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COMMENTS

ERRATA

The Board of Editors of the *Indiana International & Comparative Law Review* regretfully acknowledges an error in Volume 6, Issue 1:

The article **Evolution of the Colombian Judiciary and the Constitutional Court** by *Luz Estella Nagle* should have contanied the table below.

The Board sincerely regrets this error and apologizes to all of those affected.

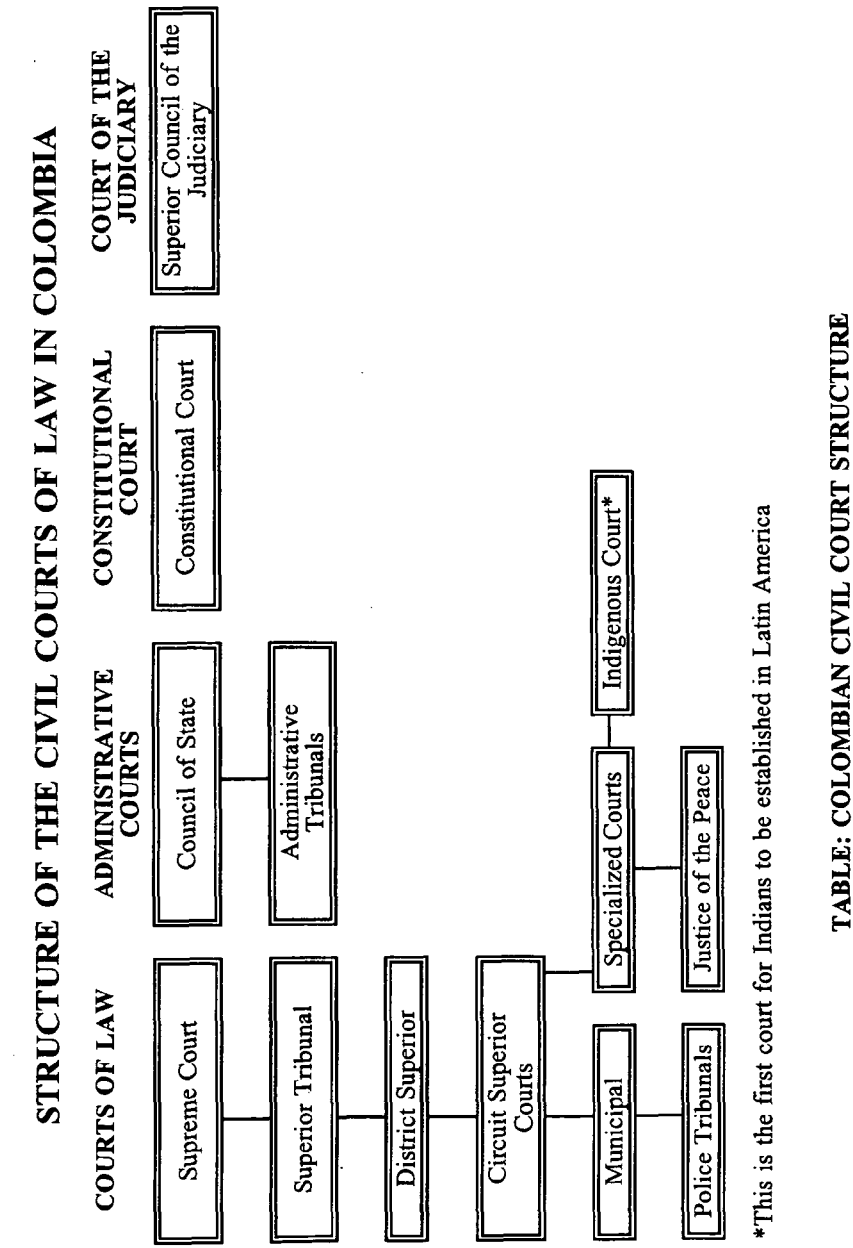

TABLE: COLOMBIAN CIVIL COURT STRUCTURE

JUDICIAL ONE-HIT?: THE DECRIMINALIZATION OF PERSONAL DRUG USE BY COLOMBIA'S CONSTITUTIONAL COURT

Michael R. Pahl[*]

I. INTRODUCTION

When the source of most of the world's cocaine decriminalizes personal drug use, the international legal community should take note. On May 5, 1994, Colombia's Constitutional Court ("the Court"), in a bitterly divided five to four decision,[1] declared provisions of a 1986 statute[2] unconstitutional which provided criminal penalties for the carrying or consuming of personal doses of marijuana, cocaine, heroin, crack, and other drugs. By this decision, the Court created a constitutional right to personal drug use based on the constitutional guarantee of the "free development of the personality."[3] The Court's decision, however, did not overturn any sections of the 1986 statute criminalizing drug trafficking.

As might be expected, reaction to the Court's decision was immediate,[4] wide-spread, and overwhelmingly critical.[5] Government officials led the outcry.

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1. Decision No. C-221 of May 5, 1994, La Corte Constitucional [Supreme Court], Gaceta Constitucional Ediciona Extraordianaria (Colombia) [hereinafter Decision No. C-221].

2. LEY 30 DE 1986 [LEY], art. 2, sec. 5, & art. 51.

3. CONSTITUCIÓN POLÍTICA DE COLOMBIA [CONSTITUTION], art. 16 (Colombia).

4. The judicial sector moved quickly to enact the decision. For example, the day after the opinion was issued the Inspector General of the District Police in Barranquilla opined that as a result of the Court's decision, 30 persons detained under the personal use statute would have to be set free. *Posible excarcelación de contraventores*, EL ESPECTODOR (Bogotá), May 7, 1994, at 10A. On May 18, 1994, in Ibagué 72 prisoners encarcerated for illegal drug use were set free in accordance with the Court's decision. *En libertad, 72 detenidos por consumo de droga en Ibague*, EL TIEMPO (Bogotá), May 19, 1994, at 11B. One reason public reaction may have been so overwhelmingly negative was that the Court simply announced the result of its decision from the bench, not providing the actual decision until over a week later. As such, numerous political actors, including President Gaviria, were unaware of the scope of the decision, such as whether the Court had overturned sections of the statute pertaining to drug trafficking as well as consumption, and the jurisprudential reasoning of the Court. Understandably, sharp public outcry filled this Court-created information vacuum.

5. The author of the opinion, Judge Carlos Gaviria, strongly disagrees. Although there was a general negative public reaction to the decision, Judge Gaviria contends that this was a result of the way in which former President Gaviria framed the issue in his public comment on the decision before reading the opinion. In addition, the former president's reaction was politically motivated, as he was then a candidate for Secretary General of the Organization of

Former President Gaviria labelled the decision "frankly absurd,"[6] warned his ministers of increasing violence and criminality, and called for a popular movement to reform the 1991 Constitution (Constitution).[7] The Attorney General, echoing President Gaviria's concerns, called for a constitutional referendum and criticized the decision on social, moral, and legal grounds.[8] The Minister of Health lamented the loss of coercive methods at the penal level to fight drugs, warning of the likelihood of increased drug consumption and drug-related violence.[9] Only the nation's chief prosecutor, Gustavo De Greiff, endorsed the Court's decision legalizing personal drug use.[10] Presidential candidates also took advantage of the decision's issuance during the 1994 elections to express their disapproval. Andrés Pastrana, the Conservative Party

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American States (OAS), and needed to show that his drug policy was in harmony with that of other OAS states. Further, the Judge is of the opinion that the negative statements of the two leading presidential candidates at that time represented no more than a politically expedient reaction to the trend of current, though uninformed, popular opinion. In Judge Gaviria's view, those who rejected the opinion essentially rushed to judgment. As such, their opinions were essentially misinformed and, thus, irrelevant. Interview with Carlos Gaviria, Magistrate, Constitutional Court of Colombia, in Bogotá, Colombia (Apr. 4, 1995) [hereinafter Gaviria](on file with the *Indiana International and Comparative Law Review*).

6. *Grave y peligroso fallo: Gaviria*, EL ESPECTADOR, May 7, 1994, at 11A.

7. *Rechazo general a la despenalización*, EL TIEMPO, May 7, 1994, at 1A, 6A. It is instructive to note, as well, that of the 26 amendments to the U.S. Constitution, only four of them represent successful efforts to overturn decisions of the Supreme Court: Amendment XI (limiting the jurisdiction of federal courts to hear suits brought against the states); Amendment XIV (deeming citizens of African descent citizens of the United States); Amendment XVI (expanding the power of Congress to tax); and, Amendment XXVI (setting voting age). This paucity of Supreme Court reversals reflects the distinctly Madisonian view that the stability of the Constitution is one of its greatest virtues, and as a consequence, constitutional amendments should be rarely, and circumspectly, undertaken. This is not to suggest that U.S. constitutional history is bereft of calls for amending the Constitution. The more than 10,000 constitutional amendments proposed in Congress certainly reflects a Jeffersonian bent. However, only 27 of these proposals have been ratified. This demonstrates how daunting the procedural requirements for amending the Constitution are, which in turn reflects how high the stakes must be in order to amend. *See generally* RICHARD BERNSTEIN & JEROME AGEL, AMENDING AMERICA, xii (1993).

8. *Se incrementará la violencia*, EL TIEMPO, May 7, 1994, at 6A.

9. *Despenalizan uso de drogas*, EL TIEMPO, May 6, 1994, at 1A, 10A. Although difficult to estimate, various studies propose that Colombia has approximately 300,000 drug addicts, 586,000 consumers of cocaine, marijuana, heroin, and *basuco* (a native substance chemically related to crack), and approximately two million alcoholics. *Se incrementará la violencia*, *supra* note 8, at 6A.

10. James Brooke, *Colombians Press for the Legalization of Cocaine*, N.Y. TIMES, Feb. 20, 1994, at 6. Gustavo De Greiff was later lambasted by the U.S. Department of Justice for endorsing negotiations with cartel leaders that could result in some of the world's most notorious criminals receiving prison sentences of less than five years, and for other activities associated with the U.S.-Colombian fight against drug trafficking. Pierre Thomas, *U.S. Criticizes Top Colombian Prosecutor Over Behavior in War on Drugs*, WASH. POST, Apr. 12, 1994, at A20. For a discussion of Gustavo De Greiff's controversial career, *see generally* MARIA TERESA HERRAN, EL FISCAL: LA DUALIDAD DE LA IMAGEN (1994).

presidential candidate,[11] called for a national referendum on the issue.[12] Ernesto Samper, the Liberal Party candidate, who was elected president in 1994, took to the bully pulpit to decry the decision as akin to "opening the doors to drug addiction."[13]

Non-governmental entities were equally vociferous in their criticism. The Roman Catholic Church called it an absurdity to decriminalize drug use while retaining criminal penalties for the sale and distribution of drugs,[14] adding that decriminalizing drugs would not further a just society because it would merely create dependency.[15] Members of the business community responded in a similar vein with a letter to President Gaviria expressing their astonishment with the decision.[16] Representatives of the tourist industry warned of the danger of undesirable tourists coming to Colombia to use drugs prohibited in their own countries.[17]

The United States government was equally critical. A senior Clinton Administration official called the decision "a very important and even devastating blow to both the Governments of Colombia and the United States," while Lee Brown, President Clinton's senior aid on drug policy, said he was "extremely disappointed."[18] The United States Department of State warned that the decision

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11. *See* Steven Gutkin, *Colombia Inaugurates President Who Raised Drug Worries in U.S.*, WASH. POST, Aug. 8 1994, at A10; *see also Tainted Victory*, WORLD PRESS REVIEW, Aug., 1994, at 29. Mr. Pastrana later caused a national scandal by accusing his Liberal Party opponent, Ernesto Samper, of receiving millions dollars in campaign funds from the Cali cartel.

12. *Rechazo general a la despenalización*, *supra* note 7, at 6A.

13. *Id.*

14. *Id.*

15. *Es un despropósito jurídico: Iglesia*, EL ESPECTADOR, May 7, 1994, at 10A. Such was the view of the Roman Catholic establishment, represented by the Colombian Episcopal Conference. Colombia's most famous dissident priest, Mayor Bernardo Hoyos of Barranquilla, approved of the Court's decision on the grounds that marijuana is less harmful to society than alcohol and cigarettes. *Frente político contra dosis personal*, EL ESPECTADOR, May 7, 1994, at 10A. Adding an interesting twist to traditional notions of liberation theology, he later called for the legalization of drug trafficking as well, on the grounds that profits from drug trafficking will stay in the country and can be used to fight hunger and for other social programs. According to Hoyos, drug trafficking is not the fault of Colombia but that of North American imperialism. *Hoyos habla de legalizar la droga*, EL TIEMPO, July 25, 1994, at 7A. Fatal flaws in Father Hoyos' proposal to socialize the drug trade include: (1) his assumption that drug traffickers, who most recently have been killing lawyers, judges, police, and anyone else attacking their criminal enterprise, will willingly give up their profits to the state through the tax system; and (2) his assumption that the Colombian government will decide to use these profits to liberate the poor from their poverty and not for other governmental programs, or to beef up its military as part of its decades long counter-insurgency struggle.

16. *Rechazo general a la despenalización*, *supra* note 7, at 6A.

17. *Anato, contra despenalización del consumo de la droga*, EL COLOMBIANO, May 11, 1994, at 3A.

18. Joseph B. Treaster, *Use of Drugs Is Legalized By Colombia*, N.Y. TIMES, May 7, 1994, at A3.

endangered Colombians, especially young people, and lamented that Colombia had lost one of its most valuable instruments in the fight against drug trafficking.[19] The United States Drug Enforcement Administration (DEA) supported President Gaviria's call for constitutional reform and called the decision a "step backward" and a "formula for disaster."[20]

The global importance of this case cannot be overestimated. From the perspective of comparative criminal law, Colombia has joined a minority of countries which have decriminalized or have experimented with decriminalizing personal drug use. More importantly, this case is undoubtedly the most controversial to appear in Colombia's post-1991 constitutional jurisprudence, if not in the country's history.

How did the Court reach a decision so unexpected and unpopular that most major elements of Colombian civil society initially called for a constitutional referendum to remedy the situation?[21] A primary reason is that the Court, in an act of extreme judicial overreaching, enshrines a right to personal drug use premised on libertarian notions of radical individualism and personal autonomy, concepts foreign to the Colombian Constitution and civil society. The decision is rooted in a radical interpretation of a prominent version of liberal political theory requiring the state to remain neutral on moral matters and allowing individual rights to trump collective interests. This illustrates what many legal scholars see as part of an expanding "rights revolution" in which many current

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19. *Rechazo general a la despenalización*, *supra* note 7, at 1A.

20. *Un paso atrás, dice la DEA*, EL ESPECTADOR, May 7, 1994, at 10A.

21. Article 373 of the Colombian Constitution establishes that the Constitution can be reformed by Congress, by a constituent assembly, or by the people through referendum. Although President Samper promised on his first day in office to have a constitutional referendum on the issue, his government decided on November 1, 1994, not to seek this remedy. John Guttierez, *Gobierno dijo no al referendo*, EL TIEMPO, Nov. 1, 1994, at 1A, 14A. Rather, the government announced the next day that, consistent with Constitutional Article 375, it would submit a constitutional reform project (a bill on constitutional reform) in the Congress in order to recriminalize personal drug use. The reasons offered by the government for this tactical change include: (1) a referendum would be too costly and difficult to put into effect (although the government had already collected over half a million signatures); (2) the country was suffering from "electoral fatigue," having gone through four elections in the year, and as such the public was not interested in going to the polls yet another time; and (3) a desire on the part of the executive not to create confrontations with the Constitutional Court. In essence, this bill attempts to reform Constitutional Article 49, protecting the right to health, by expressly permitting the state to restrict, prohibit, and sanction drug consumption — including criminal penalties. *Con ley atajaran la dosis personal*, EL TIEMPO, Nov. 2, 1994, at 1A, 3A. On Dec. 8, 1994, a primary commission of the Senate and House of Representatives approved this addition to Article 49. *Aprobada reforma para penalizar la dosis mínima*, EL TIEMPO, Dec. 8, 1994, Ultima A. Others suggest that the proposed referendum was dropped due to the lack of public support. *Mensaje de urgencia para acto que penaliza drogas*, EL ESPECTADOR, Nov. 12, 1994, at 6A.

legal and political issues are cast - and ultimately decided - in the non-compromising "exaggerated absoluteness" and "hyperindividualism" of "rights talk."[22]

One renowned scholar, Professor Mary Ann Glendon, has recently examined developments in diverse areas of United States law, concluding that this new way of talking about rights, or "rights talk," has indeed emerged.[23] Professor Glendon notes that "rights talk", which is commonly reflected in American legal culture, has spread to other countries adopting constitutions comparable to that of the United States, *i.e.*, those which contain enumerated rights reinforced with some form of judicial review.[24] As will be shown, Colombia joined this group of nations in 1991 in adopting its 380-article constitution containing a broad array of rights protected by the interpretative powers of the Constitutional Court.

