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SQUARE PEGS AND ROUND HOLES: AL-QAEDA DETAINEES AND COMMON ARTICLE 3

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"If our work is to be of value, we must always keep realities in view, and avoid laying down rules which cannot be applied. We must go as far as possible, and yet never transgress the bounds beyond which the value of the new Convention will become an illusion."[1]

I. INTRODUCTION

Who can forget that dreadful morning of September 11, 2001, with its obscene images of civilian airliners crashing into—and bringing down—the World Trade Center towers in New York City and of the Pentagon in flames? In truth, those attacks constituted a new chapter in the history of armed conflict. On 9/11, a non-state actor, the transnational terrorist organization al-Qaeda, was able to accomplish in one terrible morning what most currently-existing nation-states would be hard-pressed to do at all: al-Qaeda successfully projected power half-way around the globe and mounted a well-coordinated attack to inflict unprecedented damage and destruction on the world's sole superpower. Nineteen al-Qaeda terrorists managed in one awful morning to inflict more death and destruction on the United States—using box cutters and hijacked civilian aircraft as their weapons of choice[2]—than the Empire of Japan managed to do at Pearl Harbor with one of the world's most sophisticated naval

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1. Max Petitpierre, *Minutes of the First Seven Plenary Meetings*, *in* 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 at 9, 10 (2004) [hereinafter FINAL RECORD].

2. Nineteen al-Qaeda members hijacked four civilian aircraft, two of which were intentionally flown into the World Trade Center towers in New York City, one of which was intentionally flown into the Pentagon in northern Virginia, and one of which crashed in Pennsylvania when passengers sought to take back control of the aircraft before it, too, could be used as a missile against another high value target. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S., THE 9/11 COMMISSION REPORT FINAL REPORT OF THE NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf. A total of 2973 persons were killed by these acts. *Id.* at 552 n.188.

arsenals of its day.[3]

The resulting "Global War on Terror"[4] (GWOT) is thus an anomaly: not quite "war" in the traditional sense with vast naval armadas, armies, and air forces, yet too lethal and geographically extensive to constitute mere "criminal activity" to be dealt with solely by the Nation's criminal justice system.[5] The GWOT is, in reality, a hybrid straddling the fence between traditional armed conflict and extremely heinous criminal activity.[6] The GWOT's hybrid nature

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3. Japan attacked the U.S. fleet at Pearl Harbor and U.S. Army airfields on Oahu from a naval flotilla consisting of sixty-seven ships, including six aircraft carriers, from which 353 planes were launched to conduct the attacks. *Pearl Harbor Facts Trace History, Consequences of 1941 Attack*, MORNING CALL (Allentown, Pa.), May 27, 2001, at A4. A total of 2403 Americans were killed by the Japanese attacks. *Id.*

4. "Global War on Terror" is an unfortunate moniker that suffers much from its imprecision. It wrongly suggests that one's foe can be a method or means of warfare. Nevertheless, the Bush Administration has made clear that the so-called Global War on Terror is not aimed at "terror" per se, though one might be excused for thinking that based on the phrase itself, but rather only at those *terrorist groups* that can project power globally. *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://whitehouse.gov/news/releases/2001/09/print/20010920-8.html (emphasis added) [hereinafter Bush, Address to Congress]:

> Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya . . . .
>
> Al Qaeda is to terror what the mafia is to crime.
>
> . . . .
>
> Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group *of global reach* has been found, stopped and defeated.

5. The ongoing war is unlike any before in our history. *See, e.g., id.* ("The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and [to] make no distinction among military and civilians, including women and children.") Mark Fineman & Stephen Braun, *After the Attack; The Terror Network; Life Inside al Qaeda: A Destructive Devotion*, L.A. TIMES, Sept. 24, 2001, at A1:

> [Al Qaeda members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States.

See also Deputy Sec'y of Def. Paul Wolfowitz, Prepared Statement for the House and Senate Armed Services Committees: "Building a Military for the 21st Century" (Oct. 3, 2001), available at http://www.defenselink.mil/speeches/2001/s20011003-depsecdef.html:

> Our new adversaries may be, in some cases, more dangerous than those we have faced in the past.
>
> . . . .
>
> Their decision-making is not subject to the same constraints that earlier adversaries faced. [They] answer to no one. They can use the capabilities at their disposal without consultation or constraint—and have demonstrated a willingness to do so.

6. For purposes of this paper, the GWOT will be understood as constituting "armed conflict" within the meaning of the international law of war. This stance is consistent with the views of: (1) the President of the United States, *see, e.g.*, President George W. Bush, Remarks

helps explain the ongoing confusion in the United States and elsewhere concerning the type of treatment owed by the United States and its allies to those captured and detained in this war. Those who view the 9/11 attacks as acts of war, as something beyond mere criminal acts *writ large*, argue that al-Qaeda detainees should be subject to and governed by the law and customs of war;[7] on the other hand, those who view the events of 9/11 as extremely heinous criminal acts, but not acts of war, argue that the detainees should be subject to and governed by the United States criminal justice system, with all of its inherent rights and protections.[8]

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at National Day of Prayer and Remembrance (Sept. 4, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/print/20010914-2.html ("War has been waged against us. . . ."); Bush, Address to Congress, *supra* note 4 ("On September the 11th, enemies of freedom committed an act of war against our country."); (2) the Congress of the United States, *see, e.g.*, Sense of Congress Regarding Terrorist Attacks, Pub. L. No. 107-40, 115 Stat. 224 ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ."); (3) the Supreme Court of the United States, *see, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)) (noting that "capture, detention, and trial of unlawful combatants . . . are 'important incident[s] of war'"); (4) the United Nations Security Council, *see, e.g.*, S.C. Res. 1368, pmbl., U.N. Doc. S/Res/1368 (Sept. 12 2001) (recognizing and reiterating, in light of the events of 9/11, a nation's "inherent right of individual and collective self-defence," a war-related right); (5) our NATO allies, *see, e.g.*, Statement by NATO Secretary General, Lord Robertson, Statement of Support (Oct. 2, 2001), *available at* http://www.state.gov/s/ct/rls/other/5197.htm (confirming that 9/11 attacks triggered application of mutual defense provision, Article 5, of the Washington Treaty); (6) our ANZUS Pact allies, *see, e.g.*, The Hon. John Howard, Prime Minister of Austl., Joint Press Conference with the Deputy Prime Minister and the Ministry for Foreign Affairs (Sept. 14, 2001), *available at* http://www.pm.gov.au/media/speech/2001/speech1240.htm) (announcing that the Australian Cabinet had agreed that the attacks of 9/11 warranted invocation of mutual defense provisions of the ANZUS treaty); and (7) our Rio Pact allies, *see, e.g.*, Org. of Am. States [OAS] Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, OEA/Ser.F/II.23, RC.23/RES.1/01 (Sept. 21, 2001), *available at* http://www.oas.org/OASpage/crisis/RC.23e.htm (recognizing that the 9/11 attacks triggered the reciprocal defense provisions of the Rio Pact). *See also* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 21 (2003) (noting that 9/11 attacks exhibit "characteristics of armed conflict including their purpose, coordination, and intensity"); *id.* at 35 (noting that al-Qaeda intended the attacks as "acts of war" against the United States).

7. *E.g.*, captives must meet certain criteria to receive protection under the Prisoner of War Convention, *see* Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 3-5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; captives are to be detained by the regular armed forces of the detaining nation, *see id.* art. 39; captives may receive legal representation upon the filing of charges, *see id.* art. 105. Note that captives are kept in preventive, not punitive, detention, i.e., they are detained to ensure that they do not again take up arms, not as punishment for their activities. Taking up arms unlawfully, i.e., in violation of the Conventions' rules, is itself a war crime: "[U]nlawful combatants . . . violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the 'killing [and] disabling . . . of peaceable citizens and soldiers.'" Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2832 (2006) (Thomas, J., dissenting) (quoting W. Winthrop, MILITARY LAW AND PRECEDENTS 784 (rev. 2d ed. 1920)).

8. *See, e.g.*, Brief for Petitioners at 14, Al Odah v. United States, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96764 (alleging that the U.S. Government was "violating

One author has attempted to place the events of 9/11 in historical perspective in these words:

> In the hours and days that followed [the attacks of 9/11,] many compared the events of September 11, 2001, to those of December 7, 1941—another day of infamy. Just as Franklin D. Roosevelt declared war following the attack on Pearl Harbor, so George W. Bush declared war following the attack on the World Trade Center and the Pentagon. But what kind of war would it be? It soon became clear that the "war on terrorism" would bear little resemblance to World War II. After December 7, 1941, America mobilized as never before. Millions of men traded civilian clothes for military uniforms, millions of women left home to take jobs left vacant, whole factories were retooled from making cars and tractors to manufacturing tanks and artillery shells. After four years of extreme exertion, America's sacrifices were rewarded with the unconditional surrender of its foes—Imperial Japan, Nazi Germany, Fascist Italy.
>
> No such triumph would be likely over the forces of terrorism—any more than total victory could be declared in the war on crime, or the war on drugs, or the war on poverty. Just as this was not a conflict that would result in total victory, so it would not call for total mobilization of the home front. No draft was instituted after the attack, nor was industry put

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fundamental principles of due process by imprisoning [Petitioner] indefinitely without charge, access to counsel, or access to any impartial process for reviewing [his] detention[]."); Petitioners' Brief on the Merits at 4-5 n.3, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 162758 (alleging that petitioners have not been charged with any wrongdoing or brought before any panel and have been denied counsel). *But see* Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591 (2002).

> The ability to prosecute domestic crime, and the necessity of providing constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake. . . .
>
> It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. . . . U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11.

Id. at 610-11 (emphasis in original).

> on alert. This war would be fought by a relatively small number of professional soldiers, sailors, airmen, marines. They would be pitted against the men of the shadows, holy warriors who wore no uniform, who shirked open battle, who took refuge among civilians and emerged to strike when least expected at the infidel's most vulnerable outposts. . . . The greatest challenge in fighting terrorism was not to kill the enemy; it was to identify the enemy. Spies, police officers, covert operators, even diplomats would be on the front lines; and civilians would suffer more heavily than the uniformed military.[9]

The international community anticipated neither the rise of groups like al-Qaeda, able to engage in extensive, lethal, armed conflict around the globe, nor the hybrid nature of the armed conflict that has resulted.[10] Because no one foresaw the advent of non-state actors like al-Qaeda being able to engage in global armed conflict, the current law of war[11] lacks defined and adequate means to deal with the peculiarities inherent in such a conflict. Despite this reality, today many in the West and elsewhere are arguing that the specific rules enunciated in the 1949 Geneva Conventions—agreements adopted, first and foremost, to deal with gaps in, and abuses of, the law of war arising out of the events of World War II[12]—are adequate to deal with the GWOT and can be easily and neatly applied to it.

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9. MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER xiii-xiv (2002).

10. These attacks are, indeed, difficult to categorize. As one commentator opined:

> Because al Qaeda did not act on behalf of a state, the conflict was not an "international armed conflict" on September 11. Because al Qaeda neither controls nor seeks to control territory in the United States, the conflict is not a classical "internal" armed conflict.. Moreover, because al Qaeda neither challenges the legitimate authority of the United States government within its territory nor suggests that the United States exercises illegitimate dominion over any other territory, the hostilities are not part of a "war of national liberation."

Jinks, *supra* note 6, at 20 (internal citations omitted).

11. "Law of war," "law of armed conflict," and "international humanitarian law" are synonyms and may be used interchangeably.

12. *See* COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 5-6 (Jean S. Pictet ed., 1960) [hereinafter GC III CMT.] (noting that, despite the overall successful application of the 1929 Convention during World War II, it was nevertheless apparent that the 1929 Convention needed revision; that the ICRC began to draft proposed changes even before the Second World War had ended; and that the ICRC drafts served as the point of departure for the conferences dealing with revising the 1929 Convention); 2-A FINAL REPORT, *supra* note 1, at 9 ("Unfortunately, the Conventions of 1929 . . . prove[d] inadequate to alleviate th[e] sufferings [of World War II]. It is our duty never to lose sight of the tragic experiences the world has seen and to remedy as far as possible the deficiencies revealed in the texts of 1929."); JAMES E. BOND, THE RULES OF RIOT INTERNAL CONFLICT AND THE LAW OF WAR 43 (1974) (noting that rules governing warfare lag behind the means of conducting warfare and seldom anticipate technological innovations).

Such arguments simply fail to recognize the unique, especially brutal and lawless, nature of the GWOT: a war in which international law and humanitarian norms are routinely *and intentionally* flouted and mocked by al-Qaeda and its supporters. Current international rules cannot adequately deal with those unalterably opposed to civilized norms, and to think that they can grossly misapprehends the goals of the terrorist groups involved.[13] Treating the GWOT like previous armed conflicts reflects either gross ignorance or intentional blindness on the part of the West. Such an approach contributes, not to enhancing peace and world order, but instead to increased international lawlessness and disrespect for international law. It does so by extending rights and protections explicitly designed for combatants adhering to international law and humanitarian norms to those who heinously and purposefully violate such rules and norms.

International treaties, such as the Geneva Conventions, have historically sought to provide enhanced rights and protections as a reward to those who engage in *lawful belligerency* in order to encourage combatants to respect and keep international law and norms of behavior, thereby mitigating the evil effects of war.[14] Extending the same rights and protections to those who intentionally flout and disobey the law of war by engaging in purposeful barbarism destroys the incentive for all future combatants to abide by the Geneva Conventions' rules and norms and constitutes a significant step backward. Moreover, such action subverts the authority and legitimacy of international treaties, since extending rights and protections specifically designed for lawful combatants to the intentionally lawless constitutes an illegitimate and unauthorized amending of what the High Contracting Parties at Geneva agreed to observe and be bound by, thereby making a mockery of such conventions and reducing the incentive of all States to participate in negotiating future agreements.[15] Such misplaced application seems to be especially true of

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13. *See, e.g.*, Op-Ed, *Ridding Islam of the Cancer Within*, IRISH TIMES, Oct. 4, 2005, at 16 (quoting al-Qaeda spokesman Suleiman Abu Ghaith: "We have not reached parity with [the Americans]. We have the right to kill four million Americans—two million of them children—and to exile twice as many and wound and cripple hundreds of thousands."); Gordon Cucullu, *Gitmo Jive*, AM. ENTERPRISE (Sept. 2005), *available at* http://www.taemag.com/issues/articleid.18656/article_detail.asp:

> [The prisoners at Guantanamo Bay] are not driven by poverty, unemployment, or class deprivation. They are motivated by a virulent form of Islam that promotes jihad and death to Western Civilization. They will kill Americans—including women and children—without conscience, for they are convinced that restoration of the Islamic caliphate is their sole mission on this Earth.

14. *See, e.g.*, GC III CMT., *supra* note 12, at 9 (noting that Geneva Conventions determined "to mitigate the sufferings of war victims"); RESPECT FOR INTERNATIONAL HUMANITARIAN LAW: HANDBOOK FOR PARLIAMENTARIAN S 11 (1999) (noting that the purpose of the law of war is "to limit the effects of war on people and objects").

15. *See infra* note 98. One should also ask why States would desire to enter into future agreements if the terms they have agreed to in past treaties are to be stretched beyond recognition and applied in a manner inconsistent with what was agreed. When treaties can be interpreted to effect what was not intended or agreed, they actually promote lawlessness and

Common Article 3 of the 1949 Geneva Conventions.[16]

This Article analyzes Common Article 3 of the 1949 Geneva Conventions. Part II reviews the historical antecedents of Article 3. Part III focuses on what transpired at the 1949 Geneva Conference and on what the State Parties agreed to concerning Article 3. Part IV evaluates how Article 3 is being distorted and applied today, in direct contradiction to what the High Contracting Parties anticipated and agreed.[17]

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disorder in international affairs, since no State can be sure how some international adjudicative body will twist the meaning of a treaty to suit its view of what the treaty *should mean* rather than what the parties agreed, through negotiations and compromise, that the treaty *actually means*. COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 19 (Jean S. Pictet, ed., 1958) [hereinafter GC IV CMT.] ("There could be *no question of obliging a State to observe the Convention in its dealing with an adverse Party which deliberately refused to accept its provisions*.") (emphasis added).

This does not mean, however, that unlawful combatants like members of al-Qaeda enjoy no protections at all under international law. All detainees, including captive members of al-Qaeda, must be treated humanely in accordance with the norms of the customary law of war. What it does mean, though—as this Article will show—is that Article 3 and its requirements do not apply to al-Qaeda and its members.

16. Article 3 is often referred to as "Common Article 3," since the same language is included as Article 3 in each of the four Geneva Conventions of 1949. Note that current Article 3 changed numbers during the course of the 1949 Diplomatic Conference at Geneva. What is known today as Article 3 was originally the fourth paragraph of Article 2. *See* 2-A FINAL RECORD, *supra* note 1, at 128. Later, it was separated from Article 2 and redesignated as Article 2A. *See id.* at 129. *See also* 3 FINAL RECORD, *supra* note 1, at 205, 211, 217, 231. For convenience in this Article, except where discussing the issue in its historical context, the article will be referred to as Article 3 or Common Article 3.

Article 3 reads, in pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: [here follows a list of provisions applicable to victims of such conflicts, including members of armed forces who have laid down their arms or are otherwise *hors de combat*].

See, e.g., GC III, *supra* note 7, art. 3. One of the key provisions applicable to victims of "armed conflict not of an international character" is the right to be tried by a "regularly constituted court." *See id.* art. 3(i)(d). If, however, members of al-Qaeda do not qualify as victims of such a non-international conflict, they are not protected by Article 3, and the provisions of Article 3, including the court provision, do not apply to them.

17. The Geneva Conventions are agreements between sovereign *States*. Hence, it is what the *States* agreed to when negotiating the treaty which should carry the day when interpreting the provisions of a treaty. The International Committee of the Red Cross (ICRC) concurs in this view. When questions are directed to the ICRC as to how to interpret a specific article in one of the Conventions, the ICRC notes the following in the Foreword to each of the 1949 Convention Commentaries: "The Committee, moreover, whenever called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty*." *See* GC III CMT., *supra* note 12, foreword (emphasis added). *See also* COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, foreword [hereinafter, GC I CMT.]; COMMENTARY II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA, foreword [hereinafter, GC II CMT.]; GC IV CMT, *supra* note 15, at foreword.

II. HISTORICAL ANTECEDENTS TO CURRENT ARTICLE 3

Over the last century, international conventions have sought to regulate the incidents of war in order to protect, inter alia, the health, safety, and dignity of combatants who fell into the hands of the enemy.[18] Such conventions set forth rules to govern what is and is not permissible in war. Combatants who fall into enemy hands complying with the rules set forth in the conventions are afforded certain explicit legal rights and protections, whereas captives who violate such rules enjoy only basic humane standards of treatment according to the customs of war.[19]

The development of the law of war, and especially the extending of certain rights and protections to both combatants and noncombatants alike, has been an iterative process,[20] one which has historically sought to remedy for future conflicts the problems and abuses identified in previous ones. Developing and adopting measures to protect those taken captive during wartime is of relatively recent vintage. The first international effort to regulate the status of prisoners of war was drafted in Brussels in 1874.[21] Yet, "it was not until the Peace Conferences of 1899 and 1907 that States first agreed to limit as between themselves their sovereign rights over prisoners of war."[22] "The Regulations annexed to the Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land gave prisoners of war a definite legal statute to protect them from arbitrary treatment by the Detaining Power."[23]

During World War I, however, the Hague Regulations "proved [to be] too

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Even the Supreme Court of the United States has misunderstood and misapplied Article 3. A five-Justice majority in the recent decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), appears to accept—with little, if any, independent research or analysis—the arguments made and positions taken by Petitioner Hamdan and his *amici* regarding Article 3, even though such arguments and positions contradict the text and negotiating history of the Article. As this paper shows, even a cursory reading of the Final Record of the 1949 Geneva Conference reveals that no delegation at Geneva agreed to the currently claimed meaning and reach of Article 3. *See infra* Part III, As such, one may not legitimately argue that *Common Article 3* guarantees to al-Qaeda captives any rights at all, much less trial by a "regularly constituted court." *See* GC III, *supra* note 7, art. 3. Because the Supreme Court opinion reflects the arguments and reasoning of Petitioner Hamdan and his *amici*, this paper focuses primarily on their reasoning.

18. *See, e.g.*, 85 INT'L REV. OF THE RED CROSS June 2005, inside front cover (noting ICRC mission "to protect the lives and dignity of victims of war").

19. *See, e.g.*, GC III, *supra* note 7, art. 142, ¶ 4; GC III CMT., *supra*, note 12, at 16 (noting that "in case of denunciation of the convention," "usages established among civilized peoples, . . . the laws of humanity and the dictates of public conscience" still govern treatment of captives); *id.* at 648.

20. GC III CMT., *supra*, note 12, at 9-10 (regarding protection for prisoners of war, "[t]he Regulations annexed to the Fourth Hague Convention of 1907 contained seventeen Articles relative to prisoners of war, the 1929 Convention constituted a code of almost one hundred articles, and . . . the present 1949 Convention contains 143 articles.").

21. *Id.* at 5.

22. *Id.* at 4.

23. *Id.* at 5.

indefinite[,] and the belligerents were compelled to sign temporary agreements amongst themselves [e.g., the Berne agreements of 1917 and 1918] on disputed points."[24] Having learned many lessons from the experience gained during World War I, following the war, the International Committee of the Red Cross (ICRC) sought "to improve the conditions of prisoners of war by giving them a regular statute."[25] In 1921, at the Xth International Red Cross Conference, representatives of both the participating Governments and National Red Cross Societies requested that the ICRC draft a new Geneva Convention to correct the shortcomings of previous efforts and to provide improved protections for prisoners of war.[26]

The ICRC completed its draft of the proposed new Convention in 1923.[27] The 1923 draft served as the point of departure for the 1929 Diplomatic Conference, held in Geneva from July 1-27, 1929.[28] "The [1923] draft was presented to the 1929 Diplomatic Conference, was adopted and the 'Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War' . . . thus came into being."[29] It was the 1929 Convention that applied to World War II prisoners of war.[30] Despite the fact that the 1929 Convention "provided prisoners of war with effective protection and treatment far better than that which they had received during the 1914–1918 conflict," "[i]t nevertheless became apparent to those who benefited from it as well as those who had to apply it, that the 1929 Convention needed revision on a number of points because of changes in the conduct and the consequences of war. . . ."[31] Hence, "[e]ven before the end of hostilities [in World War II], the [ICRC] . . . embarked on a study of revising the 1929 Convention."[32]

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24. *Id.* at 3, 5. Despite serious shortcomings in the Hague Conventions, the ICRC did its best to prove by practical measures the interest shown by the Red Cross in prisoners of war. . . . [O]n its own initiative it opened an International Prisoners of War Agency which within a short time had 7 million individual cards in its card-indexes. . . . Moreover, by sending delegates to the camps, it was able not only to bring the comfort of a friendly visit to prisoners of war, but also to make an impartial judgment of the treatment accorded to them and to persuade the Detaining Powers to make the improvements which were called for by the tenets of the Red Cross.

Id. at 3-4.

25. *Id.* at 4.

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.* at 4.

30. *Id.* at 4-5.

During the Second World War, [the 1929] Convention applied to millions of prisoners of war; it provided the basis for action by the [ICRC] in their behalf and made it possible to carry out over 11,000 camp visits, to send relief at the rate of 2,000 freight cars per month from 1943 on and to build up a card-index containing 30 million cards.

Id. at 4.

31. *Id.* at 5-6.

32. *Id.* at 6.

The revision of the 1929 Convention proceeded as follows:

> The available literature was gathered together and the points on which the law needed expanding, confirming or modifying brought out. Draft Conventions were then drawn up with expert help from Governments, National Red Cross Societies and other relief Societies. Several meetings were convened in Geneva for this purpose, the most important being the Preliminary Conference of the National Red Cross Societies in 1946, and the Conference of Government Experts in 1947 . . . . The [ICRC] then drew up complete texts and presented them to the XVIIth International Red Cross Conference at Stockholm in 1948. They were adopted there with certain amendments.
>
> After passing through these various stages, the draft texts were taken as the only working document for the Diplomatic Conference which . . . met at Geneva from April 21 to August 12, 1949. . . .[33]

The 1949 Diplomatic Conference established four primary Committees, each of which would focus on one of the following issues:

> (a) Revision of the First Geneva Convention and the Hague Agreement of 1899 which adapts that Convention to maritime warfare,
> (b) Revision of the Prisoners of War Convention,
> (c) Preparation of a Convention for the protection of civilian persons in time of war, and
> (d) Provisions common to all four Conventions.[34]

As one of the provisions "common to all four Conventions," Article 3 was dealt with by the latter Committee.

Common Article 3 is fundamentally different from all the rest of the articles in the four 1949 Conventions because "the whole of the rules applying to *non-international* conflicts are concentrated" in that single article.[35] As the

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33. *Id.*

34. *Id.* at 7. Note that the working drafts suggested the creation and adoption of four separate Conventions, to wit, Geneva Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 7; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

35. GC III CMT., *supra* note 12, at 28 (emphasis added).

ICRC Commentary aptly notes, "[u]p to 1949, the Geneva Conventions were designed to assist only the victims of wars *between* States."[36] Nevertheless, "the Red Cross ha[d] long been trying to aid the victims of *civil wars and internal conflicts*, the dangers of which are sometimes even greater than those of international wars."[37] One of the major hindrances to extending protection to victims of internal conflicts was that,

> [i]n a *civil war*, the lawful Government . . . tends to regard its adversaries as common criminals. . . . [Hence, a]pplications by a foreign Red Cross Society or by the [ICRC] for permission to engage in relief work have more than once been treated as unfriendly attempts to interfere in the domestic affairs of the country concerned.[38]

Despite this resistance, the Red Cross was, nevertheless, able to provide assistance in some civil conflicts.[39] In 1921, at the Xth International Red Cross Conference, the ICRC was able to garner support for a resolution "affirming the right of all victims of *civil wars or social or revolutionary disturbances* to relief in conformity with the general principles of the Red Cross."[40] By means of that resolution, the ICRC was able "in at least two cases—the civil war at the time of the 1921 plebiscite in Upper Silesia and the [1936] civil war in Spain—to induce both sides to give some kind of undertaking to respect the principles of the Geneva Convention."[41]

As a result of the successful interventions in Upper Silesia and Spain, the ICRC was encouraged "to reconsider the possibility of inserting provisions relating to *civil war* in[to] the Conventions themselves."[42] In 1946, at the Preliminary Conference of National Red Cross Societies, the ICRC "proposed

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36. *Id.* (emphasis added).

37. GC III CMT., *supra* note 12, at 28 (emphasis added). The term "civil war" is generally understood to mean "any *internal* armed conflict between persons of [the] same country." BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (emphasis added). *See also* The New Lexicon Webster's Encyclopedic Dictionary of the English Language 181 (Deluxe ed. 1991) (defining civil war as "war between the citizens of one country").

38. *Id.* at 28-29 (emphasis added).

39. *Id.* at 29.

40. *Id.* (emphasis added). Each category of conflict listed—to wit, civil wars or social or revolutionary disturbances—reflected a type of armed conflict between some segment of a State's population and the ruling government of that State. Given the timeframe, the ICRC doubtless had in mind, inter alia, the violent events in post-World War I Germany and the Bolshevik Revolution (and ensuing civil war) in Russia when it drafted the 1921 resolution; hence, the terms used.

41. *Id.* (citing XVIth International Red Cross Conference Document No. 12, International Committee of the Red Cross, *General Report of the International Committee of the Red Cross on its Activities from August 1934 to March 1938*; XVIth International Red Cross Conference Document No. 12bis, International Committee of the Red Cross, *Supplementary Report by the International Committee on its Activities in Spain*).

42. *Id.* at 30 (emphasis added).

that, *in the event of civil war*, the contending parties should be invited to declare their readiness to apply the principles of the Convention on a basis of reciprocity."[43] The National Red Cross Societies sought to expand the ICRC proposal by recommending that the following text be inserted at the beginning of each of the Conventions: "In the case of armed conflict *within the borders of a State*, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary."[44] The foregoing statement represented the view of the Red Cross movement.[45]

When the proposed text was presented to the Conference of Government Experts in 1947, those experts narrowed the language and reach of the proposal and instead "recommended . . . a partial application of the provisions of the Convention *in the case of civil war*."[46] In turn, the Government Experts revised the article to state that "the principles of the Convention were to be applied *in civil wars* by the Contracting Party, subject to the adverse Party also conforming thereto."[47] Thus, as feared by the ICRC, the proposal of the Government Experts "fell a long way short of that of the Red Cross Societies."[48]

Nevertheless, based on the views expressed at the 1946 and 1947 Conferences and on the reality that any extension of the reach of the Conventions had to be acceptable to the State Parties,[49] the ICRC added the following text as the fourth paragraph to Article 2 of the draft Conventions:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend

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43. *Id.* (emphasis added).

44. *Id.* (citing INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE PRELIMINARY CONFERENCE OF NATIONAL RED CROSS SOCIETIES FOR THE STUDY OF THE CONVENTIONS AND OF VARIOUS PROBLEMS RELATIVE TO THE RED CROSS 14 ff, 51 (1947)) (emphasis added).

45. *Id.*

46. *Id.* at 31 (emphasis added).

47. *Id.* (emphasis added) (citing INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS 8 (1971)).

48. *Id.* This demonstrated the divergent interests of the ICRC and National Red Cross Societies, as humanitarian advocates of individual rights and protections on the one hand, and State Parties, as protectors of sovereign rights on the other. Such a divergence, however, was not unforeseen by the ICRC. *See id.* at 30 ("There was reason to fear that there might be objections to the idea of imposing international obligations on States in connection with their *internal affairs*. . . .") (emphasis added).

49. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 336-37 (noting that, "[i]n a Diplomatic Conference . . . realistic and practical views must be taken, and the [ICRC] was aware from the outset . . . that the [Stockholm] text . . . had no chance of being adopted by Governments and that a *compromise solution should accordingly be sought*") (emphasis added).

> on the legal status of the Parties to the conflict and shall have no effect on that status.[50]

It was this text that was subsequently discussed at the XVIIth International Red Cross Conference in Stockholm in 1948. Following lengthy discussion of the draft text, the Stockholm Conference "adopted the proposals of the [ICRC] for the First and Second Conventions, and in the case of the Third and Fourth Conventions made the application of the Convention subject to the proviso that the adverse Party should also comply with it."[51] Thus, the proposal came to the 1949 Diplomatic Conference in Geneva.

III. DISCUSSIONS AND DECISIONS AT THE 1949 GENEVA CONFERENCE

What ultimately became Common Article 3 in the 1949 Geneva Conventions was one of the most controversial sections of the ICRC draft proposals dealt with at the 1949 Diplomatic Conference:

> From the very outset, divergences of views became apparent. A considerable number of delegations were opposed, if not to any and every provision *in regard to civil war*, at any rate to the unqualified application of the Convention to such conflicts. The principal criticisms of the Stockholm draft may be summed up as follows. It was said that it would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State. To compel the Government of a State *in the throes of internal conflict* to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition. There was also a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention,

50. GC III CMT., *supra* note 12, at 31. The resulting ICRC draft appears to constitute an intentional ICRC attempt to broaden the language and reach of the proposal presented to the 1948 Stockholm Conference from the terms suggested at the 1947 Conference of Government Experts. The ICRC, as an advocacy organization, admits it tries to "push the envelope" on occasion. *See* GC IV CMT., *supra* note 15, at 27 (noting that the ICRC encountered obstacles "*as always* when endeavoring to go *a step beyond* the text of the Conventions") (emphasis added).

51. GC III CMT., *supra* note 12, at 31.

> representing their crimes as "acts of war" in order to escape punishment for them. A rebel party, however small, would be entitled under the Convention to ask for the assistance and intervention of a Protecting Power. Moreover, it was asked, would not the *de jure* Government be compelled to release captured rebels as soon as order was re-established, since the application of the Convention would place them on the same footing as prisoners of war? Any such proposals giving *insurgents* a legal status, and consequently support, would hamper the Government in its measures of legitimate repression.[52]

As indicated in the above quotation and as will be shown from the Final Record of the Diplomatic Conference, discussions by the various national delegations on what ultimately became Article 3 dealt *exclusively* with the use of armed force *internally* within a State. Nowhere in the Final Record is there any indication that any of the national delegations foresaw that Article 3 would cover instances of the use of armed force between a Contracting State and a non-State entity from without—*or that they had agreed to such a proposition.*

"[A]t the Plenary Meeting on 26 April 1949, the Articles common to all four Conventions were referred to the Committee known as the Joint Committee."[53] At the very first meeting of the Joint Committee to consider extending legal protections to victims of non-international conflicts, the Stockholm Draft's call for applying the Conventions' provisions to "*all cases of armed conflict* which are not of an international character" elicited a number of concerns. The Representative from the United Kingdom noted that paragraph 4 of Article 2 "would appear to give the status of belligerents to *insurgents*, whose right to wage war *could not be recognized.*"[54] The British Delegation argued further that "application to *civil war* would strike at the root of national sovereignty and endanger national security . . . ."[55] The Representative from Norway noted: "As to *civil war*, the term 'armed conflict' should not be interpreted as meaning 'individual conflict', or 'uprising'. *Civil war* was a form of conflict resembling international war, *but taking place inside the territory of a State.*"[56] Hence, from the outset, the delegations understood clearly that the thrust of the proposed language dealt with extending rights and protections to those engaged in certain domestic armed conflicts. As a result, the discussions revolved solely around the issues of insurgency and internal strife.

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52. *Id.* at 32 (emphasis added).

53. 2-B FINAL RECORD, *supra* note 1, at 128.

54. *Id.* at 10 (emphasis added). Note that the term "insurgent" means "a rebel against a lawful government or civil authority." THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 502 (Deluxe ed. 1991).

55. 2-B FINAL RECORD, *supra* note 1, at 10 (emphasis added).

56. *Id.* at 11 (emphasis added).

At the second meeting of the Joint Committee, the Canadian Representative noted that Canada understood the fourth paragraph of the proposed article[57] to apply to civil wars and rebellions.[58] The Representative from Switzerland opined "that Article 2 raised interesting problems, [but] that only that relating to the application of the principles of the Convention to *civil war* [i.e., the fourth paragraph of Article 2] was controversial."[59] The Representative from Burma countered that "[t]he proposed Convention should not give legal status to *insurgents* who sought by undemocratic methods to overthrow a legally constituted Government by force of arms."[60] Once again, the various delegations remained concerned solely with extending rights and protections to those affected by insurgency and internal strife.

In light of the initial discussions and the strong views expressed from the very outset, it was decided to form a Special Committee of the Joint Committee to draft proposed language regarding "armed conflict not of an international character." One of the points of concern expressed by the British Representative was "the position of vanquished *insurgents* after a *civil war* was over."[61] This was of concern to the British delegation because they feared that full application of the Geneva Conventions' protections to cases of civil war would, once the armed conflict ended, compel the de jure Government to forego punishing the insurgents and to release them.[62]

In light of the focus on internal conflicts, the Representative from Monaco "considered it indispensable to distinguish between rebellion, which was more than an uprising but had not yet taken on the proportions of a *civil war*. . . ."[63] In reply to Monaco, the Representative from Australia opined "that in international law, there were well-defined principles as to the meaning of civil war. He added that in his view the Conventions should not apply to local uprisings."[64] Here, the discussions dealt solely with the potential types of *domestic* conflicts to which international norms should apply. No delegation expressed any understanding that what the various delegations were discussing involved anything but internal conflicts.

Because of delegates' concerns about the breadth of the Stockholm proposal, the Committee decided to abandon the Stockholm language—to wit,

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57. *I.e.*, Article 2. What ultimately became Article 3 was originally the fourth paragraph of Article 2. *See supra* note 16.

58. 2-B FINAL RECORD, *supra* note 1, at 13.

59. *Id.* at 15 (emphasis added). Note that Switzerland understood the fourth paragraph of Article 2 (i.e., what ultimately became Article 3) to apply to *civil war*.

60. *Id.*

61. *Id.* at 45 (emphasis added).

62. *See* GC III, *supra* note 7, art. 118 (requiring that prisoners be released once the conflict ends).

63. 2-B FINAL RECORD, *supra* note 1, at 45 (emphasis added). Here, it appears that the delegation of Monaco was trying to discern when an internal conflict would achieve a level of intensity sufficient to justify providing internationally sanctioned protections in domestic conflicts.

64. *Id.*

that the Convention would apply "in *all cases* of armed conflict which are not of an international character"[65]—and to define more clearly to which cases of armed conflict not of an international character the Conventions should apply. In reply, the Representative of France opined "that *civil war* was a political and not a legal concept . . . [and that t]he Conference was not competent to define civil war, nor to confer competency on a body of a political character."[66] Still, the discussions remained focused solely on internal armed conflict.

At the Special Committee meeting on May 18, 1949, the Representative from Monaco continued the critique of the expansive Stockholm draft language, arguing that the "Stockholm text was unsound in aiming at applying to *civil war* all the provisions of the Conventions. He proposed [instead] that the Working Group should . . . determine which provisions of the Conventions would be applicable in the case of civil war."[67] The British Representative supported that proposal and then raised again the issue of the anomaly of "protect[ing] insurgents . . . during the rebellion and treat[ing] them as traitors at the close of it."[68] Still, the discussions remained fixed on civil war and other internal conflicts.

At the meeting of the Special Committee on June 14, 1949, the Committee Chairman noted that there were special problems regarding Article 3 and the *Fourth* Geneva Convention. He stated that it would be impractical to list specific articles of the Fourth Convention, "which would be inapplicable in the case of *civil war.*"[69] Instead, "the Working Party considered it advisable to impose on the Contracting States only one obligation; that of complying in all cases with the underlying humanitarian principles of the [Fourth] Convention."[70] Regarding the other three Conventions, "the Working Party considered that *certain civil wars* were sufficiently akin to international wars to justify application of the provisions of these three Conventions as a whole. However, it *would be necessary to define these civil wars..*"[71] Here again, the entire focus and thrust of the discussions centered on *internal* armed conflict.

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65. GC III CMT., *supra* note 12, at 31 (emphasis added).

66. 2- B FINAL RECORD, *supra* note 1, at 45 (emphasis added).

67. *Id.* at 49 (emphasis added). This proposal suggests that Article 3 should not only not apply to *all* non-international armed conflicts, but that all of the Conventions' provisions should *not* apply to such conflicts either. Hence, both the types of conflicts to be covered and the provisions applicable to such conflicts were being narrowed, not expanded. *Id.*

68. *Id.* This reconfirms that the focus was on civil wars and other domestic conflicts, since an individual cannot be a "traitor" to other than his own sovereign. Hence, the British understanding excluded the possibility of non-State actors from without the State.

69. *Id.* at 76 (emphasis added).

70. *Id.*

71. *Id.* (emphasis added). Defining the various types of civil war became a sticking point and led to the idea that one should not have to debate, once an internal armed conflict begins, what "type" of civil war it is before knowing whether any of the provisions of the Conventions applies; this led, in turn, to the French proposal to focus on applying humanitarian principles rather than debating types of civil war. *See id.* at 93 (French representative noted that France could only support a draft "which confined itself to the application of humanitarian principles *in the case of civil war*" (emphasis added)).

At the meeting of the Special Committee on June 15, 1949, the French Representative was concerned that the draft language

> still contained some dangerous elements from the very nature of the subject it dealt with. The French Delegation considered that signatory Governments who were *confronted with an insurgent movement* would be in a dilemma: either they would never apply the clauses of the Conventions, or they would implicitly recognize that the adverse party had a character which was tantamount to that of a State.[72]

In turn, the Representative from the United States noted with approval that "[t]he draft proposed by the Working Party included a definition of the restricted circumstances in which the Conventions would apply to *civil war*. . . ."[73] The British Representative continued to express concern that "application of the Conventions to *civil war* created a new situation, containing many pitfalls."[74] Notwithstanding the diverse views, the discussion remained centered only on internal conflicts.

At the meeting on June 24, 1949, the French Representative explained that the Working Party "considered that it was not appropriate to mention deportation, [because that concept] was *irrelevant in the case of civil war*."[75] As the discussion continued, the United States Representative opined that "it would be unfortunate if the obligations were not laid upon the Contracting States to apply the Conventions *in certain cases of civil war*."[76]

Following the proposal wherein the Conventions' provisions would apply in full to *certain types of civil war* but not to others, the French Representative stated that his delegation "could only support a draft based on the proposal of the Second Working Party which confined itself to the application of humanitarian principles *in the case of civil war*."[77] He also wished to "place on

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72. *Id.* at 78 (emphasis added). This fear ultimately led to the inclusion of the final sentence in Article 3: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." *See e.g.*, GC III *supra* note 7, art. 3.

73. 2-B FINAL RECORD, *supra* note 1, at 78 (emphasis added).

74. *Id.* at 79 (emphasis added).

75. *Id.* at 83 (emphasis added). "Deportation" would have been relevant if other types of armed conflicts not of an international character, such as those involving persons from outside the effected State's borders, had been under consideration. Thus, France's comment is yet another indicator that such a possibility was not being considered by the Working Party or France. *Id.*

76. *Id.* (emphasis added).

77. *Id.* at 93 (emphasis added). *See also supra* note 71. Many of those who argue that Article 3 should be interpreted broadly misunderstand what France was advocating and what the various delegations agreed upon. France made its proposal to focus on applying humanitarian principles in response to the Working Party's suggestion that "*certain types* of civil war" should be covered by international protections while other types of civil war should not. *See id.* at 76 (emphasis added). The French suggestion dealt only with the inherent difficulty in classifying types of civil war and, hence, in no way broadened Article 3's reach to cover all types of armed

the record the great difficulty which existed in applying the rules of international warfare to cases of *civil war*."[78] The Representative of Italy proposed deleting "the word 'captivity,' which implied the status of a prisoner of war and was incompatible with the idea of *civil war*."[79] The Burmese Representative expressed anew that the Asian "countries he represented in the Special Committee could not agree to an extension of the Conventions to *civil war*."[80] Once again, the focus of the various delegations remained fixed on dealing only with internal conflicts.

In order to clarify further under what specific conditions Article 3 would apply, various delegations sought to add complementary conditions to the draft text. The Representative of France "proposed to restrict the application of the provisions of the Convention . . . to the case when the adverse party possessed an organized military force, an authority responsible for its acts acting within a determinate territory and having the means of respecting and ensuring respect for the Convention."[81] The Representative of Spain supported the French proposal but preferred the following language: "[T]he Conventions should only be applied in cases where the legal government was obliged to have recourse to the regular armed forces against insurgents organized as military and in possession of a part of the national territory."[82] The Australian Delegation suggested that the phrase "civil war in any part of the home or colonial territory of a Contracting Party" replace the expression "non-international conflict."[83] The United States Representative also proposed adding complementary conditions to determine when the Conventions would apply:

- that the insurgents must have an organization purporting to have the characteristics of a State;
- that the insurgent civil authority must exercise *de facto* authority over persons within a determinate territory;
- that the armed forces must act under the direction of the organized civil authority and be prepared to observe the ordinary laws of war; [and]
- that the insurgent civil authority must agree to be bound by the provisions of the Convention.[84]

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conflict not of an international character.

78. *Id.* at 94 (emphasis added).

79. *Id.* (emphasis added). "Prisoner of War" applies only to those categories of persons meeting the conditions enumerated in Article 4 of the Third Geneva Convention. GC III, *supra* note 7, art. 4. Moreover, the concept only applies to international conflicts. *Id.* Thus, like France, Italy did not consider that Article 3 applied to conflicts outside a respective nation's borders.

80. 2-B FINAL RECORD, *supra* note 1, at 102 (emphasis added).

81. *Id.* at 121.

82. *Id.*

83. *Id.*

84. *Id.*

The various proposals had the following understanding in common: "that it would be dangerous to weaken the State when confronted by movements caused by disorder, anarchy and banditry, by compelling it to apply to them, in addition to its peacetime legislation, Conventions which were intended for use in a state of declared or undeclared war."[85] Further, none of the proposals would protect persons involved in banditry, rioting, or general social disorder, which was a continuing concern of many delegations. Nonetheless, as the foregoing attests, the attention of the various national delegations remained focused solely on internal armed conflicts.

Following the deliberations of the Joint Committee on the various Articles under its purview, the Joint Committee presented its Report to the Plenary Assembly. The portion of the Report dealing with what ultimately became Article 3 read, in pertinent part, as follows:

> In the Stockholm Draft, the fourth paragraph of Article 2 stipulated that, in all cases of armed conflict not of an international character, each of the Parties to the conflict should be bound to implement the provisions of the Conventions.
>
> At the present Conference, the question immediately arose of deciding what was to be understood by "armed conflict not of an international character which may occur in the territory of one of the High Contracting Parties." *It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged as soon as *rebellion arose within their frontiers*, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied. But *at what point should the suppression of the rising be regarded as a civil war*? What criterion should be adopted?[86]

The Report continued:

> The first solution considered was to impose the application of this Convention only when the rebellion had asserted and organized itself with enough strength and coherence to represent several of the features of a State (the existence of an army, an authority responsible for its actions, a specified area of territory, etc.). A further possible solution was to make the

85. *Id.*

86. *Id.* at 129 (emphasis added). Once again, there is no mention at all of any other understanding as to the reach of the Article beyond civil wars and *similar internal conflicts*. Instead, the issue was how to determine when an internal armed conflict had risen to the level where international intervention would become appropriate.

> criterion the recognition of the rebels as belligerents by the State in conflict with them or by other States. But in view of the enormous practical difficulties to which these differentiations would have given rise, and the *very thorny problems presented by the application to civil war of Conventions drawn up for international war*, an attempt was made to find another principle which might provide a solution, and it was proposed to restrict the obligations of the legitimate government *and the rebel authority* to the most obvious and imperious rules of the Conventions, that is, to humanitarian duties as a whole.[87]

The Report of the Joint Committee indicated quite clearly that the Article was universally understood by the national delegations to apply solely to civil wars and similar internal armed conflicts.

Following the presentation of the Joint Committee's Report to the Plenary Committee, the Plenary Committee then took up the debate. The Representative of the Soviet Union concurred in the need to extend the protections of the Conventions to the victims of civil and colonial wars.[88] In response, the Burmese Representative argued that "[t]o give international recognition to insurgency would certainly be as grave an error as recognition of aggression."[89] He criticized the Article because it "include[d] civil wars—domestic matters—in an international Convention."[90]

In subsequent discussion, the Representative of Venezuela stated: "We must be quite certain of what is meant by 'armed conflicts not of an international character.' There is no doubt that this does not apply to the exploits of bandits or to riots of any kind, but to *civil war* . . . ."[91] The Representative of Mexico also recognized that the term non-international wars applied to "civil wars, wars of resistance or wars of liberation."[92] The Swiss Representative noted that the Article concerned applying the principles of the Conventions to *civil wars* and that the text and reach of the Article were the result of compromise.[93] In response to various statements criticizing the proposed wording of Article 3, the Swiss Representative responded:

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87. *Id.* (emphasis added). Recall that a "rebel" is one who "opposes a lawful government by force of arms." THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 832 (Deluxe ed. 1991). Moreover, the juxtaposition in this paragraph of the phrases "the very thorny problems presented by the application to *civil war* of Conventions drawn up for international war" (emphasis added) and "the legitimate government and the *rebel authority*" (emphasis added) confirms a focus on *internal* conflict.

88. 2-B FINAL RECORD, *supra* note 1, at 325-26.

89. *Id.* at 327-28.

90. *Id.*

91. *Id.* at 333 (emphasis added).

92. *Id.* Each of these "wars" has in common that it is directed against a political authority ruling a specific piece of territory.

93. *Id.* at 334-35.

> On the one hand . . . we are told that it does not go far enough, while on the other . . . it is said it goes much too far. These two criticisms compensate each other. And to those who complain that the suggested solution does not go far enough, there is a pertinent reply: half a loaf is better than no bread.[94]

He continued: "A comparatively modest solution is certainly better than none. . . . [Moreover, t]his means that the [ICRC] will not be exposed to the risk of its services being refused by the Parties to a conflict in case of *civil war*."[95] When asked to comment on the proposed wording of the Article, the ICRC Representative responded as follows:

> The [ICRC] had no intention of speaking on a question which, in their opinion, comes within the exclusive competence of governments. As they have been asked to give their views, however, . . . the [ICRC] feel that they cannot refuse the invitation to speak on the matter. Their position is clear; the [ICRC] was in favour of the text which they themselves submitted to the Stockholm Conference and which provided for the full application of the Conventions in the event of conflicts not of an international nature.
>
> In a Diplomatic Conference, however, realistic and practical views must be taken . . . .
>
> The [ICRC] gave [the text adopted by the Joint Committee] their support and still give it today, because this text is simple and clear and has the merit of ensuring, *in the case of civil war*, at least the application of the humanitarian rules which are recognized by all civilized peoples. This text, therefore, without being a complete expression of the ideal which the [ICRC] has in view, ensures a minimum protection and—which is still more important—gives impartial international bodies, such as the [ICRC], means of intervention.[96]

94. *Id.* at 335. Note that this comment by the Swiss Representative confirms that the agreed-upon reach of Article 3 was *not* to every possible type of non-international armed conflict.

95. *Id.* (emphasis added). Once again, note the descriptive "modest," hardly an adjective one would choose if the reach were as wide-ranging as today's proponents of a broad application of Article 3 claim.

96. *Id.* at 336-37 (emphasis added). Even the ICRC representative understood that the delegates had decided to limit the reach of Article 3 to civil wars.

When the final vote on the Article was taken in Plenary session, the text that ultimately became Article 3 "was adopted by 34 votes to 12 with 1 abstention."[97]

During the entire Diplomatic Conference—whether in Plenary or Committee session—the national delegations' discussion about extending rights and protections to victims of "conflicts not of an international character" focused exclusively on civil wars and related *internal* conflicts. There is no evidence in the Final Record to indicate that the Parties to the Conference understood that they were agreeing to anything other than extending certain principles of humanitarian treatment to victims of civil wars and similar internal conflicts. Yet, that is not how Article 3 is being interpreted and applied today.

IV. HOW ARTICLE 3 IS BEING APPLIED TODAY

Despite the fact that the Final Record provides no indication that Article 3 dealt with—*or was intended by the High Contracting Parties to deal with*—anything other than civil wars and their close relations, such as rebellions, insurgencies, or colonial wars, commentators and jurists have expanded the reach and distorted the meaning of Article 3 until it is no longer recognizable. Instead of affirming that Article 3's terms (or any treaty's terms, for that matter) gain their meaning—and legitimacy—from what was mutually agreed upon by the High Contracting Parties,[98] today's commentators and jurists have placed a gloss on Article 3 such that, rather than applying only "[i]n the case of armed conflict *not of an international character occurring in the territory of one of the High Contracting Parties*,"[99] Article 3 now applies to *all* conflicts *everywhere*.[100]

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97. *Id.* at 339.

98. *See, e.g.*, GC III CMT., *supra* note 12, foreword ("The Committee, moreover, when called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.*") (emphasis added); 2-B FINAL RECORD, *supra* note 1, at 336 (noting that determining the text and meaning of a treaty provision falls "within the exclusive competence of governments").

99. GC III, *supra* note 7, art. 3 (emphasis added).

100. *See, e.g.*, Brief of Professors Ryan Goodman et al. as Amici Curiae Supporting Reversal, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53970 at *2 (Geneva—Applicability) [hereinafter Goodman Brief] (arguing that "Common Article 3 provides the minimum humanitarian rules applicable in all armed conflicts—even those that also qualify as international armed conflicts within the meaning of Common Article 2"); Brief for International Human Rights Organizations Center for Constitutional Rights et al. as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 53982 at *18 [hereinafter Human Rights Brief] (arguing that Article 3 reaches "all persons in all conflicts"); Brief of International Law Professors Listed Herein as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 42058 at *6 n.3 (Commissions-Geographic Requirement) [hereinafter, Law Professors' Brief] (arguing that Article 3 applies "in an international armed conflict"); Brief for Petitioner,

Such a result is inconsistent with how United States courts normally construe treaties. Although "[t]reaties are to be *liberally construed* so as to effect the apparent intention of the parties . . . , [w]hen their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their practical construction of it."[101] Granted, United States

> [c]ourts commonly declare that treaties are more "liberally construed" than contracts. *This does not mean, however, that treaty provisions are construed broadly.* Rather, this "liberal" approach to treaty interpretation merely reflects . . . the willingness of courts, when interpreting difficult or ambiguous treaty provisions, to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Indeed, existing precedents—though sparse—suggest that treaty provisions should be construed narrowly rather than broadly. *As treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly—for fear of waiving sovereign rights that the government or people of the State never intended to cede.* Ambiguous provisions of a treaty should thus be interpreted to derogate minimally from the sovereign power of the State, which is the quintessential and most legitimate entity in international law.[102]

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53988 at *49 [hereinafter Hamdan Brief] (arguing that "Article 3 binds all conflicts, and all parties"); Reply Brief for the Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 684299 at *19 [hereinafter Hamdan Reply Brief] (arguing that Article 3 applies to "all conflicts"). *But see* Jinks, *supra* note 6, at 20 (noting that evidence exists "suggest[ing] that Common Article 3 applies only to civil wars" and that "textual ambiguity in the provision raises some questions about whether [Article 3] applies to transnational armed conflict").

101. Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929) (emphasis added). The terms of Common Article 3 are anything but clear. *See infra* note 110.

102. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638-39 (5th Cir.) *cert. denied*, 513 U.S. 1016 (1994) (quoting E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991)) (emphasis added). The Government's brief reflected the narrow interpretation because of the effect a broad reading would have on United States sovereignty. Brief for Respondents, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 U.S. S. Ct. Briefs LEXIS 292 at *24 (noting that the Geneva Convention neither "preclude[s] the trial of petitioner by military commission" nor "create[s] private rights enforceable in domestic courts"); *id.* at * 25 (noting that President has concluded that al-Qaeda not covered by Geneva Convention). Moreover, the Supreme Court noted the following in *Hirabayashi v. United States*:

> The war power of the national government is "the power to wage war successfully." . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . *Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those*

The view that Article 3 applies to more than civil wars (and similar domestic armed conflicts) derives from the following arguments:

(1) By its own terms, Common Article 3 applies to all armed conflicts not between two or more High Contracting Parties;[103]
(2) Narrowly Interpreting Common Article 3's reach is not faithful to the context and purpose of Article 3;[104] and
(3) Narrowly interpreting Common Article 3 would create an "inexplicable and unacceptable gap" in the Conventions' coverage.[105]

Each argument will be discussed in turn.

A. Argument That, By Its Own Terms, Common Article 3 Supports a Broad Interpretation and Application

Common Article 3 reads, in pertinent part: "In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . ."[106]

Proponents of a broad understanding of Article 3 typically parse the Article's initial clause into two parts and then analyze the parts independently of each other, as follows.

1. Meaning of the Phrase "Armed Conflict Not of an International Character"

Those who argue that Common Article 3 is *not* confined to civil wars (and similar internal conflicts) focus first on the phrase "of an international character."[107] They argue that "of an international character" "*clearly* refers to the party structure in a conflict—a conflict between two or more states."[108]

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branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. 81, 93 (1943) (internal citations omitted) (emphasis added). *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation"); Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (finding that political branches accorded high level of deference in area of military affairs).

103. *See, e.g.*, Brief of the Association of the Bar of the City of New York and the Human Rights Institute of the International Bar Association as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53985 at *7-9 (Geneva—Common Art. 3) [hereinafter NYC Bar Brief]

104. *See, e.g.*, Goodman Brief, *supra* note 100, at *20 (citing GC III CMT., *supra* note 12, at 36).

105. *See, e.g., id.* at *22.

106. *E.g.*, GC III, *supra* note 7, art. 3.

107. *See* Goodman Brief, *supra* note 100, at *19.

108. *See id. See also* Hamdan Brief, *supra* note 103, at *49 ("[A]s Judge Williams recognized: 'the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., between nations.'"); NYC Bar Brief, *supra* note 103,

From this, they argue it follows that the phrase "not of an international character" must mean a conflict that is not between two or more states. Hence, it could include conflicts with non-State entities of all types, whether internal or external.

Although this approach might seem logical at first blush, it is seriously flawed. Such an approach not only neglects reading both parts of Article 3's initial clause as an integrated whole, it also presupposes that the respective Article 3 phrasing has a single defined meaning and is not subject to multiple interpretations. That is simply untrue.[109] To determine how those most intimately involved with Article 3 viewed the clarity of the Article's language, one should turn first to the ICRC commentaries.[110]

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at *8.

109. *See, e.g.*, GC III CMT., *supra* note 7, at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"); BOND, *supra* note 12, at 51 (citing Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 43 (1971)) ("One of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey."); Jinks, *supra* note 6, at 38-41 (noting that the record supports three plausible understandings of the phrase "armed conflicts not of an international character"); Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 94 (2004) (noting that Article 3's vagueness "has resulted in disagreement over the range of conflicts to which it is meant to apply" and that the "precise meaning" of "'armed conflict not of an international character' is unclear"); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 816 (2005) (noting that the reach of Article 3 has grown over time); Hamdan v. Rumsfeld, Brief of Human Rights First et al. as Amici Curiae, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 53968 at *23 [hereinafter Human Rights First Brief] (noting that Article 3 has evolved over time and is now considered a "'floor' below which parties may not go *in any armed conflict*" (emphasis added)).

The issue of multiple interpretations did not end at Geneva in 1949. The confusion continued during the negotiating of Protocal Additional II in 1977. *See* COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTING OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) (Yves Sandot et al. eds., 1987) [hereinafter PROTOCOL II CMT.] at ¶¶ 4448, 4450 (noting that because Common Article 3 did not define the term "armed conflict," "it gave rise to a great variety of interpretations"; in fact, "[s]ix variants were formulated, based on thirteen proposals" in an attempt to explain to which specific types of armed conflict Common Article 3 applied).

110. NYC Bar Brief, *supra* note 103, at *6 & n.3 (noting that Article 3 was described "in the official Red Cross Commentaries as 'one of [the] most important Articles' in the Conventions" and that the Red Cross Commentaries are "'widely recognized as a respected authority on interpretation of the Geneva Conventions [whose authors] were primarily individuals intimately involved with the revision of the Convention of 1929 and the drafting of the present Conventions.'").

Yet, when turning to any ICRC document on the 1949 Conventions, one must keep in mind several important points. First, as a non-State actor the ICRC was not, and indeed could not be, a High Contracting Party to the Conventions. As such, no ICRC member voted on either the text or the meaning of any treaty provision decided at Geneva in 1949. Second, the ICRC, consistent with its history as a humanitarian organization, represents a certain point of view about the law of war and what it hoped would be achieved at Geneva in 1949. However noble and enlightened the ICRC's views may be, only the motivation and understanding of the States Parties to the Conventions matter when determining what a treaty means. Third, the ICRC

In discussing the introductory sentence of Article 3, the ICRC Commentator for the Third Convention asked the following question: "What is meant by 'armed conflict not of an international character'?"[111] He then continued: "The expression is *so general, so vague*,"[112] that "many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry."[113] The ICRC

Commentaries on the 1949 Geneva Conventions are suffused with various statements representing the ICRC's positions on issues, many of which were aspirational in nature and did not reflect the meaning and reach of a specific article agreed to by the High Contracting Parties. *See, e.g.*, GC III CMT., *supra* note 12 at 10 (emphasis added):

> [T]he Commentary serves a useful purpose, for it sets out the motives for the decisions of the authors of the Convention [i.e., including the ICRC's motives, since it was the ICRC which authored the Stockholm text that served as the point of departure for the Conventions], specifies the conditions in which the various provisions are applicable, and frequently—*without any hesitation*—points out shortcomings observed in connection with numerous problems [i.e., where the ICRC believed participating States fell short of what the ICRC had hoped for].

See also id. at 26-27 ("[A]lthough the Convention, *as a concession to legal form*, provides that in certain circumstances a Contracting Party may legally be released from its obligations, its spirit encourages the Power in question to persevere in applying humanitarian principles, whatever the attitude of the adverse Party may be.") (emphasis added); *id.* at 36 (emphasis added):

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? *We [i.e., the ICRC] do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible.*

See also GC IV CMT, *supra* note 15, at 58 (noting "an important *and regrettable* concession to State expediency" (emphasis added)); *id.* at 23 ("*That may not be a strictly legal interpretation; it does not altogether follow the text itself; but it is in our [i.e., the ICRC's] opinion the only honourable and reasonable solution.*" (emphasis added)). *See also* Jinks, *supra* note 6, at 24 (noting that ICRC Commentaries' "interpretive propositions are themselves fraught with ambiguities"). As such, one must be careful to distinguish between when the ICRC is accurately relating what actually transpired at the Conference and when it is stating its independent views, no matter how noble and enlightened such views may be. Once again, the language and meaning of treaties are determined, not by the ICRC or what the ICRC would like them to be, but solely by the States that have negotiated and agreed to be bound by the treaties' terms.

