, at 23-24, 40, 1946-1972 HKC 18 (HKSAR Court of Final Appeal May 13 1950); Civil Air Transp. Inc. v. Central Air Transp. Corp., 2 All E.R. 733 (P.C. 1952).

188. Fung Yuen Mui v. Chan Kam Yee, 1991-1 HKC 462, 1991 HKC LEXIS 383

A third request to the colonial Hong Kong courts to review an act of a sovereign occurred just three months before the handover and raised the issue of the role of the court in applying a certificate when the certificate does not clearly state the fact which is central to the case. In *Ting Lei Miao v. Chen Li Hung & Anor*,[189] the certificate stated that the UK did not recognize Taiwan as a state and that the UK had minimal dealings with Taiwan. The certificate did not answer the central issue in the case, which was whether Hong Kong courts could recognize the decisions of Taiwan's courts. Counsel argued that British policy permitted the court in such a situation to look at a wide range of evidence, apart from the certificate, in order to determine the fact in question. The High Court disagreed, stressing the limited role of the court in such a situation, yet it went ahead and decided the issue without guidance from the Foreign and Commonwealth Office.[190]

Before the handover, the Hong Kong courts also interpreted provisions of UK treaties without the benefit of certificates from the UK government. Extradition cases provided occasions for this type of review. In such cases, the language of the relevant extradition treaty did not dispose of the issue before the court, and so the court had to exercise discretion in its reading of the treaty and its application of it to the issue.[191]

Another branch of Hong Kong common law promoted judicial review of the sovereign's laws with the dictum that for statutory language to limit judicial review it had to be expressed clearly and comprehensively. The Hong Kong courts applied this doctrine to UK statutes as well as to local ones. In *Chan Yik Tung v. Hong Kong Housing Authority*, the Hong Kong High Court interpreted a UK housing statute's provisions on judicial review in such a way as to invalidate their limiting effect on the Hong Kong courts. In doing so, the court used strong language to set out this dictum: "Section 19(3) of the Housing Ordinance is merely a partial exclusion clause. Irrespective of the nature of the partial exclusion, no court should stand by and allow an attempted encroachment on its power of review unless it is restrained by an unassailably appropriate ouster clause."[192]

In addition to review of UK laws in Hong Kong courts before the reversion to Chinese sovereignty, courts reviewed the constitutionality of acts of the Hong Kong colonial government, whose Governor was appointed by the

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(HKSAR Court of Final Appeal Mar. 1, 1991).

189. Ting Lei Miao v. Chen Li Hung & Anor., Hong Kong High Court, 1997-2 HKC 779, 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

190. *See* Ting Lei Miao v. Chen Li Hung & Anor., Hong Kong High Court, 1997-2 HKC 779, 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

191. *See* Choi Sze Yuen v. Gov't of the United States, 1992 HKC LEXIS 962, 1992 HKCU 189 (HKSAR Court of Appeal June 10, 1992); Fchoi Sze Yuen v. Gov't of the United States, 1992 HKC LEXIS 954, 1992 HKCU 181 (HKSAR Court of Appeal June 10, 1992).

192. Chan Yik Tung v. Hong Kong Housing Authority, 1989 HKC LEXIS 467 (HKSAR Court of Final Appeal, Dec. 11, 1989).

Queen through the Prime Minister. One example of judicial review of an act of the Hong Kong government against the Letters Patent was *Ho Po Sang v. The Director of Public Works & Kwong Siu Kau*, in which the Hong Kong Court of Appeal held that, in the absence of legislation to this effect, Article XIII of the Letters Patent did not provide for the delegation of the Governor's authority to the Director of Public Works to lease Crown lands.[193] Although this is considered a landmark case in Hong Kong and is frequently cited, later courts did not restrict themselves so narrowly in their interpretation of other provisions of the Letters Patent. A later court decided that Article XIV of the Letters Patent provided for the delegation by the Governor of Hong Kong to the Chief Justice the power to appoint magistrates to the Hong Kong bench. Here, the court exercised broad discretion in interpreting this constitutional provision. It adopted a "generous and purposive" approach to interpreting the provision, one which required going beyond the plain meaning of the text and into the realm of what is practical in the administration of Hong Kong's government. One of the authors of the opinion concluded that:

> it is not possible to read Article XIV...without the necessary implication of a power to delegate because the Governor cannot possibly, personally, appoint and dismiss etc. the entire public service of Hong Kong, if he is to have time to do anything else. We understand that there are approximately 190,000 civil servants at present in Hong Kong.[194]

This local case law carved out a broad role for Hong Kong's colonial courts to review government acts and to interpret constitutional documents and laws of Hong Kong's sovereign. Hong Kong courts not only interpreted UK constitutional documents, treaties, and statutes on their own without any guidance by the government tailored to the instant case, but they also exercised discretion in the application of certificates from the UK government.

In sum, three possible sources of constraint on the power of Hong Kong courts to invalidate PRC statutes will not likely constrain this power. *Ma Wai Kwan* seems to have chilled the use of the act of state doctrine and the invocation of Article 19, at least temporarily. Article 19 is so difficult to read that it almost defies interpretation, and therefore Hong Kong courts, which have never ruled on anything pursuant to Article 19, have an incentive to continue to find ways around it. The act of state doctrine never did much in colonial Hong Kong to constrain the discretion of judges, and if it is revived, there is little reason to believe it will exert more constraining force upon the courts. The upshot of all this, then, seems to be that Hong Kong courts will

193. Ho Po Sang v. Director of Pubic Works, 1959 HKLR 632.

194. Attorney General v. Chiu Tat-Cheong, 2 HKLR 84, 96, 100 (1992).

continue for some time to possess the power to invalidate PRC statutes. This power is not precluded by law and is explicitly set out in the part of *Ng Ka Ling* that remains good law.

CONCLUSION

In the HKSAR, Hong Kong courts may invalidate local and PRC statutes at least insofar as they apply to Hong Kong and violate the Basic Law. Questions arising out of the application of the NPCSC decision, which nullified the only attempts so far by the Hong Kong Court of Final Appeal to invalidate local statutory provisions, are not fully resolved, and to the extent they are resolved, they leave some of the invalidation of local law in effect. What is more, much of the resolution of these questions is left to the courts of Hong Kong. The NPCSC has not interfered in the working out of any of the questions of the application of its decision to reinterpret the court of Final Appeal's interpretation of Article 24(2) of the Basic Law.

This power to invalidate statutes is final except insofar as the Court of Final Appeal decides it will not be, or if the Hong Kong government and the NPCSC repeat the unusual move of reinterpreting a Hong Kong ruling. The promises of the Hong Kong government and the Basic Law Committee, combined with the imminent development of procedures for NPCSC interpretations of the Basic Law, go a long way toward ensuring that the Standing Committee's adjustment of the Court of Final Appeal's invalidation of local law did not set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process takes away review power from the courts of Hong Kong.

In the HKSAR, the parameters of judicial review are in flux, but being in flux, opportunities present themselves to address in the Hong Kong courts the question of who has the authority to determine the parameters. This is an important way in which China's ingenious experiment with "one country, two systems" is being put to the test. And thus far, most of the working out of these parameters has proceeded without interference by the NPCSC or the Hong Kong government. The NPC has refrained from enacting, pursuant to its constitutional power to establish the "system" within an SAR, a statute which clarifies the boundaries of Hong Kong's judicial review, and from amending the Basic Law pursuant to the procedures in Article 159 of the Basic Law. The PRC Constitution invests the sole power to interpret it in the NPC, but the Basic Law gives a "high degree of autonomy to Hong Kong" and invests in its judges the power to interpret the HKSAR's constitution as to issues that fall within that autonomy. During the first three years of the SAR, Hong Kong's courts have exercised their powers of review autonomous from the PRC government. The June 26, 1999 decision by the NPC Standing Committee does not prohibit the Hong Kong Court of Final Appeal from further defining in its next decision its authority if the appropriate issue

presented itself, much the same way it did in *Ng Ka Ling*. Both the NPCSC and the Court of Final Appeal, of course, are limited by what is already specified in the Basic Law. Even an amendment of the Basic Law by the NPC is limited by the provision that such amendments may not "contravene the established basic policies of the People's Republic of China regarding Hong Kong."[195]

Given the relative lack of interference in the working out of the scope of the judicial review power of the Hong Kong courts, the long swing of the pendulum between *Ma Wai Kwan* and *Ng Ka Ling* shows that the Hong Kong courts have, since the handover, struggled to determine the scope of something that carries with it a great load of significance for the legal system of Hong Kong, and indeed, all of China. In grappling with the momentous process of interpreting for the first time the Basic Law's provisions on judicial review, and with the attendant risk of provoking a constitutional crisis, the Hong Kong appellate courts have looked to the extreme ranges of review powers afforded to Hong Kong judges in the Joint Declaration and the Basic Law and flip-flopped several times on their interpretations of the constitutional right of abode provisions. If the Court of Final Appeal had not reversed the position of the High Court on the power to review acts of the sovereign, and done so with such strong language setting out the broadest possible power of judicial review, the NPCSC probably would not have issued its only constitutional interpretation to date. The language the court used to revisit the constitutional scope of its review power twelve months later suggests that the NPCSC interpretation taught the Court of Final Appeal to be more prudent in the exercise of its review power.

Despite all of this movement, however, these review powers remain as full as they were before the British relinquished sovereignty over Hong Kong. The dire predictions of judicial review leaving Hong Kong with the sailing of the Royal Britannia at midnight on June 30, 1997 have not yet come true.

195. Basic Law, art. 159.

A JUST WORLD AT PEACE

Sheila Suess Kennedy*

I. INTRODUCTION

The tension between peace and justice is an enduring one in human history. The goal of civilized societies is to achieve a just peace; that is, to create institutions that allow citizens to settle even their deepest differences without violence or the disenfranchisement of dissenting voices.

This Commentary examines the values inherent in liberal democratic theory from the standpoint of that tension between order and justice. My thesis is that the creation of just global institutions, as justice is understood in the classic western liberal political tradition, offers the best chance to assure stability and peace in a world that is not only diverse, but increasingly interrelated and interdependent. In a global economy, where markets and technology encourage communication and interaction among previously insular populations, there are as many opportunities for increased friction as there are for increased understanding. The challenge of the twenty-first century will be to establish institutions that protect civil liberties and human rights while respecting, to the maximum extent possible, the sometimes bewildering array of cultural and normative imperatives that comprise the global village.

To frame an issue is to make a value judgment. By using the American experience with liberal democratic theory as a paradigm for this discussion, I have made the following assumptions, all of which are open to debate:

1) Self-determination and a significant degree of autonomy are personal, ethnic and national goods. That is, protecting the ability of individuals, cultures and states to determine and pursue their own ends is desirable.
2) Absence of warfare among nations and eradication of violence between peoples is desirable.
3) Peace achieved through the exercise of authoritarianism, or through the domination of some by others, is neither desirable nor sustainable. That is, while suppression of violence through the exercise of power may be preferable to war and insurrection, it is both less desirable and less likely to endure than a

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peace that respects the basic human rights of individuals, groups and countries.

4) Increased contact among nations and peoples is inescapable, due to technology and a growing world marketplace. Isolation is no longer a viable option.
5) Maintenance of diversity is a good. Enforced uniformity and cultural genocide are to be avoided.
6) As a result of increased contact, potential for conflict will increase. It will become more difficult to balance respect for autonomy and diversity against economic and political pressure for increased integration of global financial, cultural and social institutions.
7) Supra-national forums and authorities will continue to be established, in order to deal with various aspects of global economic and personal relationships, and their effectiveness in mediating conflict will depend upon whether they are perceived as legitimate and just by those over whom they assert jurisdiction.

If these assumptions are correct, the American experience may prove instructive. The United States is one of the most diverse countries in the world; the forging of political community has occurred in the face of vast differences and continuing tensions among multiple religious, ethnic and racial groups. While there is considerable room for improvement, and substantial basis for criticism, the United States may nevertheless provide a template for achievement of a stable and just world order. This is not because the liberal democratic worldview is necessarily morally superior to others (any discussion of morality is beyond the purview of this Commentary), but because it has proved to be a practical and useful mechanism for mediating claims among competing worldviews.

In the remainder of this Commentary, I will define the fundamental elements of liberal democratic theory, discuss its strengths and weaknesses, and consider what its application to global governance might look like.

II. THE LIBERAL PARADIGM

Liberalism has been defined as "a principle of political organization that accords individuals the freedom to navigate a course of their own design, constituted by self-elected plans and purposes."[1] William Galston has suggested that liberal societies are characterized by a strategy that minimizes coercion,[2] and Ronald Dworkin has defined liberal constitutionalism as "a

1. Ronald Beiner, *What Liberalism Means*, 13 SOC. PHIL. & POL'Y 191 (1996).
2. *See* WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE

system that establishes legal rights [to self determination] that the dominant legislature does not have the power to override."[3]

Liberal theory accords to individuals the broadest moral authority over their own lives consistent with the maintenance of public order. So long as individuals do not act in ways that harm the persons or property of others, they are to be free of state coercion.[4] Liberalism thus rests upon a view of the world that separates—as many cultures do not—the public from the private. Liberal theory distinguishes between the communal and the personal; with respect to communal behaviors, it further distinguishes between public activities that are governmental, and communal actions taken through voluntary associations, which are considered private. Although the historic distinction between public and private is being substantially eroded by the practice of government subcontracting,[5] the distinction remains a bedrock of liberal democratic theory. Libertarians would limit the role of government to the conduct of activities requiring the use of state coercive powers: controlling crime, waging war, levying taxes, and enforcing private agreements.[6] They would leave other activities of a communal nature to civil society, which is composed of churches, mosques, synagogues, arts organizations, private charities, and a multiplicity of other voluntary associations and nonprofit corporations.[7]

Having defined spheres of human activity in this way, liberalism (at least initially) fostered a definition of justice based upon a concept of "negative" liberty, a conception that accorded great importance to liberty and individual autonomy, which were in turn defined as the right to be free of governmental constraint. That economic or personal factors might operate to constrain autonomy as dramatically as any government edict was seen as unfortunate, but beside the point. The point was to limit power.

This original understanding has been criticized as representing a cramped view of human rights, and so strict a libertarian paradigm no longer describes American political reality. However, the importance of negative liberty and the high priority assigned to limitations on government power continue to inform liberal public policy.[8] Legislative bodies in the United

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LIBERAL STATE (1991).

3. Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 1 (1995).

4. How "harm to others" is to be defined is, of course, a highly contentious matter. Liberal principles are deceptively simple; their proper application (as evidenced by the thousands of books written on the topic) is anything but simple.

5. *See generally* Sheila Kennedy, When is Private Public? State Action in an Era of Privatization and Government Contracting, Address Before the Law and Society Association Annual Meeting (May 2000) (on file with author).

6. DAVID BOAZ, LIBERTARIANISM: A PRIMER (1997).

7. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA AND ROBERT PUTNAM, BOWLING ALONE (2000).

8. This emphasis creates genuine problems when, for example, the United States is asked to endorse Conventions like the Universal Declaration of Human Rights, G.A. res. 217 A(III), U.N. Doc. A/810 (1948), or the Convention on the Rights of the Child, G.A. res. 44/25, annex,

States have constantly struggled against the limits imposed on government in the American system, and in many cases, so-called "positive rights" which were not included in the original U.S. Constitution have subsequently been extended by statute.[9]

A negative approach to the exercise of public power posits government as a neutral arbiter among citizens who are legal equals. There are many problems with such a "neutral" system, not least the fact that it does not address systemic inequalities, does not recognize the absence of a level playing field. Indeed, there are many justice issues that simply fall outside the paradigm of negative liberty as conceived by the liberal state. An even more fundamental problem is that neutrality is not experienced as neutral by those who hold comprehensive doctrines. For such "seamless garment" believers, no system that fails to recognize the supremacy and impose the mandates of their own belief system can ever be legitimate.

Within the western liberal tradition, communitarians, like the socialists and communists before them, complain that a neutral state that places process above substance and sees individual moral choice as a private rather than public concern, fails to meet the universal and human need for meaning. They contend that liberal theory suffers from an "impoverished vision of citizenship and community."[10] Communitarians and other critics of liberalism take issue with the most fundamental commitment of liberal democracies: that persons should be free to set and pursue their own ends, in accordance with their own values. They argue that freedom, properly understood, is "freedom to do the right thing" and that political community, in order to be experienced and sustained as a true community, must insist upon a shared *telos*, an agreement on moral ends.[11] In this view, it is more important that those ends be the correct ones than it is that they be freely chosen.[12]

To those of a less authoritarian bent, a system of government neutrality and negative rights has one overriding virtue: it makes the use of power to enforce conformity largely illegitimate.

Liberal democrats further argue that liberalism *does* endorse ends: liberty, individual autonomy, equality before the law, tolerance. The American Bill of Rights has been referred to as a moral code.[13] Liberalism begins with respect for the value and uniqueness of each individual and

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44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, which include *as rights* affirmative entitlements to food, housing and medical care.

9. *See e.g.*, the Civil Rights Act of 1964.

10. MICHAEL SANDEL, DEMOCRACY'S DISCONTENT (1996).

11. *See id.;* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (2d ed. 1996).

12. The question of who will choose the ends, who will define what the "right thing" is and exercise the power to enforce "right ends" is seldom addressed. Presumably, the majority will do so.

13. *See generally* SHEILA KENNEDY, WHAT'S A NICE REPUBLICAN GIRL LIKE ME DOING AT THE ACLU (1997).

requires behavior consistent with that respect, notably tolerance for those who differ. Liberal political theory values a unity that can accommodate diversity;[14] and affirms the belief that society is strengthened and enriched by a multiplicity of voices and a constant testing of moral and political theories. To allow the state to prescribe a particularistic moral code or to impose political uniformity would violate the conscience and insult the personhood of citizens and would engender resentments ultimately dangerous to continued social stability and civic peace.

Liberals also challenge the notion that human community must be defined politically. They assert that political communities, in common with religious communities, ethnic groups, professional or fraternal organizations, and any number of other associations that are meaningful to their members, are partial communities, and that their utility in promoting justice rests upon the fact that they provide room for competing allegiances.

> Freedom-promoting social orders are, it appears, *pluralistic*: societies of partial allegiances in which groups endlessly compete with each other and with the state for the allegiances of individuals, and in which individuals loyalties are divided among a variety of crosscutting (or only partially overlapping) memberships and affiliations. Liberalism needs community life, therefore, and it needs community life to be constituted in a certain way. . . . Liberal statecraft should aim for a complex, cross-cutting structure of community life in which particular group-based allegiances are tempered by other, competing group allegiances and by a state representing a common, overarching, but partial, point of view that gives everyone something in common.[15]

Societies and governments are not the same things. Governments are one mechanism among many for the expression of social values and communal aspirations, and liberals warn that there is substantial danger in reposing all moral authority in a coercive state. If the goal of political community is unity without uniformity and diversity without culture war, tolerance for the divergent lifestyles and diverse values of multiple communities is both a tool *and* an end.

Liberal democrats also make another, more practical argument: there is no reasonable alternative to state neutrality, unless one wishes to use the state's coercive power to impose ends endorsed by the majority upon unwilling minorities. John Rawls defends the liberal enterprise by positing an

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14. *See generally* Will Kymlicka, *Social Unity in a Liberal State*, 13 SOC. PHIL. & POL'Y 105 (1996).

15. Stephen Macedo, *Community, Diversity, and Civic Education: Toward a Liberal Political Science of Group Life*, 13 SOC. PHIL. & POL'Y 105, 255 (1996).

"overlapping consensus" of shared limited goals.[16] The complex framework he establishes rests in part upon a central insight: every time you add a goal that government is to enforce, you introduce a new source of conflict. In the United States today, we have deep divisions over numerous such issues. The right to enjoy the proceeds of one's own labor conflicts with taxation that redistributes money for social ends; the right of a woman to control her own body conflicts with the religious belief of many that abortion is murder; the right of government to wage war encounters the resistance of those who believe all wars to be immoral. There are numerous other examples. No society or government can avoid such conflicts, no matter how respectful of individual autonomy, but liberal democracies are obliged to minimize them by restraining the state from intruding too much into the realms that have been defined as private. The classic formulation of this principle is that with which this section began: government intervention is warranted only when one citizen threatens harm to the person or property of another.[17] While the United States and the world's other liberal democracies have long since moderated that simple libertarian principle, often for reasons that are sound and even more often for reasons that are specious and worrisome, I would argue that it is a formula to recommend as an approach to global peace. Marc Stier has recently described the liberal strategy for avoiding conflict:

> Neutrality about the good is, for liberals, also central to their strategy for preserving internal peace. Liberals hold that we can reduce political and social conflict if we place certain matters beyond the bounds of political decisionmaking. Extreme and dangerous political conflict, the kind that leads to civil wars, results when governments prevent some citizens from pursuing ends of fundamental importance to them. When governments respect our rights, though, people are free to make decisions for themselves about these matters. Thus conflict about divisive issues is prevented. This strategy of avoidance is one of the prime ways in which liberals hope to keep the peace. Of course, some people may be frustrated because they cannot attain their own ends by using the power of the state to restrict what other people say and do. The liberal expectation, however, is that people would rather have their own freedom protected than interfere with the freedom of others, if only because they recognize that an illiberal regime might at some point turn against them.[18]

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16. JOHN RAWLS, POLITICAL LIBERALISM 133 (1993).

17. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

18. Marc Stier, Principles and Prudence: Reconciling Liberalism and Communitarianism, at 3 (2000) (unpublished manuscript, on file with author).

III. GLOBAL APPLICATION

As a rapidly shrinking world enters the Twenty-First century, these questions are no longer theoretical. Sophisticated communications are fast creating the "global village" foreseen by Marshall McLuhan. Global markets are emerging, creating new geopolitical realities. Thomas Friedman noted "[u]nlike the cold-war system, which was largely static, globalization involves the integration of free markets, nation-states and information technologies to a degree never before witnessed, in a way that is enabling individuals, corporations and countries to reach around the world farther, faster, deeper, and cheaper than ever.[19] Alfred Aman has described the implications of so unprecedented a phenomenon:

> The end result of these new networks of investment, finance and production is that they help to create relatively integrated markets for their products and they produce new, multiple sets of relationships or economic networks that transcend the geography of states.... As a result, new bodies of global and international law are developing to address issues that are neither wholly domestic nor wholly international.[20]

This global integration has both positive and negative implications. In terms of diminishing armed conflicts of the sort that the world has previously known, I would argue that global markets are emphatically good. Countries don't bomb places where their citizens own real estate; they don't wage war on those who purchase their goods and services. It has been said, and not entirely in jest, that no wars occur between countries that both have McDonald's.[21]

But even if it is true that global communication and a global economy are making conventional war less likely, the absence of armed conflict between nation-states is not the same as peace, and certainly not the same as a just peace. In such a world, it is still possible (and perhaps even likely) that the strong will dominate the weak, that the gap between haves and have-nots will widen, and that the new dialectic will be tribalism against globalism.[22] By tribalism, Barber means the resistance of insular religious or ethnic comprehensive cultures to the seemingly inexorable march of global

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19. *See* Thomas L. Friedman, THE NEW YORK TIMES MAGAZINE, Mar. 28, 1999.

20. Alfred J. Aman, *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, 31 VAND. J. TRANSNAT'L L. 4, 781-82 (1998).

21. *See* BENJAMIN BARBER, JIHAD VS. MCWORLD (1995).

22. *See id.*

capitalism.[23] Such resistance proceeds largely from a fear of cultural imperialism, fear of having one's ethnic group or tribe or even one's nation swallowed up and replaced by a pallid, all-encompassing western materialism.[24] We are already seeing the emergence of terrorism and local insurrection as the new warfare, fought by those who believe that they are thereby protecting their cultural or national or ethnic autonomy against an emerging, westernizing world culture.

It is in the context of this reality that existing supranational institutions are being strengthened and new ones are being created. But it is not only marginalized societies that fear the development of a "new world order," conceived as a transnational or supranational authority or world government. In the United States, as in other western industrialized countries, there are powerful voices advocating isolationist measures. Even quite moderate politicians express concern over potential loss of sovereignty to international agencies. Nationalism and national identity are powerful forces even in countries with a large economic stake in further global commerce. The political difficulties that have attended the emergence of the European Community are illustrative of the barriers to full co-operation, even among countries with many similarities and strong incentives for added institutional integration.

On a more theoretical level, political scientists who believe global institutions are necessary and desirable nevertheless worry that citizen apathy and political disaffection will increase if power is exercised by institutions that are ever more remote.[25] If power shifts to supra-national institutions, the distance between the exercise of authority and the kinds of civic participation that are necessary to legitimate such exercise becomes too great. If global citizens are to retain—or regain—control over the governments that rule them, power must devolve as well as evolve, with local, national and international bodies each exercising jurisdiction only over those functions that require action at that geographic level.

Politicians are aware of the dual nature of globalization's pressure. In a discussion of Tony Blair's celebrated "third way" of governing, which rejects the prior European political categories of Left and Right, the Economist Magazine reported on a seminar devoted to an exploration of the new approach as follows:

> The old left sought to maximise the role of the state, the old right to minimise it. The third way should seek instead to

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23. *See id.*

24. *See id.*

25. In the United States, increased concentration of power in Washington has been accompanied by a perception of powerlessness among citizens, and a corresponding lack of interest in voting and elections. Participation in national politics is increasingly viewed as an exercise in futility, unless one is very rich or famous or well-connected.

> restructure government, at all levels. It should promote subsidiarity and address the "democratic deficit." Measures included constitutional reform, greater transparency, and more local democracy...The third way recognises that we no longer live in a bipolar world and realises that states no longer face enemies, only dangers.[26]

Some governing functions must be handled globally. Others are best addressed locally. A number of commentators and political scientists have remarked that, under the press of globalization, political authority is draining away from states, simultaneously moving upward to supranational organizations, downward to sub-national units, and "sideways or *laterally* to private actors assuming previously 'public' responsibilities."[27]

The challenge to governance in this brave new world will thus be to identify not only what functions are appropriately governmental and nongovernmental, but also, for those that are deemed governmental, to identify the proper unit or level of government that should have jurisdiction of the matter.

Mediation of treaties, trade disputes, environmental threats and international peacekeeping are inescapably global issues. Justice systems, transportation and labor policies, central banking decisions and the like are generally issues of national concern. Burglary and assault, traffic engineering, garbage collection, and similar matters are just as clearly local. A workable international federation must reflect this reality, or it will not have the support of the nations it purports to represent nor the legitimacy to exercise the limited powers it must have.

An international body based upon liberal democratic principles will not suppress indigenous cultures or supplant existing national governments. Like national governments in the libertarian political tradition, its power will be limited. The liberal democratic distinction between public and private will inform the conduct of such an international institution, and will prohibit its interference with the internal affairs of its "citizens"—in this instance, member nations—much as the Bill of Rights in the United States places limits on government interference with its human citizens. Ideally, the United Nations will evolve into such an institution, melding moral authority and legitimacy to the power to enforce a limited but common set of standards for nations' behavior.

While such an approach holds great promise, knotty and enduring problems remain. There will always be those who resist membership in a world community so conceived, those whose religious views or cultural

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26. *Ideology*, ECONOMIST, May 2, 1998, at 52.

27. Miles Kahler and David A. Lake, Globalization and Governance, at 2 (2000) (unpublished manuscript, on file with author).

ambitions impel them to attack democratic institutions, subvert popularly elected governments, and otherwise engage in activities intended to shift the balance of power in favor of their own comprehensive worldviews. An international body committed to respecting the internal affairs of member nations will find it extremely difficult to justify measures taken against such efforts, which are likely to take the form of intrastate conflicts.

Even more difficult will be conflicts between fundamental human rights and national sovereignty. In the United States, that conflict was most stark during the civil rights movement, when respect for the sovereign rights of states came into conflict with the fundamental constitutional rights of African-American citizens of those states. At what point will a world government committed to human rights feel impelled to prevent a nation state from denying fundamental rights to its own citizens? What if the deprivation is rooted in the culture and history of that nation-state? How, to pose but one example, will a liberal world government address the genital mutilation of young women in certain parts of the world?[28] Will such assaults be tolerated as an expression of a state's right to cultural autonomy and self-determination? Or, will the violation of a woman's body without her meaningful consent be considered a criminal act that a global authority has the right to prohibit? Who are the more important constituents of global government—the nation-states or the people?

If intervention into the internal affairs of nations can be justified on the basis that it is necessary to put down subversion, or to protect the bodily integrity of women, can it also be justified in order to redress economic deprivations? It can be argued that a neutrality that ignores systemic inequalities is hardly neutral; that it is only when all people enjoy at least a minimal standard of living that the concept of autonomy has any real content or meaning. Indeed, the Universal Declaration of Human Rights incorporates that insight. Will we ultimately empower a global authority to enforce the Universal Declaration, much as the United States government enforces the Bill of Rights within the various states? And what of the growing "lateral" concentrations of power in international corporations that owe allegiance to no state, or to many? Global capitalism has encouraged mergers and acquisitions across national boarders; technology has enabled the creation of comparatively rootless international corporations. Some of these companies have gross national products that exceed those of many countries. Such concentrations of economic power, arguably unconstrained by the law of any particular nation, present yet another challenge to global authority.

IV. CONCLUSION

However daunting these and other problems may seem, there is no turning back. Global institutions will be vested with authority for the same

28. *See generally* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000).

reason that governments have always been formed: to enforce civil peace and to mediate disputes. The issue is not whether to create such institutions, but what form to give them.

The alternatives to a liberal democratic order are authoritarianism, on the one hand, and disorder, or chaos, on the other. With all its deficiencies, I submit that democratic liberalism based upon the rule of law[29] offers the best avenue to global peace and justice. A liberal federation governed by a global authority required to respect individual, ethnic and national autonomy, encourage diversity within unity, and enforce the fundamental human rights set out in the Universal Declaration of Human Rights is most likely to engage the allegiance of the human family, and most likely to achieve and maintain a just world peace.

29. William Whitford has offered an excellent definition of the term "rule of law" in an article by the same name in the Wisconsin Law Review. According to Whitford, the original meaning of the term "rule of law" was that no individual should be "above" the law; that government actions should be accountable to some set of pre-determined standards, to be applied by an independent body (probably a court) and contained in constitutions, statutes, administrative regulations and common law precedents. *See* William Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723.

NATIONALIZE THE REVISED ARTICLE 9 FILING SYSTEM: A COMPARISON OF THE OLD ARTICLE 9 AND CANADIAN PERSONAL PROPERTY FILING SYSTEMS

I. INTRODUCTION

Article 9 of the Uniform Commercial Code must be viewed as a legislative success story. Completed in its current form in 1972, Article 9 was accepted by all fifty states.[1] In Canada, Article 9 was used as a model for the Personal Property Security Act,[2] a body of legislation governing secured transactions in most Canadian provinces.[3] Further away, New Zealand based its personal property law on Article 9.[4] Even international treaties and conventions have been influenced by Article 9.[5] Nearly fifty years after its conception, practicing commercial lawyers still view Article 9 as "fundamentally and conceptually sound."[6]

Still, Article 9 is not without critics. Much criticism centers on the Article 9 filing system. "The [A]rticle 9 filing system is in disarray."[7] "The rules governing when and where to file a financing statement are incomprehensible at best, diabolical at worst."[8] Secured parties must untangle a web of federal, state, and local laws in order to perfect their security interests using the Article 9 filing system. Fortunately, Revised Article 9 becomes law in a majority of states on July 1, 2001.[9] Therefore, now is the appropriate time to look back at the mistakes of the original Article 9, to examine how Canada,

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1. *See* National Conference Committee on Uniform State Laws, *at* www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucca9.htm (last visited Apr. 20, 2001) [hereinafter, NCCUSL]. Louisiana was the final state to adopt Article 9 in 1988. *See* 1988 La. Acts 528 § 1.

2. *See* Michael G. Bridge et al., *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567, 569 (1999).

3. *See id.* Nine Canadian provinces and one territory have adopted the Personal Property Security Act. *See id.* at n.6. These include, in order of implementation: Ontario, Manitoba, Yukon Territory, Alberta, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland. *See id.*

4. *See id.* at 569-70.

5. *See id.* at 570.

6. *Id.* at 569.

7. Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, 55 LAW & CONTEMP. PROBS. 5, 37 (1992). [hereinafter LoPucki, *Computerization*].

8. Todd C. Nelson, *Article Nine Goes Online*, 32 ARIZ. ATT'Y 35 (1996).

9. *See* NCCUSL, *supra* note 1. The states that have adopted Revised Article 9 are: Alaska, Arizona, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and the District of Columbia. *See id.* A few of these are still awaiting a governor's signature. *See id.* Revised Article 9 has been introduced in: Colorado, Florida, Georgia, Louisiana, Massachusetts, Missouri, New Jersey, New Mexico, New York, South Carolina, and Wisconsin. *See id.*

which modeled its own filing system on Article 9, has adapted to meet the requirements of the information age, and finally, to answer the question of whether Revised Article 9 was written to avoid the mistakes of the current code, or alternatively, whether Revised Article 9 will ultimately succumb to the same pressures that undermined the original Article 9.

II. THE ORIGINAL ARTICLE 9 FILING SYSTEM

In 1962, the first widely adopted version of Article 9 of the Uniform Commercial Code (U.C.C.) arrived.[10] After a further revision in 1972, Article 9 was adopted by all fifty states, the District of Columbia, Puerto Rico, and Guam.[11] Like other articles of the U.C.C., Article 9 promised to substantially unify what had been a state-by-state approach to commercial law.[12] This included simplifying perfection with the creation of the Article 9 filing system.[13] Grant Gilmore, the reporter for the original drafting committee of Article 9, envisioned this as "one big filing system" in each state.[14] These filing systems would create a means for secured parties to record their liens and effectively put other lenders on notice.[15] Nearly a half-century later, many scholars doubt that the Article 9 filing system can accomplish this limited purpose.[16] The problem is three-fold. First, a secured party must decide where to file its financing statement.[17] Second, a secured party must decipher the requirements of the financing statement for the chosen location.[18] Finally, secured parties must deal with a host of other factors, including specific federal, state, and local government formalities.[19]

The first problem facing a secured party is deciding where to file its financing statement. This has been a complicated question since Article 9's beginning. [20] There was disagreement during the drafting of Article 9 over the proper place to file a financing statement.[21] Agricultural states favored filing

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10. *See* RUSSELL A. HAKES, THE ABCS OF THE UCC: ARTICLE 9: SECURED TRANSACTIONS 2, 3 (1996).

11. *See id.* at 3.

12. *See* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 332 (1998).

13. *See* U.C.C. §§ 9-401 to 9-408 (1972) [hereinafter, the current 1972 Official Text of U.C.C. Article 9 will be cited as Cur.].

14. LoPucki, *Computerization, supra* note 7, at 15. "[O]ne big filing system" should not imply that the drafters of Article 9 envisioned a national filing system. *Id.* The language refers to a preference for statewide filing, as opposed to local filing at the county level. *See id.*

15. *See* LOPUCKI & WARREN, *supra* note 12, at 328.

16. *See* LoPucki, *Computerization, supra* note 7, at 6.

17. *See id.* at 15.

18. *See id.* at 11-12.

19. *See id.*

20. Not only must a secured party decide in what state to file a financing statement, it must decide where specifically inside that state it must file. *See* LOPUCKI & WARREN, *supra* note 12, at 330.

21. *See id.* at 331.

in county records (local filing).[22] Industrial states, however, favored filing with the Secretary of State (central filing).[23] Both sides had valid reasons.[24] Because the drafters could not agree on which filing system to use, they settled for a compromise.[25] U.C.C. § 9-401 was created with three alternative sections, with each adopting state instructed to elect one.[26] Those three sections differ primarily with the degree to which they favor central or local filing.[27] Simply stated, these three methods are predominately central filing,[28] predominately local filing,[29] or dual filing at the central and local level.[30] In all three methods, real estate related filings-collateral including minerals, fixtures, or timber-are made in local real estate records.[31]

From its beginnings, therefore, the "where to file" section of the U.C.C. has been non-uniform. Unfortunately for secured parties, the complexities did not stop there. Since 1972, states have continually amended § 9-401(1). The result is that rather than three methods of filing, today there are numerous methods.[32] It is difficult to point to any two states that answer the "where to file" question exactly the same.[33] For example, in Georgia, a secured party

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22. *See id.*

23. *See id.*

24. *See id.* Most states at the time of Article 9's drafting were already operating central and local filing systems. *See id.* Choosing one method over another would have cost jobs, many of which were political patronage. *See id.* Furthermore, at the time, communications and travel infrastructure were not well developed. *See id.* The issue of whether or not filings would be made at a state capitol or local county seat was significant. *See id.*

25. *See* Cur. § 9-401 cmt. 1. "This section does not attempt to resolve the controversy between the advocates of a completely centralized state-wide filing system and those of a large degree of local autonomy." *Id.*

26. *See* LOPUCKI & WARREN, *supra* note 12, at 331.

27. *See id.*

28. *See* Cur. § 9-401(1) First *Alternative Subsection (1).* States that adopted the first alternative: Connecticut, Delaware, Idaho, Iowa, Maine, Oregon, Utah, Washington. *See* Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L .REV. 577, 656 (1995) [hereinafter LoPucki, *Proper Place for Filing*].

29. *See* Cur. § 9-401(1) Second *Alternative Subsection (2).* States that adopted the second alternative: Alabama, Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Wisconsin. *See* LoPucki, *Proper Place for Filing*, *supra* note 28, at 656.

30. *See* Cur. § 9-401(1) Third *Alternative Subsection (3).* States that originally adopted the third alternative: Arkansas, Maryland, Massachusetts, Mississippi, Missouri, Nevada, Pennsylvania, New York, North Carolina, Ohio, Vermont, and Virginia. *See* LoPucki, *Proper Place for Filing*, *supra* note 28, at 656.

31. *See* LOPUCKI & WARREN, *supra* note 12, at 331-32.

32. *See* LoPucki, *Proper Place for Filing*, *supra* note 28, at 656. A number of states use versions of § 9-401(1) that are not based on any of the three alternatives in the model code. *See id.* These states include: Georgia, Hawaii, Kentucky, Louisiana, North Dakota, and Wyoming. *See id.*

33. Because each state has its own way of numbering legislation, simply finding Cur. § 9-401(1) in a particular state can be difficult. As a result, commercial companies have produced U.C.C. filing guides that attempt to answer the "where to file question" for all states. *See e.g.*,

cannot file centrally.[34] All filings must be made in a local office but are thereafter centrally indexed.[35] In Massachusetts, filings can be made in local real estate offices, in town or city offices, and with the Secretary of State.[36] In Delaware, filings are to be made only with the Secretary of State.[37] All together, there are 4283 different possible locations for filing.[38] A filing in the wrong place can be disastrous.[39]

The second problem facing a secured party is deciding how to meet the specific requirements for filing in the chosen location. The requirements of a financing statement are laid out in U.C.C. § 9-402(1).[40] The basic requirements include: (1) debtor name, (2) secured party name, (3) debtor's address, (4) address where the secured party may be contacted, (5) debtor signature, and (6) collateral description.[41] Unfortunately, like the "where to file" section, the "requirements" section of the U.C.C. has been somewhat altered by state governments.[42] One cannot always, therefore, file the same financing statement in every state. Here the problem is two-fold: nearly every state has its own financing statement form, and the requirements for what must be, should be, or can be included on each form vary widely.[43]

In an effort to assure consistency in financing statements, states developed financing statement forms. These vary widely in appearance and function.[44] Indiana, for example, requires that financing statements be submitted in triplicate, with each page of the form a different color.[45] Not even

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CARL R. ERNST, THE SOURCEBOOK: TO PUBLIC INFORMATION (1999).

34. *See* GA. CODE ANN. § 9-401(1) (1999). "The proper place to file in order to perfect a security interest is with the clerk of the superior court of any county of the state (the 'filing officer')." *Id.*

35. *See id.*

36. *See* MASS. GEN. LAWS ch. 106, § 9-401(1) (1986).

37. *See* DEL. CODE ANN. tit. 6, § 9-401(1) (1999). Real estate related filings are still made at local real estate recording offices. *See id.*

38. Joshua Stein, *How to Make the UCC Filing System More Reliable and Easier to Use*, SECURED LENDER ¶ 10 (1996), *at* http://www.real-estate-law.com/articles/uccfile.htm.

39. Unlike other filing mistakes that can lead to a rejection, a filing at the improper place may still be accepted by the filing officer, leading a secured party to believe it is in the proper place. *See* Cur. § 9-401 cmt. 5. The financing statement may therefore be ineffective. *See id.* Section 9-401(2) seeks to counter this. *See* Cur. § 9-401(2). It states: "A filing which is made in good faith in an improper place or not in all the places required by this section is nevertheless effective . . . against any person who has knowledge of the contents of such financing statement." *Id.*

40. Cur. § 9-402(1).

41. *See id.*

42. DONALD C. DELICH & JAMES R. DELICH, UNIFORM COMMERCIAL CODE FILING GUIDE: CONCERNING THE UNIFORM COMMERCIAL CODE AND RELATED PROCEDURES 44-231 (2000). The authors outline the different filing requirements for each state. *See id.*

43. *See id.*

44. *See The Uniform Commercial Code Filing Guide*, UCCGUIDE CHARTS (2000) [hereinafter, *UCC Guide*].

45. *See* IND. CODE § 26-1-9-402(1) (2000). The relevant portion of the Indiana Code specifies, "Except as provided in subsection (2), a financing statement is sufficient if it is on the form prescribed by the secretary of state." *Id.* The Indiana Secretary of State promulgates the

the size of the forms is uniform.[46] Some states require unique sizes of paper forms, while others settle for the standard 8 ½ x 11.[47] Some states even require forms to be submitted on carbon paper.[48] The practical result is a wide variety

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colored paper regulations. *See The Uniform Commercial Code Filing Guide,* UCCGUIDE IN-FILEFACT (2000).

46. *See UCC Guide, supra* note 44.

47. *See id.* Some unique form sizes include, in inches: Alabama, 8 x 10; Illinois, 8 x 5, New York, 7⅜ x 5; Iowa, 8 x 5 for U.C.C. filings and 8 x 10 for real estate filings. *Id.*

48. *E.g.,* Maryland's form specifics are some of the most complicated of all:

> In addition to other requirements stated herein, any person tendering for filing a financing or continuation statement, or any amendment thereof, or an assignment, termination or release statement, upon a printed form shall cause said printed form to be printed in not less than 8 point type, in black letters upon white paper of sufficient weight and thickness as to be clearly readable. If any such statement shall be wholly typewritten or typewritten on a printed form, the typewriting shall be in black letters, in not less than elite type upon white paper of sufficient weight or thickness as to be clearly readable. In those filing offices where such statements are photostated or microfilmed no such statement upon which a rider or riders have been placed or attached in such a manner as to obscure, hide or cover any other part of the statement shall be tendered or received for filing, and no such statement not otherwise readily subject to photostating or microfilming shall be tendered or received for filing until a charge equal to three times the fee allowed by law for the filing, noting in the index, furnishing a receipt for such filing and recording of the same shall have been paid to the filing officer. Each sheet of any such statement tendered for filing shall not exceed in size 8½ by 14 inches upon which the printed or typewritten matter shall not be more than 6½ by 10 inches and any statement tendered for filing with sheets smaller than this maximum shall have a margin at the top and bottom of at least 2 inches each and with side margins of at least 1 inch each. Any person tendering any such statement for filing shall cause the name or names of every person attached to said statement to be typed or printed and, if a signature, to be typed or printed below such signature. The statement shall also contain a designation of the person and the address to which the filing officer may deliver or mail any such statement after it shall have been recorded as hereinafter provided. A financing statement shall also indicate whether or not the underlying secured transaction or transactions being publicized by such financing statement are subject to the recordation tax imposed by Title 12 of the Tax - Property Article, or whether partially so subject. If such transaction or transactions are wholly or partially subject to the recordation tax then the principal amount of the debt initially incurred shall be stated for the purpose of computing the tax then payable, and the payment and collection of subsequent taxes by reason of additional indebtedness shall be governed by Title 12 of the Tax - Property Article. If a statement is to be recorded in the land records, such statement must state conspicuously at its top "To Be Recorded in the Land Records" and any such statement tendered for filing in Baltimore City or in any county where a block system is maintained for recording papers among the land records shall contain in the description of the real estate the house number and street, if there be any, or the block reference. Statements other than those to be recorded in the land records shall be recorded in a well-bound book or books or other appropriate medium to be styled "Financing Records" and indexed in a book or books or other appropriate medium to be styled "Index of Financing Records."

MD. ANN. CODE § 9-402(9) (2000). This statement is entirely absent from the model version

of state forms, which reflect a diversity of state filing requirements.[49]

In recent years, there has been a movement to solve this inconsistent - forms problem. In 1995, the Secured Transactions Section of the International Association of Corporate Administrators introduced the National Financing Statement form (National form).[50] It was designed to function as a standard form for use in every filing office in the country.[51] Many filing offices around the country quickly accepted it.[52] However, two problems remain. First, in many states, use of the National form over the suggested state form may result in a different filing fee.[53] Second, there is uncertainty about local filing offices' acceptance of the National form.[54] Even though a Secretary of State may allow the National form, there is no guarantee that a local county office will not reject it.[55] Naturally, secured parties shy away from use of a form that has the possibility of rejection.[56]

The form is not the only complicated filing requirement. What is actually required on the form varies from state to state.[57] For example, Tennessee has an indebtedness tax.[58] In several states, a secured party is required to include the debtor's social security number or employment identification number.[59] Also, filing fees are different from state to state and county to county.[60] Failing to meet these state specific requirements can have

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of Article 9. *See* Cur. § 9-402.

49. *See* Harry C. Sigman, *Putting Uniformity Into—And Improving the Operation of—the Commercial Code: The New National Financing Statement Form*, 51 BUS. LAW. 721, 722 (1996). An example of the National Form is included in the appendix.

50. *See id.* at 721.

51. *See id.*

52. *See id.*

53. Interview with Gregory J. Seketa, an attorney who has focused his practice on secured transactions, formerly an Executive Vice President of ProValent, Inc., a company that designed a web-based application to allow secured parties to transmit and service financing statements online, in Indianapolis, Ind. (Nov. 1, 2000).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See* Sigman, *supra* note 49, at 722.

58. *See* TENN. CODE ANN. § 9-403 (1998). Others states also impose taxes on U.C.C. filings above and beyond normal filing fees. *E.g.* Maryland, MD. CODE ANN. TAX-PROP. §§ 12-101-115 (2000); Alabama, ALA. CODE § 40-22-2 (2000).

59. *See* Sigman, *supra* note 49, at 729. These states include: Colorado, Georgia, Kansas, Minnesota, Nebraska, North Dakota, Oklahoma, and South Dakota. *See id.* n.16. For example, the Kansas statute adds the following to the standard financing statement requirements: "[the financing statement] shall contain the social security number (SSN) or the federal employer identification number (FEIN) of the debtor, except that when the debtor is a sole proprietorship, the financing statement shall contain only the social security number (SSN) of the debtor." KAN. U.C.C. ANN. § 84-9-402(1) (West 2000).

60. *See* Carl R. Ernst, Chair, Property Records Industry Joint Task Force Standards Committee, *Recorder's Guide to New Article 9-5 of the Uniform Commercial Code* 34 (Dec. 21, 1998), *at* http://www.prijtf.org/taskforce/Art9RcrdFinal.htm. [hereinafter, Ernst, *Recorder's Guide*]. Fees per filing range from $5.00 in Mississippi to $69.50 in Pennsylvania. *Id.* The amount of the fee has little bearing on the number of filings made. *See id.*

disastrous results.[61] At best, a filing is rejected. This gives the secured party a second chance.[62] At worst, a filing is accepted and recorded even though the statutory requirements are not met.[63] This means that although the secured party believes it has done everything correctly, in reality, it may have an unperfected security interest.[64] As a result, filing offices reject an estimated ten to fifteen percent of filings in the United States each year.[65]

Once a filing is made correctly, however, a secured party cannot assume that it will remain effective in the future. The model version of Article 9 provides that once a filing is correctly made, it remains effective for a period of five years.[66] Unfortunately, states have tampered with this aspect as well. In Maryland, filings remain effective for twelve years.[67] In Arizona, filings remain effective for six years.[68] Although these requirements were designed to afford secured parties more protection, in reality, they make matters more complicated. Secured parties monitor their filings in order to know when to renew.[69] A multiple state filing made simultaneously in Maryland, Arizona, and Delaware, however, would expire at different times. [70] This would make it very difficult for a large commercial lender to monitor financing statements in multiple states.

To properly perfect a security interest, in some situations a secured party must also comply with law outside Article 9 of the U.C.C.. The Food Security Act of 1985[71] was a Congressional attempt to reform an irregular section of the U.C.C. by federal legislation.[72] U.C.C. § 9-307 originally created a "farm products exception" that gave agricultural lenders added protection of their collateral.[73] This section of the U.C.C. was very controversial. As a result, numerous states modified it or omitted it

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61. *See* Seketa, *supra* note 53.