This Article demonstrates how the Court, discovering a right to personal drug use premised on the constitutional guarantee of the "free development of the personality," engages in the precise type of "rights talk" described by Professor Glendon and others. This Article demonstrates how the Court's libertarian decision, placing individual autonomy on the constitutional pedestal and severely restricting the state's use of the criminal law to protect its citizens' health and well-being, reflects the "near aphasia [of "rights talk"] concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity."[25]

Part II of this Article discusses the creation of the 1991 Constitution, placing particular emphasis on the diverse social, political, and cultural values that members of the Constitutent Assembly represented. This section also discusses the Constitutional Court, one of the many new judicial institutions created as part of the 1991 Constitutional Reform.

Part III provides a brief history of drug criminalization in Colombia, focusing especially on the 1986 statute which the Court declared unconstitutional. Part IV presents the Plaintiff's arguments. Part V presents the opinion of the Court's majority. It demonstrates how the Court engages in "rights talk" by formulating personal drug use as an absolute right essential to personal autonomy in the libertarian state. This section also illustrates how, as a policy matter, the Court has adopted an extreme position in the drug legalization debate, based on the supposition that each individual is sovereign and autonomous. This severely

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22. MARY ANN GLENDON, RIGHTS TALK x (1991).

23. *Id.* Professor Glendon concludes that "rights talk" can be identified by "its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity and its silence with respect to personal, civic, and collective responsibilities." *Id.*

24. *Id.* at 7.

25. GLENDON, *supra* note 22, at 14.

restricts the State's ability to impose restrictions on drug consumption.[26] Part VI examines the dissent's opinion. It illustrates an alternative way of talking about rights, responsibilities, and the social role of the individual more reflective of Colombia's culture, civil society, and the 1991 Constitution. As a policy matter, the dissent argues that drug consumption should be criminalized as part of the State's constitutionally protected role in promoting health, and as part of the State's police power. Viewed together, the opinions of the majority and the dissent reflect what Professor Glendon calls the "great dilemma" of contemporary liberalism: "How to hold together the two halves of the divided soul of liberalism — our love of individual liberty and our sense of community for which we accept a common responsibility."[27]

Part VII questions the libertarian jurisprudence adopted by the Court. It shows how judicial authoritarianism is masked in the language of individual rights and personal autonomy. This Article concludes that the Court's decision is an extreme example of anti-democratic judicial overreaching.[28] This is an especially troubling development in a country which sought in its 1991 Constitution to reform and strengthen participatory democracy. Overall, this Article serves as a clarion call that Colombia's Constitutional Court, designed to protect a broad array of constitutional rights, may indeed turn out to be Colombia's most dangerous branch.

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26. *See* FRANCISCO E. THOUMI, POLITICAL ECONOMY AND ILLEGAL DRUGS IN COLOMBIA 289 (1994). Professor Thoumi of Colombia's University of the Andes argues that this libertarian position recognizes that individuals are not islands and that their actions may affect others, but governmental intervention is not the solution except in extreme cases. *Id.* at 290, n.13.

27. *See* Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 536 (1992).

28. The comments of Francisco Santos, an editor of *El Tiempo*, Colombia's major daily, are instructive:

> I think we have a very active court, a court that has changed policy radically, because of its activism. I think that it is important if you look into its cases, how they write (their opinions), they are very weak. That's where I would see the danger. The problem is when you go deeper. What moves them - politics, ideology - that's where I don't see things very clearly. That's where I don't see a court that knows where it's going, that's where I see a court in which tactical alliances are more important than ideology and the thorough study of a case, and that's where I see the danger.

Interview with Francisco Santos, Editor, EL TIEMPO, in Bogotá, Colombia (Mar. 28, 1995) [hereinafter Santos] (on file with the *Indiana International and Comparative Law Review*). Specifically discussing decriminalization, he had this to say:

> What came down? Why? Where does it come from? Out of the blue ... Is that how this Court is going to handle things? It has shown it is like that. Is that how this Court is going to change the law of the land? It looks like it, and it worries me, it worries me.

Id.

II. THE 1991 CONSTITUTION

A. *Political Crisis and the Culture of Violence*

The story of how the Court decriminalized personal drug use begins with the 1991 Constitution, signed into law on July 4, 1991, and praised by President Gaviria as a "peace treaty and a new instrument for national reconciliation."[29] The 1991 Constitution was a response to the profound political crisis affecting Colombia in the late 1980s, manifested by a lack of faith in the political system and increasing fears of violence attributed to drug traffickers' attacks on the Colombian state in the late 1980s.[30] The causes of the political crisis affecting Colombia were manifold and complex. Many political analysts, however, point to the *Frente Nacional*, or National Front,[31] as a primary cause. The National Front was a bipartisan power-sharing agreement that the two main Colombian political parties, the Liberals and Conservatives, entered into in 1958 to end a civil war known as *La Violencia*.[32] The agreement provided for the compulsory sharing of all elective and appointive positions between the Liberal and Conservative parties and the alternation of the two parties in the presidency every four years.[33]

Many observers agree that the National Front regime, terminating in 1974, achieved its main purpose — ending *La Violencia* and thus providing a respite from the political violence destroying the country.[34] The National Front, however, also effectively excluded third parties and others from political life, and ultimately proved incapable of responding to an increasingly complex and fragmented civil society.[35]

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29. Carlos Obregon, *Constitución: El nuevo pacto social*, EL TIEMPO, Dec. 30, 1991, at 1.

30. *See* John Dugas, *La constitución política de 1991: ¿Un pacto politico viable?*, *in* LA CONSTITUCIÓN POLÍTICA DE 1991: ¿UN PACTO POLITICO VIABLE? 15 (John Dugas ed., 1993).

31. *Id.* at 16. For a discussion of the National Front, see DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 223-48 (1993); *see also* ROBERT E. DIX, THE POLITICS OF MODERN COLOMBIA 41-46 (1987).

32. *See* BUSHNELL, *supra* note 31, at 201-22; *see also* DIX, *supra* note 31, at 37-41. An estimated 200,000 Colombians were killed during *La Violencia*. Mary Williams Walsh, *In Colombia, Killings Just Go On and On*, WALL ST. J., Nov. 12, 1987, at 10.

33. *See* BUSHNELL, *supra* note 31, at 224; *see also* DIX, *supra* note 31, at 41, 42.

34. *See* BUSHNELL, *supra* note 31, at 226, *see also* DIX, *supra* note 31, at 42, 43.

35. Dugas, *supra* note 30, at 16. Bushnell notes, however, that the National Front regime was not as exclusive as it might seem. The bipartisan regime approximated the political desire of the electorate; electoral competition still took place; and, lax party rules allowed third-party candidates, even Communists, to run as Liberals or Conservatives. *See* BUSHNELL, *supra* note 31, at 224. Dix, on the other hand, notes that "the absence of partisan competition diminished political interest among the electorate, and may have helped to produce high rates of voter abstention, [contributing to] the declining legitimacy of the political system." DIX, *supra* note 31,

Along with the National Front regime, the 1886 Constitution was a major factor contributing to the political crisis of the late 1980s. "Colombia's 1886 Constitution was, after that of the United States, the oldest uninterrupted constitution in the Americas."[36] Unsurprisingly, the 1886 Constitution was seen by many as outdated, if not obsolete, and incapable of incorporating new social forces.[37] A primary purpose of the 1991 Constitution, then, was to serve as a new inclusive and pluralistic social compact representing a reconstruction of the diverse interests constituting Colombian civil society.[38]

The political crisis in the late 1980s was reflected in and related to the violence plaguing Colombia, marked by high rates of common crime, as well as by violence from leftist guerrillas, state security forces, private paramilitary groups, and most notoriously, drug traffickers.[39]

Concerning crime, Colombia has suffered for years from one of the world's highest crime and impunity rates.[40] During the past thirty years, for example, it is estimated that only 1.2% to 2.0% of all crimes reported ended in a sentence.[41] The high crime rate and the insecurity produced in daily Colombian life seriously diminished the confidence of Colombians in their political system and served as an important impetus prompting the 1991 Constitutional Reform.[42]

Along with crime, violence committed by numerous Colombian groups - leftist guerrillas, state agents such as the military and police, private paramilitary groups, and drug traffickers - has been pervasive, persistent, and deadly. Beginning with *La Violencia*, recent Colombian history is replete with examples of astonishingly high levels of violence. Certain events in the 1980s, however, brought this violence to a fever pitch. For example, M-19,[43] a leftist group, stormed the Palace of Justice in November of 1985, taking twenty-four Supreme Court justices and 300 judicial personnel hostage. The government refused to

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at 42 (quoting JONATHON HARTLYN, PRODUCER ASSOCIATIONS, THE POLITICAL REGIME AND POLITICAL PROCESSES IN CONTEMPORARY COLOMBIA 27-28 (1984)).

36. *See generally* William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 40 (1991).

37. *See* Caroline Hartzell, *Las Reformas Economicas en la Constitución de 1991*, *in* LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLITICO VIABLE?, *supra* note 30, at 77.

38. *Id.*

39. Dugas, *supra* note 30, at 18.

40. *See* BUSHNELL, *supra* note 31, at 252-53.

41. *See* Gabriel Gutierrez Tovar, *Reflexiones sobre la Impunidad*, *in* JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD 219, 225 (Héctor Peña Días ed., 1991).

42. *See* Fernando Carillo Flores, *Presentación*, *in* LA REVOLUCIÓN PACÍFICA DE LA JUSTICIA 10 (Fernando Carrillo Flores ed., 1991).

43. The Movimiento 19 de Abril (M-19), an ideologically eclectic guerrilla group specializing in urban terrorism, originated as a reaction to Rojas Pinilla's defeat in the 1970 presidential elections. The movement eventually spread to the jungle areas of southern and western Colombia. M-19 became a legitimate political force in 1990, and their leader, Antonio Navarro Wolf, played a major role in the 1991 Constituent Assembly. *See* DIX, *supra* note 31, at 49.

negotiate, choosing a military option instead. In the ensuing raid, involving over twenty-eight hours of intense fighting and the eventual bombing of the Palace of Justice by the government, eleven Supreme Court justices, several dozen hostages, a dozen soldiers, and thirty-five members of M-19 were killed.[44]

The government's war against drug traffickers was another factor which brought violence to the boiling point in the late 1980s. The first major victim was Minister of Justice Rodrigo Lara Bonilla who was killed by drug traffickers in April of 1984 for destroying one of their largest clandestine laboratories.[45] Other threats and assassinations by drug traffickers followed, culminating in the gruesome presidential elections of 1989, when three presidential candidates were killed. Politically, the most important assassination was that of Luis Carlos Galán, considered most likely to be Colombia's next president.[46] Drug traffickers also were believed to have killed Bernardo Jaramillo, the leftist *Union Patriótica* (Patriotic Union) candidate, adding another name to the list of over one thousand Patriotic Union activists assassinated in the late 1980s.[47] Carlos Pizarro, the candidate of M-19, the former urban terrorist group, was assassinated in 1990 as well.[48]

B. *The National Constituent Assembly*

As a result of this pervasive violence, which by the late 1980s had turned the country into the killing fields of Supreme Court justices, presidential candidates, leftist activists, judges, and others, a student protest movement arose in 1990 at Bogotá's El Rosario University. It promoted the creation of a national constituent assembly to reform the 1886 Constitution.[49] Two comparative legal scholars have summarized the need for constitutional reform as follows:

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44. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COLOMBIA: A COUNTRY OF STUDY 298 (Dennis M. Hanratty & Sandra W. Meditz eds., 1990). As Ana Carrigan of the N.Y. Times notes, it is impossible to determine precisely the number of deaths in the Palace of Justice tragedy because the Colombian army destroyed the building - and the evidence - in its attack against M-19. Carrigan portrays the government's bombing of the Palace of Justice, and subsequent cover-up, as part of the "dirty civil war" against the left which previously had been fought in the far reaches of the countryside, now brought home to the nation's capital by this famous attack. *See* ANA CARRIGAN, THE PALACE OF JUSTICE: A COLOMBIAN TRAGEDY (1993).

45. *See* Rachelle Marie Bin, *Drug Lords and the Colombian Judiciary: A Story of Threats, Bullets, and Bribes*, 5 U.C.L.A. PAC. BASIN L.J. 178, 179 (1986). *See also*, Jose Antonia Mantilla, *International News*, REUTERS, May 1, 1984, Tues. A.M. cycle, *available in* LEXIS, News Library, Curnws File.

46. *See* BUSHNELL, *supra* note 31, at 264.

47. *Id.* at 266.

48. *Id.*

49. Dugas, *supra* note 30, at 23.

> Until 1991, Colombian constitutional reform has been as much an effort to avoid societal problems as it has been a means to solve them. The violence and social division which grew out of inattention to basic needs apparently caused Colombian leaders to recognize that a societal collapse would be inevitable without a genuine commitment to a more open, democratic, and responsive government.[50]

Concerning the above scholars' warning of a potential societal collapse, it is important to note that by seeking constitutional reform, these reformers respected the rule of law which proports to seek peace and a more pluralistic political system through constitutional reform. Thus, the reformers shunned violence and other repressive methods of reform which have been commonly utilized in the rest of the Americas.[51] Constitutional reform was first considered in the elections of March of 1990, when more than two million Colombians expressed their support for a constituent assembly.[52] This support became official in the presidential elections of May, 1990, when over eighty-eight percent of the voters approved of the convocation of the Constituent Assembly.[53] On October 9, 1990, the Supreme Court of Justice declared the convocation of the Constituent Assembly to be constitutional, and on December 9, 1990, Colombians went to the polls to elect the seventy-four members of the body.[54] After six months of debate, the Constituent Assembly produced a 380-article constitution (one of the lengthiest existing), signed into law by President Gaviria on July 4, 1991.[55]

The tasks of constitutional interpretation and of ensuring that pre-1991 laws conform to the Constitution were given to the Constitutional Court,[56] one of

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50. Banks & Alvarez, *supra* note 36, at 43-44.

51. In contrast, consider the attempted *coup d'etat* against the Perez government in Venezuela in February of 1992, or more notoriously, the suspension of the Peruvian constitution by Alberto Fujimori on April 5, 1992. For a discussion of the failure of constitutionalism in Latin America due in large part to military coups and reliance on authoritarian means, *see generally* Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 6-9 (1991).

52. Dugas, *supra* note 30, at 23; *see also* Banks & Alvarez, *supra* note 36.

53. Banks & Alvarez, *supra* note 36, at 57.

54. *Id.* at 58.

55. A Look at the New Book of Rules; Congressional Clientelism is Curbed; Judiciary Reformed, LATIN AM. WKLY. REP., July 25, 1991, at 4.

56. *See* CONSTITUTION, *supra* note 3, arts. 239-245. Essentially, the Constitutional Court has exclusive jurisdiction on all constitutional matters. This role was previously played by the Supreme Court of Justice, now the highest court of ordinary jurisidiction. *Id.*, arts. 234, 235. Professor Glendon notes that most liberal democracies have not embraced the United States system of permitting ordinary courts to rule on constitutional questions. By contrast, most countries have variants of the system developed in Austria in the 1920s, where such matters are referred to a tribunal that deals exclusively or primarily with constitutional issues. *See* GLENDON,

the many new judicial institutions created as part of the 1991 Reform.[57] Upon creation, the Constitutional Court was granted much broader powers of judicial review than its United States counterpart. For example, the Constitutional Court not only reviews existing statutes, but it also reviews congressional bills and international treaties.[58] Also, citizens may challenge any law in the Constitutional Court, regardless of whether it is being enforced or whether a "case or controversy" exists.[59] Thus pursuant to its constitutional role, the Court reviewed the 1986 statute at issue.

III. THE MODERN HISTORY OF DRUG PENALIZATION IN COLOMBIA

Colombia's first drug law appeared in 1920, following the 1912 International Convention on Opium at the Hague.[60] The 1920 law concerned the

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supra note 22, at 161. The need for a Constitutional Court, and specifically, the power of judicial review, was based on the following: (1) the fact that the general character of the Constitution does not permit frequent reform like other laws; (2) the ambiguity of some constitutional phrases; (3) the necessity to adapt abstract texts and the occasional myopic vision of the Constitutuent Assembly; and, (4) the need to balance and limit certain "fundamental" or "absolute" rights. One critic has noted that the only article *not* subject to interpretation by the Constitutional Court is the article describing the nation's flags and its colors. *See generally*, Matthias Herdegen, *El Desarrollo Constitucional a la Luz del Derecho Comparado*, 84 UNIVERSITAS 7 (1994).

57. *See generally* Jaime Giraldo Angel, *La Reforma Constitucional de la Justicia*, *in* LA CONSTITUCIÓN POLÍTICA DE COLOMBIA: UN PACTO POLITICO VIABLE?, *supra* note 30, at 97. For a description of the creation of the central prosecutor's office, or the *Fiscalía*, *see* Michael R. Pahl, *Wanted: Criminal Justice — Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT'L L.J. 608 (1993).