This does not mean, however, that one may never legitimately rely on a Commentator's comments as being an accurate reflection of what actually transpired. For example, an ICRC statement may be relied upon when the ICRC Commentator describes or admits to an occurrence opposed to the ICRC's preferred result. *See, e.g.*, GC III CMT., *supra* note 12, at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"). Such a statement is akin to the "statement against interest" exception to hearsay, *see* FED. R. EVID. 804(b)(3), which is based on the theory that a person would not make a statement against his or her interest unless the statement is likely to be true. *See id.* Advisory Committee's Note.

111. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49 (same formulation of question).

112. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49; GC II CMT., *supra* note 17, at 33; Canestaro, *supra* note 109 at 94 (noting that the "precise meaning of Common Article 3's reference to 'armed conflict not of an international character' is unclear"); Jinks, *supra* note 6, at 21 (noting that no one can say with assurance what meaning "armed conflict not of an international character" was meant to convey).

113. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49; GC II

Commentator for the Fourth Convention posed exactly the same question, but answered it more emphatically:

> *That was the burning question which arose again and again at the Diplomatic Conference.* The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry.[114]

If, in fact, the issue of the meaning of the phrase "armed conflict not of an international character" was a "burning question" that "arose again and again" during the Conference, and the phrase was "so general, so vague" as to cause continuing concern among the Conference participants, one wonders how the identical Article 3 language can be so clear to commentators and jurists today[115] when it was not at all clear to those wrestling with the issue in 1949.

Given that the phrase was not considered to be clear by those at the Conference itself (as admitted by all of the ICRC Commentators),[116] in order to be intellectually honest, today's commentators and jurists should turn to the record itself to discover what the High Contracting Parties understood the phrase to mean. Only then can they begin to understand what the High Contracting Parties agreed to be bound by. Part III, *supra*, dealt in depth with the statements and views expressed by the various delegations, all of which confined themselves to dealing with civil wars and related internal conflicts.

The Brief of Professors Ryan Goodman et al. (Goodman Brief)[117] correctly noted that "Common Article 3 was *revolutionary* because it subjected *wholly internal matters* to international humanitarian law."[118] Despite that observation, the Goodman Brief nonetheless claims that the delegates to the 1949 Conference did, in fact, agree (despite total silence in the Final Record that such a topic was even entertained) to extend the reach of Article 3 beyond "wholly internal matters" (like civil wars) to all persons in all conflicts where a High Contracting Party is fighting an entity not a Party to the 1949

CMT. *supra* note 17, at 33. Note once again that no mention is made, even by the ICRC Commentators, of anything but internal types of conflict.

114. GC IV CMT., *supra* note 15, at 35 (emphasis added).

115. *See, e.g.*, NYC Bar Brief, *supra* note 103, at *7 (arguing that the United States Circuit Court panel's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), "depart[ed] from the *plain language* of Common Article 3") (emphasis added). Yet, the ICRC commentary on Protocol II reveals that confusion as to the precise meaning and breadth of Common Article 3 existed well beyond Geneva in 1949. *See, e.g.*, PROTOCOL II CMT., *supra* note 109, at ¶¶ 4448, 4450.

116. *See supra* notes 109, 112-115.

117. Goodman Brief, *supra* note 100, at *21.

118. *Id.* at *21 (citing Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294, 300-01 (1949)) (emphasis added). *See also* GC III CMT., *supra* note 12, at 28 ("Up to 1949, the Geneva Conventions were designed to assist only the victims of wars between States.").

Conventions.[119]

This raw assertion raises a number of questions. Why, for example, is it more likely that Parties to a treaty agreed on what was never discussed at all than on what was discussed at length at each of the sessions—*especially so when the Parties were discussing, for the first time ever, the limiting of the domestic reach of national sovereignty by an international treaty*?[120] In context, which is more likely: (1) that the High Contracting Parties to the 1949 Geneva Conference, sovereign States all, decided to proceed cautiously and deliberately in yielding to international monitoring and regulation a limited portion of what had hitherto constituted wholly internal matters (i.e., civil wars) or (2) that they agreed, the first time they were ever asked to do so, to freely yield broad sovereign rights to allow the international community to monitor and regulate not only civil wars but also all manner of unknown and unknowable future conflicts? Given the slow, painstaking process that was required to develop rules governing *international* armed conflicts, it is both illogical and absurd to believe that States would knowingly cede such broad sovereign rights regarding internal conflicts the first time they were requested to do so.[121]

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119. Goodman Brief, *supra* note 100, at *23-24. Note, however, that the 1949 Geneva Conference explicitly rejected the ICRC's draft language to apply protections in "all cases" of non-international armed conflicts. GC III CMT., *supra* note 12, at 31.

120. *See, e.g.*, Canestaro, *supra* note 109, at 93 ("States have resisted efforts to regulate conflict within their borders, fearing 'that any outside encroachments on their sovereignty might be a possible attempt on their territorial integrity and political independence'"); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 210 (1971) (noting that, because Article 3 "was a pioneer provision in a multilateral convention restricting States in their manner of quelling internal rebellion," "it was accepted with difficulty and considerable caution"); GC IV CMT., *supra* note 15, at 40 (noting that the 1947 Conference of Government Experts narrowed significantly the proposed Article 3 language preferred by the National Red Cross Societies and the ICRC) *see supra* notes 46-48 and accompany text; GC III CMT., *supra* note 12, at 30 ("There was reason to fear that there might be objections to the idea of imposing international obligations on States in connection with their *internal affairs* . . . ." (emphasis added)). *See also* Goodman Brief, *supra* note 100, at *21 ("Common Article 3 was revolutionary because it subjected *wholly internal matters* to international humanitarian law." (emphasis added)).

121. *See* GC III CMT., *supra* note 12, at 28 (noting that "[u]p to 1949, the Geneva Conventions were designed to assist only the victims of wars between States."); *id.* at 31 (noting that the proposal of the Government Experts at the 1947 Conference "fell a long way short of that of the Red Cross Societies"). The following description may help explain why the High Contracting Parties would proceed cautiously:

> The international law of war was primarily designed to govern a contest between two armed forces which carry on hostilities in a more or less open fashion. Analogously, the rules of football were designed to govern a contest between two uniformed teams, clearly distinguishable from the spectators. How well would those rules work, however, if one team were uniformed and on the field, the other hid itself among the spectators and the spectators wandered freely over the playing field?

BOND, *supra* note 12, at 82 (quoting Joseph B. Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 95, 104 (1963)).

From the Final Record, we know with certainty that the delegates to the 1949 Conference were concerned about civil wars and related *internal* conflicts, because such language suffuses their comments. We also know that impassioned arguments were made concerning how and to what degree certain provisions of the Geneva Conventions should apply to civil wars and related internal conflicts. Because no substantive topic other than civil wars/internal conflicts was discussed, there is no evidence whatsoever that the delegates agreed to anything beyond applying Article 3 to such internal conflicts. Extrapolating Article 3's reach to *all* armed conflicts (despite overwhelming evidence that the High Contracting Parties limited their agreement only to civil wars and similar domestic strife) is a gross, baseless, and illegitimate distortion of the Article's agreed-to meaning.[122]

2. *Meaning of the Phrase "Occurring in the Territory of One of the High Contracting Parties"*

After dealing with the phrase "armed conflict not of an international character," proponents of a broad reach for Article 3 then turn their attention to the phrase "occurring in the territory of one of the High Contracting Parties." Having concluded that the non-international conflicts language, in reality, means that Article 3 applies to all armed conflicts everywhere,[123] many of the proponents of Article 3's broad application do little, if any, analysis of the territorial clause.

The Goodman Brief, however, does discuss the territorial limit in some detail.[124] Goodman and associates argue against a narrow geographical reading because the proponents of a narrow interpretation "can point to no discussion in the drafting negotiations where such an astonishing limitation [i.e., limiting the reach of Common Article 3 to conflicts which occur *only* in the territory of one of the High Contracting Parties] . . . was contemplated, proposed, or debated."[125]

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122. *See, e.g.*, GC II CMT., *supra* note 17, at 33 (noting that Article 3 applies to conflicts "similar to an international war, but [which] take place within the confines *of a single country*" (emphasis added)). *See also* 2-B FINAL RECORD, *supra* note 1, at 336 (noting that it is "the exclusive competence of governments" to determine the meaning and reach of the Conventions' terms); Part III, *supra*.

123. *See supra* note 100.

124. Other briefs argue that the use of the word "one" in the phrase "occurring in the territory of one of the High Contracting Parties" merely serves to establish that a High Contracting Party must be involved in a conflict to trigger Article 3's application. *See, e.g.*, Hamdan Reply Brief, *supra* note 100, at *19. *But see* GC III CMT., *supra* note 12, at 31 (noting that the Parties specifically rejected the ICRC's proposed language: "which may occur in the territory of one *or more* of the High Contracting Parties" (emphasis added)); GC II CMT., *supra* note 17, at 33 (noting that Article 3 applies to conflicts which "take place within the confines of *a single country*" (emphasis added)); GC IV CMT., *supra* note 15, at 36 (same).

125. Goodman Brief, *supra* note 100, at *21. Ironically, for Goodman and his associates, the inverse can just as easily be argued: proponents of a broad reading can point to no

Yet, this argument fails for two reasons. First, as pointed out repeatedly in Part III, *supra*, the debate concerning Article 3 centered solely and exclusively on civil war and kindred internal conflicts, such as insurrection and rebellion. A civil war, by definition, is an "*internal* armed conflict between persons of [the] same country."[126] Similarly, an insurrection is a "rebellion, or rising of citizens or subjects in resistance to their government. [It] consists [of] any combined resistance to the lawful authority of the state . . . ."[127] A rebellion is "[d]eliberate, organized resistance, by force and arms, to the laws or operations of the government, committed by a subject."[128] Because each of these definitions describes activities by a state's citizens/subjects aimed against the political authority of that state, the use of such terms is a powerful indicator that the delegates understood that Article 3 applied only to domestic armed conflicts. Moreover, the ICRC Commentator for the Fourth Convention, when describing to what types of conflicts Article 3 applies, described Article 3's reach: "[I]t must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, *but take place within the confines of a single country*."[129]

Second, parsing Article 3's initial clause into two disconnected sections seems to be the crux of the interpretive problem. The combined text actually reads: "In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."[130] When one notes that the subject concerns a non-international conflict occurring in the territory of one State Party, it is not difficult to understand why the High Contracting Parties understood Article 3 to be applying solely to civil wars and other internal conflicts (as their discussions—and even ICRC Commentators—clearly indicate). The territorial language appears to be a significant and intentional limitation on the type of non-international armed conflict being considered and is not surplusage. The two parts of Article 3's initial clause

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discussion in the drafting negotiations where such an astonishing *extension* (i.e., to include conflicts in the territory outside of that of the respective High Contracting Party) was contemplated, proposed, or debated by the various delegations attending the Conference. In fact, most of the discussions centered on ensuring that *internal* conflicts like riots and banditry would not be covered within the understanding of *civil war*, which, as noted above, is commonly understood to take place in one country. *See, e.g.*, BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (defining civil war as "any *internal armed conflict* between persons of [the] same country") (emphasis added). *See also supra* note 17. Further, the argument for reading Article 3 broadly overlooks the ICRC Commentator's observation that Article 3 applies to conflicts that "take place within the confines of *a single country*." GC II CMT., *supra* note 17, at 33 (emphasis added); GC IV CMT., *supra* note 15, at 36 (same).

126. BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (emphasis added).

127. *Id.* at 808.

128. *Id.* at 1266.

129. GC IV CMT., *supra* note 15, at 36 (emphasis added). *See also* GC II CMT., *supra* note 17, at 33 (concurring in the observation that Article 3 applies to armed conflicts that "take place within the confines *of a single country*" (emphasis added)).

130. *E.g.*, GC III, *supra* note 7, art. 3.

considered as a whole,[131] the ICRC's expressed desire to extend humanitarian coverage to victims of civil wars,[132] and the ICRC Commentators' observations that the non-international conflicts to which Article 3 applies take place within "a single country"[133] all make clear how the High Contracting Parties interpreted Article 3 and why.[134]

B. Argument that Narrowly Interpreting Common Article 3's Reach Is Not Faithful to the Context and Purpose of Article 3

The argument that a narrow interpretation of Article 3 runs afoul of the Article's basic context and purpose develops generally as follows: (1) "[Article 3's] drafting history makes clear that Article 3 was designed to balance the modest humanitarian goals of the Conventions with the sovereignty of states over internal matters";[135] (2) "The *purpose* of Common Article 3 justifies applying it 'as widely as possible'";[136] (3) "The drafters of the Conventions

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131. *Id.*

132. *See generally* Part II, *supra*. *See also* GC III CMT., *supra* note 12, at 33 (noting that until 1949, Geneva Conventions were designed solely to assist victims of international conflicts); *id.* (noting that the ICRC had long been trying to aid victims of *civil war* (emphasis added)); *id.* at 29 (noting that in 1921 the Xth International Red Cross Conference supported a resolution affirming that *civil war* victims should also enjoy rights and protections (emphasis added)); *id.* (noting that 1921 resolution was useful in helping to aid civil war victims in Upper Silesia and Spain); *id.* at 30 (noting that, following successes in Upper Silesia and Spain, ICRC sought to include *civil war* protections in Geneva Conventions (emphasis added)); *id.* (noting work done to include *civil war* protections at the 1946, 1947, and 1948 gatherings in preparation for 1949 Geneva Conference (emphasis added)).

133. *See, e.g.*, GC II CMT., *supra* note 17, at 33.

134. Despite the argument that civil wars often are influenced from without, *see, e.g.*, Goodman Brief, *supra* note 100, at *21 (noting that Spanish Civil War had "substantial transnational dimensions"), the ICRC nevertheless described its services as meeting the needs of victims of "civil war" and not as something far broader. *See, e.g.*, GC III CMT., *supra* note 12, at 29-30. *See also* 2-B FINAL RECORD, *supra* note 1, at 334-35 (where the Swiss delegate noted that "applying the principles of the Conventions to civil wars" was the result of compromise); *id.* at 335 (where the Swiss delegate described what was achieved as a "comparatively modest solution"). Hence, to argue that Article 3 cannot be limited to civil wars merely because such wars may be influenced from abroad is a non sequitur that does not reflect what transpired at the 1949 Conference.

135. Goodman Brief, *supra* note 100, at *20 (citing LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 23-36 (2003)).

136. *Id.* (quoting GC III CMT., *supra* note 12, at 36) (emphasis added). Jean Pictet, overall editor of the 1949 Geneva Commentaries, argued that Article 3 "should be applied as widely as possible. Pictet argue[d] that the protections article 3 affords . . . are so minimal that each state must already grant them to common criminals; therefore, they should be granted to insurgents as well." Major Robert W. Gehling, *Protection of Civilian Infrastructures*, 42 L. & CONTEMP. PROBS. 86, 119-20 (1978) (citing GC IV CMT., *supra* note 15, at 35-36). Yet, such arguments, noble as they are, overlook the following reality:

> Governments, by tradition and inclination, regard rebels and traitors as worse offenders than ordinary criminals . . . [even though] the soldier or civilian wounded or captured in a civil war is no less in need of care and decent treatment than the soldier wounded or captured in repelling an invader of his country.

purposely avoided any rigid formulation that might limit the applicability of Common Article 3";[137] (4) "The only limit on Article 3's application suggested in the drafting history, or even discernible in the abstract, was the sovereign prerogative of states to suppress unrest within their own territory";[138] and (5) "The principal issue was identifying the circumstances in which such 'internal' matters become a legitimate matter of international concern."[139] Using such reasoning, the Goodman Brief concludes that the United States Government interpretation of Article 3's meaning and reach[140] "is not faithful" to the Article's "context and purpose."[141] Yet, this argument, like the first, lacks a solid basis.

First, even proponents of a broad interpretation of Article 3 agree that Article 3 was intended to extend humanitarian protections and relief to victims of civil war.[142] Article 3 accomplished that purpose. Second, the 1949 Conference was the first attempt at a major international conference to convince sovereign States to voluntarily relinquish, by treaty, certain sovereign rights to allow the international community to provide humanitarian aid and protection to *future enemies* of the respective sovereign on that sovereign's own soil.[143] As such, the context at the Geneva Conference was political in nature and subject to intense negotiation and painful compromise.[144]

Moreover, those who believe that the High Contracting Parties agreed to a broad application of Article 3 simply dismiss the fact that it took *over seven decades* of on-again, off-again, negotiations and conferences (i.e., from the

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Id. at 120 (citation omitted). *See also* GC IV CMT., *supra* note 15, at 27 (noting that, in civil wars, governments tend to regard "adversaries as common criminals").

137. Goodman Brief, *supra* note 100, at *20 (citing GC III CMT., *supra* note 12, at 32-37).

138. *Id.* (citing MOIR, *supra* note 136, at 23-36).

139. *Id.*

140. Brief for Respondents, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 460875 at *48-49 & n.24 (arguing that Article 3's text, Article 3's drafting history, the President's interpretation of the Article, and the ICRC Commentary all support the proposition that Article 3 does not apply to the conflict with al-Qaeda because that conflict is international in character).

141. Goodman Brief, *supra* note 100, at *20.

142. This was the desire of the ICRC and the International Red Cross Societies from 1921 onward and was reflected in much of the work at the pre-1949 conferences held in Geneva and Stockholm. *See* Part II and note 132, *supra*. *See also* Goodman Brief, *supra* note 100, at *19 n.11.

143. *See* GC III CMT., *supra* note 12, at 28-29, 32. Although Article 3 was intended to provide protection to victims of non-international armed conflicts, it expressly includes within the definition of persons to be protected "*members of armed forces* who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause . . . ," *see, e.g.*, GC III, *supra* note 7, art. 3 (emphasis added), and persons who have taken up arms against the State qualify as enemies of the State.

144. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 336 (noting that it is "the exclusive competence of governments" to determine the meaning and reach of the Conventions' terms); *id.* at 334-35 (where the Swiss representative noted that the text and reach of Article 3 were the result of compromise). This includes the Parties' declining to adopt a more specific descriptive than "armed conflict not of an international character" and their rejecting the territorial reach language in the Stockholm draft.

initial attempt in 1874 in Brussels) for international humanitarian law to arrive at the level of the 1949 protections.[145] That the participating States in 1949 ultimately agreed to cede certain elements of their national sovereignty in time of civil war was a significant step at the time. Hence, Article 3 met the ICRC's desire to provide aid and protection to victims of civil war despite a natural reluctance on the part of States to part with their sovereign right to deal *exclusively* with their own citizens/subjects in open revolt against them. These achievements alone suffice to refute the charge of lack of faithfulness to Article 3's context and purpose.

Proponents of broad application also argue that Article 3's purpose justifies its application "'as widely as possible.'"[146] Yet, on that point, the proponents are simply parroting the view of the ICRC, not the position of the delegates who adopted the Article.[147] Hence, however noble (and otherwise desirable) the ICRC goal might be, it remains nonetheless merely an expression of ICRC desire, not what the Parties decided. With respect to Article 3, only the terms to which the Parties to the Conventions agreed matter.[148] As such, the ICRC's view should carry no weight whatsoever when arguing the meaning and reach of Article 3.[149]

In sum, the High Contracting Parties did, in fact, agree to cede elements of their national sovereignty to extend to victims of civil war the aid and protection of the international community, but nothing more.

C. Argument that Narrowly Interpreting Common Article 3 Would Create an "Inexplicable and Unacceptable Gap" in the Conventions' Coverage

Having argued that the United States Government has been unfaithful to the context and purpose of Article 3, the Goodman Brief then asserts that the Government's limited interpretation of Common Article 3 "would also create an inexplicable and unacceptable gap in the Conventions' coverage."[150] In support of their assertion, Goodman and associates argue:

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145. GC III CMT., *supra* note 12, at 5.

146. Goodman Brief, *supra* note 100, at *20 (quoting GC III CMT., *supra* note 12, at 36).

147. *See supra* note 110.

148. GC III CMT., *supra* note 12, at 3; 2-B FINAL RECORD, *supra* note 1, at 336-37 (noting that, "[i]n a Diplomatic Conference . . . , realistic and practical views must be taken, and the [ICRC] was aware from the outset . . . that the [Stockholm] text . . . had no chance of being adopted by Governments and that a *compromise solution should accordingly be sought*" (emphasis added)).

149. The ICRC rightfully admits that it attempts to "push the envelope," so to speak, whenever it can. *See, e.g.*, GC IV CMT., *supra* note 15, at 27 (noting that the ICRC encounters obstacles "*as always* when endeavoring to go a step *beyond the text of the Conventions*" (emphasis added)).

150. Goodman Brief, *supra* note 100, at *22. *See also* Human Rights Brief, *supra* note 100, at *22 & n.15 (arguing that Article 3 was meant to create "seamless" coverage and that the Government's position would create a "gap" in such coverage).

> Armed conflicts between states and non-state armed groups regularly involve substantial international dimensions with respect to location of armed forces, zones of hostility, and outside support given to the competing parties. According to a leading study, 51% of civil wars in *1946-2000* extended to or across the national border of the conflict-ridden country. . . .[151]

"Furthermore, according to a study of 74 insurgencies *since 1991*, '44 received state support that . . . was significant or crucial to the survival and success of the movement. . . . Other outside supporters were also active . . . .'"[152] Goodman's argument continues: "The world's most well-known non-international armed conflicts include major transnational dimensions."[153] From this data, Goodman and associates conclude:

> *Given the notoriety and frequency of such conflicts*, it is implausible that the drafters of Common Article 3 meant to exclude such a subset—indeed, any subset—of non-international armed conflicts. The Government offers no theory why the drafters would have excluded such conflicts from the scope of Common Article 3. Such a theory would have to be convincing on its own terms.[154]

The above argument is, at best, bizarre. Given that the vast majority of the data upon which the Goodman Brief relies comes from conflicts which occurred *after* the 1949 Geneva Conference adjourned, the argument that it is "implausible" that Article 3's drafters would exclude "any subset . . . of non-international armed conflicts" would appear to presuppose that such drafters were either prophets or psychics. The Goodman Brief also argues, based on no evidence whatsoever, that a narrow interpretation would create an "inexplicable and unacceptable" gap.[155]

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151. Goodman Brief, *supra* note 100, at *22 & n.14 (citing Halvard Buhaug & Scott Gates, *The Geography of Civil War*, 39 J. PEACE RES. 417, 415 (2002)) (emphasis added). Note that the data come from conflicts occurring between 1946 and 2000, whereas the Geneva Conference occurred in 1949. One could, therefore, infer that most of the cases cited post-date the 1949 Geneva Conference.

152. *Id.* at *22 (quoting DANIEL L. BYMAN ET AL., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENTS 2 (2001)) (emphasis added). Every conflict cited in this study occurred *after* 1949.

153. *Id.* at *22-23 & n.15. In support of this point, Goodman cites to a manuscript dated 2005, which included the following non-international conflicts: Afghanistan, Cambodia, India, Nicaragua, Rwanda, Sierra Leone, Sudan, Tajikistan, Uganda, and Zimbabwe. The vast majority of these conflicts post-date the Geneva Conference.

154. *Id.* at *23 (emphasis added).

155. Similarly, the NYC Bar Brief argues that, "[a]lthough the other articles of the Conventions apply . . . only in international conflicts . . . [,] Common Article 3 was intended as a 'gap filler' for *all other conflicts*." NYC Bar Brief, *supra* note 103, at *3. The NYC Bar Brief makes this claim based on "Common Article 3's expansive language." *Id.* *But see* GC II CMT.,

But such an argument fails on a number of points. First, it simply disregards that each of the previous Conventions had, indeed, left gaps—which is why subsequent Conventions became necessary.[156] In that context, it also fails to explain why one should assume that the 1949 Conventions would be able to accomplish, *with respect to gaps*, what no previous Convention had been able to do.

Moreover, if the 1949 Conventions had closed all gaps (an implicit assumption in proponents' position[157]), the argument fails to explain why the international community decided that the two June 1977 Protocols Additional to the 1949 Geneva Conventions[158] were needed. What actually transpired at Geneva concerning Common Article 3 was not "inexplicable" at all; it accurately reflects the fact that human beings, despite the best of intentions, either do not anticipate every possibility when attempting to solve complex problems or choose to solve such problems piecemeal. To expect total resolution of complex problems when addressed the first time is both wishful thinking and naïve.

Second, the argument overlooks the fact that the 1949 Conference was a political event where the final result was based on negotiations and compromise.[159] As mentioned earlier, it was also the first time that States had been asked to cede sovereign authority to the international community to intervene on behalf of persons in open rebellion against the ceding authority, events that had hitherto been handled solely as domestic matters.[160] From the

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supra note 17, at 33 (noting that Article 3 only applies to conflicts that "take place within the confines of *a single country*" (emphasis added)).

156. *See, e.g.*, 2-A FINAL REPORT, *supra* note 1, at 9.

> Unfortunately, the Conventions of 1929 . . . proved inadequate to alleviate th[e] sufferings [of World War II]. It is our duty never to lose sight of the tragic experiences the world has seen and to remedy as far as possible the deficiencies [i.e., gaps] revealed in the texts of 1929.

Id. BOND, *supra* note 12, at 31 (noting that reformers fail to appreciate future challenges and hence cannot make rules to avoid future abuses).

157. *See, e.g.*, *supra* note 155 and accompanying text.

158. *See* PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, 8 JUNE 1977; PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, RELATING TO THE PROTECTION OF VICTIMS OF NON- INTERNATIONAL ARMED CONFLICTS, 8 JUNE 1977.

159. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 334-35 (where the Swiss Representative acknowledged that the text and reach of Article 3 were the result of compromise).

160. *See, e.g.*, GC III CMT., *supra* note 12, at 28 ("Up to 1949, the Geneva Conventions were designed to assist only the victims of wars between States."). Yet, the ICRC Commentaries on the Additional Protocols of 1977 admit that gaps in the 1949 Conventions, did, in fact, exist. *See, e.g.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at xxix (Yves Sandot et al. eds., 1987) (admitting that the 1949 Conventions "did not cover all aspects of human suffering" and "by the 1970's" "had exposed gaps and imperfections"); PROTOCOL II CMT., *supra* note 109, at ¶ 4364 (noting that Article 3's protections do not cover medical personnel or medical emblems); *id.* at ¶ 4366 (noting that Article 3's protections do not cover relief actions); *id.* at ¶ 4368 (admitting "imperfections and shortcomings" regarding Article 3's coverage); *id.* at ¶ 4658 (noting that Article 3 omitted a requirement to protect wounded and sick); *id.* at 4794 (noting that Article 3

Final Record, the evidence is overwhelming that the Parties to the Conventions understood that Article 3 was aimed at protecting the victims of civil war (and similar internal armed conflicts) and nothing else. Hence, limiting the reach of Article 3 to civil wars and similar internal conflicts was a fully *acceptable* solution to the Parties which adopted the Article, because it was on those very terms that it was agreed to.[161]

Third, the argument presupposes an all-or-nothing measure for success. Although Article 3 may not have closed every gap, it did close a major one—that of protecting the victims of civil war and similar internal armed conflicts. As such, it was not a failure. It was a significant first step. The Swiss Representative seems to have said it best:

> On the one hand . . . we are told that [Article 3] does not go far enough, while on the other . . . it is said it goes much too far. These two criticisms compensate each other. And *to those who complain that the suggested solution does not go far enough, there is a pertinent reply: half a loaf is better*

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had not dealt at all with the need "to guarantee humane treatment for all persons not participating in hostilities"); *id.* at ¶¶ 4848-49 (noting that Article 3 was silent on prohibiting "deportations, transfers and evacuations in or from occupied territories").

161. Yet, even here,

> state practice underscores the limited range of conflicts to which authorities believe Article 3 applicable. Though there has been . . . no absence of opportunities for the application of Article 3 . . . since its adoption, states have generally ignored it. . . .
>
> A few examples will illustrate . . . ample justification for [] pessimism. From 1946 until 1949, when the fighting ended, the Greek government, though it permitted the ICRC to perform limited humanitarian functions, denied that it was embroiled in a civil war and refused to abide by the laws of war. While Article 3 had not yet come into force, the ICRC did call the Greek government's attention to the work of the 1946 Preparatory Conference of the Red Cross Societies [which had called for applying humanitarian norms to civil wars]. Article 3 had certainly come into force when Biafra split from Nigeria, precipitating a bloody civil war. [Yet, t]he Nigerian government never admitted any legal obligation to adhere to [Article 3's] provisions . . . . The widely reported "night of the long knives" suggests that the military in Indonesia did not take seriously any restraints contained in Article 3. In [recent military actions by Pakistan and Sri Lanka] . . .[, n]either has publicly recognized any obligation under Article 3 . . . . [In another example,] Portuguese authorities . . . never admitted any obligation to apply the provisions of Article 3 to rebel forces in . . . Mozambique and Angola . . . .

BOND, *supra* note 12, at 58-59. Moreover, "[w]hatever the precise parameters of 'armed conflict not of an international character,' . . . states continue to insist that they may in internal conflicts deal with their own citizens as they wish without reference to external—that is, international—standards." *Id.* at 61. Given such widespread violations of Article 3's provisions, it is difficult to believe, as some maintain, that those provisions have become part of customary international law. *See, e.g.*, Hamdan Brief, *supra* note 100, at *49 (arguing that Article 3 applies "as a matter of customary international law").

than no bread.[162]

He noted further that a "*modest* solution is certainly better than none. . . ."[163] "Modest" is hardly an adjective one would choose if the decision were as wide-ranging as proponents of a broad reading of Article 3 claim, and it casts considerable doubt on the belief that Common Article 3 was to be broadly applied. Nevertheless, Article 3 was a significant achievement in its own right. Just because Article 3 was not intended to apply to every imaginable type of non-international armed conflict does not negate the fact that what Article 3 achieved was significant. In truth, the Government's theory—based as it is on the overwhelming evidence found in the Final Record of the 1949 Geneva Conference that Article 3's reach was limited to civil wars (and similar internal armed conflicts)—meets the Goodman Brief's challenge and is, in fact, fully "convincing on its own terms."

V. CONCLUSION

International agreements are political documents whose meaning and reach are often the product of intense negotiation and painstaking compromise. The 1949 Geneva Conventions were no exception. What the terms of the Conventions mean and to what conflicts they apply resulted from the give and take of the Parties to the negotiations. Despite ardent arguments to the contrary, the evidence is overwhelming that Common Article 3 was never meant to apply to every imaginable type of non-international conflict, much less to all conflicts everywhere.

Instead, Article 3 was intended solely to extend limited protections to victims of civil war and similar internal armed conflicts; it was never meant to apply to transnational conflicts with terrorist groups like al-Qaeda. Modern commentators and jurists—including five sitting Justices on the Supreme Court of the United States—have (whether knowingly or unknowingly) misinterpreted and misapplied Common Article 3, thereby violating the agreed-upon meaning and reach of the Article and subverting the rule of law internationally. Because the High Contracting Parties at the 1949 Geneva Conference never intended Article 3 to apply to armed conflicts outside of a single state, Article 3's provisions cannot legitimately serve as a basis to require that the United States Government resort to a "regularly constituted court" (as opposed to a military commission) for dispensing justice to members of al-Qaeda taken captive during the GWOT.

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162. 2-B FINAL RECORD, *supra* note 1, at 335 (emphasis added). This comment by the Swiss representative indicates that the agreed upon reach of Article 3 was *not* to every type of non-international armed conflict.

163. *Id.* (emphasis added).

CONTROLLING THE COMMON LAW: A COMPARATIVE ANALYSIS OF NO-CITATION RULES AND PUBLICATION PRACTICES IN ENGLAND AND THE UNITED STATES*

Lee Faircloth Peoples**

INTRODUCTION

Finding a balance between growth and restraint has been a central tension in common law countries. Various practices have been employed to achieve a balance between growth and restraint. The nineteenth century legal treatise tradition, the American Law Institute's Restatement, the West Digest System, uniform laws, legal encyclopedias, and other devices have been used in the United States in an effort to bring order to the rapidly expanding common law. The Law Commission, Law Reform Committee, *Digest*, and *Halsbury's Laws of England* are examples of similar efforts in England.[1]

Publication practices and no-citation rules play an important and controversial role in controlling the growth of the common law. These practices seem fundamentally in conflict with a system that bases its very existence on widely available judicial decisions that are presumptively citable.[2] Common law systems have employed these measures in part to satisfy a bench and bar who complain of drowning in a sea of cases.

England and America have taken drastically different approaches to publication practices and no-citation rules. The English approach is found in a

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1. Some of the key aims of the Law Commission are "[t]o ensure that the law is as fair, modern, simple and as cost-effective as possible" and "[t]o codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes." The Law Commission, About Us (Oct. 2, 2006) http://www.lawcom.gov.uk/about.htm.

2. Common law systems cannot exist "until the decisions of its courts are regularly published and are available to the bench and bar." Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat*, 44 AM. U. L. REV. 757, 758 (1995) (citing GRANT GILMORE, THE AGES OF AMERICAN LAW 9 (1977)). The presumption judicial decisions are citable in a common law system is posited by Patrick J. Schiltz in *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 43 (2005) [hereinafter Schiltz, *Citation*].

combination of rules limiting the rights of lawyers to cite unreported judgments and giving judges the power to prospectively declare the precedential value of their judgments.[3] In contrast, American federal appellate courts are free to issue unpublished opinions and to decide their precedential value, but are prohibited from imposing any restrictions on the citation of unpublished opinions.[4]

This Article examines why England and America took divergent approaches and explores the potential consequences for the common law. Part I of this Article establishes a context for the discussion through a historical survey of publication and citation practices in England and the United States. Part I concludes with an explanation of the current rules in both jurisdictions. Part II examines efficiency arguments advanced to justify the practices employed in England and explores why these arguments were accepted in England and rejected in the United States. Part III addresses policy arguments made in each country over no-citation rules. Part III also compares the substantial differences in both the volume and substance of policy arguments made in each country. Part IV predicts the impact no-citation rules will have on the future of the common law through an examination of the precedential value of unreported and unpublished cases, the role of the judiciary in controlling the growth of the common law, jurisprudential theories, and the degree no-citation rules will be enforced in both jurisdictions.

This Article compares the publication practices and citation rules of the federal courts of appeals in the United States with the English House of Lords and Supreme Court of Judicature.[5] Accordingly, the legal system of England and Wales is addressed (hereinafter referred to as England for the sake of brevity and consistency).[6] This Article does not explore the practices of Scotland and Northern Ireland, the other countries comprising the United Kingdom,[7] or of American state or federal courts other than the Courts of Appeal.[8]

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3. Practice Statement (Court of Appeal: Authorities), (1996) 1 W.L.R. 854 (A.C.) (Eng.) [hereinafter Practice Statement (Court of Appeal)]. Practice Direction (Citation of Authorities), (2001) 1 W.L.R. 1001 (A.C.) (Eng.) [hereinafter Practice Direction]. Both are discussed more thoroughly *infra* notes 77-84 and accompanying text.

4. FED. R. APP. P. 32.1(a). Rule 32.1 is discussed more thoroughly *infra* note 134.

5. Under the Constitutional Reform Act 2005, a Supreme Court of the United Kingdom is being constituted and will take over the judicial functions of the House of Lords. Constitutional Reform Act, 2005, c. 4, § 40 (Eng.). The appellate jurisdiction of the English Court of Appeal, High Court, and Crown Court are part of the Supreme Court (of Judicature). Supreme Court Act, 1981, c. 54, § 1 (Eng.). TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 13 (9th ed. 2002). The courts comprising the Supreme Court of Judicature were selected for discussion in this article because the no-citation rules apply to these courts.

6. I acknowledge the House of Lords does in some instances hear cases from the Scottish and Northern Irish systems. However, for the purposes of this comparison, I will refer to the system as the English legal system.

7. Scottish courts issue unreported judgments which are available from the Court Service website and commercial publishers. According to Dr. Charlotte Waelde, of the University of Edinburgh, unreported Scottish judgments have the same precedential weight as other

The volume of case law is much greater in the United States than in England.[9] This difference raises the methodological concern eloquently stated by Gutteridge "[l]ike must be compared with like; the concepts, rules or institutions must relate to the same stage of legal, political and economic development. . . ."[10] The disparity in the number of cases is not insurmountable and provides fertile ground for comparisons explored in Parts III and IV of this Article. Numerous other comparative studies of the American and English legal systems have exploited this disparity to posit more sophisticated conclusions than are offered in this Article.[11]

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judgments and there are no restrictions on citing them. Email from Dr. Charlotte Waelde, Senior Lecturer, University of Edinburgh School of Law, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (July 5, 2006, 10:11 CST) (on file with author). In Northern Ireland all judgments are widely available through print and electronic sources. Northern Irish judges frown upon over-citation of authority but there are no formal restrictions on citing unreported judgments. E-mail from Philip Leith, Professor of Law, Queens University Belfast, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (July 30, 2006, 12:25 CST) (on file with author).

8. FED. R. APP. P. 32.1(a) is unique for the uniformity it promises to bring to the federal appellate courts on the issue of citation to unpublished opinions. There is little uniformity among the rules of other federal courts and state jurisdictions. Patrick J. Schiltz notes a trend among individual federal circuits and states toward abandoning no-citation rules. *See* Schiltz, *Citation, supra* note 2, at 35-39. For useful guides to the practices of other jurisdictions, see Melissa M. Serfass & Jessie W. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2005); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003); and Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003).

9. In 2002, 15,736 cases were filed with the appellate courts in England. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS, ENGLAND AND WALES 5 (2002). http://www.dca.gov.uk/publications/annual_reports/2002/judstat02_ch01.pdf. The appellate courts include the Court of Appeals Civil and Criminal Divisions and the three divisions of the High Court: The Court of Chancery, Queen's Bench Division, and Family Division. *See id.* In contrast, 60,860 cases were filed in the United States Courts of Appeals during this same time period. TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 76 (2005). Professor A.L. Goodhart argued in 1939 that it was easier to find a case in America where 40,000 cases are published each year than it was to find a case in England where only 750 are reported annually. GEORGE S. GROSSMAN, LEGAL RESEARCH: HISTORICAL FOUNDATIONS OF THE ELECTRONIC AGE 27 (1994) (citing A.L. Goodhart, *Reporting the Law*, 55 L.Q. REV. 29, 30 (1939)). The pattern identified by Goodhart has held throughout history.

10. PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 218 (1995) (citing HAROLD C. GUTTERIDGE, COMPARATIVE LAW 73 (1949)). Over-reliance on a single and exclusive comparative law methodology was criticized by Vernon Palmer, who argues "there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs." Vernon Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 290 (2005).

11. *See generally* RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA (1996) (offering complex observations about the legal systems of both countries supported with extensive data and discussing the volume of case law throughout). *See also* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 128-30

The term "common law" is used throughout this Article to denote the body of judicial decisions that, along with other sources, make up the law in countries whose legal systems are described as having a common law basis. The English term "judgments," the American term "opinions," and the generic terms "decisions" or "cases" will be used throughout this Article. The term "no-citation rule" refers not only to rules related to citation of cases but also encompasses rules declaring the precedential value of cases.

It is useful to understand the meaning of the English term "unreported" and the American term "unpublished." An "unreported" English case is one not selected by the law reporters to "appear[] in one of the generalised or specialised series of reports."[12] An English court does not have any input into whether a case will be reported.[13] Many unreported English cases are available in electronic databases.[14] Conversely, an unpublished American case is designated as such by the deciding court.[15] The court deciding the case is often guided by specific rules defining the type of opinions that should be designated as unpublished.[16] The unpublished case may still be reported in the *Federal Appendix* or be available through an electronic database.[17] The precedential value and citation of unreported and unpublished cases will be explored in more detail below.

I. THE HISTORY OF PUBLICATION AND CITATION

A. *The History of Reporting and Citation in England*

English judges have delivered their judgments ex tempore, orally from the bench, throughout most of English legal history.[18] Before courts kept written records "knowledge of what was adjudicated could reach back in time only as far as the 'living memory' – the memory of the oldest living person."[19] The advent of judges taking time for reflection before delivering their judgments or producing written judgments is a comparatively recent phenomenon.[20] As early as the reign of the first three Edwards, the practice

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(1987) (discussing the volume of case law); ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 101-74 (1990) (comparing the written and oral traditions and discussing increasing caseloads); DELMAR KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 87 (1964).

12. Roberts Petroleum Ltd. v. Bernard Kenny Ltd., (1983) 2 A.C. 192, 202 (H.L.) (Eng.).

13. MARTINEAU, *supra* note 11, at 107.

14. Roderick Munday, *The Limits of Citation Determined*, 80 L. SOCIETY'S GAZETTE 1337 (May 25, 1983) (noting the Lexis database contained over 5000 unreported judgments by 1983) [hereinafter Munday, *Limits of Citation*].

15. See the section *Standards for Publication of Judicial Opinions, infra.*

16. *Id.*

17. *Id.*

18. MARTINEAU, *supra* note 11, at 106.

19. GROSSMAN, *supra* note 9, at 3-4 (citing R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 67 (2d ed. 1988)).

20. MARTINEAU, *supra* note 11, at 106.

was for judges and lawyers to cite cases from memory.[21] This practice developed from the early right of a barrister as amicus curiae to "inform the court of a relevant decision of which he was aware"[22] regardless of whether the decision appeared in printed form.[23] From the right to cite decisions from memory "followed the right to cite his written report of decisions to which he personally vouched as a member of the Bar."[24] In essence, barristers could create written accounts of cases for which they personally vouched. These written accounts are an early form of unreported English cases.

The systematic reporting of cases in England is performed by lawyers working as law reporters.[25] These law reporters select cases to be "reported" in series of published reports.[26] The law reporters are the gatekeepers of the size and substance of English common law. In England the judge who decides the case has no input into whether the case will be reported.[27]

While case law is essential to the English system, case reporting has been undertaken in a careless and haphazard fashion.[28] Plea rolls commenced in the twelfth century and recorded the outcome of a particular case without any discussion of the issues or the reasons given for a decision.[29] Year books and abridgements containing summaries of discussions in court, first appeared in the thirteenth century.[30] The era of nominate reports spanned approximately

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21. JOHN P. DAWSON, THE ORACLES OF THE LAW 57 (1968) (citing T.E. Lewis, *The History of Judicial Precedent*, 46 L.Q. REV. 341-55 (1930)). The first three Edwards reigned from 1272-1377 according to the Law Courts Libraries Table of Regnal Years, Oct. 14, 1999, http://www.lawlink.nsw.gov.au/lawcourtslibrary.nsf/pages/regnal.

22. MICHAEL ZANDER, THE LAW-MAKING PROCESS 308 (6th ed. 2004) (quoting GREAT BRITAIN, LORD CHANCELLOR'S DEPT., REPORT OF THE LAW REPORTING COMMITTEE 3-4 (1940) [hereinafter REPORT OF THE LAW REPORTING COMMITTEE]).

23. *See id.*

24. *Id.* As one judge remarked to a barrister citing an unreported case, "Mr. Robinson has followed the time honoured tradition of the Bar in stating a case which he knows neither the origin of nor the substance of nor the reference to. But he need not worry, we have all done it . . . . He is following the true tradition." Munday, *Limits of Citation*, *supra* note 14, at 1337 (citing NOTABLE BRITISH TRIALS, THE TRIALS OF FREDERICK NODDER 34 (1950)).

25. *See* ZANDER, *supra* note 22. Traditionally, only barristers could create reports of judgments. The privilege was recently extended to solicitors under the Courts and Legal Services Act, 1990, c. 41, § 115 (Eng.). The term "lawyer" is used to include both barristers and solicitors.

26. In the discussion over controlling the growth of case law, the terms "reported" and "unreported" are used consistently in England, while the terms "published" and "unpublished" are used in America. The American terms will be explored in the next section.

27. *See* ZANDER, *supra* note 22. "His Majesty's Judges from time to time might for the public benefit and perhaps their private profit devote a part of their leisure to the compilation of reports." REPORT OF THE LAW REPORTING COMMITTEE (1940), *supra* note 22, at 7.

28. Munday, *Limits of Citation*, *supra* note 14, at 1339.

29. J.H. Baker, *Records, Reports, and the Origins of Case-Law in England*, *in* JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 15-21 (J.H. Baker ed. 1989), *reprinted in* GROSSMAN, *supra* note 9, at 4.

30. *See* GROSSMAN, *supra* note 9, at 6.

1550 – 1790.[31] Nominate reports reproduced arguments of lawyers and judgments.[32] In the mid-1600s, "the supply of published reports of English court decisions suddenly changed from conditions of extreme poverty to a somewhat tarnished wealth."[33] This "flood of reports" was due to the "insatiable curiosity" of lawyers creating a market for the reports.[34]

The quality and accuracy of reports produced during this time period varied widely.[35] Some were so poor that judges prohibited citations to them.[36] One judge has been quoted as saying, "[a] multitude of flying reports (whose authors are as uncertain as the times when taken . . .) have of late surreptitiously crept forth . . . we have been entertained with barren and unwanted products. . . ."[37]

For a brief period in the early 1800s, the central common law courts experimented with an early version of no-citation rules.[38] The courts appointed "authorized" reporters, gave the authorized reporters access to court records, and, in some instances, checked the reporters' drafts.[39] The authorized reporters were also given a distinct market-advantage over other reporters of the day: courts allowed citation to their reports only.[40] This approach was abandoned because of the length of time it took for the authorized reporters to prepare their reports and the high prices charged for the reports.[41] It has also been noted that this early no-citation rule did not prevent other reports from being cited if the reports were simply attested to by a barrister.[42]

In 1848, the Special Committee on the Law Reporting System was formed to consider improvements to the system of reporting and publishing law books.[43] The Committee's report details "a new evil" among reporters of over-reporting cases that do not announce new legal doctrines.[44] Other ills of the current system identified in the report include reporting cases without regard for the interests of the public or profession, inaccuracies and delays in publication, and expense.[45] Identifiable reform did not occur until the Incorporated Council on Law Reporting was formed with the objective of reporting decisions "in a

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31. *See* DAWSON, *supra* note 21, at 65, *reprinted in* GROSSMAN, *supra* note 9, at 16.

32. *See id.*, at 65-79. The term "nominate reports" refers to accounts of cases reported under the name of the barrister who compiled them, *Plowden's Reports*, for example. *Id.*

33. *Id.* at 75.

34. *Id.*

35. *See id.* at 77.

36. *Id.*

37. ZANDER, *supra* note 22, at 309 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 7).

38. DAWSON, *supra* note 21 at 80-81.

39. *Id.*

40. *Id.*

41. *Id.* at 81.

42. REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 8.

43. W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS 4 (1884).

44. *Id.* at 6-7.

45. *Id.*

convenient form, at a moderate price and under gratuitous professional control,"[46] "'independently of the Government' under the direction of 'an unpaid council.'"[47] The Council drew its membership from the bar with the Attorney General and Solicitor General also serving as members.

The Council began publishing the *Law Reports* in 1865. The *Law Reports* does not hold a monopoly on reporting, but it is thought to be extremely accurate and reliable. The *Law Reports* has long enjoyed the "privilege of primary citation"[48] and, in a Practice Statement issued in 1998, it was formally announced that lawyers should cite to cases as they appear in the *Law Reports* as it is the most authoritative.[49] One main feature of the *Law Reports* is selectivity. The Council employs a staff of lawyers who are very discerning in choosing cases for publication in the *Law Reports*.[50] The *Law Reports* policy of selectivity represents an effort in England to control the growth of case law by reporting only the most relevant decisions.

The creation of the Incorporated Council on Law Reporting and the *Law Reports* did not curtail England's perceived over-reporting problems. In a 1939 article, Professor A.L. Goodhart noted eighteen law reports were then in publication, most of them reporting the same cases.[51] He argued it was easier to find a case in America, where 40,000 cases were published each year, than it was to find a case in England where only 750 were reported annually.[52] In 1940, the Committee on Law Reporting was appointed to study some of the same problems examined in 1848.[53] Early on, the Committee addressed the

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46. ZANDER, *supra* note 22, at 310 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 10).

47. GROSSMAN, *supra* note 9, at 25.

48. *Id.* at 32.

49. Practice Statement (Supreme Court: Judgments) (1998) 1 W.L.R. 825 (S.C.) (Eng.) [hereinafter Practice Statement: Supreme Court].

50. The criteria for reporting a case has remained largely unchanged since the *Law Reports* was first published. The criteria were first announced in a letter written by W.T.S. Daniel, Vice Chairman of the Special Committee on the Law Reporting System, in 1863. The criteria for reporting a case include:

> (1) all cases which introduce or appear to introduce a new principle or rule, (2) all cases which materially modify an existing principle or rule, (3) all cases which settle or materially tend to settle a question upon which the law is doubtful, and (4) all cases which, for any reason, are peculiarly instructive.

Criteria for exclusion include: "(1) those cases which pass without discussion or consideration which are valueless precedents [and] (2) those cases which are substantially repetitions of what is reported already." R. Williams, Address at Cambridge University Law Faculty Conference, Law Reporting, Legal Information and Electronic Media in the New Millennium 14-15 (Mar. 17, 2000) (transcript on file with author) [hereinafter R. Williams].

51. Goodhart, *supra* note 9, at 29.

52. GROSSMAN, *supra* note 9, at 27 (citing A.L. Goodhart, *supra* note 9, at 30. Roderick Munday has commented Goodhart's thinking may not have represented the mainstream thought of his time. Comments of Roderick Munday (Aug. 25, 2006) (on file with author). Goodhart's act of dissenting from the Report of the Law Reporting Committee is evidence of his position outside of the mainstream.

53. GROSSMAN, *supra* note 9, at 27.

creation of a no-citation rule, but never reached agreement on the issue.[54] The Committee also considered having a stenographer record every judgment given ex tempore, sending copies to the judge for correction and filing the judgment with the court.[55] The committee rejected this idea because of the financial costs associated with it, the notion most decisions worthy of reporting were already reported, and "[w]hat remains is less likely to be a treasure house than a rubbish heap in which a jewel will rarely, if ever, be discovered."[56] The Committee's report recommended no real reform except requesting the *Law Reports* to "speed up publication and to take a more generous view of what is reportable."[57]

Following the Committee's report, some commercial reports ceased publication because of market conditions, but, generally, the reporting of cases continued to grow.[58] In addition to publishing the *Law Reports,* the Incorporated Council of Law Reporting began publishing the *Weekly Law Reports* as an advance service including cases that would eventually appear in the *Law Reports*.[59] The *All England Law Reports*, the *Law Reports* main rival, commenced publication in 1936 as a generalist series reporting cases from all courts.[60] Reporting cases in newspapers also continued in the period after the Committee's report.[61] A number of specialized reports focusing on specific areas of law and certain types of courts began to flourish in the period after the release of the Committee's report.[62]

A 1963 comparative study of the appellate courts in the United States and England by Delmar Karlen addressed attitudes toward case reporting and citation in England.[63] The author concluded that most English lawyers and judges were content with the selective publication practices and preferred seeing even fewer decisions reported, but noted "counterforces working in the direction of fuller reporting."[64] The danger of an important case being missed in this selective process is not as severe as in a more expansive system of reporting all cases where "vital cases might be overlooked in the masses of

54. *Id.*

55. *Id.*

56. ZANDER, *supra* note 22, at 312 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 20).

57. GROSSMAN, *supra* note 9, at 27 (citing REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 22). Professor Goodhart, a Committee member, strongly dissented from the final report. *See id.*

58. *Id.* at 32.

59. *Id.*

60. *All England Law Reports* enjoyed success because it reported cases more quickly than the *Law Reports* and did a better job of indexing and cross-referencing cases than the *Law Reports*. *Id.* at 33.

61. MARTINEAU, *supra* note 11, at 105.

62. *Id.*

63. KARLEN, *supra* note 11.

64. *Id.* at 88.

unimportant cases reported."[65] Karlen noted that English judges depend on the discretion of the *Law Reports'* editors, do not believe many cases have precedential value, and discourage the citation of unreported judgments.[66]

The seeds of "fuller reporting" alluded to by Karlen were sown in 1951 when the Lord Chancellor ordered that shorthand reporters would take down all judgments of the Court of Appeal and that copies would be retained in the court file and in the court's library.[67] A basic index of these judgments was kept, but, in large part, the judgments were not extremely useful because copies of the judgments were not widely available.[68] The advent of computerized databases in the early 1980s changed things dramatically.

Writing in 1983, Roderick Munday discussed the transcripts of unreported judgments retained by the court, noting "their citation in court has become an everyday matter."[69] When Munday's article appeared, the Lexis database contained over 5000 unreported judgments and the "prospect of a Lexis terminal in every law library and lawyer's office, inevitably impel[led] the legal system towards an extreme with which it [would] have to come to terms."[70] Munday was fearful of "nightmarish possibilities" created by the Lexis database and of the English Bar acquiring "American vices," including obsessive over-citation detailed in Karlen's study.[71] Munday concluded by calling for "a fresh Committee to review the entire system of reporting, citation and storage of English case law" and to determine the "limits of citation."[72]

Lord Justice Diplock called for a drastic departure from the English tradition of lawyers freely citing judgments that "[did] not appear in any series of published law reports" in the case of *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*[73] In a separate speech, equivalent to a concurring opinion in the United States, Lord Justice Diplock proposed that the House of Lords adopt:

> the practice of declining to allow transcripts of unreported judgments of the civil division of the Court of Appeal to be cited upon the hearing of appeals to this House unless leave is

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65. *Id.* at 103.

66. *Id.* at 100.

67. MARTINEAU, *supra* note 11, at 105. These unreported judgments have been referred to as unexploded land mines. GROSSMAN, *supra* note 9, at 32.

68. Until the advent of electronic databases, researchers could only access the entire collection of unreported judgments at the Supreme Court Library. *See* Munday, *Limits of Citation, supra* note 14, at 1337.

69. *Id.* In another article written around the same time, Munday offers the idea of prohibiting citations to unreported decisions. *See* ZANDER, *supra* note 22, at 317 (citing R.J.C. Munday, *New Dimensions of Precedent*, J. SOC'Y PUB. TCHRS. L. 201 (1978)).

70. Munday, *Limits of Citation, supra* note 14, at 1337.

71. *Id.* at 1337-38.

72. *Id.* at 1339.

73. Roberts Petroleum Ltd. v. Bernard Kenny Ltd., [1983] 2 A.C. 192, 200 (H.L.) (Eng.). Lord Justice Diplock declares citation to unreported judgments is "a growing practice" and "ought to be discouraged." *Id.* at 201.

> given to do so; and that such leave should only be granted upon counsel giving an assurance that the transcript contains a statement of some principle of law, relevant to an issue in the appeal to this House, that is binding upon the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, is not to be found in any judgment of that court that has appeared in one of the generalised or specialised series of reports.[74]

He argued this rule would save time as unreported judgments contain irrelevant material and usually provide no assistance to the court in reaching a decision.[75] He believed the current system of law reporting operated to effectively control the common law in England. "If a civil judgment of the Court of Appeal . . . has not found its way into the generalised series of law reports or even into one of the specialised series, it is most unlikely to be of any assistance to your Lordships."[76]

The substance of Lord Justice Diplock's proposal became a Practice Statement[77] applicable to the Court of Appeal Civil Division in 1996. The language was substantially similar to the language Lord Justice Diplock proposed in the *Roberts Petroleum* judgment:

> Leave to cite unreported cases will not usually be granted unless counsel are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle.[78]

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74. *Id.* at 202.

75. *See id.* Lord Justice Diplock had been a vocal opponent of citation of unreported cases and of over-citation. *See* Munday, *Limits of Citation*, *supra* note 14, at 1338 (listing cases where Lord Justice Diplock expressed the opinion over-citation is "an ineradicable practice." (quoting Naviera de Canarias S.A. v. Nacional Hispanica Aseguradora S.A., (1977) 2 W.L.R. 442, 446 (H.L.) (Eng.)). *See also* de Lasala v. de Lasala, (1979) 3 W.L.R. 390 (P.C.) (Eng.); Lambert v. Lewis, [1981] 2 W.L.R. 713 (H.L.) (Eng.).

76. *Roberts Petroleum*, (1983) 2 A.C. at 202.

77. Practice Statements for the Civil Division are now known as Practice Directions and made by the Master of the Rolls as president of the Civil Division. They apply in addition to civil procedure rules. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CIVIL PROCEDURE RULES: PRACTICE DIRECTIONS (2006), *available at* http://www.dca.gov.uk/civil/procrules_fin/contents/frontmatter/raprnotes.htm.

78. Practice Statement (Court of Appeal), *supra* note 3, at 854. The application of the rule was broadened to the High Court and Crown Court. *See* Practice Statement: Supreme Court Judgments, *supra* note 49. The rule was restated in the Practice Direction (Court of Appeal (Civil Division), (1999) 1 W.L.R. 1027 (A.C.) (Eng.).

Justice Laddie's postscript in the case of *Michaels v. Taylor Woodrow Developments Ltd.* is further evidence of a desire to control the growth of the common law through publication and citation practices.[79] Justice Laddie wrote in 2001, having observed the increase in the size and use of electronic databases and their impact on the common law in the eighteen years since the *Roberts Petroleum* case. He lamented the loss of the law reporters' tradition of selectivity:

> Now there is no preselection . . . . A poor decision of, say, a court of first instance used to be buried silently by omission from the reports. Now it may be dug up to support a cause of action or defence which, without its encouragement, might have been allowed to die a quiet death.[80]

He offered a solution in which ex tempore judgments are not to be cited, unless the court indicates to the contrary, as a way to prevent "the bulk of material from clogging up the system."[81]

Justice Laddie's sentiments appeared in the form of the 2001 Practice Direction which took the reforms announced in *Roberts Petroleum* and the 1996 Practice Statement even further. The Practice Direction prohibits citation of certain categories of reported judgments unless the judgment "clearly indicates that it purports to establish a new principle or to extend the present law."[82] Judgments given after the date of the Practice Direction are required to explicitly indicate whether they establish a new principle or extend present law and courts are instructed to search for such statements in judgments cited by lawyers.[83] The Practice Direction requires advocates to justify their citation to all categories of judgments, presumably including both reported and unreported judgments, which "only appl[y] decided law to the facts of the particular case; or otherwise as not extending or adding to the existing law."[84]

B. The History of Publication and Citation in the United States

Early American court decisions were not published. American lawyers and judges relied upon English cases as precedent. After the Revolutionary war, the need for uniquely American jurisprudence led to the publication of the first volume of American decisions in 1789.[85] In sharp contrast to the oral

79. Michaels v. Taylor Woodrow Dev. Ltd., [2001] Ch. 493 (Ch.D.) (Eng.).

80. *Id.* at 520.

81. *Id.* at 522.

82. Practice Direction, *supra* note 3, at 6.1. Section 6.2 spells out the specified categories: "[a]pplications attended by one party only, [a]pplications for permission to appeal[, and d]ecisions on applications that only decide that the application is arguable." *Id.* at 6.2.

83. *Id.* at 6.1.

84. *Id.* at 7.1.

85. MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 16 (9th ed. 1989).

tradition followed in England, American judges have almost always produced their own written opinions;[86] however, many early American reporters followed the English tradition of reporting from their notes and observations instead of reprinting the written opinion of the court.[87] By the start of the twentieth century, reporters' duties shifted to merely obtaining written opinions produced by the court and publishing them.[88]

The appointment of official reporters at the federal and state levels in the United States is another distinct contrast to the English practice of leaving reporting to private enterprise. Excerpts from the Report of the Committee on Law Reporting of the Association of the Bar of the City of New York of 1873 reveal discontent with the system of reporting at the time.[89] The report cites an overwhelming number of law reports available in America as early as 1821, including an abundance of cases containing no new principles and selected without care.[90] The report pinned the blame on the for-profit publishers, interested in volume rather than quality, and called for the creation of an official reporter.[91] The United States Supreme Court and many states appointed official reporters.[92] Many states eventually abandoned the practice and designated West their official reporter.[93]

Another contrast with the English system of only reporting select judgments is the American practice of comprehensive reporting. In the latter part of the nineteenth century, the drastic increase in the number of reported cases prompted calls for reform of the American reporting system.[94] In 1871, *American Reports* and *American Decisions* were introduced as selective reports that included only the "real gems" of American law and excluded "redundant, regressive cases."[95] These reports included state cases of "established general authority" cited by text writers and excluded obsolete cases with no

86. A 1785 statute required Connecticut judges to produce written opinions. C. JOYCE, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1297-1362 (1985), *reprinted in* GROSSMAN, *supra* note 9, at 40-41. *See also* MARTINEAU, *supra* note 11, at 110. For a brief period of time in its earliest years, the Supreme Court gave oral opinions at the conclusion of arguments but soon abandoned this practice in favor of written opinions. Statutes requiring judges to produce written opinions in every case were later questioned as causing the unnecessary publication of too many cases. *See* John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 160 (1915).

87. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 46-47 (1990).

88. *Id.*

89. GROSSMAN, *supra* note 9, at 59-65 (citing REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1873)).

90. *Id.*

91. *Id.*

92. MARTINEAU, *supra* note 11, at 112.

93. *Id.* at 113.

94. GROSSMAN, *supra* note 9, at 66-67 (citing REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1873)).

95. *Id.* at 69.

significance.[96] This concept of reporting was not successful, as lawyers eventually chose the comprehensive style.