62. *See id.*

63. *See id.*

64. *See id.*

65. LoPucki, *Computerization, supra* note 7, at 12. An ABA Task Force reported that in California alone forty-nine percent of UCC-2 filings (continuations, terminations, amendments, assignments, and partial releases) were rejected in one year. *Id.*

66. *See* Cur. § 9-403(2).

67. MD. CODE ANN. § 9-403 (1999).

68. ARIZ. REV. STAT. § 9-403 (2000).

69. *See* Seketa, *supra* note 53.

70. A filing made simultaneously in Maryland, Arizona, and Delaware on January 1, 2000, would need to be continued in order to prevent lapse by January 1, 2012, in Maryland; January 1, 2006, in Arizona; and January 1, 2005, in Delaware, which follows the standard five year rule. Obviously, this creates a nightmare for those who must oversee commercial liens.

71. 7 U.S.C. § 1631 (1985).

72. *See* Charles W. Wolfe, *Section 1324 of the Food Security Act of 1985: Congress Preempts the 'Farm Products Exception' of Section 9-307(1) of the Uniform Commercial Code*, 55 UMKC L. REV. 454 (1987).

73. Cur. § 9-307(1). Buyers in the ordinary course of business take free of a security interest even though a security interest is perfected and the buyer knows of its existence. *See id.* The farm products exception exempts buyers of farm products from this rule. *See id.* The result is that agricultural lenders have an added guarantee of payment. *See id.*

altogether.[74] Congress decided that federal action was necessary to harmonize that section of the U.C.C.. [75]

The Food Security Act creates another level of complexity for secured parties, or at least those that make agricultural liens.[76] Under the Act, agricultural lenders must provide notice to other lenders that they have a lien on farm products.[77] This notice is made either by sending a written form to other lenders, or by registering the lien with the Secretary of State or other central office.[78] This registration acts much like a U.C.C. filing, but it is important to note that a U.C.C. filing in many states must be made in addition to a Food Security Act filing in order for a lender to be properly perfected.[79] Therefore, secured parties that regularly take security in farm products must have an understanding of Food Security Act requirements.

Obviously, given the complexities of the current Article 9 filing system, any transition to online filing and searching would be complicated. A transformation to electronic transactions requires two functions: paperless documentation and electronic payment.[80] The Article 9 filing system is not set up to do either of these.[81] Nevertheless, some states have attempted to make online filing possible.[82] However, currently under Article 9, there are tremendous impediments to filing and searching over the Internet. First, there are over 4200 filing offices and therefore over 4200 possible filing locations.[83] Form requirements are also unnecessarily complex.[84] Finally, debtor signature requirements hinder many states from attempting to offer online filing. [85]

In conclusion, the Article 9 filing system has grown from a somewhat

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74. *See* Daniel P. Johnson, *Federal Legislation Provides Protection For Buyers of Farm Products: Food Security Act Supercedes the Farm Products Exception of UCC Section 9-307(1)*, 47 U. PITT. L. REV. 749, 761 (1986). At least a third of the states adopted an amendment to U.C.C. § 9-307(1). *See id.* California completely eliminated the farm products exception altogether. *See id.*

75. *See id.* at 765.

76. *See* Mark V. Bodine, *Clear Title: A Buyer's Bonus, A Lender's Loss—Repeal of UCC § 9-307(1) Farm Products Exception by Food Security Act § 1324 [7 U.S.C. § 1631]*, 26 WASHBURN L.J. 71, 83 (1986).

77. *See id.* at 84-85.

78. *See id.* When a secured party registers a Food Security act filing with the central office, it is entered into a master list. *See id.* at 89. This list is then distributed to all requesting secured parties, effectively putting them on notice of any agricultural liens. *See id.* at 89-90.

79. *See id.* at 89.

80. *See* Julia Alpert Gladstone, *Designing Legislation to Facilitate Electronic Commerce on the Internet*, 45 R.I. B.J. 13, 14 (Feb. 1997).

81. *See e.g.*, MD. ANN. CODE § 9-402(9), *supra* note 47. A few states do allow payment electronically by credit card. *See* DELICH, *supra* note 41, at 43. The majority of states do not. *See id.*

82. *See* Sigman, *supra* note 49, at 723. Texas was the first state to attempt online filing in 1996. *See id.* Other examples include Kansas and South Dakota. *See id.* at 724.

83. Nelson, *supra* note 8, at 35.

84. *See id.* at 41.

85. *See* Rev. § 9-101 cmt. 4h.

unified law into an overly complex compilation.[86] A secured party must be familiar with federal, state, and local laws and regulations. Even then, it is possible that a filing may be rejected for good, bad, or no reason at all.[87] It is simply impractical for a secured party to do everything necessary to correctly make a U.C.C. filing every time, especially in high volume, low touch transactions.[88] The Article 9 filing system is a product of obsolete technology—it offers substantial limitations for filing systems attempting to move online.[89]

III. THE CANADIAN PERSONAL PROPERTY SECURITY ACT FILING SYSTEM

Canada's secured transactions law is based primarily on Article 9 of the U.C.C..[90] A natural question, therefore, is whether Canadian provinces have similar difficulties bringing their secured transactions filings online; the answer is two-fold. First, generally, Canadian provinces have been much more willing to design or modify their statutes to suit online financing statement filing.[91] Second, like the United States, there is still a great deal of inconsistency from one province to the next.[92]

The Canadian equivalent to Article 9 of the U.C.C. is called the Personal Property Security Act (P.P.S.A.).[93] Unlike the U.C.C., which began as a model code that each state subsequently adopted, the Canadian P.P.S.A. arose out of individual provincial initiatives.[94] Like the U.C.C., the P.P.S.A. has enjoyed success—it has been adopted by all but one of the common law jurisdictions in Canada.[95] Quebec has adopted its own secured transactions law based on the principles inherited from the French Civil Code.[96] Because

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86. *See* Nelson, *supra* note 8, at 41.

87. *See* LoPucki, *Computerization, supra* note 7, at 9. "[E]ven a reasonably diligent filer may be unable to achieve or maintain an effective filing." *Id.*

88. *See id.* at 6.

89. *See* Nelson, *supra* note 8, at 41.

90. *See* Ronald C.C. Cuming, *Article 9 North of 49#: The Canadian PPS Acts and the Quebec Civil Code*, 29 LOY. L.A. L. REV. 971 (1996) [hereinafter Cuming, *PPS* Acts]. Canadian law reformers used Article 9 as a building block for their personal property registration systems. *See id.*

91. *See id.* at 971.

92. *See id.* at 975.

93. *See* Bridge et al., *supra* note 2, at 569.

94. *See* Cuming, *PPS Acts, supra* note 90, at 974. In 1964, the Canadian Bar Association prepared a model of the P.P.S.A. to be used throughout the country. *See id.* at 974 n.8. This model proved to be too weak, and was not widely accepted across Canada. *See id.* Another revision was made in 1972. *See id.* Nevertheless, provinces each created their own versions, with each subsequent enactment of a province reflecting a new version with new features. *See id.* at 974-75. Therefore, it is hard today to point to a single version of the P.P.S.A. as the model act. *See id.* at 975. There is a Uniform Law Conference of Canada, but it has not yet drafted a uniform version of the P.P.S.A. *See* Uniform Law Conference of Canada, *at* http://www.law.ualberta.ca/alri/ulc/ (last visited Oct. 3, 2000).

95. *See* Bridge et al., *supra* note 2, at 569.

96. *See* Fabienne D. Struell, *Quebec's Creative Regime as a Model for Chile's Secured*

of its relative difference, the Quebec system of filing falls outside the scope of this note. However, it is important to understand that Canada does not have a unified secured transactions law.[97]

Determining where to file in a Canadian P.P.S.A. province is not a difficult question. All financing statements are filed into a province-wide registry.[98] If a filing relates to real estate, it should also be made in the land records of the local real estate office.[99] Unlike United States filing systems, which rely heavily on paper financing statement forms, Canadian P.P.S.A. statutes provide secured parties with a variety of methods for submitting financing statements. These methods are not uniform from province to province. For example, Ontario allows filing of paper financing statements in any number of branch offices located throughout the province.[100] A secured party may file in any branch office.[101] The financing statement is then couriered to Toronto where it is centrally indexed.[102] In Nova Scotia, alternatively, a secured party cannot even file a traditional paper financing statement.[103] Nova Scotia requires online filing.[104] Generally, the earlier a province adopted the P.P.S.A., the more likely the concentration will be on paper filing rather than on electronic filing.[105] This is certainly true here; Ontario adopted the P.P.S.A. in 1967,[106] and Nova Scotia adopted the P.P.S.A. in 1996.[107] Provinces that adopted the P.P.S.A. after 1990 have designed their systems around on-line access.[108]

Transaction Reform, 5 SW. J. L. & TRADE AM. 207, 224 (1998). Although Quebec's secured transaction law is not modeled after Article 9, it represents a compromise between a civil code system and the P.P.S.A. *See id.*

97. *See* Cuming, *PPS Acts, supra* note 90, at 975.

98. *See* Ronald C.C. Cuming, *An Overview of a Canadian Personal Property Security System, at* http://www.natlaw.com/pubs/overview.htm (last visited Oct 3, 2000) [hereinafter, Cuming, *Overview*].

99. *See* David L. Denomme, *Registration – Filling Out the Forms*, 14 NAT. B.L. REV. 19 (1995) [hereinafter, Denomme, *Registration*]. *E.g.*, Ontario P.P.S.A. § 54(1) provides that notice of registration when collateral includes fixtures, crops, minerals, or hydrocarbons should be made in the proper land records. R.S.O. ch. P-10 § 54(11) (1998) (Can.). This is similar to the Article 9 § 401 requirement that real estate related financing statement are to be made in the proper local office. Cur. § 9-401(1).

100. *See* Denomme, *Registration*, *supra* note 99, at 3-4. For years, the only way to complete a financing statement was on a paper form. *See id.* at 3. Although still possible today, most registrations are now done electronically. *See id.* at 4. All online filings are made in the central registry. *See id.*

101. *See id.* Ontario has forty-nine branch registration offices and one central office. *Id.* Ontario does not require paper filing. *See* R.S.O. ch. P-10, § 54(1) (1990).

102. *See id.*

103. *See* R.S.N.S. ch. P-13, § 43(1) (1996) (Can.). "There shall be an electronic registry known as the Personal Property Registry for the purpose of registrations pursuant to this Act and pursuant to any other Act that provides for registration in the Registry." *Id.*

104. *See id.*

105. *See* Cuming, *PPS Acts, supra* note 90, at 975.

106. *See id.* at 975 n.9.

107. *See* R.S.N.S. P-13 (1996) (Can.).

108. *See* Letter from David Denomme, Legal Counsel, Liquor Control Board of Ontario,

Overall, the function of the registration system of Canada is much the same as the function of the Article 9 filing system in the United States.[109] Registration provides notice to other creditors of a security interest and establishes priority in the event of insolvency of the debtor.[110] A secured party can usually register a financing statement prior to the execution of a security agreement.[111] In both countries, asset based lenders regularly use these registration systems for help in determining whether or not to make loans.

The general requirements to file a financing statement in a P.P.S.A. jurisdiction are similar to Article 9 requirements. The basic form requires: (1) the name and address of the debtor, (2) the name and address of the secured party, and (3) a description of the collateral.[112] The form does not require the debtor's signature.[113] Like Article 9, the particular requirements may vary from province to province. For example, when collateral includes serial number goods,[114] the secured party must include the serial number of the goods that are being used as collateral.[115] In Ontario, there is no requirement for a collateral description at all.[116] Instead, a secured party can simply check the appropriate box, such as "Inventory" or "Equipment."[117] Likewise, each province charges different amounts for filings.[118] In sum, there are irregularities in each provincial P.P.S.A. filing statute.[119] Therefore, a secured

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observer member, Personal Property Security Law Subcommittee of the Canadian Bar Association-Ontario (C.B.A.O.) and C.B.A.O Personal Property Security Opinions Committee (Oct. 3, 2000) (on file with the Indiana International and Comparative Law Review) [hereinafter, Denomme, Letter].

109. *See* Cuming, *PPS Acts, supra* note 90, at 980.

110. *See* Denomme, *Registration, supra* note 99, at 1. P.P.S.A. statutes do not provide legal notice of security interests to other secured parties. *See, e.g.*, R.S.B.C. ch. P-359, § 47. Registration not notice:

> Registration of a financing statement in the registry does not by itself constitute express, constructive or implied notice to any person of, or express, constructive or implied knowledge on the part of, any person of (a) the financing statement or its contents, or (b) the security interest perfected by the financing statement or the contents of any security agreement.

Id. Although this does not legally constitute notice, the registration of a financing statement does provide notice to a secured party that a financing statement has been created. *See* Denomme, *Registration, supra* note 99, at 1.

111. *See* Cuming, *PPS Acts, supra* note 90, at 980.

112. *See* Cuming, *Overview, supra* note 98.

113. *See* Ronald C.C. Cuming and Catherine Walsh, *Possible Implications of Revised UCC Article 9 for Canadian Personal Property Security Acts*, A Report Prepared and Presented to the Uniform Law Conference of Canada, *at* http://www.law.ualberta.ca/alri/ulc/99pro/epppsaucc.htm (last visited Sept. 19, 2000).

114. The definition of what are "serial number goods" varies in scope from province to province. *See* Letter from David Denomme, (Jan. 23, 2001) (on file with the Indiana International and Comparative Law Review) [hereinafter, Denomme, Second Letter].

115. *See e.g.*, R.S.N.S. ch. P-13, § 44(8)(b) (1996) (Can.).

116. *See* Denomme, *Registration, supra* note 99, at 14.

117. *See id.*

118. *See* Cuming, *Overview, supra* note 98.

119. *See id.*

party must know the specific requirements for each province.[120]

One major difference between Article 9 filing systems and the Canadian P.P.S.A. filing systems is the degree to which each has been computerized. In Canada, all of these registry systems are computerized.[121] Each province maintains an electronic registry of financing statements and most offer searches through computer terminals.[122] Obviously, this makes searching for financing statements much more reliable than searching a traditional paper filing system.[123] Still, searching in the various provinces is anything but simple. A secured party must understand how each individual system functions.[124]

Another difference between P.P.S.A. and Article 9 filing systems is the duration that a filing is effective. In Canada, secured parties typically set the duration of effectiveness of their financing statement.[125] Likewise, if a secured party wishes to extend the duration of effectiveness, he may do so by filing a financing change statement.[126] The rationale for this flexibility is that computerization renders limiting filing durations unnecessary.[127] Paper record systems need to be periodically cleansed because they physically get very large.[128] Computerized records, however, do not physically require much additional office space as they grow.[129] To provide deterrent to selecting a lengthy or infinite registration, filing offices charge every year a filing is effective.[130]

Because a secured party can register a financing statement for an indefinite period and without a debtor's signature, P.P.S.A. statutes have

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120. *See id.*

121. *See* Norman Siebrasse & Catherine Walsh, *The Influence of the ULSIA on the Proposed New Brunswick Land Security Act*, 20 NOVA L. REV. 1133, 1138 (1996). In this article, the authors describe the personal property registrations systems of Canada as sophisticated computerized data registries. *See id.*

122. *See id.*

123. *See id.*

124. *See id.* For example, some systems are designed to accommodate for errors in registration entries. *See id.* For example, a search of John Smith will also reveal entries under John Smyth. *See id.*

125. *See* Cuming & Walsh, *supra* note 113. Canadian P.P.S.A.s allow registration terms of one to twenty-five years to eternity. *See id. See e.g.*, R.S.N.S. ch. P-13, § 45(1) (1996) (Can.). "Except as otherwise prescribed, a registration pursuant to this Act is effective for the period of time specified as part of the financing statement by which the registration is effected." *Id.*

126. *See e.g.*, R.S.N.S. ch. P-13, § 45(2) (1996) (Can.). "A registration may be renewed by registering a financing change statement at any time before the registration expires and, except as otherwise prescribed, the period of time for which the registration is effective shall be extended by the renewal period specified as part of the financing change statement." *Id.*

127. *See* Cuming, *Overview*, *supra* note 98.

128. *See id.*

129. *See id.*

130. *See id.* Although registration fees vary, they are approximately $5 per year plus a $5 administration fee. *Id.* Selecting infinite duration results in a $400 fee plus a $5 administration fee. *Id.*

safeguards for preventing abuse.[131] First, secured parties must give the debtor a copy of either the financing statement or verification statement.[132] Second, a debtor may demand that the secured party amend or terminate the financing statement if it was made incorrectly.[133] Failure to meet the debtor's demand, if justified, can result in a statutory $500 penalty, payable to the debtor.[134] Finally, a province may control who has access to the filing systems.[135] For example, Ontario protects debtors by limiting who can file a financing statement electronically.[136] In Ontario, a filing party must register with the Ministry of Consumer and Commercial Relations, the central filing office, in order to obtain an account.[137] This account allows the filing party, whether a lender or a commercial intermediary, to submit financing statements electronically.[138] Hence, in reality large financial institutions, leasing companies, and some large law firms complete their own registrations.[139] For smaller lenders, financing statements can be filed electronically through use of a third party service provider.[140] These protections help ensure that secured parties are not careless when filing financing statements.

Like Article 9 filing systems, Canada's P.P.S.A. filing systems retain unique provincial qualities. Secured parties in Canada, like in the United States, must therefore acquaint themselves with a host of different filing systems and statutes. Still, Canadian systems in general are more modern in

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131. *See id.*

132. *See id.* A verification statement is issued when filing is done electronically and no paper financing statement exists. *See id.* For example, the Nova Scotia P.P.S.A. provides:

> The secured party or person named as secured party in a financing statement shall give to each person named as debtor in the statement, within thirty days after it is registered, a verification statement in accordance with the regulations, except where that person has waived in writing the right to receive it.

R.S.N.S. ch. P-13, § 44(11) (1996) (Can.).

133. *See id.* For example, the New Brunswick P.P.S.A. provides that if a secured party fails to amend or discharge a financing statement after a debtor demands for good reason, the debtor may amend or discharge the financing statement by filing a change form. *See* R.S.N.B. ch. P-7.1, § 50(4)-(5) (1993) (Can.).

134. The Ontario P.P.S.A. provides that the secured party shall pay the debtor $500 for failing to discharge or amend an incorrect financing statement. R.S.O ch. P-10, § 46(7) (1990) (Can.). This penalty is in addition to any other damages a debtor can prove. *See* Denomme, Second Letter, *supra* note 114. "Experience in the province of Saskatchewan, where this system [of fines] has been in place for 12 years, has demonstrated that secured parties rarely fail to respond to [debtor] demands." Cuming, *Overview, supra* note 98.

135. *See* R.S.O. ch. P-10, § 46(2.2) (1990) (Can.).

136. *See id.* "A financing statement or financing change statement in the form of data in a required format may be tendered for registration by direct electronic transmission of the information only by a person who is or who is a member of a class of persons that is authorized by the registrar to do so." *Id.*

137. *See* Denomme, Letter, *supra* note 108.

138. *See id.*

139. *See* Denomme, *Registration, supra* note 99, at 23.

140. *See* Denomme, Letter, *supra* at 108. *See also* Oncorp Direct, Inc., *at* http://www.oncorp.com (providing an example of a website that facilitates electronic filing).

their acceptance and promotion of electronic filing.[141] Even Ontario, the oldest P.P.S.A. province, encourages electronic filing.[142] It does this by charging more for filings on traditional paper medium.[143] Filing paper forms has greater administrative costs.[144] Overall, Canadian filing systems are computerized and automated.[145] This has led to a great deal of trust in registration officials, confidence completely lacking under Article 9 filing systems.[146]

Unlike the process that created uniform laws in the United States, the Canadian P.P.S.A. grew out of a process of legislative evolution.[147] Creating national Canadian standards has proven too difficult because of rapid advances in technology, coupled with intervening introductions of the P.P.S.A. in various provinces, and Quebec's use of an altogether different filing system.[148] Article 9, on the other hand, was created in the 1950's; long before any computerized filing system was foreseeable.[149] The Canadian P.P.S.A.s arrived years later, after electronic filing, and later online filing, became possible.[150] The creation of computerized filing systems in Canada has helped modernize Canadian transaction law.[151] Currently, the Canadian systems represent "the most advanced of their kind in the world."[152]

IV. THE REVISED ARTICLE 9 FILING SYSTEM

The success of the Canadian Provinces' adaptation of electronic and online filing, together with the failure of many American Article 9 filing systems to adapt to modern technology, led many scholars searching for ways to improve Article 9.[153] The answer, they hoped, would come from the creation of a Revised Article 9. Only time will tell if it will be as widely received as the original version, but for now, a few conclusions can already be drawn: Revised Article 9 represents great steps forward in simplicity and compatibility with electronic commerce. At the same time, however, like original Article 9 and the Canadian P.P.S.A.s, the revision fails to bring a uniform approach to filing. In this regard, the mistake began even before its creation.

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141. *See* Cuming & Walsh, *supra* note 113.

142. *See* Denomme, *Registration, supra* note 99, at 3. In Ontario, the majority of filings are done electronically. *See id.*

143. *See id.* at 4. The Ministry in Ontario charges an extra $5 administrative fee on all registrations not completed electronically. *Id.* n.6.

144. *See id.*

145. *See* Cuming, *PPS Acts, supra* note 90, at 982.

146. *See* Cuming & Walsh, *supra* note 113.

147. *See* Cuming, *PPS Acts, supra* note 90, at 974-75.

148. *See* Cuming, *Overview, supra* note 98.

149. *See id.*

150. *See id.*

151. *See id.*

152. *Id.*

153. *See* LoPucki, *Computerization, supra* note 7, at 5.

The history of Revised Article 9 began in 1990.[154] In that year, the Permanent Editorial Board for the U.C.C., along with the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) established a committee to study Article 9.[155] In 1992, the committee recommended numerous changes and the creation of a committee to revise the code.[156] Organized in 1993, this drafting committee met fifteen times and spent the next five years working on revisions.[157] In 1998, the result was an altogether new Article 9.[158]

The ultimate goal of the new Article 9 is much like the goal of the original Article 9–to communicate the existence of prior security interests to those who will take subject to them.[159] In order to accomplish this, the drafters focused on improving the code in a number of areas. First, the committee wanted to make perfection easier over a greater range of assets.[160] Second, the committee wanted to improve the clarity and precision of the old code.[161] Third, the committee hoped to reduce the cost of compliance and reduce the risk for errors.[162] Finally, and perhaps most importantly, the committee wanted to facilitate electronic commerce.[163]

When examining where to file rules in Revised Article 9, it becomes evident that the drafters had such goals in mind. Unlike the original code, which provided for three alternatives,[164] the model code has only one.[165] All filings are made at the central office, except for real estate related filings, which are made in local real estate records, largely as before.[166] This shifts a significant number of filings away from local filing offices.[167] Most certainly, some local governments will resist this, since local filings in many jurisdictions represent revenue and jobs.[168] More importantly, however, the

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154. *See* U.C.C. § 9-101 cmt. 2. (1999) [hereinafter, the Revised U.C.C. Article 9 will be cited as Rev.].

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See* LoPucki, *Proper Place for Filing, supra* note 28, at 582.

160. *See* JULIAN B. MCDONNELL, UNIFORM COMMERCIAL CODE: ANALYSIS OF REVISED ARTICLE 9 1-2 (1998).

161. *See id.* at 2.

162. *See* Steven O. Weise, *An Introduction to the Revised UCC Article 9, in* WHAT LAWYERS NEED TO KNOW ABOUT THE NEW UCC ARTICLE 9-*SECURED TRANSACTIONS* 91, 96 (Sandra Stern ed., 2000).

163. *See* MCDONNELL, *supra* note 160, at 2.

164. *See* Cur. § 9-401(1). Although the original drafters of the U.C.C. provided different alternative locations for filing, they promoted central filing. *See id.*

165. *See* Rev. § 9-501.

166. *See* Ernst, *Recorder's Guide, supra* note 60. Some states will be harmed more than others, based on filing systems already in place. *See id.* Dual filing states adopting Revised Article 9 have the most to lose. *See id.*

167. *See id.*

168. *See id.* "Even though the operations of most recording offices are paid out of general funds and funded with considerably less than the fees that recorders collect on behalf of the

move to central only filing will undoubtedly help filing systems move online.[169] From an economic standpoint, there are fewer computers to purchase and fewer employees needed to run one central office, as opposed to multiple local offices.[170]

Determining where to file among the states, however, is more complicated than simply knowing where in a state to file. Many security interests are granted in multi-state transactions.[171] In the original Article 9, and in P.P.S.A. jurisdictions, a secured party would need to file in all states, or provinces, where collateral is located.[172] Revised Article 9 changes this. There are three possible ways of determining where to file: file where collateral is located, file where debtor is located, or file where debtor is organized or incorporated.[173] Revised Article 9 abandons the first concept in favor of the second two.[174] The revised code provides that filing should be made in the place of the debtor's location.[175] Section 9-307 specifies a debtor's filing location: if the debtor is incorporated, the debtor must file in the state of incorporation.[176] If the debtor is an entity, but not incorporated, the debtor must file in the state of the chief executive office.[177] If debtor is an individual, the debtor must file at his or her principal residence.[178] The point of these revisions is to simplify the where to file question and to reduce the duplicative filings that are necessary under the current code.[179]

The filing requirements under the Revised code have also been simplified. The basic requirements are set out in Section 9-502.[180] The financing statement has only three requirements.[181] First, the financing

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county, town, parish or district, recorders still take seriously their responsibility for providing funds for local government operations." *Id.*

169. *See, e.g.*, Arthur H. Ravers and John L. McCabe, *A Central Filing System for Financing Statements* COLO. LAW. (Sept. 1999). Colorado has recently moved a number of its local U.C.C. records to a centralized computer database. *See id.*

170. Georgia and Louisiana have already connected all local filing offices electronically to the central office. *See* GA. CODE ANN. § 11-9-401 (2000); LA. REV. STAT. ANN. § 9-401 (2000). In both states, one may file a financing statement in any county. *See id.* It is then indexed into a central filing database. *See id.*

171. *See* Sigman, *supra* note 49, at 722.

172. *See* CORINNE COOPER, THE NEW ARTICLE 9 UNIFORM COMMERCIAL CODE 7 (1999).

173. *See* LoPucki, *Proper Place to File, supra* note 28, at 580-81. Over half of all filings are for corporate debtors. *See id.*

174. *See* COOPER, *supra* note 172, at 7.

175. *See* Rev. § 9-301. "Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral." Rev. § 9-301(1).

176. Rev. § 9-307.

177. *See id.*

178. *See id.*

179. *See* COOPER, *supra* note 172, at 1.

180. Rev. § 9-502.

181. *See id.*

statement must provide the name of the debtor.[182] This requirement is met by following the guidelines in Sections 9-503 and 9-506.[183] Second, the statement should provide the name of the secured party name or a representative of a third party.[184] This section reflects Revised Article 9's indifference to who files the financing statement.[185] One need not be a secured party to make the filing.[186] Instead, the revision states that any person is entitled to make a filing, provided that he has authorization from the debtor.[187] Finally, a financing statement requires indication of the collateral covered.[188] Unlike the original version, Revised Article 9 allows for extremely general collateral descriptions.[189] These factors together help realize the drafters' goal to simplify filing requirements.[190]

Another simplification involves promoting the use of standard financing statement forms.[191] A large percentage of filings are submitted by parties located outside the state where they are received for filing.[192] A lack of standardized forms from one state to the next made these cross-state filings extremely difficult and expensive.[193] Revised Article 9's drafters recognized this and responded with Section 9-521.[194] Section 9-521 specifies use of a standardized financing statement–the National form.[195] The National form represents the combined efforts of filing officers, secured parties and their counsel, and service companies.[196] All of these parties hope that the National form will achieve four goals: first, improve upon present filing systems; second, help forge a functional national filing system; third, facilitate the move to advanced technologies in the operation of the filing systems;[197] and fourth,

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182. *See id.* § 9-502(a)(1).

183. *See* Rev. § 9-101 cmt. h. Section 9-503 explains what constitutes a sufficient debtors name when a debtor is a registered entity, estate, trust, individual, or partnership. Rev. § 9-503. Section 9-506 explains that financing statement must substantially satisfy the code's requirements to the point that it is not seriously misleading. Rev. § 9-506.

184. *See* Rev. § 9-502(a)(2).

185. *See* Rev. § 9-101 cmt. h. "[The filing section of the code] is largely indifferent as to the person who effects a filing." *Id.* "The filing scheme does not contemplate that the identity of the 'filer' will be part of the searchable records." *Id.*

186. *See* Rev. § 9-509.

187. *See id.*

188. *See* Rev. § 9-502(a)(3).

189. *See* Rev. § 9-504. A collateral description is sufficiently detailed even if it provides only "an indication that the financing statement covers all assets or all personal property" of the debtor. *Id.*

190. *See* COOPER, *supra* note 172, at 6.

191. *See* Rev. § 9-520.

192. *See* Sigman, *supra* note 49, at 722.

193. *See supra,* Part II.

194. *See* Rev. § 9-521.

195. *See id.* The National form refers to four forms: the National UCC-1, the National UCC-1 Addendum, the National UCC-3, and the National UCC-3 Addendum. *See id. See also* appendix.

196. *See* Rev. § 9-521 cmt. 2.

197. *See* Sigman, *supra* note 49, at 727. A quick look at the National form makes one

facilitate the transition to and operation of Revised Article 9.[198] Only time will tell if the National form will meet these goals. Regardless, the National form represents a valid attempt to unify a portion of the code that was very non-uniform.[199]

Use of the National form is recommended in Revised Article 9, but it is not expected to be the only means of filing.[200] Revised Article 9 is medium neutral.[201] This means that references to paper and paper filing have been mostly removed.[202] For example, Maryland's current Article 9 filing system requires that financing statements "to be printed in not less than 8 point type, in black letters upon white paper of sufficient weight and thickness as to be clearly readable."[203] However, Maryland's version of Revised Article 9 does not even mention the word paper.[204] Overall, the drafters of the revised article hope that medium neutral language will promote and facilitate online filing.[205]

Perhaps the most significant change in the Revised Article 9 filing structure is the removal of the debtor's signature requirement.[206] The purpose of any financing statement is to provide notice to another secured party of the original secured party's security interest.[207] This notice merely indicates that a person may have a security interest in the collateral specified in the financing statement, nothing more.[208] Therefore, whether a debtor signs a financing statement makes little difference to a secured party searching for information under that debtor's name.[209] Most importantly, however, doing away with traditional signatures helps overcome one major obstacle to online filing.[210]

However, doing away with signatures may also raise some concern. After all, the filing rules should not be so relaxed as to allow any person to file against anyone he or she chooses. Still, under the current code's signature

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understand why it is technology friendly. Unlike old forms that often had a large square for debtor name and address, the National form has a box for each field, debtor name, debtor street address, debtor city, debtor state, and debtor zip code. *See* Rev. § 9-521. For a filing officer entering information into a computerized database, the National form's specific boxes greatly decrease the likelihood for mistakes. *See* Rev. § 9-521 cmt. 2.

198. *See* Sigman, *supra* note 49, at 722.

199. *See id.*

200. *See* Darrell W. Pierce, *Uniform Commercial Code Revised Article 9 – Changes to the Filing System, in* WHAT LAWYERS NEED TO KNOW ABOUT THE NEW UCC ARTICLE 9-*SECURED TRANSACTIONS* 82 (Sandra Stern ed., 2000).

201. *See id.*

202. *See id.*

203. MD. CODE. ANN. § 9-402(9) (1999).

204. *See* MD. CODE ANN. §§ 9-501 – 9-521 (1999). The word paper is only used in Maryland's Revised Code when referring to "chattel paper" and not a paper financing statement. *See* MD. CODE. ANN. § 9-513.

205. *See* COOPER, *supra* note 172, at 1.

206. *See* Weise, *supra* note 154, at 98.

207. *See* Rev. § 9-502 cmt. 2. "This section adopts the system of 'notice filing.'" *Id.*

208. *See id.*

209. *See id.*

210. *See* Weise, *supra* note 162, at 98.

requirement, filing offices have no way of checking validity.[211] Anyone could file by forging the debtor's signature.[212] Nevertheless, in order to protect against fraudulent filings, Revised Article 9 requires the debtor's authorization to file.[213] This authorization does not have to be on the financing statement itself.[214] A security agreement alone is sufficient authorization.[215] If a secured party wishes to file before the security agreement is signed, the secured party must obtain express authorization.[216]

If a secured party fails to obtain proper authorization and commences filing regardless, a debtor is not without remedies. Section 9-625 provides a remedy for debtors when a secured party violates any part of the Revised Code.[217] Furthermore, Section 9-509(d)(2) authorizes the debtor to either terminate or amend a financing statement if it was made in error.[218]

Under current Article 9 filing systems, however, even correctly made filings are not always accepted.[219] This occurs because of a large amount of local filing office regulations and perceived discretion.[220] The drafters of Revised Article 9 felt that filing officers had become "too independent in their adoption of so-called local rules which sometimes resulted in otherwise legally sufficient filings being rejected."[221] The original code is partially to blame; it provides practically no guidelines to filing offices.[222] This lack of consistent rules has caused a great deal of mistrust of local filing office officials.[223] The revised version provides filing officials with a much clearer set of guidelines.[224] First, it specifies exactly what are grounds for rejection.[225] In general, there are very few reasons, such as failure to pay the appropriate fee or use the correct medium.[226] If a filing officer does reject a filing, he must communicate a reason for the rejection to the filer.[227] Second, the Revised

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211. *See id.*

212. *See id.*

213. *See* Rev. § 9-509(a)(1).

214. *See id.*

215. *See* Rev. § 9-509(b). The financing statement must reflect the collateral described in the security agreement and property that become collateral. *See id.*

216. *See* Weise, *supra* note 162, at 98.

217. Rev. § 9-625.

218. Rev. § 9-509(d)(2).

219. *See* LoPucki, *Computerization, supra* note 7, at 9.

220. *See* H. Bruce Bernstein, *COMMERICAL FINANCE ASSOCIATION: Summary of Uniform Commercial Code Revised Article 9, at* http://www.cfa.com/public/parent-revised-article-9.jhtml (last visited Oct. 5, 2000).

221. *Id.*

222. *See* Ernst, *Recorders Guide, supra* note 60, at 22. "Under Article 9-4 some legal issues, and virtually all administrative details of the UCC system, were left to the discretion of the filing office, without even a requirement to explain to the users of the system how it operates in that office." *Id.*

223. *See* Cuming & Walsh, *supra* note 113.

224. *See id.*

225. *See* Rev. § 9-519.

226. *See* Rev. §§ 9-516; 9-520.

227. *See* Rev. § 9-520(b). Upon rejection, the filing officer must communicate to the filer

Code allows for promulgation of some local filing rules.[228] Because operating a filing office is a very complicated business, the drafters sought to give local offices some flexibility.[229] Section 9-526 provides that the appropriate local government agency should adopt and publish rules consistent with Revised Article 9.[230]

Finally, Revised Article 9 requires filing offices to make annual reports to the governor and the legislature.[231] These reports are to specify how the practices of the particular filing office differs from the practices of other filing offices and how it differs from the Model Code.[232] After an annual report is given to the governor and the legislature, the drafters anticipate that both branches will enact reforms to harmonize their U.C.C. filing system with that of other jurisdictions. Ultimately, the drafters hope that this harmonization of filing office rules will "reduce the costs of secured transactions substantially."[233]

All of the above changes to the Article 9 filing system represent major steps towards the creation of online filing systems. Unfortunately, they still fall well short of creating a national filing system. The problem is not with the changes; the problem is with the structure of the U.C.C. itself. The U.C.C. represents a uniform body of laws to be adopted by each individual state. The system falls apart, however, when states seek to modify the code to suit their local lobbies. This was ultimately the problem with the original Article 9, and this will most likely be the problem with the Revised Article 9 as well. Some states have already made substantial changes to Revised Article 9 in their jurisdictions. For example, Indiana has already adopted Revised Article 9.[234] However, Indiana chose to require debtor authorization on original financing statements.[235] This requirement is essentially the same as original Article 9's debtor signature requirement.[236] It also represents a stumbling block to

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the reason for refusal and the date and time the record would have been filed had the filing been accepted. *See id.* The rejection must not be more than two business days after submission for filing. *See id.*

228. *See* Rev. § 9-526.

229. *See* Rev. § 9-526 cmts. 2, 3.

230. Rev. § 9-526(a).

231. *See* Rev. § 9-527.

232. *See id.*

233. Rev. § 9-526 cmt. 3.

234. Indiana adopted Revised Article 9 on January 11, 1999. *See* Commercial Finance Association: *Revised Article 9 By States, at* http://www.cfa.com/public/parent-revised-article-9-by-states.jhtml (last visited Oct. 30, 2000). The revised code was enacted on March 15, 2000. *See id.* It will become law in Indiana, as in other jurisdictions, on July 1, 2000. *See id.*

235. *See* IND. CODE § 26-1-9.1-502(a)(4) (2000).

236. *See id.* Indiana's version of original Article 9 actually provided for electronic filing without a debtor's signature. *See* IND. CODE § 26-1-9-402(9) (2000).

> A financing statement may be transmitted and filed electronically. A signature requirement under this section is satisfied by: (A) an intent by the filing party to sign the filing under IC 26-1-1-201(39); and (B) the entry of the filing party's name on the electronic form in a signature box or other place indicated by the

moving filing online in Indiana.[237] Likewise, Maryland has already adopted changes to Revised Article 9.[238] The Maryland version of the code adds an additional requirement to the model version–the filer must include the principle amount of indebtedness, the county of the debtor's residence, and the amount of recordation tax payable.[239] This requirement is much like those in Maryland's original Article 9 statute.[240] In both of these jurisdictions, filers will need to understand requirements not included in the model code.

These requirements may seem insignificant–and perhaps ten years ago they would have been–but the modern era of electronic commerce demands more uniformity.[241] The Internet and e-commerce make people more willing to cross boundaries and more intolerant of impediments caused by traditional mediums.[242] More than ever, a set of truly uniform standards is needed. The Revised Article 9 filing system is an example of breeding a better horse after the arrival of the tractor. There is no doubt that uniformity was a driving force behind the creation of a Revised Article 9, but it was also the hope of original Article 9, where uniformity has been elusive.[243]

V. SUGGESTIONS FOR IMPROVEMENT TO THE REVISED ARTICLE 9 FILING SYSTEM

The logical question to ask, therefore, is what can be done to ensure the U.C.C. filing system is uniform? Revised Article 9 does have a built-in system of unification.[244] Sections 9-526 and 9-527 impose a duty on the central filing office to annually report how filing office rules are not in harmony with rules in other jurisdictions.[245] It is hoped that annual reports will promote the standardization of filing office policies and technologies used in other jurisdictions.[246] These reports may very well succeed at this objective.

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secretary of state.

Id. Therefore, Revised Article 9 in Indiana includes a formal barrier to electronic filing not even present in its former version. *See id.*

237. *See* Rev. § 9-502 cmt. 3

238. The Maryland legislature adopted Revised Article 9 on February 17, 1999. *See* Commercial Finance Association, *supra* note 226. Maryland enacted the revised code on April 27, 1999. *See id.* Like most all other jurisdictions that have to date enacted it, it will become effective on July 1, 2001. *See id.*

239. *See* MD. CODE ANN. § 9-502 (1999).

240. *See* MD. CODE ANN. § 9-402(9) (1999).

241. *See* Barry B. Sookman, *Electronic Commerce, Internet and the Law: A Survey of the Legal Issues*, 48 U.N.B. L.J. 119, 159 (1999). "Electronic commerce by its very nature is global. Electronic commerce policies and activities will have limited impact unless they facilitate a global approach." *Id.*

242. *See id.* at 120.

243. *See* Rev. § 9-526 cmt. 3. This Official Comment is titled "Importance of Uniformity." *Id.*

244. *See* Rev. §§ 9-526, 9-527.

245. *Id. See supra*, Part IV.

246. *See* Rev. § 9-527 cmt. 2. "This section is designed to promote compliance with the

However, if they are only made annually, it will take years before every filing office in the country follows the same policies and guidelines.[247] Waiting years is too long for electronic filing to be put on hold. Therefore, what can be done in the immediate future to improve on the Revised Article 9 filing structure?

First, every state must adopt Revised Article 9. Currently, twenty-seven states and the District of Columbia have adopted it.[248] This is a good start, but the goal of uniformity in secured transaction law will not be realized until every state adopts the revision. In fact, uniformity is frustrated if only a portion of the states adopt Revise Article 9 and a handful hold onto the original version. In that case, secured parties operating in multiple states would have to contend not only with state inconsistencies with Article 9, but with two different Article 9 versions altogether.[249] This would do little to simplify the complexities of the current Article 9 filing mess.

Nevertheless, adopting Revised Article 9 is not enough to improve the current filing systems. Many states seem unable to resist modifying the code and thereby creating local irregularities.[250] This problem appears to already be underway.[251] As states adopt the revision, they continue to unravel its uniformity.[252] This is not entirely the states' fault.[253] Parts of the Revised Article 9 model code have blanks which states fill in.[254] Naturally, states are going to fill in the blanks in unique ways.

Second, the United States needs the creation of a national database for registration of financing statements.[255] This concept would have been completely foreign to the original drafters of Article 9 but was not foreign to the drafters of Revised Article 9.[256] Still, the drafters chose a state-by-state approach. With current computer technology, the idea of a central

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standards of performance imposed upon the filing office and with the requirement that the filing office's policies, practices, and technology be consistent and compatible with the policies, practices, and technology of other filing offices." *Id.*

247. This is assuming that legislatures act positively after receiving filing office reports. State legislatures may also further complicate matters by amending Revised Article 9 so that it is even more unlike the Revised Article 9 in other jurisdictions.

248. NCCUSL, *supra* note 1.

249. This statement refers to the original Article 9 filing rules specified in Sections 9-401-409 and Revised Article 9 rules specified in Sections 9-501-527.

250. *See* Sookman, *supra* note 241, at 120.

251. *See supra*, Part V.

252. *See id.*

253. Section 9-525 of Revised Article 9 contains all of the fee requirements for form filing. Rev. § 9-525. Rather than set uniform fees, the model code leaves the exact amount to be filled in by state legislatures. *See id.* In California, a filing costs $10. CAL. CODE § 9525 (2000). In Nevada, a filing cost $20. NEV. REV. STAT. § 104.9525 (2000). Even before these sections go into effect, July 1, 2001, they are already significantly different from each other.

254. *See* Rev. § 9-525.

255. *See* Stein, *supra* note 38, ¶ 4.

256. *See* LoPucki, *Computerization*, *supra* note 7, at 16. This article was written in 1992, when drafting of Revised Article 9 was still in its infancy.

computerized financing statement database is very feasible, especially as filing offices move to online filing.[257] The benefits would be multiple. First, a computerized central index should conceivably have no lag time.[258] This would be a great advantage to searchers.[259] Second, online filing into a central database would eliminate the need for multiple filings and searchings in different locations.[260] This would decrease the cost of filing.[261] Secured parties could directly access records without the use for filing agents or filing officers.[262] Third, the computerized database would provide much greater reliability.[263]

There are two ways to create a national computerized database. First, state U.C.C. databases could be linked together to form a national database.[264] This linking method is already somewhat accomplished by private database services.[265] Revised Article 9 also provides for the sale of records to private companies on a regular basis.[266] Although these private service companies may offer online searches, they may not offer online filing.[267] This inevitably leads to a delay from the time a filing is effective until the time a filing can be found through a search.[268] Unfortunately, as long as there are over 4200 filing offices, many of which use paper-based filings, these private companies would still be limited in what they have to offer.[269] The end product would still be slow, inconsistent, and unreliable.[270]

The second alternative to creating a national database requires a new approach. The federal government should preempt Section 5 of Revised Article 9 by creating a central database for U.C.C. filings.[271] The Food Security Act of 1985 demonstrates that federal law can reform irregular state law.[272] This would avoid the local irregularities permitted by Article 9 because

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257. *See* Stein, *supra* note 38, ¶ 6.

258. *See id.* ¶ 15. Lag time means the gap between when a filing is filed and when it is actually in the records and locatable by another party conducting a search. *See id.*

259. *See id.*

260. *See id.* A decrease in filing offices would decrease government payrolls, which are often politically important jobs. *See id.* ¶ 27.

261. *See id.* ¶ 27.

262. *See id.* ¶ 14.

263. *See id.* ¶ 13.

264. *See id.* ¶ 12.

265. *See id.* ¶ 6. *See, e.g.*, Lexis, *at* http://www.lexis.com; Accusearch, *at* http://www.accusearch.com; Choicepoint, *at* http://www.choicepoint.com.

266. *See* Rev. § 9-523. The drafters hope that this will facilitate the creation of national databases. *See* MCDONNELL, *supra* note 160, at 400. "Deep in their corporate hearts, the revisers believe that private agencies will normally do a better job of information storage and retrieval than public officials." *Id.*

267. *See* Stein, *supra* note 38, ¶ 10.

268. *See id.*

269. *See id.*

270. *See id.* ¶ 12.

271. *See supra,* Part I. The Food Security Act of 1985 proves that federal preemption of the U.C.C. is possible. *See* Wolfe, *supra* note 62, at 454.

272. *See id.* "[The Food Security Act] represents the first wholesale reformation of the

all filings would be subject to only one set of guidelines–the federal guidelines. This database could be government-run or privatized.[273] Privatization would perhaps improve service and save taxpayer money.[274] It would also create some risks.[275] Nevertheless, a central national database is the only way to truly avoid the irregularities of state-by-state Article 9 filings.

Finally, real estate filing needs to be brought into the twenty-first century. Although Revised Article 9 does much to centralize and standardize financing statement filings, it makes an exception for real estate related filings.[276] Section 9-501 provides for filings affecting timber or fixtures on real property to be made in local real estate records.[277] Moving real estate records in the United States into a centralized database would undoubtedly be an enormous job, but with technological advances it should not seem insurmountable. Only a few years ago, very few states offered computerized central filings for regular U.C.C. financing statements.[278] Now, anything else seems costly and inefficient.[279] Unfortunately, the drafters of Revised Article 9 did little to advance real estate related U.C.C. filings.[280]

"Electronic filing . . . is in its infancy."[281] If all states adopt Revised Article 9, the move to electronic filing will be advanced. States will need to refrain from tampering with the Revised Article 9 in the way that they did with the original version. Furthermore, the United States needs to create a national filing database.

VI. CONCLUSION

From a historical standpoint, the original Article 9, the Canadian P.P.S.A.s, and Revised Article 9 fit nicely together. The original Article 9 represents the birth of modern secured transaction law. As technology progressed, Article 9 started to show its age. The Canadian versions, the P.P.S.A.s, represent Article 9's evolution. With advancements in technology, the P.P.S.A.s adapted the original Article 9's filing system to match. Revised Article 9 represents the latest generation. From that standpoint, Article 9 has come a long way. Unfortunately, however, Revised Article 9 is flawed in the

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UCC by federal legislation." *Id.*

273. *See* Stein, *supra* note 38, ¶ 24.

274. *See id.* ¶ 28.

275. *See id.* ¶ 25. These risks include monopoly pricing or price regulation. *See id.* This could be avoided by having competing private U.C.C. filing networks. *See id.*

276. *See* Rev. § 9-501.

277. *See* Rev. § 9-501(a). If collateral is as-extracted collateral, timber to be cut, or fixtures, then the filing should be made in the office where the mortgage is held. *See id.*

278. *See supra*, Part I.

279. *See* Rev. § 9-526 cmt. 3. Uniformity reduces costs. *See id.*

280. *See* Rev. § 9-501. Nothing in Section 9-501 or the Official Comment mentions the benefits to keeping real estate related filings in local records. *See id.*

281. Ernst, *Recorders Guide*, *supra* note 60.

same way that the original version was, and in the same way that the Canadian P.P.S.A.s are—it is based on a state-by-state approach instead of a national one. This will inevitably lead to an endless string of local irregularities. Ultimately, these flaws are harmful to everyone who seeks credit. "[H]armonization of personal property security law is likely to occur only when the needs of credit grantors are perceived as more important than the unfettered freedom of each jurisdiction to maintain traditional attitudes and approaches."[282]

*Todd J. Janzen**

282. Ronald C.C. Cuming, *Harmonization of the Secured Financing Laws of the Nafta Partners*, 39 ST. LOUIS U. L.J. 809, 810 (1995).

* J.D. Candidate, 2001, Indiana University School of Law–Indianapolis; B.A., 1995, Bethel College of Kansas. Thank you to my wife, Sarah Janzen, for her love, patience, and support during the writing of this note. I would also like to thank Gregory J. Sekata for his advice and guidance; and David L. Denomme for his essential input regarding Canadian personal property statutes.

APPENDIX

The National form can be found at the Texas Secretary of State's website: http://www.sos.state.tx.us/ucc/uccforms.shtml#UCC1.