58. *See* CONSTITUTION, supra note 3, art. 241 (discussing the jurisdiction of the Constitutional Court).

59. *Id.*

60. Observers have noted that Colombian legislation concerning drugs has been primarily based on conventions and international treaties, at the expense of academic debate and public discussion. Others have noted that international pressure to conform to international norms has similarly limited the capacity of Colombia to draft drug legislation to meet its own, specific problems. *See* Ricardo Sánchez, *Droga: Legalidad y Política*, in LA LEGALIZATION DE DROGA 95, 112 (1994); *see also* Rodrigo Uprimny Yepes, *Mas allá del prohibicionismo: Políticas alternativas frente a las drogas*, in LA LEGALIZATION DE DROGA 117, 119 (1994). Professor Thoumi, as well, has observed that the majority of drug policies adopted by Colombia have been in response to immediate political, economic, and social pressures, not a result of a consensus or a social model oriented towards how society should advance in this area. THOUMI, *supra* note 26, at 209.

In comparision, laws in the United States concerning drug consumption first took effect in the late 19th Century. Narcotic addiction was considered an evil, but did not carry a criminal label. The most notorious case from this period, of course, was *Yick Wo v. Hopkins*, where a California statute was declared unconstitutional because it specifically applied against those of Chinese decent. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The movement in the United States to criminalize drug use and eradicate the drug problem first took root in the early part of the 20th

importation and sale of drugs, such as cocaine, opium, codeine, morphine, cannabis, and other substances, which allegedly were "forming pernicious habits."[61] The Second International Convention on Opium, taking place in 1925 in Geneva, Switzerland, served as the impetus for Colombia's second drug statute, Law 118. Enacted in 1928, this statute authorized the government to add to its list of prohibited substances, and criminalized drug trafficking with penalties from one to six months in prison.[62] This statute also served as a precursor for the statute challenged in this case by providing for the treatment of addicts in state facilities.[63]

The Penal Code of 1936 incorporated the above laws by prohibiting drug trafficking, although drug consumption was decriminalized for a brief period ending in 1946 (Law 45).[64] The rationale for drug laws passed during this period included the defense of public health, crime prevention, and what some have considered racism, as arguments against drug use focused on the "defense of the race," punishing those few consumers from poor sectors who were largely *mestizo*.[65]

The movement to include mandatory treatment as part of the criminal law was strengthened with Decree 1669 of 1964. This decree distinguished between those criminals requiring treatment, who were placed in medical establishments, and those not requiring treatment, who were sent to an agricultural colony or jail.[66] Similarly, Decree 1136 of 1970 established mandatory treatment for those disturbing the peace while intoxicated by alcohol or drugs. Critics have lamented,

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century, similar to Colombia. *See generally*, LAWRENCE J. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).

The constitutionality of international treaties entered into by the United States relating to international drug trafficking was upheld as early as 1944. The United States may "enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit-forming drugs[;] . . . and Congress is constitutionally empowered to enact whatever [law] is necessary and proper for carrying into execution the treaty making power . . . ." *See* Stutz v. Bureau of Narcotics of Dept. of Treasury of United States, 56 F.Supp. 810, 813 (N.D.Cal. 1944) (citing U.S. Const. art. I, § 8).

61. *See* FERNANDO TOCORA, LA DROGA: ENTER LA NARCOCRACIA Y LA LEGALIZACION 65 (1992); *see also* EDUARDO VASQUEZ CHACON, TRATADO JURIDICO DE LAS DROGAS 11, 12 (1982).

62. TOCORA, *supra* note 61, at 65-66; *see also* VASQUEZ CHACON, *supra* note 61, at 12.

63. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 12.

64. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 13; ROY RIASCOS ELIAS & JAIME VALLEJO ZULETA, ESTUPEFACIENTES Y ALUCINOGENOS ANTE EL DERECHO PENAL DE COLOMBIA 78 (1971).

65. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 13; RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 78 (1971).

66. VASQUEZ CHACON, *supra* note 61, at 13; *see also* RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 93-95.

however, that the state was unable to provide sufficient public facilities to meet the good intentions of this law.[67]

The 1970s marked a rise in drug use, especially marijuana, due to various social changes associated with the cultural revolution of the 1960s. Because drug use was originally confined to socially marginalized groups and a few eccentrics, it was not considered a public threat and, accordingly, there was minimal political reaction.[68] In the 1980's, however, Colombia, like the United States, experienced a rise in cocaine-related drug use which posed a direct threat to society. As would be expected, the political response was to strengthen laws concerning personal drug use.[69]

Accordingly, in January of 1986, Congress passed Law 30 of 1986, which increased criminal penalties for personal drug use and drug trafficking.[70] In challenging this law, the Plaintiff in the case at hand limited his challenge to the statutory provisions concerning fines, prison time, and mandatory treatment for personal drug use. The constitutionality of the drug trafficking provisions was not raised.

The first provision defined the quantity of drugs considered as a personal dose.[71] The second provision classified different types of drug users: (1) first and

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67. VASQUEZ CHACON, *supra* note 61, at 14; *see also* RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 107-8 (noting that personal use was not sanctioned under this decree because the decree only referred to carrying drugs in a public place or openly displaying them in public. The failure to mention carrying in a private place reflected, according to these authors, the legislative intent not to sanction personal use).

68. THOUMI, *supra* note 26, at 281.

69. *Id.* at 281-82.

70. The principle characteristics of Law 30 of 1986 include the prohibition of the production and commercialization of numerous substances; the regulation of chemicals used in making drugs and of plant seeds; the establishment of anti-drug programs in schools; the establishment of free treatment centers for chemical dependency in institutions of higher education; the regulation of the sale of cigarettes and alcohol; and the definition of the crime of selling drugs and the establishment of increased penalties. *Id.* at 280-81. One author has criticized Law 30 of 1986 on the grounds that it was developed under emergency legislation during a state of seige. *See* Sánchez, *supra* note 60 at 113. This argument cuts both ways, however. On one hand the validity of statutes can be questioned because they are enacted under states of seige. On the other hand, because Colombia has been under legal states of seige for most of its recent history, this argument could be used to attack all of Colombia's *corpus juris*. This view, taken to its extreme, would seem to invalidate most of Colombian law.

71. Under this statute, personal use is defined generally as the amount of drug that a person carries or keeps for his personal consumption. Specifically, the statute defined: (1) personal use of marijuana as not exceeding 20 grams; (2) hash as not exceeding five grams; (3) cocaine or other cocaine-derived substance as not exceeding one gram; and, (4) heroin not exceeding two grams. The statute also provided that drugs found on the person with the intention of distribution or sale will not be considered a personal dose, regardless of the quantity. LEY, *supra* note 2, at art. 2, § j.

second-time offenders, subject to fines and imprisonment;[72] and (2) first-time offenders with a demonstrable drug addiction, subject to mandatory treatment-the statute's "tough love" remedy.[73]

The statute provided that the addicted first-time offender be placed in a psychiatric or similar institution, public or private, for the time necessary for his rehabilitation.[74] At the judge's discretion, the addict would undergo outpatient treatment or be placed in an institution until the treating physician certified that the addict had recovered.[75]

IV. FRAMING THE ISSUE: PLAINTIFF'S CASE

The most surprising aspect of the 1986 Personal Use statute challenged in this case is how unremarkable it seems at first blush. Like similar statutes in the United States and other countries, it appears to be a reasonable, indeed a commendable, statute designed to deter drug use through relatively minor criminal sanctions, and to help some of society's most vulnerable members through mandatory treatment. Plaintiff,[76] however, construes this seemingly

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72. First-time offenders were subject to up to 30 days in prison and a fine up to one-half a minimum monthly salary. Second-time offenders were subject to up to a year in jail and a fine of one-and-a-half monthly salaries when the second crime occurred within 12 months of the commission of the first. LEY, *supra* note 2, art. 51, §§ a and b.

73. *But c.f., Ecuador prepara despenalización al consumo de drogas*, EL TIEMPO, Nov. 17, 1994, at 15A (illustrating that Ecuador is considering decriminalizing personal drug use because their current drug law *fails* to provide treatment for drug addicts, as occurs in other Latin American countries).

74. LEY, *supra* note 2, art. 51, § c.

75. *Id.*

76. One of the most important elements of the 1991 Constitution is its celebration of the country's diversity, well represented by Plaintiff, Alexandre Sochandamandou. Proud of his Hindu ancestry and calling himself a "spiritual shaman of the New Age," this 1960s National University philosophy graduate has served as sort of a juridical gadfly, bringing constitutional questions to the court over diverse areas such as the declaration of state holidays and the order of citizens' last names. His suit concerning drug legalization was the first to be accepted by the court. This case reflects the philosophical considerations concerning individual liberties promoted in his book LA FILOSOFIA DEL MESTIZO: UN MÉTODO PARA DESARROLLAR LOS PODERES DEL ALMA. *Del brahamanismo al libre albedrio*, EL ESPECTADOR, May 7, 1994, at 10A.

One of Mr. Sochandamandou's principal ideas is that drug use enhances the spiritual life. As such, he might have argued, or the Court might have considered, a free exercise-type claim afforded protection under Constitutional Articles 18 and 19. Such claims, however, generally have been rejected in the United States. For example, a number of states, including Arizona, Colorado, and New Mexico, have made an exception to their drug laws for sacramental peyote use. However, the Supreme Court has ruled that states, under the free exercise clause of the First and Fourteenth Amendments, may create exceptions to their drug laws for sacramental use. However, they are **not** required to create these exceptions. *See* Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (emphasis added) (holding that the free

laudable statute as unconstitutional for three reasons. First, the statute interferes with a citizen's right to control their personal health. Second, the statute discriminates between and among different classes of drug users. Third, the statute masquerades harsh criminal penalties as benign medical treatment.

A. *Formulating New Rights: The "Right" to be Sick*

The Court begins its analysis by delicately noting the difficulty of framing Plaintiff's arguments, for Plaintiff's complaint was "not as clear as would be desirable."[77] Reconstructed by the Court, Plaintiff's first argument concerns the constitutional limits on state intervention in personal health. Plaintiff argues the statute violated Constitutional Article 366, which provides that the social ends of the State are general welfare and the betterment of the quality of life.[78] Plaintiff argues that if the State could not guarantee the addict's recovery through mandatory treatment, then the State could not deprive the addict of the (illegal) drug that would alleviate the addict's misery.[79]

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exercise clause does not relieve the individual of the obligation to comply with valid or neutral laws of general application - such as laws banning personal drug use - so long as the law does not violate other constitutional protections).

77. Decision No. C-221 at 7. This imprecision is understandable, given that Colombian law does not have a "case or controversy" requirement and, as a result, constitutional issues may be brought directly to the Court's attention. Consequently, constitutional questions are not filtered through the issue-narrowing appellate process as occurs in the United States. In 1910, Colombia first instituted this process, known as "popular action," which permits any person, regardless of any direct interest in the outcome, to bring an action directly to the Supreme Court challenging a statute. *See generally* JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 775 (1978). For this reason, the Court was forced to piece together Plaintiff's "layman" arguments into a justiciable whole.

78. Decision No. C-221 at 7. Note here that such a general right was not designed by the Constituent Assembly for immediate application. Article 85 of the Constitution provides that certain fundamental rights and traditional liberties are of immediate application. All other rights, in particular social, economic and cultural guarantees, must await legislative action. *See* Mathias Herdegen, *Hacia Un Realismo Consticional*, 83 UNIVERSITAS 11, 13 (1992). In this sense, the Colombian Constitution is similar to European constitutions containing commitments to welfare rights which do *not* give rise to enforceable individual rights. Rather, these "programmatic rights" are more statements of social goals and aspirations whose implementation must await legislative or executive action and budgetary appropriations. *See* GLENDON, *supra* note 22, at 99.

79. Decision No. C-221 at 7, 8. Note that in the United States, state courts have upheld criminalizing drug use with arguable medicinal value, such as marijuana, as constitutional statutes. *See, e.g.*, State v. Hanson, 364 N.W.2d 786 (Minn. 1985) (holding that legislative classification of marijuana as a Schedule I controlled substance was constitutional, despite contention that marijuana had medicinal value). In *Hanson*, the court held that the defense of medical necessity was not available to a person charged with marijuana use or possession absent a showing that the proposed medical use was so unique or effective that it would have been inappropriate for legislative action. *Id.*

Plaintiff then turns to a panoply of constitutional provisions[80] to frame the issue of the statute's constitutionality in terms of inalienable rights. Because drug addicts are "psychophysiologically sick," Plaintiff argues that "the State cannot sanction with penalties or security measures the inalienable right of persons to be psychophysiologically ill whatever the cause, including drug addiction or toxicmania."[81] He also argues that the statute violated Constitutional Articles 28 and 95, using the libertarian argument that the State "cannot penalize those who simply use intoxicants, because their conduct does not hurt anyone other than themselves."[82]

B. *Discriminatory Aspects of the Personal Use Statute*

Plaintiff then provides three examples of how the statute violated the constitutional guarantee of equality.[83] First, the statute allegedly discriminated between sick persons and drug addicts because it permitted the use of addictive drugs to alleviate the suffering of sick persons, but prohibited the use of addictive

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80. *See* CONSTITUTION, *supra* note 3, arts. 5, 28, 29, 34, and 49.

81. Decision No. C-221 at 8.

82. *Id.*

83. *Id.* In the United States, defendants have challenged sentencing for cocaine base (crack) and cocaine powder offenses on equal protection grounds, due to the alleged discriminatory impact on African-Americans. A large percentage of African-Americans are sentenced for possession of cocaine base (carrying stiffer sentences), as opposed to the small percentage sentenced for possession of cocaine powder. Federal circuit courts, however, have overwhelmingly rejected this argument. *See,* e.g., United States v. House, 939 F.2d 659 (8th Cir. 1991). In *House*, the court held that the term "cocaine base" was not so vague as to not provide sufficient notice that the conduct was criminal. *Id.* at 664. Moreover, the court held that the statute did not discriminate on the basis of race, nor did it affect a fundamental right. *Id.* As such, the difference in penalties need only be rationally related to a legitimate governmental objective. *Id.* Here, the court found the distinction in sentencing to be "rationally related to Congress's objective of protecting the public welfare." *Id.* The court also upheld the propriety of the sentence here on the grounds that the Supreme Court has indicated in non-capital cases that "successful challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* (citing Solem v. Helm, 463 U.S. 277 (1983)). *See also* United States v. Willis, 967 F.2d 1220 (8th Cir. 1992). One state supreme court, however, has bucked the federal trend, holding that the statutory distinction between crack cocaine and cocaine powder violates the equal protection clause of the state constitution. State v. Russell, 477 N.W.2d 886 (Minn. 1991). In this case, the court held that the distinction in sentencing failed under the tougher *state* rational basis test, because the state needed more than mere anecdotal support for the difference in sentencing. *Id.* at 889. Rather, the state, under the more stringent rational basis test, would have to show a reasonable connection between the actual, and not just theoretical, effect of the challenged classification and the statutory goal. *Id.*

The United States Sentencing Commission recently voted to make crack cocaine sentences equal to those for powder cocaine. The prosecutors and attorneys representing the United States voted to reject the proposal. *Reno Backs Strict Sentences for Sellers of Crack Cocaine*, N.Y. TIMES, April 16, 1995, at 18.

drugs to reduce the suffering of addicts.[84] Second, the statute allegedly used a double standard to discriminate between types of drug users, because those addicted to socially unacceptable drugs, such as cocaine or marijuana, were subject to criminal sanctions, while those addicted to socially approved drugs, such as nicotine or alcohol, were not.[85] Third, the statute allegedly discriminated based on the level of drug addiction, because establishing a criminal penalty based on a fixed personal dose fails to take into account the difference among persons as to their degree of addiction.[86]

C. *"Benign" Medical Care as Criminal Sanction*

Plaintiff also takes issue with the medical treatment called for by the statute, construing it as a maleficent instrument of the State's penal power. Plaintiff argues that because the statute provided for medical treatment until the addict was "cured," it potentially placed the addict under State control in perpetuity if the addict proved to be incurable.[87] Plaintiff also argues that because the treatment often took place in jails, it was punitive in nature. If the addict was treated behind bars with common criminals, the distinction between benign medical care and punitive sanction might be lost.[88] Finally, Plaintiff objects to the statute because it placed the addict's life and liberty in the hands of the attending physician, not a judge.[89]

The Court also considers the arguments of the Ministry of Justice and the Attorney General, two governmental entities who argued for the constitutionality of the statute. The Ministry of Justice defended the statute on the scientific ground that Constitutional Article 366 was not violated because the health needs of drug users are neither served by administering the toxicant that is harming them, nor by the free use of the substance. Rather, the proper role of the State includes education, prevention, treatment and rehabilitation, all of which suppress drug use.[90]

The Attorney General, interestingly, agreed with the Plaintiff regarding the potential for perpetual treatment, and in fact had previously challenged, without success, the statute before the Constitutional Court to prevent the use of the statute to incarcerate addicts indefinitely. Unlike Plaintiff, however, the Attorney General emphasized the benign and progressive nature of the statute, under which drug addicts are viewed more as victims to be treated than criminals to be

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84. Decision No. C-221 at 8.
85. *Id.*
86. *Id.* at 9.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 10.

punished.[91] Generally, the Attorney General defended the statute as part of the State's police power, including the power to criminalize drug use, develop treatment programs, and set personal dosage limits.[92]

V. THE MAJORITY SPEAKS: CREATING A RIGHT TO USE DRUGS BASED ON THE FREE DEVELOPMENT OF THE PERSONALITY

After presenting the Plaintiff's and governmental intervenors' arguments, the majority begins its opinion by defining the general philosophical principles that should govern Colombian society. This penchant for philosophical argument at the expense of, or as a gloss on, constitutional text recurs throughout the Court's opinion. As a result, the majority's opinion often reads more like a philosophical treatise on the merits of drug decriminalization than reasoned jurisprudence grounded in the Colombian Constitution. It is of little wonder, then, that this attempt by the Court to find and then "enforce norms that cannot be discovered within the four corners of the document,"[93] supports the accusation by many that the Court is engaging in judicial activism.