John B. West was a pioneer of comprehensive reporting in America.[97] West first began publishing excerpts from the decisions of the Supreme Court of the state of Minnesota in 1876.[98] By 1887, his *National Reporter System* provided lawyers with comprehensive coverage of judicial opinions from all states.[99] Supreme Court decisions were available in the *Supreme Court Reporter* and federal appellate court decisions and select federal district court decisions were available in the *Federal Reporter*.[100] Under this system of comprehensive reporting nearly every appellate court decision, and some federal district court decisions, found their way into the law reports.[101]

By the end of the nineteenth century, the American legal profession was in a difficult situation. The operation of the common law system was strained by the yearly exponential growth in the number of cases. Lawyers could no longer master all the cases or rely on their memories.

Early calls for reform focused on reducing the number of opinions published but not on limiting lawyers' ability to cite opinions.[102] The Chief Justice of the Wisconsin Supreme Court complained about the volume of case law in 1915, remarking that lawyers' briefs are devoted to reciting precedent, many of which add nothing to the law.[103] The Chief Justice proposed that judges only write opinions in certain types of cases and prohibit publication of opinions with no precedential value.[104] The publication of only select opinions was again suggested in the late 1940s by judges of the Third and Fifth Circuits and several states including Texas and Alabama enacted rules dictating the criteria for published opinions.[105] The American reliance on judges to control

96. *Id.* at 71 (citing *Object of the American Decisions*, 1 AM. DEC. v-x (1878)).

97. *See* SURRENCY, *supra* note 87, at 49.

98. *Id.*

99. *Id.*

100. J. MYRON JACOBSTEIN, ET AL., FUNDAMENTALS OF LEGAL RESEARCH 43-50 (7th ed. 1998).

101. *Id.*

102. SURRENCY, *supra* note 87, at 38. According to Surrency, "[c]iting unpublished decisions was common both before and after the Revolution, but now, it is difficult to determine with what frequency." *Id.*

103. Winslow, *supra* note 86, at 158-59.

104. *Id.* at 161-62. Chief Justice Winslow sagely predicted, "I confess that the question of how such an opinion [without precedential value] can be kept away from the pernicious activity of private reporting systems is a very difficult one." *Id.* at 162. For an even earlier complaint, see James Kent, *An American Law Student of a Hundred Years Ago, in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 837, 842 (1907). Kent, upon appointment to the Supreme Court of New York in 1798, complained, "I never dreamed of volumes of reports & written opinions. Such things were not then thought of." *Id.*

105. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent - Limited Publication and the No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1169 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*]; *see also* Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against*

the growth of the common law by selectively designating cases for publication is contrary to the English approach of letting the law reporters decide which cases merit reporting.

In 1964, the Judicial Conference of the United States resolved that the federal appellate and district courts should only authorize the publication of precedential opinions.[106] The 1971 report of the Federal Judicial Center also recommended limited publication practices and a no-citation rule.[107] The report was circulated to circuit judges who were requested to develop plans to implement the report's recommendations.[108] A few years later, the Federal Judicial Center's Advisory Council for Appellate Justice created a report containing standards for publication of opinions and a proposed no-citation rule. This report was later published as *Standards for Publication of Judicial Opinions*.[109]

The Judicial Conference decided to let each circuit develop its own publication and citation rules based on the *Standards for Publication of Judicial Opinions*. The individual circuits were left as "11 legal laboratories" accumulating experience with publication and citation rules.[110] The Judicial Conference left publication practices and citation rules undisturbed for several decades.[111]

Federal judges' designation of opinions as unpublished increased dramatically during this period. In 1984, only approximately forty percent of federal appellate decisions were issued as unpublished opinions.[112] Today over eighty percent of federal appellate decisions are issued as unpublished opinions.[113] Before the advent of computerized legal research, a decision designated as unpublished was not easily discoverable. Today, almost all unpublished opinions are available electronically through LexisNexis, Westlaw, free websites, or in print in West's *Federal Appendix*.[114] In 2001, West's *Federal Appendix* began publishing the unpublished opinions of federal

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Unneeded Publication, 33 A.B.A. J. 751, 754 (1947).

106. *See* Reynolds & Richman, *Non-Precedential Precedent, supra* note 105, at 1169 n.17 (citing JUDICIAL CONFERENCE OF THE UNITED STATES REP. 11 (1964)).

107. *Id.*

108. *Id.* at 1170.

109. *Id.* at 1171.

110. Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1435 (2005) [hereinafter Schiltz, *Much Ado*].

111. *See id.* at 1435-41. Schiltz notes the issue was added to the Advisory Committee's agenda in 1991 where it remained dormant for a number of years until it was removed in 1998 and subsequently put back on the agenda in 2001. *Id.*

112. *See* Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1283 (2004) (citing Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 tbl. 2 (2001)).

113. *Id.* at 1283 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 ANNUAL REPORT OF THE DIRECTOR 39 tbl. S-3).

114. Complete access to all unpublished opinions has not yet been achieved. See discussion in section *Substantive Policy Arguments, infra.*

appellate courts in volumes bound identically to West's other federal reports.[115] The availability of unpublished opinions has improved so much so that the term "unpublished" is only accurate as a term of art, and not as a description of physical location.

Rules on citing unpublished opinions were restrictive at first, but have been relaxed. [116] Initially, six federal circuits prohibited the citation of unpublished decisions the Fourth Circuit disfavored it, the Tenth permitted relevant citations, and the Third and Fifth had no rules.[117] The rules became less restrictive over the next several decades. By June 2006, only four circuits banned citation of unpublished decisions (Second, Seventh, Ninth, and Federal).[118] Six circuits discouraged but allowed citation (First, Fourth, Sixth, Eighth, Tenth, and Eleventh).[119] Three circuits freely allowed it (Third, Fifth, and D.C.).[120]

No-citation rules were eventually challenged on a number of grounds in federal courts around the country.[121] Two cases are at the center of the controversy regarding no-citation rules. The first is *Anastasoff v. United States.*[122] In *Anastasoff*, the plaintiff appealed the district court's denial of her refund for overpayment of federal taxes. She argued her refund was not otherwise barred by the limitations period because of a statutory "mailbox rule" and the court was not bound by a previous unpublished decision directly on point.[123] Her argument relied upon Eighth Circuit Rule 28A(i) which provides in pertinent part, "[u]npublished opinions . . . are not precedent and parties generally should not cite them."[124] The court ruled against Anastasoff holding its own rule unconstitutional under Article III of the United States Constitution for "confer[ring] on the federal courts a power that goes beyond the 'judicial.'"[125]

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115. MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 67 (8th ed. 2002).

116. Schiltz, *Much Ado*, *supra* note 110, at 1463.

117. The First, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits permitted citation as of 1978. Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 105, at 1180.

118. 2D CIR. R. 0.23 (2006); 7TH CIR. R. 53(b)(2)(iv), (e) (2006); 9TH CIR. R. 36-3(b) (2006); FED. CIR. R. 47.6(b) (2006). This terminology is adapted from Schiltz, *Much Ado*, *supra* note 110, at 1429.

119. 1ST CIR. R. 32.3(a)(2) (2006); 4TH CIR. R. 36(c) (2006); 6TH CIR. R. 28(g) (2006); 8TH CIR. R. 28A(i) (2006); 10TH CIR. R. 36.3(B) (2006); 11TH CIR. R. 36-2 (2006).

120. 3D CIR. I.O.P. 5.7 (2006); 5TH CIR. R. 47.5.4 (2006); D.C. CIR. R. 28(c)(1) (2006).

121. *See generally* Binimow, *supra* note 8 (listing cases in which courts have discussed unpublished opinions' precedential effects).

122. 223 F.3d 898, 899 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

123. *Id.*

124. 8TH CIR. R. 28A(i)(2000).

125. *Anastasoff*, 223 F.3d at 899.

In contrast to the *Anastasoff* decision, the constitutionality of no-citation rules was upheld in *Hart v. Massanari*.[126] Judge Alex Kozinski, a long-time defender of limited publication practices and no-citation rules, wrote the opinion. The case arose from counsel's citation of an unpublished opinion contrary to the Ninth Circuit Rule stating "[u]npublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit."[127] Counsel relied on *Anastasoff* for the proposition that the Ninth Circuit Rule was unconstitutional.[128] The court found that counsel violated the rule but decided not to impose sanctions.[129] The *Hart* case held no-citation rules constitutional on the grounds that the principle of binding authority is not found in the constitution, but instead is a matter of judicial policy.[130]

In the wake of these decisions and with the efforts of the Solicitor General of the United States, the process of examining the no-citation rules of federal appellate courts began in 2002.[131] The issue was placed on the agenda of the Advisory Committee on the Federal Rules of Appellate Procedure.[132] This Committee makes recommendations for changes to the Federal Rules of Appellate Procedure. The Advisory Committee agreed that the citation of unpublished opinions in the federal appellate courts should be regulated by a consistent national rule.[133] After some debate, the Advisory Committee proposed the following amendment to the Federal Rules of Appellate Procedure (hereinafter Rule 32.1):

> (a) Citation Permitted. A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, [unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.][134]

The rule stirred up considerable controversy.[135] Rule 32.1 was subsequently approved by the Advisory Committee, the Standing Committee,

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126. Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001).
127. *Id.* at 1159 (quoting 9TH CIR. R. 36-3(2001)).
128. *Hart*, 266 F.3d at 1158.
129. *Id.* at 1180.
130. *Id.* at 1175.
131. Schiltz, *Much Ado*, *supra* note 110, at 1441.
132. *Id.* at 1442.
133. Schiltz, *Much Ado*, *supra* note 110, at 1446.
134. FED. R. APP. P. 32.1(a). The Rule applies to all federal courts of appeals and effectively repeals any circuit rules prohibiting citation to unreported cases. *See* FED. R. APP. P. 1 and 28 U.S.C. § 2072(b) (2007).
135. *See Comparing the Policy Arguments – Volume*, *infra* notes 223-39 and accompanying text.

and the Supreme Court; and went into force on January 1, 2007.[136] The methodology used to create Rule 32.1 is chronicled by the Advisory Committee Reporter, Patrick J. Schiltz, in a law review article[137] and discussed in greater detail below in the section *Comparing the Policy Arguments - Volume.* Rule 32.1 only addresses the citation of unpublished opinions issued after the effective date of the Rule. It leaves a number of issues to the individual federal appellate courts, including whether to issue unpublished opinions and what precedential value to give unpublished opinions.

II. THE EFFICIENCY ARGUMENTS

Some of the more practical arguments made in England and the United States in favor of no-citation rules focus on the assumed efficiency of such rules. The efficiency argument posits that prohibiting lawyers from citing unreported or unpublished cases saves the lawyers the time of staying up with, searching for, and including such cases in briefs and, in turn, saves clients money. Judges are also winners under the efficiency argument because they do not have to read unreported or unpublished cases or make sense of them if they are not cited by lawyers.

A. English Efficiency Arguments

In England, the efficiency argument was advanced by Lord Justice Diplock in *Roberts Petroleum.* In his judgment he states that he gained nothing from reading the two unreported cases cited in the lower court's judgment. "None of them laid down a relevant principle of law that was not to be found in reported cases; the only result of referring to the transcripts was that the length of the hearing was extended unnecessarily."[138] Lord Justice Diplock's proposed rule in *Roberts Petroleum* and the subsequent 1996 Practice Statement sparked a flurry of discussion. One author conducted an inventory of recent cases and commentary on the issues of blanket reporting and concluded unnecessarily citing cases added nothing to the law, distracted lawyers from drawing principles from authorities, and wasted the time of judges and the money of parties.[139] Citation of unreported cases is said to give rise to "significant problems," including: making the lawyer's search for authority more difficult, geographically fragmenting the bar, complicating the study of law, and making the law less accessible.[140]

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136. Schiltz, *Citation, supra* note 2, at 64; William P. Murphy, *Alito, For Precedent: Federal Appeals Rule 32.1: A Strong Search Tool for the One True Law,* 30 PENN. L. WKLY. 1 (Mar. 26, 2007).

137. Schiltz, *Much Ado, supra* note 110, at 1434-58.

138. Roberts Petroleum Ltd. v. Bernard Kenny Ltd., (1983) 2 A.C. 192, 201 (H.L.) (Eng.).

139. Munday, *Limits of Citation, supra* note 14, at 1338.

140. Munday, *supra* note 70, at 201, *reprinted in* ZANDER, *supra* note 22, at 316.

Lord Justice Diplock's proposal was criticized some years later by Justice Laddie in the *Michaels* case.[141] Justice Laddie shares Lord Justice Diplock's concerns about the effects of over-reporting and citation to unreported judgments and postulates the system will be "swamped with a torrent of material" if the problem is not tackled.[142] He laments the loss of efficiency when "courts are presented with ever larger files of copied law reports, thereby extending the duration and cost of trials, to the disadvantage of the legal system as a whole."[143] However, Justice Laddie disagreed with Lord Justice Diplock's proposed rule for a number of reasons, including the thought it would not reduce the burden on parties to search unreported judgments that might apply to their case. Justice Laddie mentioned the problem of citation to unpublished cases in the United States and quoted the language of the relevant Circuit Court rule.[144] Justice Laddie did not believe the American approach would work in England, but noted that it would prevent the "bulk of material from clogging up the system."[145]

The movement toward a no-citation rule in the English courts must be viewed against the backdrop of larger reforms occurring in the English legal system. Lord Woolf was commissioned by the Lord Chancellor to "evaluate the current status of civil litigation in England" in 1994.[146] Lord Woolf concluded the present system was too expensive, slow, fragmented, and unequal.[147] The problems Lord Woolf identified were not unlike the efficiency arguments in favor of no-citation rules. Although Lord Woolf's final report did not specifically address no-citation rules, he was responsible for the 2001 Practice Direction.[148] The introduction to the 2001 Practice Direction laments the problems for advocates and courts caused by the current volume of available material. It contends the Practice Direction is necessary to preserve recent efforts to "increase the efficiency, and thus reduce the cost of litigation."[149] This Practice Direction has been said to correspond to the main objectives of the Civil Procedure Rules, which include saving expenses and allotting an appropriate share of court resources to cases.[150]

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141. Michaels v. Taylor Woodrow Dev. Ltd., [2001] Ch. 493 (Ch.D.) (Eng.).

142. *Id.* at 520-21.

143. *Id.* at 520.

144. *Id. See also* 4TH CIR. R. 47.6(b)(2001).

145. *Michaels*, [2001] Ch. at 522.

146. Kenneth M. Vorrasi, *England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States*, 30 J. LEGIS. 361, 365 (2004) (citing STEVEN M. GERLIS AND PAULA LOGHLIN, CIVIL PROCEDURE 1 (2001)).

147. LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 1 (1995), *available at* http://www.dca.gov.uk/civil/interfr.htm.

148. Justice Laddie was a member of the Working Party, which produced the 2001 Practice Direction, *supra* note 3.

149. WOOLF, *supra* note 147, at 2.

150. Roderick Munday, *Over-Citation: Stemming the Tide – Part 1*, 166 JUST. OF THE PEACE, Jan. 5, 2002, at 6-7 [hereinafter Munday, *Over-Citation: Part I*]. The Civil Procedure

The efficiency argument for the English no-citation rules was advanced at a conference on law reporting held at Cambridge University in 2000. Lord Justice Buxton characterized the English system as economical on judge power because it looks to lawyers to cite only authority that actually informs judges about something in the law.[151] Lord Justice Buxton contemplated a shift to the American system placing less responsibility on lawyers but rejected the idea because it would require many more judges and would become "complicated and burdensome."[152]

B. United States Efficiency Arguments

Similar efficiency arguments were raised in the United States when no-citation rules were first enacted by the various federal circuit courts. Efficiency arguments appear in the 1972 Federal Judicial Centers Advisory Council for Appellate Justice's Report, *Standards for Publication of Judicial Opinions.* According to the report, a no-citation rule will reduce costs because unpublished opinions will not have to be obtained and examined.[153] Additionally, costs and delays will be further reduced as cases will not be appealed only because they are at odds with unpublished cases.[154] The no-citation rule proposed in the report was a model for many of the rules adopted by the circuit courts of appeals.[155] Additional efficiency arguments raised shortly after the publication of the report include two new ideas. Without a no-citation rule judges will spend more time drafting opinions for wider audiences if all opinions can be cited, and a no-citation rule would reduce the market for unpublished opinions and discourage publishers from selling reports of unpublished opinions.[156]

Some of the local circuit rules on publication and citation make specific reference to efficiency. The Second Circuit Rule states the "demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively"[157] The Fifth Circuit Rule declares "[t]he publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."[158]

Efficiency arguments were also made in the *Anastasoff* and *Hart* cases. In *Anastasoff,* Judge Arnold recognized that treating every opinion as precedent will be burdensome on the already over-worked system and judge, but contends

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Rules were a product of Lord Woolf's reforms.

151. Williams, *supra* note 50, at 9.

152. *Id.* at 11.

153. *Id.*

154. ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, 19 (1973).

155. Reynolds & Richman, *Non-Precedential Precedent, supra* note 105, at 1171.

156. *Id.* at 1189.

157. 2D CIR. R. 0.23 (2007).

158. 5TH CIR. R. 47.5.1 (2007).

"the price must still be paid"[159] even if backlogs expand. One solution he offers is creating more judgeships and having judges take more time to handle cases competently.[160]

In *Hart,* Judge Kozinski takes a different approach. He contends courts do not have time to write every opinion for publication.[161] According to Judge Kozinski, no-citation rules and unpublished opinions are efficient because they allow judges to dispose of routine cases with unpublished opinions and spend time writing precedential opinions in significant cases.[162] "Writing a second, third or tenth opinion in the same area of law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority."[163] Judge Kozinski posits that if parties are allowed to cite unpublished opinions, the time savings provided by unpublished opinions would vanish. Judges would spend more time writing opinions, lawyers would spend more time finding opinions, and, ultimately, clients would pay.[164] Judge Kosinski also disputes the suggestion in *Anastasoff* that more judges would cure the problem. He contends it would take a five-fold increase in the number of judges to fairly allocate the increased workload.[165] These additional opinions would have the negative effect of creating conflict within and among the federal circuit courts.[166]

Commentary defending and attacking efficiency arguments for no-citation rules is plentiful.[167] Steven R. Barnett devotes an entire section of a law review article to refuting Kozinski's arguments.[168] The section is entitled "Vanishing Time: The Kozinski Defense of No-Citation Rules." Barnett contends no-citation rules will not save judges time because judges already know that nearly all of their opinions, whether written for publication, will be made available on LexisNexis or Westlaw and will be read by attorneys. He notes that circuits with permissive citation rules have not experienced the fatal results Kozinki foretells.[169]

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159. Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000) opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

160. *Id.*

161. Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001).

162. *Id.*

163. *Id.*

164. *Id.* at 1179.

165. *Id.*

166. *Id.*

167. *See, e.g.*, Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. MAG., June 2000, at 43; Boyce F. Martin Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004).

168. Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 17 (2002).

169. *Id.* at 20.

The Supreme Court's recent approval of Rule 32.1 marks the United States' move away from a no-citation rule at the federal appellate level. The process leading up to the rule's approval provides insight into the impact of efficiency arguments against no-citation rules. Rule 32.1 was published for comment in 2003 by the Advisory Committee on the Federal Rules of Appellate Procedure (Advisory Committee).[170] The Advisory Committee received over 500 comments on the rule.[171] Comments touched on efficiency arguments noted above. Comments from those opposed to the rule came from judges fearful of the increased workload caused by citations to unpublished opinions, a minority of attorneys worried about additional research obligations of searching unpublished opinions, and parties to the judicial process concerned that citing unpublished opinions will slow the judicial process and make it more expensive.[172] Schiltz commented that "predictions of doom came not from those who have experience with permitting the citation of unpublished opinions, but from the four circuits that continue to forbid it" and that such comments were largely speculative.[173]

These and other comments were discussed at the Advisory Committee's April 2004 meeting. The Advisory Committee was "more persuaded by the comments supporting Rule 32.1 than by the more numerous comments opposing it."[174] The Advisory Committee voted to approve the rule and sent the rule to the Standing Committee where the rule was returned to the Advisory Committee pending the outcome of several studies.[175]

The first study, conducted by the Federal Judicial Center, was a comprehensive survey of federal circuit judges and the attorneys practicing before them.[176] Judges in circuits with permissive, restrictive, and discouraging citation rules were asked whether changing the citation rules would affect the length of their opinions or the time they devoted to writing them. A large majority of judges from circuits with all three types of rules responded that changing the citation rules would not have an impact on the length of their opinions or the time they devoted to writing them.

The survey asked judges whether proposed Rule 32.1 would require them to spend more time writing unpublished opinions. The majority of judges in the six circuits that discourage citation to unreported cases responded that proposed Rule 32.1 would not change the amount of time they spend preparing

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170. Schiltz, *Much Ado*, *supra* note 110, at 1431. See *id.* for a thorough history of FED. R. APP. P. 32.1(a).

171. Schiltz, *Citation*, *supra* note 2, at 29.

172. *Id.* at 35-39.

173. Schiltz, *Much Ado*, *supra* note 110, at 1464. Schiltz notes most judges who commented against the rule actually had below average workloads. *Id.* at 1479.

174. Schiltz, *Citation*, *supra* note 2, at 58.

175. *Id.*

176. TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005).

opinions. The response to the same question from Judges in the circuits banning citation to unreported cases was mixed.

Judges in circuits permitting citation of unpublished opinions were asked how much additional work it takes to deal with briefs citing unpublished opinions. The majority said it creates "a very small amount" of extra work.[177] Finally, judges in the two circuits that recently relaxed their restrictions on the citation of unpublished opinions were asked if the change affected the time required to draft unpublished opinions or if their workload was affected in general. The vast majority of judges responded that they did not spend more time writing unpublished opinions and they noticed "no appreciable change" in the difficulty of their work.[178] Attorneys were asked what impact proposed Rule 32.1 would have on their overall workload. On average attorneys predicted that Rule 32.1 would not have an "appreciable impact" on their workload.[179]

The second study was conducted by the Administrative Office of the United States Courts. It focused on the amount of time it took courts to dispose of cases and how they disposed of those cases. The study examined circuits that allowed citation to unpublished opinions. Specifically, the study focused on whether relaxed citation rules affected the timeframe for disposition of cases. The study found that allowing citation to unpublished cases did not affect the length of time it took courts to dispose of cases or the number of summary dispositions issued.[180]

Claims that liberalizing no-citation rules would swamp the courts with work, increase the amount of time attorneys devoted to research, and slow down the entire judicial process were directly refuted by both studies. The Advisory Committee met to consider Rule 32.1 in April 2005, and all members agreed the studies "failed to support the main contentions of Rule 32.1's opponents."[181]

Efficiency arguments are not explicitly addressed in the text of Rule 32.1, but are mentioned in the Committee Note accompanying the Rule (the Note). The Note cites the current conflicting no-citation rules varying from circuit to circuit as inefficient because lawyers struggle to keep up with the different rules. The Note also states efficiency concerns over judicial time wasted drafting unpublished opinions are irrelevant under Rule 32.1 because the Rule takes no position on the precedential value of unpublished opinions. Individual circuits are free to declare unpublished opinions non-precedential and, thereby, conserve judicial energy from writing lengthy unpublished opinions.[182]

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177. Schiltz, *Citation*, *supra* note 2, at 61 (citing TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 10 (2005)).

178. *Id.* at 62.

179. *Id.* at 63.

180. *Id.* at 64 (citing Draft Minutes of Spring 2005 Meeting of Advisory Committee on Appellate Rules 11 (Apr. 18, 2005)).

181. *Id.*

182. Advisory Committee's Note, FED. R. APP. P. 32.1(a) [hereinafter Advisory

C. *Comparing the Efficiency Arguments*

Efficiency arguments are the primary justification offered in favor of England's no-citation rules.[183] This contrasts with the experience in the United States where efficiency arguments were advanced but refuted by empirical studies.

One possible explanation for the success of efficiency arguments in England and their failure in the United States is the different phase each country is in with respect to no-citation rulemaking. Rule 32.1 was enacted in the United States with the benefit of hindsight. The modern era of experimentation with no-citation rules in the United States began with the Federal Judicial Center's 1971 report recommending limited publication practices and the subsequent call for each circuit to develop publication practices and citation rules.[184] As described in the previous section, different versions of no-citation rules operated in the federal circuits for a number of years. By using these circuits as "11 laboratories," the American bench and bar was able to see what worked and what did not.[185] This approach allowed the efficiency arguments to be tested, studied, and eventually refuted.

The modern era of no-citation rules began in England with Lord Justice Diplock's call for reform in the *Roberts Petroleum* case in 1983. In contrast, by the time *Roberts Petroleum* was decided, the United States had been experimenting with no-citation rules for over ten years. The process used to develop the English rules is described in more detail in the next section. The process did not involve any empirical studies testing the efficiency arguments. Additionally, the volume of discussion over no-citation rules was substantially less in England than in the United States. These procedural differences and the stage each country was at in its experience with no-citation rules explains why efficiency arguments were relied upon in England and rejected in the United States. Perhaps, as judges, scholars, and the judiciary in England gains more experience with no-citation rules they will reexamine the efficiency of the rules.

Comparative law methodology contains an underlying principle that legal systems must be compared at similar stages of their development. Gutteridge stated the principle as "[l]ike must be compared with like; the concepts, rules or institutions must relate to the same stage of legal, political and economic

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Committee's Note].

183. See sections on policy arguments and the precedential effect of unpublished opinions, *infra* notes 188-198 and accompanying text. These arguments were advanced in England in support of no-citation rules, but efficiency was the official justification for no-citation rules is England.

184. *See supra,* section on *The History of Publication and Citation in the United States.* Contrast the modern era with previous no-citation experiments in the United States, discussed *supra* It is appropriate to begin this era with the 1971 Report because it is the first mention of both publication and citation rules, and is where scholars trace the development of Rule 32.1. *See* Schiltz, *Much Ado, supra* note 110, at 1437. Schiltz compares the length of time it took to reach agreement on Rule 32.1 to a film project languishing in "development hell." *Id.*

185. Schiltz, *Much Ado, supra* note 110, at 1435.

development."[186] England and the United States are at different phases in their development of no-citation rules. A comparison of no-citation rules is, therefore, only meaningful after carefully placing the rules into historical context.[187]

III. POLICY ARGUMENTS

In addition to the efficiency arguments outlined in the previous section, arguments regarding no-citation rules were raised in both countries on policy grounds. The volume of policy arguments was greater in the United States than in England, but different substantive policy issues were raised in each country. Policy arguments appeared to be more influential in America than in England. Insight into the divergent approaches toward no-citation rules taken by England and the United States can be gained by examining these differences.

A. English Policy Arguments

Concern over the impact of no-citation rules on the rule of law in England was scant. In a brief comment appearing shortly after the *Roberts Petroleum* judgment, Colin Tapper raised the fundamental rule of law concept that those governed by law have the right to know what the law is.[188] Tapper critiques Roderick Munday's *Limits of Citation Determined* article because it does not address the simple fact "decisions of the superior courts *are* law."[189] Munday does, in fact, touch on rule of law concerns with the admission that "[p]aradoxically, English law, despite its being in the main judge-made, has always been careless of its case law."[190]

English commentators criticized the *Roberts Petroleum* judgment, and the general state of English law reporting, for perpetuating inequality of access to the law.[191] The practice of retaining transcripts of unreported Court of Appeal judgments in the Supreme Court Library permits only those with time and the right of access to discover the law. The system of law reporting in general is also criticized for creating a situation making it difficult for the public or practitioner to "hack their way through the plethora of published law reports."[192] The critique concludes by suggesting the answer to the problem

186. DECRUZ, *supra* note 10, at 218 (quoting HAROLD C. GUTTERIDGE, COMPARATIVE LAW 73 (1949)).

187. *Id.* at 226-27 (quoting Ferdinand Stone, "[w]e must study the history, the politics, the economics, the cultural background in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common." *The End to be Served by Comparative Law*, 25 TUL. L. REV. 325, 332 (1951)).

188. Colin Tapper, Commentary, *The Limits of Citation Determined*, THE LAW SOCIETY'S GAZETTE, June 29, 1983, at 1636.

189. *Id.*

190. Munday, *Limits of Citation*, *supra* note 14, at 1339.

191. ZANDER, *supra* note 22, at 322-23.

192. G.W. Bartholomew, *Unreported Judgments in the House of Lords*, 133 NEW L.J. 781,

lies not in restricting citations but in computer retrieval systems that provide easy access to the law for citizens and attorneys.

Fears over unreported judgments creating inequality of access to the law were substantiated in a 1992 study conducted by the American political scientist Burton M. Atkins.[193] The study adapted previous methodology used to compare United States appellate courts to the English Court of Appeal. The results revealed that unreported English Court of Appeal decisions were not "disposable" because they affected a lawyer's advice to a client.[194] In other words, English lawyers' advice to their clients would change if they were aware of unreported judgments. Atkins concluded that English reporting practices gave affluent and repeat litigants an advantage because they were more likely to be aware of unreported judgments.

Munday, writing in the third of a series of articles published shortly after the *Michaels* decision and 2001 Practice Direction, discussed the arousal of suspicion and lack of respect for courts and the judicial system created by certain publication practices.[195] He was critical of the use of de-publication by courts shaping the law while shielding themselves from dealing with controversial issues. He raised these policy concerns as an example of problems that can arise from the comparatively extreme de-publication practices of the State of California, but he did not specifically criticize the English no-citation rules based on these same policy concerns.

Strong criticisms of the no-citation rules were aimed at the rules' invasion of the traditional rights and privileges of lawyers. Munday noted that the restrictions on a lawyer's right to cite unreported decisions announced in *Roberts Petroleum* were "met with howls of protest."[196] Robert Zander summarized responses to the no-citation rule proposed in *Roberts Petroleum* and critiqued the rule's limit on the right of lawyers to make the best case possible.[197] Another commentator criticized the 1998 Practice Direction for curtailing the right of citizens through legal representation to conduct legal proceedings in a manner they see fit.[198]

None of these policy concerns were voiced in the *Roberts Petroleum* or *Michaels* cases or in any of the Practice Directions. The only reasons given in the cases and Practice Directions for the English no-citation rules were the efficiency arguments outlined above.

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782 (1983).

193. Burton M. Atkins, *Selective Reporting and the Communication of Legal Rights in England*, 76 JUDICATURE 58 (1992).

194. The phrase "disposable" and the underlying methodology of the study were adapted from Karen K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989).

195. Roderick Munday, *Over-Citation: Stemming the Tide – Part 3*, 166 JUST. PEACE 83, 86 (2002) [hereinafter Munday, *Over-Citation: Part 3*].

196. Munday, *Over-Citation: Part I*, *supra* note 150, at 8.

197. ZANDER, *supra* note 22, at 322-23.

198. F.A.R. Bennion, *Citation of Unreported Cases – A Challenge*, NEW L.J., Oct. 16, 1998, at 1520 (cited in ZANDER, *supra* note 22, at 322).

B. United States Policy Arguments

No-citation rules aroused markedly more debate in the United States than in England. In America, policy arguments appeared in scholarly articles, cases discussing no-citation rules, the text of Rule 32.1, and the accompanying Committee Note. Patrick J. Schiltz, Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, received over five hundred comments on Rule 32.1, making it the second most commented on procedural rule in history.[199] A website created by a group supporting Rule 32.1 includes a comprehensive list of law review articles written on the subject of no-citation rules and unpublished opinions.[200] Prior to publication of this Article, the site listed 102 law review articles.

Schiltz devoted an entire law review article to explaining why the rules created so much controversy in the United States.[201] In the article, Schiltz shared the comments of one federal appellate judge who observed that trying to talk with his fellow judges about Rule 32.1 was akin to discussing sex or religion.[202] Schiltz argued "there was a disconnect between the relatively low level of importance of Rule 32.1 and the relatively high level of emotion surrounding it."[203] His thesis was that no-citation rules are relatively unimportant but have aroused so much controversy because they sit "at the intersection of a surprising number of principles that are very important" to lawyers and judges.[204] The most significant policy arguments based on these principles are outlined below.

There has been considerable argument in the United States over whether no-citation rules are an unconstitutional restraint on the freedom of expression. Some argue the rules do not violate the First Amendment because they are similar to the multitude of other restrictions courts impose on attorneys, including rules dictating the length and format of briefs.[205] Others argue the rules infringe First Amendment rights by banning "truthful speech about a matter of public concern."[206] Both sides see a distinction between no-citation

199. Schiltz, *Much Ado*, *supra* note 110, at 1432.

200. Committee for the Rule of Law, http://www.nonpublication.com (last visited March 23, 2007).

201. Schiltz, *Much Ado*, *supra* note 110, at 1432. As Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, Schiltz's job was to receive and summarize comments on Rule 32.1. His article does an excellent job of outlining the positions for and against no-citation rules in the United States. I will draw heavily on his discussion of the reasons of principle offered for and against the no-citation rules, instead of reinventing the wheel.

202. *Id.* at 1433.

203. *Id.* at 1434.

204. *Id.* at 1467.

205. Schiltz, *Citation*, *supra* note 2, at 32.

206. *Id.* at 50. Schiltz cites the following articles in support of this contention: Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 778 (2003); David Greenwald & Frederick A.O. Schwarz Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV.

rules limiting the substance of what can be argued from rules restricting the form in which arguments are made.[207]

The central holding of *Anastasoff* was that the no-citation rule in question was unconstitutional for limiting the precedential effect of prior decisions.[208] The *Hart* case explicitly rejected this proposition, concluding instead that the principle of precedent is not constitutional, but a matter of judicial policy.[209] Rule 32.1 takes a pass on the constitutionality issue, stating in the Committee Note, "[Rule 32.1] takes no position on whether refusing to treat an 'unpublished opinion' as binding precedent is unconstitutional."[210]

Concerns over the lack of accountability created by no-citation rules were also voiced. The poor quality of unpublished opinions has been blamed on the lack of accountability they afford judges which in turn breeds "sloth and indifference."[211] The unaccountability created by unpublished opinions has led to judges engaging in corrupt practices, including issuing an unpublished opinion to avoid a public debate over a contested issue and judges changing their minds on an issue on the condition that a non-precedential opinion be issued.[212]

Accountability concerns were also voiced by Judge Arnold in the *Anastasoff* decision. Judge Arnold contended no-citation rules, like the one at issue in *Anastasoff,* are unconstitutional because the court is, in effect, saying, "[w]e may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday."[213] Accountability concerns were addressed in the Committee Note accompanying Rule 32.1. The Note proclaims Rule 32.1 expands "the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public."[214]

1133, 1161-66 (2002); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 297-300 (2001); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 780-83 (2004); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1227-30 (2003); Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, 30 LITIG. 33 (2004).

207. Schiltz, *Citation*, *supra* note 2, at 50.

208. Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

209. *Hart*, 266 F.3d at 1175.

210. Advisory Committee's Note, *supra* note 182.

211. William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996).

212. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1487 (2004) (recalling the comments of now-retired federal appellate judge Patricia Wald).

213. *Anastasoff*, 223 F.3d at 904. This statement of course must be contrasted with the following statement from *Hart*: "[no-citation rules] allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings." *Hart*, 266 F.3d at 1160.

214. Advisory Committee's Note, *supra* note 182.

No-citation rules came under strong criticism in the United States for offending notions of equal justice. The rules have been said to create "two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low quality justice for 'no-name appellants represented by no-name attorneys.'"[215] The argument follows, wealthy parties and their high-powered lawyers receive careful consideration by the courts and a published decision written by a judge, while the disadvantaged receive less attention and an unpublished opinion written by a law clerk. These arguments are supported by numerous empirical studies summarized in Penelope Pether's article *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts.*[216]

The text of Rule 32.1 aims to achieve equality in citation practices by prohibiting courts from imposing citation restrictions on certain classes of opinions and not others. The Committee Note accompanying Rule 32.1 dismisses criticisms that no-citation rules favored large institutional litigants who, unlike other litigants, were able to collect and organize unpublished opinions. The Note contends such concerns are obviated by the widespread availability of unpublished opinions in the *Federal Appendix,* Westlaw, LexisNexis, and the Internet.[217] Pether took issue with this claim, arguing it would only be valid if all litigants had equal access to Westlaw and LexisNexis and if online searching advanced to the point that all unpublished opinions were easily accessible.[218]

Pether's critiques are compelling even in light of recent advancements in the accessibility of unpublished opinions. The E-Government Act of 2002 requires all federal appellate and district courts to provide free electronic access to their written opinions including published and unpublished opinions.[219] However, mere access to unpublished opinions does not necessarily equate to an ability to discover relevant opinions.

The federal courts complied with the E-Government Act by providing the public with free access to pull up opinions via the Public Access to Electronic Court Records system (PACER). PACER works exceptionally well at retrieving dockets by known criteria such as party name, case number, or a few broadly defined case type categories, but it has no full text-searching capability.

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215. Schiltz, *Citation*, *supra* note 2, at 49, (citing Letter from Beverly B. Mann, Attorney, to Samuel A. Alito Jr., Chair, Advisory Comm. on Appellate Rules 4 (Feb. 15, 2004), http://www.secretjustice.org/pdf_files/Comments/03-AP-408.pdf).

216. Pether, *supra* note 212.

217. Advisory Committee's Note, *supra* note 182.

218. Pether, *supra* note 212, at 1516.

219. Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. A statement on the PACER website provides insight into what will be available. Written opinions "have been defined by the Judicial Conference as 'any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision.' The responsibility for determining which documents meet this definition rests with the authoring judge." Admin. Office of the U.S. Courts, http://pacer.psc.uscourts.gov/announcements/general/dc_ecf_opinion.html (last visited Apr. 16, 2007).

It is presently impossible to retrieve opinions containing text corresponding with a particular search query using PACER. Some federal courts of appeals make their opinions available from the court's website, but offer little or no search functionality.

The manner in which the federal courts have complied with the E-Government Act does little to provide the general public with relevant court opinions; instead, it perpetuates existing inequalities of access. Disadvantaged litigants will not be able to locate useful court opinions using the PACER system because they will not know the names of parties or case numbers of relevant cases. Wealthy litigants represented by well-informed lawyers are more likely to possess the requisite information necessary to retrieve relevant cases from the system.

In the wake of the Supreme Court's approval of Rule 32.1, LexisNexis made a startling announcement regarding access to unpublished opinions that will perpetuate the existing inequalities of access. The company announced it would begin charging additional fees to access unpublished federal and state cases previously available at no extra charge from the basic federal or state case database.[220]

Policy concerns were raised in the United States, similar to those raised in England, that no-citation rules unnecessarily infringe on the professional judgment and autonomy of lawyers.[221] Rule 32.1 expressly addresses these concerns and limits the power of courts to tell lawyers they cannot cite certain types of opinions. The Committee Note accompanying the Rule elaborates that lawyers will no longer worry about sanctions or accusations of unethical conduct for citing unpublished opinions and will no longer be restricted from "bringing to the court's attention information that might help their client's cause."[222]

C. Comparing the Policy Arguments

1. Volume of Arguments

There was more discussion of policy issues surrounding no-citation rules in the United States than in England. Three possible reasons may account for this disparity in the volume of discussion. First, the American legal system has comparatively more experience with no-citation rules than the English legal system does. This point was fully explored in the previous section, *Comparing the Efficiency Arguments*, but is equally applicable here. American judges and

220. Posting of Marie S. Newman to Out of the Jungle, http://outofthejungle.blogspot.com/2006/06/unpublished-opinions.html#links (June 15, 2006, 15:23 CST).

221. Schiltz, *Much Ado*, *supra* note 110, at 1469-70.

222. Advisory Committee's Note, *supra* note 182.

lawyers had more experience with different versions of no-citation rules. Consequently, American judges had more to say about no-citation rules than English judges and lawyers. The methodological concern over comparing legal systems at similar points in development discussed above is also applicable to avoid false comparisons in explaining the difference in the volume of policy arguments surrounding the no-citation rules.

The second reason for the disparity in the volume of policy arguments relates to the nature of scholarly legal communication in England and in the United States. There is a substantial difference in the amount of scholarly commentary examining the policy issues of no-citation rules in the United States as compared with England. As noted above, over 102 American law review articles have been written on the issues surrounding no-citation rules and unpublished opinions. In contrast, only a few dozen English articles and book chapters have examined the issues. This difference is due in part to the difference in size between the American and English legal academies. There are over ten thousand law faculty members in the United States while England has roughly a fourth of the number of legal academics. [223] There is also a substantial difference in the number of law schools, with approximately 194 in the United States, and fifty-three in England.[224] Finally, the United States has approximately 832 law journals, roughly four times the 170 English journals.[225]

The disparity in the volume of academic commentary over no-citation rules cannot be dismissed on purely methodological grounds. Gutteridge's observation that like must be compared with like is relevant; however, the disparity in volume is not a function of size alone, but may also be attributed to the nature of scholarly legal communication and the functions law faculty perform in each country.[226]

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223. The American Association of Law School's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, Tables 2004 – 2005 listed the total number of faculty at 10,136. This figure includes all categories of professors, deans, and law library directors. The American Association of Law School's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, Tables 2004 – 2005, http://www.aals.org/statistics/0405/html/0405_T1A_tit4.html (last visited Apr. 16, 2007). The English Society of Legal Scholars had more than 2700 members as of August 2006. This figure includes academic and practicing lawyers, so the actual number of full time academics in the U.K. could be less. *See* The Society of Legal Scholars: An Introduction, http://www.legalscholars.ac.uk/text/index.cfm (last visited Apr. 16, 2007).

224. The American Bar Association's Section on Legal Education and Admission to the Bar reported the American figure as of December 2006. *See* ABA-Approved Law Schools, http://www.abanet.org/legaled/approvedlawschools/approved.html. The English figure was obtained from the legal website Hieros Gammos, http://www.hg.org/euro-schools.html#england (last visited Apr. 16, 2007).

225. John Doyle, a law librarian at Washington and Lee University School of Law maintains a web page listing legal journals by a number of factors including country. *See* Law Journals: Submissions and Ranking, http://lawlib.wlu.edu/LJ/index.aspx (last visited March 19, 2007).

226. DECRUZ, *supra* note 10, at 218 (citing HAROLD C. GUTTERIDGE, COMPARATIVE LAW 73 (1949)).

P.S. Atiyah and Robert Summers contend that English academic legal writing has traditionally focused on "black letter research and writing," purposely avoiding policy subjects, while many American scholars have taken the opposite approach, exploring public policy extensively in their scholarship.[227] Two factors are integral to understanding the differences. First is the sharp distinction between law and policy maintained in England. Second, until recently, courts would only entertain citations to academic writing once the author was deceased.[228] These factors give English legal academics few incentives to express policy views and little promise those views will be considered or accepted. In contrast, many American academics are public policy experts; they frequently publish policy-oriented articles in the multitude of American law journals, influencing both the legislatures and the courts. Viewed in this context, the comparative lack of English legal scholarship discussing the policy implications of no-citation rules is understandable.

The final reason for the difference in the volume of discussion is related to the methodology that produced the no-citation rules in England and the United States. In England, the rules were proposed in the *Roberts Petroleum* and *Michaels* cases, discussed in a few articles, and eventually enacted as a Practice Statement and Direction. The Notes on the Practice Directions explain their jurisdictional reach and who promulgated them, but give little insight into the process leading up to their enactment.[229] One English law researcher explained that individuals charged with making practice directions "consult widely" when making them.[230] Justice Laddie wrote the *Michaels* opinion and postscript discussing no-citation rules. As a result he was placed on the Working Party, which eventually produced the 2001 Practice Direction. Justice Laddie observed that the Working Party did not conduct any studies or circulate any notes or drafts of their work for comment.[231]

The process employed in the United States to create Rule 32.1 was different from the process used in England to create Practice Directions.[232] Rule 32.1 and all other federal rules of civil and criminal procedure are technically promulgated by the Supreme Court and approved by Congress.[233] The Judicial Conference of the United States is the policy-making body

227. ATIYAH & SUMMERS, *supra* note 11, at 398-99.

228. *Id.* at 399, 403.

229. Department for Constitutional Affairs, Civil Procedure Rules, Practice Directions, http://www.dca.gov.uk/civil/procrules_fin/contents/frontmatter/rapnotes.htm (2006).

230. E-mail from Elaine Wintle, Librarian, Blackstone Chambers, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (May 4, 2006, 08:48 CST) (on file with author).

231. Telephone Interview with Sir Hugh Laddie, Retired Judge, High Court; Consultant, Willoughby & Partners, in London & Oxford (May 11, 2006).

232. Critics of this comparison might again raise the observations of Gutteridge that like is not being compared with like, see *supra* note 10. The different approaches, once fully understood, are valid examples of the differences in the volume of discussion over no-citation rules.

233. Rules Enabling Act, 28 U.S.C. §§ 331, 2071-2077 (2007).

responsible for proposing changes in the rules to the Supreme Court.[234] The Judicial Conference performs this duty through its Standing Committee on Rules of Practice and Procedure and Advisory Committees.[235] Making Rule 32.1 was a complex process and took an exceptionally long time, as described above.[236] The Advisory Committee surveyed judges, sought and received over five hundred comments, reviewed the empirical studies discussed above, and debated the proposed rule for several years.[237]

The method for adopting no-citation rules in the United States appears to have been more democratic than the English approach. The Advisory Committee's search for input from a wide variety of sources over a long period of time explains the exponentially greater volume of articles discussing the no-citation rules in the United States. The wealth of information at the disposal of the Advisory Committee also explains why more policy justifications were cited in the Committee Note accompanying Rule 32.1 than were cited in the 2001 English Practice Direction.

2. *Substance of Arguments*

Different substantive policy arguments over no-citation rules were made in each country. Significant concerns over the effects of the rules on the accountability of courts and the transparency of the judicial process were raised in the United States but not in England.[238] The apparent lack of concern over accountability and transparency are explained through close examination of the English judicial system and its judges.

Martineau contends the English oral tradition is not as accountable as the U.S. system.[239] The English system of conducting court proceedings openly and orally with few written pleadings and decisions delivered ex tempore from the bench was traditionally thought of as highly transparent and accountable. Everything was done orally in open court giving the public complete access; however, Martineau contends that this confuses visibility with accountability. The oral tradition is not as accountable as the written because it requires attendance and perfect memory of what was said. According to Martineau, accountability and transparency are more completely achieved in the United States where nearly everything is recorded. Perhaps more policy concerns over

234. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (3d ed. 2002).

235. *Id.*

236. Schiltz, *Much Ado*, *supra* note 110, at 1436-37.

237. Patrick J. Schiltz chronicled the Committee's work. *See id.* at 1434-58.

238. Munday discussed the arousal of suspicion and lack of respect for courts and the judicial system created by certain publication practices but raises them only as an example of the comparatively extreme de-publication practices of the State of California and isn't specifically critical of the English no-citaiton rules on these grounds. Munday, *Over-Citation: Part 3*, *supra* note 195.

239. MARTINEAU, *supra* note 11, at 118-20.

the transparency and accountability of no-citation rules were raised in the United States than in England because American lawyers and judges, accustomed to the written system, demanded accountable and transparent no-citation rules.

Characteristics of the judiciary in England and the United States explain the different levels of concern over the accountability and transparency of no-citation rules. Atiyah and Summers posit that English judges have more trust in the political establishment and less trust in the public and juries.[240] In contrast, American judges trust the people and are skeptical of the establishment.[241] A relevant example is Judge Arnold's critique of his own jurisdiction's no-citation rule in *Anastasoff* for its lack of accountability.[242] Patrick J. Schiltz exclusively quoted the comments of judges in one law review article to illustrate opposition to restrictive no-citation rules on grounds of transparency and accountability.[243] The skepticism of American judges explains why they have been more vocal on the issues of transparency and accountability than their English counterparts.

An obvious area for further comparison is the difference over free speech arguments, which were copious in the United States but non-existent in England. An in-depth exploration of the right to free speech in the United States and England is beyond the scope of this article.[244] English law has traditionally protected free speech. Scholars date the protection back to "the time of Blackstone and to the foundations of British democratic law."[245] Freedom of expression is restricted by English common law and statutes in the areas of "defamation, sedition, censorship, contempt of court, obscenity and nondisclosure of official secrets."[246] England comes closest to the United States' First Amendment in the Human Rights Act of 1998, which gives

240. ATIYAH & SUMMERS, *supra* note 11, at 39.

241. Atiyah and Summers' observation confirms H.L.A. Hart's critique of the "extreme skepticism" of the instrumentalist movement in America. *See* ATIYAH & SUMMERS, *supra* note 11, at 259. English no-citation rules would not cause Hartians concern on policy grounds of accountability, transparency, or equal access to justice.

242. Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000). *See also* Pether, *supra* note 212, at 1487 (recounting the critique of retired Judge Patricia Wald).

243. Schiltz, *Citation*, *supra* note 2, at 48-49.

244. For an exploration of these issues, see generally, RONALD J. KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006); Audrey C. Tan, *Employer Liability for Racist Hate Speech by Third-Parties: Comparison of Approaches in Great Britain and the United States*, 20 LOY. L.A. INT'L & COMP. L.J. 873 (1998); Gregory T. Walters, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L. J. 895 (1992/1993); EUROPEAN AND U.S. CONSTITUTIONALISM (Georg Nolte ed., 2006).

245. Susan F. Sandler, *National Security Versus Free Speech: A Comparative Analysis of Publication Review Standards in the United States and Great Britain*, 15 BROOK. J. INT'L L. 711, 741 (1989) (citing D. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW 85-86 (1978)).

246. *Id.*

"further effect to rights and freedoms guaranteed under the European Convention on Human Rights."[247] The European Convention explicitly ensures the right to freedom of expression without interference by public authority.[248] Despite these protections, the English legal community did not object to no-citation rules on free speech grounds.

An explanation for the lack of English objection to no-citation rules on free speech grounds can be extrapolated from the observations of Professor Ronald Dworkin who posits that the rule of law as it exists in the United States has more of an individual rights flavor than is found in England.[249] Dworkin has also observed that England offers less formal protections to free speech and other civil rights than most European countries.[250] Dworkin's observations explain the free speech fervor expressed in America over no-citation rules and the comparative paucity of concern in England. The lack of English free speech objection to no-citation rules also confirms the observations of Atiyah and Summers that the English judiciary has more trust in the political establishment than American judges.[251] If English judges trusted the establishment, they would be less likely to raise free speech concerns over no-citation rules.

Examining the volume and substance of policy arguments over no-citation rules illuminates the approaches taken in England and the United States. The volume of policy arguments over no-citation rules was greater in the United States than in England because America has comparatively more experience with no-citation rules. Differences in scholarly communication and the methods used to create the rules also explain the disparity in the volume of policy arguments. Substantive distinctions between policy arguments made in England and the United States are explained by the different oral and written traditions, characteristics of the judiciary, different conceptions of the right to free expression, and Dworkin's theories of individual rights.

IV. THE FUTURE OF THE COMMON LAW

The previous sections explored the past to explain why England and the United States took specific approaches to no-citation rules. This final section looks forward, to predict what effect these approaches will have on the common

247. Human Rights Act 1998, c. 42 § 1 (Eng.). Provisions giving effect to freedom of expression are found at § 12.

248. The European Convention on Human Rights, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

249. ATIYAH & SUMMERS, *supra* note 11, at 52 (citing Ronald Dworkin, *Political Judges and the Rule of Law*, LXIV PROC. BRIT. ACAD. 259, 286 (1978)).

250. Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT'L & COMP. L. REV. 357, 361 (2000) (citing RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 1 (1990)).

251. ATIYAH & SUMMERS, *supra* note 11, at 39.

law. As this section will discuss both precedent and stare decisis, it is important to distinguish the two often confused terms.[252] Precedent is a decision of a court which may or may not be binding on courts in future cases.[253] Conversely, stare decisis is derived from the Latin "to stand firmly by things that have been decided."[254] Under the doctrine of stare decisis courts may be bound to follow a particular precedent.[255] A complete exposition of the differences between the terms in England and the United States is beyond the scope of this article.

A. The Precedential Value of Unreported Judgments in England

In England, unreported judgments were traditionally given the same precedential weight as reported judgments according to the strict English understanding of stare decisis.[256] The no-citation rule proposed in *Roberts Petroleum* and codified as a Practice Statement did not, on its face, limit the precedential value given to unreported judgments. The practical effect of early no-citation rules was to limit the precedential value of unreported judgments. If unreported judgments cannot be cited to the court except in limited circumstances, unreported judgments cannot have any force as precedent. This is especially true in England, where, traditionally, judges take a rather passive role and normally do not consider cases other than those discussed by lawyers in their arguments.[257]

The early no-citation rule announced in the 1996 Practice Statement was criticized for placing too much power in the hands of the law reporters.[258]

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252. Martha Dragich Pearson argues the conflation of precedent and stare decisis can be blamed in part for the United States Courts of Appeals adherence to no-citation rules despite criticism. Dragich Pearson, *supra* note 112, at 1252.

253. The term is defined similarly in English and American legal dictionaries. The OXFORD DICTIONARY OF LAW 374 (2003) defines precedent as "[a] judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in subsequent cases." The definition continues to distinguish between authoritative and persuasive precedent and to explain the concept of ratio decendi. BLACK'S LAW DICTIONARY 1214 (8th ed. 2004) defines precedent as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues."

254. The full Latin term is "*et non quieta movere*," which means "[t]o stand firmly by things that have been decided (and not to rouse/disturb/move things at rest)." RUSS VERSTEEG, ESSENTIAL LATIN FOR LAWYERS 159 (1992).

255. The OXFORD DICTIONARY OF LAW 475 (2003) defines stare decisis as "[a] maxim expressing the underlying basis of the doctrine of precedent, i.e. that it is necessary to abide by former precedents when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1442 (8th ed. 2004) defines stare decisis as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."

256. For an explanation of the operation of precedent in England, see ZANDER, *supra* note 22, at 215-305.

257. *See* INGMAN, *supra* note 5, at 439.

258. ZANDER, *supra* note 22, at 323 (citing W. H. Goodhart, NEW L.J., Apr. 1, 1983, at 296).

Some commentators saw the early rule's restriction on citation of cases based only on their status as reported or unreported as making the law reporters, and not the judges, "arbiters of what is the law."[259]

The next phase of English no-citation rules developed in part from Justice Laddie's observation in *Michaels* of a weakness in the early no-citation rules.[260] According to the principles of stare decisis, lower courts in England would not be able to ignore unreported judgments of superior courts.[261] The 2001 Practice Direction remedied this problem, giving judges the power to declare the precedential value of certain cases the moment they are decided by including an overt statement to that effect in the judgment.[262] The rule also has the retroactive effect of requiring judges to look at cited cases to determine whether those cases extend or add to existing law, or merely apply decided law to the facts. Commentators view it as an extension of the judges' lawmaking role that takes power from the law reporters and gives it to the judges.[263]

B. The Precedential Value of Unpublished Opinions in the United States

The American system of comprehensive reporting produced fewer unpublished cases for lawyers to cite. Professor Bob Berring remarked that traditionally, if an American case did not appear in the West Reporter System, it was not a "real" case in the "eyes of legal authority" and could not be cited.[264] More unpublished cases appeared as a result of the movement to control publication during the latter half of the twentieth century.[265] The individual federal circuits were left to develop their own rules on the precedential value of unpublished cases. Currently, the rules among the circuits are not consistent. Five circuits, the First, Fourth, Eighth, Tenth, and Eleventh, treat unpublished cases as non-binding precedent that may be cited for persuasive value.[266] Six circuits, the Second, Third, Seventh, Ninth, D.C., and Federal, have rules declaring unpublished opinions are not precedent.[267] In the Fifth circuit, unpublished opinions issued before January 1, 1996 are precedential but

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259. *Id.*

260. Michaels v. Taylor Woodrow Dev. Ltd., [2001] Ch. 493 (Ch.D.) (Eng.).

261. A possible exception would be a judgment conflicting with the European Convention on Human Rights. *Id.* at 255.

262. Practice Direction, *supra* note 3, at 6.1.

263. Munday, *Over-Citation: Part 1*, *supra* note 150, at 8.

264. Robert Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1692 (2000).

265. *See Publication of Judicial Opinions, supra.*

266. 1ST CIR. R. 32.1 (2007); 4TH CIR. R. 32.1 (2007); 8TH CIR. R. 32.1A (2007); 10TH CIR. R. 32.1(a) (2007); 11TH CIR R. 36.2 (2007).

267. 2ND CIR. R. 0.23(b) (2007); 3D CIR. I.O.P. 5.3 (2007); 7TH CIR. R. 32.1(b) (2007); 9TH CIR. R. 36.3(a) (2007); D.C. CIR. R. 36(c)(2) (2007); and, FED. CIR. R. 47.6(b) (2007) Most circuit rules in this category expressly provide that unpublished opinions may be relevant to claims of issue preclusion, judicial estoppel, or law of the case.

unpublished opinions issued after that date are not.[268] The Sixth circuit has no applicable rule.[269]

The precedential value of unpublished opinions was the central issue explored in both the *Anastasoff* and *Hart* cases. Judge Arnold's opinion in *Anastasoff* was an impassioned historical defense of the doctrine of precedent. According to Judge Arnold, the framers of the U.S. Constitution intended the doctrine of precedent to limit judicial power.[270] He argued the framers' understanding of precedent was derived from the writings of Blackstone, Coke, and other authorities.[271] The opinion was filled with quotations from these authorities expounding a view of precedent as a limit on judicial power. According to Arnold, a judge adopting this view determines the law "not according to his own judgements [sic], but he determines it according to the known laws" and does not "pronounce a new law but maintain[s] and expound[s] the old."[272]

Conversely, Judge Kozinski offered an opposite perspective on the precedential value of unpublished opinions in *Hart*.[273] He devoted the bulk of the opinion to an eloquent defense of no-citation rules. He took issue with Judge Arnold's historical defense of precedent.[274] Judge Kozinski did not believe the framers had such a rigid view of precedent, contending there was lively debate over the issue and citing examples of flexibility in the common law.[275] The absence of a strict hierarchy of courts and reports, often rejected as unreliable, are examples of impediments to the strict system of precedent Judge Arnold portrayed. Judge Kozinski also cited examples of early American judges ignoring their own decisions to refute Judge Arnold's historical arguments.[276] Several law review articles examining the historical methods of both Judge Arnold and Judge Kozinski have concluded that Judge Kozinski's analysis is more sound.[277]

Anastasoff, *Hart*, and Rule 32.1 do nothing to resolve the question of the precedential weight of unpublished decisions in the United States. The Committee Note accompanying the text of Rule 32.1 states, "most importantly, [Rule 32.1] says nothing whatsoever about the effect that a court must give to one of its own 'unpublished' or 'non-precedential' opinions or to the

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268. 5TH CIR. R. 47.5.3-4 (2007).

269. 6TH CIR. R. 28(g) (2007).

270. Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000) opinion vacated as moot on rehearing en banc, 235 F. 3d 1054 (8th Cir. 2000).

271. *Id.*

272. *Id.* at 901.

273. Hart v. Massanari, 266 F.3d 1155, 1158-80 (9th Cir. 2001).

274. *Id.* at 1167 n. 20.

275. *Id.*

276. *Id.*

277. Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves Anitquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 275-84 (2002). Joshua R. Mandell, *Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255 (2001).

'unpublished' or 'non-precedential' opinions of another court."[278] Because Rule 32.1 does not restrict citing unpublished opinions, attorneys will cite them; consequently, courts will be called upon to decide the precedential value of the unpublished opinions. Patrick J. Schiltz believes the Committee is "naïve" in its position that the Rule allows courts to maintain a distinction between precedential and non-precedential opinions.[279] In his capacity as Reporter, Schiltz received and synthesized a number of comments on the Rule including comments from several judges who believed, "as a practical matter, [they] expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions."[280] Similar to Justice Laddie's postscript in the *Michaels* case, Schiltz observed that lower courts will have to treat unpublished opinions of superior courts as binding under the doctrine of stare decisis.[281]

C. *Comparing the Operation of Stare Decisis*

Atiyah and Summers' *Form and Substance in Anglo-American Law* compares the operation of stare decisis in England and the United States in support of the book's overall thesis the English legal system is more formal than the American legal system. English courts were historically bound to follow their own previous decisions and lower courts followed the decisions of higher courts. The practice relaxed somewhat in the late twentieth century, but English courts' approach to stare decisis is still very strict by American standards. In their comparison the authors explore several aspects of stare decisis.

First, the authors contend United States courts have more power than English courts to disregard otherwise binding precedents.[282] United States courts can disregard an otherwise binding precedent if the precedent has not undergone a trial period to prove it is in fact settled law.[283] In contrast, English courts can be bound instantaneously by decisions.[284] Further, an American judge may disregard an otherwise binding case if it was not unanimously

278. Report of the Advisory Committee on Appellate Rules, Memorandum from Samuel A. Alito, Chair, Advisory Committee on Appellate Rules (May 22, 2003) *available at* http://www.uscourts.gov/rules/Reports/AP5-2003.pdf.