THIS SPACE FOR USE OF FILING OFFICER

FINANCING STATEMENT — FOLLOW INSTRUCTIONS CAREFULLY

This Financing Statement is presented for filing pursuant to the Uniform Commercial Code and will remain effective, with certain exceptions, for 5 years from date of filing.

A. NAME & TEL. # OF CONTACT AT FILER (optional) | B. FILING OFFICE ACCT. # (optional)

C. RETURN COPY TO: (Name and Mailing Address)

D. OPTIONAL DESIGNATION (if applicable): ☐ LESSOR/LESSEE ☐ CONSIGNOR/CONSIGNEE ☐ NON-UCC FILING

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b)

1a. ENTITY'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

1d. S.S. OR TAX I.D.# | OPTIONAL ADD'L INFO RE ENTITY DEBTOR | 1e. TYPE OF ENTITY | 1f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 1g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b)

2a. ENTITY'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

2d. S.S. OR TAX I.D.# | OPTIONAL ADD'L INFO RE ENTITY DEBTOR | 2e. TYPE OF ENTITY | 2f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 2g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

3. SECURED PARTY'S (ORIGINAL S/P or ITS TOTAL ASSIGNEE) EXACT FULL LEGAL NAME - insert only one secured party name (3a or 3b)

3a. ENTITY'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

4. This FINANCING STATEMENT covers the following types or items of property:

5. CHECK BOX (if applicable) ☐ This FINANCING STATEMENT is signed by the Secured Party instead of the Debtor to perfect a security interest (a) in collateral already subject to a security interest in another jurisdiction when it was brought into this state, or when the debtor's location was changed to this state, or (b) in accordance with other statutory provisions (additional data may be required)

7. If filed in Florida (check one) ☐ Documentary stamp tax paid ☐ Documentary stamp tax not applicable

6. REQUIRED SIGNATURE(S)

8. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS Attach Addendum (if applicable)

9. Check to REQUEST SEARCH CERTIFICATE(S) on Debtor(s) (ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

(1) FILING OFFICER COPY — NATIONAL FINANCING STATEMENT (FORM UCC1) (TRANS) (REV. 12/16/95) Office of the Secretary of State of Texas Web Form

THIS SPACE FOR USE OF FILING OFFICER

FINANCING STATEMENT — FOLLOW INSTRUCTIONS CAREFULLY

This Financing Statement is presented for filing pursuant to the Uniform Commercial Code and will remain effective, with certain exceptions, for 5 years from date of filing.

A. NAME & TEL. # OF CONTACT AT FILER (optional)	B. FILING OFFICE ACCT. # (optional)
C. RETURN COPY TO: (Name and Mailing Address)	

D. OPTIONAL DESIGNATION (if applicable): ☐ LESSOR/LESSEE ☐ CONSIGNOR/CONSIGNEE ☐ NON-UCC FILING

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b)

1a. ENTITY'S NAME

OR

1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	
1d. S.S. OR TAX I.D.# / OPTIONAL ADD'NL INFO RE ENTITY DEBTOR / 1e. TYPE OF ENTITY	1f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION	1g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE	

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b)

2a. ENTITY'S NAME

OR

2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	
2d. S.S. OR TAX I.D.# / OPTIONAL ADD'NL INFO RE ENTITY DEBTOR / 2e. TYPE OF ENTITY	2f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION	2g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE	

3. SECURED PARTY'S (ORIGINAL S/P or ITS TOTAL ASSIGNEE) EXACT FULL LEGAL NAME - insert only one secured party name (3a or 3b)

3a. ENTITY'S NAME

OR

3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	

4. This FINANCING STATEMENT covers the following types or items of property:

5. CHECK BOX (if applicable) ☐ This FINANCING STATEMENT is signed by the Secured Party instead of the Debtor to perfect a security interest (a) in collateral already subject to a security interest in another jurisdiction when it was brought into this state, or when the debtor's location was changed to this state, or (b) in accordance with other statutory provisions (additional data may be required)	7. If filed in Florida (check one) ☐ Documentary ☐ Documentary stamp tax paid ☐ Documentary stamp tax not applicable
6. REQUIRED SIGNATURE(S)	8. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS Attach Addendum (if applicable)
	9. Check to REQUEST SEARCH CERTIFICATE(S) on Debtor(s) (ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

Office of the Secretary of State of Texas Web Form

(2) ACKNOWLEDGMENT COPY — NATIONAL FINANCING STATEMENT (FORM UCC1) (TRANS) (REV. 12/18/95)

THIS SPACE FOR USE OF FILING OFFICER

FINANCING STATEMENT — FOLLOW INSTRUCTIONS CAREFULLY

This Financing Statement is presented for filing pursuant to the Uniform Commercial Code and will remain effective, with certain exceptions, for 5 years from date of filing.

A. NAME & TEL. # OF CONTACT AT FILER (optional)	B. FILING OFFICE ACCT. # (optional)
C. RETURN COPY TO: (Name and Mailing Address)	

D. OPTIONAL DESIGNATION (if applicable): ☐ LESSOR/LESSEE ☐ CONSIGNOR/CONSIGNEE ☐ NON-UCC FILING

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b)

1a. ENTITY'S NAME

OR

1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	
1d. S.S. OR TAX I.D.# / OPTIONAL ADDTNL INFO RE ENTITY DEBTOR	1e. TYPE OF ENTITY	1f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION	1g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b)

2a. ENTITY'S NAME

OR

2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	
2d. S.S. OR TAX I.D.# / OPTIONAL ADDTNL INFO RE ENTITY DEBTOR	2e. TYPE OF ENTITY	2f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION	2g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

3. SECURED PARTY'S (ORIGINAL S/P or ITS TOTAL ASSIGNEE) EXACT FULL LEGAL NAME - insert only one secured party name (3a or 3b)

3a. ENTITY'S NAME

OR

3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS	CITY	STATE / COUNTRY / POSTAL CODE	

4. This FINANCING STATEMENT covers the following types or items of property:

5. CHECK BOX (if applicable) ☐ This FINANCING STATEMENT is signed by the Secured Party instead of the Debtor to perfect a security interest (a) in collateral already subject to a security interest in another jurisdiction when it was brought into this state, or when the debtor's location was changed to this state, or (b) in accordance with other statutory provisions (additional data may be required)	7. If filed in Florida (check one) ☐ Documentary stamp tax paid ☐ Documentary stamp tax not applicable
6. REQUIRED SIGNATURE(S)	8. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS Attach Addendum [if applicable]
	9. Check to REQUEST SEARCH CERTIFICATE(S) on Debtor(s) (ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

(3) SEARCH REQUEST COPY — NATIONAL FINANCING STATEMENT (FORM UCC1) (TRANS) (REV. 12/18/95) Office of the Secretary of State of Texas Web Form

THIS SPACE FOR USE OF FILING OFFICER

FINANCING STATEMENT — FOLLOW INSTRUCTIONS CAREFULLY

This Financing Statement is presented for filing pursuant to the Uniform Commercial Code and will remain effective, with certain exceptions, for 5 years from date of filing.

A. NAME & TEL. # OF CONTACT AT FILER (optional) | B. FILING OFFICE ACCT. # (optional)

C. RETURN COPY TO: (Name and Mailing Address)

D. OPTIONAL DESIGNATION (if applicable): ☐ LESSOR/LESSEE ☐ CONSIGNOR/CONSIGNEE ☐ NON-UCC FILING

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b)

1a. ENTITY'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

1d. S.S. OR TAX I.D.# | OPTIONAL ADD'NL INFO RE ENTITY DEBTOR | 1e. TYPE OF ENTITY | 1f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 1g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b)

2a. ENTITY'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

2d. S.S. OR TAX I.D.# | OPTIONAL ADD'NL INFO RE ENTITY DEBTOR | 2e. TYPE OF ENTITY | 2f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 2g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

3. SECURED PARTY'S (ORIGINAL S/P or ITS TOTAL ASSIGNEE) EXACT FULL LEGAL NAME - insert only one secured party name (3a or 3b)

3a. ENTITY'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

4. This FINANCING STATEMENT covers the following types or items of property:

5. CHECK BOX [if applicable] ☐ This FINANCING STATEMENT is signed by the Secured Party instead of the Debtor to perfect a security interest (a) in collateral already subject to a security interest in another jurisdiction when it was brought into this state, or when the debtor's location was changed to this state, or (b) in accordance with other statutory provisions [additional data may be required]

7. If filed in Florida (check one) ☐ Documentary stamp tax paid ☐ Documentary stamp tax not applicable

6. REQUIRED SIGNATURE(S)

8. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS Attach Addendum [if applicable]

9. Check to REQUEST SEARCH CERTIFICATE(S) on Debtor(s) [ADDITIONAL FEE] (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

(4) DEBTOR COPY — NATIONAL FINANCING STATEMENT (FORM UCC1) (TRANS) (REV. 12/18/95)

Office of the Secretary of State of Texas Web Form

THIS SPACE FOR USE OF FILING OFFICER

FINANCING STATEMENT — FOLLOW INSTRUCTIONS CAREFULLY

This Financing Statement is presented for filing pursuant to the Uniform Commercial Code and will remain effective, with certain exceptions, for 5 years from date of filing.

A. NAME & TEL. # OF CONTACT AT FILER (optional) | B. FILING OFFICE ACCT. # (optional)

C. RETURN COPY TO: (Name and Mailing Address)

D. OPTIONAL DESIGNATION (if applicable): ☐ LESSOR/LESSEE ☐ CONSIGNOR/CONSIGNEE ☐ NON-UCC FILING

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b)

1a. ENTITY'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

1d. S.S. OR TAX I.D.# | OPTIONAL ADDN'L INFO RE ENTITY DEBTOR | 1e. TYPE OF ENTITY | 1f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 1g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b)

2a. ENTITY'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

2d. S.S. OR TAX I.D.# | OPTIONAL ADDN'L INFO RE ENTITY DEBTOR | 2e. TYPE OF ENTITY | 2f. ENTITY'S STATE OR COUNTRY OF ORGANIZATION | 2g. ENTITY'S ORGANIZATIONAL I.D.#, if any ☐ NONE

3. SECURED PARTY'S (ORIGINAL S/P or ITS TOTAL ASSIGNEE) EXACT FULL LEGAL NAME - insert only one secured party name (3a or 3b)

3a. ENTITY'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | COUNTRY | POSTAL CODE

4. This FINANCING STATEMENT covers the following types or items of property:

5. CHECK BOX (if applicable) ☐ This FINANCING STATEMENT is signed by the Secured Party instead of the Debtor to perfect a security interest in (a) in collateral already subject to a security interest in another jurisdiction when it was brought into this state, or when the debtor's location was changed to this state, or (b) in accordance with other statutory provisions (additional data may be required)

7. If filed in Florida (check one) ☐ Documentary stamp tax paid ☐ Documentary stamp tax not applicable

6. REQUIRED SIGNATURE(S)

8. ☐ This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS Attach Addendum (if applicable)

9. Check to REQUEST SEARCH CERTIFICATE(S) on Debtor(s) (ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

(S) SECURED PARTY COPY — NATIONAL FINANCING STATEMENT (FORM UCC1) (TRANS) (REV. 12/18/95)

Office of the Secretary of State of Texas Web Form

General Instructions for National Financing Statement (Form UCC1) (Trans)

Please type or laser-print this form. Be sure it is completely legible. Read all instructions.

Fill in form very carefully; mistakes may have important legal consequences. Follow instructions completely. If you have questions, consult your attorney. Filing officer cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing officer use.

When properly completed, send Filing Officer Copy, with required fee, to filing officer. If you want an acknowledgment, also send Acknowledgment Copy, otherwise detach. If you want to make a search request, complete item 9 and send Search Request Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, use 8-1/2 X 11 inch sheets and put at the top of each additional sheet the name of the first Debtor, formatted exactly as it appears in item 1 of this form; you are encouraged to use Addendum (Form UCC1Ad).

Item Instructions

1. Debtor name: Enter only one Debtor name in item 1, an entity's name (1a) or an individual's name (1b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. Entity Debtor. "Entity" means an organization having a legal identity separate from its owner. A partnership is an entity; a sole proprietorship is not an entity, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered entity (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine correct name, entity type, and state of organization.

1b. Individual Debtor. "Individual" means a natural person and a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.

For both entity and individual Debtors: Don't use Debtor's trade name, D/B/A, A/K/A, F/K/A, etc. in place of Debtor's legal name; you may add such other names as additional Debtors if you wish.

1c. An address is always required for the Debtor named in 1a or 1b.

1d. Debtor's social security or tax identification number is required in some states. Enter social security number of a sole proprietor, not tax identification number of the sole proprietorship.

1e,f,g. "Additional information re entity Debtor" is optional. It helps searchers to distinguish this Debtor from others with the same or a similar name. Type of entity and state of organization can be determined from Debtor's current filed charter documents. Organizational I.D. number, if any, is assigned by the agency where the charter document was filed; this is different from taxpayer I.D. number; this should be entered preceded by the 2-character U.S. Postal identification of state of organization (e.g., CA12345, for a California corporation whose organizational I.D. number is 12345).

Note: If Debtor is a transmitting utility as defined in applicable Commercial Code, attach Addendum (Form UCC1Ad) and check box Ad8.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional Debtors, or one or more additional Secured Parties, attach either Addendum (Form UCC1Ad) or other additional page(s), using correct name format. Follow Instruction 1 for determining and formatting additional names.

3. Enter information, determined and formatted per Instruction 1. If there is more than one Secured Party, see Instruction 2. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may provide either assignor Secured Party's or assignee's name and address in item 3.

4. Use item 4 to indicate the types or describe the items of collateral. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or other attached additional page(s).

5, 6. All Debtors must sign. Under certain circumstances, Secured Party may sign instead of Debtor; if applicable, check box in item 5 and provide Secured Party's signature in item 6, and under certain circumstances, in some states, you must also provide additional data; use Addendum (Form UCC1Ad) or attachment to provide such additional data.

7. If filing in the state of Florida you must check one of the two boxes in item 7 to comply with documentary stamp tax requirements.

8. If the collateral consists of or includes fixtures, timber, minerals, and/or mineral-related accounts, check the box in item 8 and complete the required information on Addendum (Form UCC1Ad). If the collateral consists of or includes crops, consult applicable law of state where this Financing Statement is to be filed and complete Ad3b, and Ad4 if required, on Addendum (Form UCC1Ad) and, if required, check box in item 8.

9. Check box 9 to request Search Certificate(s) on all or some of the Debtors named in this Financing Statement. The Certificate will list all Financing Statements on file against the designated Debtor currently effective on the date of the Certificate, including this Financing Statement. There is an additional fee for each Certificate. This item is optional. If you have checked box 9, file copy 3 (Search Request Copy) of this form together with copies 1 and 2. Not all states will honor a search request made via this form; some states require a separate request form.

Instructions re Optional Items A-D

A. To assist filing officers who might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. If filer has an account with filing officer or is authorized to pay fees by means of a card (credit or debit) and wishes to use such means of payment, check the appropriate box and enter filer's account number in item B, or, in the alternative, filer may present this information by a cover letter.

C. Complete item C if you want acknowledgment copy returned and you have presented simultaneously a carbon or other copy of this form for use as an acknowledgment copy.

D. If filer desires to use titles of lessee and lessor, or consignee and consignor, instead of Debtor and Secured Party, check the appropriate box in item D. This item is optional. If this is not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item D, complete items 1-9 as applicable and attach any other items required under other law.

WOMEN'S RIGHTS UNVEILED: TALIBAN'S TREATMENT OF WOMEN IN AFGHANISTAN

I. INTRODUCTION

I have four children. Life is very difficult under the Taliban, especially because of what they have done to women. During the past year, I have been out of my house only three times, always accompanied by a male family member, or my husband.

Once, I went to the baker's [sic]. There I saw another woman. She was picking up some bread, and her sleeves moved up her arms a bit, and a Talib came and beat her. I became very afraid, and I ran away.

My house in Afghanistan is not very big. It has two rooms, one bathroom, and a kitchen. All the day, I am inside the house, doing housework—cooking, washing, cleaning, things like this. My husband is a shopkeeper.

We have a courtyard, so sometimes I can go outside and feel the sun on my face. It is surrounded by a high wall, so no one can see in.

I do not see my women friends. If the women have the time to go outside, the male members of the family don't have time to escort them, or don't want to. So we all stay in our houses.[1]

It is hard for people in other countries to believe that we women in Afghanistan are beaten everyday by the Taliban. The sadness in our story is endless.

I know that they [the Taliban] beat us, lash us, and lock us in our homes all because they want to destroy the dignity of women. But all these crimes against us will not stop our struggle.

Will other women in the world join with us?[2]

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1. DEBORAH ELLIS, WOMEN OF THE AFGHAN WAR 229 (2000). This story is a testimonial of an Afghan woman, Tahar, describing her life in Afghanistan. *See id.* For other testimonials of Afghan women and refugees, see *id.*

2. *Id.* at 234. This speech was given by an Afghan woman at International Women's Day. *See id.*

The Taliban,[3] the current rulers of Afghanistan, impose rules on women pertaining to their social lives, dress, education, employment, and access to health care services.[4] Women who do not follow these rules endure degrading treatment and torture.[5]

Women's lives were not always this way. Part II of this Note discusses the history of Afghanistan. Afghanistan has been engaged in war for over thirty years.[6] During the reign of the Soviet Union in Afghanistan, from 1979 to 1992, women enjoyed equal rights and expanded job opportunities.[7] These rights became severely impaired, however, after the Communist government fell and the Taliban began to take over the country.[8] Part III of the Note discusses the recent constitutional history of Afghanistan. The 1990 Constitution, which protected gender equality,[9] is no longer in force.[10]

The Taliban is not the recognized government of Afghanistan.[11] Part IV of the Note describes the recognized government headed by Burnhanuddin Rabbani, the prior president. Part V of the Note discusses human rights doctrines to which Afghanistan is a party including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Also examined is Afghanistan's position as a signatory party to the Convention on the Elimination of All Forms of Discrimination Against Women.[12] As such, the Taliban's actions cannot contradict the objectives of this Convention.[13] The Taliban and the Rabbani government are both bound by these human rights doctrines.[14]

The situation for women prior to Taliban control is discussed in Part VI. In general, women worked in a broad range of jobs and enjoyed social, economic, and political freedom.[15] Part VII describes rules the Taliban imposes and how these rules violate the human rights doctrines to which Afghanistan is a party. The Taliban rules affect women's freedom of movement, thought, expression, peaceful assembly, association, religion,

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3. Taliban is defined as "student of Islamic religious studies." *Id.* at 60. The Taliban also refer to themselves as the Islamic Emirate of Afghanistan. *See* S. Res. 1267, U.N. SCOR, at 236 (1999), *reprinted in* 38 I.L.M. 235. The Inter Services Intelligence Division, Pakistan's security service, created the Taliban. *See* ELLIS, *supra* note 1, at 60. Pakistan and Saudi Arabia fund the Taliban. *See id.* at 61. The Taliban were given over $10 billion dollars in weapons and aid for their cause. *See* AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 18 (2000).

4. *See infra* notes 187-224, 230-334 and accompanying text.
5. *See infra* notes 335-343 and accompanying text.
6. *See infra* notes 20-59 and accompanying text.
7. *See infra* notes 23, 172-82 and accompanying text.
8. *See infra* part VII.
9. *See infra* note 70 and accompanying text.
10. *See infra* note 83 and accompanying text.
11. *See infra* notes 86-90 and accompanying text.
12. *See infra* note 108 and accompanying text.
13. *See infra* note 110 and accompanying text.
14. *See infra* notes 157-171 and accompanying text.
15. *See infra* notes 172-182 and accompanying text.

employment, education, and political life.[16] Also infringed are women's rights to health services, to partake in the government, and to be free from torture.[17] The Taliban's policies amount to a violation of all governing human rights doctrines.[18]

The Taliban justify their strict rules through the tenets of the Islamic religion.[19] Part VIII analyzes the Taliban's rules in relation to the Islamic culture, and explores the proposition that, in addition to violating governing human rights doctrines, the Taliban are also violating the key premises of the Islamic religion. Part IX discusses possible methods for change including gradualism and influences from organizations, such as the United Nations. Part X describes the lives of Afghan refugees who have fled the country in hopes of a better life. In conclusion, Part XI of the Note suggests that the Taliban must allow input into the governance of the country and repeal all laws that violate human rights doctrines. At a minimum, the Taliban should liberally interpret Islamic law.

II. HISTORY OF AFGHANISTAN[20]

The Soviet Union[21] ruled Afghanistan from 1979 to 1992.[22] During the Soviet reign in the 1980s, the Communists legally guaranteed women equal rights.[23] Women saw expanded opportunities in the areas of education and employment.[24] While some women took advantage of these prospects, other women engaged in warfare against the Communists,[25] open protests,[26] and underground activities.[27] Punishments for these activities included beatings, arrests, torture, and imprisonment.[28]

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16. *See infra* notes 187-229, 258-335 and accompanying text.
17. *See infra* notes 230-257, 335-353 and accompanying text.
18. *See infra* notes 187-353 and accompanying text.
19. *See infra* note 354 and accompanying text.
20. For a summary of the history of Afghanistan since its inception see Marjon E. Ghasemi, *Islam, International Human Rights & Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445, 447-49 (1999). *See also* J. Alexander Their, *Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State*, 35 STAN. J. INT'L. L. 351, 361-64 (1999) (discussing the history of the creation of Afghanistan).
21. *See generally* W. Michael Resiman and James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L. L. 459, 466-79 (1988) for the Soviet Union's historical role in Afghanistan.
22. *See* ELLIS, *supra* note 1, at xviii.
23. *See id.* at xviii, 40.
24. *See id.* at 40.
25. In Herat, women guerrillas fought in the countryside against the Communists. *See id.* at 8.
26. In the children's revolt on April 21, 1980, high school girls in Kabul protested. *See id.* at xviii. The demonstration ended many days later with thousands of arrests. *See id.* at 8. Fifty students, including thirty females, were killed. *See id.* at xviii. In 1983, in the capital of Kabul, mourning women sought the dead bodies of their loved ones, and the discharge of jailed Afghans. *See id.* at 7-8.
27. The underground group was divided into three sections. *See id.* at 8. The first group investigated suspected spies. The second group trailed the suspects to determine their connections. The third group assassinated Russians. *See id.*
28. Women reportedly were beaten, burned with cigarettes, forced to stand outside in the

The Soviet troops left Afghanistan in 1989.[29] The Mujahideen[30] fought against the Communists until the reign officially ended in 1992.[31] The United States,[32] Egypt, Pakistan, and China supported the Mujahideen with weapons and funding.[33]

The government changed in 1992,[34] and Burnhanuddin Rabbani acted as the interim president.[35] The Afghan Peace Accord created the government structure.[36] The government offices included a president, prime minister, and a cabinet.[37] Unfortunately, the government structure did not provide needed stability in the country.[38] A rivalry between groups supporting the president and those supporting the prime minister ensued and fighting continued.[39]

A. *Taliban Begin to Take Control*

The Taliban[40] began to emerge victorious in November, 1994.[41] The Taliban, a group comprised of men, received their education in religious schools known as madrassas.[42] The Taliban learned that "women were a temptation, an unnecessary distraction . . . ."[43] As members of the Pashtun clan,[44] the Taliban follow strict rules pertaining to social relationships.[45]

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hot sun for a long period of time, shocked with electricity, and forced to withstand objects inserted into their rectum. *See id.* at 9.

29. *See* AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

30. Mujahideen means "[h]oly warriors fighting jihad or holy war." RASHID, *supra* note 3, at 243. For a glossary of Afghan terms, see *id.* at 243-44.

31. *See* ELLIS, *supra* note 1, at xviii, 42.

32. The United States spent six million dollars in aid to the guerilla groups. *See id.* at 43. Funds continued after the Soviets left. *See id.* The United States spent over three million dollars to support Gulbuddin Hekmatyr, the leader of the Hezb-e Islami party. *See id.* Hekmatyr fought against the Communists and then against the other groups to get control. *See id.*

33. *See id.* at 41, 43. The Soviet Union spent $45 billion fighting the Mujahideen. *See* RASHID, *supra* note 3, at 18.

34. *See* ELLIS, *supra* note 1, at xviii, 42.

35. *See Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 49th Sess., Agenda Item 12, ¶43, U.N. Doc. E/CN.4/1993/42 (1993) [hereinafter *Final Report on the Situation of Human Rights in Afghanistan* (1993)].

36. *See Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 50th Sess., Agenda Item 12, ¶¶ 10, 11, 13, U.N. Doc. E/CN.4/1994/53 (1994) [hereinafter *Final Report on the Situation of Human Rights in Afghanistan* (1994)].

37. *See id.* ¶13.

38. *See id.*

39. *See id.*

40. For general information on the Taliban, see *supra* note 3.

41. *See Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 51st Sess., Agenda Item 12, ¶17, U.N. Doc. E/CN.4/1995/64 (1995) [hereinafter *Final Report on the Situation of Human Rights in Afghanistan* (1995)] .

42. *See* RASHID, *supra* note 3, at 22-23. *See also* ELLIS, *supra* note 1, at 60.

43. RASHID, *supra* note 3, at 33. "They were raised by men, men with a disregard for women that is cultural, religious, and, primarily, political." ELLIS, *supra* note 1, at 60.

44. For information about the Pashtun clan see RASHID, *supra* note 3, at 10-12. *See also* Ghasemi, *supra* note 20, at 448.

45. *See* Ghasemi, *supra* note 20, at 448. The tradition of the Pashtuns is to disregard Islamic inheritance laws. *See* Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293-95 (1998).

The Taliban formed with good intentions. Their goals were to "restore peace, disarm the population, enforce Sharia law and defend the integrity and Islamic character of Afghanistan."[46] The Taliban attempted to end internal fighting.[47] After they conquered the city of Kandahar in 1994, an estimated twenty thousand Afghans joined in support along with hundreds of madrassa students from Pakistan.[48]

In 1995, three groups, one of which was the Taliban, vied for control of Afghanistan.[49] Later that year, the Rabbani government offered to transfer power to a new government, one which all parties could agree upon.[50] However, the parties did not stop fighting long enough to reach an agreement.[51] The Taliban emerged victorious in Herat in 1995,[52] the capital, Kabul, in 1996,[53] and Bamiyan in 1998.[54]

In 1999, two factions, the Taliban and the United Front, fought for control.[55] These groups attempted to compromise in 1999.[56] The negotiations ended when the Taliban decided the United Front must agree to join their

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Women are not given property rights and are forced into marriage. *See id.*

46. RASHID, *supra* note 3, at 22. The leader of the Taliban, Mullah Mohammed Omar, stated the intentions of the Taliban when he said, "'We took up arms to achieve the aims of the Afghan jihad and save our people from further suffering at the hands of the so-called Mujaheddin. We had complete faith in God Almighty. We never forgot that. He can bless us with victory or plunge us into defeat.'" *Id.* at 23. Omar is a very secretive leader. *See id.* He resides in the city of Kandahar and has been to Kabul, the capital, only twice. *See id.* Omar remains cut-off from the Western world by refusing to speak to journalists or diplomats. *See id.* For the history of Omar's life see *id.* at 23-26. *See* Ghasemi, *supra* note 20, at 453. The law that encompasses Islamic jurisprudence is the Shari'a. *See id.*

47. *See id.* at 22.

48. *See id.* at 31. Many boys that engaged in fighting were between fourteen and twenty-four years old. *See id.* at 32.

49. The three groups were "the Taliban, the forces controlled by General Dostum together with his supporters in the Supreme Coordination Council and the government forces of President Rabbani." *Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 52nd Sess., Agenda Item 10, ¶ 14, U.N. Doc. E/CN.4/1996/64 (1996) [hereinafter *Final Report on the Situation of Human Rights in Afghanistan* (1996)].

50. *See id.* ¶ 18.

51. *See id.*

52. *See* ELLIS, *supra* note 1, at xix.

53. *See id.* The Taliban executed a former President of Afghanistan, Mohammed Najibullah. *See Interim Report on the Situation of Human Rights in Afghanistan*, U.N. GAOR, 51st Sess., Agenda Item 110(c), ¶ 57, U.N. Doc. A/51/481 (1996) [hereinafter *Interim Report on the Situation of Human Rights in Afghanistan* (1996)]. It was estimated that the Taliban controlled three quarters of Afghanistan in 1996. *See id.* *See also Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 53rd Sess., Agenda Item 10, ¶ 18, U.N. Doc. E/CN.4/1997/59 (1997) [hereinafter *Final Report on the Situation of Human Rights in Afghanistan* (1997)]. The remaining areas of Afghanistan are controlled mostly by Supreme Council for the Defence of Afghanistan. *See id.* ¶¶ 14, 18.

54. *See* ELLIS, *supra* note 1, at xix.

55. *See Report on the Situation of Human Rights*, U.N. ESCOR, 55th Sess., Agenda Item 9, ¶ 11, U.N. Doc. E/CN.4/1999/40 (1999) [hereinafter *Report on the Situation of Human Rights* (1999)].

56. Both groups accepted a peace accord that consisted of a proposal for a power-sharing government and a cease-fire. *See id.* ¶ 14. *See also The Situation in Afghanistan and Its Implications For International Peace and Security*, U.N. GAOR, 54th Sess., Agenda Item 50, ¶¶10-14, U.N. Doc. A/54/536, S/1999/1145 (1999) [hereinafter *The Situation in Afghanistan and Its Implications for International Peace and Security*].

system of government.[57] The Taliban currently control ninety-seven percent of Afghanistan[58] and seek formal recognition.[59]

B. *Taliban's Governing Structure and Style*

The Taliban government is "neither parliamentary nor presidential, but Islamic."[60] The Taliban strictly enforce Islamic law.[61] The "Department for enforcement of right Islamic way and prevention of evils," or the religious police, punish violations of Taliban decrees and Islamic rules.[62] Each province that the Taliban rules has Taliban officials presiding over it.[63] However, Taliban policies are not carried out similarly in all areas because of an inefficient administrative structure.[64] Religious courts and tribunals, which also apply Islamic law, exist in all provinces.[65]

III. CONSTITUTIONAL HISTORY OF AFGHANISTAN

The Soviet departure from Afghanistan in 1989[66] set the stage for a new Constitution.[67] The 1990 Constitution of the Republic of Afghanistan[68] implemented Islam as the state religion,[69] gave men and women equal rights,[70]

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57. *See The Situation in Afghanistan and Its Implications For International Peace and Security*, *supra* note 56, ¶12.

58. *See Interim Report on the Situation of Human Rights in Afghanistan*, U.N. GAOR, 54th Sess., Agenda Item 116(c), ¶ 36, U.N. Doc. A/54/422 (1999) [hereinafter *Interim Report on the Situation of Human Rights in Afghanistan* (1999)].

59. 59 *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 58. The Taliban stated that they could satisfy the United Nations' three main concerns if they were recognized. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶¶ 36, 38. The Taliban viewed the United Nations' three concerns before recognition would be given to them as "(a) elimination of narcotic drugs; (b) dealing with Osama bin Laden [suspected terrorist]; (c) education of women and girls." *Id.* ¶38. The Special Rapporteur noted, however, that recognition of the Taliban was not related to the these concerns. *See id.* ¶ 40.

60. *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 13.

61. *See id.* ¶ 13.

62. *See id.*

63. *See id.* ¶ 28.

64. *See id.*

65. *See id.* ¶ 29.

66. *See* AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

67. *See id.* at 4, 5.

68. The Constitution of the Republic of Afghanistan replaced the 1987 constitution. *See* Their, *supra* note 20, at 368. The preamble to the Constitution provided:

> Therefore, keeping in mind the historic changes that have taken shape in our homeland and in the contemporary world, adhering to the principles of the sacred religion of Islam, abiding by the accepted Afghan traditions and rituals, relying upon the realities of the country's history and culture, respecting the valuable heritages of the Constitutionalist Movement and in conformity with the Charter of the United Nations and the Universal Declaration of Human Rights . . . .

AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992). For the history of the Constitution see Their, *supra* note 20, at 366-70.

69. Chapter 1, Article 2 provides, "The sacred religion of Islam is the religion of

denounced torture,[71] allowed freedom of expression,[72] acknowledged freedom of assembly,[73] allowed government criticism,[74] recognized the right to work,[75] the right to an education,[76] and the right to health services.[77] The Constitution set the Loya Jirgah[78] as the governing body.[79] The government consisted of a president, a 205 seat parliament, and a supreme court.[80]

Chapter 12 of the Constitution discusses foreign policy and mentions the observance of the United Nations Charter and the Universal Declaration of Human Rights.[81] Furthermore, the Constitution provides that all Afghan

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Afghanistan. In the Republic of Afghanistan no law shall run counter to the principles of the sacred religion Islam and other values enshrined in this Constitution." AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 10-11 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

70. Chapter 3, Article 38 states, "Citizens of the Republic of Afghanistan, both men and women, have equal rights and duties in the eyes of the law . . . ." *Id.* at 18.

71. Chapter 3 Article 42 states, "In the Republic of Afghanistan, punishment incompatible with human dignity, torture and excruciation are prohibited." *Id.* at 19.

72. Chapter 3, Article 49 provides, "Citizens of the Republic of Afghanistan enjoy the right of freedom of thought and expression." *Id.* at 21.

73. Chapter 3, Article 50 states, "Citizens of the Republic of Afghanistan enjoy the right to assembly, peaceful demonstration and strike, in accordance with the provisions of the law." *Id.*

74. Chapter 3, Article 51 provides:

> Citizens of the Republic of Afghanistan enjoy the right to petition, criticise and make suggestions, either individually or collectively.
>
> State organs, social organisations and responsible officials are bound to consider the petitions, criticisms and proposals and take necessary actions in regard to them within the time prescribed by law. Surveillance for criticism is forbidden.

Id.

75. Chapter 3, Article 52 states, "Citizens of the Republic of Afghanistan have the right to work and are entitled to equal pay for equal work. The state, through enactment and application of just and progressive labour laws, shall provide necessary conditions for the citizens to enjoy this right." *Id.* at 21-22.

76. Chapter 3, Article 56 states:

> Citizens of the Republic of Afghanistan have the right to free education.
>
> The State shall adopt necessary measures for the eradication of illiteracy, generalization of balanced education, education in mother tongue, ensuring compulsory primary education, gradual expansion of general, technical, professional and vocational education and growth of the system of higher education for training national cadres.

Id. at 22-23.

77. Chapter 3, Article 57 states:

> Citizens of the Republic of Afghanistan have the right to health and social security. The state shall adopt necessary measures for expansion of all-round, balanced and countrywide medical services, expansion of hospitals, health centres, training of doctors and personnel for medical services, universal prevention of diseases, expansion of free health services, arrangement and encouragement of private medical services, improvement of material welfare of the age, war and work disabled and dependents of martyrs.

Id. at 23.

78. *See id.* at 25. The Loya Jirgah consists of the elected President and other governing officers. *See id.* at Chapter 4.

79. *See id.*

80. *See* Shefali Desai, *Hearing Afghan Women's Voices: Feminist Theory's Re-conceptualization of Women's Human Rights*, 16 ARIZ. J. INT'L & COMP. L. 805, 819 (1999).

81. Chapter 12, Article 133 states, "The Republic of Afghanistan respects and observes the UN Charter, the Universal Declaration of Human Rights and other accepted principles and norms of international law." *See* AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in*

citizens are bound by the Constitution.[82]

After the Communist government fell, the Constitution was discarded.[83] The Taliban have imposed new rules[84] and claim to be creating a new constitution.[85]

IV. WHO REPRESENTS THE RECOGNIZED GOVERNMENT OF AFGHANISTAN?

The Taliban and the prior government each claim to be the only legitimate government.[86] Former President Burnhanuddin Rabbani controls most of Afghanistan's embassies[87] and holds the United Nations seat for Afghanistan.[88] The Taliban cannot occupy Afghanistan's seat because the group is not recognized internationally.[89] The only countries that currently recognize the Taliban as the government of Afghanistan are Pakistan, Saudi Arabia, and the United Arab Emirates.[90]

V. GOVERNING HUMAN RIGHTS DOCTRINES

A. *Universal Declaration of Human Rights*

All countries must abide by the principles of the Universal Declaration of Human Rights[91] (UDHR). The UDHR provides for equality between men

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CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 46 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

82. Chapter 3, Article 61 states, "Every citizen of the Republic of Afghanistan is bound to observe the Constitution and the laws of the Republic of Afghanistan. Ignorance of provisions of law is no excuse." *Id.* at 24.

83. *See* ELLIS, *supra* note 1, at xviii, 42.

84. *See id.* at 62-64.

85. *See infra* note 349.

86. *See* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 8, n.23 (Ian Brownlie ed., 1998). *See also* Afghanistan Human Rights Practices, 1999, *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/afghanis.html (last visited Sept. 2, 2000) [hereinafter Afghanistan Human Rights Practices, 1999].

87. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

88. *See id. See also* Amnesty International Annual Report 2000, *available at* http://www.web.amnesty.org (last visited Sept. 2, 2000). *See also* Ghasemi, *supra* note 20, at 464.

89. *See* Ghasemi, *supra* note 20, at 464.

90. *See Interim Report on the Situation of Human Rights in Afghanistan*, U.N. GAOR, 52nd Sess., Agenda Item 112(c), ¶ 20, U.N. Doc. A/52/493 (1997) [hereinafter *Interim Report on the Situation of Human Rights in Afghanistan* (1997)].

91. *See* Ghasemi, *supra* note 20, at 461. The UDHR Preamble states:

> *Whereas* the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Universal Declaration of Human Rights, Dec. 10, 1948, Department of State Bulletin, *available at* LEXIS [hereinafter UDHR]. *See also* Universal Declaration of Human Rights, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 6 (1994). Article 30 states, "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." For a discussion of the Taliban's violations of the UDHR, see Ghasemi, *supra*

and women,[92] rights against torture,[93] protection in one's private life,[94] right to consent to marriage,[95] right to own property,[96] freedom of thought and religion,[97] right to engage in political affairs,[98] right to employment,[99] right to adequate standard of living,[100] right to education,[101] and right to engage in the

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note 20, at 461-62. *Id.*

92. Article 2 states, in part, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." UDHR, *supra* note 91.

93. Article 5 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

94. Article 12 states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." *Id.* Article 13 states in part, "1. Everyone has the right to freedom of movement and residence within the borders of each State." *Id.*

95. Article 16 states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Id.

96. Article 17 states, "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." *Id.*

97. Article 18 states, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.* Article 19 states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.*

98. Article 20 states, "1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association." *Id.* Article 21 states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service of his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Id.

99. Article 23 states in part:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Id.

100. Article 25 states:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All

social life of the culture,[102] among many other protections.[103] The prior Afghan Constitution stated that it was in conformity with the UDHR.[104]

B. *Convention on the Elimination of All Forms of Discrimination Against Women*

The Convention on the Elimination of All Forms of Discrimination Against Women[105] (CEDAW) went into effect on September 3, 1981.[106] There are 167 States Parties[107] to the CEDAW and three signatories, Afghanistan,[108]

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children, whether born in or out of wedlock, shall enjoy the same social protection.

Id.

101. Article 26 provides:
1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Id.

102. Article 27 states:
1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Id. Article 28 states, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." *Id.*

103. *See generally id.*

104. *See* AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

105. The Preamble states:

> Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

The Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, 19 I.L.M. 33, 35 [hereinafter CEDAW]. *See also* The Convention on the Elimination of All Forms of Discrimination Against Women, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 48 (1994). For a feminist analysis of the CEDAW see Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 24-85 (1996).

106. *See* The Convention on the Elimination of All Forms of Discrimination Against Women, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 48 (1994).

107. The parties to the CEDAW are: Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia,

Sao Tome and Principe, and the United States.[109]

As a signatory to the CEDAW,

> A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .[110]

States Parties to the CEDAW pledge to abolish discriminatory laws, take all appropriate steps to promote essential human rights freedom for women, and abstain from engaging in discriminatory acts along with other activities.[111]

Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Tajikistan, Thailand, The Former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, *at* http://www.unhchr.ch/pdf/report.pdf (last modified Mar. 19, 2001) [hereinafter Status of Ratifications of the Principal International Human Rights Treaties].

108. Afghanistan signed the CEDAW on August 14, 1980. *See id.*

109. The United States signed the CEDAW on July 17, 1980. *See id.* Secretary of State Madeline Albright said at a women's conference, "[A]fter 18 years, it is long past time for America to become [a] party to the Convention on the Elimination of All Forms of Discrimination Against Women." Secretary of State Madeline Albright, Women and Foreign Policy: A Call to Action, *Remarks at the Women's Conference, Los Angeles, California,* Oct. 5, 1999, *available at* LEXIS, Department of State Dispatch File. On the situation in Afghanistan, Secretary Albright said, "[T]he Taliban, seems determined to drag Afghan women back from the dawn of the 21st century to somewhere closer to the 13th. The only female rights they appear to recognize are the rights to remain silent and uneducated, unheard, and unemployed." *Id.* Even though the United States has refused to ratify the CEDAW for twenty years, the city of San Francisco passed a city ordinance to ratify the CEDAW in 1998. Editorial, *The Shame of the Senate,* SAN FRANCISCO CHRONICLE, July 14, 2000, *available at* LEXIS, News Group file.

110. Vienna Convention on the Law of Treaties, Jan. 27, 1988, art. 18, 1155 U.N.T.S. 331 *reprinted in* BURNS, WESTON & CHARLESWORTH, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 69, 73 (1997).

111. Part I, Article 2 states:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their

The CEDAW defines discrimination as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[112]

The CEDAW's purpose is to promote and insure equality of men and women in all aspects of life including employment,[113] health,[114] education,[115]

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national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

CEDAW, *supra* note 106, at 36. Part I, Article 3 states:

> State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Id. *See* Division for the Advancement of Women, *available at* http://www.un.org/womenwatch/daw/cedaw/index.html (last visited Mar. 27, 2001).

112. Part I, Article 1 of the CEDAW, *supra* note 106, at 36.

113. Part III, Article 11 states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
   (a) The right to work as an inalienable right of all human beings;
   (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
   (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
   (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
   (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity

cultural life,[116] political affairs,[117] legal matters,[118] and home life.[119] The

to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Id. at 39.

114. Part III Article 12 states:
1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Id. at 40.

115. Part III, Article 10 states:
States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in preschool, general, technical, professional and higher technical education, as well as in all types of vocational training;
(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
(d) The same opportunities to benefit from scholarships and other study grants;
(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women.
(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
(g) The same opportunities to participate actively in sports and physical education;
(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Id. at 38-39.

116. Part I, Article 5 states in part:
States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

Id. at 37.

117. Part II, Article 7 states:
States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) To participate in the formulation of government policy and the

CEDAW has a special provision for the protection of women living in rural areas.[120] The CEDAW is the sole human rights treaty to confirm women's reproductive rights.[121]

The Committee on the Elimination of Discrimination Against Women (Committee) oversees the State reporting measures and prepares comments, suggestions, and general recommendations for the States Parties.[122]

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Protocol) provides a reporting

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implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Id.

118. Part IV, Article 15 states in part, "1. States Parties shall accord to women equality with men before the law." *Id.* at 41.

119. Part IV, Article 16 states in part:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
   (a) The same right to enter into marriage;
   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
   (c) The same rights and responsibilities during marriage and at its dissolution; . . .
   (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Id. at 41-42.

120. Part III, Article 14 states in part:

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . .
   (b) To have access to adequate health care facilities, including information, counselling and services in family planning; . . .
   (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency; . . .
   (f) To participate in all community activities;. . .
   (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Id. at 40-41.

121. *See* Division for the Advancement of Women, *available at* http://www.un.org/womenwatch/daw/cedaw/index.html (last visited Mar. 27, 2001) (discussing the CEDAW). *See* CEDAW, *supra* note 106, part I, article 5, part III, article 12, part III, article 14, part IV, article 16.

122. For a summary of the role of the Committee, see The Committee on the Elimination of Discrimination Against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/committ.htm (last visited Mar. 27, 2001). For the exact procedures for States Parties to the CEDAW, see the CEDAW, *supra* note 105, part V. *See also* Southard, *supra* note 105, at 23-24 (discussing how the Committee has a lack of commitment to the CEDAW and its goals).

procedure for violations of the CEDAW.[123] The Protocol is not yet in force.[124] Seventeen States are parties to the Protocol,[125] and forty-nine States signed the Protocol.[126] Afghanistan is not one of them.[127]

C. *The International Covenant on Economic, Social, and Cultural Rights*

The International Covenant on Economic, Social, and Cultural Rights (CESCR) has 143 States Parties[128] and eight signatories.[129] Afghanistan became a States Party to the CESCR on January 24, 1983.[130] The CESCR promotes equality for men and women,[131] the right to work,[132] the right to an

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123. *See* U.N. GAOR, 54th Sess., 28th plen. mtg., Agenda Item 109, at 281, U.N. Doc. A/RES/54/4 (1999), *reprinted at* 39 I.L.M. 281 (2000).

124. *See* Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 107. The Optional Protocol is open for signature to any State that has signed, ratified, or acceded to the CEDAW. *See* U.N. GAOR, 54th Sess., 28th plen. mtg., Agenda Item 109, at 281, U.N. Doc. A/RES/54/4 (1999), *reprinted in* 39 I.L.M. 281 (2000).

125. The States Parties are: Austria, Bangladesh, Bolivia, Croatia, Denmark, Finland, France, Hungary, Iceland, Ireland, Italy, Mali, Namibia, New Zealand, Senegal, Slovakia, Thailand. *See* Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 107.

126. The signatories are: Argentina, Azerbaijan, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Chile, Colombia, Costa Rica, Cuba, Cyprus, Czech Republic, Dominican Republic, Germany, Ghana, Greece, Guatemala, Guinea-Bisau, Indonesia, Kazakhstan, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mexico, Mongolia, Netherlands, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Romania, Sao Tome and Principe, Sierra Leone, Slovenia, Spain, Sweden, Tajikistan, Former Yugoslav Republic of Macedonia, Turkey, Ukraine, Uruguay, and Venezuela. *See id.*

127. *See id.*

128. The States Parties to the CESCR are: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Hungary, Iceland, India, Islamic Republic of Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *See id.*

129. The signatories are Belize, China, Lao People's Democratic Republic, Liberia, Sao Tome and Principe, South Africa, Turkey, and the United States of America. *See id.*

130. *See id.*

131. Part II, Article 2 states, "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Economic, Social, and Cultural Rights, Sept. 28, 1966, 1966 U.S.T. 52 [hereinafter CESCR]. *See also*

adequate standard of living,[133] the right to a healthy life,[134] the right to an education,[135] and the right to partake in cultural life,[136] among many other rights and freedoms.[137]

D. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (CCPR) has 148 States Parties[138] and six signatories.[139] Afghanistan became a States Party

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International Covenant on Economic, Social, and Cultural Rights, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 11 (1994). Part II, Article 3 states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." CESCR, *supra* at 79.

132. Part III, Article 6 states in part, "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." *Id.* at 80.

133. Part III, Article 11 states in part:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

Id. at 84.

134. Part III, Article 12 states in part, "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.* at 85.

135. Part III, Article 13 states in part,

> 1. The States Parties to the present Covenant recognize the right of everyone to education . . . .
> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
> (a) Primary education shall be compulsory and available free to all;
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to al by every appropriate means, and in particular by the progressive introduction of free education;
> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
> (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
> (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Id. at 85-87.

136. Part III, Article 15 states in part, "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life. . . ." *Id.* at 88.

137. *See generally id.* Parts I-III, at 77-88.

138. The parties to the CCPR are: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Islamic Republic of Iran, Iraq, Ireland, Israel, Italy,

to the CCPR on June 9, 1995.[140] The CCPR provides for equality between men and women,[141] the right to liberty and security,[142] right to privacy,[143] right to freedom of thought,[144] marriage rights,[145] political rights,[146] and prohibits

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Jamaica, Japan, Jordan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, United States of America, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *See* Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 107.

139. The signatories to the CCPR are China, Guinea-Bissau, Lao People's Democratic Republic, Liberia, Sao Tome and Principe, and Turkey. *See id.*

140. *See id.*

141. Part II, Article 2 states in part:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, Oct. 5, 1977, 1966 U.S.T. 521, 95, 97-98 [hereinafter CCPR]. *See also* International Covenant on Civil and Political Rights, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 17 (1994). Part II, Article 3 states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." *Id.* at 98. Part III, Article 26 states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. at 113.

142. Part III, Article 9 states in part, "1. Everyone has the right to liberty and security of person . . . ." *Id.* at 102-03.

143. Part III, Article 17 states in part, "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." *Id.* at 108-09.

144. Part III, Article 18 states in part, "1. Everyone shall have the right to freedom of thought, conscience and religion . . . ." *Id.* at 109. Part III, Article 19 states in part, "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression;" *Id.* at 109-10.

145. Part III, Article 23 states:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Id. at 111-12.

146. Part III, Article 25 states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely

torture,[147] among other rights and freedoms.[148] The CCPR also provides for a remedy for those whose rights are violated.[149]

E. *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has 123 States Parties[150] and eleven signatories.[151] Afghanistan became a States Party to the CAT on June 9, 1995.[152] CAT defines torture as:

> [A]ny act by which severe pain or suffering, whether physical

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chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Id. at 112-13.