The majority begins this search for governing principles with a philosophical consideration of Plaintiff's libertarian argument that the State should not penalize personal activities, such as drug use that does not affect others. According to the majority, the resolution of this question depends on two mutually exclusive philosophical notions of the citizen and the State.

The first is a theological notion, rooted in natural law, in which humans are the property of God and, therefore, can be regulated by the State in conformance

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91. *Id.* at 11.

92. *Id.* As Professor Glendon emphasizes in RIGHTS TALK, the language used in legal cases to explain rights and responsibilities is of the essence. *See* GLENDON, *supra* note 22, at 7. Plaintiff used arguments steeped in the language of personal autonomy, individual rights and suspicion of the state, especially its power to discipline and punish. As such, in the Plaintiff's view the Constitution should be seen as a framework for the protection of individual rights within a *laissez-faire*, libertarian state, in which individual rights trump collective interests.

The governmental intervenors focused on the State's duty to care for the health of its citizens through treatment programs and to promote the general welfare through the exercise of its police power. Adhering to common strains of the civic republican tradition, they argued that the State, rather than being neutral on the question of personal drug use, may prohibit such use on moral grounds and should use various means - including education, treatment, and prevention programs, as well as the criminal law - to achieve this end. Most importantly, these distinctive ways of talking about rights and responsibilities, and the proper spheres of the State and the individual, serve here to define and refine the issues for eventual resolution by the Court, as parties and intervenors do in the United States appellate process.

93. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980). In this case, the norms at issue are of a libertarian nature.

with God's will.[94] Without much discussion, the majority rejects this theological, natural law based notion of the citizen and state and instead chooses secular liberalism, defining it as follows: "[t]he legislator can prescribe the form in which I must behave with others, but not the form in which I must behave with myself, to the extent that my conduct does not interfere with anyone else's world of action."[95]

In a certain sense, the reader can stop here since the eventual outcome of the case, as well as the Court's thinly veiled anti-religious bias, is obvious. By creating a theological strawman, the Court foreshadowed the eventual outcome of the case, namely, that the proper role of the Colombian state is to be neutral among ends, leaving moral issues, such as whether to use drugs, to be decided by individuals rather than by the State.

The Court's reductionistic philosophical "clash of absolutes," in which drug laws either take their cue from authoritarian theology or contemporary notions of liberalism, is hard to defend both in theory and in practice. Although never explicitly stated, the Court frames the issue with such bipolar philosophical opposites as if to suggest that those who support laws penalizing personal drug use are little more than God-fearing meddlers who seek to impose God's will and to reinstate a chemically-based Inquisition. At the same time, the Court apparently characterizes those who support legalization as the noble modern descendants of John Stuart Mill and defenders of freedom. Not at any time does the Court suggest, however, that there may be strains of gray between these two positions, or that portraying a Colombian drug law passed in 1986 as theologically based is anachronistic, at best. The Court also fails to consider that drug laws have long existed in countries such as the United States, with neither a natural law based jurisprudence nor an established church. Moreover, the logical extension of the Court's philosophical dichotomy suggests that atheists who support drug laws, or theists who support legalization, are in a state of some odd theological cognitive dissonance.

Beyond these theoretical considerations, however, the crucial point is that the Court never considers the validity of this jurisprudential cleavage in the most relevant context: Colombia.[96] The Court does not explain, for example, how

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94. Decision No. C-221 at 14. Mark A.R. Kleiman, among others, has criticized the argument that drug use should be banned because it is an offense against God, noting that "(t)o employ the force of the state to ban voluntary behavior that is not demonstrably harmful is to legitimate the use of democratic politics to wage cultural holy wars." MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 59 (1992). The majority seems to focus on the mere possibility that the 1986 statute is rooted in natural law. Even if it is, which is never demonstrated, the pertinent question is what harm it produces.

95. Decision No. C-221 at 14.

96. Others have noted this scotoma in the Court's vision:

> (There is) no reference to what Colombians are thinking. None whatsoever. It's an opinion that comes out of the blue, with no political context, with no social context, no philosophical context, no health context, no legal context, no violence

these two governing principles - natural law based jurisprudence or libertarian jurisprudence - can be gleaned from constitutional text. The Court also does not demonstrate, for example, that the legislative intent of the 1986 statute, or of any other Colombian statute relating to drugs, was premised on theological notions of the State's duty to impose God's will through penal law. More broadly, the Court fails to consider the historical context of the 1986 statute. After all, Colombia has never gone through the sort of moral crusade against alcohol as in the United States during Prohibition or, some might argue, in our current "war on drugs." For this reason, it is hard to conclude that the 1986 statute should be overturned because of some apparent improper theological taint. Even if it could be proven that the statute addressed here arose from natural law considerations, the Court is on exceedingly shaky ground if it is suggesting that any law based, in part or in whole, on theological considerations is *ipso facto* unconstitutional. Were that to be true, the Court would be effectively excluding religious citizens from the public square.[97]

The Court supports its view that those favoring drug criminalization are philosophically engaged in a sort of chemical holy war only by references throughout the case to the writings of Thomas Szasz, a psychiatrist who has described drug laws as akin to heresy laws.[98] Why the views of a U.S. psychiatrist carry more weight than the views of the Colombians who passed the 1986 statute, reformed the Constitution in 1991, and to whom the Court's

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> context, and I think that's a big threat. It's a threat to stability, not because of the sentence, but *how* it was done and *why* it was done, and the shallowness of the opinion. It's a threat to what many people might believe is a certain type of moral and legal type of conduct. What about if (the judges) say . . . extradition must be allowed again? They could do it, they can do exactly what they want.

Santos, *supra* note 28.

97. The view that constitutional issues can become impermissibly entangled with religious views has arisen in the United States in many contexts, especially abortion. The idea that religious views impermissibly taint governmental action in the abortion arena has been taken by such eminent scholars as Laurence H. Tribe. However, he has recently rejected this view. LAURENCE H. TRIBE, ABORTION, THE CLASH OF THE ABSOLUTES 116 (1990).

Professor Tribe's current view of the relation between religious views and constitutional issues concerning the abortion debate has been expressed as follows:

> (A)s a matter of constitutional law, a question such as (abortion), having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it . . . . Thus, the theological source of beliefs about the point at which human life begins should not cast a constitutional shadow across whatever laws a state might adopt to restrict abortions that occur beyond that point.

Id. If this is true for the question of abortion, on which religions have long taken a public position, it should be true concerning drug decriminalization, an issue about which organized religions have been especially prominent in the public sphere.

98. THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS 179 (1974).

decision will apply, is never explained.[99] This is not the only time the Court dives into the murky waters of philosophical speculation and bases their opinions, as here, on exclusively foreign sources. Regrettably, this look abroad for philosophical ideas occurs at the expense of the Colombian people who express their opinions through their elected representatives in both the Congress and the Constituent Assembly. The Court is acting as a sort of "constitutional *cognoscenti*," and is remaking the historic constitution from materials, such as natural law or its own prophetic vision, to promote a more socially permissive society than called for by either the actual Constitution or the legislative opinion of the Colombian people.[100]

After expressing the need to weed out any theological taint in the law, the Court begins to blend its extra-textual libertarian notion of the person with Colombian law and constitutional text. Accordingly, once establishing the libertarian rubric, the Court narrows the constitutional issue to the proper interpretation of Constitutional Article 49, which concerns the duty of citizens to obtain the integral care of their health and of their community.[101] In its opinion, the Court does not state why the case turns on the interpretation of this article alone, especially when Plaintiff, governmental intervenors, and the dissent discuss other constitutional provisions.[102] However, this narrow constitutional support is not surprising given the Court's predilection for philosophical speculation at the expense of constitutional text. The Court then formulates several "hermeneutic possibilities," or interpretations, upon which to decide the constitutionality of the statute.

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99. Judge Gaviria defends his broad use of foreign thinkers. In his view, the problem of drug legalization is not a parochial one. As such, it is not the type of problem for which one should listen to Colombians simply because they are Colombians. According to Judge Gaviria, there is no reason that the thoughts of Colombians should prevail over that of "universally recognized thinkers," such as the authors mentioned throughout his opinion. In his view, it would be unremarkable that in Colombia, people have not thought about this issue as profundly as, say, Erich Fromm or John Rawls have thought about personal liberty. These thinkers should not be rejected simply because they are not Colombians. As to why Colombian jurists are not cited, Judge Gaviria opined that the function of a judge is not to reproduce particular opinions of jurists or magistrates. Rather, the proper role of a judge is to support his own opinion with a solid philosophical base, elaborating the ideological fundamentals which form part of the Constitution. In determining what constitutes the "free development of the personality," the opinions of John Rawls, Erich Fromm and Thomas Szasz are more relevant than those of "local thinkers." *See* Gaviria, *supra* note 5.

100. For a similar criticism in United States constitutional law, *see* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6 (1990).

101. Decision No. C-221 at 14.

102. Of course, the U.S. Supreme Court, for example, frequently decides constitutional issues as narrowly as possible. Here, however, the supposed restrictive reliance on Article 49 alone as constitutional support serves more as a fig leaf to cover the broad, noninterpretivist extra-textual approach taken by the Constitutional Court.

A. *The First Hermeneutic*

The Court's first possible interpretation of Constitutional Article 49 is that the article reflects a general hortatory desire of the Constituent Assembly regarding health. According to this interpretation, the policy goal of protecting the citizen's health, construed broadly, could be used as the basis of a criminal sanction, such as the statute criminalizing personal drug use.[103]

1. *Effects on the Family or the Argument from Propinquity*

Implicit in the Court's treatment of Article 49 is its exclusive use in support of the 1986 statute if the State can prove that drug use affects the health and well-being of others. In other words, once the Court determines that the general governing principle of the Constitution is libertarianism, the burden shifts to the State to prove that drug use affects the health and well-being of others, and not just the individual.

The Court next considers several arguments in support of the 1986 statute that addressed the harmful effects of drugs. The Court never states its standard of review. While it is clear the Court found fault with many of the policy arguments supporting the statute, the difficulty lies in determining whether the Court finds the statute unconstitutional because it simply disagrees with these policy arguments offered in support of the statute or because these policy arguments affect constitutionally protected rights. The Court does not seem to consider the fact that disagreement with the policy arguments in support of drug criminalization may not be tantamount to finding these arguments unconstitutional.

In the United States, for example, many of the arguments below would clearly pass constitutional muster under the rational basis test. In Colombia, however, the lack of an expressed standard of review is troubling for two basic reasons. The first is predictability. Establishing a standard of review is extremely important in a burgeoning constitutional system. Otherwise, those who wish to comply with the constitution are left in the dark as to what, in fact, is unconstitutional. The second reason is the international repercussions of the case. Due to Colombia's notoriety as the world's largest supplier of illegal drugs, it is all the more important that special attention be given to clarifying the standard of review and the rules of interpretation.[104]

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103. Decision No. C-221 at 14.

104. According to Judge Gaviria, an opinion does not have to mention the rules of interpretation used. He argues that constitutional protections of the free development of the personality, human dignity, and the construction of the ethical person gleaned from constitutional text, are sufficiently clear to establish that laws criminalizing drug use contradict these principles. As such, no specific standard of review was necessary. Gaviria, *supra* note 5.

The Court first discusses the argument that drug laws are constitutional because drug use affects not only the individual, but harms others as well.[105] However, the Court gives little value to the notion that penalizing drug use could be based on the consideration of harm done to others, such as those close to the user. If the purpose of the law is to protect the community who is "hurt" by being deprived of the presence, comfort or economic support of the drug user, then the statute could not punish the drug user who does not have these close relationships.[106] The Court assumes here, in apparent refutation of John Donne, that every man is indeed an island, at least regarding personal drug use, unless the State can prove otherwise. In any event, if the Court is saying that the statute is over-inclusive because some addicts lack these personal relationships, they imply that the statute is valid for those possessing such relationships. Unfortunately, most criminal laws are blunt instruments, and it is questionable whether any country could design a drug law that required proof of direct harm to those propinquitious to the users.

Moreover, the Court frames the issue in terms of the social good caused by the "lack" of drug addicts, rather than more plausibly, social bad caused by their existence. That is to say, the Court does not consider the millions of Colombians who might not want their families submitted to the "extravagances . . . and frequently the atrocities" of those addicted to or using drugs.[107] In addition, the Court argues that penalizing drug use has the perverse effect of causing greater harm to the community than if there were no drug laws at all. If the law is

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105. Concerning certain libertarian aspects of U.S. law, Professor Glendon has noted that "[t]o a greater degree than any other, the American legal system has accepted Mill's version of individual liberty, including its relative inattention to the problem of what may constitute 'harm to others' and unconcern with types of harm that may not be direct and immediate." GLENDON, *supra* note 22, at 72. Professor Glendon also notes that Mill's views underwent a sea-change in the United States, where his "stern sense of responsibility to family and country, and his decided rejection of any notion that all life-styles were equally worthy of respect, largely dropped out of sight." *Id.* Note that criminal statutes in the United States have repeatedly been upheld on the theory that drug use harms society generally. *See, e.g.*, Clark v. Craven, 437 F.2d 1202, 1202 (9th Cir. 1971) (holding that California statutes proscribing the possession of marijuana do not violate due process on the theory that there is no basis for finding harm to society).

106. Decision No. C-221 at 15. Note the similarity between the Court's notion of the solitary, disconnected Colombian addict lacking familial and societal bonds, and Professor Glendon's "lone rights bearer." She contrasts the U.S. image of the lone-rights bearer with that of other countries where "the rights-bearer is imagined as a person situated within, and partially constituted by, her relationship with others." GLENDON, *supra* note 22, at 61.

107. Letter from Fernando Londoño Hoyos, Professor of Constitutional Law, Pontificia Universidad Javeriana, to Michael R. Pahl, Visiting Professor of Comparative Constitutional Law, Pontificia Universidad Javeriana 4 (March 27, 1995) (on file with the *Indiana International and Comparative Law Review*).

incapable of stopping drug use, even more deleterious is the amount of suffering the criminal sanction causes the family and others.[108]

2. *Effects on the Community or the Argument from Utility*

The Court then attacks what might be called the argument from utility, based on the civic republican notion that the State has an obligation to mold the moral character of citizens for their own good and the good of society through laws such as those penalizing drugs. The Court notes that to sustain the argument that drugs must be banned because they diminish the utility of certain individuals to society, those already marginalized by other types of anti-social behavior, egotists, misanthropes, etc., should be allowed to use drugs so that society could rid itself of these undesirables.[109] Arguing the slippery slope, the Court then questions why other substances proven pernicious to social welfare, for example tobacco, alcohol, or even fatty foods, should not be banned under this utilitarian logic as well.[110] However, the Court does not consider a possible reason for the legislature's refusal to ban these substances: because the use of tobacco, alcohol or fatty foods, unlike heroine and cocaine, for example, almost exclusively affects the individual user and not society at large.[111]

3. *Effects on Social Well-Being or Nipping Crime in the Bud*

The Court then considers another common utilitarian argument emphasizing the link between drug use and crime.[112] The Court first notes that the statute is under-inclusive because it does not penalize a toxic substance

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108. Decision No. C-221 at 15. Others in the United States have noted the harm caused to the community by criminalizing drugs because those with criminal records, especially minorities, are hindered from becoming productive members of society. *See* Raul Tovares, *How Best to Solve the Drug Problem: Legalize*, NAT'L CATHOLIC REPORTER, Dec. 22, 1989, at 20.

Judge Gaviria uses the idea of harm to the family to criticize the framing of the issue regarding constitutional referendum. According to Gaviria, the question posed to the public through the referendum should not be framed as, "Should consumption be legal?", but, "If your son has consumed a marijuana cigarette, should he go to jail?" *See* Gaviria, *supra* note 5.