279. Schiltz, *Citation*, *supra* note 2, at 40.

280. *Id.* (citing letter from John L. Coffey et al., Circuit Judges, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004) *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf).

281. Schiltz, *supra* note 2, at 40. *See also Michaels v. Taylor Woodrow Dev. Ltd.*, [2001] Ch. 493, 521 (Ch. D.) (Eng.).

282. ATIYAH & SUMMERS, *supra* note 11, at 120.

283. *Id.*

284. ZANDER, *supra* note 22, at 215 (citing *Re* Schweppes Ltd's Agreement (1965) 1 All E.R. 195 (Willmer L.J. dissenting)).

decided.[285] In England, however, judges devote a great deal of effort to dissecting the ratio decidendi of a plurality judgment before eventually following it.[286]

Second, the United States Supreme Court and the highest courts of each American state have always been capable of overruling their own previous decisions as well as the decisions of inferior courts. In contrast, the House of Lords has only enjoyed the power to overrule its own previous decisions since 1966.[287] The authors also argue that precedents have less mandatory formality in America; whereas, English judges are more willing to follow decisions they do not agree with and are not technically bound to follow.

These examples are used to support the conclusion that English judges approach stare decisis in this manner because it contributes significantly to the predictability of decisions and certainty in the law.[288] Atiyah and Summers are not alone in this contention. Delmar Karlen's book *Appellate Courts in the United States and England* also concluded that English judges follow a more rigid doctrine of precedent than American judges. The English approach keeps English law "simple and compact" as judges "enjoy broad discretion in molding the law."[289] Judge Richard Posner's *Law and Legal Theory in England and America* characterizes English judges as modest positivists with a firmer commitment to stare decisis than American judges.[290] Posner argues these characteristics of English judges combined with the proportionally smaller size of the English legal system, compared with the American system, are both "cause and effect of the greater certainty of English law."[291]

The theories of Atiyah and Summers, Karlen, and Posner are supported by Richard P. Caldarone's 2004 study of the judicial decisions of the House of Lords and United States Supreme Court. Caldarone found House of Lords decisions cited fewer and more relevant cases, cited the same cases more often, and gave more deference to lower court decisions than United States Supreme Court decisions.[292] Caldarone concluded that English judges are more formal

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285. ATIYAH & SUMMERS, *supra* note 11, at 121.

286. *Id.* at 120-22. *But see* Roderick Munday, *All for One, And One for All: The Rise to Prominence of the Composite Judgment in the Civil Division of the Court of Appeal*, 61 CAMBRIDGE L.J. 321 (2002) (noting the decline of the plurality judgment in England).

287. Practice Direction (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.) (Eng.).

288. ATIYAH & SUMMERS, *supra* note 11, at 133.

289. KARLEN, *supra* note 11, at 88-89.

290. POSNER, *supra* note 11, at 90.

291. *Id.* at 90, 94. Posner argues English cases "turn over" at a lower rate than American cases. *Id.* at 94. He proves this assertion by showing the average age of citations in English Court of Appeals decisions is 28.38 years compared to 9.9 years in United States Federal Court of Appeals decisions. For a discussion of the uncertainty caused by American no-citation rules, see Michael B.W. Sinclair, *Anastasoff v. Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT L. REV. 695, 701 (2003).

292. Richard P. Caldarone, *Precedent in Operation: A Comparison of the Judicial House of Lords and the US Supreme Court*, 2004 PUB. L. 759, 778-71. Because the House of Lords and Supreme Court do not hear the same types of cases, the author limited his study to cases reviewing administrative actions. *Id.* at 759.

and give more respect to previous decisions in contrast with American judges who operate more freely in a more flexible system.[293]

The provisions of the 2001 Practice Direction, enabling the English judiciary to determine the precedential force of certain judgments, appear to confirm its role as a system shaper that contributes to the predictability and certainty of the common law. However, a critical analysis of the operation of this rule casts doubt on the power it gives English judges to use the rule for these purposes. From a purely technical point, the statements required by the rule may lack the force of law. Traditionally, only the ratio decidendi of a case is binding. The ratio decidendi of a case is defined as "the principle or principles of law on which the court reaches its decision."[294] Statements that a particular judgment should be binding precedent do not form the ratio decidendi; therefore, courts would not be bound to follow the judgment in the future.[295]

Others have questioned the ability of judges to meaningfully control the growth of the common law by declaring the precedential value of a decision the moment the decision is written. Judges, as mere mortals who lack omniscience, are limited in their ability to use this rule to control or shape the common law in a meaningful way.[296] How could any judge envision the myriad of uses and applications for a particular case the day it is decided? The English commentator G. W. Bartholomew eloquently described this difficulty:

> The somewhat amoeboid principles of the common law grow or are restrained by their application, re-application or non-application to varying fact situations. They are re-phrased, re-stated and re-iterated over and over again, and what eventually emerges is often startlingly different from that from which one started. The great principle of the common law in this context is that "great oaks from little acorns grow" – this is the *leitmotif* of the judicial process. It is the essence of the common law system that freedom, and all other principles of law, broaden down from precedent to precedent. The fact that a so-called principle of law applies in this situation rather than that, is in fact part and parcel of the principle itself. The fact that a so-called principle is phrased in one way rather than another – something which Lord Diplock tended to dismiss as a 'mere choice of phraseology' – is not separable from the

293. *Id.* at 766.

294. THE OXFORD DICTIONARY OF LAW 407 (5th ed. 2002).

295. Munday, *Over-Citation: Part 1*, *supra* note 150, at 8.

296. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 773 (2004).

> principle itself. To paraphrase Wittgenstein: the principle is its statement.[297]

Roderick Munday also discussed the difficulty of determining which cases will be precedential "in a common law system where the facts of the cases are inextricably intertwined with statements of principle, such a dichotomy [between precedential and non-precedential cases] cannot be systematically maintained."[298] Attempting to prospectively declare the precedential value of cases is uncharacteristic of a common law system and seems more appropriate to a civil law system. When discussing *Roberts Petroleum*, Munday emphasized this point by quoting Pierre Legrand: "The common law awaits the interpretive occasion. It is reactive and not, like the civil law, proactive or projective."[299] Another English commentator argues "there has been no plan in the development of the common law" and "the absence of a plan has been a condition of progress."[300]

In England, the failures of law reporters to accurately select all precedential cases for publication demonstrates the impossibility of the task. Munday cites several cases that had material effects on the law but were not selected for publication by the law reporters.[301] Given adequate time, the same criticism could likely be leveled against English judges declaring the precedential value of their opinions under the 2001 Practice Direction.

American commentators have echoed these sentiments, arguing that rules purporting to deny the precedential authority of a case in advance misunderstand the concept of precedent and the role of the precedent court and subsequent courts.[302] The role of the precedent-making court is to characterize its decision broadly, narrowly, or in any way it chooses, but it is not to decide "for one place and time only."[303] It is up to subsequent courts to determine the extent to which it is bound by previous decisions. Patrick J. Schiltz also

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297. ZANDER, *supra* note 22, at 322 (citing G.W. Bartholomew, *Unreported Judgments in the House of Lords*, NEW L.J., Sept. 2, 1983, at 781). Interestingly, Bartholomew was writing to criticize the rule proposed in *Roberts Petroleum* and not Justice Laddie's proposals in the *Michaels* case.

298. Munday, *Over-Citation: Part 3*, *supra* note 195, at 86.

299. Munday, *Over-Citation: Stemming the Tide – Part 2*, 166 J.P.R. 29, 30 (2002) [hereinafter Munday, *Over-Citation: Part 2*] (citing Pierre LeGrand, *What Can Borges Teach Us?*, *in* FRAGMENTS ON LAW-AS-CULTURE 69 (W.E.J. Tjeenk Willink ed., 1999)).

300. S.F.C. Milsom, *The Development of the Common Law*, 81 L. Q. REV. 496, 497-98 (1965).

301. *Munday, Over-Citation: Part 2*, *supra* note 299, at 31.

302. Dragich Pearson, *supra* note 112, at 1255-59. *See also* Cappalli, *supra* note 296. Frederick Schauer also has noted, "[a]t the moment we consider the wisdom of some currently contemplated decision, however, the characterization of that decision is comparatively open. There is no authoritative characterization apart from what we choose to create." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 574 (1987) (internal citations omitted). "Thus, only the precedents of the past, and not forward looking precedents, stand before us clothed with generations of characterizations and re-characterizations." *Id.*

303. Dragich Pearson, *supra* note 112, at 1257.

questioned the ability of judges to predict the future precedential impact of their decisions, citing the comment of one American lawyer who called the practice "hero-worship taken beyond the cusp of reality."[304]

American courts, like English law reporters, have not always accurately predicted the precedential value of a case the moment it was published. Schiltz notes a number of unpublished American cases reviewed by the Supreme Court (which is an indication that something important was discussed in the case), which resolve unsettled questions of law and that declare acts of Congress unconstitutional.[305]

Rule 32.1's silence on the precedential value of unpublished opinions does nothing to clarify the issue in America. Circuits that allow judges to issue unpublished opinions and subsequently treat those opinions as non-precedential achieve the same results as the English courts under the 2001 Practice Direction. Issuing an unpublished decision and not giving it precedential value accomplishes essentially the same result as including a statement in a judgment that the case establishes no new principle of law and should not be extended beyond the instant case.

American courts also possess numerous other devices that allow them to control the common law by disposing of cases without writing a potentially precedential opinion. Appellate relief from the Supreme Court is notoriously rare. The Court refuses to hear most cases by issuing a brief order denying certiorari. Such orders provide no insight into the Court's refusal to accept the appeal. Courts use summary dispositions to decide cases with one or two sentences; these dispositions fail to give any insight into the court's reasoning. Vacatur upon settlement is a practice whereby courts destroy their decisions based on a settlement reached by the parties.[306] California, Hawaii, and Arizona state courts depublish opinions by retrospectively removing them from the record and rendering them worthless as precedent after they have been published.[307]

The ability of judges in both England and America to control the common law by prospectively predicting the precedential weight of their decisions is questionable. It remains to be seen whether English law will remain predictable and certain through the exercise of this power.

D. Hart and Dworkin

The opposite approaches taken in England and America to no-citation rules confirm the dichotomy between the jurisprudential theories of Herbert Lionel Adolphus Hart and Ronald Dworkin. The late Oxford Professor of

304. Schiltz, *Citation*, *supra* note 2, at 46.
305. *Id.* at 46-47. *See also* Cappalli, *supra* note 296, at 797.
306. Dragich, *supra* note 2, at 764.
307. Pether, *supra* note 212, at 1479.

Jurisprudence H.L.A. Hart is credited with re-energizing English positivism.[308] Hart was a formalist in many respects, especially in his view of the comprehensiveness of existing law.[309] For Hart, the "life of the law" consisted of rules which "d[id] *not* require . . . a fresh judgment from case to case."[310] Hart believed the "central or core cases, falling fair and square within the scope of a rule, [gave] rise to no indeterminacy, and c[ould] be dealt with by those whose business it [was] to apply the law without falling back on any element of discretion."[311] Pre-existing rules are common, cases of first impression are rare, and judges do not need to go beyond the plain meaning of the text or grapple with substantive meaning.[312]

The English no-citation rules echo Hart's positivist and formalistic approach to a judge's task. The rules allow English judges to maintain a neat and tidy closed common law universe. Judges operating in this universe can resolve most cases by relying on well-known and settled precedents. These judges do not want or need lawyers citing unpublished judgments that serve to only clutter up the common law. The rules allow judges to keep the common law in order by selecting which judgments will have precedential value in the future and which will not.

Ronald Dworkin, a student of Hart's at Oxford, offered an opposing view critical of Hart's positivism. Dworkin's "noble dream" was for judges to come to the correct answer in deciding cases by providing the closest fit with existing laws, rules, and principles.[313] Dworkin's theory of what to do in "hard cases" meshes well with the American approach to no-citation rules expressed in Rule 32.1.[314] Under Dworkin's approach, judges faced with hard cases where existing rules do not seem to fit, should not stick with the rules as Hartian formalists but should instead search for new rules that improve the law.[315]

For Dworkin's theory to work, a judge must be able to find new rules to fit hard cases. Rule 32.1's approach to unpublished opinions is the perfect match for judges dreaming the noble dream. It allows lawyers to bring unpublished decisions containing new and unique solutions to the attention of the judge. Scholars contend that Hart's theories are more closely aligned with the English legal system, while Dworkin's theories appropriately describe the

308. ATIYAH & SUMMERS, *supra* note 11, at 258.

309. *Id.* at 259.

310. H.L.A. HART, THE CONCEPT OF LAW 132 (2d ed. 1961).

311. ATIYAH & SUMMERS, *supra* note 11, at 260. In a postscript discovered posthumously and published in a second edition, Hart softens his position stating that when "existing law fails to dictate any decision as the correct one . . . the judge must exercise his lawmaking powers" subject to constraints. HART, *supra* note 310, at 273.

312. ATIYAH & SUMMERS, *supra* note 11, at 259.

313. *Id.* at 263.

314. *See id.*

315. *Id.* at 264.

American system.[316] Examining Hart and Dworkin's theories through the lens of no-citation rules supports these characterizations.

E. Enforcement of the Rules

When examining the impact no-citation rules have on English and American common law, it is important to determine how stringently courts follow and enforce the rules. In England, it appears courts largely ignore the rules. Only a handful of English cases, in addition to *Roberts Petroleum* and *Michaels*, contain any reference to lawyers citing an inappropriate number of cases or citing unreported cases unnecessarily.[317] None of these cases impose any sanctions or restrictions on lawyers for this behavior; rather, the courts merely complain about the practice.

Munday admits the rule called for in *Roberts Petroleum* has only had a limited impact, has not stopped lawyers from citing unreported cases, and only a few judges have commented on the practice in "relatively isolated *dicta*."[318] The comments of several speakers at the conference Law Reporting, Legal Information and Electronic Media in the New Millennium held at Cambridge University in 2000, confirm these observations. Mr. Behrens, a barrister, commented that the limit on citation announced in *Roberts Petroleum* and codified in the 1996 Practice Statement is ignored, no one has ever faced a challenge based on the rule, and "the rule really has gone."[319] This situation is confirmed through the additional comments of Lord Justice Buxton.[320] Justice Laddie, author of the *Michaels* postscript and member of the Working Party that produced the 2001 Practice Direction, commented that the Practice Direction is not being followed by lawyers or enforced by the courts.[321]

Additional research confirms the anecdotal evidence that no-citation rules are largely ignored. A search of the Westlaw database United Kingdom Reports All (UK-RPTS-ALL) [322] for the citations to the relevant Practice

316. POSNER, *supra* note 11, at 36; ATIYAH & SUMMERS, *supra* note 11, at 264.

317. Munday, *Limits of Citation*, *supra* note 14, at 1338 (citing Naviera de Canarias SA v. Nacional Hispanica Aseduradora SA, (1977) 2 W.L.R. 442, 446 (Eng.); de Lasala v. de Lasala, (1979) 2 All E.R. 1146 (Eng.); Lambert v. Lewis, [1982] A.C. 274 (Eng.); Pioneer Shipping Ltd. v. BTP Tioxide Ltd., (1981) 2 All E.R. 1030, 1046 (Eng.); MV Yorke Motors v. Edwards, (1982) 1 All E.R. 1024 (Eng.)); Munday, *Limits of Citation: Part 2*, *supra* note 299, at 31 (citing Dep't of Health & Social Security v. Evans, (1985) 2 All E.R. 471, 479 (Eng.); Vodafone Cellular Ltd. v. Shaw, [1995] S.T.C. 353 (Eng.); R (*In re* Carroll) v. Sec'y of State for the Home Dep't, [2001] EWCA Civ. 1224 (Eng.)).

318. *Munday, Over-Citation: Part 2*, *supra* note 299, at 31. Munday has subsequently commented English lawyers avoid excessive citation to irrelevant unreported cases because such practices do not persuade judges irrespective of whether they are prohibited by no-citation rules. Comments of Roderick Munday (Aug. 25, 2006) (on file with author).

319. R. Williams, *supra* note 50, at 49.

320. *Id.* at 9.

321. Telephone interview with Sir Hugh Laddie, Retired Judge, High Court; Consultant, Willoughby & Partners, in London & Oxford (May 11, 2006).

322. This is the most comprehensive database of United Kingdom cases available on

Statements and Directions reveals no reported or unreported case where an English lawyer, who has violated the no-citation rules received any form of punishment other than a verbal reprimand form the court.[323]

In the United States, it appears that most lawyers observe no-citation rules. Schiltz received numerous comments from attorneys complaining of the difficulty of sorting through the no-citation rules of each local jurisdiction.[324] Schiltz contended attorneys have wasted thousands of billable hours each year and have charged clients millions of dollars in fees for picking through these rules. The fact that attorneys took time to complain about locating no-citation rules is an indication that most of them feel obliged to follow the rules. American attorneys are ethically obliged to comply with no-citation rules. The American Bar Association's Committee on Ethics and Professional Responsibility issued an ethics opinion declaring it "ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished opinions']."[325] The Committee Note accompanying Rule 32.1 implicitly recognizes the research frustrations and ethical concerns of American attorneys as justifications for Rule 32.1.[326]

In the United States, when lawyers violate no-citation rules, courts usually require an explanation for the transgression; however, similar to the practice in England, no federal court has imposed sanctions for violation of a no-citation rule in a published or unpublished opinion.[327] Federal courts have refused to consider cases cited in violation of no-citation rules.[328] Rule 32.1 makes questions of compliance and enforcement moot, at least on citation grounds.

Westlaw. It contains "court decisions from the Law Reports series published by the Incorporated Council of Law Reporting for England and Wales, Lloyd's Law Reports published by LLP Reference Publishing, the Scottish Council of Law Reporting, and the Sweet & Maxwell series of law reports on Westlaw. Coverage begins with 1865." Description retrieved from Westlaw, June 23, 2006.

323. This search strategy was adopted under the hypothesis that a court would cite the rule violated if a lawyer was sanctioned for violating a no-citation rule.

324. Schiltz, *Much Ado*, *supra* note 110, at 1471.

325. *Citing of Unpublished Opinions Where the Court Rules Prohibit Such Usage*, 1994 ABA Comm. on Ethics and Professional Res. Formal Op. 94-386R (1994).

326. *See* Advisory Committee's Note, *supra* note 182.

327. It is possible a court has issued sanctions through a minute order or another mechanism that would not result in a published or unpublished opinion. *Hart* is the most obvious example of a court finding a technical violation of a no-citation rule but declining to impose sanctions. Hart v. Massonari, 266 F.3d 1155, 1180 (9th Cir. 2001). *See also* Schiltz, *Citation*, *supra* note 2, at 31; Holgate v. Baldwin, 425 F.3d 671, 680 (9th Cir. 2005); Sorchini v. City of Covina, 250 F.3d 706, 709 (9th Cir. 2001); White Hen Pantry, Div. Jewel Companies, Inc. v. Johnson, 599 F. Supp. 718, 719 (E.D.Wis. 1984).

328. Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 105, at 1180 nn. 77-78 (citing United States v. Kinsley, 518 F.2d 665 (8th Cir. 1975); United States v. Joly, 493 F.3d 672, 676 (2nd Cir. 1974)).

F. Implications for the Future

The fact that no-citation rules are largely ignored in England calls into question the thesis of Atiyah and Summer's *Form and Substance in Anglo-American Law* that the English legal system is more formal than the American.[329] A central tenant of formalism is that rules are followed.[330] Is the practice of ignoring no-citation rules in England evidence of a departure from formalism?

A review of Atiyah and Summer's work questioned whether England had, in fact, cast off formalism in favor of substance.[331] The review contends that England will adopt the American version of substantive reasoning.[332] This raises the broader question of whether ignoring no-citation rules will transform English common law from a small, well-tended garden into something more American.[333] Will the English system trade its clarity and predictability for more individual rights? Will the multitude of American theories in recent years including feminism, race theory, and critical legal studies become more prevalent in the English legal system?[334] Is this practice just another example of the Americanization of English law?[335]

A recent article by Munday demonstrated that unreported English judgments have created uncertainty in English criminal law.[336] Munday contemplates that uncertainty could be discovered in other areas of English law by lawyers who have the time and ambition to pour through the mass of readily available unreported judgments.[337] The result could be the reconfiguration "of what were assumed to be settled legal principles."[338] Munday terms this "a heady, and frankly disturbing prospect."[339]

In the United States, Rule 32.1's removal of restrictions on the citation of unpublished opinions could act to perpetuate the current state of the legal

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329. ATIYAH & SUMMERS, *supra* note 11, at 1. It should be noted that *Form and Substance* was written in 1987 and does not discuss *Roberts Petroleum* (decided in 1983) or no-citation rules.

330. This is an oversimplification of the theory. For a complete exposition of formalism, see Martin Stone, *Formalism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166-205 (Jules Coleman et al. eds., 2002).

331. David F. Partlett, *The Common Law as Cricket*, 43 VAND. L. REV. 1401, 1403-04 (1990). Others also contend British Formalism is yielding to other ideologies. *See* Jonathan D. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 377 (1994).

332. Partlett, *supra* note 331, at 1405-16.

333. The allusion to English judges tending a garden was borrowed from LOUIS L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 59 (1969).

334. I thank Professor Arthur G. LeFrancois for illuminating this point.

335. MARTINEAU, *supra* note 11, at 129 (discussing the use of skeleton arguments in England as a step toward the Americanization of English law).

336. Roderick Munday, *Law Reports, Transcripts, and the Fabric of the Criminal Law: A Speculation*, 68 J.C.L. 227, 234-235 (2004).

337. *Id.* at 243.

338. *Id.* at 229.

339. *Id.* at 243.

system. The rule is silent on the precedential effect courts must give these opinions, but judges and scholars have predicted these opinions will be increasingly accorded precedential authority.[340] As more unpublished opinions are given precedential weight, American law will continue to grow and expand. Rule 32.1 represents only an incremental departure from earlier efforts to control the growth of the common law in America. The rule leaves American judges with many devices to control the common law including criteria for publication, issuance of unpublished opinions, and the ability to ignore an unpublished opinion as non-precedential.

CONCLUSION

England and America have adopted two divergent approaches to no-citation rules. The English restrictive approach is a sharp break from the tradition of lawyers freely citing authority and was adopted primarily for efficiency reasons to control the perceived flood of citations to unreported judgments. In contrast, the American approach eliminates restrictions on citation to unpublished cases and was adopted after years of experimentation and vigorous policy debates.

The inequality of experience with no-citation rules between the two countries and the lack of empirical data on their impact in England explains the reliance on efficiency arguments in England and their rejection in America. There was markedly more discussion over the policy implications of no-citation rules in America than in England. Reasons for this difference include the countries' disparity in experience with the rules, the divergent nature of scholarly communication in the two countries, and the different methodologies used to enact the rules. Different substantive policy arguments over no-citation rules were made in each country. Concerns over no-citation rules impact on transparency, accountability, and freedom of expression were expressed in America but not in England. Distinctions between the oral and written traditions, unique traits of each countries judiciary, and differences in rights explain the varying levels of concern.

English no-citation rules attempt to regulate the precedential value of certain judicial decisions, while the American Rule 32.1 does not address the issue. On their face, the English rules confirm existing theories about the character of the English judiciary, ongoing efforts to control the common law, and the nature of English law. In reality, however, the rules are ignored, which calls into question traditional notions of English formalism and the ability of England to meaningfully control the growth of its common law.

Additional research could be conducted into the implications of the English practices. It would be interesting to examine if and how English law is changing through principles handed down in unreported judgments. Critics and supporters of no-citation rules will closely monitor the implementation of

340. *See supra* note 280 and accompanying text.

Rule 32.1 in the United States, as its implementation will certainly not mark the end of the debate in that country.

It remains to be seen whether publication practices and no-citation rules are effective devices for controlling the growth of the common law. Perhaps Joseph Story was correct when he remarked over one hundred and seventy years ago, "[i]n truth, the common law, as a science, must forever be in progress; and no limits can be assigned to its principles or improvements."[341]

341. Joseph Story, *The Miscellaneous Writings of Joseph Story*, *in* QUOTE IT COMPLETELY 166 (Eugene C. Gerhart ed., 1998).

PRIVACY WARS: EU VERSUS US: SCATTERED SKIRMISHES, STORM CLOUDS AHEAD

Allen Shoenberger*

"A man in a police cell is entitled to privacy just as much as a man sitting at his fireside in his own home."[1]

Disclosure through publication of still photos from a closed-circuit television film of a person brandishing a knife while walking on a public street, "constituted a disproportionate and therefore unjustified interference with his private life."[2]

Terrorists allegedly plot to blow up ten airplanes flying from Britain to the United States. The European Court of Justice invalidates an agreement by the European Union (EU) to provide airplane passenger data to the United States government, citing privacy concerns.[3]

"The Convention protects the community of men; man in our times has a need to preserve his identity, to refuse the total transparency of society, to maintain the privacy of his personality."[4]

President Bush authorizes a domestic surveillance program without informing Congress. The New York Times discovers the program and reveals it four years later.[5]

"The money transfer company SWIFT has for years secretly supplied U.S. authorities with huge amounts of personal data for use in antiterrorism

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1. Wood v. United Kingdom, App. No. 23414/02, 636 Eur. Ct. H.R. (2004) (quoting British trial judge). *Contra* Hudson v. Palmer, 469 U.S. 517, 530 (1984) (prisoners have no legitimate expectation of privacy in jail cells with respect to any matter in the cell).

2. Peck v. United Kingdom, App. No. 44647/98, 36 Eur. H.R. Rep. 41, ¶ 87 (2003).

3. *See* Cases C-317/04 and C-318/04, Eur. Parliament v. Council of the Eur. Union and Comm'n of the Eur. Cmtys., 2006 E.C.R. I-4721.

4. Malone v. United Kingdom, App. No. 8691/79, 7 Eur. H.R. Rep. 14 (1985) (Matscher & Farinha, JJ., partially dissenting) (referring to the European Convention on Human Rights and Fundamental Freedoms).

5. Scott Shane, *Spying Debate Interrupts Senate Session on Security*, N.Y. TIMES, Feb. 3, 2006, at A16. In February 2006, the ABA House of Delegates took a position in opposition to the program. In particular, the ABA stated that it "opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that doesn't comply with the 1978 Foreign Intelligence Surveillance Act." *Quick Work on Policy Opposing Surveillance*, 5 A.B.A. J. E-REP., Feb. 17, 2006.

investigations, violating EU privacy rules. . . ."[6]

As a result of a May 30, 2006, decision of the European Court of Justice (ECJ), each passenger airplane coming from Europe to the United States faced the possibility of multi-million dollar fines for failure to divulge passenger data to the U.S. government prior to arrival.[7] Fortunately for the busy summer travel season, the court effectively stayed its decision until September 30, 2006.[8] The decision in *European Parliament v. Council of the European Union and Commission of the European Communities* reflects the sharp differences between European and American privacy law. While it is widely assumed that the impact of the decision can be dealt with by the deadline, the narrow decision of the ECJ leaves several fundamental questions of European privacy law unresolved, which may only be settled by the European Court of Human Rights.[9]

The September 27, 2006, opinion by the Commission for the Protection of Private Life of Belgium regarding SWIFT's failure to comply with EU and Belgian privacy law in providing massive amounts of financial data transfer information to the U.S. government suggests that many more areas of conflict remain to be resolved between the United States and EU regarding privacy matters.[10]

This is significant for several reasons. First, the United States exists today in an interdependent, global economy. The actions of the United States affect the rest of the world, and the United States is also affected by actions of other states.[11] For example, American firms that market products and services

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6. *Transfer of Bank Data to U.S. Rebuked*, CHI. TRIB., Sept. 15, 2006, at C20.

7. *See* Cases C-317/04 and C-318/04, Eur. Parliament v. Council of the Eur. Union and Comm'n of the Eur. Cmtys., 2006 E.C.R. I-4721, ¶¶ 65-66.

8. *Id.* at ¶ 74.

9. In an article dated October 6, 2006, the New York Times indicated that a revised agreement had been reached. Various changes in the previous agreement indicated that the United States would have more latitude in sharing data among law enforcement authorities but that the data would not be automatically shared; transfers would only happen upon request. One explanation was that the data could no longer be pulled by the United States; it had to be pushed by the EU. The agreement remains subject to approval by the EU member nations, a matter that may have happened within the following week, according to the article. *Europe and U.S. Agree on Air Passenger Data*, N.Y. TIMES, Oct. 6, 2006, at 8, *available at* http://www.nytimes.com/2006/10/06/world/europe/07aircnd.html.

10. Commission de la Protection de la vie Privee, *Opinion on the Transfer of Personal Data by SCRL SWIFT Following the UST (OFAC) Subpoenas*, *available at* http://www.privacycommission.be/communiqu%E9s/summary_opinion_swift_%2028_09_2006.pdf. SWIFT has approximately 7800 financial institutions as clients. The Belgian investigation indicated that 2.5 billion records "could have been the subject of subpoenas" during the year 2005. *Belgians Say Banking Group Broke European Rules in Giving Data to U.S.*, N.Y. TIMES, Sept. 29, 2006, at 10. *See also EC Vows No Cover-Up on SWIFT Scandal*, BUS. WK., July 7, 2006, http://www.businessweek.com/print/global12/content/jul2006/gb20060707_22460.htm.

11. "In 1995, EC companies owned about 58% of all foreign direct investment in the United States, and US companies held about 44 percent of foreign direct investment in the EC According to one study, European investment supported 12 percent of US manufacturing jobs in

in Europe, and thus their employees, are directly impacted by European privacy law. Privacy law can be used as a trade barrier, negatively impacting the U.S. economy. Lawyers, businessmen, and citizens should therefore have an understanding of the contours of those laws.

Second, in important Constitutional opinions, the U.S. Supreme Court has cited European Court decisions as well as European laws and treaties.[12] There is every indication that this will continue, as it is a simple reflection of global interrelationships at both an economic and jurisprudential level. Moreover, United States Supreme Court Justices, as well as the Justices of European courts, talk to each other on a routine basis. Several years ago, a group of my law students were seated in Luxembourg to hear oral arguments before the European Court of Justice. Four United States Supreme Court Justices then walked into the courtroom and sat in the front spectator row to hear the arguments.[13] Additionally, amicus briefs are now routinely filed in the United States Supreme Court by attorneys for the European Union.[14]

1995." Mark Pollack & Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspectives*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 13-14 (Pollack & Shaffer eds., 2001) (citation omitted). "The US and EU . . . remain the world's most important economic powers and each other's primary economic partners." Mark Pollack & Gregory Shaffer, *Who Governs*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 287, 291 (Pollack & Shaffer eds., 2001).

> The European Union and the United States are the two largest economies in the world. They account together for about half the entire world economy. The EU and the US have also the biggest bilateral trading and investment relationship. Transatlantic flows of trade and investment amount to around $1 billion a day, and, jointly, our global trade accounts for almost 40% of world trade. By working together, the US and the EU can promote their common goals and interests in the world much more effectively.

European Union - United States Facts and Figures - Statistics, http://www.eurunion.org/profile/facts.htm (last visited Mar. 28, 2007).

12. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) para. 13 (1981); Roper v. Simmons, 543 U.S. 551, 575-578 (2005) (noting the abolition of the death penalty for children by "other nations that share our Anglo-American heritage, and by the leading members of the Western European community," citing the 1948 abolition of the death penalty for children in Great Britain, and the eventual complete abolition of the death penalty in Great Britain).

13. This exemplifies the cross-fertilization between judges of the supreme courts of many countries that has become frequent. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65, 103 (2004) (discussing both the frequent meetings of supreme court judges from different countries, as well as the practice of such courts citing cases decided by courts of other countries).

14. For example, in *Roper v. Simmons*, 543 U.S. 551 (2005), an amicus brief was filed on behalf of the European Union and Members of the International Community. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), an amicus brief was filed on behalf of the European Commission. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), an amicus brief was filed on behalf of the European Communities and their member States. In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), an amicus brief was filed on behalf of the European Union and Members of the International Community, as well as amicus briefs by the Republic of Honduras and the Government of the United Mexican States. In *Medellin v. Dretke*, 544 U.S. 660 (2005), an amicus brief was filed on behalf of the European Union and Members of the International Community. Moreover, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct.

Third, European courts, particularly the European Court of Human Rights, routinely confront privacy issues and have in some areas developed extensive analysis of various constitutional rights in the context of a myriad of factual situations.[15] Accordingly, it is worthwhile to become familiarized with those decisions. Whether the United States Supreme Court accepts or rejects them, the value of a body of precedent governing over 800 million persons cannot be overlooked.

Constitutionally-derived privacy law in the United States primarily deals with privacy claims against the government.[16] European law deals far more extensively with privacy claims between individuals and/or business entities (sometimes referred to as undertakings) at a supra-national level—that of the European Union or the European Convention on Human Rights.

However, it is by no means universal that more protection is afforded to private information in the European legal systems than in the United States. For example, transcripts of telephone conversations obtained by police wire taps involving significant public figures, such as former Italian President Craxi and Prince Victor Emmanuel III, son of the last king of Italy, are routinely published in newspapers long before any trial has commenced and regardless of their relevance to particular criminal allegations.[17]

2466 (2003), not only was an amicus brief filed on behalf of the European Communities, a motion was made and granted to permit an attorney to present oral argument before the United States Supreme Court as amicus curiae, a privilege ordinarily only accorded to the Solicitor General of the United States. In *F. Hoffman-LaRoche Ltd. v. Empagran*, 524 U.S. 155 (2004), separate amicus briefs were filed on behalf of The Federal Republics of Germany and Belgium, Canada, Japan, the United Kingdom, Northern Ireland and Ireland, and the Kingdom of the Netherlands. In *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), separate amicus briefs were filed on behalf of 422 current and former members of the United Kingdom and European Parliaments and on behalf of 304 United Kingdom and European Parliamentarians. In *Kansas v. Marsh*, 126 S. Ct. 2516, 2533 n.3 (2006), Justice Scalia concurred, but while doing so cited a website of the Delegation of the European Commission to the U.S.A. Justice Scalia also noted that the Supreme Court cited a brief filed for the European Union as amicus curiae in a previous case. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

15. In a previous article, I argue the United States should acknowledge the European Court of Human Rights case law, partly because it is the highest volume human rights court currently deciding cases in the world. Conversely, the United States Supreme Court decides only a tenth of the number of cases decided by the ECHR. Of course, most of the decisions by the Supreme Court are not human rights decisions in the ordinary sense of the term. *See*, Allen E. Shoenberger, *Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World – The European Court of Human Rights*, 27 WHITTIER L. REV. 357 (2005).

16. The right to be let alone dates back to the seminal article by Warren and Brandeis, which concerned actions by the government invading and individual's privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L.REV. 193 (1890). *See* Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U.L. REV. 479 (1990).

17. Craxi v. Italy, App. No. 25337/94, 38 Eur. H.R. Rep. 47, 1025 (2004) (section 30 of the decision includes extracts of wiretap conversations published in the press); Peter Popham, *The Prince and the Prostitutes*, THE INDEPENDENT, June 22, 2006, at 1 *available at* (describing that transcripts of wiretaps of Prince Victor Emmanuel had been filling Italy's daily papers about this key figure at the center of a squalid tangle of vice and greed)

Because of the importance of privacy issues to U.S. citizens and businesses, exemplified by the possibility of $2 million to $4 million dollar fines for a single airplane flight, understanding the sharp differences as well as agreements between European and U.S. privacy law is vitally important to American lawyers and businesses.

This Article will explore those differences and similarities, emphasizing the jurisprudence of the highest European courts having jurisdiction over privacy disputes, the ECJ and the European Court of Human Rights (ECHR), and the applicable statutory and treaty law of the European Union and Council of Europe. Particular attention will be paid to the privacy of telephones, homes, offices, computers, and data protection. A number of these differences may suggest or require legislative solutions in the United States, as well as a re-analysis of the U.S. approach to the protection of private data and privacy in a general sense.

THE PASSENGER DATA PROTECTION CASE

The dispute reflected in *European Parliament v. Council of the European Union* relates to measures taken by the United States subsequent to and as a result of the tragic events of September 11, 2001.[18] In November 2001, the United States enacted legislation requiring air carriers operating flights to, from, or across U.S. territory to provide U.S. customs authorities with electronic access to data contained in their automated reservation and departure control systems, referred to as Passenger Name Records (PNR).[19] The data consists of between thirty and sixty fields of information, including simple data such as names.[20] Additionally, certain fields could be used to reveal information about a passenger's religious affiliation, such as those fields indicating whether a passenger has ordered a kosher or halal meal.[21]

The Commission of the European Union negotiated with the United States regarding the disclosure of PNR data and eventually reached an agreement approved on May 14, 2004. The agreement was also approved by the European Union Council of Ministers on May 17, 2004.[22] However, the European Parliament declined to accept this decision and commenced litigation before the European Court of Justice, alleging a number of deficiencies, including:

1. The Commission decision was ultra vires because the subject matter

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http://news.independent.co.uk/europe/article1094703.ece.

18. Cases C-317/04 and C-318/04, Eur. Parliament v. Council of the Eur. Union and the Comm'n of the Eur. Cmtys., 2006 E.C.R. I-4721, ¶ 33. This was a grand chamber decision, comprised of the Presidents of all the Chambers of the Court and six additional judges.

19. *Id.*

20. Henry Farrell, *Airline Passenger Data Dispute Is Merely "An Internal EU Dust-Up,"* June 7, 2006 http://www.cfr.org/pulication/10895/.

21. *Id.* Thus, whether a passenger is Jewish or Muslim may be detected.

22. *Eur. Parliament*, 2006 E.C.R. I-4721, ¶ 43.

was outside the competence of European Community law;[23]

2. It did not matter that the data was to be transferred by private airline carriers, which are covered by the provisions of the European Directive on the Protection of Individuals with regard to the Processing of Personal Data;[24]
3. Violation of Article 8 of the European Convention on Human Rights;[25] and
4. Other claims, including the principle of proportionality, the requirement to state reasons, and the principle of cooperation in good faith.[26]

The ECJ held, in short, that the entire area subsumed by the agreement between the United States and the Commission of the European Union was beyond the competence of the Commission and Council.[27] The Court noted that, although airlines were sharing the data, and not European governments, the airlines remained subject to European law.[28] The remaining issues were left to future litigation.

The Court reasoned, that the directive forming the base of European Union privacy law excludes data concerning "public security, defense, State security, and the activities of the States in areas of criminal law" from its coverage.[29] Presumably, the reason for these exclusions relates to the limited transfer to central EU institutions of sovereign power by the twenty-seven states that collectively form the EU. The justification for sharing PNR data was explicitly for state security; more particularly, for "preventing and combating terrorism and related crimes, other serious crimes, including organized crime, that are transnational in nature, as well as flight from warrants or custody for these crimes."[30]

In theory, it is possible for the twenty-seven members of the EU to negotiate separate agreements with the United States to "solve" this competence problem.[31] All of the other issues raised by the European Parliament, however, remain unresolved. In particular, two serious issues remain undecided. First is whether the essence of the PNR agreement violates Article 8 of the European

23. *Id.* ¶ 51.
24. *Id.* ¶¶ 57-58.
25. *Id.* ¶ 62.
26. *Id.*
27. *Id.* ¶¶ 60-61.
28. *Id.* ¶ 58. The fact that the "PNR data have been collected by private operators for commercial purposes and it is they who arrange for their transfer to a third country . . . The transfer falls within a framework established by the public authorities that relates to public security." *Id.*
29. *Id.* ¶ 54 (citing Council and Parliament Directive 95/46, art. 3(2), 1995 O.J. (L281) (EC)) (concerning the protection of individuals with regard to the processing of personal data and the free movement of such data and its subsequent amendments).
30. *Id.* ¶¶ 55-56.
31. Henry Farrell made precisely this suggestion and characterized the dispute as "an internal EU dust-up." *See* Farrell, *supra* note 21.

Declaration of Human Rights. Separate agreements with the current governments of twenty-seven countries cannot resolve this issue. The ECHR stands above the constitutions of these countries and reflects the agreement of forty sovereign nations, including many of whom are not EU member states.[32] Second, assuming agreements are made with the United States, would the agreements themselves violate the scheme of protection established for personal data by the EU Directive protecting such data? If the agreements do violate that scheme, what are the consequences? Would the ECJ or the ECHR find such violations sufficient to vitiate any agreement, which is not completely consistent with the requirements of the EU directive on personal data protection?

The complex structure of the EU Directive on personal data must be examined before any of these questions can be answered. For purposes of the Directive, "personal data" means any information relating to an identified or identifiable natural person.[33] Personal data must be: (a) processed fairly and lawfully; (b) collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes; (c) adequate, relevant, and not excessive in relation to the purposes for which they are collected and/or further processed; (d) accurate and up to date; and (e) kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the data was collected or for which they are further processed.[34]

Processing of personal data is subjected to a series of conditions: (a) the data subject must have unambiguously given his consent; (b) processing must be necessary for performance of a contract to which the data subject is party; (c) processing must be necessary for compliance to which the controller is subject; (d) processing must be necessary to protect the vital interests of the data subject; (e) processing must be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the person controlling the data or a third party to whom the data is disclosed; or (f) processing must be necessary for the purposes of the legitimate interests pursued by the controller or third party to whom the data is disclosed, except where such interests are overridden by the interests of fundamental rights and freedoms of the data subject requiring protection under Article 1.[35]

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32. Russia and Turkey, for example, are members of the Council of Europe but not the EU. *See* The Council of Europe's Member States, http://www.coe.int/T/E/Com/About_Coe//Member_states/default.asp (last visited Mar. 28, 2007); European Countries, http://europa.eu/abc/european_countries/index_en.htm (last visited Mar. 28, 2007).

33. Council & Parliament Directive 95/46, art. 2(a) 1995 O.J. (L281) (EC) An identifiable person is one who can be identified directly or indirectly by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. *Id.*

34. *Id.* art. 6.

35. *Id.* art. 7. Article 1 provides:

1. In accordance with this Directive, Member States shall protect the

Certain types of data generally may not be processed, including data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning health or an individual's sex life.[36] Several exceptions apply, such as when the data subject gives explicit consent to the processing of the data, unless the state's laws provide such consent is invalid.[37] The most significant exception for PNR data purposes is contained in Article 8, Section 4: "Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down by Article 8(2)."[38]

It is further required that the data subject be provided information, including: (a) the name of the person controlling the data; (b) the purpose of processing the data; and (c) recipients or categories of recipients of the data, whether replies to questions are voluntary and the consequences of failing to reply, as well as the existence of a right to access the data and to rectify errors concerning the data subject.[39]

Article 13 of the Directive permits EU Member States to adopt legislative measures to restrict the scope of obligations under the Directive, including disclosure obligations, when such a restriction constitutes a measure necessary to safeguard: (a) national security; (b) defense; (c) public security; (d) prevention and prosecution of criminal offenses or ethical breaches for regulated professions; and (e) enumerated important economic or financial interests of the Member States.[40]

This scheme of data protection suggests that the degree of governmental limitation placed on the processing, collection, and use of personal data in the EU is both considerably more detailed and based on a different approach from that prevalent in the United States. In particular, the EU system requires that a data subject give specific approval prior to the collection and/or processing of personal data. The approach within the United States is quite different;, individuals have the ability to opt out of the data collection system, however, if they choose not to consent is implied. The approaches are referred to as "opt in" versus "opt out" systems.[41]

A second way in which the EU scheme differs from the United States is that the use of private data is seriously curtailed. Information divulged by a data subject is to be employed solely for the purpose for which the data subject

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fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

36. *Id.* art. 8.

37. *Id.* art. 8(2)(a).

38. *Id.* art. 8(4).

39. *Id.* art. 10.

40. *Id.* art. 13. These enumerated measures include monetary, budgetary, and taxation matters. *Id.*

41. *See* Caroline O. Shoenberger, *Consumer Myths v. Legal Realities: How Can Businesses Cope?*, 16 LOY. CONSUMER L. REV. 189, 198-99 (2004).

provides the information, in the absence of explicit permission stating otherwise.[42] It is quite common in the United States for personal information to be employed for purposes beyond the immediate transaction. For example, a purchaser of an expensive car might have themselves identified as a "Rodeo Drive Chic"[43] consumer to other businesses also interested in marketing high-end value merchandise.[44] Such disclosures are prohibited by the EU Directive.

Moreover, the EU Directive mandates that personal data be retained only for the period of time necessary for the purpose for which the data was shared.[45] For example, once an airline ticket is used, with the exception of a period of time for possible financial disputes, maintaining the associated personal data on file would likely be impermissible. No such temporal limitation exists in the United States.

What are the implications of these requirements for any revised PNR agreement on a country-by-country basis with the United States? Can they be complied with, or do they present a serious obstacle to any further agreement? Presumably, no airline passenger willingly gives the airline personal data possibly subjecting them to criminal prosecution. Nor do they unambiguously give their consent to such use as required by Article 7 of the Directive.[46] It is unclear whether Article 7's alternative grounds for permission of processing data grant blanket permission for such disclosures.[47] Consideration of decisions by the ECHR relating to privacy rights is necessary before these questions may be answered. Accordingly, we will turn to the jurisprudence of that court.

PRIVACY OF TELEPHONE COMMUNICATIONS: CASE LAW

The privacy of telephone conversations[48] is analyzed under Article 8 of

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42. *See* Council & Parliament Directive 95/46, art. 7, 1995 O.J. (L281) (EC).

43. This is a term employed by American Express Company to categorize its customers. *See* Dwyer v. American Express, 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1995).

44. *See id. See also* Shoenberger, *supra* note 41 at 196 (not tortious appropriation to sell or rent personal data broken down by economic strata).

45. *See* Council & Parliament Directive 95/46, art. 6, 1995 O.J. (L281) (EC).

46. *See id.* art. 7(a).

47. It is unclear, for example, whether processing the data by transmission to the United States is necessary for a legal obligation to which the data controller is subjected within the meaning of Article 7(b). The European Parliament presented various pleas for invalidation of the agreement that were not reached by the ECJ. These pleas included allegations that the agreement with the United States violated fundamental principles of the Directive, breached fundamental rights, including those covered by Article 8 of the European Convention on Human Rights, and breached the principle of proportionality. Cases C-317/04 and C-318/04, Eur. Parliament, v. Council of the Eur. Union and Comm'n, 2006 E.C.R. I-4721, ¶¶ 50, 62.

48. Telephone calls made from or to business premises, as well as to and from the home, are covered by the notions of "private life" and "correspondence" within the meaning of art. 8(1). *See* Huvig v. France, 12 Eur. H.R. Rep. 528 (1990) (warrant covered both business and personal telephone calls); Kopp v. Switzerland, App. No. 23223/94, 27 Eur.H.R.Rep. 91(1999) (private and professional telephone lines tapped); Halford v. United Kingdom, App. No. 20605/92, 24 Eur.H.R.Rep. 523 (1997) (home and office telephones tapped); MM v.

the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[49] Article 8, entitled "Right to Respect for Private and Family Life," provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[50]

At first glance the guarantee of respect in Article 8, Section 1, appears to be vitiated by the broad exceptions of Section 2. ECHR case law, however, demonstrates that the opposite is correct. Only after intense scrutiny is surveillance of telephone conversations by a government or private individual permissible under the European Convention.[51]

The ECHR analyzes privacy cases in a five step process. First, the Court determines if there is an interference with private life. Second, the Court determines if the interference was by a public authority. Third, the Court determines if the interference was justified, in that it must be in accordance with the law, the law must be accessible to the individual, there must be protections against arbitrary interference by public authorities, and the law must be sufficiently precise. Fourth, the Court determines whether the interference occurred for a proper public purpose. Finally, the Court determines that the purpose is necessary in a democratic society. [52]

Application of Article 8

The ECHR has established that telephone calls made from or to business premises or the home are covered by the notions of "private life" and "correspondence" within the meaning of Article 8(1).[53] Indeed, a police cell is also considered a private place for purposes of the European Convention.[54]

Netherlands, App. No. 39339/98, 39 Eur. H.R. Rep. 19 (2004) (police encouraged woman to record conversations on her phone to corroborate allegations that sexual advances were being made towards her via telephone).

49. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention].

50. *Id.*

51. See infra notes 53 – 125 and accompanying text.

52. *See, e.g., Halford*, 24 Eur. H.R. Rep. at 523.

53. *Huvig*, 12 Eur. H.R. Rep. at 528; Miailhe v. France, App. No. 12661/87, 16 Eur. H.R. Rep. 332, 332 (1993) (offices and house searched for documents; 15,000 documents seized).

54. Wood v. United Kingdom, 636 Eur.Ct.H.R. (2004) 12, 33 (audio taping).

Similarly, Community Cable Television (CCTV) films of a person on a public street[55] also implicate privacy interests, at least insofar as the videotapes or still pictures therefrom are published in newspapers or television news programs (including in one instance national British Broadcasting Corporation coverage).[56] Even telephone calls on an internal police department phone network are protected as private.[57] Similarly, intercepting phone numbers sent to a pager may violate Article 8,[58] as can the accidental recording of a conversation on someone else's telephone.[59] In short, virtually any conversation on any telephone system is covered by the Article.

Interference by a Public Authority

Private persons who record telephone conversations at the request of the police implicate the Convention; such recording "engage[s] the responsibility of the state."[60] To allow private parties to conduct such investigations would "be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents."[61]

Such treatment mirrors the development of the "state action" doctrine in the United States.[62] The appearance of public authority may be sufficient to implicate the protection of the Fourteenth Amendment's Equal Protection clause. For example, in *Burton v. Wilmington Parking Authority*,[63] the United

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55. The person was contemplating suicide, and within a few moments attempted to cut his wrists. Peck v. United Kingdom, App. No. 44647/98, 36 Eur. Ct. H.R. 41, ¶ 10 (2003).

56. *Id.* ¶¶ 13-20.

57. *Halford*, 24 Eur.H.R.Rep. at 524.

58. Taylor-Sabori v. United Kingdom, App. No. 47114/99, 36 Eur.H.R. Rep. 17, ¶¶ 16-19 (2003).

59. Kruslin v. France, App. No. 11801/85, 12 Eur. Comm'n H.R. Dec. & Rep. 547, 455-59 (1990). In *Kruslin*, an individual was staying with a criminal suspect whose calls were being tapped as part of a police investigation into a murder. The person being recorded talked about a separate murder. *Id.* ¶¶ 9-10. The individual was charged with murder, aggravated theft, and attempted aggravated theft. *See also* Lambert v. France, App. No. 23618/94, 30 Eur. Ct. H.R. 346, 351 (2000) (target of investigation entitled to complain about tapping a third party's telephone line).

60. MM v. Netherlands, App. No. 39339/98, 39 Eur. Ct. H.R. 19, at ¶¶ 41-42. Although initial suggestion of recording the conversation was made by private party, "the police superintendent made a crucial contribution to executing the scheme by making available for a short time his office, his telephone, and his tape recorder." *Id.* ¶ 38 (quoting A v. France, App. No. 14838/89, 17 Eur. H.R. Rep. 462, 477 (1994)).

61. *MM*, 39 Eur. H.R. Rep. at 422.

62. State action is normally required to find the Due Process and Equal Protection clauses of the Fourteenth Amendment applicable. *See* Shelly v. Kraemer, 334 U.S. 1 (1948); United States v. Stanley, 109 U.S. 3 (1883). *Contra* Marsh v. Alabama, 326 U.S. 501 (1946) (First Amendment applies to town completely owned by a private company; distribution of religious literature could not be criminalized).

63. 365 U.S. 715 (1961) (acknowledging that state and national flags were flying on the building and rent from the coffee shop was necessary to make the public garage a viable economic enterprise for the Wilmington Parking Authority were factors in making the coffee shop a state actor). In *Burton*, the Court articulated a test for state action that requires that facts

States Supreme Court held that a private coffee shop located in a public garage was subject to the limitations of the Fourteenth Amendment when it refused to serve black customers.

JUSTIFICATION IN ACCORDANCE WITH THE LAW

The scrutiny with which courts review an interference with privacy is quite strict. Ordinarily, explicit textual authorization is required by the applicable domestic legal system, however, the ECHR has recognized that adequate policy strictures may suffice. For example, at the time when *MM v. Netherlands* was decided, Dutch law presupposed that a preliminary judicial investigation and order by an investigating judge was necessary to authorize tapping or interception of "telecommunications" traffic. In *MM*, police suggested to a woman that she record telephone conversations with her husband's lawyer in order to prove allegations that the lawyer was making sexual advances toward her. Because no judicial oversight had been exercised in *MM*, these conditions failed. The Court held private tapping of telephone calls between the lawyer and his client's wife violated the lawyer's privacy rights even though the lawyer made sexual advances.[64]

In *Kruslin v. France*, the ECHR required that a law authorizing tapping had to be particularly precise, with clear, detailed standards.[65] In that context, however, enactments, which rank lower than statutes, and unwritten law may suffice as justifications.[66] But, even France admitted that seventeen safeguards implemented in French law and practice were inadequate and not "particularly precise enough."[67] While some of these safeguards were established in both written and case law, not all were so established. In some instances only a practice lacking the necessary control was established.[68] The system did not have adequate protections against possible abuse. For example, categories of those people able to have telephones tapped by judicial order were not specified, nor were the nature of offenses that could justify such an order.[69]

Also unspecified were the procedures for drawing up summary reports containing intercepted conversations, the precautions taken to communicate the recordings accurately and completely for judicial inspection, the circumstances in which tapes could be erased or destroyed (particularly when an accused has been discharged or acquitted by the court), or any limitation upon the duration

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and circumstances be sifted and weighed to determine if there is an adequate connection between the private and public actors to hold the private action tantamount to state action. *Id.* at 723.

64. *MM*, 39 Eur. H.R. Rep. at 422. Press reports of the case induced two other women to complain of rape or sexual assaults. *Id.* at 416.

65. Kruslin v. France, App. No. 11801/85, 12 Eur. Comm'n H.R. Dec. & Rep. 451, 458 (1990).

66. *Id.* at 457. In particular, case law may be adequate. *Id.*

67. *Id.* at 456.

68. *Id.* at 458.

69. *Id.*

of the tapping.[70] The court concluded that French law did not indicate with reasonable clarity the scope and manner of relevant discretion conferred on the relevant public authorities.[71]

In contrast to French law, the United Kingdom applied no statutory system regulating interception of pager messages.[72] That practice was held violative of Article 8 of the European Convention for the Protection of Human Rights.[73] Similarly, in *Halford v. United Kingdom*, interception of private telephone calls on a private telephone network was violative of Article 8, since there was no domestic regulation providing for public scrutiny or limitation of abuse of discretion by public authorities.[74]

Domestic law must be sufficiently clear to provide an individual adequate notice of the circumstances in which public authorities may listen to calls.[75] In particular, an individual must be able to understand the law so as to enable them to regulate their own conduct.[76] In *Malone*, the government contended that the applicant, "a suspected receiver of stolen goods was a member of a class of persons against whom measures of postal or telephone interception was liable to be employed."[77] However, the court determined that the entire regulatory scheme of interception in the United Kingdom did not indicate with reasonable clarity the scope and manner of exercise of relevant discretion by public authorities.[78] Thus, the minimum degree of legal protection a citizen was entitled to was lacking and therefore, constituted a violation of Article 8 of the Convention.[79]

The Court was clearly concerned with narrowing the ambit of discretion given to relevant officials, particularly with regard to interceptions that are secret, either when conducted or subsequent to the activity.[80] The Court was terse in its treatment of "metering."[81] Metering records the time and duration of phone calls as well as the numbers called; it was designed by the Post Office, as the responsible entity for the provision of telephone services.[82] The United Kingdom government argued that such metering did not entail interference with

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70. *Id.*

71. *Id.*

72. Taylor-Sabori v. United Kingdom, App. No. 47114/99, 36 Eur.H.R. Rep. 17, ¶¶ 16-19 (2003).

73. *Id.* ¶ 19.

74. Halford v. United Kingdom, App. No. 20605/92, 24 Eur. H.R. Rep. 523, 536 (1997).

75. Malone v. United Kingdom, App. No. 8691/79, 7 Eur. H.R. Rep. 14, 40 (1985).

76. *Id.*

77. *Id.* at 39.

78. *Id.* at 44.

79. *Id.* at 45. U.K. law was described as "somewhat obscure and open to differing interpretations." *Id.* at 44. The court found a violation even though published statistics indicated that the number of warrants granting authority to intercept was relatively low, while the number of indictable crimes committed and telephones installed was rising. *Id.*

80. *Id.* at 32-33. At no point is a person informed that his communications had been intercepted.

81. *See id.* at 34-35.

82. *Id.* at 45.

any right guaranteed by Article 8, because the supplier of telephone service necessarily obtains this data to enable it to properly charge (or bill) the subscriber.[83] No U.K. law regulated the disclosure of such data, and thus no warrant was required to obtain it.[84] The Post Office does, on occasion, make such information available to the police when requested.[85]

The Court, however, determined that such data did implicate private information, and thus the unregulated provision of such information constituted a violation of Article 8, because no regulation of the exercise of discretion by public authorities existed.[86] One judge posits in a concurring opinion that he would have gone even further:

> The danger threatening democratic societies in the years 1980-1990 stems from the temptation facing public authorities to "see into" the life of the citizen. In order to answer the needs of planning and of social and tax policy, the State is obliged to amplify the scale of its interferences. In its administrative systems, the State is being led to proliferate and then to computerize its personal data-files. Already in several of the members States of the Council of Europe each citizen is entered on 200 to 400 data-files.
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> Telephone tapping has during the last thirty years benefited from many "improvements" which have aggravated the dangers of interference in private life. The product of the interception can be stored on magnetic tapes and processed in postal or other centres equipped with the most sophisticated material. The amateurish tapping effected by police offices or post office employees now exists only as a memory of pre-war novels. The encoding of programmes and tapes, their decoding, and computer processing make it possible for interceptions to be multiplied a hundredfold and to be analysed in shorter and shorter time-spans, if need be by computer. Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.
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> . . . Police interception for the prevention of crime is only one of the practices employed; to this should be added political interceptions, interceptions of communications of journalists and leading figures, not to mention interceptions required by

83. *Id.* at 46.
84. *See id.* at 18.
85. *Id.* at 32.
86. *Id.* at 47.

> national defence and State security, which are included in the "top-secret" category and not dealt with in the Court's judgment or the present opinion.
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> . . . .
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> . . . The designation of the collective institutions responsible for ensuring the ex post facto control of the manner of implementation of the measures of interception; the determination of the dates of cancellation of the tapping and monitoring measures, the means of destruction of the product of interceptions, the inclusion in the code of criminal procedure of all measures applying to such matters in order to afford protection of words uttered in a private context or in a private place, verification that the measures do not constitute an unfair stratagem or a violation of the rights of the defence – all this panoply of requirements must be taken into consideration to judge whether or not the system satisfies the provisions of Article 8.[87]

Other countries, such as Switzerland, also failed to adequately protect privacy interests in telephone conversations. In *Kopp v. Switzerland*, the ECHR found that tapping the telephone calls of a lawyer to seek information regarding the lawyer's wife was not regulated by laws with adequate "quality" to protect the privacy interests of the attorney and his clients.[88] Even though Swiss law protected the legal privilege, the actual administration of a wire tap involved a Post Office official listening to all conversations on various telephone lines at the lawyer's office, without independent judicial supervision of the listening. "In short, Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter."[89] The Court further noted that "it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients."[90]

Warning that an interception might occur is part of the requirement of legal regularity. For example, in *Halford v. United Kingdom*, failure to notify a police officer that a telephone call on an internal telecommunications system was intercepted violated the reasonable expectation of privacy otherwise

87. *Id.* at 49-53 (Pettiti, J., concurring). Considering the mute tone of most ECHR opinions, this concurring opinion stands out in sharp contrast. It may, someday, play a role in ECHR jurisprudence similar to that of the classic dissents by Justices Brandeis and Holmes in American Constitutional Law.

88. Kopp.v. Switzerland, App. No. 23223/94, 27 Eur. H.R. Rep. 91, 117 (1999).

89. *Id.* at 94.

90. *Id.* at 117.

applicable.[91] In the absence of any domestic law regulating interception of calls made on systems outside the public network, the government accepted that it had violated the requirement that any interference be in accordance with the law.[92] Without specific proof that her home telephone had actually been tapped, however, the Court was unable to conclude that Article 8 had been violated by intercepting calls on her home telephone.[93]

SURVEILLANCE AGAINST TERRORISM AND OTHER SERIOUS CRIME

In *Klass v. Germany*, the ECHR considered a secret government surveillance program of written and telephone communications that dated back to the Allied occupation of Germany after World War II.[94] The Court considered sequentially whether the program was an interference with private life (it was),[95] whether the program was in accordance with the law (it was),[96] whether the program was "necessary in a democratic society" (it was),[97] and most importantly, whether the system of surveillance adopted included adequate safeguards against abuse.[98] With regard to the inquiry concerning adequate safeguards, the court indicated "[it was] aware of the danger such a law pose[d] of undermining or even destroying democracy on the ground of defending it, [and] affirm[ed] that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."[99]

The most rigorous portion of the ECHR analysis considered the details of the oversight of the surveillance program to determine whether adequate safeguards were in place. The surveillance program required a written application listing the applicable reasons why surveillance was proper. The program required that a set of limiting conditions be met before surveillance could be permitted. The program was confined to cases in which there were factual indications to suspect a person of planning, committing, or having committed certain serious criminal acts; measures could only be ordered if the establishment of facts by another method was without prospects of success or considerably more difficult, and even then the surveillance could cover only the

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91. Halford v. United Kingdom, App. No. 20605/92, 24 Eur. H.R. Rep. 523, 524 (1997). The Assistant Chief Constable had sole use of her office telephones, one of which was designated for her private use. She had also been explicitly told she could use the phone in connection with her sex-discrimination case. *Id.* at 524.