147. Part III, Article 7 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . ." *Id.* at 101.

148. *See generally id.*, Parts I-III, at 96-113.

149. Part II, Article 2 states:

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Id. at 98.

150. The parties to the CAT are: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Seychelles, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, United States of America, Uzbekistan, Venezuela, Yemen, Yugoslavia, and Zambia. *See* Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 107.

151. The signatories to the CAT are Comoros, Dominican Republic, Gambia, Guinea-Bissau, India, Ireland, Nicaragua, Nigeria, Sao Tome and Principe, Sierra Leone, and Sudan. *See id.*

152. *See id.*

> 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 is suspected of having committed, or intimidating or coercing him or a third person, or for any 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.[153]

The CAT provides procedures for offenders[154] and redress for victims.[155] Political instability is no excuse for justifying torture.[156]

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153. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, part I, art. I. para. 1, 1988 U.S.T. 202, 55 [hereinafter CAT]. *See also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR (1984), *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 71 (1994).

154. Part I, Article 6 states in part:

> 1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal extradition processings to be instituted.
> 2. Such State shall immediately make a preliminary inquiry into the facts.

Id. at 58. Part I, Article 7 states in part:

> 1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Id. at 59.

155. Part I, Article 13 states:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Id. at 62-63. Part I, Article 14 states in part:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Id. at 63.

156. Part I, Article 2 states in part, "2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* at 56.

F. Who is Bound by These Human Rights Doctrines?

The Taliban have a duty to respect international human rights law.[157] There is a general presumption that existing treaties continue in force.[158] United Nations officials reminded the Taliban that they are bound by the treaties to which Afghanistan is a party and are obligated to uphold the standards contained in these human rights instruments.[159] The U.N. Special Rapporteur urged the Taliban to repeal any rules or edicts that contradict the provisions of the human rights documents to which Afghanistan is a party.[160]

Initially, the Taliban agreed to abide by the treaties to which Afghanistan is a party.[161] After the Taliban's victory in Kabul in 1996, the Acting Deputy Foreign Minister of the Taliban reported, "all previous contracts and treaties would continue."[162] While the Taliban Governor indicated that the Taliban would be willing to accept the human rights instruments, provisions contradicting Islamic law would not be enforced.[163] The Attorney-General of the Taliban told the U.N. Special Rapporteur,

> [I]f a promise, convention, treaty or other instrument, even if it was in the Charter of the United Nations, was contrary to Shariah, they would not fulfil [sic] it or act on it. . . . The core of our action and our policy is the law of God, as contained in the Koran.[164]

The Taliban told U.N. officials that "any discussion about human rights and international legal obligations was an attempt to interfere with religion, customs and tradition."[165] According to the U.N., this is not a justification for discriminatory practices.[166] Even though various human rights instruments

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157. "[A]ll Member States have an obligation to promote and protect human rights and fundamental freedoms and to fulfil [sic] the obligations they have freely undertaken under the various international instruments." *Situation of Human Rights in Afghanistan*, G.A. Res. 48/152, U.N. GAOR, U.N. Doc. A/RES/48/152 (1994). *See* David J. Scheffer, Ambassador at Large for War Crimes Issues, Address at the 50th anniversary of the Universal Declaration of Human Rights (Sep. 16, 1998), *available* in LEXIS, Department of State Dispatch file.

158. *See* TALMON, *supra* note 86, at 137.

159. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶¶ 88, 89, 97; *Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 72; *Situation of Human Rights in Afghanistan*, U.N. GAOR, 55th Sess., Agenda Item 116(c), ¶ 63, U.N. Doc. A/55/346 (2000) [hereinafter *Situation of Human Rights in Afghanistan* (2000)].

160. *See Situation of Human Rights in Afghanistan* (2000), *supra* note 160, ¶58.

161. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 58.

162. *Id.*

163. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 33.

164. *Id.* ¶ 31.

165. *Id.* ¶ 115.

166. The Taliban authorities need to understand that their obligations under international human rights instruments cannot be met, and violations cannot be justified, by invoking grounds based on subjective versions of religious or cultural prescriptions, many of which cannot be

bind the Taliban, by creating rules that violate these documents, the Taliban gives little regard to protected rights and freedoms.[167]

The treaties to which Afghanistan is a party also bind the Rabbani government.[168] Since the U.N. recognizes the Rabbani government,[169] this government may validly sign, ratify, or accede to a multi-lateral inter-State treaty,[170] such as the CEDAW. Since all countries do not recognize the Rabbani government as the valid government, by signing or acceding to a treaty, relations would not exist between Afghanistan and the non-recognizing parties.[171]

VI. THE SITUATION FOR WOMEN PRIOR TO THE TALIBAN TAKING CONTROL

The Taliban conquered the capital, Kabul, in 1996.[172] "Before the Taliban took over Kabul, 70 percent of the teachers were women, 40 percent of the doctors were women, over half the school students were females, and women were employed in all areas of the workforce."[173] Women worked in the medical field,[174] as deans of universities,[175] judges,[176] officers in the army, foreign diplomats, and helicopter pilots.[177] Some women were students and studied medicine and nursing.[178]

Women knew their rights and engaged in all aspects of life including the social, economic, and political arenas.[179] "[S]pecial attention was given to respect for human rights, notably freedom of expression: no censorship was

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supported by authoritative religious texts, traditional Afghan practices or the practice of other Muslim countries.

Situation of Human Rights in Afghanistan (2000), *supra* note 160, ¶ 59.

167. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 21; *Report on the Situation of Human Rights* (1999), *supra* note 55, ¶ 18.

168. *See* TALMON, *supra* note 86, at 140-44.

169. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; Amnesty International Annual Report 2000, *available at* http://www.web.amnesty.org (last visited Sept. 2, 2000).

170. *See* TALMON, *supra* note 86, at 122.

171. *See id.* at 123.

172. *See* ELLIS, *supra* note 1, at xix.

173. *Id.* at 62.

174. For example, in one hospital ninety out of four hundred hospital workers were women. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 42.

175. Women acted as deans of Kabul University. *See id.* Women were also deans and professors at the University of Balkh. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 34.

176. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 34.

177. "[T]here were 283 high-ranking women officers in the army and 18 women diplomats in the foreign service; furthermore, there were 2 female helicopter pilots." *Id.* ¶ 38.

178. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶¶ 42-43.

179. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 18.

imposed or permitted."[180] The Lawyers Association of Afghanistan created "an Islamic law board, a contemporary law board and a human rights commission board."[181] Seminars and other educational programs for women promoted awareness about human development, health, and the community.[182]

VII. RULES IMPOSED BY THE TALIBAN AND VIOLATIONS OF HUMAN RIGHTS DOCTRINES

Whether the Taliban, or some other group is in power, pursuant to the CCPR, "[T]he State must not only refrain from committing human rights violations . . . it should also prevent the violation of human rights and provide remedies for alleged human rights violations."[183]

A statement made by a Taliban official of the Attorney General's Office to journalists summarizes the Taliban's views of women: "The face of a woman is a source of corruption for men who are not related to them."[184] In 1994, the U.N. Special Rapporteur documented twenty-one ordinances regarding Afghan women's behavior.[185] "These ordinances specified, inter alia, that a woman's veil must cover her whole body, that perfumed women are regarded as adulteresses, that a woman must not leave her house without her husband's permission, and that a woman must not look at strangers."[186]

A. *Right to Freedom of Movement*

Afghan women have the right to freedom of movement according to the UDHR,[187] the CEDAW,[188] and the CESCR.[189] The Taliban impose rules that affect women socially.[190] Women are not allowed to go outdoors without a male relative as an escort.[191] Even then, women must walk quietly and refrain

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180. *Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 50.

181. *Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 17. The human rights board stated they had published over twenty-two statements discussing human rights on the radio, television, newspapers, and magazines. *See id.* The Lawyers Association of Afghanistan also provided legal aid. *See id.*; *Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 55.

182. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 37.

183. *Final Report on the Situation of Human Rights in Afghanistan* (1995), *supra* note 41, ¶ 20. See *supra* notes 139-150 and accompanying text discussing CCPR.

184. Women in Afghanistan: the Violations Continue, Amnesty International Report, *at* http://www.amnesty.org/ailib/aipub/1997/ASA/31100597 (last modified Nov. 5, 1997).

185. The committee of the High Court allegedly issued the ordinances. *See* Afghanistan Human Rights Practices, 1994, U.S. Dept. of State, Mar. 1995, *available in* LEXIS, Department of State Dispatch.

186. *Id.*

187. *See supra* note 102.

188. *See supra* note 116.

189. *See supra* note 135.

190. For a general list of rules see *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ app. I, app. II. *See* ELLIS, *supra* note 1, at 63.

191. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note

from laughing or talking loudly in the streets.[192] Women are not allowed to go to hotels, even for weddings.[193]

Women are also affected in their home life. Windows of a woman's house must be painted black.[194] Women are not allowed to wash clothes in streams.[195]

Women are affected by the Taliban's rules when they use transportation. When a woman rides in a car, all windows except the front must be painted black.[196] Women may not ride in buses with men.[197] Taxi drivers may only pick up women who are escorted by a man.[198] If caught not following this rule, the taxi driver, the woman, and her husband may suffer punishment.[199]

B. *Freedom of Thought, Expression, Peaceful Assembly, and Association*

The UDHR,[200] the CEDAW,[201] and the CCPR[202] protect these rights. "One manifestation of the freedom of expression is the way a person dresses and looks."[203] According to the beliefs of the Taliban stated in documents published on the official Taliban website, women must hide their physical attractiveness so that men are not sexually attracted to them.[204] The Taliban force women to wear the *burqa* or the *hejab*, a body covering.[205] The *burqa*

49, ¶¶ 70, 73; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, app. I; ELLIS, *supra* note 1, at 63; *The Implementation of Human Rights with Regard to Women*, U.N. ESCOR, 52nd Sess., Agenda Item 5, ¶ 46, U.N. Doc. E/CN.4/Sub.2/2000/18 (2000)[hereinafter *The Implementation of Human Rights with Regard to Women*].

192. *See* ELLIS, *supra* note 1, at 63.

193. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 83, app. I; *The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 46.

194. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 92.

195. In a Taliban decree issued by the General Presidency of Amr Bil Maruf in December 1996, number 11 states, "To prevent washing cloth by young ladies along the water streams in the city. Violator ladies should be picked up with respectful Islamic manner, taken to their houses and their husbands severely punished." RASHID, *supra* note 3, at 218-19. *See* Nancy Hatch Dupree, *Afghan Women Under the Taliban*, *in* FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 145, 156 (William Maley ed., 1998); ELLIS, *supra* note 1, at 63.

196. *See* Ghasemi, *supra* note 20, at 450.

197. *See* Telesetsky, *supra* note 45, at 296.

198. *See* ELLIS, *supra* note 1, at 63; Dupree, *supra* note 195, at 156; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ app. I; *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 46.

199. *See* ELLIS, *supra* note 1, at 63; Dupree, *supra* note 195, at 156; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ app. I.

200. *See supra* notes 98, 102.

201. *See supra* note 117.

202. *See supra* note 144, 146.

203. *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 61.

204. *See Why Women Should Stay in Their Houses*, *at* http://www.afghan-ie.com/taliban/women1.htm (last visited Sept. 5, 2000)(on file with the Indiana International and Comparative Law Review).

205. *See* Ghasemi, *supra* note 20, at 450; Dupree, *supra* note 195, at 151. Some women

is a garment that covers all parts of the body excluding the eyes, which are covered by dark mesh.[206] The *burqa* is related to various health problems.[207] Some women cannot afford a *burqa*[208]and therefore must share one with others.[209] Sexual harassment increased in Kabul after women were forced to wear the *burqa*.[210] Women may not have clothes made by a tailor[211]and cannot wear white socks.[212] Punishment results from not following the strict dress code.[213]

Freedom of expression is also shown through participation in public activities. Some Afghan women and groups have protested the Taliban's rules.[214] When the Taliban demonstrated against foreign interference,[215] Afghan women reacted by protesting with signs, which stated, "Taliban law is not Islamic law."[216] In 1996, over 150 women peacefully demonstrated to object the Taliban closing women's bathhouses.[217] The Taliban responded by beating, jailing, and turning a fire hose on the women.[218]

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find wearing the *hejab* improper because it does not conform to the Sharia. *See also Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 71; *The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 46.

206. *See* Ghasemi, *supra* note 20, at 450. Most women in Kabul wear the *burqa* but try to be fashionable by wearing bright colors. *See* Dupree, *supra* note 195, at 160.

207. "Wearing the *burqa* is related to several health problems, including poor vision and hearing, skin rashes, respiratory difficulties, headaches, asthma, alopecia (hair loss) and depression." ELLIS, *supra* note 1, at 62.

208. One *burqa* is estimated to cost one month's salary or nine dollars. *See* Ghasemi, *supra* note 20, at 450. *See also Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 84 (*burqa* costs one month's salary for a civil servant). *But see* ELLIS, *supra* note 1, at 62 (noting that the cost of one *burqa* is two months salary).

209. *See* ELLIS, *supra* note 1, at 62.

210. More women were approached with indecent proposals. *See Situation of Human Rights in Afghanistan*, U.N. ESCOR, 54th Sess., Agenda Item 10, ¶ 5, U.N. Doc. E/CN.4/1998/71 (1998).

211. In a Taliban decree issued by the General Presidency of Amr Bil Maruf in December, 1996, number 14 states, "To prevent sewing ladies cloth and taking female body measures by tailor. If women or fashion magazines are seen in the shop the tailor should be imprisoned." RASHID, *supra* note 3, at 218-19. *See also* Dupree, *supra* note 195, at 156.

212. *See* ELLIS, *supra* note 1, at 62.

213. Women have been beaten for wearing the wrong color shoes. *See* Dupree, *supra* note 195, at 152. The beatings are intended to do more psychological damage than physical harm. *See id. Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 71. *See also Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 27 (discussing how 225 women were beaten for not wearing their veils). The Taliban leader, Mullha Mohammad Omar, authorized the religious police to carry out light punishments on the street. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 32. The court system was for the worst violations. *See id.*

214. A group of women in Mazar-i-Sharif held a conference and demonstration in opposition to the Taliban. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 76. The women wrote a declaration to the United Nations Secretary-General requesting the U.N. to urge the Taliban into changing their views about women. *See id.* They also called for more action by the U.N. *See id.*

215. On October 17, 1996, the Taliban held a demonstration in Kabul. *See* Dupree, *supra* note 195, at 161.

216. *Id.* at 161.

217. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶¶ 41, 62; Dupree, *supra* note 195, at 161.

218. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 62.

One woman took a stance against the Taliban.[219] Najiba Sara Biabani created a radio show to inform Afghans about "land mines, narcotics, health, hygiene, women's rights, education, and domestic problems."[220] The Taliban threatened her, and she eventually went into hiding.[221]

The Taliban infringes on women's freedom of association rights.[222] Women are not allowed to engage in social activities[223] and are denied civil and political rights by not being allowed to associate in large groups.[224]

C. *Freedom of Religion*

Women's rights to religious freedom are protected by the UDHR[225] and the CCPR.[226]

Under the Taliban's rule, women's freedom of religion rights are non-existent.[227] The shrines are closed to women on Wednesday, which was previously the woman's day to worship.[228] Women are not allowed in public during certain times of the year, such as the holy month of Ramaddan, unless they have a legal excuse.[229]

D. *Right to Health Services*

Afghan women have a right to health services according to the UDHR,[230] the CEDAW,[231] and the CESCR.[232] Even so, health care statistics for Afghan women are among the lowest in the world.[233] The Taliban's rules

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219. *See* ELLIS, *supra* note 1, at 183-84.

220. *Id.* The show is aired at various times so that women can listen while their husbands are at the mosque if men disapprove. *See id.* at 184. The show's audience encompasses three-fourths of Afghanistan's population. *See id.* at 183.

221. Najiba was forced to leave Afghanistan after her husband was hanged and she was threatened. *See id.* at 184-86. In Pakistan, she gave a speech on Afghanistan Independence Day. *See id.* at 185. The Taliban threatened Najiba with death threats and phone calls. *See id.* After being shot at, she went into hiding. *See id.* at 185-86. She is now safe in an undisclosed European country. *See id.* at 186.

222. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 47.

223. *See id.*

224. *See id.*

225. *See supra* note 97.

226. *See supra* note 144.

227. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 47.

228. *See id.* ¶ 47.

229. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 83.

230. *See supra* note 100.

231. *See supra* note 114.

232. *See supra* notes 133-34.

233. Women's life expectancy rates are estimated at forty-four years of age. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 44. Doctors are sparse (less than 1 per 10,000 people). *See id.* Afghanistan is ranked lowest in the world according to the Gender Disparity Index. *See Report on the Situation of Human Rights in Afghanistan: Report of Special Rapporteur, Kamal Hossain*, U.N. ESCOR, 56th Sess., Agenda Item 9, at 4, U.N. Doc.

have not helped this situation.[234] The Taliban closed women's bathhouses, or *hamams*, in 1996.[235] For many women, bathhouses were the only source of running water.[236]

The Taliban also imposed rules pertaining to how women receive medical attention.[237] In 1997, hospitals were closed to women.[238] Women could only go to a clinic without running water.[239] In 1997, due to international disapproval, the Taliban withdrew this policy.[240] Currently, men and women must remain segregated in hospitals.[241] Few hospitals are set aside to treat women and those that do are ill-equipped.[242]

Originally, women could only receive medical treatment from female doctors.[243] This posed a problem since most women were forbidden from working.[244] Since June 1998, women may see male doctors if accompanied by a male relative.[245] However, this poses a medical danger when a woman needs medical treatment and a male relative is not available to accompany her.[246]

The Taliban's rules affect pregnant women and babies.[247] Male doctors may not deliver babies.[248] A single maternity hospital serves the entire country.[249] This situation has also affected women and children's mental

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E/CN.4/2000/33 (2000) [hereinafter *Report on the Situation in Afghanistan* (2000)]. Factors used in this formulation are "female life expectancy, educational attainment and income." *Id.*

234. *See* ELLIS, *supra* note 1, at 96-98.

235. The Taliban said the bathhouses were unIslamic. *See id.* at 62; Ghasemi, *supra* note 20, at 452. Doctors predict gynecological and uterine infections and scabies cases will rise. *See* Telesetsky, *supra* note 45, at 297; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 85.

236. *See* ELLIS, *supra* note 1, at 62. It was reported that less than one family in eight had access to safe drinking water in the cities. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 33.

237. *See infra* note 273.

238. *See* Telesetsky, *supra* note 45, at 299.

239. *See id.*

240. *See id.*

241. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

242. *See* ELLIS, *supra* note 1, at 96. In Kabul, women were treated in only one hospital, which was partly under construction. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

243. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, app. II.

244. *See infra* notes 264-93 and accompanying text.

245. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

246. *See* Ghasemi, *supra* note 20, at 450-51.

247. Afghanistan has the second highest rate of maternal death during delivery. *See* ELLIS, *supra* note 1, at 97. Reasons for maternal deaths include small pelvic size due to malnutrition, pregnancies close together in time, and infections. *See id.* Almost all babies are delivered at home without medical personnel. *See id.* Because of malnourished mothers, it is estimated that low birth weights account for one in five babies. *See id.* Low birth weight is related to blindness, deafness, mental retardation, and cerebral palsy. *See id.* The maternal death rate in 1990 was 1700 per 100,000 live births. *See* 1999 ABC-CLIO, Inc., Facts & Figures, *at* LEXIS, Kaleidoscope. The projection for the years 2000 to 2010 of infant deaths is 141 per 1000 live births. *Id.*

248. *See* Ghasemi, *supra* note 20, at 451.

249. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 54. In 1996, only one maternity hospital was open in Kabul. *See Final Report on the Situation of Human Rights in*

health.[250] Many women suffer from mental illness[251] or drug addiction.[252] Children are also mentally affected.[253]

At the end of 1999, there were signs of improvement.[254] Access to health care improved, and some of the restrictions were not in place at year end.[255] In Kabul, all hospitals except the military hospital gave medical care to women.[256] Despite these improvements, "Health services reach only 29 per cent [sic] of the total population, but only 17 per cent [sic] of the rural population."[257]

E. Right to Employment

The UDHR,[258] the CEDAW,[259] and the CESCR[260] protect women's employment rights. These rights held true while Afghanistan was under Communist rule in the 1980s.[261] Many women worked outside the home.[262] In 1992, when the Communist government was overthrown, fewer women worked outside the home.[263]

When the Taliban came to power in 1994, women could not work in any areas other than education or health care.[264] Initially, the Taliban stated the

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Afghanistan (1997), *supra* note 53, ¶ 103. The equipment was over twenty years old and did not include an ultrasound device. *See id.* The hospital was funded solely through international aid. *See id.*

250. *See* ELLIS, *supra* note 1, at 110-12.

251. A recent study of women's health in Kabul by Physicians for Human Rights showed that 81 percent of the Afghan women interviewed reported a decline in their mental health in the last year. Thirty-five percent had mental health problems so severe they significantly interfered with their daily activities. Ninety-seven percent of those interviewed were struggling with major depression.

Id. at 110. For a story of an Afghan husband recounting the hardship of his wife's mental illness and lack of proper medical treatment, see *id.* at 109-10. *See also The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 26.

252. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 25. In 1999, Afghanistan was the world's largest producer of opium. *See The Situation in Afghanistan and Its Implications for International Peace and Security*, *supra* note 57, ¶ 63.

253. "In 1997 a UNICEF study of the psychological difficulties of the children of Kabul showed that three-quarters of three hundred children they interviewed had lost someone from their family between 1992 and 1996." ELLIS, *supra* note 1, at 111. All the children had seen acts of war. *See id.* Ninety percent believed they would die from a rocket attack. *See id.* at 112. Children are unaware of health and hygiene facts because of their lack of education. *See id.* at 98. *See also Situation of Human Rights in Afghanistan*, U.N. ESCOR, 54th Sess., Agenda Item 10, ¶ 8, U.N. Doc. E/CN.4/1998/71 (1998).

254. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

255. *See id.*

256. *See id.*

257. *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 44.

258. *See supra* note 99.

259. *See supra* note 113.

260. *See supra* note 132.

261. *See* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1995), *available in* LEXIS.

262. *See id.*

263. *See id.*

264. *See Final Report on the Situation of Human Rights in Afghanistan* (1995), *supra* note

ban on employment was temporary.[265] The Taliban reported that women could work after standards were in place for workplace gender segregation.[266] Women did not receive their promised salaries to stay at home.[267] Punishment, including beatings, resulted when women protested the ban on employment.[268]

In 1996 after the conquest of Kabul, the Taliban banned women from working, even in health care.[269] There were many educated women in Kabul.[270] These women told the U.N. Special Rapporteur Mr. Choong-Hyun Paik that they felt devalued and treated the same as illiterate persons.[271] Due to the need to staff health care facilities, the Taliban gave permission for women to work in the health field[272] subject to many rules.[273] The Taliban also allowed women to work in a knitting factory.[274] Due to an inability to

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41, ¶ 36; , U.S. DEPT. OF STATE AFGHANISTAN HUMAN RIGHTS PRACTICES, 1995 (Mar. 1996), *available in* LEXIS; U.S. DEPT. OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1995), *available in* LEXIS.

265. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 71.

266. *See id.*

267. *See* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1997), *available in* LEXIS.

268. *See* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1997), *available in* LEXIS.

269. Up to 40,000 women were affected. *See id.*

270. *See supra* notes 299, 331-34 and accompanying text.

271. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 72.

272. *See* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1997), *available in* LEXIS.

273. Rules of work for the State Hospitals and private clinics based on Islamic Sharia principles. Ministry of Health, on behalf of Amir ul Momineen Mullah Mohammed Omar. Kabul, November 1996.

1. Female patients should go to female physicians. In case a male physician is needed, the female patient should be accompanied by her close relative.
2. During examination, the female patients and male physicians both should be dressed with Islamic *hijab* (veil).
3. Male physicians should not touch or see the other parts of female patients except for the affected part.
4. Waiting room for female patients should be safely covered.
5. The person who regulates turn for female patients should be a female.
6. During the night duty, in what rooms which female patients are hospitalized, the male doctor without the call of the patient is not allowed to enter the room.
7. Sitting and speaking between male and female doctors are not allowed, if there be need for discussion, it should be done with *hijab*.
8. Female doctors should wear simple clothes, they are not allowed to wear stylish clothes or use cosmetics or make-up.
9. Female doctors and nurses are not allowed to enter the rooms where male patients are hospitalised
10. Hospital staff should pray in mosques on time.
11. The Religious Police are allowed to go for control at any time and nobody can prevent them. Anybody who violates the order will be punished as per Islamic regulations.

RASHID, *supra* note 3, at 218. *See also Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, app. II.

274. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 75.

work or a lack of available jobs, many women resorted to begging and selling their possessions to provide for their families.[275] Others resorted to prostitution.[276] Widows are especially hit hard by the restrictions on employment.[277] Because of years of civil war, some women are widowed and do not have any male relatives.[278] These women face difficulties leaving their homes to buy food for their children.[279] Since many widows are unable to work, children in the family must work to provide for the family.[280] Some children dig up human remains to sell.[281]

In 1999, the Taliban began to allow women with no income to seek employment.[282] However, many widows did not know of the change, and the number of jobs available was limited.[283]

The Taliban also placed restrictions on how widows received aid.[284] Initially, widows could receive assistance from aid agencies only through male relatives.[285] In 1999, this reportedly changed, and women could independently claim international assistance.[286]

Some employment restrictions were lifted in 1999.[287] A limited number of women were given the opportunity to work for international agencies or nongovernmental agencies.[288] Women were also allowed to work as nurses

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275. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; Telesetsky, *supra* note 45, at 297; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶¶ 72, 100.

276. Many women pretend to be beggars and instead perform prostitution acts with shopkeepers. *See* M. Ilyas Khan, *Beyond Good or Evil*, Herald Magazine, *at* http://www.rawa.org/ilyas.htm (last visited Aug. 1999). The storeroom or attic of the shop is used. *See id.* The Revolutionary Association of Women of Afghanistan estimates that there are twenty-five to thirty brothels in Kabul. *See id.* The Taliban receive services at the brothels at no cost. *See id.*

277. In Kabul, it is estimated that 30,000 women are widowed. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86. A 1997 survey by the International Commission on Civil and Political Rights (ICRC) documented 50,000 widows with an average of seven to nine children per widow. *See* Dupree, *supra* note 195, at 155. In Bamyan, widows head fifteen percent of all households. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 20.

278. *See* ELLIS, *supra* note 1, at 62.

279. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶¶ 70, 73.

280. *See* ELLIS, *supra* note 1, at 62; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 100.

281. "Disturbances in the ground caused by rocket explosions has brought human remains closer to the surface of the ground, making it easier for little hands to get at the bones." ELLIS, *supra* note 1, at 62. The bones are used to make "cooking oil, soap, chicken feed, and buttons." *Id. See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 100.

282. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 53.

283. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

284. *See id.*; *Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 95.

285. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; *Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 95.

286. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

287. *See id.*; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 53.

288. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86. Women employees

and doctors.[289] Women could seek employment opportunities in agriculture and home-based crafts.[290]

In 2000, the Taliban took away some job opportunities available to women. Women were no longer allowed to work for the United Nations or nongovernmental agencies.[291] In July, 2000, the Taliban prohibited women from working for foreign agencies outside of the health sector.[292] In August, 2000, the Taliban closed a bakery in Kabul, which employed many women and sold bread to the city's poorest women.[293]

F. Right to Education

Afghan women and girls have a right to education under the UDHR,[294] the CEDAW,[295] and the CESCR.[296] Before the Taliban came to power, urban boys and girls engaged in this right through free education.[297] Some conservative rural families chose to keep girls at home.[298] Prior to the Taliban taking over Kabul, many female professors and educated persons who wanted to ensure education for their daughters left the city.[299]

After the Taliban came to power, rules forbade girls from attending school; however, the rules varied from region to region.[300] In Kabul, for example, announcements on the radio and in the streets stated girls were not allowed to attend school.[301] In most areas, girls could not attend school or vocational training projects.[302] Some schools stayed open despite the

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were not allowed to go to the actual agency but instead reported to the project site. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 53.

289. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 53.

290. "Female employment opportunities are limited to carpet weaving, tailoring, embroidery, soap making, candle making, poultry raising, honey production and bakery activities." *The Implementation of Human Rights with Regard to Women, supra* note 191, ¶ 42.

291. *See The Implementation of Human Rights with Regard to Women, supra* note 191, ¶ 44; *Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 48.

292. *See Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 56.

293. *See id.*

294. *See supra* note 101.

295. *See supra* note 115.

296. *See supra* note 135.

297. *See* ELLIS, *supra* note 1, at 127.

298. *See id.*

299. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 77.

300. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶¶ 71-72; Afghanistan Human Rights Practices, 1999, *supra* note 86.

301. *See* ELLIS, *supra* note 1, at 62.

302. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 69. In September, 1995, girls' schools in Kandahar were closed. *See id.* ¶ 73. In September 1996, girls' schools in Kabul were closed. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 77. "It has been reported that 63 schools were closed in Kabul and that more than 103,000 girls, 148,000 boys and almost 8,000 female teachers were affected." *Id.* There were no schools open for girls in Jalabad. *See Situation of Human Rights in Afghanistan*, U.N. ESCOR, 54th Sess., Agenda Item 10, ¶ 1, U.N. Doc. E/CN.4/1998/71 (1998) [hereinafter *Situation of Human Rights in Afghanistan* (1998)].

restrictions.[303]

The Taliban assert that schools licensed by the Taliban are allowed.[304] In order to obtain a license, the school must not allow girls over eight years of age to attend and must teach only the Qur'an.[305] The age restriction for girls stems from the Taliban's belief that girls and boys should not commingle in schools after age nine.[306] A Taliban official acting as the Deputy Governor of Herat admitted that the Koran provides for education for everyone.[307] The Taliban Acting Minister of Higher and Vocational Education "stated that it was an obligation in Islam for both boys and girls to go to school but that schools must be segregated to avoid corruption."[308]

Alternatives to public education for girls, such as radio programs[309] and home schools,[310] provide girls with a means of education. In some areas, home schools are the only available source of education for girls,[311] and the Taliban even closed some of the home schools.[312]

The Taliban give many excuses for why girls are not being educated. The Taliban assert that girls may attend school after security improves.[313] The

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303. Some girls were able to attend elementary or home schools. *See* Afghanistan Human Rights Practices, 1999, *supra* note 87.

304. *See id.*; Ghasemi, *supra* note 20, at 453. The U.N. Special Rapporteur on Violence Against Women, visited one of the Taliban's schools. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 40. The textbooks contained pictures of guns and torpedoes. *See id.*

305. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86; Ghasemi, *supra* note 20, at 453.

306. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 80.

307. *See id.* ¶ 74.

308. *Id.* ¶¶ 73, 83.

309. A program called *New Home, New Life* was developed by the British Broadcasting Corporation. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 82. It discusses "cultural, social, economic, human rights, peace, health, conflict resolution, mine awareness and other issues of vital daily importance for the population of Afghanistan." *Id.*

310. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53,¶ 35; Afghanistan Human Rights Practices, 1999, *supra* note 86; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 52.

311. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 27. The Taliban has "obstructed informal tutoring." *Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 53. In Kabul, home school teachers must register with the religious police. *See id.* In rural areas, where the religious police are not prevalent, home schools are easier to conduct without intervention by the Taliban. *See id.* "Externally supported education programmes (especially in rural areas) provide education to an estimated 7 per cent [sic] of a total of 4.4 million children of primary school age." *Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 34.

312. In 1998 in Kabul over 100 girls schools funded by nongovernmental organizations and home vocational programs were shutdown. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86. The Taliban closed many private and home schools in 1998 stating that the schools were dispersing anti-Taliban propaganda. *See* Ghasemi, *supra* note 20, at 452-53.

313. *See* ELLIS, *supra* note 1, at 128. The Taliban took over the city of Kandahar in 1994 and the schools are still not open. *See id.* One of the Taliban's excuses is that "their front-line soldiers would not be able to concentrate on killing people if they knew that women were walking the streets on their way to school." *Id.* The Taliban told the U.N. Special Rapporteur on Violence Against Women in 1999 that girls ages six through ten were allowed to receive primary education from mosque schools. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86. Public schools however are only for boys. *See id.* Girls and boys are allowed to attend

Taliban also claim there are insufficient funds for girls to attend school.[314] Some officials stated that the situation was not a high priority and a solution would be found later.[315] The Taliban also said, "If we allowed it [education] in this city, there would be protests in other parts of the country."[316] Supposedly, some members of the Taliban in Afghanistan educate their daughters in Pakistani schools.[317]

Some reports show an easing of restrictions on education for girls.[318] In 1999, the Taliban reported that girls ages five to ten could receive primary education through schools licensed by the Taliban.[319] Other reports state only boys may attend the Taliban licensed schools.[320]

Other countries[321] and organizations[322] have offered to provide funds for integrated schools.[323] The United Nations reports females, up to high school age, are allowed to attend private schools or schools funded through international organizations.[324]

Regardless of the form of education available, only a small portion of the female Afghan population is attending school.[325] The United Nations reported at the end of 1998, "hardly any girls and only 24 per cent [sic] of boys attend school."[326] Not surprisingly, Afghanistan's illiteracy rate of over seventy-five percent ranks as one of the highest globally.[327] The female

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schools funded by nongovernmental organizations or international donors. *See* Dupree, *supra* note 195, at 154; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 77. Most officials note that areas controlled by the Taliban are peaceful and secure so the Taliban's excuses are not valid. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 114.

314. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 80.

315. *See id.*

316. *Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 98.

317. *See id.* ¶ 78.

318. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶¶ 48, 51; *The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 40; *Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 53.

319. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 51.

320. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 32. Boys have also been affected through the restrictions on female employment. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶¶ 69, 73. Since the majority of teachers are women, boys' schools have been closed and reopened various times depending on whether the Taliban allow women to work in the educational field. *See id.* ¶ 73.

321. Norway offered to provide financial aid for schools in Kabul if boys and girls could both attend. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 80.

322. The United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) offered funding for schools if girls and boys could attend. *See id.* ¶ 8. The Taliban refused these offers. *See id.*

323. *See id.* ¶ 80.

324. *See Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 53.

325. *See Report on the Situation of Human Rights* (1999), *supra* note 55, ¶ 17.

326. *Id.*

327. The literacy rate for females is the lowest of all countries in Asia. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 77.

illiteracy rate is ninety-six percent.[328]

1. Obstacles for Afghan Women Attaining Secondary Education

Women are also discouraged from receiving a higher education.[329] The Taliban closed Kabul University and then reopened it with only males in attendance.[330] Additionally, the Taliban closed a medical teaching facility in Kandahar.[331]

The Taliban eased restrictions in 2000. The Taliban allowed forty medical students to continue their medical education at Kabul University.[332] A nursing school in Herat reopened and the Taliban made plans to start a nursing school in Kandahar.[333]

2. Violations of Human Rights Doctrines

The Special Rapporteur emphasized that the Taliban's lack of official commitment to educating girl children is a violation of international law and Afghanistan's commitments under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.[334]

G. Rights Against Torture

Torture is prohibited under the UDHR,[335] the CCPR,[336] and the CAT.[337] The Taliban strictly enforce laws, and physical punishments result from breaking the rules.[338] Every Friday in Kabul, the Taliban force crowds into the soccer stadium to witness beatings, whippings, limbs being cut off, or

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328. *See* Afghanistan Human Rights Practices, 1999, *supra* note 86.

329. *See infra* notes 331-32 and accompanying text.

330. Ten thousand students, four thousand of which were females, attended the University before it was shut down in 1996. *See* ELLIS, *supra* note 1, at 128; *Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 71.

331. The school was shut down because the staff was all male. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 75. The World Health Organization's nursing school was shut down. *See* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1996 (Mar. 1997), *at* LEXIS, Department of State Dispatch. The Taliban indicated that at some point in the future women "would be allowed to study medicine, education and moral and other social subjects." *Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 73.

332. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 29.

333. *See id.*

334. *Id.* ¶ 41.

335. *See supra* note 93.

336. *See supra* note 147.

337. *See supra* note 153.

338. *See* ELLIS, *supra* note 1, at 63-64. *See also supra* notes 199, 213, 218.

executions.[339] For example, the Taliban punish those who commit adultery by stoning them to death, and homosexuals are killed by a collapsing wall.[340] The Taliban issue arrests and lashings for disobeying the clothing rules.[341] One woman who wore nail polish had her thumb cut off.[342] The Taliban's actions are "described as amounting to cruel and degrading treatment and punishment."[343]

H. Right to Partake in Government

Afghans have the right to partake in their government under the UDHR,[344] the CEDAW,[345] and the CCPR.[346] After the Communist government fell, the Constitution was discarded.[347] The Taliban told the U.N. Special Rapporteur, Mr. Kamal Hossain, that the Taliban is drafting a new constitution.[348] Allegedly, religious scholars are preparing a new constitution[349] in contrast to the prior procedures of engaging in public comment and approval.[350] The U.N. suggested, "If, indeed, a constitution was being prepared, such a constitution must be accepted by representatives of all segments of the Afghan population, such representatives to be elected according to procedures which were in conformity with the Covenant [CCPR]."[351] Furthermore, the U.N. noted that "Afghans have continued to be prevented from choosing their government in a peaceful and democratic manner."[352] Through these acts, the Taliban is in violation of Article 21 of the UDHR and Article 26 of the CCPR.[353]

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339. *See* ELLIS, *supra* note 1, at 63.

340. *See id.*

341. Women wearing veils too long were beaten with chains. *See Final Report on the Situation in Afghanistan* (1997), *supra* note 53, ¶¶ 40-41; ELLIS, *supra* note 1, at 64.

342. *See* ELLIS, *supra* note 1, at 64.

343. *Final Report on the Situation in Afghanistan* (1997), *supra* note 53, ¶ 40. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 48.

344. *See supra* note 98.

345. *See supra* note 117.

346. *See supra* note 146.

347. *See* ELLIS, *supra* note 1, at xviii.

348. *See Report on the Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 9; *Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 37. The Special Rapporteur noted,

> The fact that the Taliban themselves recognize the need for a constitution to be drawn up underlines the need to develop an inclusive process which would enable all segments of the Afghan population to participate in working out an acceptable constitutional framework and procedures for its acceptance and approval by the Afghan people.

Report on the Situation of Human Rights in Afghanistan (2000), *supra* note 159, ¶ 10.

349. *See Interim Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 58, ¶ 37.

350. The prior process consisted of the *Loya Jirga* (or national assembly) made up of elected and nominated officials who approved the Constitution. *See id.*

351. *Id.* ¶ 39.

352. *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 92.

353. The Special Rapporteur of the Commission on Human Rights, Mr. Kamal Hossain, stated:

VIII. CULTURAL RELATIVISM

The Taliban claim to follow the principles of the Islamic religion.[354] For a complete analysis of the situation, the Taliban's acts must be assessed in relation to the Islamic culture. "Cultural relativism is the 'claim that rights and rules about morality . . . are encoded in and thus depend on cultural context.'"[355]

"Ninety-nine percent of Afghanistan is Muslim and follow the teachings of Islam."[356] Muslims believe that individuals have a precise role in society.[357] "In Islam, religion governs politics, economics, and law."[358] The Qur'an,[359] the sacred scripture of Islam, outlines the criteria and beliefs for Muslims.[360] Some basic beliefs are common to all Muslims.[361]

> The most fundamental denial of human rights which needed to be addressed was that of the right of the people of Afghanistan effectively to participate in the governance of their country through freely chosen representatives. This is the right recognized in article 21 of the Universal Declaration of Human Rights. . . and elaborated in article 26 of the International Covenant on Civil and Political Rights, to which Afghanistan is a party.

Report on the Situation of Human Rights in Afghanistan (2000), *supra* note 159, ¶ 3.

354. *See* Desai, *supra* note 80, at 819; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 33. A Taliban representative stated in a interview,

> The Taliban are running a system of government, based on being subordinate to the rule of Sharee'ah, where the Taliban rulers and the public in subjection to a system of Sharee'ah, are accountable in front of a court of Law. Whether the crime is committed by a ruler or his subjects, both are subjected to the Islamic Penal Code and both are deserving of it's [sic] punishment and it is for this reason that the lives and wealth of people today, in this region will be seen to be safe and secure.

Nazeer Laghari and Mufti Jameel Khan, Interview with the Ameerul M'umineen, *at* http://www/afghan-ie.com/taliban/intview1.htm (last visited Sept. 5, 2000)(on file with the Indiana International and Comparative Law Review).

355. Desai, *supra* note 80, at 809 (quoting INTERNATIONAL HUMAN RIGHTS IN CONTEXT 192 (Henry J. Steiner & Philip Alsten eds., 1996)). According to this theory, "notions of right (and wrong) and moral rules necessarily differ throughout the world because the culture in which they inhere themselves differ." *Id.*

356. Telesetsky, *supra* note 44, at 295. Afghanistan was involved in an Islamic revivalism during the 1970s and 1980s. *See* Oliver Roy, *Has Islamism a Future in Afghanistan?, in* FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 199-200 (William Maley ed., 1998).

357. 357*See* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 6 BUFF. J. INT'L L. 1 (1995). By satisfying these roles, society as a whole is benefitted. *See id.*

358. Kathryn J. Webber, *The Economic Future of Afghan Women: The Interaction Between Islamic Law and Muslim Culture*, 18 U. PA. J. INT'L ECON. L. 1049, 1058 (1997).

359. The two common spellings are Koran or Qur'an. *See* Ghasemi, *supra* note 20, at 445 n.4.

360. *See* Leila P. Sayeh and Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 315 (1999). The Qur'an is made up of 114 chapters with 6,666 verses. *See* Khaliq, *supra* note 357, at 8.

> The verses of the Qur-an, as a whole, differentiate between certain types of conduct, classifying behavior into the following categories: Fard (a compulsory duty, which is punishable if it is omitted); Haram (an unlawful or forbidden action, which is punishable); Mukruh (a disliked and disapproved action but one which carries no penalty); Jaiz (a permitted action, but one which is legally indifferent); and Maidub (an action which is rewarded, but whose omission is not

Islamic jurisprudence is a mix of the primary sources of law, the Qur'an and the Sunnah,[362] and the secondary sources of ijtihad,[363] ijma,[364] and Al-Qiyas.[365] The law that encompasses Islamic jurisprudence is the Shari'a;[366] however this is not a formal legal code.[367] The principles of the Shari'a affect all aspects of life.[368]

"Custom is a valid, recognized source of Islamic law."[369] Due to local and cultural influences, the Shari'a was modified.[370] Because of local customs, various regions of Afghanistan have different interpretations of the Qur'an.[371] In reality, cultural norms limit the right to Islamic recognized rights.[372]

A. *Women's Role in the Islamic Culture*

The Shari'a provides a hierarchy[373] for gender and classes[374] with men having superior rights.[375] The Qur'an states that women need guardians[376] so they do not act sexually irresponsibly.[377] The women's primary role in the

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punishable).
Id. at 8-9.

361. *See* Khaliq, *supra* note 357, at 7.

362. The example portrayed by the Prophet is the Sunnah. *See* Sayeh and Morse, *supra* note 360, at 316 n.27. The Sunnah describes model behavior. *See* Khaliq, *supra* note 357, at 9. If the Sunnah contradicts the Qur'an, the law of the Qur'an is superior, as the Qur'an is the word of God. *See id.* The Sunnah and the Hadith, the recorded sayings of the Prophet, were completed after the Prophet's death. *See id.* at 10. To ensure authenticity, all author's works were compiled, and those principles which were repeated in others works where compiled to make up the Sunnah and the Hadith. *See id.*

363. "Ijtihad is the general term for legal reasoning or interpretation and the entailed use of reason and analogy to interpret the sacred sources of Islamic law." Sayeh and Morse, *supra* note 360, at 316 n.28.

364. Ijma is the agreement of principles by the Ullamah, learned ones, or scholars on the Qur'an and the Sunnah. *See* Khaliq, *supra* note 357, at 11 n.45.

365. "Al-Qiyas is a legal principle, introduced in order to derive a logical conclusion from a certain law on a certain issue that has to do with the welfare of Muslims." *Id.* at 11-12. The Qur'an, the Sunnah, or Ijma must provide the foundation for the Al-Qiyas. *See id.* at 12. Many scholars are not supportive of using this principle. *See id.*

366. *See* Ghasemi, *supra* note 20, at 453. Sharia or Shari'ah means "path to follow." *See* Khaliq, *supra* note 357, at 7 (quoting Abdullah A. An-Na'im, *Islamic Ambivalence to Political Violence*, 31 GERMAN Y.B. INT'L L. 307, 315 (1988)).

367. *See* Desai, *supra* note 80, at 821.

368. *See* Khaliq, *supra* note 357, at 7.

369. Webber, *supra* note 358, at 1068.

370. *See* Khaliq, *supra* note 357, at 7.

371. *See Final Report on the Situation of Human Rights in Afghanistan* (1995), *supra* note 41, ¶ 21.

372. For the social norms of Israel, Egypt, and the West bank, see Webber, *supra* note 358, at 1067-79.

373. The hierarchy is based on "religion, civil status, age and gender." Khaliq, *supra* note 357, at 13.

374. Mature male Muslims have the most rights. *See id.* at 13. Free, mature female Muslims have the second highest rights. *See id.* Non-Muslim female minors are accorded the fewest rights. *See id.*

375. This principle originated in Chapter 4, verse 34 of the Qur'an. *See id.* at 13-14.

376. Verse 4:34 states this. *See id.* at 14.

377. Women are thus often portrayed as willing and encouraging partners in leading men 'off the path' which they are supposed to follow, by having sexual

Islamic society is child bearer.[378]

Under the Qu'ran, women have some enumerated rights.[379] Women may engage in business contracts, independently own property, and partake in public life.[380] Although under some interpretations women cannot request a divorce, women have the right to raise their children after their divorce.[381] Men are responsible for the economic needs of the children.[382]

The Qu'ran states some rules that affect men and women differently, such as inheritance laws, dower, and marriage.[383] Some of these rules are in women's favor.[384] Other rules, such as the obedience doctrine, under which a woman has a duty to be obedient to her husband, can negatively affect women's rights.[385] For example, men may use these rules to keep women from working outside the home.[386]

B. The Taliban's Actions and Islam

During the life of the Prophet Muhammad, women worked and participated actively in the culture[387] and voiced opinions freely.[388] The Hadith,[389] the record of the Prophet Muhammad's life, promotes respect for

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intercourse with them outside wedlock, leading to illegitimate children and immorality in society, which in turn leads to social unrest and a challenge to the Islamic way of life.

Id.

378. *See id.* at 13. The idea is based on producing children to increase the population and the number of Muslims. *See id.* Women's motivation for conceding to this role is a reward in the after life for fulfilling their duty. *See id.* at 13 n.54.

379. *See* Telesetsky, *supra* note 45, at 301.

380. *See id.*

381. *See id.*

382. The father must provide for a son until he reaches the age of eighteen and a daughter until she is married. *See id.*

383. Men are allowed to engage in polygamy with up to four wives at once. *See* Khaliq, *supra* note 357, at 15. Women can be married to only one man at a time. *See id.* Men can divorce at will while women must satisfy criteria. *See id.* Under inheritance law, men generally inherit more than women. *See* Webber, *supra* note 358, at 1061.

384. For dower the man must give the women money or property upon marriage. *See id.* at 1062. It is seen as a symbol of respect. *See id.* Women in valid contractual marriages are entitled to maintenance. *See id.* at 1063-64. Maintenance is "food, clothing, lodging, and medical care." *Id.* at 1064. The minimum requirement of maintenance is for three menstrual periods and is seldom paid after the minimum requirement. *See* Khaliq, *supra* note 357, at 15.

385. *See* Webber, *supra* note 358, at 1065-66. There are restrictions on the enforcement of maintenance that negatively affect women. *See id.* at 1063. Law requires that women obey their husbands and ask permission to leave the house. *See id.* at 1065.

386. "Using the obedience doctrine to prevent a woman from working generally is acceptable in the Muslim world." *Id.* at 1066. Men may stop providing maintenance. *See id.*

387. Prophet Muhammad's first wife worked in business, and his second wife was a political and religious leader. *See* Ghasemi, *supra* note 20, at 457.

388. *See* Telesetsky, *supra* note 45, at 302. *See also* Sayeh and Morse, *supra* note 360, at 321-24 (discussing how men are required to respect women as the Prophet did.)

389. *See* Sayeh and Morse, *supra* note 360, at 316 n.27. The Hadith is made up of the "recorded sayings of the Prophet." Khaliq, *supra* note 357, at 9. The Hadith states, "The best of you is he who is best to his wife,"; "Paradise is under the feet of the mother;"; and "All people are equal, as the teeth of a comb. There is no claim of merit of an Arab over an non-Arab, or of a white over a black person or of a male over a female." Ghasemi, *supra* note 20, at 455 (quoting MUHAMMADE ABDUL-RAUF, THE ISLAMIC VIEW OF WOMEN AND THE FAMILY

females.