109. Decision No. C-221 at 16.

110. *Id.*

111. Professor Kleiman argues, for example, that the health of users cannot serve as the fundamental basis for drug laws. After all, being overweight, eating too much meat, failing to exercise, and failing to wear a seat belt cause more preventable deaths than drugs do. KLEIMAN, *supra* note 94, at 291.

112. For example, 32% of men in prison for rape admit they were using illegal drugs at the time of the crime. Jeffrey A. Eisenbach, *Drug Legalization: Myths vs. Reality*, HERITAGE FOUNDATION REPORTS, Jan. 25, 1990.

commonly linked to violence and crime: alcohol.[113] Even if this is true, the Court glosses over the fact that the legislature may have had good reason to exclude alcohol from the list of banned substances. Alcohol is the quintessential "democratic" drug. The enforcement problem would be overwhelming. Indeed, rather than using the statute's apparent under-inclusiveness to overturn the 1986 statute, the Court might have made other suggestions due to the elevated social harms caused by drinking - traffic accidents, spousal abuse, family breakups, etc. - which suggest that the legislature might be wise to impose stiffer penalties for public drunkenness and drunken driving, or to raise alcohol taxes, in order to decrease consumption.[114] In any event, the argument that legal use and free availability of alcohol have been linked to increased violence and crime hardly serves as a good argument for legalizing other dangerous drugs like cocaine and heroin that are even more likely to produce these effects.[115]

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113. Decision No. C-221 at 16. At the time the decision was announced, health functionaries had been pressuring the government to adopt some restrictions on advertising and labelling of alcohol and tobacco, as occurs in the United States, due to the major health problems these substances cause to Colombian society. See THOUMI, *supra* note 26, at 270. Other critics, mainly from the left, have noted the paradox of the Colombian state being responsible for paying for health services and in charge of the citizen's quality of life, while simultaneously acting as a seller and promoter of alcohol. *See, e.g.*, Hernando León Londoño Berrio, *La Problemática de la Droga en Colombia*, 47 NUEVO FORO PENAL 20 (March 1970).

Note that in the United States, state courts have repeatedly determined that under-inclusiveness is not a constitutional bar to narcotics laws. In *State v. Vail*, for example, the Minnesota Supreme Court concluded that "[t]he Legislature is not compelled to attempt to regulate all harmful substances merely because it attempts to regulate some." Thus, the fact that Schedule I, which includes marijuana, does not include all substances that meet the statutory criteria is not constitutionally fatal. State v. Vail, 274 N.W.2d 127, 136 (Minn. 1979); *see also* National Organization for Reform of Marijuana Laws (NORML) v. Gain, 100 Cal App.3d 586, 161 Cal.Rptr. 181 (Cal.Ct.App. 1979) (holding that marijuana laws do not violate potential user's right to equal protection merely because other substances, such as alcohol and tobacco, are not illegal); *see also In re* Orosco, 82 Cal. App.3d 924, 147 Cal.Rptr. 463 (Cal.Ct.App. 1978).

114. A central critcism of Judge Gaviria is that the government does not have any policy against alcohol consumption. In fact, at the time the opinion was issued, the government was attempting to decrease taxes on both alcohol and tobacco, tending to increase consumption. *See* Gaviria, *supra* note 5.

115. Supporters of drug decriminalization almost always point to the example of marijuana, not hard drugs, as substances closely analogous to legally available nicotine and alcohol. Indeed, the analogies between marijuana and alcohol use are compelling — wide social use, small harm in the short term, and, as the Court notes here, marijuana may be less criminal than alcohol. However, whatever the merits of drug decriminalization regarding marijuana, those supporting decriminalization often back away when the question of so-called hard drugs - heroin, crack, cocaine, LSD - are considered.

Judge Gaviria engages in a similar type of facile reasoning here. When asked about the discriminatory aspects of the 1986 statute, he replied that people who find themselves in analogous circumstances should be treated the same under the law. As support, however, he predictably cited analogous circumstances between alcohol and marijuana— not, of course, between casual alcohol use and casual crack smoking. *See* Gaviria, *supra* note 5.

The Court also argues that the statute was over-inclusive. In particular, the Court argues that the statute swept too broadly because certain substances penalized under this statute, such as marijuana and hashish, have a pacifying effect and have not been linked to crime.[116]

The problem with the Court's approach here is that the Court never provides a working definition of what it means by unconstitutional discrimination. It is unclear whether any statute that is under-inclusive or over-inclusive will be held unconstitutional by the Court. Even if the statute in fact sweeps too broadly, by including, for example, marijuana and hashish, it does not automatically follow that all drugs should be decriminalized. The Court might have considered here that, even assuming marijuana and hashish are not criminal, the legislature might have had some rational basis for banning other more dangerous drugs like heroin, cocaine, or crack.

Considering the argument that drugs should be banned as a deterrent because of their potential danger, the Court counters that in a positivist legal system a person cannot be punished for what he might do, but only for what he has done.[117] However, the Court does not consider whether other crimes under

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116. For the classic defense of the view that hallucinogens are non-criminogenic and mind-expanding drugs, see ALDOUS HUXLEY, THE DOORS OF PERCEPTION (1954). While this is pure conjecture, it is highly unlikely that the decision would have been rejected so strongly if the Court had limited itself, as courts in Alaska and Germany have done, to decriminalizing personal use of hashish and marijuana. The spector of legally available cocaine and heroin, with well-recognized pernicious social effects, most likely contributed greatly to the case's poor reception.

117. Decision No. C-221 at 17. In the United States, for example, the Supreme Court has held that punishing drug addicts simply for their status as an addict, and not for any overt act, is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Robinson v. California, 370 U.S. 660 (1962). In *Robinson*, the Supreme Court held unconstitutional a California statute making it a misdemeanor offense for a person to "be addicted to the use of narcotics." *Id.* California courts had construed the statute as making the "status" of narcotic addiction an offense for which the offender may be prosecuted " at any time before he reforms," even though he has never used or possessed any narcotics within the state and has not been guilty of any antisocial behavior there. *Id.* at 666. Justice Douglass' concurrence is especially instructive, because he focuses on narcotics addiction more as a disease to be cured than as a crime to be punished, much like the intent of the Colombian statute under consideration here. "A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil committment would do as well." *Id.* at 677. "Moreover, [this] prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." *Id.* at 678.

Justice Douglass, although opposed to criminalizing addiction, would not go as far as the Court here and hold unconstitutional all personal use law. On the contrary, "[t]he addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Id.* at 676; *Cf.* Powell v. Texas, 392 U.S. 514, (1968) (holding that conviction for public drunkenness of one who was to some degree compelled to drink did not amount to cruel and

Colombian law premised on the probability of harm rather than actual harm, such as carrying a concealed weapon or driving while intoxicated, could be unconstitutional under this analysis.[118] Equally questionable would be various aspects of the criminal code, such as pretrial detention.[119] After all, a defendant held in pretrial detention is being deprived of liberty based on either the potential danger to the community, or the potential of fleeing the jurisdiction.[120] If this deprivation of liberty can be construed as a "punishment" without due process of law, the defendant would have a valid constitutional claim based on the distinction between probable and actual harm established here by the Court.

The Court concludes this criminological analysis by noting that even if drug users are more likely to commit crimes than those who do not use drugs, they

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unusual punishment where it did not appear that defendant was incapable of staying off the streets on occasion in question); State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969) (reversing conviction for drunkenness because words "voluntarily drinking," as used in statute making intoxication by voluntarily drinking intoxicating liquors a criminal offense, meant drinking by choice, and that where defendant was a chronic alcoholic whose drinking was due to his illness and was involuntary, he could not be convicted under the statute); Wheeler v. United States, 276 A.2d 722 (D.C.Cir. 1971) (holding that constitutional prohibition against cruel and unusual punishment did not prevent conviction of defendant for possession of narcotics paraphernalia even though such paraphernalia was used to satisfy his own craving for heroin).

Others have raised issue, for example, with so-called recidivist statutes, in which criminal sentences are based, in part, on predictions of the likelihood of the defendant committing future crimes. *See,* e.g., Paul S. Robinson, *Moral Credibility and Crime,* THE ATLANTIC MONTHLY, March 1995, at 72-78.

118. This author refers here to the problem of using actual harm as a constitutional standard, because this would appear to invalidate so-called inchoate crimes, in which a crime is committed whether or not anyone gets hurt. Examples include drunken driving, concealing a weapon, and the possession of drugs. For an interesting discussion of this issue, *see* FRIEDMAN, *supra* note 60, at 281.

Mark Kleiman defends inchoate crimes on the grounds that merely punishing behavior, what the person in fact does, is not always a sufficient response. In the case of drunken driving, for example, the misbehavior involved, reckless driving and speeding, is often more difficult to detect and prove than the fact that the person is legally drunk. Proving actual misbehavior might involve, for example, constant video surveillance of our roadways, whereas drunkenness can be proven by a simple breath or blood test. Kleiman implicity recognizes that the law is being used as a blunt instrument here; some may in fact drive better when drunk. Nevertheless, he notes that it is hard to doubt that there would be more deaths and injuries without drunken driving laws than in a world with such laws, albeit imperfect and sometimes punishing those who have caused no actual harm. Drunken driving, accordingly, is punishable even if no accident occurs because the drunken driver shows a culpable indifference to the safety of others, which must be deterred through criminal law. *See* KLEIMAN, *supra* note 94, at 80, 222.

119. *See* arts. 396-414, Código de Procedimiento Penal Colombiano [hereinafter CPPC].

120. For example, Article 395 of the CPPC provides the mechanisms for prohibiting the defendant from leaving the country.

should only be punished for the crimes they commit, not for drug use which does not lead to any crimes at all.[121]

B. *Second Hermeneutic Possibility*

Returning to the operative constitutional article guaranteeing the right to health, the Court presents the second possible interpretation as follows: "[t]hat the Colombian State is assumed to be the owner and Lord of the life and destiny of each person subject to its jurisdiction," and therefore it is prescribed behaviors that under a less absolutist perspective would be decided on a personal basis and not by the State.[122] The Court rejects this natural law interpretation, noting that the Constitution "is libertarian and democratic in character, not authoritarian and much less totalitarian."[123] The Court did not provide here, however, any support for its view that the overriding philosophical principle of the Constitution is libertarianism.

Nevertheless, the Court maintains that any law suggestive of an authoritarian or totalitarian regime will have to be overturned so that it does not conflict with the Constitution as a whole. It remains to be seen whether the Constitutional Court, charged under the Constitution to review all Colombian legislation, will review the entire Colombian *corpus juris* in light of the libertarian principles.

The Court does not say, for example, whether economic and social regulation could be overturned under the rubric of libertarianism, in a sort of Colombian *Lochner* period. The Constitution contains many clauses regarding a planned economy,[124] as well as a clause stating that property serves a "social function."[125] The Constitution clearly permits a mixed-economy, with blends of both *laissez-faire* and vestiges of socialism. This blend would place clear constitutional obstacles to Colombia becoming libertarian in the economic sphere. The problem is that the Court provides no philosophic or constitutional rationale for applying these libertarian principles to the social sphere, but not the

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121. The Court does not explain here the historical root for its notion of "positivistic legal system" in criminal law. According to Judge Gaviria, Colombia passed a statute in 1955 (Estatuto 14 de 1955) which sanctioned the unemployed for being in a "dangerous state." The justification of the law was that the unemployed, in order to survive, were more likely to commit property crimes, such as assault and robbery. *See* Gaviria, *supra* note 5. The unconstitutionality of various "status crimes" has been determined by many U.S. courts. *See supra* note 117 and accompanying text.

122. Decision No. C-221 at 18.

123. *Id.*

124. *See generally* CPPC, *supra* note 119, arts. 332-373. Much of the constitutional articles concerning a mixed-economy and state intervention are the direct result of bargaining with left-wing groups during the Constituent Assembly, who favored a more interventionist and social-welfare oriented state.

125. *Id.* art. 58.

economic sphere.[126] In sum, the Court construed the "paternalistic" statute at issue here as reflective of an authoritarian judicial order because excluding the right to use drugs from the ambit of personal liberty is inconsistent with the Constitution's reigning libertarian principles.

C. *The Court's Conclusion*

In light of the above arguments, the Court concludes that the only possible interpretation of the intent of Constitutional Article 49 was a hortatory expression of the Constituent Assembly encouraging citizens to care for their health. Such an indistinct, aspirational desire of the Constituent Assembly could not serve as the basis for the statute's penal sanctions.[127] The Court does not consider why the indistinct, aspirational nature of Constitutional Article 16, guaranteeing the "free development of the personality," is not subject to similar criticism when used to strike down the 1986 statute.[128] The Court grounds its conclusion with the following arguments.

1. *Medical Treatment: Protection of the Addict or Criminal Sanction?*

Having declared the criminal sanctions called forth in sections a and b of the statute unconstitutional, the Court then considers whether the mandatory medical treatment called forth by section c of the statute constitutes a criminal penalty or a humanitarian method which benefits the sick. According to the Court, the former would be unconstitutional because personal drug use cannot be criminalized for the reasons given above. Similarly, the latter is unconstitutional because the same orbit of liberty permitting a person to use drugs protects the decision whether to undertake medical treatment.[129] The Court does not consider here, however, whether the concepts of "orbit of liberty," or "free choice," are applicable to those hopelessly addicted to drugs. A crucial flaw in the majority's opinion, generally, is that by relying on a "rational choice" model for those

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126. After all, if the Court is interested in foreign thinkers, they might have considered critics from the right in the United States, such as William F. Buckley and Milton Friedman, who advocate the philosophically consistent libertarian position in which both drug criminalization and government control of the economy should be abolished.

127. Decision No. C-221 at 19.

128. Francisco Santos had the following to say about the Court's use of the phrase "free development of the personality" to overturn the personal use statute. Asked how the Court defines this phrase, he said "[p]ersonally I don't know. That's what worries me. It's not obvious, it's just 'develop the personality.' Jesus Christ! You don't change something as important as that (the 1986 statute) with that. You don't do it with that shallowness of thought." *See* Santos, *supra* note 28.

129. Decision No. C-221 at 20.

addicted to drugs, the opinion reflects a broad misunderstanding of the type of compulsion and loss of free will inherent in drug addiction.[130]

Turning for the first time to a consideration of other areas of Colombian law that may shed light on the issue of personal drug use, the Court argued by analogy that since suicide is not a crime, the individual citizen, not the state, is the owner of the individual's life and body.[131] Thus, the individual is free to decide whether or not to undergo treatment.[132] Indeed, rather than considering the humanitarian intent of mandatory treatment, the Court compares it to the treatment of dissidents in totalitarian regimes to "cure" the heretics.[133] The Court does not explain why the experience of totalitarian countries is applicable to Colombia, nor is there any consideration of whether treatment programs in Colombia have, in fact, resembled that of totalitarian countries. Instead, the Court engages in a sort of legal McCarthyism, raising the "red scare" of treatment in totalitarian regimes, without ever showing what relevance whatsoever this has to the concrete Colombian situation. Although Colombia, like other civil law countries, does not have a doctrine of *stare decisis*, the Court cited as guidance a previous Circuit Court opinion holding the forced medical treatment of a citizen unconstitutional on the grounds that this violated the constitutional guarantee of the "free development of the personality."[134] The Court's limited discussion of this case makes it difficult to see how this case serves as a basis on which the Court would declare a right to use drugs. After all, medical treatments are not all equally intrusive. For example, forcing a citizen to undergo a surgical operation and forcing a drug addict to undergo treatment are not equally intrusive. In citing

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130. *See generally* KLEIMAN, *supra* note 94, at 5, 29-45. Kleiman notes the paradox that drug use challenges, in fact, the very personal autonomy upon which rational-choice models rely in theory. Drug addiction, for example, means that dichotomy between "voluntary" and "involuntary" actions is false. *Id.* at 41. As such, he concludes that it is not unreasonable "for a society that makes most of its regulations about consumer choice on the basis of the rational actor assumption to be somewhat more paternalistic when it comes to choices about drug use." *Id.* at 45.

131. Decision No. C-221 at 20. From the perspective of comparative law, Prof. Glendon has noted that while the notion of the human body as individual property is common to the Anglo-American tradition, this notion is foreign to Europeans whose legal systems reflect that the human body is not subject to ownership by anyone. By extension, this notion is also foreign to Latin Americans who adopted European-based civil law systems. *See* GLENDON, *supra* note 22, at 21.

132. Decision No. C-221 note 20. The Court did not consider here whether a person with an infectious disease, for example, would still have the right to decide whether to undergo treatment.

133. *Id.*

134. *Id.* at 21. Colombia, like other civil law countries, does not generally have a system of *stare decisis*. However, under the pre-1991 system, Supreme Court decisions on constitutional matters "constitute[d] an important part of Colombian constitutional law and [were] followed as precedent." MERRYMAN & CLARK, *supra* note 77, at 569. This judicial tradition has remained unchanged with the creation of the 1991 Constitutional Court.

this case for support of its opinion, the Court does not discuss any essential differences between these two actions and, apparently, views them as equally instrusive.