92. *Id.* at 533-34.

93. *Id.* at 536-37. The Court awarded petitioner 10,000 British pounds as just satisfaction for the serious interference with her privacy, along with 600 pounds for attending the proceedings in Strasbourg, and costs of 25,000 pounds. *Id.* at 523.

94. Klass v. Germany, App. No. 5029/71, 2 Eur. H.R. Rep. 214, 220 (1980).

95. *Id.* at 229.

96. *Id.* at 231 (as modified by a (German) Federal Constitutional Court decision).

97. *Id.*

98. *Id.* at 232.

99. *Id.*

specific suspect or his presumed "contact-persons."[100] Exploratory or general surveillance was not permitted.[101] Further, only certain named officials could approve such surveillance, including Federal Ministers designated by the Chancellor, or where appropriate, the supreme Land authority.[102] Additionally, although not required by law, the competent Minister in practice, except in urgent cases, could seek the prior consent of the G 10 Commission.[103]

The G 10 Commission has provided strict limitations on the implementation of surveillance measures and the use of gathered information. Permission lasts a maximum of three months, after which a new application is necessary.[104] Once the conditions for the surveillance terminate, so must the surveillance.[105] Knowledge and documents obtained through surveillance may not be used for any purpose other than the original reasons listed in the application, and documents must be destroyed once they are no longer needed for their original purpose.[106] During implementation of surveillance, a person qualified for judicial office must exercise initial control, which includes examination of the information before it is transmitted to the requesting service The receiver of the information must destroy any superfluous data.[107] Recourse to the courts is precluded during implementation as well as execution of surveillance itself; however, the option for subsequent direction is provided.[108]

During surveillance, the competent Minister reports every six months to a Board consisting of five members of Parliament. The Minister reports any measures taken to the G 10 Commission on a monthly basis. In practice, the Minister seeks prior authorization from the G 10 commission.[109] The members of the Commission are appointed for the term of the parliament, "are completely independent . . . and cannot be made the subject of instructions."[110] The Court concluded that the review system implemented before and throughout the surveillance process did not exceed what is necessary in a democratic society.[111]

After surveillance has ended, judicial control is possible under the requirement of the German Federal Constitutional Court's judgment of

100. *Id.* at 233.
101. *Id.*
102. *Id.* at 243.
103. *Id.* at 233. The G 10 Commission is a parliamentary oversight commission appointed in proportion to parliamentary representation, but it always includes a member of the opposition party. *Id.* at 222.
104. *Id.* at 214.
105. *Id.* at 221.
106. *Id.* at 233.
107. *Id.*
108. *Id.*
109. *Id.* at 221.
110. *Id.* at 222.
111. *Id.* at 235.

December 15, 1970.[112] That decision requires that the subject of the surveillance be notified as soon as notification can be made without jeopardizing the purpose of the surveillance.[113] The Minister must consider such communication immediately after surveillance has been terminated, and, if necessary, at regular intervals thereafter, reporting his decisions to the G 10 Commission on a regular basis.[114] The G 10 Commission may then order the Minister to inform the subject.[115]

The ECHR considered these measures. In the absence of evidence to the contrary, the ECHR assumed that the relevant authorities were "properly applying the legislation in issue."[116] The Court agreed with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.[117] The Court then balanced the legislation against the individual right to privacy and concluded that the provisions were appropriate in a democratic society to further the interests of national security and prevention of crime.[118]

The Court next considered whether there were adequate remedies in German law for dealing with secret surveillance. The Court held that although "there can be no recourse to the courts in respect to the ordering and implementation of restrictive measures, certain other remedies are nevertheless open to the individual believing himself to be under surveillance."[119] After notification, various legal remedies are available before the courts, including civil damages and remedies for destruction of documents, as well as resort to the Constitutional Court.[120] The Court concluded, "in the particular circumstances of this case, the aggregate of remedies provided for under German law satisfies the requirements of Article 13 [of the Convention]."[121]

It is clear from *Klass* that the ECHR considered each and every restriction under German law in making its decision, including, in particular, the subsequent notification requirement, Ministerial supervision, and the supervision on a regular basis of the G 10 Commission. It is impossible to say whether the absence of one or more of the procedures would have resulted in a different outcome, but it is reasonable to assume most of the requirements were absolutely necessary.

Accordingly, it is necessary to consider the short, separate opinion of

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112. *Id.* at 221.
113. *Id.*
114. *Id.* at 214.
115. *Id.*
116. *Id.* at 237.
117. *Id.*
118. *Id.*
119. *Id.* at 240. These include complaining to the G 10 Commission and to the Constitutional Court. Although these were limited remedies, the Court opined, "it is hard to conceive of more effective remedies being possible." *Id.*
120. *Id.* at 240-41.
121. *Id.* at 241. Article 13 requires that domestic law provide a remedy for violation of a right under the European Convention. *Id.*

Judge Pinheiro Farinha. Judge Farinha declared the entire scheme, including its mere existence, is a "real threat" to private and family life.[122] He expressed difficulty accepting that such surveillance measures can be ordered by political authority itself.[123] The oversight of the G 10 Commission, as well as the supervision of an independent judge (as contemplated by the German law), were essential protections.[124] In this case, however, because there were representations by the Government that none of the applicants had been the subject of surveillance or had surveillance ordered, it does not disclose a violation of the Convention.[125]

The surveillance program conducted in the United States by the Bush administration stands in sharp contrast to the intense review of the German surveillance program by the ECHR, with its repeated noting that politics not be involved in the German surveillance. This program has been employed by the Bush administration as a political wedge against the Democrats.[126] It has been reported that a Justice Department official refused to approve the program because of doubts about its legal and constitutional basis and whether adequate oversight existed.[127]

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122. *Id.* at 242 (Farinha, J., separate opinion).

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Adam Nagourney, *Seeking Edge in Spy Debate*, N.Y. TIMES, Jan. 23, 2006, at A1.

> [T]he White House . . . views its controversial secret surveillance program not as a political liability but as . . . a way to attack Democrats and re-establish President Bush's standing after difficult year.
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> Democrats—and . . . some Republicans, too—have indeed challenged the administration for eavesdropping without obtaining warrants. They argue, among other points, that the White House is bypassing legal mechanisms established in 1978 that already allow law enforcement agencies to move rapidly to monitor communications that might involve terrorists.

Id. See also Shane, *supra* note 5:

> Senate Democrats on Thursday angrily accused the Bush administration of mounting a public relations campaign to defend the National Security Agency's domestic surveillance program while withholding details of the secret eavesdropping from Congressional oversight committees.
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> . . . .
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> President Bush approved the eavesdropping without warrants shortly after the 2001 terrorist attacks, but since the program's existence was revealed in December [2005] by The New York Times, some legal experts and members of Congress have asserted that it violates the Foreign Intelligence Surveillance Act.

Id.; David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1355 (2005). The *New York Times* broke the story on December 16, 2005, reporting that it had delayed publication of the story for more than a year. *Id.*

127. Eric Lichtblau & James Risen, *Justice Deputy Resisted Parts of Spy Program*, N.Y. TIMES, Jan. 1, 2006, at 1. Attorney General Ashcroft, from his hospital bed, also was reluctant to approve the program, although it remained unclear whether he ultimately approved the program or whether the administration went forward without his approval. *See id. See also*

There is, in fact, a federal statute, the Foreign Intelligence Surveillance Act (FISA),[128] that provides for "extensive review and fixed accountability."[129] The process for obtaining a warrant "required, first, that the head of the relevant intelligence agency and the Attorney General 'certify personally' that the purpose of the FISC application was to collect foreign intelligence, and second, that a judge sign the order authorizing the surveillance."[130] It appears that FISA, as originally framed, would satisfy the ECHR through its inclusion of judicial oversight, although no provision for notice of surveillance targets similar to that required by the German Constitutional Court is included.[131]

Broad standing rules in both the United States and European Union allow challenges by an individual whose phone has been tapped based upon policies of strict regulation and monitoring of such programs. According to the ECHR, each person recorded by a wiretap has standing to contest its legality.[132] In *Lambert v. France*, the complaint originally rejected by French courts had been raised by a person whose phone was not being tapped.[133] The ECHR's broad view of standing brought French law into alignment with U.S. law. In *Alderman v. United States*, the Supreme Court recognized the standing of a defendant to challenge if either he is a party to the conversation or the conversation took place on his premises.[134]

Programmatic challenges, however, are treated differently in the

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Sanford Levinson, *The Deepening Crisis of American Constitutionalism*, 40 GA. L. REV. 877, 888 (2006) ("[T]he National Security Agency (NSA) surveillance of phone calls of American citizens, undertaken without a scintilla of judicial approval, and by the Bush Administration's defense of the surveillance in spite of legislation, the [FISA], that seems quite clearly to make it illegal.") (footnote omitted); *see generally* Katherine Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517 (2006).

128. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62).

129. Diane Carraway Piette & Jesselyn Radack, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL'Y REV. 437, 460 (2006).

130. *Id.* at 460.

131. *See id.* at 486.

> FISA was a compromise forged in the fires of controversy created by Watergate, COINTELPRO, and the fifty-year litany of abuses meticulously documented in the Church Committee Report. FISA was a compromise designed to protect the American people from an overreaching, over-intrusive, and unchecked government while still allowing the government to conduct vital surveillance for foreign intelligence purposes with judicial oversight. . . . [I]t is clear that the privacy concerns of American citizens and Congress then are just as valid today.

Id.

132. Lambert v. France, (2000) 30 Eur. H.R. Rep. 346, 349.

133. *Id.* at 354. The complaint alleged that an extension of wiretap authorization was obtained by standard form written instructions without particularized justifications. *Id.* Even though the complainant was charged with handling the proceeds of aggravated theft, held in custody over 6 months, and released subject to judicial supervision, the ECHR awarded him 10,000 francs in non-pecuniary damage, along with costs of 15,000 francs. *Id.*

134. Alderman v. United States, 394 U.S. 165, 197 (1969) (Fortas, J., concurring in part and dissenting in part).

European Union than the United States. In Klass, the Court held that the mere possibility one could have been tapped permitted one to challenge the surveillance program itself.135 No allegation that surveillance measures had been applied was required.

Conversely, the U.S. Supreme Court has applied a more restrictive standing test in denying the right of citizens to challenge the infamous COINTELPRO surveillance program, which requires that actual injury be demonstrated by a litigant.136 Thus, the allegation that one had their own phone tapped does not suffice for a systemic challenge in the United States.137 Actual harm in some concrete form must be demonstrated, not merely the possibility that one's free speech might be chilled by a surveillance system.138

PROTECTION OF PLACES AGAINST SURVEILLANCE

Although most of the aforementioned cases and discussion focused on ECHR decisions involving telephone and/or postal interceptions, many cases have also dealt with the privacy of particular places, including the home, a prison cell, and an office. The ECHR's general approach is similar to that sketched out above; interferences with the rights to privacy are only permissible if in accordance with the law.

For example, in *Elahi v. United Kingdom*,[139] the Court considered the installation of a listening device in a subject's home for purposes of detecting heroin traffic. The subject was prosecuted with the recordings of detailed discussions between the applicant and his co-accused, demonstrating involvement in conspiracies to import and distribute drugs, including heroin.[140] The defendant absconded during trial, was convicted in absentia, and was sentenced to twelve years imprisonment.[141] When re-arrested several years later, he appealed the original conviction and was rejected.[142]

The Government, however, admitted before the ECHR that Home Office Guidelines for such surveillance were neither legally binding nor publicly accessible. Hence, the ECHR found there had been a violation of Article 8.[143]

In *Wood v. United Kingdom*, the Court considered audio tapes made in a

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135. Klass v. Germany, App. No. 5029/71, 2 Eur. H.R. Rep. 214, 227 (1980). One is not even required to allege surveillance measures were applied against him. *Id.*

136. Laird v. Tatum, 408 U.S. 1, 14 (1972).

137. Of course, a defendant in a criminal case ordinarily does have standing. *See* Peters v. Kiff, 407 U.S. 493 (1972) (criminal defendant has standing to challenge exclusion of jurors of different race).

138. *Id.* at 14.

139. Elahi v. United Kingdom,_App.No. 30034/04, 2006 WL 1994706. The listening devices had been installed while the police executed a search warrant in connection with a car theft case. *Id.*

140. *Id.* ¶ 8.

141. *Id.* ¶ 10.

142. *Id.* ¶ 11.

143. *Id.* ¶ 20.

police cell while suspects were being held together in hopes that they might reveal criminal activity.[144] No statutes existed either permitting or prohibiting such taping.[145] The applicant was convicted largely through the use of these tapes and sentenced to eight years imprisonment.[146] The court of appeals found there had been a violation of Article 8 of the Convention, but dismissed the appeal because the recording could still be relied upon as evidence.[147] The court reasoned that as long as there was no unfairness or suggestion the confessions were oppressively obtained or otherwise unreliable, they were usable as evidence.[148] Because the Government had conceded there had been no legal basis for the surveillance and that no effective remedy existed under British law,[149] the Court held the Convention was violated.[150] Earlier decisions by the ECHR, including *Khan v. United Kingdom*[151] and *Allan v. United Kingdom*,[152] reached similar results regarding police taping because no statutory system existed to regulate the use of covert recording devices by the police.[153]

In *Miailhe v. France*, the court considered customs officers' seizure of more than 15,000 documents from premises housing governmental head offices and the Philippines consulate.[154] The Court held the wholesale seizures made on the applicants' premises were indiscriminate, to such an extent that several thousand documents seized had no relevance to the inquiries.[155] The Court reasoned that granting customs authorities exclusive competence to assess the expediency, number, length, and scale of inspections in the absence of a judicial warrant did not afford adequate protections against abuse.[156]

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144. Wood v. United Kingdom, App.No. 23414/02, [2004] Eur. Ct. H.R. 636.

145. *Id.* ¶ 12.

146. *Id.* ¶ 15.

147. *Id.* ¶ 17.

148. *Id.* ¶¶ 20-21. The House of Lords refused to consider the case. *Id.* ¶ 22.

149. *Id.* ¶ 32.

150. *Id.* ¶ 33.

151. Khan v. United Kingdom, App. No. 35394/97, 31 Eur. H.R. Rep. 45 (2001). The police had installed listening devices in the premises of a friend of the applicant. In audio recordings, the applicant admitted that he had been involved in the illegal importation of drugs by his cousin, who had arrived in the U.K. on the same plane as the applicant. *Id.* ¶ 10. The applicant was convicted and sentenced to three years imprisonment. *Id.* ¶ 12. His appeal was dismissed by the House of Lords, even though Lord Nolan, giving the opinion of the majority of the House, stated:

> The sole cause of this case coming to your Lordship's House is the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seems astonishing, even more so in view of the statutory framework which has governed the use of such devices by the Security Service since 1989, and the interception of communications by the police as well as by other agencies since 1985.

Id. ¶ 14.

152. Allan v. United Kingdom, App. No. 48539/99, 36 Eur. H.R. Rep. 12 (2003).

153. *Id.* ¶ 36.

154. Miailhe v. France, App. No. 12661/87, 16 Eur. H.R. Rep. 332, 334 (1993).

155. *Id.* at 343.

156. *Id.*

Ultimately, the initial prosecution was aborted because of subsequent changes in the criminal law.[157] In a similar customs search case, *Funke v. France*,[158] a seizure of documents in a private home was deemed violative of Article 8 because the restrictions and conditions provided for by law "appear[ed] too lax and full of loopholes for the interferences . . . to have been strictly proportionate to the legitimate aim pursued."[159]

The ECHR has considered many cases involving searches and seizures of homes. In *Soini v. Finland*,[160] the Court considered the legality of searching the homes of anti-fur demonstrators who were forcibly removed from a sit-in demonstration at a department store.[161] The demonstrators' homes were searched; eventually, they were charged with criminal violations, including, in several cases, defamation of a department store.[162] After convictions of various offenses and sentences of forty, fifty, or sixty days, many convictions were reversed on appeal and the remaining sentences were reduced to fines.[163] Upon review, the ECHR held that Article 8 had not been violated by the searches of the demonstrators' homes, or by the brief seizure of a diary of one demonstrator.[164] The searches were adequately justified under domestic law and thus regarded as necessary in a democratic society.[165] The seizure, however, of multiple copies of a pamphlet for evidentiary use was held not adequately prescribed by law and hence a violation of Article 10 of the Convention, which pertains to freedom of expression.[166]

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157. *Id.* at 335.

158. Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297, 312 (1993).

159. *Id. Accord* Cremieux v. France, App. No. 11471/85, 16 Eur. H.R. Rep 357 (1993) (concerning searches and seizures in homes and office).

160. Soini v. Finland, App. No. 36404/97, 2006 Eur. Ct. H.R.48.

161. *Id.* ¶ 7.

162. *Id.* ¶ 15.

163. *Id.* ¶ 23.

164. *Id.* ¶ 46. The diaries were seized on June 13, 1996; two were returned on June 26, 1996, the other September 9, 1996. *Id.* ¶13.

165. *Id.*

166. *Id.* ¶ 57. The applicants had contended that the police could have simply photocopied the pamphlets and that seizure was unneeded. *Id.* Article 10 provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention, *supra* note 49, art. 10.

In a more serious case, *Elci v. Turkey*, sixteen Turkish lawyers were arrested, detained for varying periods, and subjected to torture.[167] During their detention, five attorneys' homes and offices were searched and privileged material taken.[168] The Court found no Government records existed limiting the scope of the searches and seizures, and "the search and seizure measures were implemented without any, or any proper, authorization or safeguards."[169] No search warrants had been issued by a prosecutor or judge, and no judicial authority before or after the searches described the scope or purpose of the searches.[170] Thus, the Court held that Article 8 had been violated.[171]

In one rather peculiar case, *Chappell v. United Kingdom*, a private search authorized by an ex parte judicial order was challenged in the ECHR.[172] In order to be granted such an order, the petitioner must have clearly demonstrated to the court that his claim would succeed on the merits. In granting the order, the Court noted "the potential damage is very serious for [the petitioner/defendant], and there is clear evidence that the defendant has in his possession incriminating documents or things, and that there is a real possibility that, if he is forewarned, he may destroy such material."[173] The petitioner was then authorized to search the defendant's premises.[174]

Similarly, in *Chappell* (which originated as a copyright action)[175] the police obtained a search warrant for pornographic video films.[176] The warrant on behalf of the copyright plaintiff and the police warrant were served together, and the plaintiff and several policemen in plain clothes conducted the search.[177] Despite allegations that the simultaneous searches by the police and the plaintiff were distracting, the Court did not find the searches disproportionate to the legitimate aims pursued.[178]

Although the petitioner's claims of invasion of privacy were rejected in *Chappell*, it is important to note that the case was framed as a potential violation of the Convention.[179] Rarely can individuals in the United States successfully claim that purely private action constitutes a constitutional violation.[180]

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167. Elci v. Turkey, App. Nos. 23145/93 and 25091/94, Eur. Ct. H.R. 588 (2003).

168. *Id.* at 687.

169. *Id.* at 698-99.

170. *Id.* at 697.

171. *Id.* at 700. The Court also concluded that there had been torture of several of the lawyers while in custody and ill-treatment of others that was sufficiently serious as to render it inhuman and degrading within the meaning of Article 3 of the Convention. *Id.* at 646-47.

172. Chappell v. United Kingdom, App.No. 10461/83, 12 Eur. H.R. Rep. 1 (1989).

173. *Id.* at 5.

174. *Id.*

175. *Id.* at 8.

176. *Id.* at 8-9.

177. *Id.* at 10-12.

178. Chappell v. United Kingdom, App. No. 10461/83, 12 Eur. H.R. Rep. 22.

179. *Id.* at 17.

180. The state action requirement often arises as a constitutional impediment to actions

Forcible police entry into a premises, even with a search warrant, has been held to be a violation of the Convention. In *Keegan v. United Kingdom*,[181] the police failed to make inquiries to discover that the target family had moved out over six months previously.[182] Although the police acted without malice, the action was nevertheless an abuse of power. The Court reasoned that the Convention protected against any abuse of power, however it was motivated or caused.[183] Domestic law that conditioned recovery of damages upon such malice[184] was rejected as inadequate.[185]

U.S. law regarding liability contrasts quite sharply with such holdings. A combination of good faith defenses available to police officers,[186] along with the restrictive implications of *Monell v. Department of Social Services*,[187] frequently results in exculpating both individual officers as well as units of local government from liability.[188] Thus, execution of search warrants in the wrong house or apartment unit rarely creates liability unless the police officers demonstrate some improper mental element, such as knowingly or recklessly

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regarding equality or due process. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

181. Keegan v. United Kingdom, App. No. 28867/03, Eur. Ct. H.R. (2006).

182. *Id.* ¶ 33.

183. *Id.* ¶ 34.

184. *Id.* ¶ 19. Lord Justice Ward of the Court of Appeals in the United Kingdom stated, while rejecting the appeal:

> "That an Englishman's home is said to be his castle reveals an important public interest, but there is another public interest n the detection of crime and the bringing to justice of those who commit it. These interests are in conflict in a case like this and on the law as it stood when these events occurred, which is before the coming into force of the Human Rights Act of 1998, which may be said to have elevated the right to respect for one's home, a finding of malice on the part of the police is the proper balancing safeguard."

Id.

185. *Id.* ¶ 34.

186. Hope v. Pelzer, 536 U.S. 730, 736 (2002). Government officials performing discretionary functions are entitled to qualified immunity so long as "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 344-45 (1986). *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (objective reasonableness of official's conduct by reference to clearly established law provides immunity); Wilson v. Layne, 526 U.S. 603 (1999) (Qualified immunity allowed police to bring media observers into defendant's home while executing arrest warrant, for although it was unconstitutional to do so, that rule had not been clearly established at the time of the entry into the house).

187. Monell v. Dept. of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978). *Monell* exonerates a unit of local government from liability unless a policy or custom of the local government unit was implicated in the violation of inhabitants' constitutional rights. *Id.* at 694-95. Improper action by a law enforcement official alone is insufficient to create municipal liability. *Id.*

188. "The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole." Owen v. City of Independence, 445 U.S. 622, 657 (1980) (quoting *Monell* , 436 U.S. at 694).

employing false statements to obtain the warrant.[189] Mere mistake is insufficient if the "officer's conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched."[190] A mistaken search of a house on a different street and of a different color from the one to be searched, however, might not be "objectively reasonable."[191]

Damage claims against federal officers ordinarily founder on similar impediments when suits are brought under the Federal Torts Claims Act.[192] In theory, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[193] permits recovery from Federal agents for violations of certain constitutional rights, such as the Fourth Amendment prohibition of unreasonable search and seizure. Such actions, however, are unavailable in a number of situations.[194] For example, pat-down searches are entitled to qualified immunity, but strip searches, done willfully and wantonly, are not so protected.[195] Moreover, the evidence obtained by improper searches may still be used in criminal prosecutions.[196]

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189. Hill v. McIntyre, 884 F.2d 271, 273-74 (6th Cir. 1989). A seventeen-year-old girl was handcuffed and forced to stand wearing only a sheer nightshirt until, after some delay, a female officer provided more clothing. Dry goods and food were spilled onto the floor and the front door was broken open. Approximately $3000 in damages was claimed. *Id.*

190. Maryland v. Garrison, 480 U.S. 79, 88-89 (1987).

191. Dawkins v. Graham, 50 F.3d 532, 535 (8th Cir. 1995). *Compare* Pray v. City of Sandusky, 49 F.3d 1154 (6th Cir 1995) (officers' entry of wrong downstairs door in duplex unit reasonable under circumstances since raid was at night on the premises of a suspected drug dealer), *with* Richardson v. Oldham, 12 F.3d 1373 (5th Cir. 1994) (objectively reasonable to execute search warrant against either of two houses which fit search warrant description since it was not demonstrated that officer knew two houses fit description).

192. Qualified immunity is an affirmative defense. Harlow, v. Fitzgerald, 457 U.S. 800, 815; Gomez v. Toledo, 446 U.S. 635, 640 (1980). There is also immunity for discretionary acts under the Federal Tort Claims Act. *See* Berkovitz v. United States, 486 U.S. 531, 539 (1988).

193. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (warrantless entry into an apartment).

194. Carlson v. Green, 446 U.S. 14, 18-19 (1980). When Congress provides an alternative remedy viewed as equally effective or when, even absent legislative remedial action, there are "special factors counseling hesitation." *Id.* at 18. The Supreme Court has refused to imply a cause of action under the Fifth Amendment for military personnel who were the victims of alleged racial discrimination by superior officers. *See* Chappel v. Wallace, 462 U.S. 296 (1983); Soldiers were severely injured when deceptively subjected to LSD experimentation by the Army. United States v. Stanley, 483 U.S. 669 (1987). Disability recipients whose procedural due process rights were violated in benefit termination decision. Schweiker v. Chilickey, 487 U.S. 412 (1988). All situations in which an alternative remedy was completely unavailable or significantly limited. PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 1268-69 (10th ed. 2003).

195. Anderson v. Cornejo, 284 F.Supp. 2d 1008, 1031-36 (N.D. Ill. 2003), *rev'd* in part, *vacated* in part and *remanded,* 355 F.3d 1021 (2004).

196. Hudson v. Michigan, 126 S.Ct. 2159, 2185 (2006) (evidence usable when there is forcible entry into premises in violation of knock-and-announce rules).

REMEDIES FOR VIOLATIONS OF FUNDAMENTAL RIGHTS

Remedies provided by the ECHR for privacy violations range from a statement that there was a violation (the finding being just satisfaction), the ordering of financial compensation for pecuniary or non-pecuniary damage, or the ordering of payment for substantial costs and expenses for litigation.

Just Satisfaction from the Finding of Violation

The finding of a violation of Article 8 in a case involving customs officers invading head offices and homes, and seizing documents with no relationship to the investigation, was held to be adequate just satisfaction.[197] It should be noted that the Court so held even though it believed non-pecuniary damage had been suffered.[198]

The Court reached a similar "just satisfaction finding" decision in a case in which no domestic remedies existed with which to raise an arguable Article 8 issue.[199] Curiously, the Court found no direct violation of Article 8 but nevertheless reached the decision after extensive consideration of arguments about the alleged violation.[200] Notably, the petitioner had only requested a symbolic sum of 100 Swiss francs.[201]

Such a "just satisfaction finding" was also issued in the far more serious home invasion case of *Chalkley v. United Kingdom*.[202] The police in *Chalkley* arrested the petitioner and his partner and removed them and their children, taking them to the police station in order to plant a listening device in their home.[203] The police reentered the premises several months later to renew the battery.[204] The petitioner was charged with conspiracy to commit robbery and burglary. The Court allowed the tape-recorded evidence to be used at trial; eventually, the petitioner and his co-defendant entered guilty pleas and received ten year imprisonment sentences.[205]

In another example of surreptitious installation, police officers installed a

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197. Cremieux v. France, App. No. 11471/85, 16 Eur. H.R. Rep. 357, 366 (1993).

198. *Id.* at 368.

199. Camenzind v. Switzerland, App. No. 21353/93, 28 Eur. H.R. Rep. 458 (1998).

200. *Id.* at 467. The search was for an allegedly illegal cordless telephone. *Id.* at 461. The target of the search admitted that he had used such a telephone, but stated it was no longer in his possession. *Id.*

201. *Id.* at 471. Costs of 8000 Swiss francs were awarded, less legal aid already paid. *Id.* at 471.

202. Chalkley v. United Kingdom, App. No. 63831/00, 37 Eur. H.R. Rep. 30 (2003).

203. *Id.* at 681. The arrest regarded a separate credit card offense whose investigation had lapsed, but was revived to give a pretext for the removal. *Id.* at 682. The police had a copy of the house key cut to enable them to reenter the house later. *Id.* No prosecution ensued on the credit card matter. *Id.*

204. *Id.*

205. *Id.* at 683. After serving approximately five years, the applicant was released on license. *Id.* Costs of 4800 Euros were awarded. *Id.* at 686.

listening device in the apartment of a friend of the defendant. The Court found that action constituted a violation of Article 8. The finding of a violation was held to be just satisfaction, despite the fact that the defendant had received a sentence of three years imprisonment.[206] Costs of 11,500 British pounds were awarded.[207] In most cases of this type, the petitioner had already been released from confinement, in part because of the length of time it took to take their cases up through the domestic legal system and then over to the ECHR in Strasbourg.[208]

The Court has considered the possibility that an objection to confinement itself might be addressed; in at least one case the Court required direct causation between the material obtained in violation of Article 8 and the conviction.[209]

In particular, the ECHR has held the admissibility of an illegal recording of a telephone call does not necessarily vitiate a Swiss criminal conviction for hiring an assassin to kill one's wife.[210] In that case, the tape-recorded telephone call was played in court before two lay judges and six jurors.[211] The defendant was found guilty of attempted incitement to murder and sentenced to ten years imprisonment.[212] Because the defendant had failed to exhaust available domestic remedies regarding the tape recording, the Court could not consider an Article 8 challenge.[213] Accordingly, the Court considered the use of the recording under Article 6 of the Convention, which provides for a fair trial.[214] The Court found there was sufficient evidence other than the tape recording to sustain the conviction, including the testimony of the "strong arm" man hired to

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206. Khan v. United Kingdom, App. No. 35394/97, 31 Eur. H.R. Rep. 45, 1019 (2000). The applicant had been released on license after serving a part of his sentence on August 11, 1994. *Id.*

207. *Id.*; *see also* Wood v. United Kingdom, App. No. 23414/02,2006 WL 1994706 (costs above that already supplied by legal aid of 550 euros awarded); Elahi v. United Kingdom, App. No. 30034/04, 2006 WL 1994706 (costs of 6000 euros awarded. It may be that this petitioner was still in custody at the time of the ECHR decision. The sentence pronounced in 1999 was a twelve year sentence, but the defendant had absconded and was rearrested years later); Taylor-Sabori v. United Kingdom, App. No.47114/99, 36 Eur H.R. Rep. 17 (2002) (costs of 4800 euros awarded); Valenzuela Contreras v. Spain, App. No. 27671/95, 28 Eur.H.R.Rep. 483, 508 (1998).

208. This is the author's impression from review of many European Court of Human Rights cases involving domestic criminal convictions and violations of Article 8. One contributing factor, to be sure, is the relatively shorter sentences awarded by European Courts by comparison to American sentences. Such shorter sentences when combined with the length of time necessary to bring and litigate a case before the ECHR likely explains the situation. See *infra* note 212.

209. Schenk v. Switzerland, App. No. 10862/84, 13 Eur. H.R. Rep. 242, ¶ 48 (1988)

210. *Id.*

211. *Id.* at 247.

212. *Id.* at 248. He actually served approximately two years, for he was given a partial pardon because of health reasons. *Id.* at 261. The decision was rendered about 3.5 years after his release. *Id.* at 246, 261.

213. *Id.* at 263.

214. *Id.*

kill the wife.[215]

In a case involving bankruptcy, a lawyer was permitted to inspect the petitioner's mail in a manner not in accordance with law.[216] The Court rejected a claim for non-pecuniary damage, stating the finding of a violation was itself sufficient.[217] Additionally, in a similar case, the search of a lawyer's office pursuant to a search warrant was deemed unlawful and unjustified, and such finding was deemed just satisfaction.[218]

Pecuniary and Non-pecuniary Damage Awards

The ECHR has, in many other cases, awarded damages to petitioners who allege violations of their rights to privacy under Article 8 of the Convention: either as non-pecuniary damages, emotional distress, or pecuniary damage. For example, a case involving a person taped on another's tapped phone resulted in an award of 10,000 francs.[219] In addition, an award of 11,800 euros was granted for non-pecuniary emotional damages in a case involving the closed circuit television taping and subsequent broadcast of an individual brandishing a knife on a public street.[220]

In a case involving covert surveillance of a police holding cell, the Court awarded 1,642 euros in non-pecuniary damages for violation of the petitioner's right to respect for private life and because of the lack of an effective remedy under domestic law.[221] The petitioner was convicted of murder and given a life sentence because of the taped evidence.[222]

Another case, involving customs officers violating Article 8 by searches and seizures in a home, resulted in an award of 50,000 francs for non-pecuniary

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215. *Id.* at 266. The Court briefly stated it could not directly reach the Article 8 issue, but in dicta it indicated it would have reached a similar result under Article 8. *Id.* at 268. *See also* Valenzuela Contreras v. Spain, App. No. 27671/95, 28 Eur. H.R. Rep. 483, 508 (1998) (costs of 1,5000,000 pesetas were awarded); Elahi v. United Kingdom, App. No. 30034/04, 2006 WL 1994706 (costs of 6000 euros awarded).

216. Narinen v. Finland, App. No. 45027/98, 4 Eur. H.R. Rep. 241, ¶ 37 (2004).

217. *Id.* ¶¶ 46, 49. App. No. 45027/98, 4 Eur. H.R. Rep. 241, 257 (2004) (costs and expenses of 5043 euros were awarded).

218. Niemietz v. Germany, App. No. 13710/88, 16 Eur. H.R. Rep. 97, 103 (1993). *Accord* Kruslin v. France, App .No. 11801/85, 12 Eur. Comm'n H.R. Dec. & Rep. 451, 454 (1990).

219. Lambert v. France, App. No. 23618/94, Eur. H.R. Rep. 346, 348, 355 (1998) (costs of 15,000 francs were also awarded).

220. Peck v. United Kingdom, App. No. 44647/98, 36 Eur. H.R. Rep. 41,753 (2003) (costs of 18,075 euros were also awarded).

221. Allan v. United Kingdom, App. No. 48539/99, 36 Eur. H.R. Rep..12 (2003). Costs of 12,800 euros were also awarded. *Id.* at 161. The Court had also found a violation of an Article 6 right, the right to a fair trial, partly through the police placing an informant in the jail cell with the defendant, gaining information in defiance of the will of the defendant, and thereby impinging upon the defendant's right to silence and privilege against self-incrimination. *Id.* at 159. The applicant's request for violation of his right to privacy was for a "reasonable sum." *Id.* at 160.

222. *Id.* at 148. The murder conviction was obtained on a ten to two jury vote. *Id.*

damages.[223] In a forcible entry case, where the police broke down the door of a private home with a battering ram, the Court awarded 3,000 euros each to the husband, wife, and fourteen year old child, and 2,000 Euros each to the parties' young children even though the suspect had moved more than seven months prior to entry, .[224] The Court noted the "violent and shocking nature of the police entry of the applicants' home" as well as the undoubted distress caused and medical reports indicating they would benefit from therapeutic intervention.[225] Similarly, in another case the improper publication of private telephone conversations of the former prime minister of Italy, Benedetto Craxi, resulted in an award of 2,000 euros to each member of the prime minister's family in non-pecuniary damages.[226]

In *Michta v. Poland*, the improper opening of prison correspondence resulted in an award of 1,500 euros in non-pecuniary damages.[227] Further, in a case involving interception of private telephone calls of an applicant who was at the time an Assistant Chief Constable, the Court awarded 10,000 British pounds in non-pecuniary damages.[228] The Court noted the interception of calls was conducted for the primary purpose of collecting material to be used against the applicant in sex discrimination proceedings that she herself had initiated.[229] This was considered a serious infringement of her rights.[230]

In a sequence of cases from Turkey, the ECHR consistently held Article 8 was violated, along with other Articles of the European Convention, when security forces destroyed the houses of various people. Deliberate destruction of houses and property constituted grave and unjustified interference with the rights to private and family life.[231] For example, pecuniary damages of 25,000 euros and non-pecuniary damages of 14,500 euros were awarded in a case involving the burning of a house.[232] In a similar case, each of five applicants were awarded over 8,000 euros in pecuniary damages for the physical damage to their houses and outbuilding, 6,000 euros for other property, 6,000 euros for lost income, 6,000 euros for rent for alternative housing, and 14,500 euros in

223. Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297, 313 (2003). The amount requested was 300,000 francs. Costs of 70,000 francs were also awarded. *Id.* at 312. One factor used in reaching the conclusion that Article 8 was violated was the fact that the prosecution was not related to the original reason cited for the search. One might surmise that the unregulated discretion of the customs officers to conduct a search was viewed as particularly suspect, since the search failed to turn up the anticipated evidence of criminal conduct.

224. Keegan v. United Kingdom, App. No. 28867/03. Costs and expenses of 9500 euros were also awarded. *Id.* ¶ 53.

225. *Id.* ¶ 48.

226. Craxi v. Italy, App. No. 25337/94, 38 Eur. H.R. Rep. 47, 1025 (2004). No costs were requested. *Id.*

227. Michta v. Poland, App. No. 13425/02 Eur .Ct. H.R. 537 (2006),

228. Halford v. United Kingdom, 24 Eur. H.R. Rep. 523, 550 (1997).

229. *Id.*

230. *Id.* 600 British pounds were awarded for pecuniary damages and 25,000 British pounds for costs. *Id.* at 552.

231. Yoyler v. Turkey, App. No. 26973/95 Eur. Ct. H.R. 398 (2003).

232. *Id.*

non-pecuniary damages.[233]

Conversely, in a Turkish case authorities had detained sixteen Turkish lawyers, five of whom had their houses and offices searched during the detention. The lawyers were awarded various sums, ranging from 1,510 to 1,660 euros each in pecuniary damages and from 12,000 to 25,500 euros each in non-pecuniary damages.[234] However, none of the lawyers made a specific claim for just satisfaction in relationship to violations of Article 8 of the Convention.[235] The higher non-pecuniary damage awards relate to torture, ill-treatment, and unlawful detention by the authorities, with the awards increasing as the length of detention increased.[236]

Conclusion Regarding Remedies

In a high proportion of cases involving invasion of privacy, when the basis for state intervention was suspected criminality, the finding of violation as "just satisfaction" is often the major remedy provided.[237] Court costs, including attorneys' fees, are rdinarily awarded as well.[238] In none of these reviewed

233. Ayder v. Turkey, App. No. 23656/94, Eur. Ct. H.R. 3 (2004), *available at* http://worldlii.org/eu/cases/ECHR/2004/3.html. Costs of 40,000 euros were also awarded less 725 euros in legal aid already paid. *Id.*; *accord* Ozkan v. Turkey, App. No. 21689/93 Eur. Ct. H.R. (2004), *available at* http://worldlii.org/eu/cases/ECHR/2004/133.html (non-pecuniary damages of 1500 euros to 49,800 euros awarded to thirty-two different families); Akdivar v. Turkey, App. No. 21893/93, 23 Eur.H.R.Rep. 143, 194 (1997); Mentes v. Turkey, App. No. 23186/94, 26 Eur. H.R. Rep. 9 (1998); Selguk v. Turkey, App. Nos. 23184/94 and 23185/94, 26 Eur. H.R. Rep. 447 (1998) (awards given of 1,000,000,000 dinars to two applicants for destroyed buildings, 4,000,000,000 dinars in pecuniary damages, and 10,000 in British pounds for non-pecuniary damages); Bilgin v. Turkey, App. No. 23819/94, 36 Eur. H.R. Rep. 50 (2003) (pecuniary damages of 12,000 British pounds and non-pecuniary damages of 10,000 British pounds awarded for burning of house and property).

234. Elci v. Turkey, App.No. 23145/93; 25091/94 Eur. Ct. H.R. (2003), *available at* http://worldlii.org/eu/cases/ECHR/2003/588.html.

235. *Id.* However, only three of the remaining lawyers were awarded non-pecuniary damages above those of any of the five lawyers whose Article 8 rights were violated, respectively one award of 14,400 euros, and two of 36,000 euros. It appears these awards are largely proportional to the time of unlawful detention. Also, the awards of pecuniary damages appear to relate to lost earnings for the period of detention. *Id.*

236. *Id.*

237. *See* Wood v. United Kingdom, App. No. 23414/02, 636 Eur. Ct. H.R. (2004); Valenzuela Contreras v. Spain, App. No. 27671/95, 28 Eur.H.R.Rep. 483, 508 (1998); Kruslin v. France, App. No. 11801/85, 12 Eur. Comm'n H.R. Dec. & Rep. 547, 455-59 (1990); Taylor-Sabori v. United Kingdom, App. No. 47114/99, 36 Eur.H.R. Rep. 17, ¶¶ 16-19 (2003); Niemietz v. Germany, App. No. 13710/88, 16 Eur. H.R. Rep. 97, 103 (1993); Narinen v. Finland, App. No. 45027/98, 4 Eur. H.R. Rep. 241, ¶ 37 (2004); Elahi v. United Kingdom, App.No. 30034/04, 2006 WL 1994706; Kopp v. Switzerland, App. No. 23223/94, 27 Eur.H.R.Rep. 91(1999).

238. *See* Soini v. Finland, App. No. 36404/97, 2006 Eur. Ct. H.R.48 (each applicant awarded 1,000 euro, as well as 425.9 euro for costs and expenses); *Contreras*, App. No. 27671/95, 28 Eur.H.R.Rep. at 508 (no award for pecuniary damage, but 1,500,000 pesetas for expenses and lawyers' fees awarded); MM v. Netherlands, App. No. 39339/98, 39 Eur. H.R.

cases did courts order criminal convictions overturned because of improper privacy invasions.

In cases where criminal activity was not the basis for surveillance, modest damage awards (by American standards) of both a pecuniary and non-pecuniary nature were ordinarily awarded. In some cases involving criminal conduct, such damage awards also occurred. Since damage awards are ordinarily paid by the states in the Council of Europe, one may assume that these awards were paid as well, providing some tangible recognition of the violation plus the intangible value of a finding that the government violated the fundamental right to privacy.

When serious property destruction accompanies the privacy invasion, the ECHR is quite willing to order far more substantial pecuniary damage awards, such as in numerous cases from Turkey involving the destruction of homes and property.[239] Noticeably absent, however, from ECHR damage awards is any rule indicating that where no actual damages are awarded, costs (legal fees and expenses) may not be awarded. The two types of awards, damages and costs, appear to remain disconnected in the ECHR.

Significantly, the ECHR is on course to carve out a system of human rights protection for over 800 million people from the more than forty-five states currently forming the Council of Europe.[240] Thus, any decision that solidifies a rule of law either curtailing or defining the power of government or liberties of fellow citizens has significant value. To award legal costs encourages people to bring such cases and courts to define such rights. Therefore, such cases have significant societal value.

Additionally, conspicuously missing from the privacy decisions of the ECHR are orders of injunctive relief. No case or statute requires a state to conform its legislative and administrative statutes and regulations to the ECHR commands. Except for awards of damages and costs, there is no direct confrontation with the sovereign nature of states. But, many cases do mention that legislative changes have occurred, often subsequent to the operative facts of the case at bar.[241]

Rep. 19 (2004) (10,000 euros awarded for costs and expenses); *Kruslin*, App. No. 11801/85, 12 Eur. Comm'n H.R. Dec. & Rep. at 455 (20,000 francs for costs and expenses); Halford v. United Kingdom, App. No. 20605/92, 24 Eur.H.R.Rep. 523 (1997) (25,000 pounds awarded for costs and expenses); Keegan v. United Kingdom, App. No. 28867/03, Eur. Ct. H.R. (2006) (9,500 euros for costs and expenses); Narinen v. Finland, App. No. 45027/98, 4 Eur. H.R. Rep. 241, ¶ 37 (2004) (6843 euros for costs and expenses); *Elahi*, App.No. 30034/04, 2006 WL 1994706 (6000 euro for costs and expenses); Allan v. United Kingdom, App. No. 48539/99, 36 Eur. H.R. Rep. 12 (2003) (12,800 euros for costs and expenses); Peck v. United Kingdom, App. No. 44647/98, 36 Eur. H.R. Rep. 41 (2003) (18,075 euros for costs and expenses); Khan v. United Kingdom, App. No. 35394/97, 31 Eur. H.R. Rep. 45 (2001) (11,500 pounds for costs and expenses); *Kopp*, App. No. 23223/94, 27 Eur.H.R.Rep. at 91 (15,000 francs for costs and expenses).

239. *See, e.g.*, Selguk v. Turkey, App. Nos. 23184/94 and 23185/94, 26 Eur. H.R. Rep. 447 (1998).

240. *See supra* note 32.

241. *See, e.g.*, Klass v. Germany, App. No. 5029/71, 2 Eur. H.R. Rep. 214, 231 (1980).

Clearly, the decisions of the ECHR have encouraged states to change their domestic law in order to avoid future legal problems. The United Kingdom's adoption of the Human Rights Act of 1998, which made the European Convention on Human Rights domestically applicable within the country, is one example.[242] By not ordering statutory changes, the ECHR avoids the type of conflict with sovereign power exemplified by United States Supreme Court decisions, such as *Martin v. Hunter's Lessee*.[243] Accordingly, one may credit the ECHR with adopting a wise policy to minimize conflicts with states.

By awarding costs even when a prisoner's confinement resulted from evidence of criminality gained from an invasion of privacy, the ECHR sets a standard for the states of the Council of Europe to aspire. When the evidence of criminality relates to some other offense other than the original reason for surveillance, significant non-pecuniary damages have been awarded.[244] According to the ECHR, invasions of privacy must be narrowly and strictly authorized for appropriate and proportionate reasons.[245] Thus, broad administrative or police discretion is antithetical to the legal order the ECHR finds embodied in the European Convention on Human Rights.

Moreover, in contrast to the general practice in the United States in which an improper search generates (at best) the preclusion of the use of the evidence or its fruits in a criminal case, the ECHR may award non-pecuniary damages. Likewise, the ECHR approach rejects the U.S. approach, which ordinarily rejects the award of attorneys' fees unless something beyond nominal damages are awarded.[246] The U.S. approach permits an award of nominal damages in cases involving the deprivation of constitutional rights unless actual injury can be demonstrated.[247] In cases involving improper searches the United States Supreme Court suppresses the improperly gathered evidence, but does not apply any other remedy.[248]

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242. Human Rights Act 1998, ch. 42 (Eng.).

243. 14 U.S. 304 (1816) (conflict between the Virginia Court of Appeals decisions and decisions by the United States Supreme Court). *See also* Roe v. Wade, 410 U.S. 113 (1973) (effectively invalidating all state abortion legislation); Furman v. Georgia, 408 U.S. 238 (1972) (effectively invalidating all existent state capital punishment legislation).

244. *See, e.g.*, Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297, 312 (1993) (seizures related to alleged financial dealings gave rise to parallel proceedings for disclosure of documents resulted in 50,000 francs for non-pecuniary damage plus 70,000 francs for costs and expenses);

245. *See, e.g. Funke*, App. No. 10828/84, 16 Eur. H.R. Rep. at ¶ 57 ("strictly proportionate to the legitimate aim pursued"); Kopp v. Switzerland, App. No. 23223/94, 27 Eur.H.R.Rep. 91, ¶ 72 (1999) ("law must be particularly precise"); Huvig v. France, 12 Eur. H.R. Rep. 528, ¶ 34 (1990) (law must "afford adequate safeguards against various possible abuses").

246. Farar v. Hobby, 506 U.S. 103, 111-12 (1992) (actual relief, either monetary damages or a judgment or order affecting the "behavior of the defendant towards the plaintiff"). *Id.* at 110.

247. Carey v. Piphus, 435 U.S. 247 (1978).

248. Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (violation of knock and announce

Similarly, in a decision involving statutory interpretation, the Supreme Court required proof of actual damages from a privacy violation under the Privacy Act[249] before the plaintiff could recover the statutory minimum damages of $1,000.[250] Privacy concerns, however, are inherently intangible. How does one value the solitude of seclusion in the midst of a Redwood forest, or the value of some degree of seclusion in the midst of a busy, urban neighborhood or building?

THE EU PRIVACY DIRECTIVE: CONTRAST WITH U.S. PRIVACY LAW

In addition to the effects the European Convention on Human Rights has on privacy, an entirely separate but interrelated regime exists in Europe regarding privacy law: the regime regulated by the European Privacy Directive of the European Parliament and the Council of Europe of October 24, 1995.[251] That directive requires the member states of the European Union[252] to develop domestic laws regarding privacy under the Directive's guidance.[253] Such domestic law must include very specific elements and mandate personal information be:

> Processed fairly and lawfully;
> Collected for specified and legitimate purposes only;
> Accurate and up-to-date;
> Steps must be taken to rectify or erase incorrect data;
> Nontransferable to third parties without permission;
> Nontransferable to countries which lack adequate privacy protection;
> Protected by a corporate data controller (equivalent to the U.S. chief privacy officer responsible for ensuring that data practices are followed;
> Processed only in cases where the subject has given clear consent.[254]

At first glance, the sharpest difference between European and American privacy law is the adoption of an "opt in" versus "opt out" system of approving

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rule no justification for application of exclusionary rule for evidence).

249. 5 U.S.C. § 552A(g)(4)(A)(2004).

250. Doe v. Chao, 540 U.S. 614, 621 (2004) (citing the general tort rule that actual damage is required for recovery). *Accord* Memphis Cmty Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (damage based upon abstract value or importance of constitutional rights held not a permissible element of compensatory damages in cases under 42 U.S.C. § 1983).

251. Council & Parliament Directive 95/46, 1995 O.J. (L281) (EC).

252. All member states of the EU are also members of the Council of Europe, but more than a dozen members of the Council of Europe are not members of the EU, including, for example, Russia, Switzerland, and Turkey. *See supra* note 32.

253. Council & Parliament Directive 95/46, art. 32, 1995 O.J. (L281) (EC).

254. Council Directive, Daintry Duffy EU Data Privacy_Directive, CSO, Aug. 2003, http://csoonline.com/read/080103/privacy-sidebarr_1607.html.

the release and use of personal data. In the European system, each data subject (i.e. person) must give clear, explicit permission for the data to be collected, used, and/or transferred.[255] American law has generally adopted an opt out approach, in which a data subject must affirmatively inform a business entity that he or she does not want the data shared.[256]

Exceptions to the EU requirement of explicit permission do exist: if the collection of data is necessary for performing a contract with the data subject; is for compliance with a legal obligation; is necessary for protecting the vital interests of the data subject; is necessary for the performance of a task carried out in the public interest; or is necessary for legitimate purposes pursued by the controller or by a third party to whom data is disclosed, except where such interests are overridden by the interest for fundamental rights and freedoms of the data subject with protection under Article I of the Privacy Directive.[257]

The first major dispute between the U.S. and the EU pertained to the Privacy Directive and the related effort to develop a safe harbor solution to permit U.S. business enterprises to continue to operate in Europe.[258] Case law and national legislation concerning this Directive is far less developed than that of the ECHR regarding privacy rights embodied in the European Convention on Human Rights. Nevertheless, the ECJ has decided several interesting privacy cases.[259]

The Directive is not limited to commercial activity. For example, the Directive applied to church parishioners putting personal information on a web page, despite the non-commercial nature of this act.[260] The web page posting sometimes included full names, sometimes first names, and described the jobs

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255. Council & Parliament Directive 95/46, art. 7(a), 1995 O.J. (L281) (EC).

256. Gramm-Leach-Bliley Act, 26 U.S.C. § 6103 (1975), *amended by* Pub. L. No. 108-173, 117 Stat. 2066 (2003).

257. Council Directive 95/46, art. 7(b)-(f) 1995 O.J. (L 281) 31 (EC).

258. Alexander Zinser, *The Safe Harbor Solution: Is It an Effective Mechanism for International Data Transfers Between the United States and the European Union?*, 1 OKLA. J.L. & TECH. 11 (2004). "[W]ith regard to data transfers from the European Union to the United States, data controllers in the United States are required to ensure an adequate level of protection in order to be in compliance with European data protection laws. However, the fulfillment of the requirement of adequacy is problematic." *Id.*; Kyle T. Sammin, Note, *Any Port in a Storm: The Safe Harbor, The Gramm-Leach-Bliley Act, and the Problem of Privacy in Financial Services*, 36 GEO. WASH. INT'L L. REV. 653 (2004). *See also*, Gregory Shaffer, *Globaliztion and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1 (2000).

259. *See* Case C-101/01, Lindqvist, [2003] E.C.R. I-12971; Case C-68/93, Shevill v. Presse Alliance SA, [1995] E.C.R. I-415; Case 53/84, Adams v. Comm'n, [1985] E.C.R. 3595.

260. Case C-101/01, Lindqvist, [2003] E.C.R. I-12971. "[P]rocessing of personal data such as that described . . . is not covered by the exceptions in Art. 3(2) of Directive 95/46." A fine of SEK 4000 plus SEK 300 to be paid to a Swedish fund to assist victims of crimes was assessed by the Swedish trial court. *Id.* On Jan. 29, 2007, one U.S. dollar was equal to SEK 6.9767. Currency Converter, http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=SEK&submit=Convert.

held and hobbies of eighteen colleagues in the parish.[261]

The EU differs from the Council of Europe, however, because its primary focus is on economic matters rather than issues of human rights.[262] Still, personal rights litigation does sometimes implicate economic concerns, such as privacy rights protected through defamation lawsuits.

The ECJ considered the matter of jurisdiction for suits in defamation in *Shevill v. Presse Alliance SA*.[263] The Court held that the target of a defamatory publication could bring legal action in either the state in which the publisher was established or before the courts of each contracting state in which the publication was distributed.[264] If suit was brought in a contracting state of distribution, the damages recoverable were limited to the harm caused in that contracting state.[265] If the action was brought either in the state of the defendant's domicile or where the publisher was established, however, suit could be brought for all harm caused.[266] Thus, in effect the broadest scope was permitted within the contracting states of the EU for lawsuits protecting aspects of privacy through defamation suits.

In a more unusual privacy case, a whistleblower employee of a Swiss company violating EU antitrust law had his name disclosed by the employees of the EU Commission. As a result, when he subsequently went to Switzerland, he was arrested and criminally prosecuted for making the disclosures.[267] The whistleblower sued the Commission for damages as well as for an order requiring Switzerland to correctly interpret and respect international law.[268]

The subject of searches has been frequently considered by the ECJ in reported cases. The Court has repeatedly affirmed that the EU Regulations must be interpreted in ways consistent with the fundamental rights protected by the European Convention on Human Rights.[269] The Court has distinguished

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261. *Id.* ¶ 13. In many cases family circumstances, telephone numbers, and other matters were mentioned. The defendant also stated that one colleague had injured her foot and was on half-time on medical grounds. *Id.*

262. *See* MATS LINDFELT, FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION – TOWARDS HIGHER LAW OF THE LAND? 1-4, ABO Akademi University Press (2007)(discusses the limited incorporation of fundamental rights in EU jurisprudence).

263. Case C-68/93, Shevill v. Presse Alliance SA, [1995] E.C.R. I-415.

264. *Id.* ¶ 33.

265. *Id.* ¶ 30.

266. *Id.* ¶¶ 25, 32.

267. Case 53/84, Adams v. Comm'n, [1985] E.C.R. 3595. The Commission was ordered to pay half the damage suffered by Mr. Adams as a result of identifying him as the source of the information. He was held in solitary confinement in Swiss prison and convicted under Swiss law for economic espionage. While he was in prison, Mr. Adams' wife was interrogated by Swiss police officers and then she committed suicide. *See* RALPH H. FOLSOM, PRINCIPLES OF EUROPEAN UNION LAW 94 (2005); Kurt Riechenberg, *The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues*, 4 TUL. J. INT'L & COMP. L. 63, 75-76 (1995).

268. Case 53/84, Adams v. Comm'n, [1985] E.C.R. 3595.

269. *See* Case 85/87, Dow Benelux NV v. Comm'n, [1989] E.C.R. 3137; Case 97/87, Dow Chems. Iberica v. Comm'n, [1989] E.C.R. 3165; Case 4/73, Nold v. Comm'n, [1977] E.C.R. 7;

between the protections of the home and protections of business premises, for which "not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities."[270] In all legal systems of the member states, however, any intervention must have a legal basis. Consequently, those varied systems provide protection against arbitrary or disproportionate intervention.[271]

The broad search powers granted to the Commission include authorization to: examine books and other business records; take copies of or extracts from the books and business records; ask for oral explanations on the spot; and enter any premises, land, and means of transport of undertakings.[272] In order to conduct such examinations, prior authorization is required. With the authorization and required cooperation of the national authorities (who have a very limited ability to question the legitimacy of the search),[273] the investigation is authorized to go forward; however, they

> may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking, which may, however, be implied, in particular by the provision of assistance to the Commission's officials.[274]

If the undertaking expresses opposition to the investigation, however, the Commission may search for any information with the "assistance of the national authorities, which are required to afford them assistance necessary for the performance of their duties."[275] Each state has an obligation to ensure that the

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Case 222/84, Johnston v. Chief Constable, [1986] E.C.R. 1651; Case 46/87, Hoest v. Comm'n, [1989] E.C.R. 2589.

270. Dow Benelux NV, [1989] E.C.R. at ¶ 28.

271. *Id.* The Court also noted that it has the power to determine whether measures taken by the Commission under the European Coal and Steal Community Treaty are excessive. *Id.* (citing Case 5/62, Societa Industriale Acciaiene San Michele v. Eur. Coal and Steel Cmty., [1962] E.C.R. 449).

272. *Id.* ¶ 32 (citing Treaty Establishing European Coal & Steel Community, art. 14(1), Apr. 18, 1951, 261 U.N.T.S. 140).

273. *Id.* ¶ 6.

> [The] national body, after satisfying that the decision ordering the investigation is authentic, [are] to consider whether the measures of constraint envisaged are arbitrary or excessive having regard to the subject-matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures.

Id. ¶ 7. *See also* Case C-94/00, Freres v. Consommeation et de la Repression des Fraudes, [2002] E.C.R. I-9011. (Community law precluded review by the national court of the justification of measures beyond that required by the principal that coercive measures were not arbitrary or disproportionate to the subject matter of the investigation).

274. *Freres*, [2002] E.C.R. I-9011.

275. *Id.*

Commission's action is effective, but in doing so they respect the relevant procedural guarantees "laid down by national law."[276]

Attorney-client confidentiality is respected by many of the contracting states and will be respected by the Commission under case law of the ECJ.[277] The definition of "attorney" is critical. In-house lawyer communication is not protected, because such lawyers are considered employees of the enterprise.[278] Moreover, the protection afforded to communications from outside lawyers only applies to lawyers entitled to practice in one of the Member States.[279] American lawyers practicing in Europe, who are not qualified to practice in one of the member countries, enjoy no confidentiality of written communication.[280]

Remedies Under Members State Laws

As indicated above, remedies in EU member states for violation of laws relating to privacy include both criminal and civil sanctions. Under the provisions of the Privacy Directive and implementing member state statutes, what may be considered more serious penalties may be imposed upon a business entity that desires to collect and maintain personal data for business purposes. The enterprises may be banned from such activity if they fail to comply with the privacy commands and thus suffer serious hardship in their efforts to prosper as an economic enterprise.[281] This is particularly significant to banks, airlines, insurance companies, and marketing enterprises of all types, who would be unable to collect and manage data about their customers and clients.[282]

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276. *Id.* ¶ 44.

277. *See* Case 155/79, Austl. Mining & Smelting Eur. Ltd. v. Comm'n, [1982] E.C.R. 1575, ¶ 3.

278. *Id.* ¶ 29.

279. *See id.* ¶ 25. Regardless of the member state in which the attorney is licensed, the protection of attorney-client confidentiality stems from either of two sources: recognition of the role of attorneys in a system of a rule of law or, alternatively, that the "right of defence must be respected." *Id.* ¶ 20.

280. *See id.* ¶ 25.

281. For violation of the safe harbor agreement, "[S]anctions include deletion of data obtained improperly in violation of the Safe Harbor Principles, 'suspension and removal of a seal, compensation for individuals for losses incurred as a result of non-compliance' and/or injunctive orders." Zinser, *supra* note 258, at 40. Furthermore, "[P]rivate sector dispute resolution bodies and self-regulatory bodies must notify failures of safe harbor organizations to comply with their rulings to the governmental body with applicable jurisdiction or to the courts." *Id.* (quoting Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45666-01 (July 24, 2000). They are also required to notify the United States Department of Commerce. *Id.*

282. See Joel R. Reidenberg, E-Commerce and Trans-Atlantic Privacy, 38 HOUS. L. REV. 717, 735-38 (2001); Fred Cate, The Changing Face of Privacy Protection in the European Union and the United States, 33 IND. L. REV. 174, 227-229 (1999).

CONCLUSION

This Article, in a broad outline, sketches a number of the major European regulatory systems regarding privacy. These systems contemplate far more privacy than is typical in the United States. The idea that a jail cell inmate or a person walking down the street would enjoy privacy protections is quite absent from American law but starkly present in European law.