"Prior to the success of the Taliban, individual households were free to enforce their own versions of moral codes without interference from the Ministry of Prevention of Vice and Promotion of Virtue."[390] Now, Taliban leaders enforce the law as they see fit and prohibit individual interpretation.[391]

One Islamic scholar told a U.N. Special Rapporteur that the Taliban's interpretation of the Qur'an is incorrect.[392] According to that scholar, "A strict reading of the Koran interprets women's rights and responsibilities as equal to men's responsibilities, but not identical. The Taliban uses this 'equal but different' philosophy to require women to stay at home and tend to domestic duties and childcare."[393] Therefore, a strict reading of the Qur'an may not support the ban on women working.[394] Under the Qur'an, persons have a right to work for a living.[395] The Taliban violate this strict interpretation of Islamic law through restrictions on female employment.[396]

The Taliban requirement that women wear the *burqa* also appears to violate Islamic law.[397] The Qur'an does not specify that women must cover their face and hair, although the Islamic tradition is to wear a veil.[398] Other Islamic countries, such as Iran, do not require women to wear a *burqa*.[399]

Another infringement of Islamic law by the Taliban is the closing of women's bathhouses.[400] Many women no longer have access to water for bathing[401] despite the usual Islamic emphasis on cleanliness and good personal hygiene.[402]

Furthermore, the Taliban violate Islamic law by restricting female educational opportunities.[403] The Qur'an promotes education[404] and does not set educational limitations on females.[405] The Prophet Muhammad promoted education for all women.[406] "Some Islamic scholars believe that the Taliban

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21, 25 (1977)).

390. Telesetsky, *supra* note 45, at 302.

391. *See id.*

392. *See Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 29.

393. Telesetsky, *supra* note 45, at 301.

394. *See* Ghasemi, *supra* note 20, at 456.

395. *See id.* at 457.

396. *See id.* For the rules regarding Afghan women and employment see notes 259-94 and accompanying text.

397. *See* Ghasemi, *supra* note 20, at 457-58. For a discussion of the *burqa*, see notes 205-13 and accompanying text.

398. *See id.*

399. In Iran, women wear veils that cover only their head and neck. *See id.*

400. *See* Telesetsky, *supra* note 45, at 296-97.

401. *See supra* note 235 and accompanying text.

402. *See* Telesetsky, *supra* note 45, at 296-97.

403. *See supra* notes 294-334 and accompanying text.

404. The Qur'an states, "Proclaim! (or Read!) in the name of thy Lord and Cherisher, who created . . . man, out of a leech-like clot: proclaim! [sic] and thy Lord is most bountiful. He who taught (the use of) the pen, taught man that which he knew not.'" Ghasemi, *supra* note 20, at 458 (quoting Qur'an at 96:1-5).

405. *See id.*; Telesetsky, *supra* note 45, at 301.

406. *See* Sayeh and Morse, *supra* note 360, at 325.

have distorted the Koranic teachings to ignore basic premises such as mandatory education for both males and females."[407] Other Muslim countries, such as Jordan, Kuwait, and Bahrain, improved their primary education system for females.[408] Girls attend school regularly in some Muslim countries.[409]

C. *Islamic Practices in Other Countries*

Other Islamic countries are shocked by the Taliban's strict interpretation of the Qu'ran.[410] Iran is critical of the Taliban's policies,[411] and Pakistan attempts to differentiate their policies from those of the Taliban.[412]

IX. METHODS FOR CHANGE

A. *Gradualism*

Under the theory of gradualism, the situation for women improves as changes are made within the Islamic culture.[413] Gradualism encourages a liberal interpretation of the Islamic religion.[414] Gradualism is described as "a method of interpretation that proceeds by degrees, over time, advancing slowly but regularly."[415] Islam experienced gradualism in women's rights through changes in the areas of education[416] and marital consent.[417] Based on these historical experiences, Islam may provide a means for change under the theory of gradualism.[418]

A division exists among scholars regarding whether interpretations of the Qur'an may progressively change as society changes over time.[419] Some

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407. Telesetsky, *supra* note 45, at 300.
408. *See* Ghasemi, *supra* note 20, at 458.
409. *See id.*
410. *See id.* at 459.
411. Iran reportedly financially supported anti-Taliban forces. *See* Ghasemi, *supra* note 20, at 459. Iranian officials charge that the Taliban's policies give the Islamic religion a bad name. *See id.* Islamic groups in Pakistan made this same assertion. *See* Telesetsky, *supra* note 45, at 300-01.
412. In 1998 when the Pakistan government switched from a British common law system to the Qur'an, the Prime Minister emphasized that women's and minorities' rights would not be violated. *See* Ghasemi, *supra* note 20, at 459.
413. *See* Sayeh and Morse, *supra* note 360, at 331-32.
414. *See id.*
415. *Id.* at 318. *See also* Webber, *supra* note 358, at 1080-82.
416. Before the period in which the Prophet lived, known as Jahiliyyah, men dominated. *See* Sayeh and Morse, *supra* note 360, at 321-25. The Prophet used gradualism in education to equate women's status to that of men. *See id.*
417. During Jahiliyyah, the father decided if the daughter would be married based on gifts the potential husband offered to the father. *See id.* at 325. The Prophet allowed women the option of accepting or rejecting a marriage proposal. *See id.* Some Islamic cultures permit a wali, or male guardian, to accept or reject marriage proposals. *See id.* at 326.
418. *See* Sayeh and Morse, *supra* note 360, at 330-31. *But see* Roy, *supra* note 356, at 204.
419. *See* Khaliq, *supra* note 357, at 6.

scholars believe the Shari'a allows varying interpretations of existing precedent in certain situations.[420] These situations include: "(1) necessity or public interest, (2) change in the facts which originally gave rise to the law, and (3) change in the custom or usage on which a particular law was based."[421] If one of the above situations arises, existing law changes as long as it does not conflict with the Qur'an.[422] The new law is then part of the Shari'a.[423] Over time, judges closed the door of ijtihad,[424] which limits flexibility in interpretation.[425] Pakistan revived the ijtihad, however, and may influence the Taliban into doing the same.[426]

B. Organizations Help to Promote Awareness and Change

Initially, the Taliban declared edicts regulating the behavior of female staff members of nongovernmental organizations.[427] The Taliban also victimized women volunteers.[428] No human rights organizations currently operate in Afghanistan.[429]

Other organizations work from outside the country or conduct underground activities. The Revolutionary Association of Women of Afghanistan (RAWA)[430] promotes the rights of women in Afghanistan and Afghan refugees in Pakistan.[431] RAWA's activities include holding demonstrations and press conferences, educating women through literacy and political courses,[432] and managing a hospital, a school, and employment

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420. *See* Sayeh and Morse, *supra* note 360, at 317.

421. *Id.*

422. *See id.*

423. *See id.*

424. Closing the door of ijtihad is a process in which leaders of the tenth century limited interpretation to accepted schools. *See id.* at 318. Political reasons were the basis of this decision. *See* Khaliq, *supra* note 357, at 10-11. *See also* Webber, *supra* note 358, at 1081.

425. *See* Khaliq, *supra* note 357, at 11. *See also* Webber, *supra* note 358, at 1081.

426. *See* Webber, *supra* note 358, at 1083.

427. These regulations stated that Shari'a prevented women from working. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 95, app. II.

428. Five CARE International women workers were forced out of their car. *See* Dupree, *supra* note 195, at 157. The woman had written authorization to perform their work. *See id.* The guards condemned the volunteers over a loudspeaker by saying they were prostitutes. *See id.* Then, the guards whipped them with a metal and leather whip. *See id.* However, the Deputy Director of the religious police stated that the guards' acts were not authorized and apologized for the events. *See id*; *Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 94.

429. *See* Human Rights Watch 2000 Report, *Asia Overview, at* http://www.hrw.org/wr2k/Asia.htm (last visited Sept. 3, 2000).

430. RAWA was created in 1977. *See* ELLIS, *supra* note 1, at 216. For general information about RAWA see Desai, *supra* note 80, at 840-41; *Revolutionary Association of Women in Afghanistan, at* http://p2.rawa.org/rawa/index.html (last visited Mar. 27, 2001).

431. *See* ELLIS, *supra* note 1, at 216.

432. *See id.* at 216-18. Sajida, a RAWA activist, stated,

> We want to at least raise their [women's] awareness of their own rights, because most Afghan women don't know about this. They think women *should* be the slaves of men. Our political courses are about women's rights, about the criminal activities of the Taliban, to disclose the real nature of the Taliban, so they know that what the Taliban is doing is *not* part of the Koran.

projects.[433] RAWA celebrates International Women's Day.[434] RAWA must conduct activities underground in Afghanistan but may do so in public in Pakistan.[435] RAWA conducts these activities despite threats to the participants' safety.[436]

Other groups that promote Afghan women's rights are the Feminist Majority Foundation[437] and the Cooperation Center for Afghanistan.[438] The European Union also addressed the situation in Afghanistan by encouraging the Taliban to end discrimination against women.[439] The International Committee of the Red Cross also plays a crucial role in providing medical supplies and services.[440]

The Afghan Women's Network works with the United Nations to include women's thoughts in a solution for peace, to guarantee basic rights and to increase more female involvement in the United Nations and nongovernmental programs.[441]

Id. at 218.

433. *See id.* at 217.

434. On March 8, 1927, women gathered in Bukhara, tore off their *burqas*, and burned them in a bomb fire. *See* ELLIS, *supra* note 1, at 221. Women who unveiled were raped, murdered, and shamed by their families. *See id.* Those that survived were blamed for causing an earthquake that happened later that year. *See id.* at 222. March 8 of every year is now a day of celebration to promote equality. *See id.* at 221. RAWA plans events for this occasion. *See id.* at 218.

435. *See* ELLIS, *supra* note 1, at 218.

436. Sajida describes how the Taliban threatened to hurt those involved in a planned demonstration in Pakistan to denounce the Taliban. *See id.* RAWA postponed the event. *See id.* In 1998, the Taliban told women that they would cut off their legs for partaking in the events for this day. *See id.* at 222. Deborah Ellis, a journalist, attended one such event and received a note saying,

> We have found that you are in contact with a group of prostitutes called RAWA. These whores fight Islam . . . . You better save your life and leave this city and let RAWA call girls continue to sell their bodies[,] but they will be stoned to death by our brothers and you will be informed about it soon.

Id. at 226. However, women in Afghanistan were allowed to celebrate International Women's Day on March 8, 2000. *See The Implementation of Human Rights with Regard to Women*, *supra* note 191, ¶ 19. Over 700 women partook in a formal celebration. *See id.* A Taliban leader spoke at the gathering, which represented the first time a Taliban official addressed Afghan women in a public setting. *See id.*

437. The Feminist Majority Foundation is involved with activism campaigns to help end the apartheid of Afghan women. *See Stop Gender Apartheid in Afghanistan*, *at* http://www/feminist.org/afghan/facts.html (last visited Mar. 28, 2001). The campaigns include the Adopt an Afghan Girl's School campaign, the Afghan Women's Craft campaign, and the Afghan Women's Scholarship program. *See id.* The Feminist Majority Foundation works with other organizations, such as Amnesty International USA, Human Rights Watch, the International Women's Human Rights Law Clinic, the National Organization of Women, the National Political Congress of Black Women, the Women's Alliance for Peace and Human Rights in Afghanistan, and the World Council of Muslim Women Foundation, in the campaign to Stop Gender Apartheid in Afghanistan. *See id.*

438. *See* Press Release, Council of Ministers, 2239th Council Meeting (Jan. 24, 2000), *available at* LEXIS, RAPID File.

439. *See id.*

440. In 1993, the International Committee of the Red Cross (ICRC) was stationed in Kabul and Mazar-I-Sharif. *See Final Report on the Situation of Human Rights in Afghanistan* (1994), *supra* note 36, ¶ 43.

441. *See Interim Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 53, ¶ 21.

C. *United Nations*

The United Nations promotes equal rights for men and women.[442] Afghanistan became a member of the U.N. on November 19, 1946.[443] The U.N. is attempting to bring about change in Afghanistan. For example, the U.N. set up a special mission to Afghanistan in October, 1993.[444] However, the resignation of two heads of the mission[445] and the failure to facilitate negotiations between the Taliban and the Rabbani government[446] hampered this mission.

The U.N. also gives aid, health supplies, food, water, and other staples, such as blankets and kerosene stoves, to the Afghan people and refugees.[447] The United Nations Children's Fund (UNICEF) distributes door-to-door information on health and education issues and the CEDAW.[448] Some U.N.

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442. "We the peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ...." U.N. Charter preamble.

443. *See List of Member States, at* http://www.un.org/Overview/unmember.html (last visited Mar. 27, 2001). *See* AFG. CONST., *reprinted in* Felix Ermacora, *Afghanistan, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 6 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

444. *See* William Maley, *The UN and Afghanistan: "Failure of a Mission", in* FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 182, 187 (William Maley ed., 1998).

445. Mahmoud Mestiri resigned four months prior to the Taliban's conquest of Kabul. *See id.* at 182. His predecessor, Dr. Norbert Holl, resigned in October 1997. *See id.* at 182-83.

446. *See id.* at 192. The Taliban claims that they no longer trust Burhanuddin Rabbani. Nazeer Laghari and Mufti Jameel Khan, *Interview with the Ameerul M'umineen, at* http://www/afghan-ie.com/taliban/intview1.htm (last visited Sept. 5, 2000)(on file with the Indiana International and Comparative Law Review). A Taliban representative said, "[T]hey [Burhanuddin and Hikmatyar] have always betrayed us, betrayed the nation, violated the agreements and unjustly spilled the blood of the Muslims, and now, we have no trust in them and neither is the Afghan nation willing to trust them." *Id.* It has been argued that the U.N. failed in its mission for Afghanistan. *See* Maley, *supra* note 444, at 198.

> Missions can fail in at least six different ways. First, relevant internal issues can be overlooked. Second, relevant internal parties can be overlooked. Third, the contribution to destabilisation of external parties or issues can be over looked. Fourth, parties can lose confidence in the good faith of the mediator. Fifth, negotiations can be conducted too publicly, in such a way that the glare of publicity limits the flexibility of parties, and encourages them instead to posture for the benefit of their supporters. Sixth, the parties may simply not be interested in reaching an agreement at a given moment: the conflict may not be ripe for settlement. All these reasons for failure have played their role at one time or another in the Afghan case.

Id. at 197. To the contrary, sixty-three non-governmental organizations signed a letter to the secretary-general of the U.N. praising the U.N. for its efforts to help women in Afghanistan and setting forth several suggestions for continued assistance. *See Protecting Afghan Women's Rights*, NEW STRAITS TIMES (MALAYSIA), May 5, 1997, at 15, *available at* LEXIS, News, Asia & Pacific Rim File. The recommendations included educating warring groups in Afghanistan about human rights, appointing women to participate in negotiation meetings with the Taliban, and arranging visits to Taliban controlled areas. *See id.*

447. *See Final Report on the Situation of Human Rights in Afghanistan* (1994), *supra* note 36, ¶¶ 39-41.

448. *See The Implementation of Human Rights with Regard to Women, supra* note 191, ¶ 30.

groups suspended aid and assistance in regions which discriminated against women.[449]

1. The Taliban and the U.N.

The Taliban play a role in the lives of female U.N. workers. During the U.N. special missions to Afghanistan, the Taliban prohibited U.N. female assistants from meeting Taliban officials.[450] Many U.N. workers face violence and risk their own lives.[451] The Taliban allegedly killed some U.N. workers.[452]

In August, 2000, the Taliban issued a statute which restricted the U.N.'s activities.[453] The statute requires that the Taliban serve as the middlemen between the U.N. and the people.[454] Understandably, this statute may hinder the U.N.'s ability to give assistance to the Afghan people.[455]

2. The U.N.'s Recommendations

The Special Rapporteur,[456] Mr. Kamal Hossain reported,

> [P]ervasive human rights problems are both a cause and consequence of the governance crisis. The character of the existing authorities, who rule without the consent and participation of the Afghan people, is the root cause of human rights violations . . . . The focus thus needs to shift from incremental changes to a framework change.[457]

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449. UNICEF suspended its programs in Kandahar and Herat until discrimination stops. *See Final Report on the Situation of Human Rights in Afghanistan* (1996), *supra* note 49, ¶ 76.

450. *See id.* ¶ 72; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 86.

451. In 1994, fighting was heavy in Kabul. *See Final Report on the Situation of Human Rights in Afghanistan* (1994), *supra* note 36, ¶ 20. A 24-hour cease-fire was called so that U.N. staff and diplomats could leave the city. *See id.*

452. An unknown gunmen killed seven workers of the Organization for Mine Clearing and Rehabilitation (OMAR), a U.N. nongovernmental organization. *See Seven Workers of UN-Affiliated NGO killed in Afghanistan*, NNI *at* http://www.rawa.org/7killed.htm (Aug. 7, 2000). The Taliban blamed the incident on another group, the Northern Alliance. *See id*; *Final Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 53, ¶ 74; *Situation of Human Rights in Afghanistan* (1998) *supra* note 302, ¶ 2. In 1998, a U.N. Special Mission to Afghanistan official was killed. *See Report on the Situation of Human Rights in Afghanistan* (1999), *supra* note 55, ¶ 4.

453. *See Situation of Human Rights in Afghanistan* (2000), *supra* note 159, ¶ 57.

454. *See id.*

455. *See id.*

456. The goals of the United Nations Special Mission to Afghanistan (UNSMA) were:

> (a) to support the Special Envoy in promoting peace through contact with the two contending sides [the Taliban and the United Front] as well as through the wider Afghan political and civil community; (b) to monitor and report political and military developments in Afghanistan; and (c) to coordinate activities with the Office of the United Nations Coordinator for Afghanistan as well as the indigenous and international humanitarian assistance community.

Situation of Human Rights in Afghanistan (2000), *supra* note 159, ¶ 61.

457. The Special Rapporteur also said,

> The circumstances which encourage this view include changes in the neighboring

This framework change must involve the Afghan citizens and refugees.[458] The U.N. Secretary General added:

> The objective would be to rebuild Afghanistan and to restore the country to all of its people. This would only be possible through a negotiated peace and a process of transition aimed at the establishment of a broad-based, multi-ethnic and truly representative government.
>
> Only such a government could be expected to repeal the edicts which result in systematic violations of human rights and to create the conditions under which basic human rights could be guaranteed to the women, men and children of Afghanistan, rights that they are entitled to by virtue of the fact that Afghanistan is a party to the main international human rights instruments.[459]

The Special Rapporteur also reported that helping the human rights situation requires ending the arms flow.[460] In a recent report, the U.N. specifically urged the Taliban to lift restrictions on women.[461]

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countries, the recent discussions among them, the meetings between the Taliban and their neighbours, the release of several hundred opposition prisoners by the Taliban, and the resolve expressed within the United Nations for positive action. All these, taken together, present an opening which should not be missed.

Id. ¶ 60.

458. *See id.* ¶ 55.

459. *Id.* ¶¶ 62-63. Afghanistan is a party to the CCPR, CESCR, and CAT. *See id.* Afghanistan signed the CEDAW. *See id.*

460. "Stopping the arms flow must assume greater priority in the international community's endeavours to promote human rights in Afghanistan." *Report on the Situation of Human Rights in Afghanistan, supra* note 233, ¶ 56.

461. The U.N.

> [u]rges all the Afghan parties, and in particular the Taliban, to bring to an end without delay all violations of human rights of women and girls and to take urgent measures to ensure:
>
> a. The repeal of all legislative and other measures which discriminate against women and girls and those which impede the realization of all their human rights;
> b. The effective participation of women in civil, cultural, economic, political and social life throughout the country;
> c. Respect for the equal right of women to work, and their reintegration in employment;
> d. The equal right of women and girls to education without discrimination, the reopening of schools and the admission of women and girls to all levels of education;
> e. Respect for the right of women to security of person and that those responsible for physical attacks on women be brought to justice;
> f. Respect for the freedom of movement of women;
> g. Respect for effective and equal access by women and girls to the facilities necessary to protect their right to the highest attainable standard of physical and mental health;

Situation of Human Rights in Afghanistan, U.N. ESCOR, ¶ 9, U.N. Doc. E/CN.4/RES/2000/18 (2000).

X. REFUGEES

Some Afghans felt the situation in Afghanistan was so bad that they had to leave the country.[462] A large number of Afghans fled the country in the 1980s during the Soviet fighting.[463] Afghan refugees account for the largest refugee group with 1.2 million in Peshawar, Pakistan.[464] In Afghanistan, over one million Afghan refugees are internally displaced.[465]

The Convention Relating to the Status of Refugees has a specific definition for who is considered a refugee.[466] Gender, however, is not included as a protected group in the definition[467] and courts have not consistently construed who is a "particular social group."[468]

For those who do fit the definition of refugee, some find life in the refugee camps is no different from life in Afghanistan.[469] Many women live a strict lifestyle, including being forced to stay indoors.[470] Many young girls are forced to stay inside with their mothers.[471] A representative for Physicians for Human Rights reported that there were no showers, food, education, or work in some of the refugee camps.[472]

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462. See ELLIS, *supra* note 1, at 78-94 for testimonials of Afghan refugees.

463. *See id.* at 41.

464. *See id.* at 73. *See also* U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1994 (Mar. 1995), *available at* LEXIS (states statistics for refugees in 1994); U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1995 (Mar. 1996), *available at* LEXIS (states statistics for refugees in 1995); U.S. DEP'T OF STATE, AFGHANISTAN HUMAN RIGHTS PRACTICES, 1996 (Mar. 1997), *available at* LEXIS (states statistics for refugees in 1996); Afghanistan Human Rights Practices, 1999, *supra* note 86.

465. *See* ELLIS, *supra* note 1, at 73.

466. Chapter I, Article 1 states:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:... 2. owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS, 57 (1994). *See also* Protocol to Convention on Status of Refugees, Oct. 4, 1967, art. I, para. 2, 19 U.S.T. 6223, *reprinted in* 6 I.L.M. 78 (discussing how the Protocol applies to all States Parties to the original Convention Relating to the Status of Refugees).

467. *See* Convention Relating to the Status of Refugees, *supra* note 466, at 57.

468. Peter C. Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 258, 270-74 (1994) (analyzing the extension of "particular social group" to include gender). *See also* Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33 (1997) (discussing how gender based refugee claims fit within the definition of "particular social group" if violence against women is seen as a violation of human rights and not disregarded as a private issue).

469. *See* ELLIS, *supra* note 1, at 76.

470. *See id.* at 74-75.

471. *See id.* at 75.

472. *See id.* at 76. He also reported that some women did not have a place to go to the restroom. *See id.* at 77. They would have to refrain from going all day and after dark go to the edge of the camp so they could go to the bathroom on the hill. *See id.*

Some women stay in the refugee camps with the children while the husbands fight the war in Afghanistan.[473] Some women are separated from their extended families and live amongst strangers.[474] Members of the Mujahideen groups, who led the camps and gave out the rations, force women to have sex in order to receive food for their children.[475]

Refugee camps are also a difficult adjustment for children.[476] Many children are not enrolled in the camp schools.[477] Safety for children is also a concern in the camps.[478]

A. *Afghan Refugees in Pakistan*

The refugees have taken an economic toll on Pakistan.[479] Aid to the refugees in Pakistan has slowed or stopped.[480] The Pakistani government stopped short of forcing the refugees out of their country.[481] The government shut down four Afghan universities in Peshawar and a year later reopened them.[482] Trying to facilitate the return of refugees to Afghanistan, the government stated in March of 1999 that all Afghans should anticipate being restricted to the confines of the camps.[483]

B. *Afghan Refugees in Iran*

Iran is also a host country for many Afghan refugees.[484] In the beginning, the Iranian government welcomed the refugees because of a need for workers in the booming economy.[485] Living conditions were reportedly better than in Pakistan.[486] Many refugees lived in the city instead of in camps.[487] Many jobs were available, and education was free.[488] Many women

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473. *See id.* at 74.
474. *See id.*
475. *See id.*
476. *See id.* at 74-75.
477. The children outnumber the available openings in the schools. *See id.* at 75. The schools are free but some families have had to require the children to stay home and beg or work to support the family. *See id.*
478. Children have been kidnapped, have disappeared, and some have had body parts stolen. *See id.* One young girl, Sheela, vanished for a week. *See id.* When she returned home, one of her kidneys had been removed. *See id.* She died three days later. *See id.*
479. Refugees affected the labor market by working for lower wages. *See id.* at 88. Rent in Peshawar increased because of the demands of aid workers, reporters, and U.N. officials for housing. *See id.*
480. "A staff member of the International Committee for the Red Cross considers Afghanistan and the refugees to be their largest under-funded program." *Id.*
481. *See id.*
482. *See id.* at 88-89.
483. *See id.* at 89.
484. *See id.* at 93.
485. *See id.*
486. *See id.*
487. *See id.* at 94.
488. *See id.* at 93.

worked or attended school for the first time.[489]

In the 1990s, the economy slowed.[490] Beginning in 1995, more refugees were housed in camps.[491] Refugees were restricted from certain areas of the cities, known as "refugee-free zones."[492] Anti-Afghan sentiments grew.[493] The government introduced incentive packages for Afghans to return to Afghanistan.[494]

In 1998, the situation worsened after an Iranian journalist and seven Iranian diplomats were killed in Afghanistan.[495] Iranians lashed out, and thirty Afghans were killed in a random act of violence.[496] In November of 1998, thousands of refugees were ordered to return to Afghanistan within three weeks.[497]

The head of the U.N. refugee agency is currently touring to hasten the return of Afghan refugees.[498] Many Afghans are reluctant to return home because of the poor economic situation in the country and the strict rules for women.[499]

According to the Convention Relating to the Status of Refugees, Iran, as a party to this Convention, may not return Afghan refugees if a threat to their life or freedom exists.[500] However, seventy thousand Afghan refugees were forcibly returned to Afghanistan between January and the end of September in 1999.[501]

C. *Returning Home*

The Geneva Accords signed in 1988 provide a safeguard for Afghan refugees to return to Afghanistan voluntarily.[502] Many refugees returned home

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489. *See id.*
490. *See id.*
491. *See id.* at 94.
492. *Id.*
493. *See id.*
494. These packages were meant to help them through the first few months in Afghanistan. *See id.* at 93.
495. *See id.* at 94.
496. *See id.*
497. *See id.*
498. *See* Associated Press, *Head of U.N. Refugee Seeks to Hasten Return of Afghans* (Sept. 15, 2000), *available at* http://www.cnn.com/2000/ASIANOW/central/09/14/ pakistan. refugees.ap/index.html.
499. *See id.*; *see also* ELLIS, *supra* note 1, at 93-94. *See also Iran: Are Returning Afghan Refugees Properly Protected? at* http://web.amnesty.org/ai.nsf/index/MDE130282000?OPEN DOCUMENT&of=COUNTRIES/IRAN (Sept. 26, 2000).
500. Chapter V, Article 33 states, "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, *reprinted in* TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 64 (1994).
501. *See The Situation in Afghanistan and Its Implications For International Peace and Security, supra* note 57, ¶¶ 53-54.
502. The U.N. Special Rapporteur, Mr. Kamal Hossain, noted:

> Non-interference in the internal affairs of Afghanistan and non-intervention were to be internationally guaranteed and the United Nations was entrusted with a

between 1990 and 1995 after the Soviet reign ended.[503]

In 1997, the Taliban issued an amnesty decree for refugees to return to Afghanistan.[504] "It provides guarantees for the safe and dignified return of refugees, respect for their basic human rights and exemption from prosecution for non-personal criminal offences committed before leaving the country, as well as for draft evasion and desertion."[505]

XI. CONCLUSION

No woman should be forced to leave her birth country so that she may enjoy activities, such as taking a stroll outside, without government interference. The Taliban's rules impact every aspect of a woman's life. The Taliban's rules violate human rights doctrines, to which Afghanistan is a party, and also violate the Islamic religion. The ideal solution to remedy these human rights violations is the implementation of a new governing structure which would allow popular input and would adhere to the governing human rights doctrines. Since this proposal appears out of reach while the Taliban remain in power, the best solution for now may be to attempt to influence the Taliban in their interpretation of the Qur'an and use of gradualism to promote women's rights.

Shannon A. Middleton[*]

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monitoring role in relation to the interrelated set of obligations created by the Accords. It was expected that the human rights of the Afghan people would thus be safeguarded. This legitimate expectation remains unfulfilled to date.

Report on the Situation of Human Rights (1999), *supra* note 55, ¶ 19.

503. *See* ELLIS, *supra* note 1, at 73. Eighty-two thousand refugees voluntarily returned to Afghanistan in the first nine months of 1999. *See The Situation in Afghanistan and Its Implications For International Peace and Security*, *supra* note 57, ¶ 53.

504. *See Interim Report on the Situation of Human Rights in Afghanistan* (1997), *supra* note 90, ¶ 70, app. I.

505. *Id.* ¶ 70.

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THE AUSTRIAN PSYCHOTHERAPY ACT: NO LEGAL DUTY TO WARN

SHALL THE UNITED STATES FOLLOW THE LEADER IN THE FIELD OF PSYCHOTHERAPY?

I. INTRODUCTION

The Austrian Psychotherapy Act provides no exceptions to patient confidentiality.[1] It is the only one of its kind, internationally.[2] The Act runs directly counter to the law in the United States, which provides for numerous exceptions to patient confidentiality.[3] In addition, the American "*Tarasoff* rule"[4] creates a duty of therapists to warn potential victims when patients communicate to therapists the intent to cause serious bodily harm to those victims.[5] The crux of the debate is the weight to be given two interests: (1)

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1. *See* Karen Gutierrez-Lobos, et al., *Wrapped in Silence: Psychotherapists and Confidentiality in the Courtroom*, 44 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 33 (2000), 2000 WL 13918460.

2. *See id.*

3. *See infra* notes 98-135. *See also* Tarasoff v. Regents of University of Cal., 551 P.2d 334, 339-40 (Cal. 1976) (establishing therapists' duty to warn third parties of imminent danger posed by patients); Jaffee v. Redmond, 116 S.Ct. 1923, 1931-32 (1996) (recognizing psychotherapist-patient privilege, but indicating that the privilege is not absolute); *In re* Lifschutz, 467 P.2d 557, 561 (Cal. 1970) (holding that a litigant-patient exception to the statutory psychotherapist-patient privilege does not unconstitutionally infringe rights of privacy of either psychotherapists or their patients); People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. Ct. App. 1982) (holding that psychologist's report of suspected child abuse based upon communication from patient's child fulfilled reporting obligation, and that psychologist was not thereafter required to disclose related communications from patient); Ritt v. Ritt, 238 A.2d 196, 198-99 (N.J. Ct. App. 1967) (holding that communications between plaintiff-wife and psychiatrist were not protected from disclosure during depositions, and reasoning that the patient only had a limited right to confidentiality, subject to exceptions created by supervening interests of society. Here, the supervening interest was the fact that institution of litigation by the patient constituted vitiation of her right to absolute confidentiality), *rev'd*, 244 A.2d 497, 499 (New Jersey Supreme Court held that the issue had been subsequently decided because the New Jersey legislature had enacted a statute creating the physician-patient privilege that would cover the psychiatric relationship here).

4. This rule arose from the case of *Tarasoff*, 551 P.2d at 339-40. In that case, police officers and therapists failed to warn a victim of a patient's intention to kill her. *Id.* at 340. The patient killed the victim. *See id.* at 339. The victim's parents filed suit against the police officers and therapists for failure of their duty to warn the victim and failure to confine the patient. *See id.* at 340. The court rejected all claims against the police officers. *See id.* at 353. The court also rejected the claim against the therapists for failure to confine the patient. *See id.* at 351. However, the court held that the therapists' special relationship with the patient transferred to the victim. *See id.* at 344. Therefore, the court held, the therapists had a duty to use reasonable care in warning the victim of danger. *See id.* at 340.

5. *See id.*

the patient's right to confidentiality and therapist's need to maintain the trust of his patient, and (2) the public's right to be protected from dangerous individuals.[6] Austria places greater emphasis on the former;[7] the United States assigns higher value to the latter.[8]

Because tort claims for therapist misfeasance are frequently litigated in the United States, it may be time for America to look at its international contradiction. This Note will compare the U.S. and Austrian systems. Part II discusses the basis of the debate between patient rights and public safety. Part III explains the Austrian Psychotherapy Act's rationale, provisions, and effects. Part IV explains the U.S. system, including a discussion of the general right of patients to confidentiality and exceptions to this right. Part V compares the Austrian and American systems. Finally, Part VI proposes a change in the status of American law.

II. THE DEBATE: PATIENT RIGHTS VS. PUBLIC SAFETY

The debate centers on the relative weight of two interests: (1) the patient's right to confidentiality and therapist's need to maintain the trust of his patient, and (2) the public's right to be protected from dangerous individuals.[9]

A. *The Patient's Right to Confidentiality[10] & the Therapist's Need to Maintain the Trust of the Patient*

Numerous arguments have been asserted in favor of retaining patient confidentiality.[11] First, without a confidentiality right, prospective patients in need of treatment will be deterred from seeking help.[12] Second, absent a

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6. *See id. See also* Catherine Agnello, *Advocating for a Change in the Massachusetts HIV Statute: Putting an End to Physician Uncertainty*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 105, 105-06 (1997).

7. *See* Karen Gutierrez-Lobos, et al., *supra* note 1.

8. *See Tarasoff*, 551 P.2d at 347.

9. *See id.* at 340; Agnello, *supra* note 6, at 105-06.

10. *See In re* Lifschutz, 467 P.2d 557, 567-68 (Cal. 1970). *See also* Ellen W. Grabois, *The Liability of Psychotherapists for Breach of Confidentiality*, 12 J. L. & HEALTH 39, 49-53 (1998) (discussing the nature of the confidentiality relationship between patient and therapist).

11. *See infra* notes 12-20 and accompanying text.

12. *See Tarasoff*, 551 P.2d at 359 (Cal. 1976) (Clark, J., dissenting). *See also* Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. ON C.L. & C.R. 107, 135 (1999) (suggesting that mandatory disclosure of HIV seropositivity will deter potential patients from being tested and receiving treatment necessary to curb the spread of the disease); Roger Doughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 113, 165 (1994) (suggesting that the stigma and potential discriminatory effects surrounding HIV seropositivity will deter patients from being tested and receiving treatment). *But see Tarasoff*, 551 P.2d at 346 (arguing that such predictions are entirely speculative).

guarantee of confidentiality, patients will be discouraged from making full disclosures necessary to their treatment.[13] Third, confidentiality is necessary to maintain the trust of the patient,[14] which is essential to any therapeutic relationship.[15] Fourth, by decreasing effectiveness of treatment, imposition of a duty increases danger to society of violence by the mentally ill.[16] Fifth, the duty to warn may deprive patients of two of their constitutionally protected rights, namely, the right of privacy and the right to receive treatment.[17] Sixth, imposition of liability for failure to warn will discourage therapists from treating patients with violent tendencies.[18] Seventh, potential liability may discourage therapists from testifying on behalf of patients because disclosures

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13. *See Tarasoff*, 551 P.2d at 359 (Clark, J., dissenting). *See also Lifschutz*, 467 P.2d at 567-68 (discussing potential for patient deterrence, but holding that patient's right to confidentiality is not absolute); AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.05 (2000) (discussing importance that patient feel free to disclose information to physician); Donald H.J. Hermann & Rosalind D. Gagliano, *Symposium on AIDS and the Rights and Obligations of Health Care Workers: AIDS, Therapeutic Confidentiality, and Warning Third Parties*, 48 MD. L. REV. 55, 69 (1989) (suggesting that the threat of liability may deter therapists from inquiring into dangerous activities of patients with HIV).

14. *See Tarasoff*, 551 P.2d at 359-60 (Clark, J., dissenting). *See also* Gutierrez-Lobos, et al., *supra* note 1 (suggesting that confidentiality is important for effective psychotherapy); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 306-08 (1982) (arguing that informing the patient of the limitations of confidentiality may destroy the necessary trust relationship between patient and therapist). *But see id.* at 271 (suggesting that informing the patient of the potential need to disclose information may actually make the trust relationship between the patient and therapist stronger).

15. *See generally supra* note 14.

16. *See Tarasoff*, 551 P.2d at 360 (Clark, J., dissenting).

17. *See* Wyatt v. Stickney, 325 F.Supp. 781, 784 (M.D.Ala. 1971). *See also* People v. Feagley, 535 P.2d 373, 386-87 (Cal. 1975) (discussing constitutional right of involuntarily committed patients to receive treatment); *Lifschutz*, 467 P.2d at 567-68 (discussing right to privacy); *Tarasoff*, 551 P.2d at 360 (Clark, J., dissenting) (suggesting that imposition of a duty to warn will increase the risk of civil commitment of those who should not be confined, thus increasing the risk that the right to personal liberty will be violated); Nason v. Superintendent of Bridgewater State Hosp., 233 N.E.2d 908, 913 (Mass. 1968) (discussing the right to receive treatment).

18. *See, e.g.*, Allison L. Almason, *Personal Liability Implications of the Duty to Warn are Hard Pills to Swallow: From Tarasoff to Hutchinson v. Patel and Beyond*, 13 J. CONTEMP. HEALTH L. & POL'Y 471, 495 (1997); Gutierrez-Lobos, et al., *supra* note 1; Hermann & Gagliano, *supra* note 13, at 69; Ginger Mayer McClarren, *The Psychiatric Duty to Warn: Walking a Tightrope of Uncertainty*, 56 U. CIN. L. REV. 269, 284 (1987); Merton, *supra* note 14, at 311. *See also* Judy E. Zelin, J.D., Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information about Patient*, 48 A.L.R.4th 668 (1986). The author notes that most states provide a private cause of action against licensed health care providers who impermissibly disclose to third parties confidential information obtained in course of treatment relationship. *See id.* Depending on the jurisdiction, the claim may be filed as breach of contract, malpractice, breach of fiduciary duty, act of fraud/misrepresentation, or breach of specific civil statute permitting award of damages. *See id.* In addition, licensed health care providers who breach confidentiality of patients run risk of professional disciplinary action. *See id.*

made while testifying may form the basis for lawsuits against therapists.[19] Finally, the duty is not practical because predictions of dangerousness are unreliable, thus the duty may result in unnecessary warnings being given or necessary warnings not being given.[20]

B. Public's Right to be Protected from Dangerous Persons

On the contrary, numerous arguments have been advanced in favor of a duty to warn.[21] The most prevalent of these arguments is that "[t]he protective privilege ends where the public peril begins."[22] The *Tarasoff* court stated,

> [T]here now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient.[23]

The relationship between the therapist and patient is comparable to that of a medical doctor and patient because therapists receive training to treat patient disorders just as medical doctors are trained to treat patient diseases.[24] Thus, patient dependence on a therapist's judgment in diagnosing emotional disorders and predicting dangerousness is as justified as is patient dependence on a medical doctor's prognosis.[25]

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19. *See* Merton, *supra* note 14, at 311.

20. *See, e.g., Tarasoff*, 551 P.2d at 354 (Mosk, J., dissenting); People v. Burnick, 535 P.2d 352, 365 (Cal. 1975) (en banc); Donna Dickinson, *Ethical Issues in Long Term Psychiatric Management*, 23 J. MED. ETHICS 300, 302-03 (1997); Simon A. Hill, *The Man Who Claimed to Be a Paedophile* [sic], 26 J. MED. ETHICS 137, 137-38 (2000); The Honorable Robert J. Kane & George Sigel, *Violence Prediction: Revisited*, 20 N.ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 64-70 (1993); Merton, *supra* note 14, at 296-301; Joshua M. Weiss, *Idiographic Use of the MMPI-2 in the Assessment of Dangerousness Among Incarcerated Felons*, 44 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 70 (2000), 2000 WL 13918463. *But see Tarasoff*, 551 P.2d at 346 (concluding that professional inaccuracy in predicting violence does not negate a therapist's duty to protect the threatened victim and that the risk of unnecessary warnings being given is a reasonable price to pay for the lives of victims saved).

21. *See Tarasoff*, 551 P.2d at 347.

22. *Id.* at 347.

23. *Id.* at 344.

24. *See id.* at 345.

25. *See id.*

III. AUSTRIA: "THE HOME OF MODERN PSYCHOLOGY"[26]

Austria has spawned cutting-edge psychological scholars and theories. Sigmund Freud,[27] Anna Freud,[28] Alfred Adler,[29] and Viktor Frankl[30] are but a few. Perhaps Austria is still ahead of its time with its Austrian Psychotherapy Act. Or perhaps the rest of the world is smart to remain skeptical.

A. The Austrian Psychotherapy Act

The home of modern psychology is protecting its creation. In 1991, Austria enacted the Austrian Psychotherapy Act.[31] The Austrian Psychotherapy Act provides that "[p]sychotherapists, as well as their auxiliary staff, shall be obliged to keep confidential all secrets shared with them or becoming known to them in the exercise of their profession."[32] Even information obtained from children or juveniles is generally protected under the Act.[33] Children's legal representatives are only given information regarding the nature, extent, and cost of psychotherapy, not the children's personal secrets.[34] This requirement of confidentiality is not without its penalties. Section 23 of the Act provides that professionals who violate Section 15 of the Act shall be subject to a maximum monetary fine of fifty thousand Austrian shillings,[35] or shall be punished in the criminal courts if the

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26. Sigmund Freud began the era of "modern psychology" in the late 1800s with his development of psychoanalysis. LESTER A. LEFTON & LAURA VALVATNE, MASTERING PSYCHOLOGY (3rd ed. 1988). For an interesting discussion of the atmosphere of Vienna in which psychoanalysis was born, see FREDERIC MORTON, A NERVOUS SPLENDOR: VIENNA 1888/1889, 54 (1979).

27. Sigmund Freud developed the theory of psychoanalysis. *See* LEFTON & VALVATNE, *supra* note 26. He focused on the unconscious and on how it directs human behavior. *See id.* "Almost a century ago, Freud pointed out the importance of the therapist's duty of discretion about the insights emerging from access to the unconscious. Since then, privacy and confidentiality have been the cornerstones of the psychotherapeutic relationship." Gutierrez-Lobos, et al., *supra* note 1.

28. Anna Freud, Sigmund Freud's daughter, is a renowned psychologist in the area of developmental psychology of children. *See* LEFTON & VALVATNE, *supra* note 26, at 475-77.

29. Alfred Adler was heavily influenced by Sigmund Freud, and many psychologists consider his theory an extension of Freud's. *See id.* Adler believed that social interaction is an important factor that influences personality development. *See id.*

30. Viktor Frankl developed what is generally known as the Third School of Viennese Psychiatry, the school of logotherapy. *See* VIKTOR FRANKL, MAN'S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY (3rd ed. 1984). Logotherapy stresses man's freedom to transcend suffering and find a meaning to his life regardless of his circumstances. *See id.* Frankl's survival of concentration camps at Dachau and Auschwitz was the basis for his formulation of the theory. *See id.*

31. Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) (1991).

32. *Id.* § 15.

33. *See* Gutierrez-Lobos, et al., *supra* note 1.

34. *See id.*

35. Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie

deed meets the elements of a criminal offense.[36] The Act is currently the only law that provides for strict confidentiality by psychotherapists with no exceptions.[37]

The Act does, however, allow—but does not mandate—breach of confidentiality in emergency situations.[38]

> In the case of the imminent threat of a criminal act involving the life, physical integrity, or freedom of the victim, the possible disadvantages as a result of the criminal act will generally have precedence over the breach of confidentiality, in which case the psychotherapist has a reporting obligation protected by law. The danger must be direct or imminent, and the occurrence of damage must be certain or highly probable. Public interests (legal proceedings or the health system in general) are not regarded as emergencies.[39]

In addition, breach of confidentiality is only allowed if other measures are insufficient to prevent the act of violence.[40]

B. *Rationale for the Act*

The Austrian Constitution and the European Convention on Human Rights protect personal privacy in general.[41] This protection encompasses individual privacy as well as the relationship with certain professionals such as clergy, attorneys, physicians, and therapists.[42] The Austrian Psychotherapy Act furthers these rights to privacy.[43] Professionals explain that the "duty of confidentiality is intended to protect people who seek psychotherapeutic treatment and accept the special and confidential relationship that this involves."[44] The Act further "contributes to a clearly defined

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(Psychotherapiegesetz) § 23 (1991). This penalty provision will likely be updated in January 2002 to include an amount of 3,634 Eurodollars instead of Austrian shillings. *See* Bundesgesetz über die Niederlassung und die Ausübung des freien Dienstleistungsverkers von Psychotherapeuten aus dem Europäischen Wirtschaftsraum (EWR-Psychotherapiegesetz) § 10 (1999). Three thousand six hundred and thirty-four Eurodollars is roughly equivalent to 50,000 Austrian schillings or 3,427 American dollars. *See* Expedia Currency Converter, *available at* http://www.expedia.com/pub/agent.dll?qscr=curc (last visited Jan. 21, 2001).

36. *See* Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) § 23 (1991).

37. *See* Gutierrez-Lobos, et al., *supra* note 1.

38. *See id.*

39. *Id.*

40. *See id.* Examples of alternative measures include an increase in the frequency of therapy sessions, drug treatment, hospital referral, or civil commitment. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *Id.*

psychotherapeutic relationship, thus acknowledging the importance of confidentiality for psychotherapy to be effective."[45]

C. *Definition of "Psychotherapist" under the Act*

The Act defines psychotherapy as:

> the comprehensive, deliberate and planned treatment, on the basis of a general and a special training, of disturbances in behaviour and states of disease conditions, due to psycho-social or also psycho-somatic causes, by means of scientific, psychotherapeutic methods, in an interaction between one or several treated persons and one or several psychotherapists, with the objective of mitigating or eliminating the established symptoms, to change disturbed patterns of behavior and attitudes, and to promote a process of maturing, development and sanity in the treated person.[46]

The Act applies to all individuals who complete the full psychotherapy training as defined by the Act[47] and those who engage in the listed activities with a patient, regardless of their respective professions.[48] Thus, social workers, probation officers, and others may be protected by the Act.[49] A professional who may also be subject to other laws may find greater protections under the Act.[50] Thus, a psychiatrist who qualifies under the law as a psychotherapist and defines his relationship as psychotherapist-patient rather than physician-patient is subject to the Act and not to the Austrian Medical Practice Act (Osterreichisches Arztegesetz).[51]

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45. *Id.*

46. Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) § 1(1) (1991).

47. *See id.* §§ 2-8.

48. *See id. See also* Gutierrez-Lobos, et al., *supra* note 1.

49. *See* Gutierrez-Lobos, et al., *supra* note 1.

50. *See id.*

51. *See id.* The authors point out that the Austrian Medical Practice Act, unlike the Austrian Psychotherapy Act, includes reporting obligations when "there is a suspicion of a punishable offense that has resulted in death or serious bodily harm, or if there is a suspicion of torture or neglect of a minor, juvenile, or defenseless person, even where minor bodily harm or health impairment results." *Id.* These exceptions to confidentiality are strictly governed: "Disclosure may be required for criminal proceedings, to insurance companies (in the case of specific, legally defined reporting obligations), or to government officials for certain diseases." *Id. See also* Osterreichisches Arztegesetz §§ 26-27 (1994).

D. Training Requirements & Prerequisites to Become a Psychotherapist

The Act specifies training requirements for psychotherapists.[52] These requirements include completion of a general preparatory instruction in psychotherapy and special training in psychotherapy, taught in theory and in practice.[53] The general training consists of a minimum of 765 hours of instruction in a variety of basic principles[54] and 550 hours of practical experience.[55] The special training consists of a minimum of 300 hours of instruction in a variety of areas,[56] with a minimum of 50 hours in one of the priority areas provided under the Act.[57] In addition, the special training requires 1600 hours of practical experience, with a minimum of 100 hours in one of the priority areas provided under the Act.[58] The Act also sets forth requirements for the training facilities.[59] In addition to these training requirements, the Act sets forth prerequisites for training to become a psychotherapist[60] and prerequisites for the independent exercise of

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52. *See* Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) §§ 2-8 (1991).

53. *See id.* § 2.

54. *Id.* § 3(1). These basic principles include information regarding psychotherapy, somatology and medicine, methodological principles of research and science, questions of ethics, and framework conditions for the exercise of psychotherapy. *See id.*

55. *Id.* § 3(2). The practical instruction includes individual or group self-experience, practical exercise in management of persons with behavior disturbances or with diseased persons, and attendance at practical exercises in supervision. *See id.*

56. *Id.* § 6(1). The areas include the theory of sound and psychopathological personality development, methods and techniques, personality and interaction theories, and psychotherapeutic literature. *See id.*

57. *Id.*

58. *Id.* § 6(2). These subject areas include teaching therapy, teaching analysis, and individual or group self-experience; practical psychotherapeutic knowledge gained from relations with persons with behavioral disturbances or disease, under the supervision of a psychotherapist; attendance at practical exercises with supervision; and psychotherapeutic activity with persons with behavior disorders or diseases. *See id.*

59. *See id.* §§ 4, 5, 7, 8.