2. *The Sanction (or Treatment) of the Drug User and the Free Development of the Personality*

Constitutional Article 16,[135] which guarantees the "right to the free development of the personality," was interpreted by the Court to secure a general right to autonomy.[136] This right is premised on the notion of the state as an instrument serving the citizen, not of the citizen as means to the state's end.[137] The Court stated that the fundamental characteristic of an autonomous person consists of him or her making decisions on moral and other matters.[138] However, the ground for this decision is hopelessly obscure. For example, the Court does not cite the *Gaceta Constitucional*, an extensive public record of the debates in the Constituent Assembly, or any other source, for this view.

By interpreting the article this way, the State must be neutral on moral matters and may not collectively take over the responsibility of individual citizens to decide moral questions such as personal drug use. Again, the Court does not consider whether the rational choice model can be applied to drug addicts, be they heroin users, alcoholics, or smokers. Because the decision whether or not to take drugs is intimately tied to personal autonomy, which is constitutionally guaranteed by the "free development of the personality," the Court concluded that "norms making drug use a crime are clearly unconstitutional."[139] Again, the Court does not consider that some types of drug use may be the polar opposite of an autonomous choice.

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135. "Everyone has the right to the free development of their personality without more limitations than those imposed by the rights of others or judicial order." Decision No. C-221 at 22.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 24. In contrast, in the United States most state courts have explicitly rejected the notion that laws criminalizing drug use are unconstitutional on the grounds that they violate an individual's right to privacy or personal autonomy. *See, e.g.*, State v. Vernon, 283 N.W.2d 516 (Minn.1979) (holding that because intrusion into the personal right to choose what to possess was a necessary and reasonable way to advance the legitimate interests of the state in regulating cocaine, the statute prohibiting and providing criminal penalties for possession of cocaine did not unconstitutionally intrude on any right of privacy or personal autonomy), *cert. denied*, 444 U.S. 1062 (1980).

A notable exception is the Alaska Supreme Court, which held that prosecution of an adult for possession of marijuana for use in the home violated the state's constitutional right of privacy. Ravin v. State, 537 P.2d 494 (Alaska 1975). In 1990, a referendum to reverse the ruling passed with 55% of the vote, leaving the courts to decide whether such a referendum can modify a constitutional interpretation. KLEIMAN, *supra* note 94, at 279.

Moreover, the Court argued that forcing a person who has not committed any penal infraction to undergo medical treatment is not only violative of the Constitution, but is "monstrous and contrary to the most elemental principles of civilized law."[140] What those elemental principles are is not stated by the Court. Also, as previously noted, because the Court does not consider actual medical treatment in Colombia, one cannot infer what the Court means by "monstrous." Perhaps this comment is best dismissed as unfortunate hyperbole. After all, many "civilized" countries, such as the United States, with a much less monstrous and bloodied past - and present - than Colombia, rely heavily on forced medical treatment to cure addicts and control crime.

3. *Liberty, Education, and Drugs*

The Court then considers how the state, by finding drugs undesirable, could discourage and limit their use while respecting the liberty of citizens. Educational programs designed to remove ignorance about the dire effects of drugs are the only constitutionally permissible policy.[141] Whether educational programs have been effective in the absence of criminal law in reducing drug use, or whether a developing country like Colombia replete with social problems can actually put in place an effective drug education program, is not considered by the Court.[142]

However, the Court emphasized the potential danger in this educational role, restricting the state to "showing in an honest and rigorous method the causal connection existing between distinct methods of living and their inevitable

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140. Decision No. C-221 at 26.

141. *Id.* While emphasizing that education was the sole permissible method in reducing drug use in the libertarian state, the Court did not consider whether education alone, unbuttressed by criminal sanctions, is effective in reducing drug consumption. Numerous studies in the United States have indicated that drug education alone has had little or no effect on drug use. *See*, Eisenbach, *supra* note 112; *see also, Stopping Drugs in Schools: Tough Policies Work*, THE HERITAGE FOUNDATION EDUCATIONAL UPDATE (Fall 1988). As Professor Kleiman explains, educational programs often do not work because those most susceptible to rational persuasion are the least likely to engage in self-destructive, chronic drug use. He sums up his doubts that education alone, without criminal sanctions, can be successful, as "[t]he widespread faith in prevention through persuasion seems to rest on the feeling that persuasion would be wonderful if it worked, rather than a well-founded conviction that we know how to make it work." KLEIMAN, *supra* note 94, at 175-76.

142. When Francisco Santos was asked whether a developing country like Colombia, whose major city, Bogotá, suffers from long traffic jams, periodic blackouts, water shortages, horrific air pollution and one of the world's highest rates of impunity, could establish an effective drug education program, he replied that "[s]ometimes they think they live in Switzerland or something like that. And that opinion looks like it was written by a Swiss magistrate." *See* Santos, *supra* note 28.

consequences, without manipulating consciences."[143] Note the Court's insistence that the state's generally accepted hortatory role be carefully watched lest the bully pulpit slip into propaganda, misinformation and other means of manipulation.

However, one wonders how an education effort headed by the government will not run the risk of repeating the same type of discrimination alleged by the Plaintiff and others in the legalization debate — namely, targeting society's undesirables and rebels to change them. Moreover, how is the state to educate citizens "without manipulating conciences?" If the Court does not trust the state to force addicts to be treated, why does the Court trust the state to educate people?

In any event, it is not at all clear that a governmental propaganda effort would not be violative of the "free development of the personality." If citizens have a "right to be left alone" in choosing to use drugs, should they not be free from government propaganda and preaching that seeks to influence their constitutionally protected free choice?[144] Moreover, if the state is to be truly neutral on the issue, should not Colombia adopt a sort of "Fairness Doctrine"[145] in which government financed propaganda designed to dissuade drug use is

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143. Decision No. C-221 at 24 (emphasis added). However, the Court did not consider whether one can indeed teach about the effects of drugs without somehow bringing moral issues to the fore.

144. This precise issue, of course, arose in the United States in regard to informed consent provisions of state statutes passed after the Supreme Court's 1973 decision in *Roe v. Wade*. The Supreme Court has upheld informed consent provisions requiring doctors and clinics to persuade women to give up their right to abortion. *See generally* Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) (O'Connor, Kennedy & Souter, JJ.).

While the Constitutional Court has not yet considered (and may never consider) the constitutionality of government propaganda against drug use, given the Court's mistrust of state power, it would not be surprising if the Court adopted a position regarding drug education efforts somewhat akin to Justice Steven's dissent in *Casey* regarding informed consent. In *Casey*, Justice Stevens argued that the plurality was unjustifiably obtuse regarding the anxiety-producing and distorting effects of state-imposed "misinformed consent" speech. *Id.* at 2841-43.

When asked about this precise issue, Judge Gaviria responded that regarding persons who wish to take drugs, there are those who understand the effects and those who do not. The State may develop educational programs to aid those in the latter group. *See* Gaviria, *supra* note 5. As a practical matter, it is hard to imagine how the state could make such a distinction, unless requiring some form of informed consent procedure before purchasing drugs, or through individual questioning to determine what one knows, which may be as over-intrusive in the private sphere as the criminal statute challenged in this case. Information aimed at the public in general will not necessarily ensure that those who wish to use drugs, but do not understand the effects, will be reached.

145. The Fairness Doctrine, a Federal Communications Commission policy in existence until 1985, required FCC licensees broadcasting political messages to give equal time to opposing views. *See generally* 47 C.F.R. §76.209(d) (1994). I raise this issue as a mere intellectual matter; I am not advocating in any way that the Colombian state in fact subsidize public advertising for drug users and dealers.

matched by state funding for known drug users to advocate their constitutionally protected lifestyle choice?

Also, it is interesting to note how the Court, paying heed to the liberal state's hesitance to decide moral questions, strains to maintain its neutrality on the issue of drug use. The court even states that while it neither proposes nor judges to be desirable a society of educated free men who resolve to live in a drugged state, it recognizes that "nothing ethical can oppose this decision."[146] The exclusive means for the state to discourage drug use that is consistent with liberty is education, with the Court ever vigilant to other methods more proper to the totalitarian state, such as "electric shocks, surgical cuts, and chemical treatments."[147] Note the similarities between the Court's paranoidal suspicion of state power and the democratic process, and the Critical Legal Studies, a nihilistic neo-Marxist movement which views all law as inherently oppressive and political.

The Court concludes by noting that the state has a regulatory role as well.[148] Once personal drug use is legalized, the state can establish reasonable limits on use as with other legal substances such as alcohol or tobacco.[149] Such regulation could include reasonable time, place and manner restrictions, as well as internal regulations by private and public institutions.[150]

However, the Court did not discuss the constitutionally permissible limits of such restrictions. Any "sin tax" on legal substances, for example, restricts free

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146. Decision No. C-221 at 25.

147. *Id.* Judge Gaviria defends the opinion's references to totalitarian regimes by arguing that although Colombia, fortunately, has not been in such a situation, Colombia and other democratic countries could enact this type of treatment. *See* Gaviria, *supra* note 5. Otherwise stated, the Court is overturning a statute in part because of its potential application in a totalitarian manner. If the experience of totalitarian countries is to be used as a constitutional benchmark, other areas of Colombia law should be subject to similar scrutiny. For example, Constitutional Article 58 defines property as having a "social function," and sets forth powers of eminent domain. CONSTITUTION, *supra* note 3, art. 58.

It is well known that totalitarian countries have not only used treatment programs to cure the heterodox but have also expropriated property without compensation. Should constitutionally-protected takings also be held unconstitutional due to their potential application in a totalitarian manner?

148. Decision No. C-221 at 27.

149. *Id.*

150. *Id.* For example, on May 24, 1994, the Gaviria government proposed the prohibition of drug use in public places, recreational facilities and educational centers. Gutierrez, *supra* note 21, at 1A, 11A. The Samper government has considered civil sanctions such as firing public employees who use drugs, fines, suspensions and cancellations of drivers licenses for those using drugs. *Id.* at 14A. Similarly, United States courts have upheld the constitutionality of statutes concerning time, place, and manner restrictions, such as those establishing enhanced penalties for drug use and sale in specially protected areas. *See, e.g.*, United States v. Thornton, 901 F.2d 738 (9th Cir. 1990) (holding that federal statute mandating enhanced penalty when drug distribution occurs within 1000 feet of a school does not violate equal protection, nor is it unconstitutionally over-inclusive or under-inclusive).

choice by making the goods more costly. The Court did not consider whether such a tax on legal drugs, similar to those for alcohol and tobacco, would be a constitutional infringement on the free development of the personality. Future cases will have to clarify the constitutionally permissible ambits of governmental restrictions on legal substances.[151]

Along with providing for reasonable time, place and manner restrictions, the Court hastens to emphasize that this decision does not affect any provisions of the 1986 statute penalizing activities associated with the drug trade.[152] Why drug trafficking does not fall within the ambit of the elastic constitutional clause guaranteeing the free development of the personality, as well, is inexplicably and alarmingly left unexplained by the Court.[153]

VI. THE DISSENT: AN OVERVIEW

The rejection of the majority's opinion by important elements of Colombian civil society finds its intellectual support in the dissent's opinion,

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151. Judge Gaviria argues that when the Court held that criminalizing drug use was held unconstitutional, the Court was not declaring that all governmental policies which dissuade users from using drugs are unconstitutional. *See* Gaviria, *supra* note 5.

152. Decision No. C-221 at 27. However, some have questioned the practical effect this decision will have on street-level dealing, which will make enforcement virtually impossible. Similar to the division of dirty money into smaller portions through a practice known as "smurfing" to avoid cash transaction limits, some suggest that savvy drug dealers will now only carry the legal personal doses on their person to avoid criminal sanctions attendant to trafficking. Each small portion can be sold at the street level, and if one is stopped, "personal use" can be used as a defense. Once a sale is made, dealers will simply replace this amount with another legally accepted amount. This practice, combined with the inefficiency and corruption of the police, may lead to virtual impunity for some types of street-level dealing. Letter from Fernando Londoño Hoyos, *supra* note 107.

153. Letter from Fernando Londoño Hoyos, *supra* note 107. Specifically, the Court only mentions in passing that all norms relating to narcotics trafficking remain intact. According to Judge Gaviria, it was obvious that the Court was only referring to personal consumption, not trafficking. However, once the Court starts using vague constitutional phrases like the free development of the personality, the question that naturally follows is whether various activities associated with the drug trade can be seen and, thereby, constitutionally protected as the free development of the entreprenuerial personality. The case could have clarified this point, as Judge Gaviria did in his interview. Plaintiff only challenged the portions of the statute pertaining to personal drug use. Accordingly, only those portions of the statute relating to drug consumption, not those relating to drug trafficking, were under review. Moreover, according to Judge Gaviria, the constitutional question relating to drug trafficking would be much more complex, because Colombia, like the United States, is a signatory to international treaties related to drug trafficking. *See* Gaviria, *supra* note 5. That Plaintiff did not challenge the portions of the statute pertaining to drug trafficking, or that the constitutional issues relate to international treaties, does not end the issue. Because the Court does not have discretionary jurisdiction, it will have to hear and decide any constitutional case challenging the drug trafficking portions of the 1986 statute.

known as the *salvamento*.[154] According to the dissent, the majority's invalidation of the drug criminalization statute, based on the constitutional guarantee of the free development of the personality, is an exercise of "raw judicial power."[155] The dissent posits that the majority's decision is not reasoned jurisprudence grounded in the 1991 Constitution and Colombian law and will likely have deleterious effects on Colombian society.[156]

As a jurisprudential matter, the dissent explicitly rejects the majority's absolutist, libertarian and individualistic rights talk model.[157] The dissent views

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154. Colombian law provides the "opportunity to dissent and state reasons," as in the United States. In contrast, certain civil law systems, such as France, encourage judicial unanimity and dissents are not publically acknowledged. *See* MERRYMAN & CLARK, *supra* note 77, at 569.

155. Roe v. Wade, 410 U.S. 179, 222 (1973) (J. White, dissenting). While the reference to Justice White's dissent in *Roe* may seem farfetched at first, several similarities between the United States Supreme Court's striking down a Texas statute criminalizing abortion and the Colombian Constitutional Court's invalidation of a statute prohibiting personal drug use make it appropriate here. Both cases involved the establishment of a new constitutional right affecting what many view as the inner or personal sphere through a broad interpretation of nebulous constitutional guarantees (various constitutional "penumbras" and "emanations" in the United States and Constitutional Article 16's right to the free development of the personality). Both cases replaced political participation and decision-making with judge-made law, one by restricting the states' regulation of abortion, the other by overturning the Colombian state's criminalization of drugs. Also, both cases are highly controversial and lead to the drastic remedy of constitutional amendment to overturn the decisions, such as bipartisan support for a Human Life Amendment (included in the Republican Party's platform) and the Colombian government's consideration of constitutional referendum.

The language used by Justice White in his dissent could easily have been used by the Colombian *salvamento*, as well. Questioning the majority's decision to overturn a Texas law criminalizing abortion, Justice White stated that he could:

> [f]ind nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

Id. at 221-22. The *salvamento* similarly finds little support in the language or history of the 1991 Constitution to overturn the 1986 statute. Justice White goes on to note that the "people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." *Id.* This silencing of persons in the political process is similar to the *salvamento* noting that the upshot of this case is that the collectivity is rendered inert by this decision. Accordingly, it is reasonable to argue that the criticism made by Justice White in *Roe v. Wade* could legitimately be applied to the *salvamento*: "As an exercise of raw judicial power, the Court perhaps has the authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution lends this Court." *Id.* Moreover, the Supreme Court's decision in *Roe*, like the Constitutional Court's decision here, produced ripple effects throughout the judiciary. Even liberals like Laurence Tribe admit, albeit favorably, that *Roe* has "led to a radical transformation" of the American judicary. TRIBE, *supra* note 97, at 79.