It would be unthinkable in the United States for a court to hold, as did the ECHR, that the eldest daughter of Prince Rainier III of Monaco, Princess Caroline, had a valid complaint that German law did not adequately protect her from paparazzi who followed her every daily movement because her private life made no contribution to a debate of general interest.[283] Similarly, one would expect that the ECHR would hold that the public has no legitimate interest in learning that the Italian King in exile, Victor Emmanuel III, had procured prostitutes for business associates or for himself (absent, that is, prosecution for soliciting). The European approach to privacy, limiting data disclosure to particular purposes with explicit consent required and prohibiting further transmission of such data without further permission, makes a great deal of sense. These principles are essentially absent in United States privacy laws.

283. Von Hannover v. Germany, App.No. 59320/00, 43 Eur. H.R.Rep. 7 (2006). Furthermore the Court considers that the public does not have a legitimate interest in knowing where the applicant [Princess Caroline and her children] is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well know to the public.

Id. ¶ 77.

EAST TIMOR'S LAND TENURE PROBLEMS: A CONSIDERATION OF LAND REFORM PROGRAMS IN SOUTH AFRICA AND ZIMBABWE

Amy Ochoa Carson*

INTRODUCTION

This Note suggests ways to alleviate East Timor's[1] land tenure problems. These problems resulted from the country's complicated history.[2] In 2002, East Timor was given its long-awaited independence and became the world's newest nation.[3] Since being discovered in the 1500s, East Timor was originally a Portuguese colony[4] and, more recently, an Indonesian colony.[5] Now that East Timor has gained its independence, it faces many obstacles before it can become a successful, self-sufficient nation. As of 2005, the country had one of the lowest real gross domestic products (GDP) in the world at eight hundred dollars.[6]

A massive problem East Timor must overcome is its complicated and

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1. In this Note the name East Timor will be used. There are, however, various names for the country of East Timor:

> The name most common in the English-speaking West is really a tautology since Timor is just the Indonesian word for 'east'. So East Timor is East East, and in fact the Indonesians referred to the province as Timor Timur or, in its shortened version, Tim Tim. . . .
>
> . . . [East Timor is also called] Timor Leste, which is East Timor in Portuguese. Or Timor Lorosae (also Loro Sa'e and Lor Sae), which can be Translated as 'Timor where the sun rises' in Tetun. Finally, the official English language name is Democratic Republic of East Timor . . . .

TONY WHEELER, EAST TIMOR 33 (2004).

2. Daniel Fitzpatrick, *Property Rights in East Timor's Reconstruction and Development*, *in* EAST TIMOR DEVELOPMENT CHALLENGES FOR THE WORLD'S NEWEST NATION 178 (Hal Hill & João M. Saldanha eds., 2001).

3. *See id.* at 177.

4. Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371, 373 (2004).

5. *Id.* at 375.

6. Central Intelligence Agency, *Rank Order – GDP – per capita (PPP)*, *in* THE WORLD FACTBOOK (2007). GDP is "the total value of goods and services produced in a country over a period of time." MSN Encarta, Gross Domestic Product, http://encarta.msn.com/encyclopedia_761588125/Gross_Domestic_Product.html (last visited February 25, 2007). There are three ways to calculate GDP: "(1) by adding up the value of all goods and services produced, (2) by adding up the expenditure on goods and services at the time of sale, or (3) by adding up producers' incomes from the sale of goods or services." *Id.* GDP is used by economists "to measure the standard of living in a country. They divide a country's GDP by its population to arrive at GDP per head." *Id.*

extensive land tenure issues.[7] Because the country went from being a territory of one state to the territory of another, it faces a number of conflicting land title problems.[8] The violent military conflict that occurred directly prior to the country's independence exacerbated the problem.[9] This period of violence, brought about by the Indonesian military, resulted in the destruction of the country's infrastructure, buildings, and titles to land, leaving a legal disaster with regard to land tenure issues.[10] The lack of certainty over land title and the damage done by the Indonesian military has seriously halted the country's ability to thrive economically.[11] Thus, East Timor is in dire need of laws to determine ownership of land and new, progressive forms of land reform. Yet despite the exigency of the circumstances, careful thought and analysis must occur before determining the appropriate regulations in order to ensure land reform that is successful and withstands the test of time.[12]

There are four categories of land claims that the people of East Timor are bringing in hopes of reclaiming their land.[13] This Note assesses the prospects for success of these various land claims and provides a comparative analysis to land reform that occurred in South Africa post-apartheid and Zimbabwe post-colonialism. Based upon these findings, this Note analyzes the mechanisms by which East Timor should work toward resolving its land tenure issues.

Part I discusses East Timor's colonial history. It begins with a discussion focusing on East Timor as a colony of Portugal. It then proceeds to examine East Timor as a colony of Indonesia. Lastly, Part II discusses the Referendum and the violence and destruction that occurred prior to the vote for independence and after the vote was announced.

Part II examines the unique situation in East Timor. Not only is the country facing problems associated with post-colonization, but it is also facing problems associated with a post-conflict environment. This Part then presents the four types of land claims that East Timor citizens are bringing in their independent country. The basis of each land claim is explained, as well as the problems of recognizing or ignoring such claims. True life accounts of the

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7. *See generally* DANIEL FITZPATRICK, LAND CLAIMS IN EAST TIMOR (2002). Land tenure is the "way people 'hold' rights to land and real property." HENRI A.L. DEKKER, THE INVISIBLE LINE: LAND REFORM, LAND TENURE SECURITY AND LAND REGISTRATION 43 (2003). Land tenure denotes both a "legal term" and an "emotional term." *Id.* The "emotional significance of land tenure [is] the way individuals perceive benefits, enjoyment, and obligations in respect to real property." *Id.*

8. *See* FITZPATRICK, *supra* note 7, at 1.

9. *See id.* at 6. During this time, many of the country's land records were intentionally destroyed. *Id.* at 7.

10. *See generally id.* at 6-7 (finding that there are conflicting land titles and many people do not have proof that they own their land).

11. *See* Fitzpatrick, *supra* note 2, at 177-78.

12. *See generally* FITZPATRICK, *supra* note 7. *See also* DANIEL FITZPATRICK, COMMONWEALTH OF AUSTL., LAND ISSUES IN A NEWLY INDEPENDENT EAST TIMOR, Parliament of Australia (2001), http://www.aph.gov.au/library/pubs/rp/2000-01/01RP21.pdf.

13. *See infra* note 70 and accompanying text.

difficult situations facing people in East Timor are then discussed in an effort to humanize this situation. This will allow readers to better understand the magnitude of problems facing the new East Timor government and its citizens. This part concludes with a discussion of the impact that land issues are having on East Timor to show why land tenure problems need to be resolved before the country can prosper.

Part III provides general information about land reform, specifically the benefits and detriments associated with such measures. The motives and reasons a country might choose to reform land ownership are also discussed. In addition, general criticisms against land reform are presented.

Part IV provides background information on South Africa, specifically the country's history regarding property rights and the ways in which South Africans were dispossessed of their land. The discussion then moves to events that took place post-apartheid with relation to land reform. The successes of the South African land reform program are presented, as well as the problems and shortcomings of the country's efforts to reform the land issues and distribute ownership interests more equally.

Part V explores Zimbabwe's colonial past and the impact it had on ownership of land. It then discusses the land reform program implemented following the country's independence. The country's attempted methods to reform the land to allow for more equal distribution among individuals are provided. Additionally, criticisms of Zimbabwe's efforts in reforming property rights are explained.

Part VI discusses recent developments in East Timor in the area of land tenure and its attempts to resolve land problems. This section presents recently enacted land laws. Additionally, Part VII provides an explanation of new departments and organizations dealing with land tenure.

Part VII provides suggestions of ways for East Timor to reform land use and begin to resolve conflicting land titles. This Note suggests that land reform is a good option for the country because it will provide land to landless individuals, redistribute land in a more equal manner than has been done in the past, and allow the country to improve economically by encouraging people to use the land productively. In making this argument, the failures and successes of land reform in South Africa and Zimbabwe will be evaluated and applied to East Timor in an effort to make predictions of problems that East Timor is likely to encounter in the future. This comparative analysis of land reform in South Africa and Zimbabwe will provide the groundwork for suggested methods to implement land reform in East Timor.

I. BACKGROUND INFORMATION AND HISTORY

East Timor, a small country slightly larger than Connecticut, is located in southeastern Asia.[14] The country has mountainous terrain and natural resources that include gold, petroleum, natural gas, manganese, and marble.[15] Rice and maize are the country's "chief food crops."[16] Potential cash crops include cashews, cloves, sugar, sandlewood, cocoa, and arabica coffee.[17] Additionally, cattle and fishing are important activities for the country.[18]

Little is known about the early years of the island of Timor, however, it is believed the island was first visited by Chinese and Japanese traders as early as the seventh century.[19] By 1513 Portuguese explorers arrived in Timor.[20] Prior to the arrival of Portuguese explorers, Timor was "divided into a number of small kingdoms."[21] Next, the Dutch arrived.[22] By 1858, a border arrangement commenced between the Portuguese and the Dutch.[23] The arrangement essentially divided the island of Timor into East Timor and West Timor.[24] East Timor became a Portuguese colony and West Timor became a Dutch colony.[25] West Timor received its independence in 1949, and thereafter became part of the Indonesian Republic.[26] Portuguese rule continued over East Timor until 1974.[27]

In 1974, Portugal's dictator, Marcello Caetano, was overthrown.[28] Subsequently, Portugal "quickly began divesting [itself] of its colonies."[29] The East Timorese, realizing they were likely to be abandoned, formed groups to determine how the small country should gain independence.[30] Indonesia, which

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14. Central Intelligence Agency, CIA - The World Factbook -- East Timor, https://www.cia.gov:443/cia/publications/factbook/geos/tt.html (last visited Apr. 5, 2007).

15. *Id.*

16. WHEELER, *supra* note 1, at 32.

17. *Id.*

18. *Id.*

19. *Id.* at 20.

20. Bowman, *supra* note 4, at 373.

21. WHEELER, *supra* note 1, at 20. There was frequent conflict among the small kingdoms and "head hunting [was] a popular activity." *Id.*

22. JOSE RAMOS-HORTA, FUNU THE UNFINISHED SAGA OF EAST TIMOR 19 (1987); *see also* Geoffrey C. Gunn, *The Five-Hundred-Year Timorese Funu, in* BITTER FLOWERS, SWEET FLOWERS EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY 5 (Richard Tanter et. al. eds., 2001).

23. Bowman, *supra* note 4, at 374.

24. *Id.* The agreement, dividing the island into East Timor and West Timor, was not ratified until the year 1913. *Id.*

25. *See id.*

26. *Id.*

27. *Id.* There was a brief period of "Japanese occupation during World War II." *Id.*

28. DON GREENLEES & ROBERT GARRAN, DELIVERANCE THE INSIDE STORY OF EAST TIMOR'S FIGHT FOR FREEDOM 4 (2002). Portugal was overthrown by Portuguese army officers in an effort to rid the country and "its oversea territories" of a repressive government. *Id.*

29. Bowman, *supra* note 4, at 374.

30. *Id.* The people of East Timor are called East Timorese. *See generally id.* The three

occupied West Timor, feared an independent East Timor would threaten its security.[31] In response to this fear, Indonesia "funneled support to individuals and parties willing to [push for] integration with Indonesia."[32]

Ultimately, a civil war ensued between parties in favor of independence and parties in favor of integrating with Indonesia.[33] Those supporting independence for East Timor were ultimately victorious but, despite this victory, the Indonesian troops still invaded East Timor.[34] During the invasion, thousands of East Timorese were killed by the Indonesian military.[35]

In 1976, Indonesia declared East Timor to be its twenty-seventh province.[36] Indonesia tried to "gain popular support" by fixing the country's infrastructure, schools, and hospitals, but at the same time continued to harass and murder East Timorese who opposed them.[37] Despite the improvements made to the country, most East Timorese did not reap the benefits and their living standards did not improve.[38] Instead, the estimated 150,000 non-East Timorese who lived in East Timor were the ones who primarily benefited from Indonesia's improvements and who held lucrative jobs in the country.[39] "At no stage did the vast majority of the East Timorese people ever feel that they lived in [a place] other than an occupied territory."[40] By 1980, an estimated one-third

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main political groups included the Timorese Democratic Union (UDT), the Timorese Social Democratic Party (ASDT), and the Timorese Popular Democratic Association (APODETI). *See* GREENLEES & GARRAN, *supra* note 28, at 4. The UDT and ASDT both "advocated eventual independence"; however, the UDT proposed continuing an association with Portugal, whereas the ASDT completely rejected colonialism. *Id.* The APODETI initially had few followers but gained strength due to Indonesian intervention; it "supported integration with Indonesia." *Id.*

31. Bowman, *supra* note 4, at 374.

32. *Id.* at 374-75.

33. *Id.* at 375.

34. *Id.* Don Greenlees, a correspondent for *Australian* in Jakarta, and Robert Garran, a long-time writer for major Australian newspapers in the areas of politics and economics, found that the United States "supported the invasion in spite of some misgivings, viewing the issue as one primarily for Indonesia, Portugal and Australia to resolve." GREENLEES & GARRAN, *supra* note 28, at 13. *See also* RAMOS-HORTA, *supra* note 22, at 1.

35. Bowman, *supra* note 4, at 375. Those who were not killed by the Indonesian military were forced into the mountainous regions of the country if they resisted Indonesian rule. *Id.*

36. GREENLEES & GARRAN, *supra* note 28, at 15. Within ten days of invading East Timor, Indonesia created an interim government in Dili. *Id.* Approximately five months later, Indonesia hand-picked thirty-seven delegates to appoint to the People's Assembly; subsequently, the Assembly voted to integrate with Indonesia. *See id.* at 11-15.

37. Bowman, *supra* note 4, at 375. "[T]he Indonesian security forces eroded [any support gained] by raping, torturing, murdering, and starving large portions of the population. . . ." *Id.* Also note that "[e]ven the roads that Indonesia built in East Timor, of which it was unduly proud, served in large part to transport troops and equipment from district to district" and, thus, were not for the benefit of the people of East Timor. DAMIEN KINGSBURY, SOUTH-EAST ASIA A POLITICAL PROFILE 397 (2001).

38. KINGSBURY, *supra* note 37, at 397.

39. *Id.* The "East Timorese people were regarded as less than human by their new Indonesian masters." *Id.*

40. *Id.* During the Indonesian occupation of East Timor "[j]ournalists were usually forbidden entry to the territory." JOHN STACKHOUSE, OUT OF POVERTY AND INTO SOMETHING MORE COMFORTABLE 316 (2000). Journalist John Stackhouse, along with another journalist,

of the country, approximately 200,000 East Timorese, were killed by the Indonesian military.[41]

In 1999, "Indonesian President B.J. Habibie surprised the world by announcing his intention to allow the East Timorese to choose between some type of autonomy within Indonesia and independence."[42] In response to Habibie's announcement, Indonesia, Portugal, and the United Nations came to an agreement known as the Tripartite Agreement; it "allowed for a popular referendum in which the East Timorese would be allowed to vote for special autonomy within Indonesia or for a separation from Indonesia that would ultimately result in independence."[43] The agreement stipulated that the United Nations would "conduct and monitor the referendum," and Indonesia was given the responsibility of providing security during the referendum period.[44] The United Nations and Portugal agreed to allow Indonesia to provide security only after Indonesia insisted that "no U.N. peacekeepers be sent to East Timor" and that only a small amount of civilian police advisers be present.[45]

Despite the Indonesian military's efforts to keep the East Timorese people from voting, approximately 98.6% of the citizens[46] voted on August 30, 1999.[47] The result of the Referendum, announced on September 4, 1999,[48] produced an outcome of 78.5% of East Timorese voting for their independence.[49] This angered the Indonesian military; within hours after the vote was announced, "they began taking retribution on the people of East Timor and the island itself."[50]

As a result of the militia violence, thousands of East Timorese were murdered and "over 450,000 people were estimated to have been internally displaced within East Timor itself, and a further 300,000 fled or were forcibly

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snuck into East Timor and posed as tourists. *Id.* He found that there were more "police . . . than civilians" to ensure that East Timorese did not speak to foreigners about politics or their dislike of Indonesia. *Id.* at 320. The police and government informants were everywhere: a "local school teacher . . . discovered one of her ten-year-old pupils was a government informer." *Id.* at 327.

41. Bowman, *supra* note 4, at 375. The Indonesian army acted "like an insensitive occupying force" instead of "protectors of the peace." KINGSBURY, *supra* note 37, at 397.

42. Bowman, *supra* note 4, at 375-76.

43. *Id.* at 376.

44. *Id.*

45. GREENLEES & GARRAN, *supra* note 28, at 147. The United Nations and Portugal faced the tough decision of either allowing the Referendum on Indonesia's terms or fighting Indonesia's terms and risk Habibie withdrawing his offer to allow the people of East Timor to vote on their future. *Id.* Ultimately, the United Nations and Portugal chose to agree to Indonesia's insistence that it provide security. *See id.*

46. Bowman, *supra* note 4, at 377. "The Indonesian military and much of the civilian leadership opposed President Habibie's initiative." *Id.* at 376. The military's objective was to cancel the vote. *Id.* In the alternative, the military hoped to influence, through intimidation and violence, East Timorese to vote against autonomy with Indonesia. *Id.*

47. GREENLEES & GARRAN, *supra* note 28, at 191.

48. *Id.* at 202.

49. Bowman, *supra* note 4, at 377.

50. *Id.*

transported across the border to West Timor."[51] The majority of government experts and administration fled the country "[b]ecause they were either non-East Timorese or were pro-autonomy supporters."[52] This group of people included all of the country's judges and most of the country's attorneys.[53]

East Timor was officially declared an independent nation on May 20, 2002.[54] Nevertheless, this independence has not come without problems.[55] The atrocities that occurred after the Referendum have left East Timor in a dire state.[56] Specifically, the country has had to deal with problems with land tenure.[57] Many of the country's land records were destroyed during the period of violence after the Referendum.[58] The Indonesian military purposely "entered the land titles building, took the records outside, set fire to them, and then torched the building itself."[59] It is estimated that eighty percent of land titles in East Timor were destroyed.[60] In addition, homes were intentionally burned and destroyed by the Indonesian military.[61]

The acts of the Indonesian military left the country with housing shortages and little evidence to ascertain ownership of parcels of land.[62] This situation worsened when large numbers of people returned to East Timor under the force of the West Timor authorities.[63] These people returned to East Timor to find their land occupied by other people or destroyed. [64] The lack of

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51. FITZPATRICK, *supra* note 7, at 5.

52. *Id.* at 6.

53. *Id.*

54. Central Intelligence Agency, *supra* note 14.

55. *See generally* FITZPATRICK, *supra* note 7 (explaining the problems with the state of land tenure).

56. *See id.* at 6.

57. *Id.*

58. *Id.* at 7. In a positive occurrence, "a land professional who reportedly could not condone the destruction of records," took the Dili land titles book for safekeeping. *Id.* The book only contained evidence of registration and not any authorization or history. *Id.* The problem is that Indonesia has refused to return the book. *Id.*

59. *Id.* at 6. Kosovo, Iraq, Afghanistan, and Somalia are other cases in which "land ownership documents were taken, sometimes for 'ransom', sometimes for safety and sometimes to be destroyed." DANIEL LEWIS, UNHABITAT, CHALLENGES TO SUSTAINABLE PEACE: LAND DISPUTES FOLLOWING CONFLICT 4, http://www.fig.net/commission7/geneva_2004/papers/lapca_01_lewis.pdf (2004).

60. FITZPATRICK, *supra* note 7, at 7. Because of the extreme violence that occurred after the Referendum, the urgency to flee, and the forced departures, most people did not take their land titles when they left their homes. *Id.*

61. *Id.* at 8. "In Dili . . . a milk truck was used to pump [gas] into houses before they were lit and destroyed." *Id.* In addition to homes and records, the Indonesian military also targeted infrastructure. *Id.* Reports from the United Nations Transitional Authority in East Timor (UNTAET) estimate that over ninety-five percent of the infrastructure in Dili was destroyed and a total of 70 per cent of the country's entire infrastructure was "destroyed or rendered inoperable." *Id.*

62. *See id.* at 6-17.

63. *Id.* at 9.

64. *Id.* This is not necessarily something new for rural areas of East Timor, but it has created a serious problem for large cities, like the capital city of Dili. *Id.*

adequate housing has caused disputes and violence among East Timorese.[65] Additionally, there has been a fury of land claims since the country gained independence.[66]

II. THE CONSEQUENCES OF EAST TIMOR'S TUMULTUOUS PAST

A. A Unique Situation

East Timor presents a unique situation because it is not only a post-conflict environment, but it is also a post-colonial environment.[67] East Timor is facing problems associated with post-conflict environments, such as the return of refugees, inadequate shelter, restoration of land records, and restoration of institutions of governance.[68] East Timor is also facing problems associated with a post-colonial environment, including: implementing a new government, building new infrastructure, and employing a method with which to resolve land conflicts.[69] Thus, East Timor is a country that, although now independent, still has a long and difficult road ahead. It faces not only one bundle of problems associated with decolonization, but a second bundle of severe issues associated with past conflict.[70] Jose Ramos-Horta, Foreign Minister of East Timor, summed up the situation in East Timor when he described the task of re-building the new nation: "we are starting from absolutely ground zero."[71]

B. The Four Categories of Land Claims

The events that occurred after the Referendum in East Timor sparked an abundance of land claims.[72] The land claims brought by people were not based only on land lost during the period after the Referendum, but also from various times throughout East Timor's history.[73] There exist "four categories of potential claimants for land in East Timor": traditional occupiers of land, those

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65. *Id.* at 10.

66. *See generally id.* (explaining the problems with the current state of the land tenure system).

67. *See id.* at 1.

68. Daniel Fitzpatrick, *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor*, J. OF HUMANITARIAN ASSISTANCE (2001), http://www.reliefweb.int/rw/rwb.nsf/AlldocsbyUNID/ca96eed98e8813f2c1256b37003a17f2.

69. *Id.* East Timor not only has had to deal with a "wave of dispossession," but also problems associated with Portuguese colonization and Indonesian invasion and occupation. Fitzpatrick, *supra* note 2, at 178.

70. *See generally* Fitzpatrick, *supra* note 2.

71. GREENLEES & GARRAN, *supra* note 28, at 306. Horta remarked that not only was the country lacking basic needs, such as "doctors, dentists, accountants, lawyers, and police, but also tables chairs, pots, and pans." *Id.*

72. *See generally* FITZPATRICK, *supra* note 7 (describing the various types of land claims).

73. *See generally id.* Fitzpatrick describes the situation in East Timor as "most challenging." *Id.* at 1.

who derived land under Portuguese title, those who derived land under Indonesian title, and those in current possession of the land.[74]

1. Traditional Occupiers of Land in East Timor

The first category of claimants includes traditional occupiers who have held "customary rights to land."[75] Most land in rural areas of East Timor is "not registered in any formal system of land administration and remains [utilized] in accordance with traditional processes and institutions."[76] Generally, land held by traditional occupiers is held in "community-based" groups in customary tenure systems.[77]

Communal land systems may create and perpetuate East Timor's land and financial problems, which may not make it the best type of land claim for East Timor to recognize.[78] First, no single individual owns the land and there is often little incentive to invest in the land.[79] Because community-based groups may not invest in the land, the result is land in the hands of users who are not productively using the land to its fullest economic potential.[80] Second, because the land is held in community control no one from inside the community can sell the land to anyone outside of the community.[81] This restriction on alienation creates a situation in which land cannot be used as security for credit, and thus, ultimately decreasing the chances and opportunities for developing

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74. *Id.* at 15. Daniel Fitzpatrick has written extensively on this subject and his work is the basis of this Note's section regarding the four claims to title. In 2000, Mr. Fitzpatrick, Senior Lecturer, Faculty of Law at Australian National University, served as a legal consultant to the United Nations Transitional Administration in East Timor. The Australian National University, ANU College of Law – Our Staff, http://law.anu.edu.au/scripts/staffdetails.asp?StaffID=26 (last visited Mar. 19, 2007) (hereinafter Australian National University). In 2002, Mr. Fitzpatrick published *Land Claims in East Timor*, a work described by Sir Gerard Brennan, former Chief Justice of the High Court of Australia, as "profound academic scholarship." *Id. See generally* FITZPATRICK, *supra* note 7.

75. FITZPATRICK, *supra* note 7, at 168; *see generally* PEDRO DE SOUSA XAVIER, DIRECÇÃO NACIONAL DE TERRAS E PROPRIEDADES (DNTP), TIMOR-LESTE LAND MANAGEMENT: A LONG WAY TO GO, BUT WE HAVE STARTED (2005), www.fig.net/commission7/bangkok_2005/papers/6_3_sousa_ppt.pdf.

76. FITZPATRICK, *supra* note 7, at 167. *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (1941) (discussing capitalism and its relation to the legal structure of property).

77. *Id.* at 168.

78. *Id.* at 169. The arguments presented in this section have "had considerable influence on land policy in the developing world. They led, for example, to the outright rejection of customary tenure systems in Kenya, Malawi, Uganda, and Guinea." *Id.* at 170. Recently, the World Bank has tried to counteract these arguments by providing arguments supporting customary tenure systems. *Id.*

79. CRAIG RICHARDSON, THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000-2003 LAND REFORMS 51 (2004). This is a classical example of the "tragedy of the commons." *Id.* at 54. *See also* FITZPATRICK, *supra* note 7, at 170.

80. FITZPATRICK, *supra* note 7, at 170.

81. *Id.* at 169.

the land.[82] Third, "traditional forms of tenure [can] cause unsustainable over-consumption of natural resources on land."[83] "Communal farming methods are a recipe for disaster" because group members have no incentive to limit their intake, which results in destruction of the land.[84] These arguments suggest that land held in customary tenure systems is both harmful to the land and unproductive, which indicates that recognizing land claims from traditional occupiers might not be the best choice for East Timor.[85]

On the other hand, it is important to note that the World Bank has recently changed its views on tenure systems.[86] It has found that communal land systems can still provide incentives for owners to invest in the land and not deplete land of its natural resources.[87] Furthermore, the World Bank suggests land that cannot be used to access credit can still be used productively.[88] This competing view on traditional land systems "has led a large number of developing countries to seek to build on traditional tenure systems rather than replace them."[89]

2. *Land Owners during Portuguese Rule*

The second category of claimants includes those who acquired title to land during Portuguese rule over East Timor.[90] An estimated 2,483 titles were issued in East Timor during Portugal rule.[91] Claims made by these people include titles to very valuable land.[92] To recognize these claims would result in "a small colonial elite" holding large amounts of land in East Timor.[93]

Nevertheless, there are "strong moral and legal arguments" as to why the Portuguese land titles should be recognized.[94] The law of belligerent occupation is an idea developed during the 1899 and 1907 Hague Conventions on Land War.[95] Basically this principle finds:

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82. *Id.* at 170.

83. *Id.*

84. RICHARDSON, *supra* note 79, at 51. *See also* FITZPATRICK, *supra* note 7, at 170.

85. *See e.g.*, FITZPATRICK, *supra* note 7, at 167-70. *See generally* RICHARDSON, *supra* note 79, at 58-63 (comparing communal lands and land individually owned in Zimbabwe).

86. FITZPATRICK, *supra* note 7, at 170.

87. *See id.* at 170-71. The World Bank notes several studies that have found that due to the "strength of social ties and community obligations" individuals are prevented from over consuming and "taking more than their share." *Id.* at 172.

88. *Id.* at 171. The World Bank cites "certain successful agricultural industries in Africa [that] have been created without access to formal credit or registered titles." *See id.* at 170.

89. *Id.* at 172.

90. *See id.* at 141. These are people who acquired title pre-1975. *Id.* The "Portuguese issued land titles, known as 'Alvara.'" XAVIER, *supra* note 75.

91. FITZPATRICK, *supra* note 7, at 44.

92. *Id.* at 141. Land claimed includes important urban property and plantation land. *Id.*

93. *Id.*

94. *Id.*

95. Convention Respecting the Laws and Customs of War on Law, with annexed Regulations, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277, Oct. 18, 1907 [hereinafter

> occupation leads to administrative control but not sovereignty. The general rule is that the occupier is required to respect "unless absolutely prevented" the laws in force in the territory at the time of the invasion. This has been interpreted to mean that the occupier may not extend its own law and legal system to the occupied territory, and may not establish a new court system. [Furthermore,] the occupier must respect private property and refrain from pillage or confiscation.[96]

An important aspect of belligerent occupation is that the land is occupied and not annexed.[97] Little doubt exists that Indonesia occupied East Timor and thus, was a belligerent occupier.[98] Ultimately, this means "Portuguese law remained the underlying law of East Timor during the period of Indonesia's occupation."[99] Taking this viewpoint means that land titles issued under Portuguese rule should have been recognized during the period Indonesia occupied East Timor.[100] It further leads to the presumption that land titles acquired in East Timor during Portuguese rule should still be recognized today.[101]

Customs of War]. *See also* FITZPATRICK, *supra* note 4, at 46. Fitzpatrick finds that "a number of scholars also claim that both the Hague Conventions and the Fourth Geneva Convention have entered international customary law. If this is so, under general principles of international law, Indonesia is bound by the Hague Regulations notwithstanding that it is not a party to the Hague Conventions." *Id.*

96. FITZPATRICK, *supra* note 7, at 46-47. *See generally* D.A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914 (1949). There are exceptions to principles stated in the text of this Note:

> First, an occupier may change the law where it is 'absolutely prevented' from doing otherwise. Second, an occupier may take all steps necessary to maintain public order and civil life. Third, an occupier may requisition such property as is necessary for military purposes. Fourth, an occupier may take possession of all movable property belonging to the enemy state that 'may be used for military operations' . . . .

FITZPATRICK, *supra* note 7, at 47 (alteration in original) (citations omitted). These are the "'military necessity principles.'" *Id.*

97. *See* FITZPATRICK, *supra* note 7, at 47. To determine if an occupier is occupying a country or has annexed a country, one must determine if the "annexation involved armed conflict between two sovereign powers" and if the "annexation was unlawful under the rules of the international law." *Id.* at 49. If both of these factors are answered affirmatively, then the law of belligerent occupation applies. *Id.*

98. *Id.* at 51. East Timorese never welcomed Indonesian troops throughout the twenty-four year occupation. *See id.* at 52-54. Furthermore, there is nothing to indicate that East Timor wanted Indonesia to colonize it. *Id.* at 52. This idea is bolstered by the fact that Indonesia entered East Timor with force. *See id.* at 52-53.

99. *Id.* at 141. It is important to note that Portugal's status in East Timor was that of a sovereign power, whereas "Indonesia never appears to have gained sovereignty over East Timor." *Id.* at 143.

100. *See id.* at 166.

101. *See id.* at 145. Fitzpatrick adds, "there is nothing to prevent [the government] from non-discriminatory adjustment of these titles without payment of compensation to their East Timorese holders." *Id.*

Nevertheless, there are many problems associated with recognizing titles acquired during Portuguese rule. First, it would dispossess a large amount of people who purchased their land under Indonesian rule and who view themselves as bona fide landholders.[102] Second, it would dispossess many traditional occupiers who "re-took possession of Portuguese titled land after 1975, or after the Indonesian withdrawal in September 1999."[103] Third, it would likely cause political conflicts between the liberals and conservatives because it would enable many conservatives to repossess land they owned prior to 1975.[104] Finally, it would result in placing a large amount of valuable land in the hands of Portuguese, which would result in a "colonial system of land ownership."[105] Despite arguments against recognizing title acquired under Portuguese rule, however, the idea of belligerent occupation remains, suggesting that Portuguese titles should be recognized.[106]

3. Land Owners During Indonesian Rule

The third category of claimants includes those who acquired title to land during Indonesian rule over East Timor.[107] An estimated 34,965 titles were issued by Indonesia in East Timor between the years of 1975 and 1996.[108] East Timorese acquired some of these titles, but wealthy Indonesian families and Indonesian corporations acquired a larger amount.[109] In addition to the private property titles, Indonesia also "took over former Portuguese state property."[110] On this land, Indonesia built new government buildings and housing for Indonesian civil servants.[111] Indonesia is now claiming "recognition of, or compensation for, all of these types of Indonesian titles."[112]

If the law of belligerent occupation is applicable, then it "may cast doubt on the validity of Indonesia's claim for recognition of private Indonesian titles, and compensation for state or public property."[113] Applying the law of belligerent occupation would harm those East Timorese who acquired land

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102. *See id.* at 141-66. This group includes East Timorese who obtained title to land during Indonesian occupation or have "been in long-term occupation of Portuguese title land since 1975." *Id.* at 142.

103. *Id.* at 42.

104. *Id.*

105. *Id.*

106. *See generally id.* at 46-49 (discussing the idea of belligerent occupation).

107. *See generally id.* at 44-140 (chapters discussing those people that acquired title to land from Indonesia).

108. *Id.* at 44.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 45.

113. *Id.* Fitzpatrick notes there may be another way to solve East Timor's land claims problem other than by use of the law of belligerent occupation. *See id.* He states that "[in] many post-communist countries . . . compensation or property restitution laws have been enacted for the benefit of pre communist owners of private property." *Id.*

under Indonesian rule.[114] Furthermore, to find the titles acquired under Indonesian rule invalid would "[appear] to conflict with certain emerging international norms relating to housing security and protection against unreasonable evictions."[115] Therefore, a dilemma exists between invalidating titles acquired during Indonesian rule, which would result in the eviction of East Timorese, and recognizing these titles, which would overwhelmingly give land rights in East Timor to Indonesians.[116]

4. Current Possessors of Land

The fourth category of claimants includes those that are currently occupying land.[117] Due to the massive population displacements in 1975, when Indonesia entered East Timor, and after the Referendum in 1999, "the extent of informal land occupation by migrant or displaced groups in East Timor is particularly high."[118] By April 2000, most homes in Dili, the capital city of East Timor,[119] were occupied by people other than their former owners and were severely overcrowded.[120] In addition to claims by original owners of land, individuals that entered into land contracts with people that were not the rightful owners of the land are also bringing claims as bona fide purchasers.[121]

A variety of concerns arise with this group of claimants.[122] East Timor could protect these people by passing legislation.[123] There are three ways to accomplish this.[124] First, "legislation could provide for protection against eviction of any occupiers who lack alternative land for housing and cultivation."[125] Second, legislation could allow a formal right to land if a person has occupied the land for at least twelve years.[126] Finally, legislation could allow those currently occupying land the opportunity to gain formal legal rights to the land if they obtained it in good faith and were not on "notice of prior claims."[127] These forms of legislation would prevent massive evictions

114. *See id.* at 63.
115. *Id.*
116. *See id.*
117. *Id.* at 205.
118. *Id.*
119. *See* WHEELER, *supra* note 1, at 54.
120. FITZPATRICK, *supra* note 7, at 10.
121. *See id.*
122. *See id.* at 204-05.
123. *Id.* at 205.
124. *Id.*
125. *Id.*
126. *Id.* This is an adverse possession idea; adverse possession is "a method of acquiring title to real property by possession for a statutory period under certain conditions, esp. a nonpermissive use of the land with a claim of right when that use is continuous, exclusive, hostile, open, and notorious." BLACK'S LAW DICTIONARY 22 (Bryan A. Garner ed., 2nd pocket ed. 2001).
127. FITZPATRICK, *supra* note 7, at 205. Allowing this type of legislation would be extreme because it would hurt land title holders, be it from the Indonesian era or when Portugal ruled,

but would also "diminish the prospects of claims by Portuguese or Indonesian-era titleholders and potentially reward opportunistic occupations."[128]

C. *The Impact of the Land Crisis on People*

East Timor's complicated land tenure problems have greatly affected East Timorese and individuals that own land in the country.[129] For example, land tenure uncertainty has posed an obstacle for an Australian businessman who purchased hotel property in Dili in 1971 under Portuguese title.[130] In 1974, the land owner and his family fled East Timor because the Indonesian military threatened to kill any foreigners in Dili.[131] After the land owner and his family left, the Indonesians took control of the hotel and ran it until 1998.[132] The land owner then returned to East Timor and was able to convince the Indonesian authorities that he was the owner of the hotel;[133] however, the Referendum occurred and violence quickly ensued.[134] The land owner and his family again fled East Timor.[135] The land owner has again returned, but the new East Timor government has refused to acknowledge his ownership of the property.[136]

Similarly, another family leased property from the Portuguese government prior to 1975 and has had trouble establishing property rights with the new East Timor government.[137] The family remained on the property after Indonesia occupied the country but did not pay rent.[138] Now that East Timor is independent, the government is claiming the land back and is trying to evict the family.[139]

Many Portuguese families who owned land in which coffee was harvested fled East Timor when Indonesia invaded the country.[140] These families left their properties with caretakers.[141] After a while, many caretakers sold the land without the permission of the owners.[142] Now these Portuguese families are returning to find their land gone and are making attempts to reclaim

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and reward squatters. *See id.*

128. *Id.*

129. *See* FITZPATRICK, *supra* note 7, at 1.

130. Rod McGuirk, *Asia: Favaro Land Case Takes New Twist*, AUSTL. GEN. NEWS, Sept. 3, 2001.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Damien Carrick, *Property Rights: East Timor; Adverse Possession* (radio broadcast Apr. 13, 2004), *available at* http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1083899.htm.

138. *Id.*

139. *Id.*

140. Commonwealth of Austl., *Land Titling in East Timor* (2002), http://www.ausaid.gov.au/closeup/etimor/titling.cfm.

141. *Id.*

142. *Id.*

their property.[143]

These cases represent just a few of the thousands of land claims that have arisen.[144] East Timor's tumultuous past has created a land tenure problem that is complex and may take many years to resolve.[145]

D. Reasons Why Land Tenure Problems in East Timor Need to be Solved

Land tenure problems are vitally connected to many aspects of a country's well-being, specifically its economic and political stability.[146] In order for the young nation of East Timor to prosper, the country must ascertain ways to cure the current state of its land tenure system.[147]

East Timor has always struggled financially. As a Portuguese colony, the country was highly impoverished; as a colony of Indonesia, it was Indonesia's second poorest colony.[148] There is a general consensus among economists that property "is vital to sustainable economic development."[149] This is because people are less likely to want to invest and build infrastructure or plant crops in regions that lack formal property rights.[150] There is a "dramatic effect on work incentives when individuals feel secure that the product of their work efforts will not be stolen from them."[151] Furthermore, foreign companies do not want to invest in a country unless they can be guaranteed private land ownership rights.[152]

East Timor has natural resources that could be of great economic benefit to the country, but that can only be fully utilized through the establishment of an enforceable land tenure system.[153] Thus, the country's economic vitality rests upon the resolution of its land claim problems.[154]

The success of a country depends highly on its political stability.[155] East

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143. *Id.*

144. *See* Carrick, *supra* note 137. *See also* RICHARDSON, *supra* note 79, at 11 (finding that "countries that first recognized the importance of property rights were the ones that saw the fastest economic growth.").

145. *See generally* FITZPATRICK, *supra* note 7 (describing the land claims problems in East Timor).

146. *See* DEKKER, *supra* note 7, at 82-83.

147. *See generally* FITZPATRICK, *supra* note 7 (suggesting solutions for East Timor's land claims problems).

148. KINGSBURY, *supra* note 37, at 409.

149. Fitzpatrick, *supra* note 2, at 177.

150. *Id.*

151. RICHARDSON, *supra* note 79, at 15.

152. Fitzpatrick, *supra* note 2, at 177.

153. *Id.* East Timor has oil fields, "a strong coffee production industry," and a beautiful, natural landscape that could provide the country with profitable tourism opportunities. KINGSBURY, *supra* note 37, at 410.

154. *See generally* Fitzpatrick, *supra* note 1 (discussing the dire state of the country's economy).

155. *See generally id.* at 193-206 (discussing the need for a "'political order support of broad economic goals' such as prosperity, social justice and national unity"). *Id.* at 193.

Timor's current land problems have created political instability in that "[n]o-one wants to create a legal solution to the problem because everyone worries that that legal solution will deny them their own rights."[156] Thus, politics have played a huge role in East Timor's lack of beneficial land reform, as the country's political officials have resorted to ad hoc solutions that benefit the politically powerful.[157] This political corruption exemplifies the way in which land tenure issues can be interconnected with problems in the internal structure of a country and further indicates the need to cure land tenure problems.

III. LAND TENURE REFORM

Land reform is a "deliberate act to change the existing land tenure."[158] It is commonly thought to only apply to agricultural land,[159] however, land reform applies to "changing the tenure situation of all real property."[160] Land reform is generally motivated by the need to "modernize agriculture or to redress inequalities in the distribution of land assets," or for a combination of these two reasons.[161] Land is redistributed, which often results in the government taking land from those who possess large amounts and giving it to poor, landless individuals.[162] This method of redistribution can significantly help a country's economy because it gives peasants the ability to make a living off the land.[163] It is important to note, however, that land reform can also result in subsistence farming.[164]

It is imperative that land reform programs are developed specifically for the country in need; there is no standard formula or method by which to reform land.[165] In general, land reform programs should have a system that allows

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156. Carrick, *supra* note 137.

157. *Id.*

158. DEKKER, *supra* note 7, at 77. Land reform is non-evolutionary. *Id.* Also, there is a difference between land reform and agrarian reform. *Id.* Agrarian reform is a "complex of changes in rural structure that occur as a matter of passing of time, as a governmental supported activity to assist farmers in achieving more efficient agricultural land use, but also always as part of land redistribution processes either on purpose or as a side-effect." *Id.* at 78. Agrarian reform is mostly used to fight rural poverty. *Id.*

159. *Id.* "Land reform is the deliberate act to change the existing land tenure in a rural area making it a non-evolutionary way to change land tenure." *Id.* at 77.

160. Peter Jacobs et al., *Land Redistribution*, PROGRAMME FOR LAND AND AGRARIAN STUDIES, Sept. 2003, at 1.

161. DEKKER, *supra* note 7, at 77. Evidence from some former communist countries indicates that large farms are not nearly as agriculturally productive as small farms. *Id.* at 79.

162. *Id.* at 78. Land reform usually occurs for political reasons and if carried out throughout the country generally needs the support of foreign donors for its funding. *Id.*

163. Jacobs et al., *supra* note 160, at 1.

164. Maura Andrew et al., *Land Use and Livelihoods*, PROGRAMME FOR LAND AND AGRARIAN STUDIES, Aug. 2003, at 1. Using land in this way is "generally viewed as wasteful, destructive and economically unproductive in comparison to commercial production systems." *Id.*

165. DEKKER, *supra* note 7, at 80. For this reason land reform programs are not completely comparable, nor can a successful land reform program in one country be expected to yield the

loans that use "land as collateral, and provide education to new farmers."[166] In addition, governments need to provide "physical infrastructure," such as roads and utilities.[167] It is also important for a country to use a "continuum of farmers' approach."[168] This approach recognizes "and supports a broad range of large and small-scale, full-time and part-time, as well as commercial, peasant and subsistence farmers."[169]

Land reform can provide stability and enable a country to prosper.[170] First, it provides these benefits by decreasing political conflict, thereby providing a country with political stability.[171] Without political stability land is often "misallocated," resulting in thousands of peasants without land and a viable source with which to support themselves.[172] Frequently, peasants' dissatisfaction with this situation results in the formation of groups that rebel against the country's government and its failure to provide them with land.[173] In an effort to maintain peace and political stability, many countries turn to land reform.[174] Another political reason to reform land is to "show the world" that a country is working toward economic and social development.[175] Second, land reform may provide a country with economic growth.[176] "Improved access to land [allows] the rural poor to make more productive use of family labor," which may stimulate a country's economy.[177] Studies indicate the more security there is in land tenure, the more farmers harvest.[178]

Two things must occur to successfully reduce poverty through the use of land reform.[179] First, "the poor must have access to the land; [second], the poor must be assisted with sufficient resources and an enabling institutional framework for them to base their livelihood on the land."[180] A land reform

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same results in another country. *Id.* at 105.

166. *Id.* at 81; *See, e.g.*, LAND REFORM IN ZIMBABWE: CONSTRAINTS AND PROSPECTS 129 (T.A.S. Bowyer-Bower & Colin Stoneman eds., 2000) [hereinafter LAND REFORM IN ZIMBABWE].

167. DEKKER, *supra* note 7, at 81. Roads are needed to allow new land owners "access to their fields and to transport cattle, harvests and crops." *Id.*

168. Andrew et al., *supra* note 164, at 1.

169. *Id.* The alternative approach is dualistic in nature and assumes farming is either commercial or subsistent in nature. *Id.*

170. DEKKER, *supra* note 7, at 82-83. Liberation theology is another motive suggested by Dekker, but it will not be discussed in this Note. For further discussion of this theory, see generally *id.* at 83-84.

171. *See* BEN CHIGARA, LAND REFORM POLICY: THE CHALLENGE OF HUMAN RIGHTS LAW 8 (2004). *See also* DEKKER, *supra* note 7, at 82.

172. *See* DEKKER, *supra* note 7, at 82.

173. *Id.* "Land reform in the 1960s was largely motivated by the fear of insurgencies and political unrest." *Id.*

174. *See id.* at 103.

175. *See id.*

176. *Id.* at 83.

177. *Id.*

178. *Id.*

179. TULANI SITHOLE & GOODHOPE RUSWA, ZIMBABWE'S LAND REFORM PROGRAMME: AN AUDIT OF THE PUBLIC PERCEPTION 2 (2003).

180. *Id.*

lacking either of these two components is likely to be unsuccessful in reducing poverty.[181]

Land reform cannot be expected to completely absolve a country of its problems.[182] Furthermore, land reform programs often come with criticism.[183] Thinking of land reform in strictly the agriculture sense, it is argued that "[t]he youth of most of the rural regions feel that anything is better than working on a small farm with all of its uncertainties like disappointing harvests, pests, credit debts, droughts [sic] etc."[184] These people find that the increasing importance of technology is decreasing the importance of land.[185] Also, many argue that private property is a "near-sacred [right]" that should not be taken away to redistribute to landless individuals.[186] Thus, it is important for a country to carefully ascertain the benefits that might be gained by land reform, but also keep in mind the detrimental effects associated with it.[187]

IV. LAND REFORM IN SOUTH AFRICA

A. *History of Dispossession*

South Africa's history "is marked by a series of incidents in which European settlers dispossessed indigenous South Africans of their land."[188] The course of dispossession occurred gradually; it first started in the mid-1600s when Dutch settlers invaded the Cape, and continued up until the twentieth century when Europeans began "[segregating] land ownership by race."[189] Initially, Africans "welcomed the settlers," but little did they realize that these settlers would soon oust them from their native lands.[190] By 1910, the British population had exponentially increased due to "the discovery of diamonds and gold in the late 1800s."[191] A government composed of white Europeans passed policies that restricted, and in some cases denied, Africans of their property rights.[192] Ultimately, these policies drove the Africans out of their land.[193]

In 1913, the Natives Land Act was enacted and proved to play a major

181. *Id.*
182. DEKKER, *supra* note 7, at 102.
183. *See id.* at 107.
184. *Id.*
185. *Id.*
186. *Id.* This is a natural law idea. *Id.*
187. *See generally id.* at 103-07 (evaluating land reform).
188. Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa*, 23 BROOK. J. INT'L L. 465, 468 (1997).
189. *Id.*
190. *Id.* at 470-71. Several wars were fought between European settlers and Africans. *Id.*
191. *Id.* at 471.
192. *Id.* at 472.
193. *Id.*

role in moving the region towards apartheid and segregation of the races.[194] This Act "set aside seven percent of the surface area of South Africa as reserves or scheduled areas as territories where only Blacks, who comprised more than seventy-five percent of the population, could purchase property."[195] The 1913 Act created a devastating situation for Africans, which was only slightly improved by the 1936 Native Land and Trust Act.[196] The 1936 Act "increased the land available for Black ownership to 13.6% of the country's surface area."[197] However, this increase in the amount of available land to Africans was accompanied by a provision denying Africans on the land reserves the right to obtain "direct ownership" of land.[198]

By 1948, South Africa was under apartheid and laws were "entrenched [with] White privilege."[199] Racial segregation was not only socially accepted, but it was legally mandated.[200] Apartheid was justified on the "basis of an ideology of White supremacy and the alleged racial inferiority of Africans."[201]

During the period between 1960 and 1983, white farmers and the government forcibly removed Africans from non-Native areas.[202] The reserves were transformed into the homelands and "Africans were banished" to this area, which was not large enough to sustain such a large population.[203] Essentially, Africans were treated as "foreigners in their own country."[204] It is estimated that during this time approximately 3.5 million Africans were removed from their home and deported to areas called the homelands.[205]

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194. *Id.*

195. *Id.* In addition, land transactions consisting of land outside of the reserves could not take place between Blacks and persons that were not Black. *Id.* at 472-73. This resulted in diminished opportunities for Africans to earn high incomes because they could not engage in sharecropping arrangements with White farmers. *Id.* at 473.

196. *See id.* at 475.

197. *Id.*

198. *Id.* "The [1936 Act] substituted individual land ownership with trust tenure by establishing the South African Development Trust, a government body which purchased land in the released areas for 'Black settlement.'" *Id.* Additionally, Parliament passed laws that "created racially segregated sections in the urban areas" and restricted African's abilities to obtain land in urban areas. *Id.* These laws were called the Urban Areas Consolidation Act of 1945. *Id.*

199. *Id.* at 476. *See also* CHIGARA, *supra* note 171, at 18-20.

200. Robinson, *supra* note 188, at 476. This situation occurred shortly after the National Party gained control of South Africa's government. *Id.* The National Party was able to maintain support by subsidizing "White farmers in exchange for their political loyalty." *Id.*

201. *Id.* During this time, a complicated system of racial classifications was developed. *Id.* Whites composed one racial group, while Blacks were broken into various different categories based on tribal affiliations. *Id.* 476-77.

202. *Id.*

203. *Id.*

204. *Id.* at 478.

205. *Id.* at 479. The land given to the Africans in the homelands in exchange for their homes was not an equivalent trade. *Id.* In the homelands there was a land shortage, which made it hard for Africans to obtain farm land. *Id.* at 480. This created high poverty rates in the homelands. *Id.* at 481.

In 1990, almost fifty years later, the apartheid government began to repeal statutes governing segregation.[206] By 1991, the Land Acts from 1913 and 1936 were repealed.[207] Shortly thereafter, a "multi-racial transitional government" formed to rid South Africa of apartheid.[208] In 1994, Nelson Mandela was elected president and by 1996 the country had adopted a new constitution.[209]

B. The Redistribution of Land

"The post-apartheid government . . . inherited the land problem, as well as" the dissatisfaction of Africans in South Africa.[210] The exclusion of apartheid laws in the late 1980s created "a massive movement of people from [neighboring] countries into South Africa"; this only added to the already immense land problems for the country.[211] However, South Africa acted fast to create solutions to the land problems facing the country.[212] In an effort to prevent an "economic meltdown," the government continued to encourage foreign investment while at the same time continuing efforts to provide land to the "landless" people of the country.[213] A land reform program was developed in 1994 with the goal to redistribute thirty percent of "agricultural land between 1994 and 1999 through restitution, redistribution, and tenure reform [programs]."[214]

The land tenure program did not prove to be as successful as the government had hoped; a mere forty-one out of 63,000 claims were settled.[215] Over half of South Africans are still "landless and need land."[216] Additionally, "[a]chieving greater equality in land ownership and improving the livelihoods of rural people" proved to be a huge challenge."[217]

There are many reasons advanced for the land reform program's failure.[218] One criticism is that the government has remained committed "to a neoliberal macroeconomic [program]," which has slowed efforts to redistribute land because the program relies on a "'willing buyer, willing seller'

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206. *Id.* at 482.

207. *Id.*

208. *Id. See also* Jacobs et al., *supra* note 160, at 1.

209. Robinson, *supra* note 188, at 483.

210. Mfaniseni Fana Sihlongonyane, *Land Occupations in South Africa*, *in* RECLAIMING THE LAND THE RESURGENCE OF RURAL MOVEMENTS IN AFRICA, ASIA AND LATIN AMERICA 142, 142 (Sam Moyo & Paris Yeros eds., 2005).

211. *See id.* at 146.

212. *See id.* at 150.

213. *See id.*

214. *Id.*

215. *Id.* A huge part of this problem is attributed "to the fact that after eight years of post-apartheid government, 55,000 farmers still own more than 80 per cent of the land, some of which is not being productively used." *Id.*

216. *Id.*

217. Jacobs et al., *supra* note 160, at 5.

218. Sihlongonyane, *supra* note 210, at 150-52. Note that women's' ability to purchase land is limited because the market is an area reserved predominantly for men. *Id.* at 151.

principle."[219] This approach presents a problem; land prices are often inflated and after a buyer purchases land they are left with few resources with which to improve the land by way of building homes and engaging in farm production.[220]

Another reason offered to explain the failure of land reform efforts is the lack of connectivity between the Department of Land Affairs (DLA) and other departments in the government.[221] Ultimately, this has resulted in land reform losing importance on the country's "political agenda."[222] There are various groups[223] maintaining efforts to resolve land issues; however, the fight for land reform is "fragmented."[224] The lack of cohesion and organization between these groups results in a lack of structure or coherent means by which to pursue goals to reform land in South Africa.[225]

Additionally, the government has by and large failed to consider the needs of its people.[226] Land reform should be applied gradually and flexibly, while at the same time keeping in mind those that are "intended to benefit" from the land reform programs.[227] Furthermore, it is argued that the failure to educate individuals in the area about land reform and the ways by which it should occur has aided in the failure of the program.[228]

V. LAND REFORM IN ZIMBABWE

A. *History of Dispossession*

In 1895, Zimbabwe was called Rhodesia, after Cecil Rhodes,[229] and was

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219. *Id.* at 150. This method is dependent on current owners voluntarily selling their land. Jacobs et al., *supra* note 155, at 3.

220. *See* Sihlongonyane, *supra* note 210, at 150. Furthermore, land is advertised as farm land, yet it has "low agroecological value" because it was destroyed by white farmers during apartheid. *Id.*

221. *Id.*

222. *Id.* "More fashionable and politically rewarding issues, such as HIV/AIDS, poverty and the environment" have taken precedent over land issues for NGOs (non-governmental organizations). *Id.* at 158.

223. *Id.* at 153. These groups include the Association of Rural Advancement (AFRA), the Surplus People's Project (SPP), the Transvaal Rural Action Committee (TRAC), and the Border Rural Committee (BRC). *Id.* These organizations are affiliated with one another through an organization now called the National Land Committee (NLC). *Id.*

224. *Id.* at 158.

225. *Id.*

226. *See id.* at 159. Instead the government has chosen to focus on the market aspect when dealing with land issues. *Id.*

227. *See* Martin Adams et al., *Land Tenure Reform and Rural Livelihoods in Southern Africa*, NAT. RESOURCES PERSPECTIVES (1999), *available at* www.odi.org.uk/nrp/39.html. For example, in some areas land seizure may be the best option, while in other places negotiation may be most appropriate. Sihlongonyane, *supra* note 210, at 159.

228. *Id.* at 160.

229. Country Review – Zimbabwe, EBSCO, www.iucat.edu.iu.edu (2005) [hereinafter

considered a "British sphere of influence" because the British South Africa Company (BSAC) administered development of the area.[230] By 1898, Britain required the BSAC to create communal areas for the native people of the land.[231] Thus, "Native Reserves" or "Communal Areas" were developed for the indigenous people.[232] Despite the limitations on the Native Reserves created for the indigenous people, there was still "adequate land for cultivation, grazing and watering."[233] As the BSAC began to realize that agriculture in Rhodesia could be highly profitable, however, it quickly began divesting the natives of lands and placing the land into the hands of white colonists.[234] By 1923, the number of white colonists had significantly increased, and they were given the choice to join the Union of South Africa or become "a separate entity within the British Empire."[235] They rejected incorporation with the Union of South Africa and, ultimately, the United Kingdom took possession of the area.[236] Rhodesia developed into "an internally self-governing colony with its own legislature, civil service, armed forces and police."[237]

In 1934, land apportionment acts created land reserved only for Europeans.[238] These acts enabled Europeans to take over almost one third of all the land in Rhodesia.[239] Britain pressured Rhodesia to implement majority rule;[240] however, Rhodesia "showed little willingness to accede to African demands for increased political participation."[241] In 1965, Ian Smith became the Prime Minister of Rhodesia and "declared white dominance would be preserved 'for a thousand years.'" Later that year, extensive negotiations took place between Britain and Rhodesia.[242] These negotiations, however, were fruitless and merely resulted in Prime Minister Smith issuing a "Unilateral

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Country Review]. Rhodes priginally moved to Africa as a teenager to live with his brother. MSN Encarta, Cecil Rhodes, http://encarta.msn.com/encyclopedia_761566082/Rhodes_Cecil_John.html (last visited Mar. 22, 2007). In 1870, "[d]iamond fields were discovered" in the area "and Rhodes became a diamond prospector. By the time he was 19 years old he had accumulated a large fortune." *Id.* Rhodes later became one of the "main promoters of British rule in southern Africa." *Id.*

230. *Id.* Rhodes was able to procure a "concession for mineral rights from local chiefs." *Id.*

231. Arnold Sibanda, The Millennium Land Policy and the Economics of Farm Occupations by War Veterans in Zimbabwe 3 (Working Paper, June 2000).

232. *Id.*

233. *Id.*

234. *Id.* at 3; *see also* Country Review, *supra* note 229, at 7.

235. Country Review, *supra* note 229, at 7.

236. *Id.*

237. *Id.*

238. *Id.* Essentially, Whites had "'their pick of the land.'" BERTUS DE VILLIERS, LAND REFORM: ISSUES AND CHALLENGES 5 (2003).

239. Country Review, *supra* note 229, at 8. It is estimated that "[b]y the end of colonial rule 42% of the country was owned by 6,000 [white] commercial farmers." DE VILLIERS, *supra* note 238, at 6.

240. Country Review, *supra* note 229, at 8.

241. *Id.*

242. *Id.*

Declaration of Independence (UDI) from the United Kingdom."[243]

The native Africans of the area grew weary about their minority status and lack of political participation and formed groups in an effort to end colonialism.[244] Two of these important groups were the nationalist Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU).[245] Prior groups focused on political activity, but these new organizations instead concentrated on military activity.[246] In late 1965, the United Nations intervened and declared UDI illegal.[247] In late 1966, the United Nations for the first time "imposed mandatory economic sanctions on a state" when it prohibited most trade and investment with Rhodesia.[248]

Because of pressure from "embargo-related economic hardships" and "anti-government guerilla activity" by ZAPU and ZANU, Prime Minister Smith agreed to majority rule and to meet with Black Nationalist leaders in Geneva in 1976.[249] By April 1979, the first black Prime Minister, Bishop Muzorewa, was elected to "Zimbabwe-Rhodesia."

The Lancaster House agreement, signed on December 21, 1979, called for a "ceasefire, new elections, a transition period under British rule and a new constitution implementing majority rule while protecting minority rights."[250] In addition, the "agreement held that the country's name would be Zimbabwe."[251] Robert Mugabe won the elections in 1980 and formed "Zimbabwe's first government."[252] Prime Minister Mugabe stated that "his government would begin investigating ways of reversing past discriminatory policies in land distribution, education, employment, and wages."[253]

B. Land Reform

"Since 1890 up to today, the land question has singularly had the most significant impact on Zimbabwe's political and economic history."[254] Most recently, the Land Resettlement Program, developed after Zimbabwe's

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243. *Id.* "The British government considered the UDI unconstitutional and illegal but at the same time made clear it would not use force to quell the rebellion." *Id.*

244. *See id.*

245. *Id.*

246. *Id.*

247. *Id.* Britain "imposed sanctions on Rhodesia and requested other nations to do the same." *Id.*

248. *Id.*

249. *Id.* at 8-9. The Black leaders in Geneva included the leaders of ZAPU and ZANU and leaders of other organizations. *Id.* at 9. The guerilla conflict resulted in the deaths of over 20,000 people in the years between 1972 and 1979. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. LAND REFORM IN ZIMBABWE, *supra* note 166, at 187. In 1888, Rhodesia "was proclaimed a British sphere of influence," which was a monumental event in the country's history. Country Review, *supra* note 229, at 7.

independence in 1980, has had mixed reviews.[255] One position is that the program has "resulted in one of Africa's most successful examples of land redistribution."[256] The other position is that the land reform program in Zimbabwe has been disastrous to the country and its economy.[257] According to some sources, a total of over 3.5 million hectares of land have been resettled.[258] But, "[t]here is considerable controversy on the number of people who have [actually] been allocated land."[259]

Between the years of 1980 and 1990, Zimbabwe adhered to a model based upon a "'willing-buyer, willing seller' basis," which was an idea based on the Lancaster House Agreement.[260] During the 1980s, the country had a goal to resettle approximately 162,000 families.[261] Despite the country's success in resettling approximately "58,000 [families] on 3 million hectares of land, [and] reducing the white commercial farming sector to . . . 29 per cent of agricultural land," the country fell short of its goal.[262] Furthermore, a survey of people resettled onto new land found that those people regarded it as a "'mixed blessing', and [for the] most [part] felt their families were worse off than those" still living in communal areas.[263]

Shortly thereafter, the 1992 Land Act passed; this Act introduced procedural changes, reduced the size of farms, and created a land tax.[264] The Act was created in response to criticisms brought in the 1980s that land reform was progressing slowly due to its basis on market-driven land reform.[265] With this new Act, however, came new criticisms.[266] These new criticisms focused on the impacts of land reform on the economy, and "argument [ensued] over who was receiving the land."[267] Evidence indicates that many people who received land during this time were "political associates and supporters" of

255. *See* SITHOLE & RUSWA, *supra* note 179.