60. *See id.* § 10. The Act requires that persons seeking preparatory psychotherapy training have legal capacity; have passed the completion examination of an upper-level secondary school; have completed special training for the sick nursing services or the medical-technical services; and have been admitted to attend preparatory psychotherapy instruction by decree of the Federal Chancellor, on account of aptitude, after obtaining an expert opinion of the Psychotherapy Advisory Council. *See id.* The Act requires that persons seeking special psychotherapy training have legal capacity; be at least twenty-four years of age; submit a written statement by a teaching facility that a training position will be available; have completed the preparatory instruction in psychotherapy and either have completed special training for the sick nursing services or the medical technical services, or have been admitted to attend special training in psychotherapy by way of decree by the Federal Chancellor; have completed a training course at an academy for social workers, a previous teaching institute for advanced social occupations, an academy of pedagogy, or a teaching institute with public teaching authorization for marriage and family counseling, or have completed the short study course in music therapy or a university training course in music therapy; or have completed studies of medicine, pegagogy, philosophy, psychology, publishing and communication science, theology,

psychotherapy.[61]

E. Prison Psychotherapists

Psychotherapists who treat patients in institutions such as prisons are not expressly mentioned in the Act.[62] However, some Austrian practitioners suggest that the Act protects even psychotherapists who treat inmates; thus, these psychotherapists generally do not have a duty to protect third parties.[63] The rationale for this inclusion is:

> Offenders released from prison need to be able to talk freely about their criminal intentions so that they can be prevented from actually committing crimes. If this protection [of confidentiality] were not granted, the therapist or probation officer would become an informer rather than someone capable of bringing about a change.[64]

However, the strict measure of confidentiality cannot realistically apply where the offender's sentence is determined by his success in therapy.[65] Despite this problem, many prison psychotherapists in Austria still invoke their strict duty of confidentiality under the Act and refuse to give an opinion as to whether authorities should change the conditions of detention.[66]

F. Psychotherapists Are Not Witnesses or Experts in Civil or Criminal Trials

Under the Act, courts cannot compel Austrian psychotherapists to serve as witnesses or experts in civil or criminal cases.[67] In addition to the Act, the

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or studies for the teaching profession at upper-level secondary school; or can prove completion of a full study course at an officially-recognized international university. *See id.*

61. *See id.* § 11. The Act requires that persons who wish to be authorized to independently practice psychotherapy shall have successfully completed the preparatory and special instruction in psychotherapy, have legal capacity, be at least twenty-eight years of age, have submitted evidence of their physical fitness and reliability as required to carry out professional duties, and have been admitted to the List of Psychotherapists after the Psychotherapy Advisory Council has been heard. *See id.*

62. *See* Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) (1991).

63. *See* Gutierrez-Lobos, et al., *supra* note 1.

64. *Id.*

65. *See id.* In Austria, the release of offenders adjudged to be responsible and mentally disordered is conditioned upon the success of therapeutic measures. *See id.*

66. *See id.* This problem has led prison officials to circumvent the effects of the Act by organizing their own treatment groups and social learning programs. *See id.*

67. *See id.* This limitation presumably stems from Section 15 of the Act. *See* Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) § 15 (1991). *See* Gutierrez-Lobos, et al., *supra* note 1. In general, however, Austrian

reporting obligation of therapists is limited by the Amendment to the Criminal Procedure Act (Gesetzesmaterialen) of 1993.[68] According to the Criminal Procedure Act, reporting is not required if doing so would be detrimental to the performance of an official duty, the effectiveness of which depends on a personal trust relationship.[69] The Criminal Procedure Act encompasses the work of psychosocial professions, i.e., social workers and probation officers, within the arena of criminal proceedings.[70]

The Austrian Psychotherapy Act does not expressly clarify whether patients themselves may release psychotherapists from the duty of confidentiality.[71] This question is disputed.[72] However, it is generally accepted that a patient's release is not binding on a psychotherapist.[73] "In a leading case, the Austrian Supreme Court opined that the protective object of the discretionary right to withhold testimony concerns the therapist-patient relationship rather than the patient and that this right cannot, therefore, be waived by the patient alone."[74] When a patient attempts to release this right, the therapist must consider whether the patient has the ability to assess the consequences of the release on the basis of medical rather than legal interests.[75] In these situations, only the therapist can decide if disclosure would harm the patient.[76]

The rationale for limiting psychotherapists' testimony is not only to protect the psychotherapist-patient relationship, but also because psychotherapists are poorly suited to give legal testimony:

> Clinical and forensic undertakings are dissimilar in that they are directed at different (although overlapping) realities, which they seek to understand in correspondingly different ways. The process of psychotherapy is a search for meaning more than for facts. The therapist accepts the patient's narrative as representing an inner, personal reality. . . . In court, therapists can describe only impressions, countertransference reactions, and assumptions regarding the underlying psychic conflicts. The truth emerging in therapy is subjective and selective; its objective validity cannot be

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physicians may be compelled to testify in criminal proceedings. *See id.*

68. *See* Gutierrez-Lobos, et al., *supra* note 1.
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*
74. *Id.*
75. *See id.*
76. *See id.*

> assessed without data about external circumstances. Psychotherapists, therefore, cannot produce proof in the legal sense.[77]

The Act does not differentiate between psychotherapists as fact witnesses or as paid experts because the difference is not important—psychotherapists are inadequate witnesses in either vein.[78]

G. *Do Austrian Psychotherapists Have a Duty to Protect the General Public?*

Under the strict provisions of the Act, a breach of patient confidentiality may be excusable in the case of a highly probable danger.[79] However, the "danger must be direct or imminent, and the occurrence of damage must be certain or highly probable."[80] The Act does not regard public interests such as legal proceedings or the health system in general as emergencies that merit breach of patient confidentiality.[81] However, some Austrian practitioners note that, although Austrian law does not include an equivalent of the *Tarasoff* rule, Austrian psychotherapists still have a duty to the general public.[82]

IV. UNITED STATES

The United States, on the other hand, chose to create a duty of therapists to warn potential victims when patients voice threats of serious bodily harm.[83] The United States also prioritizes the well being of its children by requiring psychotherapists and others to report child abuse.[84] In so choosing, the United States places greater value on the right of the public to be protected from dangerous persons.[85] In addition, the United States uses mental health service providers as fact witnesses and experts in trials.[86] The argument has been made that the United States' exceptions threaten to swallow the confidentiality rule.[87]

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77. *Id.*
78. *See id.*
79. *See id.*
80. *Id.*
81. *See id.*
82. *See id.*
83. *See Tarasoff*, 551 P.2d at 339-40.
84. *See* John R. Murphy III, *In the Wake of Tarasoff: Mediation & the Duty to Disclose*, 35 CATH. U. L. REV. 209, 218 (1985).
85. *See id.*
86. *See* Merton, *supra* note 14, at 284-88.
87. "[T]he exceptions and implied waivers are so many and so broad that it is difficult to postulate a case in which the privilege applies." Gutierrez-Lobos, et al., *supra* note 1.

A. *General Right of Patients to Confidentiality*

In the United States, courts have held that a patient's right to confidentiality stems from the Constitution.[88] Courts have cited the right to privacy and right to receive treatment as constitutional bases for this confidentiality right of patients.[89] However, courts have held that this confidentiality right is not absolute.[90] In addition, the right inheres in the patient; a psychotherapist may not override a patient's waiver of the privilege to psychotherapeutic communication.[91]

The medical profession in the United States also acknowledges the value of patient confidentiality. The American Code of Medical Ethics provides:

> The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information

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88. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 599-603 (1977) (discussing constitutional right to privacy of patient information, but upholding statute against constitutional attack); Doe v. City of New York, 15 F.3d 264, 269 (2d Cir. 1994) (holding that individuals have a constitutional right of privacy in their medical information and that courts should apply a balancing test to determine whether the government's interest in disclosure is substantial enough to outweigh the privacy interest); Wyatt v. Stickney, 325 F.Supp. 781, 784 (M.D.Ala. 1971) (discussing right to receive treatment); People v. Feagley, 535 P.2d 373, 386-87 (Cal. 1975) (discussing constitutional right of involuntarily committed patients to receive treatment); *In re* Lifschutz, 467 P.2d 557, 567-68 (Cal. 1970) (reasoning that the confidentiality of the psychotherapeutic relationship falls within the zones of privacy created by the Bill of Rights, as discussed in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). *See also Tarasoff*, 551 P.2d at 347 (Mosk, J. dissenting) (suggesting that imposition of a duty to warn will increase the risk of civil commitment of those who should not be confined, thus increasing the risk that the right to personal liberty will be violated).

89. *See, e.g.*, *Wyatt*, 325 F.Supp. at 784 (discussing right to receive treatment); *Feagley*, 535 P.2d at 386-87 (discussing constitutional right of involuntarily committed patients to receive treatment); *Lifschutz*, 467 P.2d at 567-68 (reasoning that the confidentiality of the psychotherapeutic relationship falls within the zones of privacy created by the Bill of Rights, as discussed in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

90. *See, e.g.*, *Whalen*, 429 U.S. at 602; *Lifschutz*, 467 P.2d at 568 (holding that not all state interference with such confidentiality is prohibited).

91. *See Lifschutz*, 467 P.2d at 573 (rejecting psychotherapists claims that compulsion of privileged information violated his right to privacy, constituted an unconstitutional taking of his property right in his profession, unconstitutionally constricted the practice of medicine, and denied him equal protection under the law); R.P. Davis, Annotation, *Who May Waive Privilege of Confidential Communication to Physician by Person Since Deceased*, 97 A.L.R.2d 393 (1999) (noting that generally only the patient may waive privilege).

> without express consent of the patient, unless required to do so by law.[92]

In addition, commentators suggest that breaches of confidentiality may hinder a client's relationship with his therapist.[93] Because the treatment of potentially dangerous offenders, by its nature, encourages the disclosure of violent fantasies, a duty to warn of these disclosures creates a quandary for therapists.[94] In this vein, the *Tarasoff* court stated:

> Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.[95]

Thus, the line between the need to disclose a threat and the need to maintain patient confidentiality is a dim one, offering little guidance for therapists.[96]

B. Exceptions to Confidentiality

Although the United States recognizes the value of a patient's right to confidentiality, it allows numerous exceptions to the right.[97] The duty to warn third parties of danger presented by patients and the duty to report child abuse are among these exceptions. In addition, there are numerous exceptions to the psychotherapist-patient privilege in court cases.[98]

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92. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.05 (2000).

93. *See* Merton, *supra* note 14, at 306-08. In addition to this discussion, the author addresses the possibility that disclosure of potential weaknesses of treatment will allow a deeper trust in the professional relationship. *See id.* at 271.

94. *See id.* at 306-08.

95. *Tarasoff*, 551 P.2d at 347.

96. *See* Scott Rogge, M.D., J.D., *Liability of Psychiatrists Under New York Law for Failing to Identify Dangerous Patients*, 20 PACE L. REV. 221, 224 (2000).

97. *See, e.g.*, Robert Sadoff, *Ethical Obligations for the Psychiatrist: Confidentiality, Privilege, and Privacy in Psychiatric Treatment*, 29 LOY. L.A. L. REV. 1709, 1710-11 (1996) (noting that the privilege may be overcome by statutory exceptions or where necessary to protect the public or a third party).

98. *See id. See also* MIL. R. EVID. 513. This military rule deals with the psychotherapist-patient privilege in military tribunals and sets forth eight exceptions to the privilege: (1) when the patient is dead; (2) when the communication involves evidence of spouse or child abuse, or

C. *Duty to Warn*

Prior to *Tarasoff*, therapists were not held responsible for the violent acts of their patients unless they had a special relationship with the patient or the victim. This responsibility was generally limited to situations where the "clinician had physical control or custody of the patient . . . , knew in advance of the patient's violent intentions, and failed to exercise appropriate control."[99] In other words, therapists "previously risked liability for negligently allowing patients with violent histories and intentions to be released or to escape from their custody and control when those patients later caused harm to other people."[100]

However, in 1976, the status of the common law changed with the case of *Tarasoff v. Regents of University of California.*[101] This landmark case established the duty to warn in the United States.[102] In *Tarasoff*, police officers and therapists failed to warn a victim of a patient's intention to kill her.[103] The patient killed the victim.[104] The victim's parents filed suit against the police officers and therapists for failure of their duty to warn the victim and failure to confine the patient.[105] The court rejected all claims against the police officers.[106] The court also rejected the claim against the therapists for failure to confine the patient.[107] However, the court held that the therapists' special relationship with the patient transferred to the victim.[108] Therefore, the court held, the therapists had a duty to use reasonable care in warning the victim of danger.[109] In so holding, the court set forth the following rule:

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neglect, or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or child of either spouse; (3) when there is a duty to report under federal or state law, or service regulation; (4) when the service provider believes that the patient's mental or emotional condition makes the patient a danger to any person, including the patient; (5) if the communication clearly contemplates future commission of a fraud or crime, or if the services of the provider were sought to aid the patient in such activity; (6) when necessary to insure the safety and security of military personnel, military dependents, military property, classified information, or accomplishment of a military mission; (7) when an accused offers statements or evidence concerning his mental condition in defense, extenuation or mitigation, as necessary in the interests of justice; and (8) when constitutionally required. *See id.* 513(c)(1)-(8).

99. Rogge, *supra* note 96, at 222. *See also Tarasoff*, 551 P.2d at 335.
100. Rogge, *supra* note 96, at 222. *See also Tarasoff*, 551 P.2d at 335.
101. *See Tarasoff*, 551 P.2d at 339-40.
102. *See id.*
103. *See id.* at 340.
104. *See id.* at 339.
105. *See id.* at 340.
106. *See id.* at 353.
107. *See id.* at 351.
108. *See id.* at 344.
109. *See id.* at 340.

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.[110]

The court went on to clarify a therapist's duty by stating that the therapist must exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."[111] Within this range, the court continued, "the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence."[112] The standard used to determine the adequacy of the therapist's conduct is the traditional negligence standard of reasonable care under the circumstances.[113]

In the twenty-five years since the California Supreme Court decided *Tarasoff*, more than twenty-five states have recognized the duty to warn, by statute or case law.[114] Other jurisdictions explicitly reject the *Tarasoff* doctrine.[115] Still other courts have distinguished *Tarasoff* from certain factual situations.[116] Yet another line of cases applies the *Tarasoff* doctrine to new

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110. *Id.*

111. *Id.* at 345 (quoting Bardessono v. Michels, 478 P.2d 480 (Cal. 1970)).

112. *Tarasoff*, 551 P.2d at 345.

113. *See id.*

114. *See* Bradley v. Ray, 904 S.W.2d 302, 307-09 (Mo. Ct. App. 1995) (discussing the status of *Tarasoff* legal developments nationwide). *See, e.g.*, Almonte v. New York Med. College, 851 F. Supp. 34 (D. Conn. 1994); Naidu v. Laird, 539 A.2d 1064, 1072 (Del. 1988) (holding special relationship between mental health professional and patient supports duty to take steps to protect third parties); Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1313 (Ohio 1997), *reconsid. denied*, 676 N.E.2d 534 (Ohio 1997); Hembree v. State, 925 S.W.2d 513 (Tenn. 1996).

115. *See, e.g.*, Green v. Ross, 691 So.2d 542, 543-44 (Fla. Dist. Ct. App. 1997) (finding that Florida legislature had not established a cause of action for failure to warn); Lee v. Corregedore, 925 P.2d 324, 336-37 (Haw. 1996) (limiting the *Tarasoff* holding to cases involving potential victims of violent assault, while declining to extend it to risks of self-inflicted injury); Thapar v. Zezulka, 994 S.W.2d 635, 640 (Tex. 1999) (holding psychiatrist not liable for death of third party killed by patient because psychiatrist had no duty to warn victim and had duty to maintain patient's confidentiality); Nasser v. Parker, 455 S.E.2d 502, 502 (Va. 1995) (finding patient did not have special relationship with psychiatrist and hospital so psychiatrist and hospital not liable for patient's murder of third party).

116. *See, e.g.*, Riley v. United Health Care of Hardin, Inc., 165 F.3d 28, 1998 WL 598733, **4 (6th Cir. 1998) (patient made non-specific threats); Boulanger v. Pol, 900 P.2d 823, 834-35 (Kan. 1995) (holding psychiatrist had no duty to warn where the victim was already aware of

situations, new classes of health providers, and other defendants who may be held responsible for an individual's conduct.[117]

In addition to changes in case law, states have changed confidentiality and malpractice laws to limit, permit, or mandate the duty to warn.[118] These statutes often include immunity from *Tarasoff*-type lawsuits in return.[119] Several states extend the duty to warn to new classes of professionals in new situations.[120] For example, health care workers have a duty to warn third-party contacts of risks of exposure to a patient's transmissible disease, such as HIV/AIDS or active tuberculosis.[121] Despite clarifying statutory or case law, *Tarasoff* has "arguably become the de facto standard of care in the mental health community."[122]

The American Code of Medical Ethics incorporates the *Tarasoff* duty to warn by suggesting that confidentiality, although important, is "subject to

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the danger posed by the patient and because no special relationship existed between psychiatrist and voluntary mental patient); Bishop v. South Carolina Dept. of Mental Health, 473 S.E.2d 814, 816 (S.C. App. 1996), *aff'd as modified*, 502 S.E.2d 78 (S.C. 1998) (victim had prior knowledge of the patient's dangerousness); Limon v. Gonzaba, 940 S.W.2d 236, 241 (Tex. App. 1997) (victims neither identifiable nor foreseeable).

117. *See, e.g.*, Garamella v. New York Med. College, 23 F. Supp.2d 167, 174 (D. Conn. 1998) (psychiatric resident's supervisor liable for failing to notify resident's medical school that resident was a pedophile); Valentine v. On Target, Inc., 727 A.2d 947, 948 (Md. 1999) (holding gun dealer owed no duty to third parties to exercise reasonable care in the display and sale of handguns to prevent the theft and illegal use of handguns against third parties); Popple v. Rose, 573 N.W.2d 765 (Neb. 1998) (holding parents may be sued for failure to warn babysitter of their son's known dangerous sexual propensities, but holding that son's dangerous sexual propensities were not known in that case); J.S. v. R.T.H., 714 A.2d 924, 936 (N.J. 1998) (spouse may be held liable because she had reason to know of her husband's sexually abusive behavior against neighbor's children yet did nothing to stop it); Ludlow v. City of Clifton, 702 A.2d 506, 509 (N.J. Super. Ct. 1997) (applying Tarasoff to suit against school board and child study team, but holding defendants not liable because statutory discretionary duty fulfilled); Cain v. Rijken, 717 P.2d 140, 140 (Or. 1986) (*en banc*) (mental health provider may be liable for failure to warn of patient's inability to drive safely); Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988) (recognizing duty of psychiatrist to inform police where patient exhibits generalized dangerous tendencies, but no readily identifiable target); State v. Agacki, 595 N.W.2d 31, 38 (Wis. Ct. App. 1999) (applying public safety exception to confidentiality although the threat was not particularized). *See also* JAMES C. BECK, CONFIDENTIALITY VERSUS THE DUTY TO PROTECT: FORESEEABLE HARM IN THE PRACTICE OF PSYCHIATRY (James C. Beck ed. 1990); LEON VANDECREEK & SAMUEL KNAPP, TARASOFF AND BEYOND: LEGAL AND CLINICAL CONSIDERATIONS IN THE TREATMENT OF LIFE-ENDANGERING PATIENTS (rev. ed. 1993). *See generally* Michael L. Perlin, *Tarasoff at the Millennium: New Directions, New Defendants, New Dangers, New Dilemmas*, PSYCHIATRIC TIMES, Nov. 1999.

118. *See* Rogge, *supra* note 96, at 225. *See also* CURRAN ET AL., HEALTH CARE LAW AND ETHICS 193-99 (5th ed. 1998).

119. *See, e.g.*, Hutchinson v. Patel, 637 So.2d 415, 418-19 (La. 1994). *See generally* Michael R. Geske, *Statutes Limiting Mental Health Professionals' Liability for the Violent Acts of Their Patients*, 64 IND. L.J. 391, 403 (1989).

120. *See* Geske, *supra* note 119, at 398-400.

121. *See* Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 41-44 (1998).

122. Rogge, *supra* note 96, at 229.

certain exceptions which are ethically and legally justified because of overriding social considerations."[123] Threat of serious harm to another is one of these considerations:

> Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities.[124]

The duty to warn exception has numerous proponents, both in the United States and internationally.[125]

Yet, the *Tarasoff* duty to warn has also been criticized because its holding leaves several questions unanswered, thus offering little guidance to therapists.[126] For instance, which threats are "serious and imminent"? If not mentioned by name, when is a threatened victim "identifiable"? One author recounts a case study that exemplifies the difficulty of victim identification.[127] The case study involves a man who therapists found to be a general danger to women.[128] However, the therapists could not determine a particular woman or group of women subject to the danger.[129] Thus, the therapists could not

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123. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.05 (2000).

124. *Id.*

125. *See, e.g.*, Perreira v. State, 768 P.2d 1198, 1201 (Colo. 1989) (holding that there are situations in which the need to protect an individual or the community from the threat of harm from a patient may outweigh the strong policy in favor of non-disclosure of patient confidences); Rocca v. Southern Hills Counseling Center, Inc., 671 N.E.2d 913, 917-19 (Ind. Ct. App. 1996) (holding that, while free and frank communication should be promoted to aid proper diagnosis and treatment, public policy supports disclosure of confidential information when appropriate); Estates of Morgan, 673 N.E.2d at 1332 (held a psychotherapist liable for failing to control a schizophrenic patient despite pleas of patient's parents when the patient subsequently killed his parents); Emerich v. Philadelphia Center for Human Development, Inc., 720 A.2d 1032, 1045 (Pa. 1999) (found a duty to warn in accord with *Tarasoff*, but found that the mental health center had fulfilled its duty by warning the victim not to go to the patient's apartment); Agacki, 595 N.W.2d at 38 (applying public safety exception to confidentiality although the threat was not particularized); Charles E. Cantu, *Bitter Medicine: A Critical Look at the Mental Health Care Provider's Duty to Warn in Texas*, 31 ST. MARY'S L. J. 359, 379-405 (2000) (discussing Texas's rejection of the *Tarasoff* doctrine, and suggesting that the doctrine should be adopted in Texas); Vittorio Fineschi, et al., *The New Italian Code of Medical Ethics*, 23 J. OF MED. ETHICS 239, 243 (1997) (suggesting that the new Italian Code of Medical Ethics provides for an exception to patient confidentiality when there is potential for harm to a third party); Dr. Thaddeus H. Jozefowicz, *The Case Against Having "Professional Privilege" in the Physician-Patient Relationship*, 16 MED. & L. 385, 391 (1997) (arguing in favor of the trend toward allowing exceptions to patient confidentiality rights in order to protect the public).

126. *See* McClarren, *supra* note 18, at 293.

127. *See* Dickinson, *supra* note 20, at 302.

128. *See id.*

129. *See id.*

realistically fulfill the duty to warn.[130] Another question unanswered by the *Tarasoff* holding is what "reasonable steps" should a therapist take to protect the threatened party. Exactly what are the "standards of the profession" by which therapists are to measure their activity?[131]

D. Duty to Report Child Abuse

A duty to report child abuse exists to some degree in all fifty states.[132] The status of this duty in the psychotherapist-patient relationship is unclear. Some courts have held that statutes requiring the reporting of actual or suspected child abuse expressly make the psychotherapist-patient privilege inapplicable.[133] However, other jurisdictions have completely nullified the privilege.[134] These jurisdictions have protected therapists' discretion by suggesting that the question of whether to disclose suspected child abuse is a matter left to the individual therapist's professional and moral judgment.[135]

E. Use of Mental Health Service Providers as Witnesses or Experts in Trials

The United States uses psychotherapists as fact witnesses and experts in civil and criminal trials.[136] American courts rely upon mental health professionals to predict offender dangerousness in sentencing hearings.[137] In addition, despite a general psychotherapist-patient evidentiary privilege, courts may compel therapists to testify in a variety of situations.[138] In Austria,

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130. *See id.*

131. This problem was suggested in *Tarasoff*, 551 P.2d at 354 (Mosk, J., dissenting).

132. *See* Murphy, *supra* note 84, at 220.

133. *See* People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. Ct. App. 1982).

134. *See, e.g.*, Maryland Att'y Gen. Op., 1977 Md. AG LEXIS 107, 9 (1977) (holding that privilege applies despite child abuse reporting statute). *See also* Wisconsin Att'y Gen. Op. 10-87, 1987 Wisc. AG LEXIS 60, 11 (1987) (holding that if a report is made in good faith, the physician will be immune from civil or criminal liability).

135. *See supra* note 133.

136. *See* Merton, *supra* note 14, at 284-88. *See also* William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: the Admissibility of Testimony from Mental Health Experts Under Daubert/Kumho Analyses*, 5 PSYCHOL. PUB. POL'Y & L. 224, 238 (1999) (suggesting that much expert testimony by mental health professionals should be excluded under reigning case law).

137. *See id.*

138. *See, e.g., In re* Lifschutz, 467 P.2d 557, 561 (Cal. 1970) (holding that a litigant-patient exception to the statutory psychotherapist-patient privilege does not unconstitutionally infringe rights of privacy of either psychotherapists or their patients); *Stritzinger*, 668 P.2d at 742-45 (holding that a psychologist's testimony regarding patient's admission of sexual conduct was not properly admitted since psychologist had previously fulfilled reporting obligation under statute when he reported suspected child abuse based on communication from patient's child); Ritt v. Ritt, 238 A.2d 196, 198-99 (N.J. Ct. App. 1967) (holding that communications between plaintiff-wife and psychiatrist were not protected from disclosure and reasoning that the patient only had a limited right to confidentiality, subject to exceptions created by supervening interests

however, courts may not compel psychotherapists to testify in trials.[139] Even if an Austrian patient waives his right to confidentiality, he may not do so alone.[140] The Act deems the psychotherapist-patient relationship an entity in and of itself, so that one party may not waive the privilege without the cooperation of the other party.[141]

In 1996, the U.S. Supreme Court first recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*.[142] In *Jaffee*, a police officer received extensive counseling from a licensed clinical social worker after the police officer shot and killed a man.[143] The family of the deceased brought suit against the officer and wanted to compel disclosure of the content of the therapy sessions.[144] The Court recognized the privilege under Federal Rule of Evidence 501.[145] That Rule states, " . . . the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."[146] The Court described the common law principles underlying the recognition of testimonial privileges:

> For more than . . . three centuries it has now been recognized as a fundamental maxim that the public has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule. Exceptions from the general rule

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of society. Here, the supervening interest was the fact that institution of litigation by the patient constituted vitiation of her right to absolute confidentiality), *rev'd*, 244 A.2d 497, 499 (the New Jersey Supreme Court held that the issue had been subsequently decided because the New Jersey legislature had enacted a statute creating the physician-patient privilege that would cover the psychiatric relationship here); AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.06 (2000) (providing that physicians may communicate with a patient-plaintiff's attorney with patient consent, and may testify in court in any personal injury or related case); John C. Williams, J.D., Annotation, *Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons Threatened by Patient*, 83 A.L.R.3d 1201 (2000) (discussing state rules of evidence pertaining to the physician-patient privilege).

139. *See* Gutierrez-Lobos, et al., *supra* note 1. Physicians in Austria, however, may be compelled to testify. *See id.*

140. *See id.*

141. *See id.*

142. Jaffee v. Redmond, 116 S.Ct. 1923, 1930 (1996). The Court also extended the privilege to include licensed social workers. *See id.* at 1931.

143. *See id.* at 1925.

144. *See id.*

145. *See id.* at 1930.

146. FED. R. EVID. 501.

> disfavoring testimonial privileges may be justified, however, by a ['Jpublic good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.['][147]

The Court then weighed the benefit of requiring testimony against the benefit of allowing a psychotherapist-patient privilege.[148] The Court noted that the privilege serves the public interest by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."[149] The Court further reasoned

> . . . the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.[150]

In adopting the psychotherapist-patient privilege, the Court was reassured by the fact that all fifty states and the District of Columbia had enacted some form of the privilege.[151] In adopting the rule, the Court further rejected a case-by-case balancing of interests test, reasoning that making confidentiality "contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[152]

Justice Scalia dissented in *Jaffee*, arguing that application of the privilege would create injustice, including loss of evidence of possible wrongdoing.[153] Justice Scalia further questioned the psychotherapist's ability

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147. *Jaffee*, 116 S.Ct. at 1928 (internal citations omitted). *See also* Kathleen J. Cerveny & Marion J. Kent, *Recent Decision: Evidence Law—The Psychotherapist-Patient Privilege in Federal Courts*, 59 NOTRE DAME L. REV. 791, 815-16 (1984) (advocating for a federal psychotherapist-patient privilege and discussing the benefits of the privilege in light of the court's need for evidence).

148. *See Jaffee*, 116 S.Ct. at 1929.

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.* at 1932.

153. *Id.* (Scalia, J., dissenting).

to maintain the public's mental health.[154] In addition, Justice Scalia suggested that fear of later litigation would not likely deter a patient from seeking psychological counseling or being completely truthful to his therapist.[155] Justice Scalia also thought it unjust that a patient could seek the benefit of honesty in counseling and still have the benefit of dishonesty in court.[156] Finally, Justice Scalia took issue with the Court's extension of the privilege to licensed social workers, arguing that such professionals are not as highly skilled as psychotherapists.[157] Therefore, urged Scalia, the Court should not encourage consultation with a social worker to the extent it encourages consultation with a psychotherapist.[158]

Although the Supreme Court adopted a psychotherapist-patient privilege, its limits are not clear.[159] For instance, where a psychotherapist divulged privileged information to prevent harm to a third party, but the third party is harmed anyway, may a court then compel the psychotherapist to testify in a civil or criminal proceeding after the harm has occurred?[160] In addition, the privilege is subject to exceptions.[161]

The American Medical Association Code of Medical Ethics also recognizes that physicians may breach patient confidentiality for litigation

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154. *See id.* at 1934.

155. *See id.*

156. *See id.* at 1935. However, it could also be argued that persons who seek help for their mental distress should not be punished for doing so. In Justice Scalia's scenario, the person who seeks aid for his problem would be treated worse in court than the person who did not seek help. *See id.*

157. *See id.* at 1937.

158. *See id.*

159. *See* George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 33 (1999).

160. *See id.* The author suggests that, although mental health professionals should be compelled to testify in restraining order proceedings or hearings regarding involuntary commitment of dangerous patients, the professionals should not be compelled to testify against their patients after the threat has been carried out because public policy safety concerns are not met by breaching the privilege once the threat has been fulfilled. *See id.*

161. *See Jaffee*, 116 S.Ct. at 1923. *See also In re* Lifschutz, 467 P.2d 557, 561 (Cal. 1970) (holding that a litigant-patient exception to the statutory psychotherapist-patient privilege does not unconstitutionally infringe rights of privacy of either psychotherapists or their patients); People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. Ct. App. 1982) (holding that a psychologist's testimony regarding patient's admission of sexual conduct was not properly admitted since psychologist had previously fulfilled statutory reporting requirement by reporting suspected child abuse based on communication from patient's child); Ritt v. Ritt, 238 A.2d 196, 198-99 (N.J. Ct. App. 1967) (holding that communications between plaintiff-wife and psychiatrist were not protected from disclosure during depositions, and reasoning that the patient only had a limited right to confidentiality, subject to exceptions created by supervening interests of society. Here, the supervening interest was the fact that institution of litigation by the patient constituted vitiation of her right to absolute confidentiality), *rev'd*, 244 A.2d 497, 499 (the New Jersey Supreme Court held that the issue had been subsequently decided because the New Jersey legislature had enacted a statute creating the physician-patient privilege that would cover the psychiatric relationship here).

purposes.[162] The Code provides that physicians may communicate with a patient-plaintiff's attorney with patient consent or may testify in court in any personal injury or related case.[163]

V. COMPARISON OF AUSTRIAN AND AMERICAN LAWS

Austria places great emphasis on confidentiality as a tool to encourage open discourse within treatment.[164] But is it really possible to know why a patient would not tell a psychotherapist about a violent tendency? Perhaps he did not trust his psychotherapist, perhaps he did not premeditate the act, or perhaps he was unwilling to share his fantasy. These inherent problems in measuring the subjective state of patients make it difficult to measure the relative success of the Austrian and United States programs. However, discussion of the two different systems in light of several concerns offers some insight.

A. *Ability of Psychotherapists to Accurately Predict Dangerous Behavior*

A major concern relating to psychotherapists' treatment of dangerous patients is lack of ability to accurately predict dangerous behavior.[165] The United States addresses this issue by erring on the side of caution and requiring psychotherapists to break confidentiality when serious bodily injury to a third person is probable.[166] Austria addresses the problem by giving psychotherapists the discretion to determine whether or not they must take action to avert injury to a third party.[167] However, Austrian professionals concede that psychotherapists are incapable of offering reliable evidence for

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162. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.06 (2000). This is not unlike Austrian law, wherein physicians may be compelled to testify. *See* Gutierrez-Lobos, et al., *supra* note 1. However, physicians who are also covered by the Austrian Psychotherapy Act may not be compelled to testify. *See id.*

163. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.06 (2000).

164. *See* Gutierrez-Lobos, et al., *supra* note 1.

165. *See* People v. Burnick, 535 P.2d 352, 365 (Cal. 1975). The Court in *Burnick* suggests that psychiatric predictions of violence are inherently unreliable. *See id. See also* Hill, *supra* note 20, at 137-38 (discussing a case in which prediction of dangerousness was especially problematic); Kane & Sigel, *supra* note 20, at 75-78 (addressing the difficulty in predicting dangerousness and suggesting that evaluations are often inconsistent due to different approaches to examinations, different methodologies followed, and different perspectives in collecting and interpreting data); Merton, *supra* note 14, at 296-301 (discussing in depth the difficulty of predicting dangerousness); Weiss, *supra* note 20 (suggesting a particular assessment method to more accurately assess inmate dangerousness, but conceding that accurate assessment of dangerousness is difficult).

166. *See Tarasoff*, 551 P.2d at 339-40.

167. *See* Gutierrez-Lobos, et al., *supra* note 1.

court proceedings, thus courts should not call them as fact or expert witnesses.[168]

Courts and commentators have criticized the American *Tarasoff* rule largely because it depends upon therapists' ability to predict dangerousness:

> ['']In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness[.']. . . Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals.[169]

Judge Mosk went on to state that a duty to warn "will take us from the world of reality into the wonderland of clairvoyance."[170]

Judge Mosk's prediction is not without support. For example, one psychiatrist recounts a case that exemplifies the difficulty of predicting dangerousness.[171] The case involved a man with severe depression who admitted himself to a psychiatric hospital in September, 1998.[172] On admission, the man claimed that he had, several years before, sexually abused several children and his pet dog.[173] He further claimed a continuing urge to go after children.[174] Unfortunately, the day after admission, the man was missing.[175] The psychiatrist explains the hospital's quandary:

> At this stage, we had no clear evidence on which to assess whether he was a child abuser or not. It was decided initially to inform the police that our patient had absconded, was considered to be a risk to himself, and should be returned to

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168. *See id.*

169. *Tarasoff*, 551 P.2d at 354 (quoting People v. Burnick, 535 P.2d 352 (Cal. 1975); Murel v. Baltimore City Criminal Court, 407 U.S. 355, 364-65 (1972)) (emphasis in original).

170. *Tarasoff*, 551 P.2d at 354 (Mosk, J., dissenting).

171. *See* Hill, *supra* note 20, at 137-38.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

> the ward urgently. It was decided not (at least initially) to discuss his statements about the historical child abuse. In fact, he returned to the ward before it was felt necessary to inform the police.[176]

Upon his return, the man said he no longer had sexual desire for children but still admitted to previously abusing children and his pet dog.[177] Still, the psychiatric staff did not know if these claims were true or were merely delusions of a man seriously depressed.[178] An investigation revealed that neither the police nor social services knew the man, and no complaint had ever been filed against him.[179] The man provided some specific information about the abuse but refused to provide names of any of his claimed victims.[180] Despite the lack of concrete evidence of the man's potential danger to society, the psychiatrist decided that the "duty to protect the public from possible risk was sufficient [enough] that [he] had to involve other agencies."[181] Thus, the psychiatrist disclosed the potential risk to personnel of various social service and police agencies.[182] Interestingly, the psychiatrist was able to do so with the man's consent.[183]

Another problem with prediction of dangerousness is that evaluations are often inconsistent due to different approaches to examinations, different methodologies followed, and different perspectives in collecting and interpreting data.[184] The case of Texas psychiatrist James Grigson is indicative of this problem.[185] Grigson has been nicknamed "Dr. Death" because he has deemed every criminal defendant he has interviewed a danger to society.[186]

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176. *Id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. *See id.*
181. *Id.*
182. *See id.*
183. *See id.* There is no suggestion, however, that patient consent to disclosure under these circumstances is the norm. *See id.*
184. *See* Kane & Sigel, *supra* note 20, at 75-78 (addressing the difficulty in predicting dangerousness and suggesting that evaluations are often inconsistent due to different approaches to examinations, different methodologies followed, and different perspectives in collecting and interpreting data). *See also* People v. Burnick, 535 P.2d 352, 365 (Cal. 1975) (suggesting that psychiatric predictions of violence are inherently unreliable); Grove & Barden, *supra* note 136, at 238 (suggesting that even standardized criteria such as Rorschach tests and disorders listed in the DIAGNOSTIC AND STATISTICAL MANUAL IV would fail to meet the current reliability standards for expert testimony).
185. *See* Merton, *supra* note 14, at 287. The author suggests that "[i]t was the profession's willingness to accept attribution of peculiar expertise in predicting future conduct that landed psychiatrists in the *Tarasoff* quandary." *Id.* at 288.
186. *See id.* at 287.

The result of each determination was a death sentence for the criminal defendant.[187]

In essence, the U.S. rule holds psychotherapists liable for a task they admittedly cannot perform.[188] The *Tarasoff* court disputed this point:

> We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that ['reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.']'[189]

However, it is not entirely clear that all therapists exercise equal degrees of skill, knowledge, and care under similar circumstances.[190] In addition, despite problems inherent to prediction, American courts rely upon therapists' predictions of dangerousness when sentencing offenders.[191]

Austria, on the other hand, does not hold psychotherapists liable for failing to warn third parties based upon predictions of dangerousness.[192] It does, however, give psychotherapists the discretion to warn third parties in cases of imminent danger.[193] Austria does not utilize psychotherapists as expert witnesses due to the difference between therapeutic reality and forensic reality.[194]

1. Encouragement of Open Discourse Within Treatment

Both the United States and Austria recognize the importance of encouraging open discourse in the treatment relationship:[195]

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187. *See id.*

188. *See Tarasoff*, 551 P.2d at 344-45.

189. *Id.* at 345 (quoting Bardessano v. Michels, 478 P.2d 480 (Cal. 1970)).

190. *See* Kane & Sigel, *supra* note 20, at 75-78. The authors address the difficulty in predicting dangerousness and suggest that evaluations are often inconsistent due to different approaches to examinations, different methodologies followed, and different perspectives in collecting and interpreting data. *See id.*

191. *See* Merton, *supra* note 14, at 284-88.

192. *See* Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) § 23 (1991); Gutierrez-Lobos, et al., *supra* note 1.

193. *See* Gutierrez-Lobos, et al., *supra* note 1.

194. *See id.*

195. *See In re* Lifschutz, 467 P.2d 557, 567-68 (Cal. 1970); AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.05 (2000); Cerveny & Kent, *supra* note 147, at 796-99; Gutierrez-Lobos, et al., supra note 1.

> ['']The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition.[ ] It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.['']196

However, Austria more strongly encourages this openness.[197] The Austrian Psychotherapy Act[198] provides for patient confidentiality with no exceptions.[199] The Act allows Austrian psychotherapists to warn third parties of the danger posed by patients if no other measures will avert the danger but does not require psychotherapists to do so.[200] In addition, the Act provides that courts may not compel psychotherapists to testify as fact or expert witnesses in civil or criminal trials.[201]

The United States, on the other hand, requires psychotherapists to protect third parties from danger posed by patients, through disclosure of privileged communications if necessary.[202] The United States also utilizes psychotherapists as experts in civil and criminal trials and allows psychotherapists to act as fact witnesses in some situations.[203] Because the

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196. *Lifschutz*, 467 P.2d at 567 (quoting Taylor v. United States, 222 F.2d 398, 401 (U.S. App. D.C. 1955)).

197. *See* Gutierrez-Lobos, et al., *supra* note 1.

198. Bundesgesetz vom 7. Juni 1990 über die Ausübung der Psychotherapie (Psychotherapiegesetz) (1991).

199. *See* Gutierrez-Lobos, et al., *supra* note 1.

200. *See id.*

201. *See id.*

202. *See Tarasoff*, 551 P.2d at 339-40.

203. *See, e.g., Lifschutz*, 467 P.2d at 561 (holding that a litigant-patient exception to the statutory psychotherapist-patient privilege does not unconstitutionally infringe rights of privacy of either psychotherapists or their patients); People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. Ct. App. 1982) (holding that a psychologist's testimony regarding patient's admission of sexual conduct was not properly admitted since the psychologist had previously fulfilled a statutory reporting requirement by reporting suspected child abuse based on communication from patient's child); Ritt v. Ritt, 238 A.2d 196, 198-99 (N.J. Ct. App. 1967) (holding that communications between plaintiff-wife and psychiatrist were not protected from disclosure and reasoning that the patient only had a limited right to confidentiality, subject to exceptions created by supervening interests of society. Here, the supervening interest was the fact that institution of litigation by the patient constituted vitiation of her right to absolute confidentiality), *rev'd*, 244 A.2d 497, 499 (the New Jersey Supreme Court held that the issue had been subsequently decided because the New Jersey legislature had enacted a statute creating the physician-patient privilege that would cover the psychiatric relationship here); AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.06 (2000) (providing that physicians may communicate with a patient-plaintiff's

United States allows more exceptions to patient confidentiality, one may argue that patients in the United States are not as likely to engage in open discourse during treatment.[204]

2. *HIV/AIDS Infected Patients*

An additional concern relating to confidentiality and treatment of dangerous persons involves HIV/AIDS-infected patients.[205] Unfortunately, some HIV-positive individuals may knowingly engage in conduct likely to spread the virus. Patients with HIV could foreseeably tell their therapists about this conduct. Do the therapists then have a duty to warn the potential victims? On one hand, the disclosure of the contagious disease to public health authorities and/or third parties in danger of transmission may curb the spread of the deadly virus.[206] On the other hand, patients may avoid testing if they know the results will be disclosed.[207]

In the United States, jurisdictions are not in agreement concerning the duty to warn of HIV transmission.[208] Some states impose a duty to protect by

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attorney with patient consent, and may testify in court in any personal injury or related case).

204. *See* Gutierrez-Lobos, et al., *supra* note 1. *See also* David R. Katner, *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Clients' Medical Status*, 70 TUL. L. REV. 2311, 2338-39 (1996) (suggesting that the attorney-client relationship may be hindered by informing client of limitations on right to confidentiality).

205. *See generally* Agnello, *supra* note 6. *See also* Carmody, *supra* note 12, at 107-08 (suggesting that mandatory notification programs are not as effective as voluntary notification programs in the prevention of the spread of HIV because mandatory notification programs may deter people from getting HIV testing done, therefore separating them from medical treatment that could prevent the spread of the disease); Doughty, *supra* note 12, at 122-28 (emphasizing the importance of confidentiality for HIV-infected patients); Fineschi, et al., *supra* note 125, at 243 (indicating that the new Italian Code suggests that there is a duty to inform partners or family of a patient's HIV- positive status despite the fact that this duty is directly counter to a 1990 Italian law that specifically prohibited the revelation to third parties of a patient's HIV infection); Bernard Friedland, *HIV Confidentiality and the Right to Warn: the Health Care Provider's Dilemma*, 80 MASS. L. REV. 3, 3 (1995) (examining the belief of health care providers that they have an ethical obligation to warn partners of HIV-positive patients); Kenneth E. Labowitz, *Beyond Tarasoff: AIDS and the Obligation to Breach Confidentiality*, 9 ST. LOUIS U. PUB. L. REV. 495, 517 (1990) (concluding that health care providers have a duty to breach confidentiality in order to curb the spread of HIV).

206. *See* Agnello, *supra* note 6, at 115 (suggesting that HIV should be disclosed through contact tracing for the protection of third parties); Fineschi, et al., *supra* note 125, at 243 (indicating that the new Italian Code suggests that doctors have a duty to inform partners or family of a patient's HIV-positive status in order to protect these third parties); Friedland, *supra* note 205, at 3 (examining the belief of health care providers that they have an ethical obligation to warn partners of HIV-positive patients); Labowitz, *supra* note 205, at 517 (concluding that health care providers have a duty to breach confidentiality in order to curb the spread of HIV).

207. *See* Carmody, *supra* note 12, at 107-08. *See also* Doughty, *supra* note 12, at 122-28 (emphasizing the importance of confidentiality for HIV-infected patients).

208. *See* Agnello, *supra* note 6, at 111. *See generally* Paul Barron, et al., *State Statutes Dealing with HIV and AIDS: a Comprehensive State-by-State Summary*, 5 L. & SEXUALITY 1 (1995) (discussing state statutes regarding reporting of HIV and AIDS).

requiring physicians to report the disease to public health authorities or persons at risk of transmission.[209] Other states allow an exception to the duty of confidentiality by authorizing disclosure when necessary to prevent foreseeable danger.[210] Still other states prohibit disclosure to third parties absent consent of the patient.[211] However, all states mandate reporting of AIDS and other communicable diseases to public health officials.[212] In addition, many states implement contact tracing programs to curb the spread of the disease.[213]

The American Medical Association Code of Medical Ethics recognizes the importance of reporting HIV status.[214] Section 2.23 of the Code provides for exceptions to patient confidentiality "when necessary to protect the public health or when necessary to protect individuals[.]"[215] The section sets forth steps a physician should take before notification of the third party occurs.[216]

In Austria, physicians are required to report information regarding AIDS, but psychotherapists are not. The Austrian Medical Practice Act

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209. *See* Agnello, *supra* note 6, at 111. *See also* Christine E. Stenger, *Taking Tarasoff Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. Rev. 471, 490-504 (1996) (discussing the duty to warn third parties of potential HIV infection in terms of the *Tarasoff* rule and setting forth guidelines for physicians); Labowitz, *supra* note 204, at 517 (concluding that health care providers have a duty to breach confidentiality in order to curb the spread of HIV); Tracy A. Bateman, J.D., Annotation, *Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient*, 3 A.L.R.5th 370 (2000) (noting that courts have recognized liability of doctors to persons infected by a patient if the doctor negligently fails to diagnose contagious disease or for failing to warn third parties who have a foreseeable risk of exposure to the disease).

210. *See* Agnello, *supra* note 6, at 111.

211. *See id. See also* Annotation, *State Statutes or Regulations Expressly Governing Disclosure of Fact that Person has Tested Positive for Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS)*, 12 A.L.R.5th 149 (2000) (noting that information believed to be particularly sensitive or prone to misuse should receive additional protection from disclosure).

212. *See id. See also* Hermann & Gagliano, *supra* note 13, at 56.

213. *See* Agnello, *supra* note 6, at 112. "Contact tracing is a system of notification designed to prevent further transmission of communicable diseases by alerting those who have been exposed to an infected person. It is used in conjunction with reporting procedures and is carried out by public health officials." *Id.* at 112. For further discussion of contact tracing and other public health strategies, *see* CURRAN ET AL., *supra* note 118, at 903-26 and 964-1005. *See also* Carmody, *supra* note 12, at 124 (pointing out that all fifty states have implemented some form of HIV partner notification program).

214. *See* AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 2.23 (2000) (dealing specifically with HIV testing). *See also* Friedland, *supra* note 205, at 3 (examining the belief of health care providers that they have an ethical obligation to warn partners of HIV-positive patients).

215. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 2.23 (2000).