156. Decision No. C-221 at 31.

157. *Id.*

the majority's model as reflective of an outdated model of *laissez-faire* liberalism contrary to the concept of the Social State of Law[158] called forth by Constitutional Article 1.[159] Instead, the dissent views the Colombian Social State of Law as one rooted in the civic republican tradition, with rights and liberties being limited by considerations of the common good and the general interest prevailing over the individual interest in the State's pursuit of a just social order.[160]

Turning to the constitutional article guaranteeing the free development of the personality, the dissent emphasizes that this right does not exist in stark form, an autocratic trump untempered by limits or obligations.[161] Rather, it must be viewed in light of the rights of others and the maintenance of the juridical order.[162] Other similar constitutional articles, as well as the Court's own jurisprudence, illustrate that constitutional guarantees may be limited by the rights of others, as well as by moral, political and judicial considerations.[163] As an interpretive matter, the dissent's focus on constitutional text rather than philosophical speculation reflects a distinctly interpretative bent, in which judges should confine themselves to enforcing norms that are stated or clearly implied in the written constitution.[164]

The dissent's critique is not restricted to jurisprudential questions. As a practical matter, the dissent cautions that several social goods provided for by the Constitution, such as physical and mental health, peaceful coexistence, social solidarity and most importantly, the integrity of the family, will be harmed by legalizing drugs.[165]

Most significantly, the dissent's focus on the family as the fundamental social unit provides the basis for an alternative image of the Colombian person envisioned by the Constituent Assembly and serves as a basis to challenge the individualistic rights talk model adopted by the majority. The dissent's family-centered image reflects what Professor Glendon has called a person "situated within (personal) relationships (with others) . . . constituted in part by society."[166] Note how far afield this image is from that of the majority's, what Professor Glendon has called the "[lone] rights-bearer [-] a self-determining,

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158. The Social State of Law has been defined by one commentator as "the acknowledgment of a vast array of rights proper to the social life of individuals, of adapting the state to the social and economic realities of a country without abandoning the postulates of a Liberal State of Law." *See* Julio Andrés Sampedro Arrubia, *El Estado Social de Derecho y La Estructura del Proceso Penal de Primera Instancia en Colombia*, 83 UNIVERSITAS 61 (1994).

159. Decision No. C-221 at 32.

160. *Id.* Professor Glendon has noted the tendency of rights talk to regularly promote "particular interests over the common good." GLENDON, *supra* note 22, at xi.

161. Decision No. C-221 at 32-33.

162. *Id* at 33.

163. *Id.* at 32.

164. *See* ELY, *supra* note 93, at 1.

165. Decision No. C-221 at 31.

166. GLENDON, *supra* note 22, at 74.

unencumbered, individual, a being connected to others only by choice."[167] To the dissent, the addict's linkage to family and society implies that drug use affects not only the user but also others, thereby justifying the state's intervention in her personal sphere through criminal law.

A. *The Critique of the Free Development of the Personality as an Absolute Right*

The dissent begins by critiquing the majority's interpretation of Constitutional Article 16 as an absolute right. The dissent construes the majority opinion as "[t]he unlimited faculty of each person to do or not do what they please with their life, even going to the extremes of irrationality - such as endangering their own physical or mental integrity."[168] The dissent asserts that the majority's absolutist and individualistic interpretation of this Article is inconsistent with the Court's jurisprudence in which all rights or liberties are limited by the rights and liberties of others as well as the judicial order.[169] To support this position, the dissent considers the specific case of the drug addict. The dissent argues that the right to use drugs cannot be construed as an absolute right because the addict harms not only the addict, but the addict's family as well.[170] Society is also affected due to the heightened risk of the addict committing crimes. Given these societal effects, drug use cannot be simplistically reduced to a mere personal matter.[171]

Moreover, to consistently construe the free development of the personality as an absolute right, other conduct apparently proper to the inner sphere, such as abortion, would have to be lawful as well.[172] However, this contradicts the Court's recent jurisprudence. For example, two months before this case was decided, the Court held a 1980 statute constitutional,which penalizes abortion on the grounds that abortion cannot be constitutionally protected as an act solely affecting the individual mother because it involves the killing of another human

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167. *Id.* at 48.

168. Decision No. C-221 at 32.

169. *Id.* Professor Glendon as well has described how rights talk must be tempered by considerations such as:

> [t]he relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social costs of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.

GLENDON, *supra* note 22, at 177.

170. Decision No. C-221 at 33.

171. *Id.*

172. It would have been interesting here if the dissent had examined other potential areas of Colombian law that could possibly be considered unconstitutional if viewed through the prism of the "free development of the personality."

being.[173] The right to abortion is equally controversial, if not more so, than the right to use drugs and has frequently been defended as an individual moral decision that is not the state's concern. As such, the majority's failure to consider this obvious analogue is a troubling scotoma in their constitutional vision.

B. *Drug Addiction as Violation of Human Dignity*

After starting the opinion with several compelling jurisprudential arguments that place limits on the free development of the personality, the dissent stumbles a bit as it seeks teleological arguments in favor of criminalization based on the constitutional guarantee of human dignity. It is arguable that the unclear phrase "human dignity" is as constitutionally unclear as the majority's favored clause, "the free development of the personality." A better approach might have been to first consider the general power of the state to regulate narcotics. Then the dissent could have considered various constitutional articles which, when taken as a whole, indicate that the Colombian Constitution does not call forth a libertarian state. The dissent then could have concluded that drug criminalization and other laws affecting the personal sphere typically fall within state police power. However, because the majority has framed the constitutional issue in terms of value-neutral libertarianism, the dissent has to respond to their arguments with the constitutional articles that fit. Hence, the dissent uses the rubric "human dignity" in order to present several arguments concerning the societal dangers of drug use.[174]

Accordingly, the dissent followed with a consideration of the majority's argument that drug penalization is an affront to human dignity. This argument is premised on the philosophical notion that individuals should retain the right to decide moral questions such as drug use, regardless of the consequences. In contrast to this libertarian and morally relativistic conception, the dissent posits a teleological vision in which persons are perfectible beings oriented to good.[175]

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173. Decision No. C-221 at 35. Note that abortion appears to be the type of legal issue envisioned by the Constituent Assembly for future adjudication by the Constitutional Court. Unlike most other Latin American countries whose constitutions specifically prohibit abortion, the Colombian Constitution avoids the question of when life begins and whether a fetus should be deemed a living person. Given the influence of the Catholic Church, the strong legal tradition supporting the criminalization of abortion and Colombia's signature on the American Convention on Human Rights, which guarantees that the right to life shall be protected by law, in general, from the moment of conception, it is not surprising that the Colombian Constitutional Court upheld this law criminalizing abortion. *See generally* Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659 (1992).

174. Decision No. C-221 at 35.

175. *Id.* It is interesting to note that both the majority and dissent begin their opinions in search of general principles rooted in natural law, somewhat akin to what Professor Dworkin has called the unique role of courts in setting out the "principles" governing society. *See* RONALD

Natural reason is the means by which humans beings, both individually and collectively through the exercise of state power, achieve this end. Thus, constitutionally protected spheres, such as the free development of the personality, must sound in acts of rationality, not barbarism.[176]

Consistent with this teleological vision, drug use is an affront to human dignity and inconsistent with natural reason because it constitutes the deprivation of a good - mental and physical health - in an irreversible and always progressive manner.[177] Blending natural law reasoning with constitutional text, the dissent turns to Article 1, which provides that Colombia is a state "founded on the respect for human dignity."[178] The dissent broadly interprets this article to prohibit any violation of human dignity.[179] According to this interpretation, the state cannot permit a person to enslave themselves with addictive drugs, nor run the risk of being under the effects of drug addiction.[180] To the contrary, the state, consistent with its search for the good through natural reason, must play a paternalistic role in preserving citizens in their dignity and in defending youth from moral and physical danger.[181]

Turning again to the practical sphere, the dissent argues that permitting drug use in the name of liberty and human dignity is tantamount to abandoning liberty to the caprice of those who manipulate and control the drug market.[182] This would replace autonomous individual choice with dependence on lethal drugs.[183] This argument is buttressed by the well-known pernicious effects drugs have on the addict — mentally, physically and spiritually. The drug user is thereby converted into a being lacking self-control and engaging in undignified, irrational and anti-social behavior.[184] Due to these obvious deleterious effects, the dissent remains perplexed as to how this self-destruction of the individual can be construed by the majority as a form of realizing the constitutional mandate for respect of human dignity.[185]

DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Because the dissent searches for principles of natural law outside of the constitutional text, however, does not mean that the dissent has "crossed the line" into non-interpretivism. The dissent roots its opinion much more closely in specific articles of the Constitution than the majority.

176. *Id.* at 38.

177. *Id.*

178. *Id.*

179. *Id.* at 39.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The dissent is referring here to one of the most critical scotomas in the majority's vision, which lacks any consideration of whether its model of the rational citizen choosing among ends is applicable to drug users. The majority's use of a rational choice model is one of their weakest points, and the dissent rightly refers to it here.

184. *Id.*

185. *Id.* at 40.

C. *Drug Use is Not an Indifferent Act*

The dissent then challenges the majority's consideration of drug use as an indifferent act. The dissent presents an image of a holistic society which cannot permit a person to endanger their health because "the well-being of each of its members is in the general interest."[186] The dissent then responds to the majority's argument that the statute is under-inclusive and that if the government was genuinely concerned about health, then cigarettes and alcohol should be banned as well.[187] The dissent distinguishes between these substances and illegal drugs based on the probability of harm.[188] In essence, the majority sweeps all drugs off the criminal code and into the libertarian hamper, while the dissent tries to defer to the apparent legislative judgment that different drugs - due to their varying effects - must be treated on a case-by-case basis. For example, while conceding the possible harm from cigarettes and alcohol, the dissent cautions that drugs present a "grave and imminent danger" due to their certain harm and high probability of addiction.[189] The dissent is careful to note that a liberal society cannot broadly cast the criminal net to control all vices. While some vices may be permitted, drugs, due to their high probability of harm, must be included in the catch. Although the dissent acknowledges the danger discussed by the majority of the "authoritarian temptation" in any drug control effort, or the use of the criminal law generally,[190] the dissent resists this temptation in recognizing the inherent limits in a free society in which all vices cannot be controlled by criminal law.[191]

D. *The Constitutional Foundations of the Norms Declared Unconstitutional*

Having discussed the philosophical issues as a counterpoint to the majority's libertarian analysis, the dissent then turns to a strict interpretive analysis to demonstrate various constitutional grounds supporting the provisions of the 1986 statute declared unconstitutional by the majority. At the most general level, the dissent points to the constitution's preamble, calling on the state to "ensure to its citizens life, coexistence, work, knowledge, liberty and peace inside of a juridical framework which guarantees a just social order."[192] According to

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186. *Id.* at 41.
187. *Id. See also* TOCORA, *supra* note 61, at 30-31, 58.
188. Decision No. C-221 at 41.
189. *Id.*
190. *Id.*
191. For example, gambling and prostitution are not crimes under Colombian law.
192. Decision No. C-221 at 42.

the dissent, these general principles are gravely harmed by the effects of drug addiction and provide a sufficient basis for upholding the constitutionality of the challenged provisions.[193] Other, more specific, constitutional provisions call into question the dissent's analysis as follows.

1. *The Social State of Law*

The dissent begins its textual analysis by discussing Constitutional Article 1, which establishes that Colombia is a Social State of Law "founded in the respect of human dignity, work, and solidarity."[194] Repeating its argument concerning the pernicious effects of drug use on human dignity, the dissent demonstrates how these same effects prove deleterious in the economic sphere by diminishing the capacity of workers which results in higher levels of unemployment.[195]

2. *The Social Ends of the State*

The dissent then turns to Constitutional Article 2, which defines the social ends of the state as "serving the community, promoting general prosperity, and guaranteeing the effectiveness of the principles, rights and duties provided for by the Constitution, in order to assure peaceful coexistence and the operation of a just order."[196] The dissent argues that a truly just order, peaceful coexistence and general prosperity are incompatible with the destruction of large sectors of the population, especially youth, by drug use.[197] Moreover, the dissent warns that drug legalization will serve as an incentive for drug production and trafficking, increasing the power of drug cartels which for many years have been "the worst enemy of Colombian society."[198]

3. *The Duty of the State to Protect the Health of its Members*

The dissent then turns to one of Plaintiff's primary arguments concerning the State's duty to protect the mental and physical health of citizens. In support of the constitutionality of the disputed statute, the dissent focuses on four constitutional articles specifically concerning the State's duty to care for the health of its citizens. Although none of these articles specifically call for drug criminalization or the treatment of addicts, the health concerns expressed therein

193. *Id.* at 42.
194. *Id.*
195. *Id.* at 43.
196. *Id.*
197. *Id.*
198. *Id.*

provide some guidance regarding these issues, especially in comparison with the nebulous "free development of the personality."

The first textual support used by the dissent, Constitutional Article 13, establishes that "the state will especially protect those persons who, due to their physical or mental condition, find themselves in circumstances of a manifest disability."[199] The drug addict was deemed to fall into this category due to the manifest disability caused by the addict's dependence on hallucinogenic drugs.[200]

The second textual support, Constitutional Article 47, states in part that "[t]he state will promote a policy of foresight, rehabilitation and social integration for those physically, sensorially or psychically disabled, giving them the special attention required."[201] To the dissent, this Article provides almost direct support for the treatment for which the contested statute calls because it provides mechanisms for the rehabilitation and social reintegration of drug addicts, as well as special treatment for addicts by placing them in psychiatric centers or similar establishments.[202]

The third textual support, Constitutional Article 49, provides in part that "attention to health and a healthy environment are public services of the state," and that the state "guarantees to all access to the services of health promotion, protection and recuperation."[203] The dissent placed special emphasis on the part of this article calling for the duty of citizens "to procure the integral protection of their health and of their community."[204] This constitutional duty indicates to the dissent that the problem of health is a not matter of individual caprice but rather subject to the general interest of the state and that of the community.[205] According to the dissent, Constitutional Article 366, stating "the general welfare and the betterment of the quality of life are social ends of the state" and that "a fundamental objective [of the state] will be the provision of the basic necessities for health," provides further support of this view.[206]

The dissent stated that these various constitutional provisions, viewed together, provided clear support for the parts of the 1986 statute requiring the State to pay special attention to those affected by drug addiction.[207]

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199. *Id.*
200. *Id.* at 44.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 45.
206. *Id.*
207. *Id.*

4. *General Versus Particular Interests and General Duties*

The dissent then focused on Constitutional Articles 2, 58 and 82 in order to establish, as a general interpretive constitutional principle, the prevalence of the general interest over the particular to challenge the majority's conception of an absolute right to the free development of the personality.[208] The dissent's interpretative principles then can at least, in part, be gleaned from specific constitutional text; they do not remain obscure like those of the majority.

The dissent began with the political problem of individual rights being used to trump collective interests. From the dissent's view, the majority's decision replaces legislative decision-making with judicial fiat because drug use cannot be repressed through criminal law, nor can the community work with the addict through rehabilitation. Essentially, the political branches and civil society have been shut out by this decision.

Note the similarity of this trumping of the collective interest by an individual, absolute right with what Professor Glendon has called the "American rights dialect of no compromise," which precludes the more balanced dialect of political compromise because "the winner takes all and the loser has to get out of town."[209] Expressed in the Colombian dialect, the dissent lamented "[t]he elements of social defense have thus been excluded from the judicial order."[210]

5. *The Rights of the Family, Children, and Adolescents*

In contrast to the majority's focus on the individual and individual rights, the dissent placed special emphasis on Constitutional Article 5, recognizing and protecting the family as the "basic institution of society," and Constitutional Article 42, defining it as the fundamental nucleus of the same.[211] The dissent repeats its pattern of focusing not on the abstract, autonomous and rational decision-maker favored by the majority, but on the concrete and common effects of drug use on the Colombian family. At the general level, drug addiction is seen as destroying family unity, generating violence and causing the loss of respect among family members and the self-respect of the user.[212] Turning to particular family members, drug use is considered especially pernicious to the father, the supreme authority in the traditional Colombian patriarchal family. Specifically, drug use effectively renders the father incapable of educating his children, leading his family to moral and material ruin and consequently reflecting poorly upon him

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208. *Id.* at 46.

209. GLENDON, *supra* note 22, at 8-9.

210. Decision No. C-221 at 46.

211. *Id.* at 47.

212. *Id.* As practical support, observers have noted that belonging to a nuclear family significantly decreases the probability of addiction to all types of drugs. *See* THOUMI, *supra* note 26, at 268.

as the head of the household.[213] The child user, for her part, will fail to acknowledge her parents' authority and will serve as a bad example for her siblings, constituting a permanent danger to other members of the family.[214]

These deleterious effects cannot be permitted in a society whose Constitution in Article 42 calls for the "integral protection of the family." This constitutional article similarly establishes that "the dignity of the family is inviolable" and that family relations should be based on reciprocal respect among its members. Both concepts are grievously affected when drugs enter the home.[215] Because the Constitution places such emphasis on the protection of the family, the dissent is perplexed by the majority's invocation of the nebulous constitutional phrase providing for the free development of the personality as a means for trumping the Constituent Assembly's obvious concern with the protection of the family.