256. LAND REFORM IN ZIMBABWE, *supra* note 166, at 187.

257. *See* SITHOLE & RUSWA, *supra* note 179.

258. DE VILLIERS, *supra* note 238, at 20.

259. SITHOLE & RUSWA, *supra* note 179, at 10.

260. LAND REFORM IN ZIMBABWE, *supra* note 166, at 2.

261. Sihlongonyane, *supra* note 210, at 173. "The 1979 Lancaster House Agreement had provisions that restricted the government from acquiring land for a period of 10 years." SITHOLE & RUSWA, *supra* note 179, at 1.

262. Sihlongonyane, *supra* note 210, at 173. Furthermore, it is important to note that the land resettled this time was primarily of "low agro-ecological value." *Id.* Additionally, some of the land acquired during this time was "land that had been abandoned by white landowners in liberated zones of the war, and hence was more easily acquirable." *Id.* at 183.

263. LAND REFORM IN ZIMBABWE, *supra* note 166, at 119.

264. *Id.* at 2. One procedural change was for land acquisition to be compulsory. *Id.* In addition, there was "less certainty over what compensation would be paid for land acquired." *Id.* However, there was still legislation that enabled landowners legal recourse and the "willing-buyer, willing seller method" was not renounced. Sihlongonyane, *supra* note 210, at 176.

265. Sihlongonyane, *supra* note 210, at 176.

266. LAND REFORM IN ZIMBABWE, *supra* note 166, at 2.

267. *Id.*

Zimbabwe's prime minister, Robert Mugabe.[268] This claim was confirmed when the Utete Commission[269] was appointed and there was a call for "ruling party 'chiefs', who were largely the multiple farm owners, to surrender additional farms."[270] This order showed that it was not "ordinary poor people" who were reaping the benefits of the land reform program. Instead it was the region's elite and those with political connections who were the primary beneficiaries of the recent land reforms.[271]

By 1997, the economy of Zimbabwe was in sharp decline.[272] A conference with donors to Zimbabwe's land reform program was held in 1998 to determine methods by which to "provide land to the landless."[273] At the conference, it was decided that Zimbabwe would "proceed with both compulsory and market acquisition" methods of obtaining land.[274] The government failed to follow through with these objectives and little occurred between 1998 and 2000 to accelerate land reform.[275] Despite this stagnant period, land reform quickly was back on track a short time later; by 2002 the government claimed it had "compulsorily acquired some 10 million hectares of land – approximately 90% of white commercial farmland – and redistributed most of it to 127,000 peasant households and 8,000 middle capitalist farmers."[276]

Despite numbers and statistics given by the Zimbabwe government that tend to indicate the land reform program was successful, the opinions of ordinary Zimbabweans generally indicate a very different view.[277] A survey[278] in 2003 identified many shortcomings and problems associated with the land reform program in Zimbabwe. First, "the majority of beneficiaries" of the land reform program were people between the ages of forty and fifty.[279] Individuals

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268. *Id.*

269. *See generally* SITHOLE & RUSWA, *supra* note 179.

270. *Id.* at 10.

271. *Id.*

272. Sihlongonyane, *supra* note 210, at 187.

273. LAND REFORM IN ZIMBABWE, *supra* note 166, at 47.

274. Sihlongonyane, *supra* note 210, at 187.

275. *Id.* The government continued to ask the people without land to wait. *Id.*

276. *Id.* at 188. The country's land reform policies in the late 1990s and early 2000s have been highly criticized because these policies involve a "framework that enables the taking of land without due process." DE VILLIERS, *supra* note 238, at 20-21. In addition, thousands of farms are occupied by rebel groups and the country has failed to address this problem. *Id.* "[T]he government has revised the constitution and amended legislation in order to allow it to acquire commercial farms compulsorily and without compensation." Human Rights Watch, *Fast Track Land Reform in Zimbabwe* (2002), *available at* http://www.hrw.org/reports/2002/zimbabwe/.

277. *See generally*, SITHOLE & RUSWA, *supra* note 179.

278. *Id.* at 2. The survey was distributed randomly to 1445 people. *Id.* It was "divided between males and females and between urban and rural residential areas in proportion to their percentages in the national population." *Id.* The major limitation of the survey was that people were reluctant to answer some of the questions because of fear of government retaliation. *Id.*

279. *Id.* at 11.

between the ages of eighteen and twenty-four, the future generation of the country, received the least amount of land.[280] Second, survey participants indicated that land may have been allocated, but that it was not actually occupied.[281] There are several reasons why individuals failed to occupy allocated land: lack of resources, poor infrastructure, drought, government corruption, and court disputes.[282] Third, "one of the strongest criticisms of the land reform process in Zimbabwe was its negative effect on production."[283] Lastly, many people believed and still continue to believe that the decline in the country's economy is a direct result of the failed land reform program.[284]

Likewise, a report produced in 2000 described the situation in Zimbabwe as a country in complete despair. Specifically, it reported that the land reform program was without regard for "law, order and authority."[285] The report noted the "key industrial index of the Zimbabwe Stock Exchange (ZSE) sunk to a 4 month low" during March of 2000.[286] Furthermore, there were a number of farm occupations occurring and most foreign aid from donor countries had been suspended.[287] With regard to farm occupations, in 2001, a white farmer reported to CNN that "150 black demonstrators overran his farm . . . they [seized] the land and warned him not to plant any new crops. . . [t]he occupiers [planted] almost 90 percent of his fields . . . and [t]he future of his farm and the more than 300 people he [employed hung] in the balance."[288] This is just one example of over two thousand farm occupations that have occurred.[289]

There are still many discrepancies in the degree of success of Zimbabwe's land reform program. If the data and statistics released by the government are accurate, then the Land Resettlement Program in Zimbabwe is "one of Africa's most successful examples of land redistribution."[290] Yet, surveys and accounts by people living in Zimbabwe suggest something quite

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280. *Id.*

281. *Id.* at 13.

282. *Id.* Allocated land often was not occupied because of legal complexities, which resulted in court litigation. *Id.* This left "farmers reluctant to occupy and invest on the farms." *Id.*

283. *Id.* at 15. There are many reasons for loss of production: "non availability of fuel," farmers' inability to receive credit, and "lack of farming skills among the resettled farmers." *Id.*

284. *Id.* at 26. The Utete Commission, however, contends that the "economic problems in Zimbabwe are not linked to the fast track land reform exercise." *Id.*

285. Sibanda, *supra* note 231, at 11. But see Bob Coen, *Zimbabwe's Land Reform Still Controversial*, CNN, Feb. 9, 2001, http://archives.cnn.com/2001/WORLD/africa/02/09/inside.africa, reporting that "[t]he government says the program is organized and sustainable."

286. Sibanda, *supra* note 231, at 11.

287. *Id.*

288. Coen, *supra* note 285 (noting the "government [denied] any involvement in the lawlessness on farms like" the one described in the text). *Id.*

289. *Id.*

290. LAND REFORM IN ZIMBABWE, *supra* note 166, at 187 (finding "[n]o other African country has acquired [3.3 million hectares] of land from private landowners and re-distributed it to the poor and landless."). *Id.*

different, painting a picture of mass devastation directly linked to the implementation of land reform.[291]

Nevertheless, many Zimbabweans believe that land reform and redistribution was necessary and remains necessary for the future of the country.[292] But, land reform programs and redistribution of land in the future will have to use new methods.[293] Many Zimbabweans found that the Land Resettlement Program was carried out in a way that tended to "punish whites" and enrich those politically aligned with Prime Minister Mugabe.[294] Additionally, land occupations were found to be a negative aspect of land reform in Zimbabwe. Land occupations began after the 1998 conference and resulted in "over a hundred politically related deaths between 2000 and 2002."[295]

Zimbabwe continues to suffer with "inequities in land distribution, poverty, and unemployment problems."[296] Even if the land reform program is not the sole cause of Zimbabwe's economic problems, it has certainly "exacerbated" the problem and consequently "decreased agricultural production and tourism revenues" for the country.[297]

VI. MEASURES ALREADY TAKEN TO RESOLVE LAND ISSUES IN EAST TIMOR

East Timor has already started the process of resolving land issues.[298] The country adopted its constitution on March 22, 2002.[299] In its Constitution, East Timor provided a safeguard to ensure land for East Timorese by "reserv[ing] land ownership for East Timor citizens only."[300]

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291. *See generally* SITHOLE AND RUSWA, *supra* note 179.

292. *Id.* at 16.

293. *Id.*; see also Robin Palmer, *Mugabe's Land Grab in Regional Perspective*, Conference on Land Reform in Zimbabwe – The way Forward, at 1, for the following list of problems associated with the land reform program in Zimbabwe: "[l]ack of funds, lack of planning, lack of capacity, [and] lack of accountability."

294. SITHOLE AND RUSWA, *supra* note 179, at 16.

295. *Id.* at 187-88. Land occupations grew much stronger in 2000. *Id.* at 190. The occupations "focused on white farms, but also sporadically on farms owned by black capitalists and the political elite." *Id.* See also *Fast Track Land Reform in Zimbabwe*, *supra* note 276, stating "[t]he police have done little to halt such violence, and in some cases are directly implicated in the abuses." *Id.*

296. The World Bank, Zimbabwe – Country Brief, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/ZIMBABWEEXTN/0,,menuPK:375746~pagePK:141132~piPK:141107~theSitePK:375736,00.html (last visited Mar. 22, 2007) [hereinafter World Bank Website].

297. *Id.*

298. *See, e.g.*, XAVIER, *supra* note 75.

299. CONST. OF THE DEMOCRATIC REPUBLIC OF E. TIMOR (2002).

300. USAID/East Timor, New Computer Database Helps Sort Land Claims Appraisal, (Dec. 14, 2004), http://timor-leste.usaid.gov/PrintVersion/EGArchive17Print.htm [hereinafter New Computer Database]; *see also* CONST. OF THE DEMOCRATIC REPUBLIC OF E. TIMOR § 54.

In March 2003, the government implemented Law 1/2003 that designated the Ministry of Justice's Directorate of Land and Property (DNTP) as the department having authority over land and property matters in East Timor.[301] Additionally, this law mandated a timeframe in which land claims were to be made.[302] March 2004 served as the deadline for land claims.[303] In December 2004, a database was developed to help resolve the over 10,000 claims for land that were filed.[304] The database enables DNTP to analyze the various claims and determine "overlapping or conflicting" claims.[305] DNTP has been able to solve approximately fifty claims for land.[306]

In February 2004, a report by the Timor-Leste Land Law Program, entitled "A Legal Framework on Land Dispute Mediation," was released to the government.[307] This report provided the government with "extensive data, detailed analysis, and a mediation mechanism for land disputes based on field research in all 13 of East Timor's districts, more than a third of its sub-districts, and 10 percent of its villages."[308] Additionally, an organization called Land Law Program of Associates in Rural Development, Inc. (ARD), was formed to assist East Timor in establishing a "land-tenure research center."[309]

In December 2004 and September 2005, the East Timorese government passed laws regarding the leasing of land.[310] Specifically, these laws set "the minimum conditions of lease agreements of private property between individuals."[311] These laws were necessary due to the lack of certainty in protection of private property and the government's inability to resolve the thousands of land claims.[312] Thus, the country is engaging in the leasing of

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301. XAVIER, *supra* note 75. The DNTP's duties include: "legislation and policy proposals, land dispute resolutions, administration of state land assets (immovable property), administration of abandoned property, cadastral survey and mapping, land registry (titles office), valuation and future taxation, [and] national mapping." *Id.* In Portugal the DNTP is Direccão Nacional de Terras e Propriedades in Portuguese. *Id.*

302. *Id.*

303. New Computer Database, *supra* note 300.

304. *Id.* Approximately 5781 claims came from people in East Timor, and 6548 claims came from people in Indonesia. Xavier, *supra* note 75.

305. New Computer Database, *supra* note 300.

306. *Id.*

307. TIMOR-LESTE LAND LAW PROGRAM, REPORT ON RESEARCH FINDINGS AND POLICY RECOMMENDATIONS FOR A LEGAL FRAMEWORK FOR LAND DISPUTE MEDIATION (2004), http://www.jsmp.minihub.org/Traditional%20Justice/Reports/LLP_Mediation%20Report/LLP MediationReportEnglish.pdf [hereinafter A LEGAL FRAMEWORK]; *see also* USAID/East Timor, New Study Documents Land Dispute Mediation, (Apr. 9, 2004), http://timor-leste.usaid.gov/EGHighlightsArchives/EGArchive9.htm [hereinafter New Study].

308. USAID/East Timor, Report Findings Help the Government Tackle Land Dispute Legislation, (May 5, 2004), http://timor-leste.usaid.gov/EGHighlightsArchives/EGArchive10.htm [hereinafter Report Findings Help].

309. New Study, *supra* note 307.

310. XAVIER, *supra* note 75.

311. *Id.*

312. *See generally id.*

property until land ownership can be ascertained.[313] The conditions for a lease agreement are: "[r]esidential use; [n]ational citizen; [p]roperty occupancy since 2000; [d]eveloped property; . . . automatic [m]onthly rent of US $10 [sic] (ten American dollars); 1 year lease agreement," with automatic renewal for an additional year.[314]

In the future, East Timor anticipates restoring private property, but first must determine which land titles it will recognize.[315] Furthermore, the East Timor government realizes that it needs to become a self-sufficient country: since "[d]uring the Indonesian occupation, East Timor was a dependent economy."[316] This requires that East Timor restore its agricultural abilities; "for the past 3 decades the economy of East Timor has been structured in such a way so it has not been self-sufficient even in food."[317] The country is looking forward to the future and anticipating a time when it will no longer receive donor assistance.[318] Senior economist Jose Garcia-Medrano stated that "donor assistance will be replaced in part by" oil and gas revenues.[319]

VII. RATIONALES FOR LAND REFORM IN EAST TIMOR

Even though East Timor has implemented different programs and departments to begin resolving land claim conflicts, it is unclear if the methods the country is engaging in are long-term fixes or short-term solutions.[320] "Land reform is a long-term process" that might allow East Timor to reap long-term benefits.[321] Although land reform has not been successful everywhere, it has had positive effects on the state of land tenure in many areas.[322] Because East Timor land tenure systems are in a state of chaos, land reform might be the best

313. *See id.*

314. *Id.*

315. *See generally* FITZPATRICK, *supra* note 7, at 2.

316. Stephanie Fahey, *The Future of East Timor: Threats and Opportunities for Economic Development of a Small Island State*, UNIVERSIDADE NOVA DE LISBOA SYMP. ON E. TIMOR, INDON. AND THE REGION (2000), http://www.riap.usyd.edu.au/research/publications/ETimor.htm.

317. *Id.*

318. USAID/East Timor, Macroeconomics Policies Promote Economic Growth and Poverty Reduction, (Dec. 16, 2004), http://timor-leste.usaid.gov/EGHighlightsArchives/EGArchive18.htm [hereinafter Macroeconomics Policies].

319. *Id.* Garcia-Medrano notes that East Timor faces the challenge of conserving its resources of gas and oil, so as to save the resource for future generations. *Id.* In 2000, East Timor signed an agreement with American, Japanese, and Australian oil companies. Gunn, *supra* note 22, at 239. Drilling was to begin in 2004. *Id.* This was the "largest investment ever made in East Timor" to date and provided a "$1.4 billion investment in gas recycling." *Id.*

320. *See, e.g.*, XAVIER, *supra* note 75.

321. LAND REFORM IN ZIMBABWE, *supra* note 166, at 188. "[It] is important that the work that we do in this field is not wasted in short term measures, and that we think clearly about leveraging the short term interventions we make into longer term impacts." LEWIS, *supra* note 59, at 14.

322. *See* DEKKER, *supra* note 7, at 79, 103; *see also id.* at 88-102 (explaining land reform programs in various regions of the world).

solution.[323]

It is important to remember that land reform programs should be created specifically for a country in order to fit that country's unique needs.[324] East Timor can learn plenty from other countries that have engaged in land reform.[325] The failures experienced by Zimbabwe and South Africa can help to indicate the shortcomings of certain methodologies.[326] Furthermore, the successes of these countries demonstrate what could potentially work well for East Timor.[327]

Regardless of which country's methods East Timor chooses to study when ascertaining ways to resolve its land problems, it should consider land reform as a viable option.[328] Moreover, the country needs to bear in mind that short-term fixes are not the best solution.[329] An unstable land tenure system will continually inhibit the country from sustaining prosperous economic and social conditions because "'nothing evokes deeper passions or gives rise to more bloodshed than do disagreements about territory, boundaries, or access to land resources.'"[330]

A. The Ways East Timor Could Benefit from Land Reform

The benefits that East Timor could reap from land reform are plentiful.[331] On the most basic level, land reform could serve "to resolve the overlapping and competing tenure rights of people" by redistributing the land.[332] Thus, East Timor's dilemma of ascertaining what land title claim to recognize could be solved by land reform.[333]

A redistribution of the country's land would provide property ownership to a large number of peasants who are currently illegally possessing land.[334] Redistribution could also result in a more equal distribution of land.[335] This would likely prevent militia and rebel upheaval in the future; evidence indicates that militia violence often occurs because of inequality of land ownership or

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323. *See generally* FITZPATRICK, *supra* note 7. *Contra* FITZPATRICK, *supra* note 12 (finding that the creation of a new system of land tenure may not be the best option).

324. *See generally* DEKKER, *supra* note 7, at 78.

325. See *id.* at 88-102 for a discussion of land reform programs implemented in other countries.

326. *See generally* Sihlongonyane, *supra* note 210.

327. *See supra* pp. 23-43.

328. *Contra* FITZPATRICK, *supra* note 12 (discussing the disadvantages of land reform).

329. *See* LEWIS, *supra* note 59, at 14.

330. *Id.* at 5. "Post-conflict experiences regularly demonstrate that land and property issues can provoke secondary conflicts." *Id.*

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

332. LUNGISILE NTSEBEZA, LAND TENURE REFORM, TRADITIONAL AUTHORITIES AND RURAL LOCAL GOVERNMENT IN POST-APARTHEID SOUTH AFRICA: CASE STUDIES FROM THE EASTERN CAPE 39 (1999).

333. *See id.*

334. *See id.*

335. DEKKER, *supra* note 7, at 77.

lack of access to land.[336] Additionally, a redistribution of land would enable the country to make good use of abandoned land.[337]

Economically, land reform could help the country become more self-sufficient.[338] Traditionally, East Timor has been an agricultural country,[339] however, it failed to meet its agricultural potential during the Indonesian occupation.[340] The country must start harvesting more crops, not only to provide food for East Timorese, but also to potentially export to other countries.[341] For example, coffee is East Timor's "main potential export crop . . . [but] coffee trees have not been adequately cared for over the past 20 years."[342] Approximately 20,000 of East Timor's 30,000 hectares of coffee plantations were "taken over by the Indonesian government" or were put in the hands of large companies.[343] The lack of certainty surrounding land titles has had a momentous effect on East Timor's prominent export product.[344]

Additionally, "East Timor has the capacity and experience to produce livestock for export."[345] Studies demonstrate that people with certainty of land title use the land more efficiently.[346] By redistributing the land, placing individuals on property, and granting these individuals legal title to property, the country's agricultural strength might be restored.[347] East Timor's economy will also benefit from foreign investment;[348] however, foreign investors do not want to enter a country where land title is uncertain.[349] Land reform can provide this certainty.[350]

There are numerous benefits that can derive from land reform.[351] First, it is important to understand the needs of the country when creating a land reform program.[352] Specifically, East Timor has a large amount of communal land,[353] so the country must be sensitive in attempting to title this land.[354] The

336. *See, e.g.*, LAND REFORM IN ZIMBABWE, *supra* note 166, at 8.

337. FITZPATRICK, *supra* note 12.

338. *See, e.g.*, Gunn, *supra* note 22, at 238.

339. Fahey, *supra* note 316; *see also* Gunn, *supra* note 22, at 238 (noting there is an "untapped potential in the agricultural sector").

340. *See* LEWIS, *supra* note 59, at 9.

341. Gunn, *supra* note 22, at 237-38.

342. Fahey, *supra* note 316.

343. Gunn, *supra* note 22, at 238.

344. *Id.*

345. *Id.* East Timor has a "vast southern rangeland" that is ideal for producing livestock. *Id.*

346. *See* FITZPATRICK, *supra* note 7, at 169.

347. *See id.* at 169-70.

348. *Id.*

349. *See supra* note 139 and accompanying text.

350. *See* NTSEBEZA, *supra* note 332, at 39.

351. See DEKKER, *supra* note 7, at 103, for a discussion of "[i]mpressive land reforms [that] were carried out in Japan, Taiwan, South Korea, Egypt, Iraq, and Israel."

352. *Id.* at 80.

353. FITZPATRICK, *supra* note 7, at 167.

354. *See generally id.* (discussing the different land titles that East Timor could recognize).

successes and failures of other countries' land reform programs can help provide information as to how land reformation should be accomplished.

B. Lessons Learned from South Africa

A major problem in South Africa's land reform program was a lack of connectivity with other departments in the government.[355] This demonstrates the need to weave a land reform program into different governmental departments and agencies.[356] To avoid the problem encountered by South Africa, East Timor should take active measures to ensure that the Directorate of Land and Property (DNTP) remains closely associated with other departments in the government.[357]

Additionally, the land reform program could require departments other than the DNTP to perform certain functions or duties relating to land reform.[358] Ultimately, this would ensure that the land problems facing the country do not disappear from the country's agenda.[359] To date, it appears that resolving land issues has been an important task for East Timor officials; they have continually sought out new laws and organizations to help resolve these problems.[360] Still, measures should be taken to ensure that the land tenure system remains of utmost importance.

South Africa's land reform program failed to take into account poverty, food shortage, and unemployment.[361] Instead, the country focused solely on resettling families with no concern for how these families would survive once on the land.[362] East Timor can learn from this deficiency within the South African land reform program. To prevent people from obtaining property without proper funding to build a house or work the land, money from foreign donors could be loaned to new land owners through a loan system using the "land as collateral."[363] In addition, programs could be implemented to teach new landowners, specifically new farmers, how to use their land productively and in ways that do not ruin the land.[364] By providing this service to new landowners, food shortages could be prevented, ultimately helping the economy and decreasing poverty in East Timor.[365]

As a whole, the land reform system in South Africa did not consider the

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355. Sihlongonyane, *supra* note 210, at 151.

356. *See id.*

357. *See generally supra* p. 27 (explaining South Africa's problems with government departments not remaining connected with one another).

358. *See, e.g.*, Sihlongonyane, *supra* note 210, at 151.

359. *See generally id.*

360. *See* XAVIER, *supra* note 75.

361. Sihlongonyane, *supra* note 210, at 151. Zimbabwe also experienced this problem. LAND REFORM IN ZIMBABWE, *supra* note 166, at 187-88.

362. Sihlongonyane, *supra* note 210, at 151.

363. DEKKER, *supra* note 7, at 81 (making this suggestion).

364. *Id.* at 81; *see also* LAND REFORM IN ZIMBABWE, *supra* note 166, at 127.

365. *See* DEKKER, *supra* note 7, at 81.

needs of its people.[366] Instead, it attempted to apply one uniform method across the entire region.[367] Certain areas often may require specific, individualized methods to solve land disputes, be it through negotiation, mediation, or land seizure.[368] The failure to employ the correct method can result in a tense environment;[369] evidence exists that indicates East Timor is cognizant of this problem.[370] In February 2004, the Timor-Leste Land Law Program released an extensive report on different policies to handle land disputes.[371] The research considered the culture, subjects, and geographic nature of many different regions in the country when suggesting methods to mediate land disputes.[372]

Overall, it looks as if East Timor has already taken into account many issues that South Africa failed to address.[373] It is important, however, for East Timor to continue its efforts. Additionally, if the country were to create a land reform program, it would be important for it to integrate its current efforts into the program.

C. Lessons Learned from Zimbabwe

Zimbabwe's land reform program has been widely criticized because it takes a "top-down, directive, controlling approach which assumes that officials know best and that peasants and pastoralists need to be told what is best for them."[374] Thus, it has been suggested that consultations should take place prior to the commencement of a land reform program. Such consultations should take place with the "commercial farmers, the landless, traditional chiefs, prospective farmers, financial institutions, farmers' union and industry."[375] Consultations would enable more people to have a voice and give the government a better idea of the interests of everyone involved.[376]

Zimbabwean surveys indicate the methods and procedures of land selection were unfairly discriminatory.[377] Many argue that political allies of Prime Minister Mugabe have been the primary beneficiaries.[378] East Timor could avoid this problem by implementing an impartial lottery system or some other methodology, which does not give preference to the elite and political

366. Sihlongonyane, *supra* note 210, at 159.
367. *Id.*
368. *Id.*
369. DEKKER, *supra* note 7, at 102-07.
370. *See, e.g.*, XAVIER, *supra* note 75.
371. A LEGAL FRAMEWORK, *supra* note 307. The research for this report was funded by USAID. *Id.*
372. *Id.*
373. *See generally* Xavier, *supra* note 75 (providing new laws and polices implemented by East Timor).
374. Palmer, *supra* note 293, at 5.
375. SITHOLE & RUSWA, *supra* note 179, at 30.
376. *See generally id.*
377. *See generally id.*
378. *Id.* at 10.

allies of those in power.[379]

Zimbabwe made a major mistake at the outset of its land reform program.[380] The Zimbabwe government set unrealistic goals; the "targets were virtually plucked from the air with little account of the practicality thereof."[381] The unrealistic targets came back "to haunt the Zimbabwean government."[382] It appeared as if Zimbabwe was accomplishing very little because the results never matched the goals.[383] Therefore, it is important to carefully study a country's potential before making announcements of projected targets.[384]

Many people criticized Zimbabwe's efforts to boost its economy by placing restrictions and requirements on resettled lands.[385] Such requirements were often placed on new landowners to produce certain products and to refrain from certain uses of the land, and leases were contingent upon adherence to these requirements.[386] The new landowners felt they should not have had to grow specified products for public market.[387] In addition, many disliked that land was only leased and not sold outright.[388] These lessees thought it was unfair to place contingencies on their ability to remain on the land.[389] Zimbabwe's preferred reasons for placing restrictions and requirements on resettled land was to avoid an "economic and environmental disaster" that many critics of the land reform program predicted would occur.[390]

East Timor could avoid these criticisms by restricting the use of land for the first year or two of occupancy and thereafter allow individuals to grow products of their choice.[391] During this initial period, ownership could be contingent upon following restrictions and requirements, but after the initial period complete ownership could vest in those occupying the land. By employing this type of system, the government could monitor the economy for a period of time, while still providing individuals the freedom to produce products of their choice. These suggestions should be considered by East Timor when determining the best way to address these issues.[392]

Some ideological arguments regarding land reform in Zimbabwe center

379. *See generally id.*

380. *See* DE VILLIERS, *supra* note 238, at 11.

381. *Id.*

382. *Id.*

383. *Id.* South Africa was cognizant of this idea and carefully assessed its land reform programs' abilities before announcing outrageous goals. *See id.* at 81.

384. *See id.* at 81.

385. LAND REFORM IN ZIMBABWE, *supra* note 166, at 127-28.

386. *Id.* at 128. *See also* RICHARDSON, *supra* note 79, at 145 (finding that when the government owns land and merely leases it, people "are vulnerable to non-renewal at any time").

387. *See* LAND REFORM IN ZIMBABWE, *supra* note 166, at 127-28.

388. *Id.* at 128.

389. *Id.*

390. *Id.* at 127.

391. *See, e.g., id.* at 126.

392. *See generally id.*

on the idea "that private property is a near-sacred right" and should not be taken away from landowners to redistribute to landless individuals.[393] The main counterargument to this position is that private property is considered "the status of foundation of a just and civilized society."[394] To hold this promise means to accept "that private property cannot perform this noble function if most people are without it!"[395]

Both Zimbabwe and South Africa were able to "mobilize funds from donors, philanthropists and other well wishers, and ultimately from the local financial market."[396] This will likely aid them in buying land and providing various programs.[397] The success of any land reform program is dependant upon a country's ability to finance it with the help of donors.[398] Thus, if possible it would also be extremely advantageous for East Timor to obtain financial assistance from donors before implementing land reform.

CONCLUSION

Currently, East Timor's land tenure system is in a state of chaos with conflicting land titles, squatters, large amounts of abandoned property, and massive destruction of homes and infrastructure. There are presently four different types of land claims being brought, and the country is faced with the difficult task of determining which titles to recognize. While all four land claims have a basis for recognition under certain legal principles, not all claims should be recognized for a different set of equitable reasons. Choosing any one type of land claim could result in a magnitude of difficulties.

East Timor has begun to study its land problems and execute new land laws, but it still has a long and difficult road ahead. Many of the purported solutions currently being implemented might only have short-term beneficial effects. Land reform may be the best option for the country, but East Timor must remember that "[l]and reform is a long-term process, not an event."[399] Reforming the land system could greatly help the country's economy, as well as lead to a more equitable redistribution of land. There is, however, no set method or program for reforming land that can be adopted. Instead East Timor must develop a program that specifically fits the needs of its people.[400]

393. *Id.* at 188.
394. *Id.*
395. *Id.*
396. *Id.* at 191-92.
397. *See id.*
398. *See id.*
399. *Id.* at 188.
400. "The challenge for East Timor is to recapture its own identity allowing for the judicious absorption of remnants of the Portuguese and Indonesian administrations in the form of language, religion and other behavioural codes." Fahey, *supra* note 316.

THE CENTRAL AMERICAN FREE TRADE AGREEMENT AND THE DECLINE OF U.S. MANUFACTURING

Christina Laun*

I. INTRODUCTION

Imagine being a middle-class American working in a factory in a Midwestern community earning an average salary of about $50,000 per year, including full health benefits and a retirement pension. You have a high school diploma, but no further education. You also have a spouse and four children. Two of your children are attending college universities, but you earn enough in a year to have a comfortable standard of living. One day, your floor manager holds a meeting explaining to every employee in your division that management has decided to lay off all of its factory workers because it is moving its manufacturing operations offshore. Management explains that the layoffs are necessary for your employer to compete with companies offering comparable products at a much lower price. In a matter of minutes, you see all of your hard-work and dreams fall apart due to forces beyond your control. You no longer have a job, health insurance, or a retirement pension. You have no other experience or higher education; your career choices are limited. Ultimately, you resort to taking a lower-paying service sector job.

This fictitious account is similar to stories originating out of Canton, Ohio.[1] For many years, Canton was a booming, industrial city and home to a number of companies, such as Maytag.[2] In the past few years, however, Canton's economy has been hit hard with factory closings, bankruptcies, and layoffs; it is no longer considered an industrial city.[3] Many displaced Canton factory workers are unemployed, while others have resorted to lower-paying service jobs, such as hospital aides.[4]

There is no definitive reason for the factory closings of domestic manufacturers in Canton, Ohio, or other cities across the country. A number of the unemployed factory workers in Canton, however, blame the city's industrial decline on the increase in imports from low-wage countries, as well as the enactment of free trade agreements.[5]

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1. Steven Greenhouse, *As Factory Jobs Disappear, Workers Have Few Options*, N.Y. TIMES, Sept. 13, 2003, *available at* http://www.commondreams.org/headlines03/0913-09.htm.
2. *See id.*
3. *Id.*
4. *Id.*
5. *Id.*

A number of other Americans fear that a newly enacted free trade agreement, the Central American Free Trade Agreement (CAFTA), will cause more cities across the United States to end up like Canton.[6] Over the past few years, CAFTA has been a controversial topic.[7] Although there are many proponents of the agreement that claim CAFTA will "benefit the American family,"[8] there are also many critics prophesizing that CAFTA will negatively impact U.S. manufacturing.[9] In particular, "CAFTA critics are worried that the agreement would promote offshoring and hurt small U.S. manufacturers."[10]

This Note provides an in-depth discussion focusing on the potential negative effects CAFTA will have on U.S. manufacturing and the U.S. economy. First, the Note will discuss the historical basis for the theory of free trade and the enactment of CAFTA. Second, the Note will analyze the potentially negative consequences that CAFTA could have on U.S. manufacturers and, in turn, on the U.S. economy. Third, the Note will set forth the positive consequences of CAFTA advocated by its proponents. Finally, the Note will discuss potential solutions to protect against CAFTA's adverse consequences.

II. THE THEORY OF FREE TRADE AND THE ESTABLISHMENT OF THE CENTRAL AMERICAN FREE TRADE AGREEMENT

The theory of free trade stems from the economic doctrine of comparative advantage, in which each country or region concentrates on what it can produce most efficiently at the cheapest cost in exchange for products from another country that it is less able to produce at a low cost.[11] The exchange of goods between countries in a free trade agreement is "carried on without such restrictions as import duties, export bounties, domestic production subsidies, trade quotas, or import license."[12] Although in theory free trade and the theory of comparative advantage result in savings to consumers and an overall increase

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6. *See generally* Yvonne Teems, *Groups Debate Impact of CAFTA Trade Bill*, DAYTON BUS. J., July 8, 2005, *available at* http://www.policymattersohio.org/media/DBJ_Groups_debate_impact_of_CAFTA_2005_0708.htm.

7. Net Aid, *U.S. Approves Controversial CAFTA*, Aug. 2, 2005, http://www.netaid.org/press/news/page.jsp?itemID=27173936. The United States House of Representatives passed CAFTA with the narrowest margin ever for the adoption of a free trade agreement. *Id.*

8. OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA BENEFITS THE AMERICAN FAMILY BY EXPANDING EXPORTS AND LOWERING THE TRADE DEFICIT, CAFTA CREATES JOBS (May 2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file408_7749.pdf [hereinafter CAFTA BENEFITS THE AMERICAN FAMILY].

9. *See infra* Part III.

10. Marylou Doehrman, *National Council Lobbies for Small, Family Owned Manufacturers*, COLO. SPRINGS BUS. J., June 3, 2005, *available at* http://findarticles.com/p/articles/mi_qn4190/is_20050603/ai_n14653603.

11. Answers.com, Free Trade, http://www.answers.com/free+trade&r=67.

12. *Id.*

in incomes,[13] in practical reality, free trade may have the dangerous effect of increasing a company's incentive to move manufacturing operations offshore to low-wage countries.[14] Ultimately, a decline in U.S. manufacturing could have a negative impact on the U.S. economy.[15]

The concept of free trade and comparative advantage has existed since the late 1700s, originating with English economists Adam Smith and David Ricardo.[16] Adam Smith created the rationale for free trade and capitalism in *The Wealth of Nations*.[17] Smith theorized:

> It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. . . . If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.[18]

Building upon the concept of free trade and capitalism that Smith created, David Ricardo expanded the idea of free trade in positing the comparative advantage theory: a theory founded upon the notion that international trade was indispensable.[19] In developing this theory, Ricardo pondered "why a country that could most cheaply produce all tradable goods would trade with a higher cost country[.]"[20] His answer was that the opportunity cost of producing the good differed between countries.[21] Ricardo illustrated that each country's output of total goods would increase if "each country specialized in the product

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13. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT 225-26 (2005).

14. *See* George Shuster, Co-Chairman, Am. Mfg. Trade Action Coal. Cent. Am. Free Trade Agreement—Ways and Means Comm. (Apr. 21, 2005) (testifying that free trade agreements grant "free access to the U.S. markets for producers that use pennies-an-hour wages, low labor standards, and low environmental standards to undercut U.S. domestic manufacturers"). Offshore manufacturing involves "[t]he relocation of business activity to a location in another country with lower costs." WordWebOnline, Offshoring, http://www.wordwebonline.com/en/OFFSHORING (last visited Mar. 18, 2007).

15. *See* American Manufacturing Trade Action Coalition, *The Hidden Cost of Free Trade*, http://www.amtacdc.org/policy/oped/thehiddencostoffreetrade.asp (last visited Mar. 18, 2007) [hereinafter *The Hidden Cost of Free Trade*].

16. *See* The Library of Economics and Liberty, Biography of Adam Smith, http://www.econlib.org/library/Enc/bios/Smith.html (last visited Mar. 18, 2007) [hereinafter Biography of Adam Smith]. *See also* The Library of Economics and Liberty, Biography of David Ricardo, http://www.econlib.org/library/Enc/bios/Ricardo.html (last visited Mar. 18, 2007).

17. Biography of Adam Smith, *supra* note 16.

18. Alan S. Blinder, *Free Trade*, http://www.econlib.org/library/Enc/FreeTrade.html (last visited Mar. 18, 2007).

19. Jonathan Larson, *History of "Free Trade,"* (1993), http://www.elegant-technology.com/TVAfretr.html.

20. Paul Craig Roberts, *Statement for U.S.-China Commission Hearing*, (May 19, 2005), http://www.vdare.com/roberts/050520_hearing.htm.

21. *Id.*

in which it had a relative advantage."[22]

The theory of free trade has expanded since the concepts developed by Smith and Ricardo; countries began significantly exploiting the idea of free trade and the theory of comparative advantage in the nineteenth century.[23] Since the nineteenth century, numerous free trade agreements between countries have been executed and enforced.[24] In particular, the United States has extended the idea of free trade to encompass three types of agreements: bilateral agreements, regional agreements, and global agreements.[25] According to the Office of the U.S. Trade Representative, the United States has numerous bilateral free trade agreements in force including, among others, agreements with Morocco, Australia, Israel, Jordan, Panama, Singapore, Southern Africa, Malaysia, and Bahrain.[26] U.S. regional free trade agreements include the North American Free Trade Agreement (NAFTA), the Middle East Free Trade Area Initiative, the Enterprise for ASEAN Initiative, the Asia-Pacific Economic Cooperation, and the proposed Free Trade Area of the Americas Agreement (FTAA).[27] Finally, U.S. global agreements include the World Trade Organization (WTO).[28]

Most recently, the United States passed CAFTA, a regional trade agreement.[29] Before becoming an official law, it scarcely passed through the House of Representatives by a vote of 217-215.[30] Initially, CAFTA was a free

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22. *Id.*

23. *See* BBC News, *A Century of Free Trade*, Feb. 12, 2003, http://news.bbc.co.uk/1/hi/business/533716.stm.

24. *See generally* Congressional Budget Office, *The Pros and Cons of Pursuing Free-Trade Agreements*, July 31, 2003, http://www.cbo.gov/showdoc.cfm?index=4458&sequence=0 (stating that since World War II, the idea of trade liberalization between a number of countries was actively pursued).

25. Office of the U.S. Trade Representative, USTR - Trade Agreements Home, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Mar. 18, 2007).

26. *Id.*

27. *Id.*

28. *Id.* The World Trade Organization (WTO) is a global organization comprised of 149 countries (as of Dec. 11, 2005) that have formed together to develop and implement "rules of trade" between countries. World Trade Organization, What Is the WTO, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 18, 2007). "The goal is to help producers of goods and services, exporters, and importers, conduct their business." *Id.* The functions of the WTO include: (1) managing WTO trade agreements; (2) providing a forum for countries negotiating trades; (3) supervising trade disputes between countries; (4) monitoring trade policies enacted by participating nations; (5) providing assistance to developing countries; and (6) supplying cooperation with other trade organizations. *Id.*

29. Office of the U.S. Trade Representative, *Dominican Republic to Join Central American Nations in Free Trade Agreements with United States*, July 23, 2004, http://www.ustr.gov/Document_Library/Press_Releases/2004/July/Dominican_Republic_to_Join_Central_American_Nations_in_Free_Trade_Agreement_with_United_States.html [hereinafter *Dominican Republic to Join Central American Nations*].

30. Stephen Koff, *LaTourette Attributes Flip-Flop on CAFTA to Tariff No One Pays*, PLAIN DEALER, Aug. 10, 2005, at A1 (noting that Ohio Representative Steve LaTourette's decision to vote in favor of CAFTA was vital to its ratification). In July, a public opinion poll

trade agreement negotiated between the United States, Costa Rica, Guatemala, El Salvador, Honduras, and Nicaragua.[31] The Dominican Republic joined these countries on August 5, 2004, and the agreement officially became known as the Dominican Republic-Central American Free Trade Agreement.[32]

CAFTA can be summarized as follows. First, the agreement immediately eliminates more than eighty percent of tariffs on "industrial goods" traded between the countries.[33] Second, the agreement eliminates tariffs between farm and agricultural exports.[34] Third, CAFTA immediately eliminates quotas and tariffs on textiles and apparel if the countries "meet the agreement's rule of origin," and the agreement "will give duty-free benefits to some apparel made in Central America that contains certain fabrics from NAFTA partners Mexico and Canada."[35] Fourth, "[t]he Central American countries will accord substantial market access across their entire services regime, offering new access in sectors such as telecommunications, express delivery, computer and related services, tourism, energy, transport, construction and engineering, financial services, insurance, audio/visual and entertainment, professional, environmental, and other sectors."[36] Fifth, the agreement gives digital products and patents, trademarks, and trade secrets nondiscriminatory protection.[37] Sixth, the agreement sets forth a three-pronged worker rights strategy that guarantees "effective enforcement of domestic labor laws, establish[es] a cooperative program to improve labor laws and enforcement, and build[s] the capacity of Central American nations to monitor and enforce labor rights."[38] Seventh, the agreement creates a legal agenda for investors.[39] Finally, the agreement institutes anticorruption procedures for government contractors.[40]

Led by the robust support of President George W. Bush, the United States began its campaign to enact CAFTA in January 2002.[41] During that time,

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showed that fifty percent of Americans supported CAFTA and only thirty-nine percent opposed the passage of CAFTA. Edward Gresser, *The Progressive Case for CAFTA*, July 2005, http://www.ppionline.org/documents/CAFTA_0715.pdf.

31. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE DOMINICAN REPUBLIC—CENTRAL AMERICA—UNITED STATES FREE TRADE AGREEMENT: SUMMARY OF THE AGREEMENT, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file128_7284.pdf (last visited Mar. 18, 2007).

32. *Dominican Republic to Join Central American Nations*, *supra* note 29. For purposes of this Note, the Dominican Republic-Central American Free Trade Agreement and the Central American Free Trade Agreement will both be referred to as CAFTA.

33. Office of the U.S. Trade Representative, *U.S. & Central American Countries Conclude Historic Free Trade Agreement*, Dec. 27, 2003, http://www.ustr.gov/Document_Library/Press_Releases/2003/December/US_Central_American_Countries_Conclude_Historic_Free_Trade_Agreement.html.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. The White House: President George W. Bush, International Trade, http://www.whitehouse.gov/infocus/internationaltrade (last visited Mar. 18, 2007) [hereinafter

President Bush announced that the enactment of CAFTA was a priority in his administration and ordered his administration to "fast track"[42] the agreement.[43] President Bush hoped to use CAFTA as a starting point to eventually negotiate the FTAA, free trade agreement between the United States and all of Latin America, excluding Cuba.[44]

The majority of Republicans in the House of Representatives strongly supported the CAFTA bill,[45] urging that it would "benefit the American family."[46] Furthermore, Republicans maintained that a free trade agreement with the six Central American countries was fully appropriate given that those Central American countries were already substantial purchasers of U.S. exports.[47]

On the other hand, of a total of 220 House Democrats, only fifteen voted

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International Trade].

42. Fast tracking occurs when the President and the U.S. Trade Representative negotiate an agreement and force it on Congress "for a straight up-or-down vote with no ability to amend the deal, offer advice, or fix problems." Rep. Michael H. Michaud, *Laboring to Keep Our Jobs in Maine*, U.S. FED. NEWS, Sept. 1, 2005.

43. ASS'N OF CARIBBEAN STATES, PROCESS OF NEGOTIATIONS TO ESTABLISH THE FREE TRADE AGREEMENT BETWEEN CENTRAL AMERICA AND THE UNITED STATES OF AMERICA (CAFTA), http://www.acs-aec.org/Documents/Trade/Cafta/CAFTA_Seguimiento_En.pdf (last visited Mar. 18, 2007).

44. CTR. OF CONCERN/U.S. GENDER AND TRADE NETWORK, FACT SHEET #2: WHAT YOU NEED TO KNOW ABOUT THE U.S.-CENTRAL AMERICAN FREE TRADE AGREEMENT (CAFTA), http://www.coc.org/pdfs/coc/CAFTA_Facts.pdf (last visited Mar. 18, 2007). Essentially, the Bush administration views CAFTA as a requirement for its ultimate ten-year goal of creating an "industrial infrastructure" throughout the region. *Id.* FTAA negotiations initiated after NAFTA was enacted in 1994. Global Exchange, Free Trade Area of the Americas, http://www.globalexchange.org/campaigns/ftaa (last visited Mar. 18, 2007). The FTAA was expected to be enacted as of January 1, 2005; however, "strong social support" among the Latin American countries in support of "a better model of integration" halted its enactment. *Id.*

45. *See* Arnie Alpert, *Analysis of CAFTA Passage*, http://www.afsc.org/trade-matters/stop-the-cafta-vote/CAFTA-analysis.htm (last visited Mar. 18, 2007). Believing that CAFTA would ultimately benefit the United States in all realms of society, only twenty-seven Republicans voted "nay" on July 28, 2005. *Id.* Just prior to the vote, Republicans in favor of CAFTA had to put together "a last minute deal" to ensure a victory. *Id.* This included, among other things, extra spending money for highway repair. *Id.* "The *Washington Post* reported, 'the last minute negotiations for Republican votes resembled wheeling and dealing on a car lot.'" *Id.* Three Republicans who specifically voiced their opposition to CAFTA, including Representatives Virgil Goode of Virginia and Walter Jones of North Carolina, experienced as much as a seventy percent decrease in federal funding for state highway projects. Darren Goode, *Three Anti-CAFTA Republicans Have Road Projects Slashed*, NAT'L J., Aug. 5, 2005, http://www.globalexchange.org/campaigns/cafta/3496.html. Neither representative will comment whether he believes there is a connection to their decreased funding for highway projects and their opposing vote to CAFTA. *See id.*

46. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8. On May 17, 2005, President Bush stated that CAFTA will "increase prosperity for our small businesses and farmers and manufacturers, and create jobs for American workers. By enforcing trade laws and agreements, we will ensure a level playing field for American workers. American workers can compete with anybody, any time, anywhere when the rules are fair." *Id.*

47. *See* Gresser, *supra* note 30 (noting that CAFTA countries purchased $15 million worth of U.S. goods in 2004).

in favor of passing CAFTA.[48] Democrats opposing CAFTA thought it was "wrong to strike a free-trade pact with poor countries lacking strong protection for workers' rights."[49] Despite this opposition, the Senate passed the free trade agreement by a vote of 54-45.[50] On August 2, 2005, President Bush officially enacted CAFTA.[51]

The Republicans, led by President Bush, supported CAFTA based upon their beliefs that it would provide domestic benefits.[52] The Democrats and numerous trade experts, on the other hand, opposed the agreement, citing concerns that the newly established law would result in a decline of manufacturing in the United States and, in turn, a loss of American jobs.[53]

III. THE HIDDEN PROBLEM OF CAFTA: THE FUTURE DECLINE OF U.S. MANUFACTURING

CAFTA's potential effects include a decline in U.S. manufacturing and, thus, less domestic employment opportunities in the manufacturing sector.[54] Specifically, a number of trade experts agree that the decrease in U.S. manufacturing may result from an increase in low-wage manufacturing opportunities available in Central America and the Dominican Republic,[55] unfair competition resulting from China's exploitation of CAFTA,[56] inadequate protection for workers' rights,[57] and exploitation of environmental laws in the CAFTA region.[58]

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48. Paul Blustein & Mike Allen, *Trade Pact Approved by House: GOP Struggles to Eke out 217-215 Victory on CAFTA*, WASH. POST, July 28, 2005, at A01.

49. *Id.*

50. U.S. Department of State, *President, Administration Officials Hail Senate Passage of CAFTA*, U.S. INFO, July 1, 2005, http://usinfo.state.gov/wh/Archive/2005/Jul/01-103533.html.

51. The White House: President George W. Bush, *President Signs CAFTA-DR*, Aug. 2, 2005, http://www.whitehouse.gov/news/releases/2005/08/print/20050802-2.html.

52. *See generally* CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8.

53. *See* Joel Wendland, *CAFTA Will Cut Jobs, Wages, and Lives, Says Experts*, POL. AFF., July 26, 2005, http://www.politicalaffairs.net/article/view/1557/1/110.

54. *See The Hidden Cost of Free Trade*, *supra* note 15.

55. *See* Judy Ancel, *The High Cost to Kansas of "Free Trade": Trade-Related Job Loss in Kansas and the Third Congressional District*, May 9, 2005, at 8, *available at* http://www.umkc.edu/labor-ed/documents/OffshoringtheKansasEconomy.pdf (finding that CAFTA and other new free trade agreements will provide incentives for manufacturers in Kansas to move production offshore).

56. *See* AM. MFG TRADE ACTION COAL., AMTAC OPPOSES CAFTA—DEAL HARMS DOMESTIC MANUFACTURING (2003), http://www.citizenstrade.org/pdf/amtac_cafta.pdf [hereinafter AMTAC OPPOSES CAFTA] (noting CAFTA provides a loophole for other countries, including China, to take advantage of importing duty free into the United States).

57. Human Rights Watch, *CAFTA's Weak Labor Rights Protections: Why the Present Accord Should Be Opposed*, Mar. 2004, http://hrw.org/english/docs/2004/03/09/usint8099.htm [hereinafter *CAFTA's Weak Labor Rights Protections*] (observing that CAFTA does not require Central American countries to comply with international labor law standards established by the United Nations).

58. *See* Sierra Club, *Central American Environmental Groups: CAFTA's Environmental*

A. Low-Wage Manufacturing

Currently, Americans buy $1.25 million per minute more manufactured goods than the United States produces.[59] Accordingly, the United States has recently lost three million manufacturing jobs to offshore production.[60] In other words, one out of every six U.S. manufacturing jobs has disappeared into a country offering lower wages.[61] The following section sets forth the reasons why opponents of CAFTA fear that the agreement will result in a loss of U.S. manufacturing jobs due to competition from low-wage manufacturers and consequently, adversely affect the U.S. economy.

1. Previous Free Trade Agreements and the Loss of Manufacturing

It comes as no surprise that CAFTA may potentially result in a decline of U.S. manufacturing jobs since previous free trade agreements have resulted in a similar decline.[62] Specifically, NAFTA, an agreement between the United States, Mexico, and Canada,[63] has resulted in a loss of approximately 1.5 million U.S. manufacturing jobs[64] since its enactment on January 1, 1994.[65] This decrease in employment is arguably due to NAFTA providing an incentive for U.S. manufactures to move their operations offshore and ship the products tariff-free into the United States.[66]

Provisions Fall Far Short, May 11, 2005, http://www.sierraclub.org/trade/cafta/central_american_enviro_groups.doc [hereinafter *CAFTA's Environmental Provisions Fall Far Short*] (stating that CAFTA does not require the Central American countries to comply with international environmental standards).

59. *The Hidden Cost of Free Trade, supra* note 15.

60. Patrick J. Buchanan, *Defeat NAFTA*, WASH. TIMES, July 27, 2005, *available at* http://www.washtimes.com/op-ed/20050726-085615-4529r.htm.

61. *Id.*

62. *See id.* (arguing that "today's trade agreements are about reshaping the world to conform to the demands of transnational corporations that have shed their national identities and loyalties and want to shed their U.S. workers").

63. Jeff Faux, *NAFTA at Seven: Its Impact on Workers in All Three Nations*, Apr. 2001, http://www.epinet.org/content.cfm/briefingpapers_nafta01_index.

64. United Steelworkers of America, Challenging Unfair Trade: NAFTA's Decade of Job Losses, http://www.usw.org/usw/program/content/839.php (last visited Mar. 18, 2007).

65. *Mexico & NAFTA Report*, LATIN AMER. REG. REPORT, Dec. 2, 1993. NAFTA was initially proposed by President George H.W. Bush on June 10, 1990, when he and Carlos Salinas, the President of Mexico, signed a declaration promoting the idea of NAFTA. *Id.* On Feb. 5, 1991, Salinas and Bush met with Brian Mulroney from Canada and ultimately announced they were in the process of planning a free trade agreement between the three nations. *Id.* In May of that same year, Congress gave approval to "fast track" NAFTA so that it would be passed within two years. *Id.* After President Clinton took office, on November 3, 1993, President Clinton signed NAFTA and sent it to Congress for its ratification. *Id.* The House of Representatives voted in favor of NAFTA 234-200. *Id.* Thus, NAFTA became law on January 1, 1994. *Id.*

66. *See* AFL-CIO, *Exporting America: Policy Solutions to Shipping Jobs Overseas*, http://www.aflcio.org/issues/jobseconomy/exportingamerica/outsourcing_solutions.cfm (last visited Mar. 18, 2007) (stating "[t]rade deals such as [NAFTA] create new rights, but no

Like proponents of CAFTA, supporters of NAFTA claimed the agreement with Mexico and Canada would increase exports and thereby create new job opportunities and raise Americans' household incomes.[67] Economists predicted that the elimination of barriers through NAFTA would allow each country to specialize in what it could produce most efficiently and import what it could not produce efficiently.[68] Furthermore, prior to its enactment, predictions were made that NAFTA would "improve the environment in border towns, and reduce the flow of undocumented immigration across the border."[69]

On the other hand, prior to its enactment labor unions were concerned about the effects NAFTA would have on the U.S. workforce.[70] In particular, labor unions feared that Americans would lose their jobs or have to take substantial pay cuts, along with reduced health benefits, because Mexican workers were earning about one fifth or less of what Americans were earning at that time.[71]

In the end, the labor unions were correct in their uncertainties about NAFTA.[72] Instead of increasing job opportunities for Americans, NAFTA actually precipitated a decline in the domestic manufacturing employment sector, which resulted in a trade deficit with Mexico.[73] With the elimination of trade barriers, NAFTA provided an incentive for U.S. manufacturers to move their operations to Mexico to decrease their labor costs.[74] As a result, "[t]he

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responsibilities, for companies that ship jobs overseas").

67. E. Anthony Wayne, Assistant Secretary, Economic and Business Affairs, Testimony Before the Subcommittee on International Economic Policy, Export, and Trade Promotion (Apr. 20, 2004), *available at* http://www.state.gov/e/eeb/rls/rm/31645.htm.

68. Keith Bradsher, *The Free Trade Accord; NAFTA: Something to Offend Everyone*, N.Y. TIMES, Nov. 14, 1993, at A14. Some economists have argued that offshore manufacturing is merely an extension of the comparative advantage theory developed by David Ricardo. Roberts, *supra* note 20. However, other economists have argued that "comparative advantage has two necessary conditions, neither of which is met . . . One condition is that capital is immobile internationally relative to traded goods. The other is that the trading countries have different opportunity costs of producing the traded goods." *Id.* "When US firms substitute foreign labor for domestic labor in their production for domestic markets, capital is flowing to absolute advantage." *Id.*

69. U.S. Representative (AZ) Raùl M. Grijalva, *Free Trade Delivers More Immigrants, Not Jobs*, HOUSTON CHRONICLE, Oct. 20, 2003, http://www.citizen.org/documents/grijalvaoped_cafta.pdf.

70. *See* Bradsher, *supra* note 68.

71. *Id.*

72. *See generally* Faux, *supra* note 63 (noting that for the majority of Americans, NAFTA was clearly not a success).

73. *Id.*

74. *Id.* One of the incentives Mexico had to offer U.S. manufacturers was a decrease in labor cost. *See* Cal Pacifico, Mexico's Advantages, http://www.calpacifico.com/mexicoadvantajes.htm (last visited Mar. 18, 2007). "The average hourly compensation cost during the year 2004, in US dollars including benefits and taxes, for production workers in Mexico was $2.48 per hour" compared to $23.17 in the United States, $21.90 in Japan, and $32.33 in Germany. *Id.* Additionally, Mexico claims NAFTA provided other incentives for manufacturers to move U.S. manufacturing to Mexico, including: (1) production of high-quality goods due to the number of "world class companies" already producing in Mexico; (2) a stable economic and political economy; (3) NAFTA duty and tariff

Economic Policy Institute found that NAFTA eliminated 766,030 actual and potential U.S. jobs between 1994 and 2000."[75] Moreover, by 2004 the U.S. trade deficit with Mexico had reached $50 billion.[76]

Likewise, the enactment of CAFTA will provide more opportunities for U.S. manufacturers to relocate to lower-cost countries within the CAFTA region.[77]

> [T]he CAFTA nations are an economically stagnant population of 46 million people, more than half of whom live below the poverty level. . . . Costa Rica, the wealthiest CAFTA nation, has a per-capita GDP of $9,000 — roughly one-quarter of ours. . . . Taken together, the six CAFTA nations have a minuscule consumer economy—but represent a huge pool of low-wage labor."[78]

Hence, as seen with the enactment of NAFTA, CAFTA could ultimately have the effect of decreasing, rather than increasing, American job opportunities.[79]

2. *Economic Analysis of Offshore Manufacturing*

Free trade agreements such as NAFTA and CAFTA make it cheaper for U.S. manufacturers to operate in low-wage countries and import products into the United States rather than manufacture products in the United States.[80] The McKinsey Global Institute (MGI)[81] reported that for every $1 of offshore

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advantages; (4) intellectual property protection; and (5) proximity to the United States. *Id.* Nevertheless, "NAFTA has also contributed to rising income inequality, suppressed real wages for production workers, weakened collective bargaining powers and ability to organize unions, and reduced fringe benefits." Robert E. Scott, *NAFTA's Hidden Costs: Trade Agreement Results in Job Losses, Growing Inequality, and Wage Suppression for the United States*, ECON. POL'Y INST., Apr. 2001, http://www.epinet.org/content.cfm/briefingpapers_nafta01_us.

75. Grijalva, *supra* note 69.

76. Buchanan, *supra* note 60.

77. *See generally* Norman Grigg, *CAFTA: Exporting Jobs and Industry*, Apr. 18, 2005, http://www.stoptheftaa.org/artman/publish/article_279.shtml (observing that agricultural and textile producers worried CAFTA would have the same effect as NAFTA—"another flood of imports and another hemorrhage of industrial jobs").

78. *Id.*

79. *See generally id.* (noting the only export America would bring to the CAFTA region is a flood of manufacturing jobs).

80. Ancel, *supra* note 55, at 8. "Our trade agreements grant corporations the right to sell products in the U.S. at high prices while making them abroad at low cost, and as . . . cheaper countries get access to U.S. markets, the incentive to move jobs only increases." *Id.*

81. MGI is a consulting firm that produced a report entitled "Exploding Myths of Offshoring." L. Josh Bivens, *Truth and Consequences of Offshoring*, Aug. 2, 2005, http://www.epi.org/content.cfm?id=2075. This report identified the large economic benefits that companies have received from offshore production. *Id.* MGI notes that the report "exaggerate[s] the size of the benefits offered to the American worker by offshoring and gloss over the more troubling distributional consequences." *Id.*

production the offshore manufacturing company (i) saved $0.58 in corporate costs, (ii) increased U.S. exports to the offshore country by $0.05, and (iii) sent back $0.04 to the United States from the offshore location.[82]

Furthermore, from 2001 to 2003 MGI reported that offshore manufacturing increased a company's average current recovery of capital income by approximately thirty-five percent, while also decreasing its average labor compensation by approximately thirty-five percent.[83] Because a primary goal of nearly every corporate board is to maximize shareholder value, it is not surprising that American corporations have moved production offshore in order to increase profits.[84]

Additionally, consumers are demanding low-priced products. Therefore, U.S. manufacturers have discovered that an economically feasible way to meet this demand is to move their manufacturing operations offshore.[85] Paper Converting Machine Co. (PCMC), located in Green Bay, Wisconsin, recently faced this dilemma.[86] PCMC is a manufacturing company that produced equipment to make "fold and print packaging for everything from potato chips to baby wipes."[87] For years, PCMC thrived as a manufacturing corporation, but eventually it fell on hard times.[88] Already recovering from a 2001 recession, one of PCMC's primary customers told PCMC, in 2003, that if PCMC did not cut its machinery prices by forty percent the customer would find a manufacturer elsewhere.[89] In order to carry out this price cut, PCMC's customer strongly urged PCMC to relocate its manufacturing operations to China.[90]

Outsourcing manufacturing results in cheaper products for Americans, but, unfortunately, it also results in job losses and lower household income for some Americans.[91] "While free trade policies might make a T-shirt at the local discount store a few cents cheaper, one must ask whether the costs paid to

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82. *Id.*

83. *See id.* (noting that in 2003 capital income was 64.8% and labor compensation was 35.2%).