216. *See id.* The Code provides that "the physician should, within the constraints of the law: (1) attempt to persuade the infected patient to cease endangering the third party; (2) if persuasion fails, notify authorities; and (3) if the authorities take no action, notify the endangered third party." *Id.*

(Osterreichisches Arztegesetz), unlike the Austrian Psychotherapy Act, includes reporting obligations when "there is a suspicion of a punishable offense that has resulted in death or serious bodily harm, or if there is a suspicion of torture or neglect of a minor, juvenile, or defenseless person, even where minor bodily harm or health impairment results."[217] The Act strictly governs these exceptions to confidentiality: "Disclosure may be required for criminal proceedings, to insurance companies (in the case of specific, legally defined reporting obligations), or to government officials for certain diseases."[218] However, a psychiatrist who qualifies under the law as a psychotherapist, and who defines his relationship as psychotherapist-patient rather than physician-patient, is subject to the Act and not to the Austrian Medical Practice Act.[219] Thus, a psychotherapist who discovers a patient's seropositivity through therapy presumably has no legal duty to disclose this information.[220]

3. *Use/Non-Use of Psychotherapists as Witnesses/Experts in Trials*

In Austria, courts may not compel psychotherapists to testify as witnesses or experts in civil or criminal trials.[221] In the United States, therapists all too often find themselves taking an oath to testify in court. Thus, in Austria the judicial system may be deprived of relevant information. However, in America, "junk science" runs rampant—litigants can find a therapist to testify as an expert on virtually anything. As a result, psychotherapy in Austria has perhaps retained more of its dignity than has psychotherapy in the United States. However, the Austrian psychotherapeutic system has surmounted the Austrian judicial system.[222]

Further, in Austria, the patient alone may not waive the psychotherapist-patient privilege.[223] However, in the United States, the patient may himself waive the privilege.[224] The California Supreme Court has stated:

> We do not believe the patient-psychotherapist privilege should be frozen into the rigidity of absolutism. So extreme a conclusion neither harmonizes with the expressed legislative intent nor finds a clear source in constitutional law. Such an application would lock the patient into a vice which

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217. Gutierrez-Lobos, et al., *supra* note 1. *See also* Osterreichisches Arztegesetz §§ 26-27 (1994).

218. Gutierrez-Lobos, et al., *supra* note 1.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *See In re* Lifschutz, 467 P.2d 557, 567-73 (Cal. 1970); Davis, *supra* note 91.

would prevent him from waiving the privilege without the psychotherapist's consent.[225]

Also unlike the United States, Austria deems psychotherapists poorly suited to give any legal testimony.[226] Thus, Austria does not differentiate between psychotherapists as fact witnesses or as paid experts because the difference is not important—psychotherapists are inadequate witnesses either way.[227]

4. *"Junk Science" vs. Integrity of the Profession?*

One may argue that Austrian psychotherapists have retained more integrity than have psychotherapists in the United States. Commentators suggest that courts should not rely upon therapists as experts because they are incompetent to act in that capacity.[228] In addition, critics have disparaged American mental health professionals for offering forensic assistance.[229] Even American Judge David Bazelon has campaigned against courts' undue reliance on technical expertise, psychiatric and otherwise.[230]

5. *Should the Judicial System Receive All Relevant Information or Is the Patient Right to Confidentiality More Important?*

Both the United States and Austria recognize a psychotherapist-patient privilege.[231] Thus, each system sees the importance of patient confidentiality. However, the Austrian privilege is more absolute than the American privilege.[232] In Austria, a patient alone may not waive the privilege.[233] The psychotherapist-patient relationship is viewed as an independent entity.[234] Thus, one party to the relationship cannot waive the privilege without the

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225. *Lifschutz*, 467 P.2d at 573.

226. *See supra* note 77 and accompanying text.

227. *See id.*

228. *See id. See also* Merton, *supra* note 14, at 296-301.

229. *See supra* notes 185-87 and accompanying text. *See also* Grove & Barden, *supra* note 136, at 238 (suggesting that expert witnesses have an ethical duty to tell the court and opposing counsel when their methods do not meet requisite reliability standards, and that failure to do so brings the profession into disrepute).

230. *See* Merton, *supra* note 14, at 272-73. *See also* People v. Burnick, 535 P.2d 352, 365 (Cal. 1975) (en banc) (suggesting that psychiatric predictions of violence are inherently unreliable); Grove & Barden, *supra* note 136, at 238 (suggesting that even standardized criteria such as Rorschach tests and disorders listed in the DIAGNOSTIC AND STATISTICAL MANUAL IV would fail to meet the current reliability standards for expert testimony).

231. *See* Jaffee v. Redmond, 116 S.Ct. 1923, 1932 (1996); Gutierrez-Lobos, et al., *supra* note 1.

232. *See* Gutierrez-Lobos, et al., *supra* note 1.

233. *See id.*

234. *See id.*

cooperation of the other party.[235] In addition, Austrian courts may not compel psychotherapists to testify as fact or expert witnesses.[236]

In the United States, however, a patient may waive the psychotherapist-patient privilege without the consent of his psychotherapist.[237] Unlike in Austria, a psychotherapist may not override the patient's waiver of the privilege.[238] In at least one American case, a court has imprisoned a psychotherapist for refusing to divulge privileged information despite a court order to do so.[239] In *In re Lifschutz*, the court held that "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings" may outweigh a patient's confidentiality interest.[240] This result is inconceivable under Austrian law.[241] "Competent Austrian authorities do not know of any case in which a psychotherapist has been prosecuted as an accomplice to a crime for failing to breach confidentiality."[242]

The Austrian system also avoids the potential for role conflicts of the treating psychotherapist.[243] Psychotherapists, because they are not compelled to testify, are not forced to wear two hats or act as double agents in court.[244] In the United States, however, a psychotherapist may act in his professional capacity to help a patient, but a court may then compel the psychotherapist to speak against his patient in court because of this professional capacity.

In addition, courts may compel American therapists to testify in a variety of situations despite the privilege.[245] This becomes especially problematic if

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235. *See id.*

236. *See id.*

237. *See In re* Lifschutz, 467 P.2d 557, 558 (Cal. 1970).

238. *See id.*

239. *See id.*

240. *Id.* at 568. It should be noted, however, that the exception compelled information only in cases in which the patient's own action initiated the exposure, so intrusion into the patient's privacy remained essentially under the patient's control. *See id.* Thus, the intrusion was constitutional. *See id.*

241. *See* Gutierrez-Lobos, et al., *supra* note 1.

242. *Id.*

243. *See id.*

244. *See id.*

245. *See, e.g., In re* Lifschutz, 467 P.2d 557, 561 (Cal. 1970) (holding that a litigant-patient exception to the statutory psychotherapist-patient privilege does not unconstitutionally infringe rights of privacy of either psychotherapists or their patients); People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. Ct. App. 1982) (holding that a psychologist's testimony regarding patient's admission of sexual conduct was not properly admitted since psychologist had previously fulfilled a statutory reporting requirement by reporting suspected child abuse based on communication from the patient's child); Ritt v. Ritt, 238 A.2d 196, 198-99 (N.J. Ct. App. 1967) (holding that communications between plaintiff-wife and psychiatrist were not protected from disclosure and reasoning that the patient only had a limited right to confidentiality, subject to exceptions created by supervening interests of society. Here, the supervening interest was the fact that institution of litigation by the patient constituted vitiation of her right to absolute confidentiality), *rev'd*, 244 A.2d 497, 499 (the New Jersey Supreme Court held that the issue had been subsequently decided because the New Jersey legislature had enacted a statute creating the physician-patient privilege that would cover the psychiatric relationship here); AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL

psychiatrists are subject to suit based upon disclosures made during testimony.[246] One author suggests that a negative side effect of the *Tarasoff* decision is to discourage therapists from testifying on behalf of their patients in criminal trials because their testimony can then be used against the therapists in civil trials.[247] Because therapists may be concerned about their own liability, the author argues, they will be less likely to aid patients through testimony.[248]

6. *Willingness of Psychotherapists to Treat or Assist Violent Patients*

A further question to be addressed relates to psychotherapists' willingness to treat violent patients. Does the Austrian Psychotherapist Act encourage or discourage therapists from taking on dangerous patients? Likewise, does the United States statutory and common law positively or negatively affect therapists' decisions to treat violent patients?

Several commentators suggest that inconsistent and indefinite liability will lead to a shortage of providers willing to treat dangerous patients.[249] One practitioner suggests that the "possibility that external pressure [due to potential ethical and legal ramifications] on the therapist to disclose such information may be successful will result in mistrust by patients and caution by therapists, to the extent of reluctance to treat clients of this type."[250]

Reverse *Tarasoff* cases exacerbate the quandary of therapists. In one such case, *Oringer v. Rotkin*,[251] the therapist issued a warning and was then sued by the patient for breaching confidentiality.[252] The court granted

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ETHICS § 5.06 (2000) (providing that physicians may communicate with a patient-plaintiff's attorney with patient consent, and may testify in court in any personal injury or related case). *But see In re* Rules Adoption, 540 A.2d 212, 217-18 (N.J. Ct. App. 1988) (invalidating several portions of the Department of Corrections regulations concerning exceptions to privileged communications between psychologist and inmates because the regulations permitted disclosure of confidences that did not present clear and imminent danger to the inmate or others, or failed to identify any intended victim).

246. *See* Merton, *supra* note 14, at 322-25.

247. *See id.*

248. *See id.*

249. *See* Almason, *supra* note 18, at 495. The author argues against extension of the *Tarasoff* rule to include personal liability of therapists who fail to discharge their duty to warn, noting that excessive and inconsistent liability will lead to a scarcity of health care providers willing to treat violent patients. *See id. See also* Hermann & Gagliano, *supra* note 13, at 69 (suggesting that allowing a jury to decide the issue of predictability of dangerousness leads to uncertainty for therapists, who may then be deterred from treating dangerous patients); McClarren, *supra* note 18, at 284 (suggesting that the inconsistency in legislation setting forth requirements regarding psychotherapists' duty to warn may lead psychotherapists to refuse to treat patients who are believed to be potentially dangerous); Merton, *supra* note 14, at 311 (suggesting that therapists will be discouraged from treating potentially dangerous patients).

250. Gutierrez-Lobos, et al., *supra* note 1 (citing H. Gurevitz, *Tarasoff Protective Privilege Versus Public Peril*, 139 AM. J. PSYCHIATRY 289-92 (1977)).

251. Oringer v. Rotkin, 556 N.Y.S.2d 67 (1st Dept. 1990).

252. *See id.* at 68.

summary judgment for the therapist because the therapist fit within the statutory *Tarasoff* exception and had followed the statute's procedures in making the disclosure.[253] This case does not assist those therapists who do not fit within the statutory exception.[254]

7. *Willingness of Patients to Seek Treatment*

Along similar lines, what impact do the American and Austrian laws have on patients' willingness to seek the help of therapists? Both Austrian and American practitioners suspect that lack of patient confidentiality will discourage patients from seeking treatment.[255] Some commentators agree that lack of confidentiality has this deterrent effect.[256] However, others question this suggestion.[257] Some empirical evidence suggests that people still seek care from physicians or therapists without the protection of confidentiality.[258] This evidence, albeit scant, shows that the suspicions of Austrian and American practitioners may be mistaken.

B. *Ramifications of Laws: Remedy for Victims?*

Because the Austrian Psychotherapy Act creates no duty of psychotherapists to warn third parties of impending danger,[259] victims are left with no remedy in Austria. In the United States, however, victims have an available remedy.[260] Austrian practitioners suggest that the lack of a *Tarasoff* rule, in combination with the Act, results in a reduced amount of related litigation in Austria.[261] Thus, court dockets are less crowded and can more

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253. *See id.*

254. *See* Rogge, *supra* note 96, at 228.

255. *See Tarasoff*, 551 P.2d at 359 (Clark, J., dissenting). *See also* Gutierrez-Lobos, et al., *supra* note 1 (suggesting that lack of confidentiality will hinder the psychotherapeutic process).

256. *See Tarasoff*, 551 P.2d at 359 (Clark, J., dissenting). *See also* Carmody, *supra* note 12, at 135 (suggesting that mandatory disclosure of HIV seropositivity will deter potential patients from being tested and receiving treatment necessary to curb the spread of the disease); Doughty, *supra* note 12, at 165 (suggesting that the stigma and potential discriminatory effects surrounding HIV seropositivity will deter patients from being tested and receiving treatment). *But see Tarasoff*, 551 P.2d at 346 (arguing that such predictions are entirely speculative).

257. *See Tarasoff*, 551 P.2d at 346 (arguing that such predictions are entirely speculative). *See also* Jaffee v. Redmond, 116 S.Ct. 1923, 1932 (1996) (Scalia, J., dissenting).

258. *See* Daniel J. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L. J. 661, 664-65 (1985). *See also* Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 924-25 (1982) (discussing the impact of the privilege on patient behavior); Myron F. Weiner & Daniel W. Shuman, *The Privilege Study*, 40 ARCHIVES GEN. PSYCHIATRY 1027, 1030 (1983).

259. See Gutierrez-Lobos, et al., *supra* note 1.

260. Potential remedies may include monetary damages or revocation of a mental health provider's license.

261. *See* Gutierrez-Lobos, et al., *supra* note 1.

quickly entertain cases involving other types of victims. In addition, Austrian psychotherapists are not deterred from treating dangerous patients for fear of being held liable later.[262] Therefore, it can be argued, dangerous persons are better able to receive treatment, in turn reducing the number of victims of these dangerous persons. Thus, the need for remedies in Austria may be lessened because its treatment system is more successful.

VI. PROPOSAL

A. *America Should Look to Austria for Guidance: Disclosure of Dangerousness Should Remain Discretionary Rather than Mandatory*

Austria has chosen the better standard for disclosure of dangerousness and has enforced it consistently. The American system is inconsistent in its rules and enforcement.[263] Thus, American psychotherapists are left in a quagmire of uncertainty.[264] By establishing a consistent rule, the legislature will protect the public interest in treating and rehabilitating the mentally ill.[265]

Another reason for a discretionary rule is that psychotherapists are unable to accurately predict dangerous behavior.[266] Courts should therefore not hold psychotherapists liable for a task that they cannot perform. It makes no sense to ask an untrained jury to decide whether a particular danger was predictable when a trained professional, intimately knowledgeable about his patient, is unable to do so.

Along these same lines, courts should not compel psychotherapists to testify in civil or criminal cases. The natures of therapy and court proceedings are not interchangeable:

> Clinical and forensic undertakings are dissimilar in that they are directed at different (although overlapping) realities, which they seek to understand in correspondingly different ways. The process of psychotherapy is a search for meaning more than for facts. The therapist accepts the patient's

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262. *See id.*

263. *See* McClarren, *supra* note 18, at 293.

264. *See* Rogge, *supra* note 96, at 229.

265. *See* McClarren, *supra* note 18, at 293.

266. *See* People v. Burnick, 535 P.2d 352, 365 (Cal. 1975) (en banc). *See also* Hill, *supra* note 20, at 137-38 (discussing a case in which prediction of dangerousness was especially problematic); Kane & Sigel, *supra* note 20, at 75-78 (addressing the difficulty in predicting dangerousness and suggesting that evaluations are often inconsistent due to different approaches to examinations, different methodologies followed, and different perspectives in collecting and interpreting data); Merton, *supra* note 14, at 296-301 (discussing in depth the difficulty of predicting dangerousness); Weiss, *supra* note 20 (suggesting a particular assessment method to more accurately assess inmate dangerousness, but conceding that accurate assessment of dangerousness is difficult).

> narrative as representing an inner, personal reality. . . . In court, therapists can describe only impressions, countertransference reactions, and assumptions regarding the underlying psychic conflicts. The truth emerging in therapy is subjective and selective; its objective validity cannot be assessed without data about external circumstances. Psychotherapists, therefore, cannot produce proof in the legal sense.[267]

Thus, courts and legislatures should construe the psychotherapist-patient privilege recognized by the U.S. Supreme Court in *Jaffee v. Redmond*[268] broadly, like the psychotherapist-patient privilege in Austria.

However, courts should not extend the psychotherapist-patient privilege recognized in *Jaffee* to include social workers and others untrained in the traditional psychotherapeutic areas.[269] Austria's privilege is read broadly because the Austrian Psychotherapy Act sets forth stringent training requirements for anyone who is to claim the protection of the Act.[270] The United States should also require a minimum level of training for the psychotherapists subject to the privilege.

A consistent American scheme will lead to additional benefits. First, a consistent privilege encourages more open discourse within treatment.[271] In addition, a consistent privilege increases the integrity of the psychotherapeutic profession because the public will no longer view psychotherapists as double agents.[272] Psychotherapists will also be more willing to treat dangerous patients under a consistent system.[273] Patients will likewise be encouraged to seek treatment, assured that their disclosures will remain confidential.[274] Each of these added benefits increases the success of psychotherapy and, in turn, contributes to the public health.

B. Disclosure of HIV Seropositivity Should Be Mandatory Because It Is More Readily Definable Than Human Dangerousness

Physicians can readily identify HIV through medical testing. In addition, the HIV virus is inherently dangerous to humans. However, psychotherapists are not as readily able to predict human behavior.[275] In addition, the psychotherapist-patient privilege is

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267. Gutierrez-Lobos, et al., *supra* note 1.
268. Jaffee v. Redmond, 116 S.Ct. 1923 (1996).
269. *See id.* at 1937 (Scalia, J., dissenting).
270. *See supra* notes 52-61 and accompanying text.
271. *See supra* notes 195-204 and accompanying text.
272. *See supra* notes 228-30 and accompanying text.
273. *See supra* notes 249-54 and accompanying text.
274. *See supra* notes 255-57 and accompanying text.
275. *See supra* notes 165-94 and accompanying text.

> "rooted in the imperative need for confidence and trust." Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[276]

Thus, courts and legislatures should not hold psychotherapists to the same duty to warn as physicians.

In Austria, authorities require physicians to report contagious diseases.[277] However, if a patient discloses his HIV seropositivity to a physician who is covered by the Austrian Psychotherapy Act, that physician has no duty to report the HIV status because it was obtained within a psychotherapist-patient relationship and is thus subject to the psychotherapist-patient privilege.[278]

Because HIV seropositivity is medically ascertainable and is often deadly, this information should not be privileged in the United States.[279] The United States should mandate disclosure of HIV seropositivity by psychotherapists to public health authorities.[280] The public health authorities can then implement partner notification or contact tracing programs to curb the spread of the disease.[281] Because courts and legislatures should mandate the

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276. Jaffee v. Redmond, 116 S.Ct. 1923, 1928 (internal citations omitted).

277. *See* Gutierrez-Lobos, et al., *supra* note 1.

278. *See id.*

279. *See generally* Fineschi, et al., *supra* note 125 (indicating that the new Italian Code of Medical Ethics suggests that there is a duty to inform partners or family of a patient's HIV-positive status, although this duty is directly counter to a 1990 Italian law that specifically prohibited the revelation to third parties of a patient's HIV infection).

280. *But see* Hermann & Gagliano, *supra* note 13, at 74 (asserting the desirability of providing therapists with discretionary authority to warn spouses or sexual partners, rather than fixing mandatory duty to warn and pointing out that therapists may not inquire into dangerous activities if there is a mandatory duty).

281. *See* Agnello, *supra* note 6, at 112. The author suggests that HIV should be disclosed through contact tracing for protection of third parties and argues that "[t]he mortal fate awaiting unsuspecting spouses and their unborn children cannot be justified by a policy calculated to preserve the confidentiality and privacy of the individual who is infected. The focus must be on the sanctity of human life." *Id.* at 117. "An individual's privacy is paramount, but human life is sacred." *Id.* at 122.

disclosure of this information, psychotherapists should inform patients of this limitation on confidentiality at the outset of treatment.[282]

VII. CONCLUSION

The United States should follow the leader in the field of psychotherapy. Like the Austrian Psychotherapy Act, American law should make duty to warn third parties of dangerous patients discretionary instead of mandatory. Such a law would eliminate much confusion, uncertainty, and litigation in America. The United States should, however, mandate disclosure of HIV seropositivity to public health officials. Each of these measures is in the interest of public health.

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282. *See* Merton, *supra* note 14, at 271. The author notes that informing the patient of the potential need to disclose information may actually strengthen the trust relationship between the patient and therapist. *See id.*

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A COMPARATIVE ANALYSIS OF THE RIGHT OF A PREGNANT WOMAN TO REFUSE MEDICAL TREATMENT FOR HERSELF AND HER VIABLE FETUS: THE UNITED STATES AND UNITED KINGDOM

I. INTRODUCTION

Few legal topics have raised more debate than the right of a pregnant woman to refuse medical treatment for religious, moral, philosophical, or personal reasons.[1] A woman's decision raises common law, statutory, constitutional, and ethical questions. Courts must define the scope of a pregnant woman's right to privacy in her own bodily integrity and compare that right to the State's interest in protecting the health of the viable fetus.[2] Courts in the United States and United Kingdom have adopted the general rule that a pregnant woman may refuse medical treatment; however, each system provides different exceptions to the general rule.[3] This Note has two purposes. First, this Note will explain the development of a pregnant woman's right to refuse medical treatment in both the United States and the United Kingdom,[4] and second, this Note will explore the situations where each system allows courts to intervene and force treatment. While the judicial system of the United Kingdom allows a court to override a woman's choice in certain circumstances, a majority of courts in the United States have not used this approach. This Note will explain the source of the right to refuse treatment in the United States and United Kingdom and then compare and contrast the exceptions to the general rule in an attempt to formulate the best approach to these precarious moral and legal dilemmas.

II. THE RIGHT TO REFUSE MEDICAL TREATMENT

In both the United States and the United Kingdom, an individual has a right to refuse medical treatment, even life-saving treatment, in most circumstances.[5] The source and development of the legal right varies in the

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1. *See generally* James Nocon, *Physicians and Maternal-Fetal Conflict: Duties, Rights and Responsibilities*, 5 J.L. & HEALTH 1 (1990); Carson Strong, *Court-Ordered Treatment in Obstetrics: The Ethical Views and Legal Framework*, 78 OBS. & GYN. 861-68 (1991).

2. *See generally* Roe v. Wade, 410 U.S. 113 (1973). The Supreme Court defined the scope of maternal and fetal rights in the *Roe* decision.

3. *See generally* St. George's Healthcare N.H.S. Trust v. Collins, [1999] Fam. 26, 1998 WL 1043638; *In re* Fetus Brown, 689 N.E.2d 397 (Ill. App. Ct. 1997).

4. The Note will focus primarily on decisions from courts within England and Wales, which express the majority approach within the United Kingdom. English courts have addressed the issue in numerous cases. This body of case law addresses the different medical, ethical, and legal issues raised within this Note.

5. *See generally* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990); Airedale N.H.S. Trust v. Bland, [1993] A.C. 789, 1993 WL 963744 (HL); *In re* C., [1994]1

two countries; however, the doctrine of informed consent provides the basis for the legal principle in both.[6] The right to refuse medical treatment developed differently in the United States and United Kingdom, and, consequently, it is important to understand the legal analysis in both countries.

A. *United States*

In the United States, a competent adult has the right to refuse medical treatment, even if refusal will result in death.[7] In *Cruzan v. Director, Missouri Department of Health*,[8] the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution[9] confers a constitutional right to preserve one's own bodily integrity by avoiding unwanted medical procedures.[10] The Court stated that the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's personal decision to reject medical treatment.[11] Justice O'Connor, in her concurring opinion, stated: "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."[12] Because the right to refuse treatment implicates a constitutional right, courts must use the most rigorous standard of review when evaluating state intervention.[13]

W.L.R. 290, 1997 WL 1105230.

6. *See generally In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc); *In re* J.T., [1998] Fam. Law 23, 1997 WL 1105230.

7. *See generally* Mark Strasser, *Incompetents and the Right to Die: In Search of Consistent Meaningful Standards*, 83 KY. L.J. 733 (1995).

8. *See Cruzan*, 497 U.S. at 266. The case involved Nancy Cruzan, a twenty-four year old woman, who had lost control and wrecked her car. *See id.* Ms. Cruzan's brain was deprived of oxygen for roughly twelve to fourteen minutes, which placed her in a persistent vegetative state. *See id.* Ms. Cruzan was incompetent, and her parents asked the State of Missouri to remove her life support (i.e., a feeding tube and respirator); however, the hospital refused to remove the tube because it would result in Ms. Cruzan's death. *See id.* at 267-68. The Missouri Supreme Court overturned the trial court's order that directed the hospital to remove the life support. *See id.* at 268. The U.S. Supreme Court granted *certiorari* to determine if Ms. Cruzan, through her representatives, had the right to refuse medical treatment if such refusal would result in death. *See id.* at 269. The Supreme Court held that an individual has the right to refuse medical treatment and the effect of such refusal was not relevant. *Id.*

9. U.S. CONST. amend. XIV, § 1. The pertinent portion states:

> No 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.

Id.

10. *See Cruzan*, 497 U.S. at 278. *See also In re* Baby Boy Doe, 632 N.E.2d 326, 331 (Ill. App. Ct. 1994).

11. *See Cruzan*, 497 U.S. at 281.

12. *Id.* at 287 (O'Connor, J., concurring).

13. *See id.* at 281.

The right to refuse medical treatment is well established in American jurisprudence. At common law, the touching of another without that person's consent was considered battery.[14] The Supreme Court noted that "[n]o right is held more sacred . . . by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[15]

In the medical context, the doctrine of informed consent protects an individual's bodily integrity.[16] Informed consent is a legal construct, which has evolved over the past thirty years into a complex doctrine designed to promote autonomous decision-making.[17] Justice Cardozo once wrote: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[18] In addition to their ethical obligations, courts impose a legal duty on physicians to inform their patients of all the risks associated with a surgery before obtaining consent to perform that surgery.[19] After receiving information concerning a surgery, the patient has the choice of whether to consent or refuse the treatment.[20] Chief Justice Rehnquist concluded that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[21] Consequently, physicians may be held responsible for failing to abide by a patient's choice.

Two cases in particular demonstrate the potential liability physicians face for failing to abide by their patient's wishes. In *Shorter v. Drury*,[22] the husband of a Jehovah's Witness brought an action against the obstetrician who treated his pregnant wife.[23] The obstetrician cut the woman's uterus and caused profuse bleeding.[24] Despite the immediate necessity of a blood transfusion, the patient refused and died from the loss of blood.[25] The jury found the physician negligent and awarded $412,000 in damages.[26] The jury

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14. *See id.* at 269.

15. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

16. *See* Alan Meisel et al., *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCH. 285, 286-87 (1977).

17. *See id. See also* Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345 (1996).

18. Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914).

19. *See generally* Meisel, *supra* note 16, at 287.

20. *See id.*

21. *Cruzan*, 497 U.S. at 270.

22. Shorter v. Drury, 695 P.2d 116, 118-19 (Wash. 1985).

23. *See id.* at 119.

24. *See id.* The physician was in a precarious situation because his negligence had caused the bleeding, yet he could take no remedial action to fix his error. *See id.* The woman would either die because of his mistake or he could save her life by compromising the woman's religious beliefs. *See id.* Under either facts, the physician faced liability for his actions. *See id.*

25. *See id.* at 118-19.

26. *See id.* at 119.

determined that the woman was 75% at fault for her refusal and reduced the damages accordingly to $103,000.[27] The Washington Supreme Court upheld the judgment and noted that the physician had informed the woman of the risk, which she chose to assume when she refused the transfusion.[28] It was the woman's refusal, not the physician's error that resulted in death.[29] One should note that the physician was not charged with malpractice for abiding by the woman's choice.[30]

Similarly, in *Corlett v. Caserta*,[31] a woman brought suit against a physician because the physician had abided by the wishes of her husband not to receive blood transfusions.[32] Upon the husband's death, his wife brought a malpractice suit.[33] The Illinois Court of Appeals held that the patient's choice to refuse a blood transfusion did not bar recovery for the physician's negligence; however, the refusal should reduce the recovery proportionally.[34] Because a competent adult has the right to refuse medical treatment, the court stated that an individual cannot impose liability upon a physician who disagrees with the consequences of the choice.[35] *Corlett* teaches that when physicians inform a patient of the risks and potential consequences of an action, and even then the patient refuses treatment, then the physician is not liable for the patient's actions.[36]

A competent adult may also refuse medical treatment for religious beliefs under the First Amendment of the United States Constitution.[37] Although those cases normally involve Jehovah's Witnesses, an individual may refuse medical treatment due to a number of traditional or non-traditional religious beliefs.[38] Both the First and Fourteenth Amendments of the U.S. Constitution guarantee that an individual has the right to refuse medical treatment.

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27. *See id.*

28. *See id.* at 123.

29. *See id.* at 124.

30. *See id* at 119-21. The court noted that the use and form of a medical release was appropriate. *See id.* at 120. The lack of a release would require the hospital to seek a court order to override the woman's decision. *See id.* The release clearly stated the woman's wishes, and, if it had not, then the outcome may have been different. *See id.*

31. Corlett v. Caserta, 562 N.E.2d 257 (Ill. App. Ct. 1990). *See also* Joelyn Knopf Levy, *Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of All Pregnant Women*, 27 J.L. MED. & ETHICS 171, 173 (1999).

32. *See Corlett*, 562 N.E.2d at 257-58.

33. *See id.*

34. *See id.* at 259-60.

35. *See id.*

36. *Id.*

37. *See* U.S. CONST. amend. I. *See also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

38. *See generally* Julie A. Koehne, *Witnesses on Trial: Judicial Intrusion Upon the Religious Practices of Jehovah's Witness Parents*, 21 FLA. ST. U. L. REV. 205 (1993).

B. United Kingdom

In the United Kingdom, courts operate on the legal principle that each individual's body is inviolate unless the individual consents to the surgical procedure.[39] There are a few exceptions; however, courts generally defer to an individual's choice even under the exceptions.[40] Generally, if a doctor performs medical treatment without obtaining a competent patient's consent, then his or her action violates medical ethics and a legal duty. In those situations, an individual may sue a doctor under the civil action for trespass of the person or criminally as an assault.[41] The consent must be informed, as doctors in the United Kingdom have an absolute duty to warn patients of all potential risks involved with a medical procedure before obtaining consent.[42] If a doctor informs the patient of all foreseeable risks, then the patient may decide to refuse the treatment, regardless of the effect that decision might have on the patient.[43]

III. THE RIGHTS OF PREGNANT WOMEN AND THE UNBORN FETUS

Pregnant women are presented with health issues that are both private and personal. Although each woman makes a choice to become pregnant (unless the woman was raped), no woman has an obligation to keep a fetus in her body under American or English law.[44] Courts in the United States and United Kingdom agree that pregnant women have a unique set of personal interests related to the pregnancy, which the courts must protect.[45] Both countries also agree that a viable fetus has limited right, and, consequently, it

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39. *See generally* Marc Stauch, *Rationality and the Refusal of Medical Treatment: A Critique of the Recent Approach of the English Courts*, 21 J. MED. ETHICS 162, 163-65 (1995); Robert Francis, *Compulsory Caesarean Sections: An English Perspective*, 14 J. CONTEMP. HEALTH L. & POL'Y 365 (1998).

40. *See* Francis, *supra* note 39, at 366-67. *See also* Gillick v. West Norfolk & Wisbech Area Health Authority, [1986] A.C. 112, 1985 WL 311014, at 2. Under English law, a person with parental authority may provide consent for a minor to undergo or forego medical treatment. *See id.* The minor may consent himself or herself, if he or she can show a sufficient degree of maturity. *See id.*

41. *See id. See also* Sidaway v. Bd. of Governors of Royal Bethlem & Maudsley Hosp., [1985] A.C. 871, 1985 WL 311459 (HL), at 10-11. The right to refuse treatment in the United Kingdom remains grounded on the traditional common law torts. *See id.* The key question is: what distinction should be made between medical treatment and assault? *See id.* In the United Kingdom, there is not a distinct difference. In the United States, there is a critical distinction.

42. *See* Francis, *supra* note 39, at 366.

43. *See id. See also In re* F., [1988] Fam. 122, 1988 WL 624168 (CA); *In re* S., [1993] Fam. 123; *In re* T., [1993] Fam. 95, 1992 WL 895109 (CA).

44. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Paton v. British Pregnancy Advisory Service Tr., [1979] Q.B. 276, 1978 WL 57203 (QBD).

45. *See Paton*, 1978 WL 57203, at 1.

is worth noting the development of women's rights and fetal rights in both countries.

A. *United States*

1. *Maternal Rights*

The Supreme Court of the United States has held that a pregnant woman has a right to personal autonomy and privacy that is not relinquished when she becomes pregnant.[46] This determination was made when the Court considered abortion rights, and it differs significantly from the right of a pregnant woman to refuse treatment that harms the health of a viable fetus.[47] Despite the difference, many of the guiding principles behind *Roe v. Wade* and *Planned Parenthood of Southeast Pennsylvania v. Casey* are involved in cases where a pregnant woman refuses medical treatment.

Perhaps the closest link between the maternal rights in *Roe, Casey*, and the right of pregnant women to refuse treatment can be found in *Thornburgh v. American College of Obstetricians and Gynecologists.*[48] The Supreme Court struck down a Pennsylvania statute that required physicians performing post-viability abortions to use the technique that provided the best opportunity for the fetus to be aborted alive.[49] The Court determined that the statute was unconstitutional because it both forced a "trade-off" between "a woman's health and fetal survival" and stressed that any procedure that increased the risk to the woman's health was unacceptable.[50] Applying this principle to maternal decisions, courts have honored the medical decisions of pregnant women in most circumstances.[51] The Supreme Court recognized the supremacy of maternal health over fetal interests; however, the maternal-fetal conflict has not been completely resolved.

In the United States, courts considering a maternal-fetal conflict distinguish between situations where: (1) a surgery is needed to save the life

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46. *See* Roe v. Wade, 410 U.S. 113 (1973). *See generally Casey*, 112 S.Ct. at 2791; David C. Blickenstaff, *Defining the Boundaries of Fetal Surgery*, 88 NW. U. L. REV. 1157 (1994); Joel Jay Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239 (1991); Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women*, 259 JAMA 1060 (1988). These three articles explore and analyze the development of maternal and fetal interests.

47. *See generally* Rebekah R. Arch, *The Maternal-Fetal Dilemma: Honoring a Woman's Choice of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637 (1996); Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 9-58 (1987).

48. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986). The Supreme Court's decision in *Casey* has limited the holding of *Thornburgh*; however, the Court's analysis is still instructive for purposes of this Note.

49. *See id.*

50. *Id.* at 768-69.

51. *See In re* Fetus Brown, 689 N.E.2d 397 (Ill. App. Ct. 1997).

of both the mother and fetus; and (2) a surgery is needed to save the life of the fetus at a risk to the mother.[52] The two situations involve separate sets of personal and state interests, and, therefore, courts have approached the cases very differently. When only the health of the fetus is in danger, the courts give absolute deference to the decision of the woman.[53] One court has written:

> A cesarean section, by its nature, presents some additional risks to the woman's health. When the procedure is recommended solely for the benefit of the fetus, the additional risk is particularly evident. It is impossible to say that compelling a cesarean section upon a pregnant woman does not subject her to additional risks — even the circuit court's findings of fact in this case indicate increased risk to [the patient]. Under *Thornburgh*, then, it appears that a forced cesarean section, undertaken for the benefit of the fetus, cannot pass constitutional muster.[54]

It appears that when the health of the mother is compromised, even to small degree, then a court will not overturn the woman's personal decision.[55] When both the health of the woman and fetus are compromised, then a court may be willing to intercede and force treatment, because the State has a compelling interest in protecting the health of both the mother and fetus.[56]

In the United States, the majority approach is that a woman is under no legal duty to guarantee the mental or physical health of her child, and, consequently, she cannot be compelled to do anything merely for the benefit of her unborn child.[57] Under this approach, the mother cannot be forced to compromise her own health for that of a fetus. The interests of the mother take priority over the interests of a viable fetus or the interests of the state.[58] One

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52. In *Thornburgh*, the abortion technique attempted to save the fetus while increasing the risk of harm to the mother. *See generally Thornburgh*, 476 U.S. at 747. The Supreme Court has not been presented with a case that involved the health of both the mother and fetus. *See id. See also In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994).

53. *See generally* Robin M. Trindel, *Fetal Interests vs. Maternal Rights: Is the State Going Too Far?*, 24 AKRON L. REV. 743 (1991).

54. *See generally In re* Baby Boy Doe, 632 N.E.2d 326, 333 (Ill. App. Ct. 1994).

55. *See id.*

56. *See* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981).

57. *See In re Baby Boy Doe*, 632 N.E.2d at 401. *See generally* Nancy K. Rhoden, *The Judge and Delivery Room: The Emergence of Court-Ordered Obstetrical Interventions*, 74 CAL. L. REV. 1951 (1986); Finer, *supra* note 46, at 239.

58. *See In re Baby Boy Doe*, 632 N.E.2d at 333. The court stated as follows:

> Courts in Illinois and elsewhere have consistently refused to force one person to undergo medical procedures for the purpose of benefiting another person – even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be minimal and the benefit to the second person may be great .... If an incompetent brother cannot be forced to donate a kidney to save the life of his dying sister, then surely a mother cannot be forced to undergo

should note that even under this majority approach, courts may intervene under certain circumstances, such as when a surgery is not "invasive."[59]

2. *Fetal Interests*

In contrast with the majority approach, a few courts have chosen to recognize fetal interests.[60] The Supreme Court of South Carolina, in *Whitner v. South Carolina*,[61] determined that a mother who was addicted to cocaine could be held responsible under South Carolina's child abuse and endangerment statute.[62] The court determined that the legislature intended the word "child" to include a viable fetus.[63] Thus, the court upheld the conviction of the mother for causing her child to be born with cocaine metabolites in its system.[64] The court recognized that a viable fetus has certain rights and interests that the State may protect.[65] This approach is highly controversial, and no other state supreme court has held a mother criminally responsible under a child abuse statute under similar circumstances.[66] The majority of

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a cesarean section to benefit her viable fetus.

Id. at 333-34 (citations omitted).

59. *Id. See also Jefferson,* 274 S.E.2d at 457 (ordering c-section to save both the mother and the fetus); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964)(ordering blood transfusion to save the life of the mother and fetus), *cert. denied*, 377 U.S. 985 (1964); *In re* Jamaica Hospital, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985)(ordering the transfusion of blood to save the life of a pregnant woman and her fetus); Crouse Irving Memorial Hosp., Inc. v Paddock, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985)(ordering blood transfusions as necessary over religious objections to save the mother and fetus).

60. *See Jefferson,* 274 S.E.2d at 457.

61. Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997). South Carolina is the only state that has adopted this approach. *See generally* WILLIAM CURRAN ET AL., HEALTH CARE LAW AND ETHICS 848-59 (5th ed. 1998).

62. *See* S.C. CODE ANN. § 20-7-50 (2000). The pertinent portion of the statute reads:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide . . . the proper care and attention for such child or helpless person, so that the life, health, or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

Id.

63. *See Whitner*, 492 S.E.2d at 777-90.

64. *See id.*

65. *See id.*

66. *See* Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995); Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); State v. Gethers, 585 So.2d 1140 (Fla. Dist. Ct. App. 1991); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Gray, 584 N.E.2d 710 (Ohio 1992); Nevada v. Encoe, 885 P.2d 596 (Nev. 1994); Collins v. State, 890 S.W.2d 893 (Tex. Ct. App. 1994). The preceding list of cases was found in CURRAN, *supra* note 61, at 856. In all the cases, the courts were asked to interpret child abuse statutes. With the exception of the South Carolina Supreme Court, courts have uniformly held that a viable fetus is not a child, and no legislature could intend such a definition absent such wording.

states have uniformly agreed that the fetus does not have protected constitutional rights until birth.[67]

Several other decisions that recognize fetal rights are worth noting; however, the cases are not binding on most jurisdictions within the United States.[68] One court held that the state has a compelling interest in protecting the health of a woman's children, who as third parties, would be deprived by the mother's refusal to undergo medical treatment and her subsequent death.[69] Further, some courts have held that the health of an unborn fetus outweighs a mother's right to refuse treatment in certain circumstances.[70] Despite these exceptional cases, most states follow the view that a competent pregnant woman has an absolute right to refuse medical treatment.[71]

In the United States, a pregnant woman, if competent, has the right to accept or forego medical treatment.[72] A viable fetus has no rights in most jurisdictions within the United States.[73] Consequently, a pregnant woman has no duty to a fetus within her body, as the courts have chosen not to compel one person to permit an intrusion on her body for the benefit of another.[74] The leading case supporting this legal premise is *McFall v. Shimp*,[75] in which a court refused to compel an individual to donate bone marrow to his cousin. The court explained its refusal by stating:

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67. *See generally* CURRAN, *supra* note 61, at 856-57. Some state prosecutors have attempted to prosecute pregnant drug offenders under laws that make it a crime to "deliver" drugs to another person. *See id.* The theory is that the mother ingested drugs and then transmitted the drug through her umbilical cord after the birth of the child. *See id.* All courts that have considered this issue have held that the drug delivery statutes were not intended to cover this type of situation. *See, e.g.*, Johnson v. State, 602 So.2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991), *appeal denied*, 471 N.W.2d 619 (Mich. 1991).

68. Some decisions have been overturned, such as the initial Illinois case discussed later in this note. Others are likely invalid due to holdings in the same or other jurisdictions. One should also note that the attitudes of many courts have changed since the initial rulings noted in footnote 66.

69. *See* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981). *See also In re* Madyun, 114 Daily Wash.L.Rptr. 2233 (D.C. Super. Ct. 1986).

70. *See* Application of President of Georgetown Coll., 331 F.2d 1010 (D.C. Dir. 1964), *cert. denied*, 377 U.S. 985 (1964); Crouse-Irving Memorial Hosp. v. Paddock, 485 N.Y.S.2d 443 (N.Y. App. Div. 1985); *In re Jamaica Hospital*, 491 N.Y.S.2d at 898; Fosmire v. Nicoleau, 551 N.E.2d 77 (N.Y. 1990).

71. *See* Application of President of Georgetown Coll., 331 F.2d at 1010.

72. *See In re* A.C., 573 A.2d 1235, 1240 (D.C. Cir. 1990)(en banc).

73. *See id.*

74. *See id.*

75. McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978). The plaintiff suffered from a bone marrow disease and had needed a bone marrow transplant to survive. *See id.* The only known match was a cousin, who had consented to the test but refused to donate the marrow. The plaintiff died two weeks after the court issued its decision. *See generally* Fordham E. Huffman, *Coerced Donation of Body Tissues: Can We Live with McFall v. Shimp*, 40 OHIO ST. L.J. 409 (1979).

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. A great deal has been written regarding this rule, which, on the surface, appears to be revolting in a moral sense. Introspection, however, will demonstrate that the rule is founded upon the very essence of our free society . . . . Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another . . . . For our law to compel defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.[76]

In this case, even though Mr. Shimp's refusal to donate his bone marrow meant that his cousin, Mr. McFall, would almost certainly die, the court did not order the invasive surgery.[77] The standard rule was applied in the context of a mother and fetus, and the same result was reached.[78] A mother does not have a duty to her fetus, and she may refuse invasive medical treatment (i.e., cesarean section, fetal surgery, or blood transfusions) if the treatment places the mother at risk.[79]

B. United Kingdom

Under English law, physicians owe certain ethical duties to pregnant women and unborn viable fetuses.[80] These obligations often conflict, and The Royal College of Obstetricians has formulated the following guidelines:

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76. *McFall*, 10 Pa. D. & C.3d at 92-93. The *McFall* decision has been adopted in virtually every jurisdiction within the United States. *See id.*

77. Of all the relatives tested, Mr. Shimp's bone marrow was the only match for Mr. McFall. Mr. Shimp resorted to the court as a last effort to save his life, but, as noted, the court refused. *See id.*

78. *See In re* A.C., 573 A.2d 1235, 1241 (D.C. Cir. 1990)(en banc). Although it was suggested that a mother has an enhanced duty to protect the fetus, the court determined that an unborn child cannot have a greater interest than a living person. *See id.* The mother has no enhanced duty to her fetus, and the mother has a right to refuse an invasive surgery such as a cesarean section. *See id.*

79. *See generally* Eric M. Levine, *The Constitutionality of Court-Ordered Cesarean Surgery: A Threshold Question*, 4 ALB. L.J. SCI. & TECH. 229 (1994).

80. *See* Stauch, *supra* note 39, at 163-65.

> The aim of those who care for pregnant women must be to foster the greatest benefit to both the mother or fetus, and inform and advise the family, utilizing their training and experience in the best interests of parties. Obstetricians must recognize the dual claims of mother and her embryo or fetus and inform and advise the family, utilizing their training and experience in the best interest of both parties.[81]

Consequently, there are situations where the mother's health and child's health are opposed to each another.[82] It is under those circumstances that courts have been asked to intervene to protect fetal interests.

In the United Kingdom, courts have carved out a few exceptions to the general rule that competent adults have an absolute right to refuse medical treatment. The courts first acknowledged the possibility of an exception in the case of *In re T*:[83]

> An adult patient who . . . suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, refuse it, or to choose one rather than another of the treatments being offered. The only possible qualification is a case in which the choice may lead to the death of a viable fetus.[84]

The court outlined two potential exceptions when treatment may be forced. First, courts may force treatment when a patient is mentally incompetent.[85] Second, courts may force medical treatment in certain circumstances when a viable fetus is involved.[86] The development of the exceptions has coincided with the manner in which the competing interests of a pregnant woman and a fetus developed within the English courts.

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81. ROYAL COLL. OF OBSTETRICIANS & GYNAECOLOGISTS, A CONSIDERATION OF THE LAW AND ETHICS IN RELATION TO COURT-AUTHORISED OBSTETRIC INTERVENTION, §§ 4.3.1 – 4.3.2 (1996). *See also* ACOG COMM. ON ETHICS, AM. COLL. OF OBSTETRICS AND GYNECOLOGY, COMM. OPINION, PATIENT CHOICE: MATERNAL-FETAL CONFLICT 1 (1987). The American College of Obstetrics and Gynecology issued a similar statement that stated: "[T]he obstetrician should be concerned with the health care of both the pregnant woman and the fetus within her, assessing the attendant risks and benefits to each during the course of care." *Id.*

82. *See id.*

83. *In re* T., [1993] Fam. 95, 1992 WL 895109 (CA), at 7.

84. *Id.*

85. *See* Tameside & Glossop Acute Serv. NHS Trust v. C.H., [1996] F.L.R. 762; *See also* St. George's Healthcare, [1999] Fam. 26, 1998 WL 1043638.

86. *See generally id.* The case involved a mentally incompetent pregnant woman and there were two issues involved: her competency and the presence of her fetus. *See id.*

1. *Maternal Rights*

Courts in England and Wales have refused to recognize the competing interests between a mother and a fetus.[87] Those courts have chosen to protect the rights of the pregnant woman by refusing to grant the fetus any standing to challenge the medical decisions of the mother.[88] Similarly, English courts considered and held that an unborn child has no standing to prevent a mother from consenting to an abortion.[89] The court stated that "the authorities . . . show that a child, after it has been born, and only then, in certain circumstances . . . may be a party to an action . . . ."[90] The child attains a legal persona upon birth, and only then, can it assert its rights.[91] The court did note that there are some exceptions when a child may bring a cause of action, however, those exceptions have been codified.[92]

2. *Fetal Rights*

Legislatures in the United Kingdom have taken very little action to protect the rights of unborn fetuses.[93] The English legislature has enacted three pieces of legislative material that are neither consistent nor controlling on the courts.[94] In the Infanticide Act of 1938,[95] the legislature outlawed the destruction of children that are capable of being born.[96] Conversely, the Abortion Act of 1967[97] allowed women to terminate a pregnancy by abortion

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87. *See id.*

88. *See* Paton v. British Pregnancy Advisory Service Tr., [1979] Q.B. 276, 1978 WL 57203, at 3-4. In the case, the court determined that a husband could not stop the abortion of the fetus he fathered. Sir George Baker wrote for the court:

> The first question is whether the plaintiff has a right at all. The fetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country . . . and is, indeed, the basis of the decisions in those countries where law is founded on the common law . . . there can be no doubt, in my view, that in England and Wales the fetus has no right of action, no right at all, until birth.

Id.

89. *See* C. v. S., [1988] Q.B. 276, 1987 WL 492060, at 3.

90. *Id. See also* Francis, *supra* note 39, at 369.

91. *See* Francis, *supra* note 39, at 369-70.

92. *See generally* Attorney General's Reference No. 3, [1996] 2 W.L.R. 412, 1995 WL 1083798. The opinion dealt with cases where an unborn child was killed with the mother. *See id.* The opinion stated that "Murder or manslaughter can be committed where an unlawful injury is deliberately inflicted either to a child in utero or to a mother carrying a child in utero . . ." *Id.*

93. *See generally* Francis, *supra* note 39, at 369-71. The Article discusses the development of English law.