84. *See generally The Economics of Outsourcing*, INFO. ECON. J., June 2004, http://www.strassmann.com/pubs/iej/2004-06-a.pdf (noting that a high outsourcing/revenue ratio is a key indicator of profitability).

85. *See* Pete Engardio, *The Future of Outsourcing; How It's Transforming Whole Industries and Changing the Way We Work*, BUS. WEEK, Jan. 30, 2006 (providing an example of how a U.S. manufacturer's largest customer insisted the business move overseas to China to provide lower-cost goods).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. William Anderson, *The Economics of Outsourcing*, Apr. 21, 2004, http://www.mises.org/story/1488. "[W]hatever savings consumers might gain from the cheaper goods sold here [United States] is more than nullified by the loss of income to workers in this country." *Id.*

achieve those savings represent a real bargain for America."[92]

3. *The Negative Consequences of Low-Wage Competition*

The availability of low-wage manufacturing in other countries makes it harder for U.S. manufacturers to compete and prosper while keeping their operations within the confines of the United States.[93] Thus, some of the potential adverse consequences of an increase in U.S. manufacturing outsourcing from CAFTA include: a decrease in the number of U.S. manufacturing suppliers,[94] an increase in the number of individuals using Welfare and Medicaid programs,[95] a significant increase in the federal budget deficit,[96] additional adverse consequences to state and local governments,[97] and a decrease in the value of a U.S. college education.[98]

a. Decrease in the Number of U.S. Manufacturing Suppliers

Many small and mid-size U.S. manufacturers that have not moved their manufacturing operations offshore are now facing a bigger problem—the loss of their U.S. suppliers that provide the essential products and parts necessary for their finished product.[99] As a result, these businesses are being forced to look elsewhere to find supplies, and many have ended up locating providers offshore that offer lower costs for materials.[100]

> U.S. manufacturers report on average imports comprised 11.2% of their dollars spent on materials and components in 2005, according to responses from 466 plants surveyed for the

92. Auggie Tantillo, *Free Trade Actually Incurs High, Hidden Costs*, AUGUSTA CHRONICLE, Apr. 24, 2005, at A05.

93. *See* Rosalind Mclymont, *Made in America; State of U.S. Manufactured Exports Not as Bleak as It Seems*, SHIPPING DIG., Feb. 6, 2006 (noting that manufacturing exports have increased because the United States has the ability to negotiate trade agreements with other countries).

94. *See* Jonathan Kratz, *Census of Manufacturers—Drifting Apart*, Apr. 1, 2005, http://www.industryweek.com/ReadArticle.aspx?ArticleID=11615&SectionID=10.

95. *The Hidden Cost of Free Trade*, *supra* note 15 (remarking that a number of displaced U.S. manufacture employees "become dependent on government entitlements").

96. *See id.* (noting that an increase in Americans dependent on government entitlements increases the federal budget).

97. *See id.* (observing that displaced workers pay little or no taxes which hurts state and local economies).

98. *See* FRIEDMAN, *supra* note 13, at 265-75 (noting that a number of specialized jobs requiring higher education are being shipped offshore).

99. University of Wisconsin: College of Engineering, *Alliance Brings E-Business Technologies to Wisconsin Manufacturers: Supply Chain Collaboration Key to Economic Growth*, Mar. 3, 2003, http://www.engr.wisc.edu/news/headlines/2003/Mar03.html.

100. *Id.*

> 2005 IW/MPI Census of Manufacturers. That's up from an average imported material/component spend of 7.8% (based on 440 plants responding) reported in the 2002 IW/MPI Census.[101]

U.S. manufacturers are also choosing to import supplies as a result of an increase in the price of supplies.[102] From 2002 to 2005, "[p]er-unit cost of components and raw materials increased more than 10% for 38.9% of 643 survey respondents. Nearly 30% of the manufacturers surveyed report a 6% to 10% rise in material and component costs, while only 3.3% say there was a 1% to 5% decrease."[103]

Obtaining supplies offshore can create problems for manufacturers that remain in the United States.[104] In particular, the disadvantages of contacting offshore suppliers includes "longer supply chains, lower supplier reliability, greater financial risk, variable quality, slower delivery, the instability of some foreign governments, and locally, public and employee backlash from the loss of American jobs."[105]

b. Increased Numbers of Americans on Welfare and Medicaid

If the effects of CAFTA result in a decrease in U.S. manufacturing jobs, the majority of new employment opportunities will emerge in low-paying service sector positions.[106] Service sector occupations include positions like waitpersons, secretaries, temp positions, and sales clerks.[107] Service sector jobs do not offer benefits comparable to most manufacturing jobs.[108] Thus, many American service sector employees are forced to rely on Medicaid and other government-subsidized programs.[109]

Service sector employment opportunities usually offer wages lower than

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101. Kratz, *supra* note 94.

102. *Id.*

103. *Id.*

104. Dean Poeth, *Manufacturing Management Strategies for the Small Business Competing in an Offshoring Economy: Beyond Lean and Six Stigma. How to Compete and Win in a Global Environment*, http://poeth.com/os-1.htm (last visited Mar. 18, 2007).

105. *Id.*

106. *The Hidden Cost of Free Trade*, *supra* note 15.

107. *Id.* "The broadest definition of the service sector encompasses all industries except those in the goods-producing sector—agriculture, mining, construction, and manufacturing. Under this definition, services include transportation, communication, public utilities, wholesale and retail trade, finance, insurance, real estate, other personal and business services, and government." Ronald E. Kutscher & Jerome A. Mark, *The Service-Producing Sector: Some Common Perceptions Reviewed*, MONTHLY LAB. REV., Apr. 1983, at 21, http://www.bls.gov/opub/mlr/1983/04/art3full.pdf.

108. *The Hidden Cost of Free Trade*, *supra* note 15.

109. *Id. See also supra* note 95 and accompanying text.

that of manufacturing jobs.[110] According to the U.S. Department of Labor's Displaced Worker Survey, approximately half of U.S. manufacturing workers who lost their jobs between 2001 and 2003 found new employment in 2004, but at a lower wage.[111] On average, service sector jobs pay thirty-three percent less than manufacturing jobs.[112] Another study conducted by Henry Farber, a professor at Princeton University, discovered that displaced manufacturing workers "faced a 17 percent decline in wages" between 2001 and 2003.[113]

Additionally, most service sector positions do not offer the benefits such as health insurance and retirement pensions, provided in most manufacturing jobs.[114] For instance, a Wal-Mart employee from San Jose claimed that "health benefits are so unaffordable [at Wal-Mart] that workers instead sign up for government health care at the urging of the retailer."[115] Accordingly, if more manufacturing employment opportunities are lost due to the enactment of CAFTA, more individuals will join the existing forty-three million uninsured Americans.[116]

Finally, a number of Americans looking for employment opportunities in the service sector industry have discovered that it is increasingly competitive because "most of the new jobs in domestic services have gone to new legal and illegal immigrants. . . . [E]mployment growth of native-born Americans has ceased in the 21st century."[117] The U.S. Chief Economist and Director of Policy, Mark Levinson, acknowledged the reality of the situation:

> Twenty-five percent of displaced workers in the U.S. don't find new ones within six months after losing their jobs. Those who are fortunate enough to find new jobs suffer big losses of income. Two-thirds earn less on their new jobs. And these figures on lost wages are from the years before the bottom fell out of the labor market for U.S. manufacturing workers in the last three years, when it's become even more difficult to transition into decent- paying jobs. And beyond lost jobs and wages, workers displaced . . . lose their homes because they can't keep up with mortgage payments, they lose their health insurance, they lose their pensions. They suffer increased

110. *See* Gene Sperling, *The Early-Warning Economy: The Time to Think About Helping Displaced Workers Is Before They Lose Their Jobs*, WASH. MONTHLY, Dec. 2005, http://www.washingtonmonthly.com/features/2005/0512.sperling.html.

111. *Id.*

112. Tantillo, *supra* note 92.

113. Sperling, *supra* note 110.

114. *The Hidden Cost of Free Trade*, *supra* note 15.

115. Janet Adamy, *Wal-Mart's Benefits Come Under Fire*, CONTRA COSTA TIMES, Oct. 19, 2003, http://sandiego.indymedia.org/en/2003/10/101416.shtml.

116. *The Hidden Cost of Free Trade*, *supra* note 15.

117. Roberts, *supra* note 20.

rates of heart disease, of divorce, depression, and suicide.[118]

In sum, because of lower wages, decreased or eliminated employee benefits, and increased competition for service sector jobs, an over-reliance on service sector jobs will potentially negatively impact the U.S. economy.[119]

c. Increase in the Federal Budget

A potential decrease in manufacturing jobs due to offshore manufacturing not only has the potential to worsen the health care crisis in the United States, but also adversely affect federal and state governments.[120] In 2005, the average manufacturing wage in Indiana was $18.14 per hour.[121] As these "high-wage" positions disappear due to offshore manufacturing, "outsourced workers and their families [will] become dependent on government entitlements such as welfare, Medicaid, unemployment benefits, and worker retraining programs[.]"[122] In 2004, the increase in the number of Americans participating in these government subsidies attributed to a $412 billion federal budget deficit in the United States.[123]

d. Adverse Consequences to State and Local Governments

State and local governments also feel the destructive impact of the decline of U.S. manufacturing.[124] Manufacturing plants forced to close down due to offshore production decrease the amount of taxes that a locality collects; the manufacturing plant often serves as the largest taxpayer.[125] Additionally, those who are unemployed or underemployed pay little or no taxes.[126] Therefore, a decrease in the amount of taxes a state or locality collects may result in an increase in private citizens' taxes or a cut in the state or local budget for services, such as police, fire department, and schools.[127]

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118. *U.S.-China Trade: Preparations for the Joint Commission on Commerce and Trade: Before the Subcommittee on Commerce, Trade, & Consumer Protection*, 108th Cong. (2004) (statement of Mark Levinson, Chief Economist and Director of Policy), *available at* http://energycommerce.house.gov/108/Hearings/03312004hearing1239/Levinson1920.htm.

119. *See* Roberts, *supra* note 20. "In the 21st century, the US labor force has been acquiring the complexion of a third world country, with new jobs available only in domestic services. In contrast, China and India are acquiring high tech manufacturing and professional service jobs, the mark of first world countries." *Id.*

120. *The Hidden Cost of Free Trade*, *supra* note 15.

121. South Carolina Department of Commerce, Average Manufacturing Wage, http://www.sccommerce.com/average_wage.html (last visited Mar. 18, 2007).

122. *The Hidden Cost of Free Trade*, *supra* note 15.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

e. Decreasing Value of a U.S. Education

One of the most disturbing consequences of low-wage competition is the potential decrease in the value of an American college education.[128] U.S. manufacturers are not the only industries outsourcing employment opportunities.[129] Other high-paying positions requiring advanced education are moving to other countries where employers can pay employees a considerably lower salary.[130] For example, "[c]ompanies are increasingly moving sophisticated, mission-critical functions such as product design and research and development to China, India and other offshore locations."[131]

Perhaps the dislocation of highly-paid, specialized jobs is a consequence of a trend in which citizens of low-wage countries come to the United States to take advantage of the U.S. educational system and then move back to their home countries to practice in their specialized field.[132] Furthermore, countries such as China and India are increasing their educational standards at the college and graduate school level, thus increasing competition for American students entering the job market.[133]

B. Unfair Competition from China via CAFTA Channel

Chinese manufactures are able to produce goods at a cost of "30% to 50% less" than U.S. manufactures.[134] This phenomenon is particularly prevalent in the bedroom furniture industry.[135] For instance, a '[m]ission style bed made in China for Universal [manufacturing company] retails for $829. U.S. models cost up to $1,800."[136] In response to these price disparities, in October 2003, U.S. manufacturers of wooden bedroom furniture and labor unions representing the employees of those manufacturers acted. They filed an "anti-dumping petition with the U.S. International Trade Commission and the U.S. Department of Commerce seeking relief from the injury allegedly caused by unfairly priced import competition from China."[137] In their petition, U.S. manufacturers and

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128. *See* Roberts, *supra* note 20. "[T]he vast majority of the new jobs that the economy is expected to create during the next ten years require no university education." *Id.*

129. *See* FRIEDMAN, *supra* note 13, at 265-75 (nothing that the recent trend is to outsource high-paying research jobs).

130. *Id.*

131. Booz Allen Hamilton, *Study Finds Companies Moving High-End Functions Offshore to Access Talent*, Oct. 31, 2006, http://www.boozallen.com/capabilities/Industries/industries_article/16945601?lpid=659806.

132. *See* FRIEDMAN, *supra* note 13, at 270-75 (remarking that "60 percent of the nation's top science students and 65 percent of the top mathematics students are children of recent immigrants").

133. *See id.* at 265 (noting that Chinese universities are starting to "crack the top ranks").

134. Pete Engardio & Dexter Roberts, *"The China Price,"* BUS. WEEK, Dec. 6, 2004, at 102 [hereinafter *"The China Price"*].

135. *Id.*

136. *Id.*

137. Dan Ikenson, *Poster Child for Reform: The Antidumping Case on Bedroom Furniture*

labor unions argued that bedroom furniture imports from China increased to "$1.4 billion from 2000 to 2003," which in turn forced numerous plant closings and job layoffs.[138]

In 2004, the U.S. International Trade Commission and the U.S. Department of Commerce found that bedroom furniture produced in China was sold "at less than fair value" in the United States[139] and "damaged America's furniture industry."[140]

In response to this result and other "anti-dumping" lawsuits[141] and U.S. "anti-dumping" regulations,[142] China is attempting to find new ways to get its exports into the United Sates at the lowest cost possible to the American consumer.[143] It is contended that one method of achieving that goal is to initially ship the products to a CAFTA nation and subsequently deliver them to the United States tariff and "duty free."[144] If this strategy is successful, it will potentially create additional competition for American manufacturers and could prompt more U.S. manufacturers to shut down their operations in the United States.[145]

In recent years, the United States has had a win-lose trade relationship with China. On one hand, the United States benefits from China's low-wage manufacturing by importing its low-cost products to American retailers and consumers.[146] Financial experts have theorized that China has the ability to

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from China, June 3, 2004, http://www.freetrade.org/pubs/FTBs/FTB-012.html.

138. Pete Engardio & Dexter Roberts, *Wielding a Heavy Weapon Against China*, BUS. WEEK, June 21, 2004, at 56 [hereinafter *Wielding a Heavy Weapon Against China*].

139. Notice of Final Determination of Sales at Less Than Fair Value, 69 Fed. Reg. 67313 (Nov. 17, 2004).

140. *Wielding a Heavy Weapon Against China*, *supra* note 138.

141. *See id.* (stating that China has lost a number of other anti-dumping lawsuits in other manufacturing sectors such as televisions, iron pipe fittings, and saccharin).

142. A number of critics have argued the anti-dumping regulations have not been successful because the Federal Court of Appeals has interpreted "dumping" as selling products at "predatory" prices. Michael S. Knoll, *Dump Our Anti-Dumping Law*, CATO FOREIGN POL'Y BRIEFING, July 25, 1991, http://www.cato.org/pubs/fpbriefs/fpb-011.html. "Predatory pricing is the practice of charging less than the marginal cost of production in order to drive competitors out of business . . . ." *Id.* However, "dumping" in the statutory sense is not the same as selling goods at a predatory level. *Id.* Anti-dumping, in the statutory meaning, is selling goods below "fair market value." *Id.* Fair market value is the price a willing buyer would buy it in the market, the product's "home market." *Id.* Thus, some critics argue "a foreign firm can be dumping even if it is charging a normal, competitive price for its product in the U.S. market." *Id.*

143. *See* AMTAC OPPOSES CAFTA, *supra* note 56 (noting that, for example, "China could supply 100 percent of the components for a product, have the product assembled in Central America, and then export the product in unlimited quantities to the United States duty free"). *Id.*

144. *Id.*

145. *See* Thomas Heffner, *CAFTA: Free Trade Funds US Global Competitors Like China to Acquire US Assets While Destroying US Industry Like Textiles, Autos*, http://www.economyincrisis.org/articles/show/57 (last visited Mar. 18, 2007) (noting that CAFTA will likely result in the same trend as NAFTA—China will utilize the CAFTA channel to "dump" cheap imports into the United States duty and tariff-free).

146. Michael Hennigan, *Americans Put Low-Cost Chinese Imports Ahead of Jobs*, Jan. 14,

supply products to American retailers at exceptionally low prices because the Chinese currency, the Yuan, is undervalued by forty percent.[147] Therefore, China has the advantage of exporting its products into the United States at an exceedingly low price.[148] Consequently, American retailers are taking advantage of these cheap imports because it costs less to produce the product in China than it would in the United States.[149] As a result, it is making it more difficult for U.S. manufacturers to compete.[150]

In light of the fact that the Yuan is considerably undervalued, the U.S. government formed the China Currency Coalition, which "is an alliance of industry, agriculture, and worker organizations whose mission is to support U.S. manufacturing by seeking an end to Chinese currency manipulation."[151] On April 20, 2005, the China Currency Coalition, which consists of thirty-five senators and representatives, filed a petition under Section 301 of the Trade Act of 1974[152] against China.[153] Moreover, a bill is currently being proposed to Congress that would ultimately make "currency manipulation" a trade violation.[154]

China is also able to provide cheap products to American consumers

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2005,http://www.finfacts.com/cgi-bin/irelandbusinessnews/exec/view.cgi?archive=2&num=1378printer=1 (noting that China more than doubles the number of goods Canada, the second largest American importer, imports into the United States). "China in 2003 replaced Mexico as the number two exporter to the United States. . . . China is coming on strong and has already displaced Mexico in areas such as computer parts, electrical components, toys, textiles, sporting goods, and tennis shoes." FRIEDMAN, *supra* note 13, at 310.

147. Hennigan, *supra* note 146. China has a fixed rate of 8.28 Yuan for every U.S. dollar for the next decade. *Id. See also* Terence Poon, *Politics & Economics: Beijing Reports Narrower Trade Surplus*, WALL ST. J., Feb. 13, 2007, at A4 (noting that "China's trading partners said its Yuan is undervalued, giving the country's exporters an unfair competitive advantage").

148. *Id.*

149. *See* FRIEDMAN, *supra* note 13, at 137-38 (quoting Xu Jun, the spokesman for Wal-Mart China, who noted that China's eighth largest trading partner is Wal-Mart, ranking ahead of Russia, Australia, and Canada).

150. *See* Hennigan, *supra* note 146 (noting the undervalued Yuan is "making China's exports cheaper and giving its manufacturers an unfair advantage").

151. China Currency Coalition, Mission, http://www.chinacurrencycoalition.org/index.html (last visited Mar. 18, 2007).

152. China Currency Coalition, Section 301 Petition, http://www.chinacurrencycoalition.org/petition.html (last visited Mar. 18, 2007). Section 301 provides that the United States "may impose trade sanctions against countries that violate or deny U.S. rights under trade agreements, or that place an unreasonable burden on U.S. commerce. The section grants the United States Trade Representative (USTR) broad authority to take a variety of countermeasures against foreign practices that unduly burden U.S. trade." *Id.*

153. *Id.* This was not the first petition the China Currency Coalition filed. *Id.* A previous petition filed on Sept. 9, 2004, was denied by the U.S. Trade Representative Board. *Id.*

154. Louis Uchitelle, *What to Do About China and the Yuan, Small Companies Want Action; Big Ones Tend to Say Go Slow*, N.Y. TIMES, Oct. 12, 2005, at Sec. C; Col. 1; Business/Financial Desk; Pg. 5, *available at* http://select.nytimes.com/gst/abstract.html?res=F40811F63D5B0C718DDDA90994DD404482&n=Top%2fReference%2fTimes%20Topics%2fPeople%2fS%2fSnow%2c%20John%20W%2e.

because the average hourly factory wage is drastically lower in China than in the United States.[155] "[T]he average hourly Chinese factory worker cost is estimated to be US $0.64: the US hourly cost is 34 times the Chinese level . . . ."[156] During December 2006, the average manufacturing rate in the United States was reported at $16.97 per hour.[157]

On the other hand, while China has been providing low-cost products to the American consumer,[158] it has also become a fierce manufacturing competitor and arguably an industrial giant.[159] Specifically, in 2006 the United States had a $202 billion trade deficit with China.[160] As a result, the United States is now dependent upon China for a vast majority of the electronic components necessary for the construction of American military hardware.[161] China, however, has been using this trade surplus from the United States to strengthen its military.[162] As a result, one must ask, "[i]f China decided not to sell to the United States during a period of crisis, would the United States have the ability to replenish its stocks without an adequate industrial base?"[163]

With CAFTA as a viable alternative for Chinese manufacturers to export its goods into the United States, competition between manufacturers will

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155. Hennigan, *supra* note 146.

156. *Id.* However, Jonathan Anderson, the chief economist in Asia for UBS, argues that "[w]ages and costs are going up in China. The economy is already past its peak. . . . There are fears that if China's currency appreciates markedly, some manufacturers will be forced to raise prices or shift production to other low-cost regions like India or Southeast Asia." David Barboza, *For Foreign Companies in China, a Rising Yuan Is Hard to Swallow*, N.Y. TIMES, Oct. 15, 2005, at Sec. C; Col. 1; Business/Financial Desk; Pg. 5, *available at* http://select.nytimes.com/gst/abstract.html?res=F50C17FA3F5B0C768DDDA90994DD404482&n=Top%2fNews%2fInternational%2fCountries%20and%20Territories%2fChina.

157. U.S. Dept. of Commerce: International Trade Administration, *Manufacturing Biweekly Update*, http://trade.gov/competitiveness/mbu/mbu_current.asp (Jan. 26, 2007).

158. *See "The China Price," supra* note 134 (stating that outsourcing manufacturing to China has allowed "U.S. multinationals from General Motors to Proctor & Gamble and Motorola" to earn big profits).

159. *See The Hidden Cost of Free Trade*, *supra* note 15.

160. *Economic Policy Institute, Trade Picture: Rapid Growth in Oil Prices, Chinese Imports Pump Up Trade Deficit to New Record*, Feb. 10, 2006, *available at* http://www.epi.org/content.cfm/webfeatures_econindicators_tradepict20060210 [hereinafter *China Imports Pump Up Trade Deficit*]. The trade deficit with China is the largest trade deficit the United States has with any other country. William R. Hawkins, *Trade Deficit Provides China With More Than Economic Advantages*, July 18, 2003, http://www.americaneconomicalert.org/view_art.asp?Prod_ID=864. "[I]f current trends continue for just another five years, the U.S. trade deficit with China would triple to over $330 billion. The total U.S. trade deficit with the entire world [in 2002] was $470 billion." *Id.* Already, the 2006 U.S. trade deficit with China is above $200 billion. *China Imports Pump Up Trade Deficit*, *supra.*

161. *The Hidden Cost of Free Trade*, *supra* note 15.

162. *Id.* China "is using its trade surplus to buy U.S. bonds" and using the interest on these bonds "to build and buy the ships, planes and missiles needed to fight a naval war off her coast." Buchanan, *supra* note 60.

163. *The Hidden Cost of Free Trade*, *supra* note 15.

increase.[164] This will provide an additional incentive for U.S. manufacturers to offshore production to low-wage countries and more Americans will lose their jobs.[165]

C. Inadequate Workers' Rights in CAFTA Nations

Prior to the passage of CAFTA, the United Nations had repeatedly criticized a number of CAFTA nations for not complying with international labor standards.[166] Arguably, CAFTA will not provide an adequate remedy to fix the labor problems in these CAFTA nations.[167] Instead, CAFTA may actually weaken them even more, which in turn would create another incentive to lure American manufacturers to move their manufacturing operations from the United States to the CAFTA region.[168]

The argument that CAFTA will not improve existing CAFTA labor standards is supported by the text of CAFTA itself.[169] Specifically, CAFTA's text does not require CAFTA nations to satisfy the basic international labor norms created by the United Nations and the International Labor Organization.[170] Rather, CAFTA merely institutes provisions "recommending that CAFTA parties 'strive to ensure' such compliance and that they are not 'encourag[ing] trade or investment by weakening or reducing the protections afforded in domestic labor laws.'"[171] Violations of these recommendations pose no serious consequences to the breaching CAFTA nation.[172] CAFTA merely imposes a monetary fine for noncompliance.[173]

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164. *See* Heffner, *supra* note 145 (noting that CAFTA will open up another door for China, Japan, Germany, and the United Kingdom, to dump cheap imports into the United States, which will ultimately devastate the U.S. manufacturing industry).

165. *Id.*

166. AFL-CIO, *Fair Trade or Free Trade? Understanding CAFTA: Labor Rights Provisions in CAFTA Are Inadequate*, http://www.wola.org/economic/brief_cafta_labor_april04.pdf (last visited Feb. 24, 2007) [hereinafter *Labor Rights Provisions in CAFTA Are Inadequate*]. For example, "[e]mployers in Central America intimidate, fire and blacklist workers for attempting to exercise their right to join an independent union, and they do so with impunity under Central American laws." *Id.*

167. *Id.*

168. *See* Lindsay McLaughlin & Brian Davidson, *An Injury to One Is an Injury to All* (June 24, 2004), http://www.ilwu.org/political/warrior/04/vol4no5.cfm?renderforprint=1 (observing that CAFTA acts as a catalyst to U.S. manufacturing job loss because weak labor laws in the CAFTA nations are driving U.S. producers out of business).

169. *Labor Rights Provisions in CAFTA Are Inadequate*, *supra* note 166.

170. *CAFTA's Weak Labor Rights Protections*, *supra* note 57.

171. *Id.* In addition, failure to require CAFTA nations to comply with international labor laws does not "[p]rotect [w]omen [w]orkers against [d]iscrimination in [l]aw or [p]ractice," does not "[e]nsure [a]dequate [d]omestic [r]emedies," and does not provide "[i]ncentives to [e]nforce [e]xisting [l]abor [l]aws." *Id. See also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA-DR FINAL TEXT, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/ asset_upload_file320_3936.pdf (last visited Mar. 18, 2007).

172. *CAFTA's Weak Labor Rights Protections*, *supra* note 57.

173. *Id. See also* Michelle Chen, *Labor Fears Free Trade Deal Will Prompt 'Downward*

The U.S. government recognizes that low labor standards in CAFTA nations could pose a problem to the success of CAFTA.[174] Accordingly, President George W. Bush and his administration have promised to spend approximately $180 million over the course of the next five years "to improve workers' rights and environmental protection in the CAFTA countries."[175] Nonetheless, CAFTA's current weak labor law protections may still force U.S. manufacturers to move offshore; U.S. manufacturers simply cannot "compete against workers [in the CAFTA region] who are forced to work long hours in dangerous conditions for an average of $50 a month, and who have no real right to negotiate a contract to ensure better working conditions and better wages."[176]

D. Exploitation of Environmental Law

It is arguable that stringent "environmental regulations," such as those adopted in the United States, "impose significant costs [and] slow productivity growth," making it difficult for U.S. manufacturers to compete against manufacturers in other countries that have less rigorous standards.[177] The CAFTA agreement does not force CAFTA nations to comply with environmental standards imposed in the United States: putting U.S.

Spiral,' May 25, 2005, http://newstandardnews.net/content/?action=show_item&itemid=1848.

174. U.S. Dept. of State, *U.S. Supports Better Labor, Environment Efforts in CAFTA Nations*, July 19, 2005, http://usinfo.state.gov/wh/Archive/2005/Jul/20-669544.html.

175. *Id.* Of the $180 million projected assistance:

> [$7] million . . . will be spent to modernize the labor justice systems in CAFTA countries, including the training of judges . . . $7 million will be spent to strengthen the ability of regional labor ministries to enforce labor laws . . . $3 million will be spent to support ILO officials who will monitor and verify progress in improving labor law enforcement and working conditions . . . $2 million [will be] allocated to fight gender discrimination, focusing on eliminating sexual harassment in the workplace . . . $1 million [will be] set aside to support an Environmental Cooperation Agreement.

Id.

176. Teamsters Take Action, *CAFTA: Bad for Working Families*, June 2, 2005, http://www.teamsterstakeaction.org/teamsters/alert-description.tcl?alert_id=1446897. For instance, in Nicaragua CAFTA provides an enticement for U.S. manufacturers to produce goods in its country by offering corporations a "desperate work force, no taxes or tariffs, subsidized electricity and water, and poorly enforced labor and environmental standards." Witness for Peace, *Inhuman Economies: What Does Free Trade REALLY Mean for Nicaragua, and the Rest of Central America's Poor*, Jan. 16, 2002, http://www.witnessforpeace.org/docs/CAFTA_facts.doc.

177. Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, J. OF ECON. LITERATURE (1995), *available at* http://economia.unife.it/materia/29/jaffe.pdf. For example, because of China's lack of environmental laws concerning pollution, among other incentives, more manufacturers are choosing to move their operations. *See generally*, Cable News Network, *China Adds Pollution to Exports* (Jan. 8, 2006), http://www.komvux.uddevalla.se/download/18.6e1b2a31108bd6d4c54800013843/CNN+China+adds+pollution+9+Jan+2006.doc. However, allegedly China now exports more than just products. *Id.* It is also exporting its pollution into other nations, particularly Russia. *Id.*

manufacturers at a disadvantage.[178] The declining competitiveness of U.S. manufacturers is reflected by a decrease in U.S. exports, an increase in foreign imports, and an increase in offshore manufacturing.[179]

CAFTA's text does not require CAFTA nations to comply with existing international environmental standards.[180] Thus, sanctions are not imposed on CAFTA nations that fail to comply with international regulations.[181] The agreement only "allow[s] action to be taken for repeated failures while providing loopholes . . . [making it] extremely difficult to take action when a country fails to enforce its laws in an attempt to attract investment."[182] Some critics of CAFTA argue that its environmental provisions do not prohibit the CAFTA region from lowering, or even waiving, "existing environmental laws in an effort to attract investment." [183] Instead, critics believe that CAFTA "would actually prohibit member countries from enacting many new environmental regulations, allowing those regulations to be challenged as 'barriers to trade.'"[184]

The lack of environmental regulation in CAFTA, provides another incentive for U.S. manufacturers to move manufacturing facilities to the CAFTA region where there are few environmental laws.[185]

IV. CAFTA'S POSITIVE EFFECT ON THE U.S. ECONOMY

While a number of critics oppose CAFTA because of its potential to adversely affect the U.S. manufacturing industry,[186] CAFTA has also had a number of proponents. President George W. Bush serves as CAFTA's most notable supporter, and he claims that it will ultimately have many positive

178. Jaffe et al., *supra* note 177.

179. *Id.*

180. *CAFTA's Environmental Provisions Fall Far Short, supra* note 58.

181. *Id.*

182. CITIZENS TRADE CAMPAIGN, CAFTA AND THE ENVIRONMENT, http://www.citizenstrade.org/pdf/ctc_caftafacts_enviroupdate_01062005.pdf (last visited Mar. 18, 2007).

183. Deborah James, *Environmental Impacts of CAFTA*, http://www.globalexchange.org/campaigns/cafta/Environment.html (last visited Mar. 18, 2007).

184. *Id.*

185. *See generally*, Global Trade Watch, Offshoring, http://www.citizen.org/trade/offshoring (last visited Mar. 18, 2007) (stating that NAFTA's environmental provisions provided an incentive for U.S. manufacturers to move operations offshore to Mexico, where there were few environmental regulations to comply with compared to environmental regulations in the United States). However, a number of free-trade supporters have argued that environmental laws are not a critical consideration when choosing a place to manufacturer; rather, considerations such as protection of property rights, education of the work-force, and a country's legal system are more important. Center for Trade Policy Studies, Free Trade Frequently Asked Questions, http://www.freetrade.org/faqs/faqs.html#three (last visited Mar. 18, 2007).

186. *See supra* Part III.

effects on the U.S. economy.[187] The Office of the U.S. Trade Representative has asserted four probable advantages of CAFTA: (1) the creation of new jobs for Americans; (2) a "level playing field" for U.S. exporters; (3) increased consumer savings; (4) and a boost to U.S. small businesses.[188]

A. Creation of New Jobs for Americans

The enactment of CAFTA is a part of President Bush's "six-point plan" [189] for creating new jobs in the United States by expanding exports and lowering the trade deficit.[190] President Bush contends that CAFTA will increase U.S. exports by opening new markets, thereby leveling the playing field for U.S. products to compete in the CAFTA region.[191] Additionally, President Bush claims that CAFTA may encourage foreign companies to set up operations in the United States, which would create additional employment opportunities for Americans.[192]

Even if CAFTA leads to a loss of American jobs in the short term, proponents are optimistic that the United States's economy should ultimately find means to create new jobs with or without the help of CAFTA.[193] There are many more ideas for future inventions; therefore, everything that is going to be invented has not yet been invented.[194] Even though jobs could be lost due to free trade, and in particular, CAFTA, "new jobs are also being created [in the United States] in fives, tens, and twenties by small companies that [Americans] can't see."[195]

B. Level Playing Field

CAFTA advocates maintain that the agreement will level the playing field by eliminating foreign taxes, opening up CAFTA members' markets, and allowing the United States to export more goods, services, and farm products to

187. *See supra* notes 34-41 and accompanying text.

188. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8.

189. *See* International Trade, *supra* note 41. President Bush's six point plan includes: (1) affordable health care; (2) elimination of frivolous lawsuits to prevent good businesses and people from losing jobs; (3) reduction of unnecessary government regulation; (4) enactment of a national energy policy to provide affordable energy to all Americans; (5) an increase in U.S. exports by pursing free trade agreements; and (6) making previous tax relief plans permanent. U.S Gov. Info, *Bush Sees Job Market, Economy Improving*, Dec. 6, 2003, http://usgovinfo.about.com/b/a/048162.htm.

190. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8.

191. International Trade, *supra* note 41.

192. *Id.* "Foreign-owned firms directly employ more than 6.4 million workers in the U.S.—jobs that might otherwise go to foreign workers—and that does not include the millions of people who work at companies that supply parts and material to foreign-owned firms." *Id.*

193. *See generally* FRIEDMAN, *supra* note 13, at 227.

194. *Id.*

195. *Id.* at 227-28.

the region.[196] In particular, the Office of the U.S. Trade Representative projected increased revenue for important industries such as agriculture.[197]

> The American Farm Bureau Federation estimates CAFTA would expand U.S. farm exports by $1.5 billion a year. The National Association of Manufacturers (NAM) estimates that CAFTA will result in an additional $1 billion a year in goods exports. . . . [A] study by the U.S. International Trade Commission finds that CAFTA will reduce our trade deficit by $756 million.[198]

Furthermore, advocates argue that not enough attention is being paid to substantial investments coming into the United States from offshore production and free trade.[199] "[E]very dollar a company invests overseas in an offshore factory yields additional exports for its home country, because roughly one-third of global trade today is within multinational companies."[200]

C. Increase in Consumer Savings

The Office of the U.S. Trade Representative maintains that free trade agreements like CAFTA will increase disposable income for U.S. citizens; particularly, they will benefit low-income families by offering imported products at a lower cost.[201] In fact, an increase in consumer savings was

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196. *See* CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8. In particular, Michigan and Colorado have already observed the benefits of an open market into CAFTA nations. *See* Michigan District Export Council, *Michigan Benefits from CAFTA-DR*, Mar. 2005, http://www.exportmichigan.com/wg_agreements_cafta_mfg.htm (noting that the amount of exports into the CAFTA region in 2004 was more than double the amount in 2000). *See also* U.S. Dept. of Commerce, *Benefits of CAFTA-DR Colorado*, Mar. 2005, http://www.export.gov/fta/CAFTA/States/Colorado.pdf (noting that exports into the CAFTA region in 2004 were $8.1 million, which was somewhat higher than the amount of exports in 2000).

197. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8.

198. *Id.* The Agriculture Coalition for CAFTA-DR conducted a study focusing on "40 Congressional districts with significant agricultural production." American Farm Bureau, *Agriculture Coalition Releases Study Highlighting Benefits of CAFTA-DR for 40 Congressional Districts* (Apr. 11, 2005), http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2005&file=nr0411a.html. The study projected the potential benefits CAFTA would have upon the agricultural industry, concluding that agricultural communities will significantly benefit from the enactment of CAFTA. *Id.*

199. *See* FRIEDMAN, *supra* note 13, at 123.

200. *Id.*

201. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8. "[Free] [t]rade delivers a greater choice of goods—everything from food and furniture to computer and cars—at lower prices." *Id.* "CAFTA would tie Central America and the Dominican Republic to the United States both economically and politically and would help keep costs down for U.S. retailers and Latin American garmentmakers. . . ." David Armstrong, *CAFTA Friends, Foes State Their Case*

observed after the enactment of NAFTA.[202] A decade after the ratification of NAFTA, the Office of the U.S. Trade Representative claimed the average American's standard of living increased approximately $2,000 per year.[203] Additionally, a study conducted by the University of Michigan concluded that "lowering global trade barriers on all products and services by even one-third could boost the U.S. economy by $177 billion, thereby raising living standards for the average family by $2,500 annually."[204]

D. Boost to Small Businesses

The Office of the U.S. Trade Representative noted that the CAFTA region is currently the United States' second largest export market.[205] The elimination of tariffs will only allow U.S. businesses that export into the CAFTA region to grow even larger.[206] According to Jim Morrison, the president of the Small Business Exporters Association, "[m]ore than 13,000 American small and medium-size businesses already export to Central America and the Dominican Republic, accounting for 37% of total U.S. merchandise exports to the region."[207] Small businesses will benefit the most from the ratification of CAFTA because its elimination of trade barriers will cause the transaction costs of trading within the region to decrease.[208] The transaction costs of shipping the completed product from the United States to the CAFTA region will become as easy as it is to ship goods within the United States.[209] Therefore, "[c]ompetition between the shipping companies will surely bring down the costs of getting [U.S.] goods to the area."[210]

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on Free Trade Deal Central American Pact Goes to House After OK by Senate, SAN FRANCISCO CHRON., July 3, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/07/03/BUGS8DI7PR1.DTL. *See also* CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8. "CAFTA will benefit the most underrepresented constituency in America: consumers, particularly the lower-income consumers who find that a 50-cent difference in the price of a T-shirt actually means something." Steven Sherman, *The CAFTA Fifteen: The New Heroes of the Poor?*, July 29, 2005, http://www.commondreams.org/views05/0729-29.htm (internal citations omitted).

202. International Trade, *supra* note 41.

203. *Id.*

204. *Id.* The Institute for International Economics organization estimated prior to the ratification of CAFTA that the enactment of CAFTA would increase the average American household by as much as $5,000 per year. American International Automobile Dealers, *CAFTA Benefits and WTO*, WASH. TIMES, June 9, 2004, *available at* http://www.washtimes.com/functions/print.php?StoryID=20050608-092109-2167.

205. CAFTA BENEFITS THE AMERICAN FAMILY, *supra* note 8.

206. *Id.*

207. Ken Hoover, *DR-CAFTA Deal Could Boost Small Exporters*, DALLAS BUS. J., July 8, 2005, *available at* http://www.bizjournals.com/dallas/stories/2005/07/11/story8.html?GP=OTC-MJ1752087487.

208. *Id.*

209. AEGIS, *CAFTA for Small & Medium Enterprises* (on file with author).

210. *Id.*

V. RECOMMENDATIONS/SOLUTIONS

Thousands of U.S. manufacturing jobs have been lost since NAFTA became law because free trade agreements have given manufacturers an incentive to move offshore.[211] The ratification of CAFTA provides yet another incentive for more American jobs to move offshore.[212] Therefore, the U.S. government needs to take certain initiatives to protect Americans employed within the manufacturing industry.[213] In addition, American citizens need to protect themselves from losing their jobs due to offshore opportunities.[214]

A. Government Initiatives

To protect against the loss of jobs due to offshore manufacturing, the U.S. government needs to accomplish three main objectives: (1) make certain that its free trade agreements are also fair trade agreements;[215] (2) ensure that the United States continues to innovate in order to facilitate job creation for Americans;[216] and (3) address the healthcare crisis and take initiatives to protect U.S. manufacturers from its effect.[217]

1. Adoption of Fair Trade Agreements

The U.S. government needs to ensure that free trade is *fair* trade in order to diminish incentives for U.S. manufacturers to move offshore to the CAFTA region.[218] While free trade involves the exchange of goods and information between countries without tariffs or taxes, fair trade "refers to exchanges, the term of which meet the demands of justice."[219] The principles of fair trade include fair wages, a better workplace, and environmental sustainability.[220] The Oxfam American campaign has developed policies that members of free trade

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211. *See* Buchanan, *supra* note 60.

212. *See supra* Part III.

213. *See infra* Part VA.

214. *See infra* Part VB.

215. *See generally* Jeffrey Eisenberg, *Free Trade Versus Fair Trade*, Sept. 21, 2006, http://www.aworldconnected.org/debates/id.2911/debates_detail.asp (noting the differences between a free trade agreement and a fair trade agreement).

216. *See* FRIEDMAN, *supra* note 13, at 227 (noting that not everything that will be invented has already been invented).

217. *See generally* Suzanne Travers, *An Appeal to Buy American; Leaders Warn of Middle Class 'Evaporation,'* HERALD NEWS, Nov. 18, 2005, at B10 (observing that the cost of health care for small businesses has sky rocketed).

218. *See* Eisenberg, *supra* note 215.

219. *Id.*

220. Grinning Planet, *Lose Two Jobs, Outsource One Free*, Mar. 8, 2005, http://www.grinningplanet.com/2005/03-08/WTO-global-trade-democracy-outsourcing-jobs-article.htm. Supporters of fair trade, such as the Fair Trade Federation, "argue that exchanges between developed nations and lesser developed countries (LDCs) occur along uneven terms, and should be made more equitable." Eisenberg, *supra* note 215.

regions should institute to ensure that free trade is indeed fair trade.[221]

First, governments need to implement fair trade for agriculture.[222] This includes ensuring a steady food supply and executing rules that protect local farmers.[223] Furthermore, the governments of developing countries need to prohibit the practice of saturating their markets with cheap agricultural products, and should implement rules that allow farmers to compete on a level-playing field.[224]

Second, governments participating in free trade agreements need to promote foreign investment rules that encourage development in their country.[225] Governments can achieve this by "develop[ing] links between foreign-owned businesses and the local economy, so profits from exports are spread through communities."[226] Additionally, governments need to both control "speculative and short-term investments" that could potentially undermine their economy, and also enforce rules that prohibit corporations from waiving existing laws in exchange for investment.[227]

Similarly, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has urged the United States to initiate policies encouraging fair trade in the CAFTA region.[228] Specifically, the AFL-CIO is urging Congress to "require governments to respect the rule of law, root out corruption, and fully and effectively enforce workers' rights in order to receive trade benefits."[229] Finally, the AFL-CIO is encouraging Congress to reject any trade agreement that fails to meet these proposed standards.[230]

Congressman Michael H. Michaud has taken steps to promote fair trade through the formation of the Fair Trade Act of 2005.[231] Rep. Michaud has also introduced a Congressional resolution demanding that the U.S. Treasury Department give American citizens "parity in the Personal Exemption Laws."[232] Personal Exemption Laws currently allow American citizens to buy

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221. Oxfam Campaigner, *Make Trade Fair in the Americas*, Fall 2003 (on file with author) [hereinafter *Make Trade Fair in the Americas*]. Oxfam America is a non-profit organization affiliated with Oxfam International that "works to end global poverty through saving lives, strengthening communities, and campaigning for change." Oxfam America, Who We Are, http://www.oxfamamerica.org/whoweare (last visited Mar. 18, 2007).

222. *Make Trade Fair in the Americas*, *supra* note 221.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Labor Rights Provisions in CAFTA Are Inadequate*, *supra* note 166. The AFL-CIO is a trade organization comprised of 52 national and international trade unions that primarily lobbies on behalf of organized laborers for labor rights and laws. Answers.com, AFL-CIO, http://www.answers.com/afl-cio&r=67 (last visited Mar. 18, 2007).

229. *See Labor Rights Provisions in CAFTA Are Inadequate*, *supra* note 166.

230. *Id.*

231. Michaud, *supra* note 42. The Fair Trade Act would withdraw the United States from involvement in CAFTA. *Id. See also* H.R.J. Res. 3480, 109th Cong. (2005).

232. Michaud, *supra* note 42.

large bulks of Canadian goods and bring them back to the United States duty free, while preventing Canadians from doing the same.[233] Rep. Michaud has also introduced a bill that would remove the President's power to fast track a free trade agreement.[234] This proposal would allow Congress more time to analyze the proposed agreement to ensure that it promotes fair trade policies.[235]

2. *Encourage Innovation*

Since the United States has experienced a loss of manufacturing jobs in the past and will likely lose more manufacturing jobs following the enactment of CAFTA, the U.S. government should encourage scientific and mathematical innovation in the United States to facilitate the creation of new jobs.[236] To accomplish this goal, the U.S. government needs to ensure the price of failure does not hinder structured risk taking.[237] In order to encourage increased innovation, policymakers need to develop flexible and enlightened bankruptcy and patent laws[238] and become proactive at encouraging investment through education.[239]

a. Flexible and Enlightened Bankruptcy and Patent Laws

Currently the United States is ahead of China and India in terms of innovation because of its capitalist market.[240] The United States is unique in the sense that it has "innovation-generating-machines," such as top-notch universities around the country, public and private research labs, retailers, and "the best-regulated and most efficient capital markets in the world for taking new ideas and turning them into products and services."[241] The stock exchanges in the United States, namely the New York Stock Exchange and NASDAQ, are where "risk capital" is accumulated and dispersed to innovators and developing companies.[242] There is no other country in the world that has a better and more efficient capital market than the United States.[243] What makes the U.S. capital market more advanced than any other country are the laws that were enacted to regulate and secure it.[244] Specifically, the United States has a

233. *Id.*
234. *Id.*
235. *See id.*
236. *See* FRIEDMAN, *supra* note 13, at 230.
237. *See id.* at 245 (noting that the United States is unique in that it has "innovation-generating-machines").
238. *See id.* at 245-49 (observing that we currently have the best protection for new ideas).
239. *See id.*
240. *Id.* at 245-46.
241. *Id.* at 245
242. *Id.*
243. *Id.*
244. *Id.*

"rule of law which protects minority interests under conditions of risk."[245]

Because the United States has such a unique and efficient capital market and other devices to foster new innovation, the U.S. government needs to ensure that it does not adopt legislation that would obstruct America's "innovation-generating-machines."[246] Currently the United States is on the right track with intellectual property laws that encourage people to come up with new ideas and mechanisms for ensuring that those ideas are protected.[247] The government should reexamine newly enacted bankruptcy laws, however, which could discourage innovators from developing new ideas.[248] Recently reformed U.S. bankruptcy laws make it easier for small businesses to collect debts, but also make it more difficult for individuals to work out debt repayment plans and resurface from bankruptcy protection.[249]

The goal of the reformed bankruptcy regime is to encourage Americans to be more responsible for their debt.[250] However, entrepreneurship experts fear that these new laws may have the unintended consequence of restraining new innovation because "entrepreneurs finance their startups by maxing out their personal credit cards as well as taking out mortgages or equity lines of credit on their homes."[251] Congress needs to make certain that the new bankruptcy laws do not have the unintended consequence of stifling new ideas and innovations that could ultimately spur job creation in America.

b. Sustaining United States' Educational Advantage

The United States needs to sustain its educational advantage over other countries in order to supply more jobs for working Americans.[252] Specifically, in order to continue to produce innovative new products and services that increase employment opportunities for Americans, the government needs to encourage and create opportunities for U.S. citizens to become more educated in science and engineering fields.[253]

In April 2005, Missouri Senator Christopher S. Bond encouraged the federal government to allocate more federal funds towards educating children in the fields of science and engineering.[254] He stated:

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245. *Id.* at 245-46.

246. *See id.*

247. *Id.* at 246.

248. Louise Witt, *Will Bankruptcy Law Stifle Entrepreneurship?*, STANDARD TIMES, May 17, 2005, *available at* http://www.southcoasttoday.com/daily/05-05/05-17-05/102ca647.htm.

249. *Id.*

250. *Id.*

251. *Id.*

252. *See* FRIEDMAN, *supra* note 13, at 244-49.

253. *See id.*

254. *Fiscal 2006 Appropriations: Hearing Before the Subcommittee on Transportation, Treasury, the Judiciary, and Housing and Urban Dev.*, 109th Cong. (2005) (statement of Sen. Christopher S. Bond).

> [T]he lack of support for NSF [National Science Foundation] and the physical sciences and the growing funding disparity between the life sciences and the physical sciences is jeopardizing our Nation's ability to lead the world in scientific innovation. Further, we are jeopardizing the work of the National Institutes of Health because we are undermining the physical sciences, which provide the underpinning for medical technological advances. Inadequate funding for NSF also hurts our economy and the creation of good jobs, which would help address the outcry of outsourcing jobs to other countries. The bottom-line is that by underfunding NSF, we are shooting ourselves and our future generations in the foot. I hope we can get NSF back on the path of doubling the budget as I have strongly advocated.[255]

Some public schools have taken their own initiative to address this problem.[256] For instance, High Tech High School, located in San Diego, California, is a public school designed to look more like a high tech company rather than a high school.[257] Less than one-third of the building is designated for traditional classrooms, with specialized laboratories "for the study of everything from biotechnology to computer animation," embracing the remainder of the building.[258] Not only is the structural aspect of this high school unique compared to other public high schools, its curriculum is even more unconventional.[259] Student-advisors create customized lesson plans for each student.[260] Instead of multiple fifty-minute classes, students only have one morning and one afternoon block so that they can concentrate on one aspect at a time.[261] Most importantly, students are given opportunities to intern at a number of large corporations in the area.[262]

The goal of creating public schools like High Tech High is to introduce students at an early age to the experiences and challenges of working at a high tech corporation.[263] Larry Rosenstock, the Principal of High Tech High, states that High Tech High "with its emphasis on technology, individualized course work, and depth rather than breadth . . . may well prove to be a blueprint for the

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255. *Id.*

256. *See* William C. Symonds, *High School Will Never Be the Same*, BUS. WEEK, Aug. 28, 2000, *available at* http://www.businessweek.com/2000/00_35/b3696053.htm.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* San Diego restructured its public schools to resemble public schools in Europe, where students complete their core curriculum by the time they reach sixteen and then dedicate two years to a more specialized program to prepare students for their future. *Id.*

21st century school."[264] Companies such as IBM have also joined in the effort to encourage more young Americans to enter science and math fields.[265] Fearing that the educational achievements of America's children are falling behind their peers in China, IBM has created a program allowing up to 100 IBM employees to leave the corporation in order to teach science and math.[266] "The goal is to help fill shortfalls in the nation's teaching ranks, a problem expected to grow with the retirement of today's educators."[267]

The U.S. government needs to consider the propositions recommended by Senator Christopher S. Bond and encourage more states to adopt public educational programs, such as High Tech High and the IBM program, in order to facilitate U.S. innovation.

3. Address and Reform the Healthcare Crisis

U.S. manufacturers have resorted to moving their production offshore, or have even been forced out of business, because of excessive labor costs in the United States.[268] One of the reasons why the United States has such a disproportionate labor cost compared to the CAFTA region is due to the high costs of health care.[269] The cost of health care is particularly pernicious to small U.S. manufacturers because the cost of providing health care to employees is not spread out among a large band of employees.[270]

In order to compete with corporations manufacturing in the CAFTA region, the "country must develop a national health-care system so that American businesses' competitive edge is not dulled by their obligations to pay skyrocketing health-care costs."[271] Representative Max Sandlin has addressed the health care crisis in America and has suggested that the federal government take the following initiatives to resolve this problem:

> [G]iving help to small manufacturers both through tax relief and the Manufacturing Extension Partnership; fully funding the Small Business Administration; improving access

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264. *Id.*

265. Brian Bergstein, *IBM to Encourage Employees to be Teachers*, USA TODAY, Sept. 16, 2005, *available at* http://www.usatoday.com/tech/news/2005-09-18-ibm-teachers_x.htm.

266. *Id.*

267. *Id.* It is estimated that over 250,000 math and science teachers are needed across the country. *Id.*

268. *See supra* Part III(C).

269. *See generally* Travers, *supra* note 217.

270. Paul Wilson, *Small Manufacturers Converge at Summit*, CHARLESTON GAZETTE, June 22, 2004. "[S]mall businesses are big business in this country . . . they are the engine of America's economy, representing more than 95 percent of all employers, creating half of our gross domestic product, and creating three out of four new jobs nationwide." Press Release, Rep. Sandlin Talks Healthcare with Small Business Leaders (June 17, 2004) (on file with U.S. Fed. News) [hereinafter *Rep. Sandlin Talks Healthcare*].

271. Travers, *supra* note 217.

> to 7(a) loans; opening the $285 billion federal marketplace to small businesses; and putting the government on a 'pay-as-you-go' basis to restrain deficit spending that raises interest rates and restricts small firms' access to capital.[272]

President George W. Bush has recently taken steps to address the problem of rising health care costs for small businesses.[273] President Bush has urged Congress to pass legislation that would permit small businesses to acquire federally regulated health care plans through trade associations and businesses.[274] These plans would be exempt from state benefit requirements and availability rules.[275] Alternatively, the U.S. Department of Labor would regulate the plans.[276] President Bush illustrated the current problem and his proposed solution:

> If you're a restaurant owner here in Loudoun County and a restaurant owner in Crawford . . . they should be allowed to pool their risk across jurisdictional boundaries. . . . In other words, the larger the risk pool, the more employees you're able to get in a risk pool, the easier it is to manage your costs when it comes to health insurance. You can't do that now. And Congress should encourage you to be able to pool risk.[277]

If the government can find a way to provide health care to all Americans at a lower cost to manufacturers, it would help curb the problem of competing against manufacturers producing in the CAFTA region and hopefully save jobs in America.

B. Individual Solutions

With increased competition due to the elimination of trade barriers, outsourcing domestic manufacturing jobs may be inevitable. However, Americans can protect themselves from job loss.[278] As Pulitzer Prize winner and New York Times writer, Thomas Friedman states:

> Every law of economics tells us that if we connect all the

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272. *Rep. Sandlin Talks Healthcare*, *supra* note 270.

273. R.J. Lehmann, *President Points to Tort Reform, Health Care as Key to Small-Business Agenda*, BEST WIRE, Jan. 20, 2006.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See generally* Ed Frauenheim & Mike Yamaoto, *Reforms, Not Rhetoric, Needed to Keep Jobs on U.S. Soil*, May 4, 2004, http://news.com.com/Offshoring+U.S.+needs+reforms,+not+rhetoric/2009-1070_3-5198156.html. *See also* FRIEDMAN, *supra* note 13, at 237-49.

> knowledge pools in the world, and promote greater and greater trade and integration, the global pie will grow wider and more complex. And if America, or any other country, nurtures a labor force that is increasingly made up of men and women who are special, specialized, or constantly adapting to higher-value-added jobs, it will grab its slice of that growing pie.[279]

Thus, U.S. citizens need to become more marketable and "untouchable" in order to succeed in a free trade world.[280]

1. Becoming More Marketable

As the U.S. government passes more free trade agreements, the potential for American jobs to become outsourced increases.[281] Therefore, U.S. citizens need to become more marketable by attaining and possessing skills that cannot be outsourced to low-wage countries within the CAFTA region.[282]

To increase their marketability, Americans should take a number of steps.[283] First, individuals should take a personal assessment of themselves to determine where they stand in relation to others in a similar field.[284] Second, individuals "need to develop the technical competence that enables [them] to meet the performance requirements of [their] specific position. . . ."[285] Third, individuals should update their current skills by enrolling in continuing education classes.[286]

Additionally, parents serve an integral part of achieving this goal of increased marketability.[287] Parents need to encourage their children to enter into educational fields that will lead to marketable jobs in the future.[288]

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279. FRIEDMAN, *supra* note 13, at 248.

280. *Id.* at 237-49.

281. *See* Frauenheim & Yamaoto, *supra* note 278 (noting that the opportunities we are educating young Americans to perform, are the very jobs that are being exported offshore).

282. *See id.* In terms of planning a career, marketability refers to the likelihood that potential employers will hire you rather than hire someone with similar skills and experience. Kathleen Spencer Lee, *How Marketable Are You*, June 2003, http://www.certmag.com/articles/templates/cmag_webonly.asp?articleid=258&zoneid=41.

283. *See* Lee, *supra* note 282.

284. *Id.*

285. *Id.*

286. *Id.*

287. *See* FRIEDMAN, *supra* note 13, at 270 (contributing students' success to their parents' insistence that their children manage their time and encouragement to enter math and science fields).

288. *See id.* If the United States does not enhance its innovation within the science and engineering fields, there is a substantial risk of job loss for those young people who decide to become employed within the manufacturing industry. Rick Barrett, *Blue Collar Alert: Silencing Factor Whistles Will Muffle Economy, Report Warns*, Feb. 1, 2006, http://www.jsonline.com/bym/news/feb06/389277.asp.

2. *Becoming "Untouchable"*

In order to minimize the possibility of having a job outsourced to a low-wage country, Americans need to become "untouchable."[289] Becoming "untouchable" includes acquiring specialized skills, an anchored job, and adaptable skills.[290]

Specialized skills include skills that are in high demand and are not fungible.[291] Any kind of "knowledge work[]" involves specialized skills.[292] For instance, people possessing specialized skills include specialized accountants, attorneys, physicians and surgeons, and computer and software engineers.[293]

Realistically, not everyone can acquire specialized skills.[294] Those who cannot acquire specialized skills need to obtain a job that is anchored.[295] Individuals who possess anchored jobs include hairdressers, waitresses, chefs, and entertainers.[296] These jobs will always be in demand and unlikely will become outsourced because they involve "face-to-face contact with a customer, client, patient, or audience."[297]

Nevertheless, not all anchored jobs are safe from being moved offshore; as more free trade agreements are passed and technology improves, corporations will have more opportunity to move jobs offshore.[298] Therefore, Americans also need to become adaptable.[299] Being adaptable means gaining "new skills, knowledge, and expertise that enable [a person] constantly to be able to create value."[300]

VI. CONCLUSION

The theory of free trade and comparative advantage has existed since the 1700s.[301] Since that time, the United States has made a number of agreements

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289. FRIEDMAN, *supra* note 13, at 237-49.

290. *Id.* at 238.

291. *Id.* "Work that can be easily digitized and transferred to lower-wage locations is fungible. Work that cannot be digitized or easily substituted is nonfungible." *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* However, with new technology emerging, "digitization of information and expanded bandwidth abroad are enabling companies to outsource to low-wage countries services ranging from routine call center work to higher-value software programming, medical diagnosis, and research and analytical activities." Lael Brainard & Robert E. Litan, *"Offshoring" Service Jobs: Bane or Boon and What to Do About It*, Apr. 2004, http://www.brookings.edu/comm/policybriefs/pb132.htm.

298. FRIEDMAN, *supra* note 13, at 238-39.

299. *Id.* at 239.

300. *Id.*

301. *See supra* notes 16-22 and accompanying text.

with other countries.[302] Although free trade often results in cheaper products for Americans, it also has the propensity to leave thousands of manufacturing employees unemployed because domestic manufacturers are no longer competitive.[303]

Most recently, CAFTA was passed to promote free trade between the United States and Central America.[304] Proponents of CAFTA have proclaimed that there will be benefits to its enactment, such as lower priced commodities.[305] However, many opponents of CAFTA contend that U.S. manufacturing employees may lose their jobs as a result of its ratification.[306] In other words, opponents characterize CAFTA as merely an extension of NAFTA and an agreement that will only exasperate existing problems.[307]

Certain measures must be taken to ameliorate the potentially adverse implications of CAFTA, such as the loss of U.S. manufacturing.[308] In particular, the U.S. government must strive to ensure CAFTA is a *fair* trade agreement, increase innovation, and address the health care crisis in the United States.[309] Moreover, Americans need to become aware of the possible negative outcome of CAFTA and the ways to insulate themselves from shifts in the job market as more trade agreements are passed.[310] If steps are not taken to protect U.S. manufacturing, many more cities across the country may end up like Canton, Ohio. In a speech to the Senate, former Federal Reserve Chairman Alan Greenspan stated:

> The basic problem that we confront is given that the advantages [of globalization] are so much greater than the deficits, how do we take care of those who are on the wrong side of this process? . . . [W]hat our international trade policy should be focusing on is finding how we put resources, basically much of the resources that we gain from globalization, to assist those who are on the wrong side of the adjustment to retrain, come back and if necessary to at least get a means of redress which recognizes that there are very significant problems in any competitive -- any advance in economic activity.[311]

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302. *See supra* notes 25-28 and accompanying text.

303. *See supra* Part III(A)(1).

304. *See supra* Part II.

305. *See supra* Part IV.

306. *See supra* Part III.

307. *See generally* Buchanan, *supra* note 60 (noting that the United States will experience the same adverse consequences observed after the enactment of NAFTA).

308. *See supra* Part V.

309. *See supra* Part V(A)(1).

310. *See supra* Part V(B).

311. Jeffrey Sparshott, *The Hidden Cost of Free Trade*, WASH. POST, Sept. 18, 2005, *available at* http://www.washingtontimes.com/specialreport/20050917-104940-2061r.htm.