94. *See id.*

95. Infanticide Act, 1938, c. 36, § 1. The Act outlawed abortions.

96. *See id.*

97. Abortion Act, 1967, c. 36, § 1 (amended by the Human Fertilisation and Embryology

in most cases. The Infant Life (Preservation) Act of 1929[98] and the Abortion Act of 1967[99] caused problems for the English courts for many years.[100] As a result, the English legislature enacted the Human Fertilisation and Embryology Act of 1990[101] to resolve the confusion and bring consistency among the various English courts. Finally, several courts have assumed that the lack of legislation gives women the right to refuse treatment. In the case of *In re F.* the court stated:

> If the law is to be extended . . . to impose control over the mother of an unborn child, where such control may be necessary for the benefit of that child, then under our system of parliamentary democracy it is for Parliament to decide whether such controls can be imposed . . . . If Parliament were to think it appropriate that a pregnant woman should be subject to controls for the benefit of her unborn child, then doubtless it will stipulate the circumstances in which such controls may be applied and the safeguards appropriate for the mother's protection. In such a sensitive field, affecting as it does the liberty of the individual, it is not for the judiciary to extend the law.[102]

The legislature intended for the courts to continue to use traditional tort theory when analyzing the right of women to refuse medical treatment, rather than creating an independent source for such a right.[103]

The development of common law rights for pregnant women have been controversial and are still evolving.[104] The general common law proposition is well established: "[A] competent adult patient cannot be forced to submit to medical treatment, however well-intentioned, and however necessary to preserve life or health."[105] The common law also allows medical professionals to intervene for incompetent patients and force treatment, if the treatment is in the "best interest" of the patient. This "best interest" standard created the

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Act, 1990, c. 37, § 37).

98. Infanticide Act, 1929, c. 87, § 1.

99. Abortion Act, 1967, c. 36, § 1.

100. *See generally* Francis, *supra* note 39. The Article provides insight into the English statutory scheme.

101. Human Fertilisation and Embryology Act, 1990, c. 37, § 37.

102. *In re* F., [1990] 2 A.C. 1, 1989 WL 650444 (HL), at 7-8. *See also* Francis, *supra* note 39, at 375.

103. *See* Francis, *supra* note 39, at 375.

104. *See In re F.*, 1989 WL 650444, at 7-8.

105. Francis, *supra* note 39, at 370. *See also* Sidaway v. Bd. of Governors, [1985] A.C. 871, 1985 WL 311459, at 1. The *Sidaway* court established the general proposition that an individual English patient can refuse medical treatment at his/her request. *See id.*

possibility that a pregnant woman could be forced into unwanted medical treatment if she was found incompetent.[106]

IV. THE RIGHT OF PREGNANT WOMEN TO REFUSE MEDICAL TREATMENT

A. *United States*

1. Before In re A.C.: Balancing Competing Interests

Although it is well established that a competent adult has the right to refuse medical treatment, the right of a pregnant woman to refuse treatment that would save the life of her fetus is not established. The right to refuse treatment is not an absolute right.[107] Prior to the *In re A.C.* decision, courts in the United States performed a balancing test to determine whether to intervene and force a competent adult to undergo medical treatment.[108] Courts balanced the woman's interest in her health and bodily integrity against four traditional State interests: (1) the preservation of life, (2) the prevention of suicide, (3) the protection of a third party,[109] and (4) the integrity of the medical profession.[110] The State's interest in protecting third parties and preserving the integrity of the medical profession has received the most attention from courts. Courts considering competing interests imposed a sliding scale to determine if state intervention was appropriate. The state's burden increased as the evasiveness of the procedure increased.[111] Courts are more willing to allow less invasive procedures, such as immunizations and blood transfusions, than invasive surgeries, such as transplants and cesarean sections.[112] The American Medical Association (AMA) recommended that physicians should honor a

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106. *See id.*

107. *See* Francis, *supra* note 39, at 270.

108. *See* Satz v. Perlmutter, 362 So.2d 160, 162-64 (Fla. Dist. Ct. App. 1978). *See also* James A. Filkins, *A Pregnant Mother's Right to Refuse Treatment Beneficial to Her Fetus: Refusing Blood Transfusions*, 2 DEPAUL J. HEALTH CARE L. 361, 362 (1998).

109. *See* Filkins, *supra* note 108, at 362. Courts are most likely to allow forced medical treatment when the health and interests of third parties are compromised. *See id.* It is well established that individuals can be forced to have vaccinations over personal or religious objections. *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1904). The State's need to protect the health of its citizens clearly outweighs the individual's interests. *See id.*

110. *See Jacobson*, 197 U.S. at 11. *See also* Alicia Ouellette, *New Medical Technology: A Chance to Reexamine Court-Ordered Medical Procedures During Pregnancy*, 57 ALB. L. REV. 927, 929-30 (1994). Scholars, judges, and medical professionals fear that forcing a woman into a treatment gives her a disincentive to use medical institutions. *See id.* They argue that a woman in medical danger will avoid a hospital if she thinks it will force treatment upon her. *See generally* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981). This was true in *Jefferson*. Although the court ordered treatment, the woman went into hiding and, eventually, gave birth to a healthy child. *See id.*

111. *See* Filkins, *supra* note 108, at 362.

112. *See In re* Baby Boy Doe, 632 N.E.2d 326, 331 (Ill. App. Ct. 1994).

pregnant woman's choice unless there are exceptional circumstances. One scholar interpreted the AMA decision as follows:

> The AMA's description of "exceptional circumstances" could encompass refusals of blood transfusions. Judging by the case law, in the opinion of most physicians, a transfusion poses little risk to the woman, is minimally invasive, and, in many cases, has the potential to save the fetus's life. Yet, if transfusions fall within the escape clause the AMA and ACOG have allowed physicians, they illustrate the pitfalls of encouraging physicians to assess for their patients the desirability of a treatment based solely on its medical risks and benefits . . . . Ultimately, the patient must decide, based on her values and beliefs, whether such a risk is tolerable. If the patient is pregnant, she necessarily will have to make the decision not just for herself, but for the fetus as well. Furthermore, so long as the patient is competent to make the decision, her decision need not be rational in the physician's opinion.[113]

The AMA and ACOG have not had an opportunity to explain the meaning of "exceptional circumstances"; however, the organizations make it clear that the woman's choice should be honored in most circumstances.[114] In 1987, a group of authors who were interested in the number of pregnant women who were forced to undergo court ordered medical treatment in the United States launched the Kolder Study.[115] The results demonstrated that physicians were not following the AMA recommendations.[116] The study showed that:

> Among 21 cases in which court orders were sought, the orders were obtained in 86 percent [17 cases]; in 88 percent of those cases, the orders were received within six hours. Eighty-one percent of the women involved were black, Asian, or Hispanic, 44 percent were unmarried, and 24 percent did not speak English as their primary language.[117]

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113. Filkins, *supra* note 108, at 177 (footnote omitted).

114. *See id.*

115. Veronika E.B. Kolder, Janet Gallagher & Michael T. Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192-93 (1987).

116. *See id.*

117. *Id.* The study took place in 1987, so attitudes have likely changed since the study was conducted. *See id.* It does show the willingness of physicians to intervene. Also, very few of the cases went to court on appeal because the women chose to end their ordeals. *See id.*

Although the attitudes of physicians have evolved and the law has changed significantly, the Kolder Study is important because it shows that in most cases courts ordered treatment, and these cases rarely get appealed.[118]

After the Kolder Study, two distinct approaches to court ordered treatment have developed in the United States. The courts of Illinois and Georgia have helped define these two opposing viewpoints.

2. *Illinois Law: The Majority Approach*

The courts in the State of Illinois have considered several cases involving maternal-fetal conflicts.[119] Consequently, Illinois has a coherent, well-developed line of cases. Those cases hold that: (1) the rights of a fetus are subordinate to the rights of a mother in all circumstances; and (2) pregnant women have an absolute right to refuse medical treatment, even if the refusal harms the health of the mother or unborn fetus.[120]

In *Stallman v. Youngquist,*[121] the Illinois Supreme Court refused to recognize a tort action against a mother for unintentional infliction of prenatal injuries.[122] The Court determined that a child does have a right to recover from unrelated third parties for pre-natal injuries, but children do not have the right to recover from their mothers.[123] It feared that allowing the action would subject a woman's every act to state scrutiny during her pregnancy, which would intrude upon both her right to privacy and her right to control her own life.[124] The majority noted:

> No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts upon the development of the fetus . . . . That this is so is not a pregnant woman's fault; it is a fact of life.[125]

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118. *See id.*

119. *See* Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988); *In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994); *In re* Fetus Brown, 689 N.E.2d 397 (Ill. App. Ct.). The court's strong preference to strengthen maternal rights is founded both in the United States Constitution and the State of Illinois Constitution. *See id.*

120. *See In re Fetus Brown*, 689 N.E.2d at 397.

121. *See Stallman*, 531 N.E.2d at 360.

122. *See id.* at 360-61.

123. *See id.* at 361.

124. *See id.* at 360. The court held that a woman was not responsible for actions that she took during her pregnancy that resulted in harm to her child. *See also In re* Baby Boy Doe, 632 N.E.2d 326, 331 (Ill. App. Ct. 1994).

125. *Stallman*, 531 N.E.2d at 358.

Ultimately, a woman's rights supersede those of the fetus and the State.[126] The court gave preference to maternal rights over fetal interests.[127] This case set the precedent for all future Illinois decisions on the issue.

The next case heard by an Illinois Appellate Court concerning maternal-fetal interests was *In re Baby Boy Doe*.[128] The case involved a woman whose fetus was receiving insufficient oxygen in the thirty-fifth week of the pregnancy.[129] The obstetrician suggested either an immediate cesarean section or the inducement of labor.[130] The patient refused the doctor's recommendation because she was a member of the Pentecostal church.[131] The woman returned to the doctor's office two weeks later, and the doctor's diagnosis revealed the fetus had worsened.[132] The doctor again recommended an immediate cesarean section, but the woman refused.[133]

The hospital then contacted the State's attorney to seek his assistance in obtaining a court order compelling surgery.[134] The case was heard, and evidence was presented.[135] The court refused to grant the hospital's petition to compel the woman to consent to the cesarean section and stated that the woman should be allowed to make her own treatment decisions.[136] The State immediately appealed. The Illinois Appellate Court upheld the lower court's determination, noting that Illinois courts should never balance a fetus's rights against those of its mother.[137] The court's rationale was that a woman's choice to refuse medical treatment must be honored, even if the decision harms the woman's health or the health of the fetus.[138] The court wrote as follows:

> Applied in the context of compelled medical treatment of pregnant women, the rationale of *Stallman* directs that a woman' right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious

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126. *See id.* at 359.

127. *See id.*

128. *In re Baby Boy Doe*, 632 N.E.2d 326.

129. *See id.*

130. *See id.* at 327.

131. *See id.*

132. *See id.*

133. *See id.* The doctor no longer had the option of inducing labor because of the gravity of the situation. *See id.* He felt that the only chance for the fetus was immediate surgery. *See id.*

134. *See id.*

135. *See id.* at 328-29. The obstetrician testified that without the cesarean section surgery, the fetus had a zero percent chance of survival. *See id.* The mother faced a 1 in 10,000 chance of dying during the procedure, compared to a one in 20,000-50,000 for a normal birth. *See id.* at 328.

136. *See id.* at 329.

137. *See id.* at 330-31.

138. *See id.* at 331. The woman delivered a healthy baby boy several weeks after refusing to consent to the medical treatment. *See id.* at 329.

> liberty, is not diminished during pregnancy. The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant; to the contrary, the *Stallman* court explicitly rejected the view that the woman's rights can be subordinated to fetal rights.[139]

The right to refuse medical treatment extends to all competent pregnant women without any qualifications.[140] The court also noted that the woman's rights are always primary, and the rights of a fetus secondary.[141]

In re Baby Boy Doe left some difficult questions unresolved. First, the court did not discuss issues raised by an incompetent or mentally ill pregnant woman.[142] Second, it left open the door regarding whether a court could compel a pregnant woman to take a blood transfusion.[143] The court considered only the "massively invasive, risky, and painful cases,"[144] leaving the "non-evasive procedures . . . for another case."[145] Feminist and legal scholars did not have to wait long for an answer to their remaining questions.[146]

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139. *Id.* at 332.

140. *See id.* at 330-33.

141. *See id.*

142. No court in the United States has considered the competency of a woman during the birthing process. *See generally id.* Although a well-established proceeding in English law, no such procedure has occurred in the United States.

143. *See id.* at 333.

144. *Id.*

145. *Id. See also* Levy, *supra* note 31, at 174-75. The author noted that this part of the holding was inconsistent with the rest of the opinion. *See id.* She reconciled the discrepancy by noting as follows:

> There are at least two explanations for this seeming inconsistency in the court's reasoning. One is that the judge who issued the opinion felt that the potential demise of a fetus due to failure of the pregnant woman to accept a treatment much less invasive than surgery distinguished such a situation from [*In re* Estate of Brooks], which involved a non-pregnant woman placing only her own life at risk. In fact, part of the Doe court's analysis rested on the increased risks to the mother of undergoing a cesarean section rather than a normal delivery, although the court seemed more persuaded by the legal precedent than by the medical risks.
>
> A second possible explanation is that the appellants had raised, as precedent, cases where courts had ordered pregnant women to accept blood transfusions. Therefore, the Doe court was faced with earlier cases that had allowed physicians to override a competent adult's wishes and was forced to distinguish those cases from the one at bar. Furthermore, the Doe court was already forging new territory in holding that a woman could decline a cesarean section; only one other court in the country had so held. The Doe court therefore might have been reluctant to make a more general finding and sought to limit its holding to the facts before it.

Id. at 174-75.

146. *See id.*

In the case of *In re Fetus Brown*,[147] the Illinois Court of Appeals completed its body of law on the subject by holding that a pregnant woman has the right to refuse a blood transfusion for religious or personal reasons.[148] The case involved a twenty-six year old, pregnant Jehovah's Witness, who had surgery on a urethral mass.[149] The woman lost a large amount of blood during the procedure and needed a transfusion, which she refused.[150] The hospital feared that the life of both the woman and fetus were in grave danger and asked that the state appoint a temporary guardian, who could then consent to the surgery.[151] The court granted the request and appointed a guardian.[152] The woman survived, delivered a healthy child, and then filed an appeal to overturn the state's action.[153]

After considering prior Illinois case law and the Supreme Court's decision in *Cruzan*,[154] the lower court's decision was reversed, and the appellate court held that the woman should not have been forced to take the transfusion for the benefit of her fetus.[155] The State argued that a court should balance the interests of the mother against the interests of the fetus and State when a case involves a "minimally invasive" procedure.[156] The appellate court held that the right to refuse medical treatment is not absolute, and that a court must balance a woman's rights against the State's interests in: (1) preserving life; (2) preventing suicide; (3) maintaining the integrity of the medical profession; and (4) protecting third parties.[157] In turn, the appellate court disregarded each of the aforementioned state interests and determined that the real state interest is protecting the health of a viable fetus.[158]

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147. *In re* Fetus Brown, 689 N.E.2d 397 (Ill. App. Ct. 1997).

148. *See id.* at 405.

149. *See id.*

150. The physicians made every effort possible to reduce the amount of blood lost during the surgery; however, their efforts failed and the woman needed a transfusion to survive. *See id.*

151. *See id.* The woman was restrained, sedated, and fought the physician, but despite her clear objection, the transfusion was given. *See id.* at 400.

152. *See id.*

153. *See id.* The issue had become moot upon the birth of the child; however, the court chose to hear the case because of the probability it would rise again in the future. *See id.*

154. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

155. *See In re* Fetus Brown, 689 N.E.2d at 397, 405-06 (Ill. App. Ct. 1997).

156. *Id.* at 401. *See also* Levy, *supra* note 31, at 175. The author noted as follows:

> Although the difference may seem semantic, balancing maternal and fetal rights presents a greater challenge than weighing the state's interest in the fetus against the mother's right to autonomy. The difference stems in part from the state's shared interest in the mother's autonomy, which places it on both sides of the argument concerning the mother's right to refuse blood. In addition, it is much more difficult to balance the rights of mother and fetus than it is to balance the rights of the mother against an impersonal government entity.

Id.

157. *See In re Fetus Brown*, 689 N.E.2d at 403.

158. *See id.* at 403-04.

The court began its analysis by examining the state's interest in a viable fetus as set forth in *Roe v. Wade*.[159] It then determined that an intentional abortion differed from a refusal of medical treatment, meaning that *Roe* had limited application.[160] The court then turned to Illinois law, which recognized a fetus's right to life from the moment of conception.[161] Further, the court examined the Illinois state child abuse laws and determined that the legislature did not intend the term "child" to include viable fetuses.[162] Because a viable fetus was not included within the definition, there was no compelling state interest that would force medical treatment.[163] There was no dispute that a blood transfusion is "an invasive medical procedure that interrupts a competent adult's bodily integrity."[164] Finally, the court stated that "the State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus."[165]

Illinois has the most well defined body of case law concerning the right of pregnant women to refuse medical treatment. The law demonstrates the majority approach in the United States, which gives absolute deference to a competent woman's choice to refuse treatment.[166]

3. *Georgia Law: The Minority Approach*

In *Jefferson v. Griffin Spalding County Hospital Authority*,[167] the Supreme Court of Georgia balanced the rights of a fetus against the rights of a mother. It determined that an expectant mother, in the last weeks of her pregnancy, lacks the rights of other persons to refuse surgery or treatment if that refusal jeopardizes the rights of the fetus.[168] The Court intervened when a pregnant woman refused medical treatment for religious reasons.[169] In the decision, the court reasoned that the woman was legally obligated to accept treatment if it would benefit both her and her fetus.[170] After the court's order, the woman went into hiding and delivered a healthy child despite the physician's prognosis.[171]

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159. *Roe*, 410 U.S. 113. *See also* Shannon Such, *Lifesaving Medical Treatment for the Nonviable Fetus: Limitations on State Authority under Roe v. Wade*, 54 FORDHAM L. REV. 961.

160. *See In re Fetus Brown*, 689 N.E.2d at 404.

161. *See id.*

162. *See In re Fetus Brown*, 689 N.E.2d at 405.

163. *See id.*

164. *Id.*

165. *Id.* at 405.

166. *See generally id.*

167. *Jefferson*, 274 S.E.2d 457.

168. *See id.* at 460.

169. *See id.* at 458-59.

170. *See id.* The treatment would benefit both the mother and her fetus; therefore, the court reasoned that the treatment was not detrimental to the woman's health.

171. *See generally id.*

This approach, although not adopted in many jurisdictions, has found some support from legal scholars. In particular, one scholar noted:

> [T]he pregnant woman, in a pregnancy being taken to term, is ethically obligated to accept reasonable risks on behalf of the fetus .... Invasiveness should not be the sole criterion for assessing physical burdens, because invasiveness in this case is not associated with net harm. To the contrary, it is associated with net benefit, because it dramatically reduces the risk of maternal mortality .... The net effect of cesarean delivery for this complication is to benefit the pregnant woman, not burden her.[172]

The scholar reconciled the *Jefferson* approach with *In re A.C.* by explaining that, when the health of the mother is compromised, the court should not intervene.[173] Conversely, when treatment will help both the mother and fetus, then a court may force treatment because the treatment does not compromise the mother's health.[174] Although recent courts such as the *In re Baby Boy Doe*[175] and *In re A.C.*[176] courts and many other jurisdictions have declined to adopt this approach, Georgia recently reaffirmed the approach, and courts in Georgia may compel treatment in many circumstances after conducting a balancing approach.[177]

The U.S. approach differs from the approach employed by courts in the United Kingdom; however, both court systems have reached the same result: a pregnant woman has the right to refuse treatment. The major difference between the two nations lies in the exceptions to the general rule.[178]

B. United Kingdom

The right of pregnant women to refuse medical treatment has arisen in several situations: forced blood transfusions, forced cesarean sections, and forced treatment on incompetent pregnant women.[179]

An English court first considered the rights of pregnant women in the case of *In re S.*[180] A woman objected to the delivery of her fetus by cesarean

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172. F. Chervenak and L. McCullough, *Justified Limits on Refusing Intervention*, 2 HASTINGS CENTER REPORT 13-15 (1991).

173. *See id.*

174. *See id.*

175. *In re Baby Boy Doe*, 632 N.E.2d 326.

176. *In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc).

177. *See id.*

178. *See* Francis, *supra* note 39, at 369.

179. *See* Stauch, *supra* note 39, at 163-65.

180. *In re* S., [1993] Fam. 123, 1992 WL 894554 (Fam. Div.), at 1. One should note that the case presented a bizarre set of facts, and it is unlikely that any court will be faced with

section for religious reasons.[181] The woman was thirty-years old, an African immigrant on her third pregnancy.[182] The physicians informed the woman that she and her fetus were in serious danger due to the position of the fetus.[183] The woman understood that she and her fetus would die without the treatment; however, she continued to refuse.[184] The hospital applied to the court for a declaration that would authorize the surgery.[185] The court authorized the surgery after a brief hearing conducted in the judge's chamber.[186] The judge could not find any binding English law, so he turned to the American case of *In re A.C.*,[187] and, ultimately he granted the application.[188] The court order stated as follows:

> It is declared that the operation of caesarean section and necessary consequential treatment which the Plaintiff, by its servants or agents proposes to perform on the Defendant at [hospital] is in the vital interests of the Defendant and the unborn child she is carrying and can lawfully be performed despite the Defendant's refusal to give her consent.[189]

Unfortunately, by the time the order was issued the child had died, and the mother would have died if the surgery had not been performed.[190] The hospital performed the surgery, the mother lived, and she did not appeal the decision to force treatment.[191]

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similar facts. *See id.* Consequently, the decision of the court is neither applicable nor binding in future cases. *See id.*

181. *See id.* The cesarean section cases are of particular interest as they are the most controversial of the forced treatment cases and the most commented upon. *See generally id.* Normally, a woman objects for religious reasons. Many cases involve Jehovah's Witnesses, who object to all blood transfusions. *See id.* Cesarean sections almost always require blood transfusions, and, consequently, pregnant Jehovah's Witnesses opt not to have the treatment despite medical necessity. *See id.*

182. *See id.* at 130.

183. *See id.* at 130-31.

184. *See id.*

185. *See id.*

186. *See generally* Sir Stephen Brown, *Matters of Life and Death* (Lecture to the Medico-Legal Society, Oct. 14, 1993) 62 MED. LEG. J. 52 (1994). Sir Stephen Brown was the presiding judge at the hearing and stated:

> The question was, should [the cesarean section] be allowed? . . . It was very clear – this was minutes, not hours – both would die. I heard very helpful submissions by counsel for the Official Solicitor and I made the . . . declaration . . . it was as vital as that.

Id.

187. *In re* A.C., 573 A.2d 1235 (D. C. Cir. 1990) (en banc).

188. *See id.*

189. Sir Stephan Brown, *supra* note 186, at 65-66.

190. *See id.*

191. *See In re* S., [1993] Fam. 123, 1992 WL 894554 (Fam. Div.), at 7. *See also* Sir Stephan Brown, *supra* note 186, at 66. One of the obstetricians on duty noted

The court determined that it was permissible to override the intent of a mentally competent woman and perform the cesarean section for her benefit.[192] The *In re S* decision defies the House of Lords decision in *Sidaway v. Board of Governors of Royal Bethlem & Maudsley Hospital*,[193] which held that competent adults have an absolute right to choose whether to agree to surgery.[194] The House of Lords stated: "If the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject that advice for reasons which are rational or irrational – or for no reason."[195] Indeed, following the *In re S* decision, the Royal College of Obstetricians formulated standards that respect a competent mother's choices in most circumstances:

> A doctor must respect the competent pregnant woman's right to choose or refuse any particular recommended course of action whilst optimising care for both mother and fetus to the best of his or her ability. A doctor would not then be culpable if these endeavours were unsuccessful. We conclude that it is inappropriate, and unlikely to be helpful or necessary, to invoke judicial intervention to overrule an informed and competent woman's refusal of proposed medical treatment, even though her refusal might place her life and that of her fetus at risk.[196]

Although the statement summarizes the current state of the common law, there are still exceptions that allow a court to authorize court intervention.[197]

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the problems that occurred during the surgery and process. In regards to his fellow doctors, he noted:

> As far as the obstetricians are concerned, I think we are deeply divided about this. Having understood that our duty is to the baby through the mother, we don't quite like this idea of maternal/fetal conflict, because the vast majority of our work is done with the mothers and through the mothers, and the idea we can breach confidentiality and then go to make applications to divide mothers and children legally, when we can't divide them physically, is actually an anathema to many.

Id.

192. *See id.*

193. *See* Sidaway v. Bd. of Governors, [1985] A.C. 871, 1985 WL 311459 (HL), at 1, per Lord Templeman.

194. *See id.*

195. *Id. But see In re* T., [1993] Fam. 95, 1992 WL 895109 (CA), at 7. The court hinted that there were exceptions to the general rule. *See id.* Also, the court *In re S* operated on the presumption that the woman was competent. *See id.* It did not inquire into the mental state of the woman. *See id.*

196. A CONSIDERATION OF THE LAW AND ETHICS IN RELATION TO COURT-AUTHORISED OBSTETRIC INTERVENTION, *supra* note 81, §§ 5.11-5.12.

197. *See id.*

In the United Kingdom, the general rule remains that a pregnant woman has the right to refuse medical treatment in most circumstances.[198]

V. THE CURRENT STATE OF LAW AND EXCEPTIONS

A. *United States*

1. *The Majority Approach: In re A.C.*[199]

The current position of the majority of United State's courts can be found in the decision of *In re A.C.*[200] That case involved a terminally ill pregnant woman with cancer.[201] The hospital suggested that the woman undergo a cesarean section in order to save the life of her unborn fetus after it had reached viability.[202] The woman refused because the surgery would shorten her life and threaten the life of her unborn fetus.[203] The hospital sought a court order to compel the surgery, which was granted after the District of Columbia Court of Appeals refused to stop the surgery.[204] The surgery was performed, the child lived for a short period of time, and the mother died two days later.[205]

The District of Columbia Court of Appeals ordered an *en banc* hearing of the case and vacated the district court decision.[206] The court held as follows:

> What a trial court must do in a case such as this is to determine, if possible, whether the patient is capable of making an informed decision about the course of her medical treatment. If she is, and if she makes such a decision, her wishes will control in virtually all cases. If the court finds that the patient is incapable of making an informed consent

198. *See id.*

199. *In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc).

200. *See id.* at 1235-39.

201. *See id.* A.C. had suffered cancer for around fourteen years, and she became pregnant during a period of remission. *See id.* At twenty-five weeks, the doctors found a terminal tumor. *See id.* The woman chose to attempt to prolong her life until twenty-eight weeks, when the fetus would have a better chance of survival. *See id.* A.C.'s condition worsened, and numerous parties got involved in the pregnancy. *See id.* The pregnant woman originally consented to the treatment but withdrew without stating a reason. *See id.*

202. *See id.* The court determined that there was a 50 to 60% chance that the fetus would survive if a cesarean section were performed. *See id.*

203. *See id.* It was also undisputed that the fetus was viable and that the surgery would shorten the life of the mother by a short period. *See id.*

204. *See In re* A.C., 533 A.2d 611 (D.C. 1987). Tragically, the child survived for only a short period of time, and the mother died two days after the surgery was performed. *See id.*

205. *See id.*

206. *See In re* A.C., 573 A.2d 1235, 1238 (D.C. Cir. 1990)(en banc).

> (and thus is incompetent), then the court must make a substituted judgment.[207]

The trial court did not conduct a competency determination before proceeding, and, consequently, it had no authority to force treatment.[208] The court also stated that it would be improper to presume that a patient was incompetent; rather, competence must be proved by medical testimony.[209]

The court stated that the decisions of a competent pregnant woman should never be overruled.[210] The court adopted two other arguments that supported A.C.'s position. The court found that to allow court-ordered treatment would breach the confidentiality of the doctor and patient relationship.[211] By breaching the relationship, the court believed it would force women away from medical treatment,[212] especially those women with high-risk pregnancies and strong non-traditional religious views. Finally, the court determined that the complexity, gravity, and urgency of the matter make the courts ill equipped to deal with the question.[213] In regard to the legal proceedings, the court pointed out several problems presented to the pregnant woman:

> [A]ny judicial proceeding in a case such as this will ordinarily take place like the one before us here under time constraints so pressing that it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of their liberty and privacy interests and bodily integrity. Any intrusion implicating such basic values ought not to be lightly undertaken when the mother not only is precluded from conducting pre-trial discovery . . . but also is in no position to prepare meaningfully for trial.[214]

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207. *Id.* at 1252.

208. *See id.* at 1252-53.

209. *See id.* at 1247. The Supreme Court has never held that competent adults have the right to refuse treatment. *See id. Cruzan* involved the right of an incompetent adult to refuse treatment. Competency has never been an issue before a court in the United States in this type of case. *See id.*

210. *See id.* at 1248-49.

211. *See id.* at 1248.

212. *See id.* The court appeared to anticipate problems posed by women with strong religious or personal beliefs. *See id.* For instance, if a Jehovah's Witness had a medical condition during her pregnancy that resulted in blood loss, she would be apprehensive of going to medical institutions if they could force blood transfusions upon her. *See id.* However, if she knew that the hospital could not force medical treatment upon her, then she would be able to go to the hospital and consent to or deny any or all suggested medical treatments.

213. *See id.* at 1248.

214. *Id.*

Although the court's opinion noted a strong disfavor for forced cesarean sections, the court declined to overrule *In re Madyun*.[215] In the *Madyun* case, a judge authorized a cesarean section over the religious objection of the pregnant woman.[216] The court intervened to protect the state's interest in the viable fetus, whose mere presence diminished the right of the woman.[217] Further, unlike *In re A.C.*, the surgery *In re Madyun* benefited both the mother and fetus, so there were not really conflicting interests.[218] It is that difference which did not require the District of Columbia Court of Appeals to overrule an earlier case, *In re Madyun*, which it affirmed in an unreported opinion.[219]

One should also note that the *In re A.C.* decision does not preclude court ordered intervention in all circumstances.[220] In its opinion, the District of Columbia Court of Appeals stated as follows:

> We emphasize, nevertheless, that it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a cesarean section. Throughout this opinion we have stressed that the patient's wishes, once they are ascertained, must be followed in 'virtually all cases' . . . unless there are 'truly extraordinary or compelling reasons to override them'. . . . Whether such a situation may someday present itself is a question that we need not strive to answer here.[221]

The court limited the cases in which a court may override a patient's wishes; however, the court clearly did not foreclose the possibility, such as when a woman may be incompetent or mentally ill.[222]

There are only a few exceptions to the rule that a pregnant woman may refuse medical treatment. As noted previously, some jurisdictions are willing to force treatment when the treatment benefits both the mother and fetus.[223] In those cases, the surgery does not compromise the mother's health for that of the fetus; rather, it benefits the mother as much, or more, than the fetus.[224] Traditionally, courts allow this type of intervention when the treatment is

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215. *In re* Madyun, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. July 26, 1986).
216. *See id.*
217. *See id.*
218. *See id.*
219. *See In re* A.C., 573 A.2d 1235, 1243 (D.C. Cir. 1990)(en banc).
220. *See generally id.*
221. *Id.* at 1248.
222. *See id.*
223. *See generally* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981).
224. *See id.*

"minimally invasive."[225] Consequently, a court may allow blood transfusions and other similar procedures.

A final exception may exist in competency determinations, as demonstrated by the English approach to this issue.[226] No court has heard a case where a hospital or state challenges the competency of a pregnant woman. This is largely due to the rare use of competency determinations in this situation within the United States; however, such a challenge may arise in the future. The United Kingdom's approach sheds light into how this exception works.

B. United Kingdom

In the United Kingdom, one exception to the general rule is that a pregnant woman must be *competent* in order to refuse medical treatment.[227] Therefore, if a court undertakes a competency determination and finds that the woman is incompetent, then the court can order medical treatment.[228] This exception has developed in recent years and continues to be very controversial.[229] Competency arises in two contexts: (1) mentally ill pregnant women and (2) competency determinations involving pregnant women.

1. Mentally Ill Pregnant Women

An English court first considered the competence of a pregnant woman in *Tameside & Glossop Acute Services NHS Trust v. C.H.*[230] A pregnant paranoid schizophrenic woman was in a mental health institute under the Mental Health Act of 1983.[231] Under the Act, a court may assume that an individual has lost the mental capacity to consent or refuse medical treatment.[232] The patient was convinced that the physicians were evil and wanted to harm her child.[233] The woman developed complications during the pregnancy and a cesarean section was needed to save the baby; however, the woman had a history of resisting treatment.[234] The hospital sought an order

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225. *See generally In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc).

226. *See generally* Frances Gibb, *Courts Wrong to Force Treatment on Pregnant Women*, TIMES LONDON, Apr. 12, 1994, *available in* 1994 WL 9163954.

227. *See id. See generally* Francis, *supra* note 39.

228. *See* Stauch, *supra* note 39, at 163-65.

229. *See id. See also* Janet Sayers, *Must a Mother Render unto Caesar?*, TIMES LONDON, May 26, 1990; Alex Richardson, *Life and Death Cases Decided in the Courts*, BIRMINGHAM POST, July 16, 1999.

230. Tameside & Glossop Acute Services NHS Trust v. C.H., [1996] F.L.R. 762.

231. *See id.* The case largely involved the interpretation and application of the Mental Health Act of 1980.

232. *See id. See also* Francis, *supra* note 39, at 376.

233. *See Tameside*, [1996] F.L.R. at 762.

234. *See id.*

from the court to permit it to use restraint and perform the surgery.[235] The court held a hearing and it was undisputed that the woman was incompetent under the standard established *In re C.*,[236] which defines competency as (1) the ability to understand information about the surgery; (2) the ability to believe that knowledge; and (3) the ability to balance the risks and arrive at an informed decision.[237]

Ultimately, the decision rested on the interpretation of the Mental Health Act of 1980,[238] which allows certain types of restraint and treatment free of liability.[239] The court had to decide if a forced cesarean section fell within the scope of the Act.[240] The evidence showed that without the surgery the fetus would die and the mother would fully recover.[241] The court determined that the death of a stillborn baby would have a negative mental impact on the woman, and consequently it ordered the cesarean section.[242] Although the court's interpretation of the Mental Health Act 1983 is controversial,[243] recent case law confirms that the court reached the proper result.[244]

2. *Competency Determinations Involving Pregnant Women*

Competency determinations are a relatively recent development in English law.[245] The standard for competency determinations was formulated by English courts in *T. v. T.*[246] and adopted by the House of Lords *In re F.*[247] The House of Lords held that, when adults are mentally incompetent or unable to communicate a personal choice concerning treatment, it is lawful for such treatment to be provided in the best interests of the patients.[248] The "best interest" of a patient is determined by examining the responsible and accepted

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235. *See* Francis, *supra* note 39, at 377.

236. *In re* C., 1 W.L.R. 290, 1993 WL 965301, at 5. The case provides the standards used in competency determinations in the United Kingdom.

237. *See id. See also* Francis, *supra* note 39, at 378.

238. Mental Health Act, 1980, c. 20, § 4 (Eng.).

239. *See* Francis, *supra* note 39, at 376.

240. *See id.*

241. *See id.* at 378.

242. *In re* C., 1 W.L.R. 290, 1993 WL 965301. The statute has been interpreted broadly. *See id.* Most treatments are considered treatment for the mental condition. *See also* B. v. Croydon Health Authority, [1995] Fam 133 (force feeding anorexic with personality disorder was determined permissible under the Act).

243. *See* Barbara Hewson, *Woman's Rights and Legal Wrongs*, 146 NEW L. J. 1385 (1996).

244. *See also* Francis, *supra* note 39, at 378-79.

245. *See generally* P.D.G. SKEGG, LAW, ETHICS AND MEDICINE 101 (1984). The author summarized the law regarding incompetent individuals by observing that it is generally accepted that a doctor is justified in providing treatment without consent to adult patients incapable of consenting for themselves." *See id.* at 104.

246. T. v. T., [1988] Fam. 52, 1987 WL 492876. *See also In re C.*, 1993 WL 965301, at 5.

247. *In re* F., [1988] Q.B. 122, 1988 WL 624168 (CA), at 13.

248. *See id.*

medical treatment for the incompetent individual's health dilemma.[249] If a physician decides that a medical procedure is in a patient's best interest, then the physician may administer the treatment without obtaining consent from a third person.[250]

The first case to consider the competency of a pregnant woman without a mental disorder was the case of *Roachdale Healthcare NHS Trust v. C.*[251] A woman in labor suffered from a ruptured uterus.[252] The medical condition developed so quickly that the physician had a one-hour window to obtain the court's permission to perform a cesarean section and save the child.[253] There was no representative at the hearing for the patient and the patient may not have even known of the hearing.[254] The woman had stated that she would rather die than have another cesarian section, because she had a bad experience with a previous cesarean section.[255] There was no evidence about the woman's mental condition; however, her obstetrician believed that she was competent. With little information and little time, the judge decided as follows:

> [I] concluded that the patient was in the throes of labour with all that is involved in terms of pain and emotional stress. I concluded that a patient who could, in those circumstances, speak in terms which seemed to accept the inevitability of her own death, was not a patient who was able properly to weigh up the considerations that arose so as to make any valid decision, about anything of even the most trivial kind, surely still less one which involved her own life.[256]

The decision is contrary to the *Sidaway*[257] decision, which prevents courts from deciding competence based on an individual's irrationality or the absence of good reasoning.[258] The holding is also problematic because: (1) the judge had little evidence; (2) the woman consented to the surgery; and (3) it stated that women in labor are incompetent.[259]

In *Norfolk and Norwich Healthcare NHS Trust v. W.*,[260] an English court was faced with a similar situation.[261] The case involved a woman who denied

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249. *See* Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582.
250. *See id.*
251. Roachdale Healthcare N.H.S. Trust v. C., [1997] 1 F.C.R. 274.
252. *See id.*
253. *See id.* The judge probably issued his decision because of the circumstances of the case, as he was dealing with some difficult facts. *See id.*
254. *See id.*
255. *See id.*
256. *Id. See also* Francis, *supra* note 39, at 380.
257. Sidaway v. Bd. of Governors, [1985] A.C. 871, 1985 WL 311459 (HL), at 1.
258. *See id.*
259. *See generally id.*
260. Norfolk and Norwich Healthcare NHS Trust v. W., [1996] 2 F.L.R. 613.
261. *See id.*

being pregnant.[262] The woman's obstetrician realized that the fetus would die within about an hour if a cesarean section were not performed.[263] The obstetrician called a psychiatrist, who determined that the woman was free of mental illness, but he determined that she was not able to balance or form a decision about the suggested treatment.[264] The judge considered the information and again decided to allow the medical procedure because it would be in her best interest to protect her mental and physical health.[265] The judge also determined that the treatment would be reasonable and a necessary incident to treatment.[266] Both the *Roachdale* and *Norfolk* cases are problematic because the courts had a very small amount of information and characterized pregnant women in labor as incompetent.

Another competency determination arose in the case of *In re L.*[267] The case involved a pregnant woman who had such a severe treatment of needle phobia that she refused to consent to medical treatment.[268] The court allowed the forced treatment and stated "her extreme needle phobia amounted to an involuntary compulsion that disabled her from weighing treatment information in the balance to make a choice."[269] Again, the decision was problematic because the woman clearly made her intentions known, and the court overrode those intentions.[270]

3. *In re M.B.: The Current Law*

The current state of law in the United Kingdom regarding medical treatment for pregnant women was decided in *In re M.B.*[271] That case involved a woman in labor who had both a footling breech and needle phobia.[272] If natural labor were to occur, then the child would be at great risk, but the mother would be in no danger.[273] The woman consented to the cesarean

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262. *See id.* The woman also had some past psychological problems. *See id.*

263. *See id.* at 614.

264. *See id.* at 616.

265. *See id.* at 616-17.

266. *See In re* F., [1990] 2 A.C. 1, 1989 WL 650444 (H.L.).

267. *See* Francis, *supra* note 39, at 382-83. The author cited to this unpublished case from the Family Division in footnote 67.

268. *See id.* The woman needed a cesarean section due to labor difficulties. *See id.*

269. *Id.* at 383.

270. *See id.* at 382-83.

271. *In re* M.B., [1997] 2 F.L.R. 426. Because of the subsequent proceedings, the case became the standard for forced medical treatment on pregnant woman. *See id.* The case had some unique circumstances: (1) the woman was represented by counsel at the hearing; (2) there was a more significant time period in which the court could deliberate; and (3) the decision was immediately appealed. *See id.* These factors and the court's past struggles with the issue caused it to deliberate and make a binding decision on future courts faced with this difficult issue. *See generally id.*

272. *See id.*

273. *See id.*

section until she saw a needle, when she retracted her consent.[274] The hospital then sought an order allowing the surgery via telephone with a judge.[275] Ultimately, the judge heard the evidence and issued the following order:

> It shall be lawful for 2 days from the date of this order, notwithstanding the inability of [the woman] to consent thereto: (i) for the hospital's responsible doctors to carry out such treatment as may in their opinion be necessary for the purposes of the [woman's] present labour, including, if necessary, caesarian section, including the insertion of needles for the purposes of intravenous infusions and anesthesia; (ii) for reasonable force to be used in the course of such treatment; (iii) generally to furnish such treatment and nursing care as may be appropriate to ensure that the [woman] suffers the least distress and retains the greatest dignity.[276]

The judge found that the woman lacked the mental capacity to make decisions about her medical treatment, and, consequently, he ordered the use of reasonable force to protect the best interests of the woman.[277] The woman's counsel immediately appealed the decision, and the full Court of Appeals heard the case, affirmed the lower court, and dismissed the appeal.[278]

The Court of Appeals began by stating that every adult is presumed to have the mental capacity to determine her own course of medical treatment, unless that presumption is rebutted.[279] Under the decision, a person may base his or her decision on "religious reasons, other reasons, for rational or irrational reasons or for no reason at all."[280] The court noted that a woman may "choose not to have medical intervention, even though the consequences

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274. *See id.*

275. *See id.* The judge was a Family Division judge and had previous experience with this type of emergency proceeding. *See id.* The woman was represented by counsel at the hearing. *See id.* Further, she had been interviewed by a psychiatrist who found:

> Away from the need to undergo the procedure, I had no doubt at all that she fully understood the need for a caesarian section and consented to it. However in the final phase she got into a panic and said she could not go on. If she were calmed down I thought she would consent to the procedure. At the moment of panic, however, her fear dominated all.

Id. See also Francis, *supra* note 39, at n.70.

276. *In re* M.B., [1997] 2 F.L.R. 426.

277. *See id.* at 430.

278. *See id.* at 432-33.

279. *See id.*

280. *Id.* at 433. Each individual may refuse treatment for a wide variety of reasons. *See id.* The decision noted that it was not the court's place to evaluate and judge that person's decision or the rationality of the decision. *See id.* Each individual has a unique set or moral standards, philosophical beliefs, and religious ideals. Consequently, each individual is the best judge of his or her own best interests. *See id.* The decision made it very clear that courts should attempt to stay out of individual's decisions. *See id.*

may be the death or serious handicap of the child she bears, or her own death."[281]

Although the courts prefer to give deference to an individual's personal beliefs, the court noted that there are some clear limitations:

> Although it might be thought that irrationality sits uneasily with competence to decide, panic, indecisiveness and irrationality in themselves do not as such amount to incompetence, but they may be symptoms or evidence of incompetence. The graver the consequences of the decision, the commensurately greater the level of competence required to take the decision.[282]

The court noted that confusion, shock, fatigue, pain, drugs, or panic induced by fear may destroy capacity.[283] The court noted that each case must be examined individually, and all evidence weighed thoroughly to determine if fear destroyed capacity or was a rational reason to refuse treatment.[284]

In the case of *In re M.B.*, the woman's needle phobia overrode her ability to rationalize and make an informed decision.[285] The woman was found incompetent and the court order was upheld.[286] The court further stated that the hospital could use reasonable force if it was in the best interest of the patient.[287] Further, and most importantly for our purposes, the court examined English common law[288] and held that it did not protect the interests of an unborn child or fetus. The court noted as follows:

> The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reason at all, choose not to have

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281. *Id.* at 433.
282. *Id.* at 434.
283. *See id.*
284. *See id.*
285. *See id.*
286. *See id.*
287. *See id.*
288. The court considered a large number of cases in reaching its decision including: Paton v. British Pregnancy Advisory Service, [1979] Q.B. 276; C. v. S., [1989] Q.B. 135; Burton v. Islington Health Auth., [1993] Q.B. 204; Villar v. Gilbey, [1907] A.C. 139; *In re* T., [1993] Fam. 95; and Patton v. United Kingdom, [1977] 3 E.H.R.R. 408. The court also considered several statutes and pieces of legislative materials including the *Attorney General's Reference No. 3* [1996] 1 Cr. App. R. 351 and the Offences against the Person Act, 1861, c. 1, § 58. The court also considered many cases from foreign jurisdictions including several American cases: Paul Morgan Memorial Hospital Authority, 201 A.2d 537 (N.J. 1964); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981); *In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc); and *In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct.). The court did not rely on any specific case or legislative material; rather, it considered a wide range of legal issues and topics in reaching its final result.

> medical intervention, even though . . . [the] consequence may be the death or serious handicap of the child she bears or her own death. She may refuse to consent to the anesthesia injection in the full knowledge that her decision may significantly reduce the chance of her unborn child being born alive. The fetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarian section operation.[289]

Ultimately, the court upheld the general premise that a competent adult woman has an absolute right to refuse treatment and protect her autonomy.[290] The court did allow physicians to intervene and override the decision of an incompetent woman, but even then, the intervention was to protect the woman's health and her best interests.[291] The court narrowed the exception and carefully defined when a court may intervene and force medical treatment.[292] A court may intervene only when the competency of the woman comes into questions, and only when the woman is found incompetent due to mental health reasons or due to the labor process.[293]

VI. BALANCING COMPETING INTERESTS: TWO APPROACHES COMPARED

Courts in both the United States and the United Kingdom have reached the conclusion that an individual has the right to refuse medical treatment.[294] Further, the majority of courts in both countries have reached the conclusion that pregnant women have the absolute right to refuse medical treatment, even if that choice results in her death.[295] Despite these similar outcomes, the legal and historical basis for the court decisions vary in the two countries and helps define the exceptions to the general rule.

Perhaps the greatest difference in the legal analysis of the United States and United Kingdom is the source of the right of pregnant women to refuse medical treatment. The right to refuse treatment in the United Kingdom is clearly grounded in traditional common law tort liability, and, specifically, the

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289. *In re* M.B., [1997] 2 F.L.R. 426, 435.

290. *See id.*; *See also* Francis, *supra* note 39, at 386.

291. *See id.*

292. *See id.*

293. *See In re* M.B., [1997] 2 F.L.R. 426, 431. The court stated that hospitals should bring forth the issue as soon as it is raised, rather than waiting for the last second, when intervention is difficult. *See id.*

294. *See generally In re* A.C., 573 A.2d 1235 (D.C. Cir. 1990)(en banc); *In re* C., [1994] 1 W.L.R. 290.

295. *See In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994); *In re* M..B., [1997] 2 F.L.R. 426, 431.

doctrine of informed consent.[296] Therefore, courts within the United Kingdom have developed, and continue to develop, the doctrine of informed consent in such a way that it protects an individual's right to self-autonomy.[297] The House of Lords and English courts are less interested in "personal" rights or "constitutional" rights, than they are in developing a workable tort doctrine of informed consent.

The United Kingdom's focus on traditional tort theory has allowed the courts to formulate one major exception to the right of pregnant women to refuse treatment: the use of competency determinations.[298] This exception is logical and consistent with English law.[299] A court has set guidelines and specific medical factors that must be examined before it may override a pregnant woman's decision.[300] Specifically, the exceptions apply if the woman's decision is both incompetent and irrational and the woman's decision will result in the death of a viable fetus. The exception insures that there is some flexibility to the traditional tort liability and common law rights within the United Kingdom.

In the United States, the right to refuse medical treatment arises from both Constitutional and common law doctrines.[301] Again, it is the common law doctrine of informed consent that prevents physicians from giving unwanted treatment; however, it is an individual's right under the U.S. that protects the individual from unwanted State intervention.[302] Because Constitutional rights trump common law rights, the focus of American jurisprudence is on the individual and his or her rights. Consequently, a majority of courts in the United States give an absolute right to individuals to refuse treatment on Constitutional grounds.[303] Although this is an inflexible doctrine, there can be no exceptions if the courts are truly going to protect the rights that they and the Constitution have created.

VII. CONCLUSION

Because the source of the right of pregnant women to refuse treatment varies in the United States and United Kingdom, it appears that the countries will always have some variations on a pregnant woman's fundamental rights. The United Kingdom's exception that allows the State to intervene when a woman is incompetent seems inconsistent with American jurisprudence and

296. *See* Francis, *supra* note 39, at 430.

297. *See In re M.B.*, [1997] 2 F.L.R. at 431.

298. *See id.*

299. *See generally* Francis, *supra* note 39.

300. *See generally id.*

301. *See generally* Krista Newkirk, *State-Compelled Fetal Surgery: The Viability Test Is Not Viable*, 4 WM. & MARY J. WOMEN & L. 467 (1998).

302. *See generally* Levine, *supra* note 79.

303. *But see* Pemberton v. Tallahassee Memorial Medical Center, 66 F.Supp.2d 1247 (N.D. Fla. 1999).

will not likely receive attention from American courts. Courts in the United States refuse to examine the rationality of an individual's choice, as the individual has a Constitutional protected interest in her decision. Because of the difference in legal analysis, it appears that the United Kingdom exception and U.S. Constitutional protections prevent a coherent approach to this difficult legal problem.

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