The dissent focuses as well on Constitutional Articles 44 and 45 concerning the rights of children and adolescents. These fundamental rights include the right "to have a family" as well as the right to "care and love," which disappears when parents or older siblings are dependent on drugs.[216] The Constitution also provides that children "will be protected against all form[s] of abandonment and from physical or moral violence."[217] Children whose parents or siblings are addicted to drugs are seen as being abandoned to fate and almost assuredly subject to physical violence.[218] Finally, the dissent considers Constitutional Article 45, providing that adolescents have a "right to protection and integral formation," noting that the recuperation of an adolescent who has fallen into drug addiction is none other than the fulfillment of the constitutional mandate.[219]

E. *A Comparative Overview of Drug Legalization*

Having established several grounds for rejecting the majority's decision, the dissent turned to extra-constitutional arguments to criticize the majority's holding, such as the experiences of other countries that have legalized drugs. The dissent first observed that a majority of countries have maintained laws criminalizing drug use, after which it specifically focused on countries such as Spain, England and Holland, whose experimentations with legalization have

213. Decision No. C-221 at 47.
214. *Id.*
215. *Id.*
216. *Id.* at 48.
217. *Id.*
218. *Id.*
219. *Id.*

failed due to increased drug use.[220] Once again, the dissent referred to Colombia's political problem of drug legalization, a problem that these other non-drug-producing nations have not faced.[221]

F. *The Dangerous Effects of Drugs Compared to Nicotine and Alcohol*

The dissent reconsidered its argument that drugs are more dangerous than nicotine or alcohol in responding to the majority's argument that the 1986 statute was under-inclusive because it did not penalize these substances. The dissent recognized that nicotine creates health problems and is an addictive drug but focused on the crimogenic effects to argue that nicotine does not present a risk to society: "[n]o one commits a crime induced by doses of nicotine."[222] Similarly, no one is incapacited for work, at least not in the short term, nor experiences learning problems in school due to tobacco.[223]

Concerning alcohol, the dissent, perhaps, minimizes the pernicious effects of addiction on the individual in an effort to draw a sharper contrast with the more serious social effects caused by drug addiction, notably, an increase in crime. For example, the alcoholic does not usually attack or kill for a drink, unlike the drug addict who does so daily in all parts of the world.[224] The dissent does not deny that alcohol has been the cause of violence; rather, they argue that drug use is much worse.[225] Moreover, the risk of addiction is much greater with drugs than it is with alcohol. Approximately ten percent of drinkers become addicted, while eighty percent of cocaine users and virtually all crack and heroin users become addicted.[226]

The dissent might have pointed out that the majority's arguments based on the inherent discrimination between alcohol and tobacco, both of which are legal,

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220. *Id.* at 50. The dissent, for example, cites studies that indicate in England the number of heroin addicts increased by 100% and illegal traffic increased by 300% during the 1960's and 1970's when addicts could receive heroin legally in pharmacies. The dissent also notes that when Alaska legalized the personal use of marijuana, use among youths aged 11 to 14 was three times higher in Alaska than in the rest of the United States. *Id.* While the dissent cites these figures to argue that drug use will rise in legalization, Kleiman and others have noted the problems with using comparisons with other countries' experiences when considering drug policy. In Kleiman's view, what has happened in other countries is not always known, and the social and institutional settings are so different that we cannot import drug policies like we do our drugs. *See* KLEIMAN, *supra* note 94, at xiii.

221. Decision No. C-221 at 50.

222. *Id.* at 53. Cigarettes are currently not classified as "drugs" in the United States. Action on Smoking and Health v. Harris, 655 F.2d 236 (D.C. Cir. 1980) (rejecting anti-smoking group's challenge to FDA's determination not to assert jurisdiction over cigarettes).

223. Decision No. C-221 at 53.

224. *Id.*

225. *Id.*

226. *Id.*

and other illegal drugs is misplaced. If anything, the problems associated with legal drugs diminish the strength of the legalization argument and instead support increased state regulation to diminish the social harms caused by these substances.

G. *The Inexplicable Paradox*

The dissent ends with a discussion of what many have noted as the fundamental paradox in the majority's decision. The Court strikes down penalites for personal use, yet leaves intact all criminal penalties related to drug trafficking.[227] According to the dissent, the only way out of this contradiction is to legalize drug trafficking by "converting the drug mafia overnight into honest businessmen and exporters."[228]

The dissent also spoke - with much prescience - of the predicted rejection of the opinion by society in general, which would endanger the high esteem earned by the Court in its efforts to defend the juridical order, the fundamentals of the Social State of Law and the highest values of Colombian society.[229] The dissent expressed its hope that the legal parameters of regulation permitted by the majority would restore, in part, the norms declared unconstitutional by the majority.[230]

VII. WAS THIS CASE CORRECTLY DECIDED?

The crucial questions are whether the majority's decision represents reasoned jurisprudence grounded in constitutional text, or whether it is a potentially dangerous anti-democratic step towards "raw judicial power" in a country desperately seeking to strengthen representative democracy. The primary focus in answering this question is institutional: Who should decide the issue of drug decriminalization under Colombia's constitutional scheme - the legislature or the courts?

A. *The Argument from Social Contract Theory*

As a jurisprudential matter, one argument in favor of judicial deferrence to democratic, legislative decision-making is based in social contract theory as

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227. *Id.* at 55.

228. *Id.* The Court will have to decide this issue as soon as a plaintiff challenges the drug trafficking portions of the 1986 statute. Whether drug trafficking becomes another constitutionally protected personality to develop remains to be seen.

229. *Id.*

230. *Id.* at 56.

developed in the Anglo-American tradition by Thomas Hobbes, John Locke and others. According to this view, a constitution is a sacred contract entered into by a people to form a government through means of a constituent assembly or constitutional convention. The specific and general intent[231] of the peoples' representatives in this assembly serves as a control or check on the power of the judiciary not to go beyond provisions of this contract. The role of the judiciary is limited largely to enforcing this contract by focusing on the intent of the constituents to decide constitutional cases.[232]

In the Colombian context, the contract-based argument suggests that the Court should have deferred to the legislature and upheld the statute in the absence of any specific or general intent within the Constituent Assembly to decriminalize personal drug use or clear constitutional language supporting decriminalization. Without such support, this case can be seen as a dramatic example of Colombian-style judicial activism weaving libertarian jurisprudence out of scant constitutional threads.

1. *The Argument from Ideological Intent: Teasing Libertarianism Out of a Non-Ideologic Body*

The Court supports its decision decriminalizing personal drug use by claiming that the philosophy governing the 1991 Constitution is libertarian and democratic in nature, not authoritarian or totalitarian.[233] Note, however, that the Court never consults the public record of the debates in the Constituent Assembly, academic writings or other support, and instead defers to philosophers such as Richard Rorty and John Rawls to defend its philosophical vision.

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231. In terms of specific intent, a relevant question is: If the members of the Constituent Assembly wanted personal drug use decriminalized, why was it not done? The easy answer is that they were busy drafting a Constitution, not considering its specific application. In light of the public outcry over this decision and subsequent efforts by the government to establish limits on drug use and to reform the Constitution, one has to wonder that if the issue of the Constitution being used to decriminalize drug use had been raised in the Constituent Assembly, whether the right to criminalize drug use would have been specifically provided for. By including a ban on extradition, this issue was put beyond the Constitutional Court's purview.

232. This principle has a long heritage in the United States system of judicial review. For example, Joseph Story states that "[t]he first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties." JOSEPH STORY, L.L.D., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

More recently, Judges often base decisions on the language of a statute or on the intent of Congress. By so doing, they essentially rest the legitimacy of decisions on the will of the more majoritarian branches of the government, perhaps subconciously expecting this co-option of majoritarian legitimacy to speed the acceptance of judicial decisions. Michael D. Daneker, *Moral Reasoning and the Quest for Legitimacy*, 43 AM. U.L. REV. 49, 51-52 (1993).

233. Decision No. C-221 at 18.

While the Court is correct in praising the democratic nature of the Constitution and its rejection of authoritarianism and totalitarianism, social contract analysis seriously calls into question the Court's determination that the Constitution represents any specific political philosophy, much less the libertarianism as the *tierra firma* into which the Court sinks its constitutional pillars. This can be seen either in the composition of the Constituent Assembly or, more importantly, in the Constitution itself. Alternatively, if certain ideologies are discernible, the Court should not have used libertarianism and the radical autonomy of the individual as the basis for its decision.

As noted previously, the Constituent Assembly was convened for two main purposes: the search for peace caused by narcoterrorism and guerrilla violence, and the creation of a more participatory, democratic, and inclusive "social pact."[234] These two goals were achieved through pluralistic representation in the Constituent Assembly reflecting Colombia's diversity. Three major groups were represented: the traditional political parties, Liberal and Conservative; non-traditional groups, like M-19; and the significant presence of minority forces, such as Protestant evangelicals, indigenous peoples and ex-guerrillas.[235] Perhaps this is the first time in Colombian history the Constituent Assembly brought together people as diverse as members of the business and financial community, union leaders, Catholics, Protestant evangelicals, educators and leftist activists. The result of this pluralism was a pragmatic, non-ideologic constitution-making body devoted to the search for peace and the opening up of the political system.

Numerous commentators have noted the non-ideologic nature of the Constituent Assembly.[236] Dr. John Dugas of Colombia's University of Los Andes explains that the election of members of the Constituent Assembly divided the traditional powers ruling the country. Consequently, no single group could

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234. *See supra* text accompanying note 50.

235. *See* John Dugas, *El Desarrollo de la Asemblea Nacional Constituyente*, in LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLITICO VIABLE?, *supra* note 30, at 46.

236. *See* Daniel Fernando Gómez Tamayo, Eduardo Mantilla Serrano, & Carlos Gerardo Mantilla G., *Anotaciones Críticas a la Carta del 91: Una Constitutución Illegal pero Legitimada*, 82 UNIVERSITAS 298, 302 (1992) (arguing that Constitution lacked a systematic ideology due to the diverse elements represented in the Constituent Assembly); *see also* José Gregorio Hernández Galindo, *La Persona Humana y Sus Derechos en la Constitución de 1991*, 82 UNIVERSITAS 395, 398 (1992) (arguing the although the Constituent Assembly opened itself to ideological elements of diverse origins, no distinctive ideology emerged as the Constituent Assembly faced concrete situtations); Hernando Valencia Villa, *Los Derechos Humanos en La Constitución de 1991*, *in* DUGAS, *supra* note 30, at 209 (arguing that diversity of rights represented in Constitution is a direct result of the process used to reform the Constitution, marked by the high level of distinct forces integrated into the 1991 Constituent Assembly and "notorious absence of a dominant ideology"); Hartzell, *in* LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLITICO VIABLE?, *supra* note 37, at 77 (noting from the economic point of view that the Constitution contains no clear economic ideology, with the result that the Colombian economy is a hybrid or mix providing space for both state inverention and the private sector).

direct the agenda, control the debate, or determine the results of the Assembly.[237] Moreover, political groups in the Assembly, such as the Liberal Party, were fragmented and lacked internal cohesion, further weakening ideological univocality.[238] The end of the Cold War also contributed to a non-ideological nature by cooling rhetoric at the extremes, enabling the left to be more pragmatic concerning the use of public force and private property and enabling the right to be more moderate on social issues.[239] Consequently, the Constituent Assembly was marked by non-ideologic pragmatism, seriously calling into question the Court's determination that the Constitution somehow represents an assembly of libertarians par excellence. In the most general terms, the Constituent Assembly was not a deliberative body dominated by, inclined towards, or even less representative of libertarianism in the common sense of the term. Nor, most emphatically and crucially, is the Constitution a "libertarian" document.

2. *The Libertarian Gloss on a Non-Ideologic Constitution*

Textual analysis[240] of the Constitution demonstrates that its most central attribute and reigning principle is ideological pluralism, not libertarianism. Although most commentators have noted the general, non-ideological nature of the Constituent Assembly, this does not mean that certain social and cultural values were not written into the Constitution. A look at these values, however, reveals that the Constitution is more an ideogical stew than a one-ingredient libertarian soup. To be sure, a hint of libertarianism and the radical autonomy of the individual may be savored here and there, but they do not make up the whole broth. In essence, these assorted libertarian principles are either too weak or too vague to serve as adequate governing adjudicatory principles for the Court. Hence, the Constitution serves neither as a *tabula rasa* onto which judges can draft their personal philosophical predilections, nor as a libertarian document on which to protect and promote libertarian ideas such as the radical autonomy of the self.

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237. *See* Dugas, *supra* note 30, at 47. For example, in voting for the Constituent Assembly, the Liberal Party received 33.7%; M-19, 25.7%; and the Conservative Party a miniscule 6.8%.

238. *Id.*

239. *Id.* at 70.

240. In determining the meaning of a text, two suggested focuses are the intention of the drafters, and the text itself. Judge Gaviria rejects the first approach: "What the interpreter uses is not a series of opinions of the people who created the rules . . . it would be worthless to try to discover what each member of the Constituent Assembly would in regards to the Court's decision." Rather than focusing on the psychological intention of the authors, the interpreter should focus on the text itself. The role of the interpreter is to find "logical harmony" within the text, determining the spirit of the text without consulting the persons who wrote it. *See* Gaviria, *supra* note 5. Because I find both the intention of the drafters and the text relevant, I focus on each interpretative approach here.

Determining the governing principles of the Colombian Constitution is a difficult task due to the excessive number of articles and resulting repetition and contradiction between constitutional norms. Defining what is and is not constitutionally protected is exceedingly difficult with a constitution containing ample - and sometimes contradictory - fundamental rights.[241] Accordingly, one should be hesitant in criticizing the court for using vague and elastic portions of constitutional text to support general philosophical positions. Poor constitutional construction makes for poor constitutional law.[242] Nevertheless, vague constitutional clauses only offer judges more interpretative liberty; such liberty must be coupled with the desire to construe constitutional rights in an amplified form.

Numerous commentators have attempted to describe the reigning principles of the 1991 Constitution. For example, one commentator has described the 1991 Constitution as follows: a blend of the respect of the individual as a subject of rights before the state reflecting the influence of the American and French Revolutions; the social doctrine of the Church (balancing the autonomy of the individual and her social responsibility); the clear and definite precedence of the juridical order over political options; and the Latin predilection for presidential systems and vestiges of moderate socialism.[243] Notably absent from this analysis is any mention of, or even a tendency towards, libertarianism. Others have focused on aspects of the Constitution such as its secular inclination, as well as its institutional features such as endorsement of popular sovereignty, participatory democracy, decentralization, and other governmental changes.[244] In questions of governing ideology, however, many have noted that because the Constitution opened itself to ideological elements of diverse origins, ample uncertainty exists as to the application of these diverse values to concrete

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241. *See* Hernández Galindo, *supra* note 236, at 396.

242. *See* Santos, *supra* note 28. Many have criticized Colombia's Constitution. Francisco Santos, although not a jurist, reflects well some of the more common complaints about Colombia's new Charter:

> I wouldn't say that it's a well-written constitution and a well-thought constitution, and that's the main problem . . . . [T]here is everything for everybody, and you don't rule a country like that. The law of the land gives you choices, gives you rights, gives you obligations and gives you a very small set of rules under which you live, work, and die. They didn't do this. It was a deterministic constitution, full of rights but no obligations.

Id.

243. Herdegen, *supra* note 56, at 8. This author has also suggested that respecting the automony of the individual (common to all constitutional liberal democracies) is not the equivalent of value-free libertarianism. Specially concerning the Colombian Constitution, this scholar has noted that "[f]rom the comparative perspective, the new constitutional statute forms part of a pluralistic order which proclaims the autonomous develop of individuality *without an indifference to values* (emphasis added)." Herdegen, *supra* note 78, at 13.

244. *See* Hernandez Galindo, *supra* note 236, at 398.

situations.[245] Faced with the perplexing question of decriminalizing drug use, the Court appears to have opted for using a few hints of libertarian inclination as support for a governing principle of the constitution. Such univocality is impossible given the diverse ideologies represented in the Constitution. From the perspective of social contract theory, the majority appears to have misinterpreted - perhaps intentionally - both the intent of the Constituent Assembly and the Constitution itself, in its desire to move Colombia towards a more libertarian state.

B. *The Argument from Democratic Theory*

Troubling as the majority's opinion is as an interpretative matter - treating the Constitution as a *tabula rasa* on which to impose their libertarian ideology - so is the danger that the opinion poses to the democratic process. Colombia is similar to other civil law countries in that judges traditionally have been extremely deferential to the other political branches. Only recently have Colombia's judges been granted broad powers of judicial review. As such, they must be careful to exercise institutional self-restraint, applying only those norms indicated, or clearly implied, by constitutional text and tradition. Judges who abuse their interpretative powers by deciding fundamental political or policy questions on the basis of moral or economic philosophies "discovered" from vague constitutional norms, are a threat to representative democracy.

The reason such judicial policy-making is especially pernicious is that judges, unlike other elected officials, are ordinarily immune from the check of the electoral process. In the United States, for example, the danger of an activist judiciary is especially acute, at least in the federal system, because federal judges are not popularly elected and ordinarily cannot be removed from office. The Colombian Constitution attempts to preserve liberties by providing that those deciding difficult and tendentious policies, such as legalizing drugs, are held directly accountable to the people through regular elections. Federal judges, by contrast, alone are given life tenure so as to shield them from being held accountable to the people.[246]

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245. *Id.*

246. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA, at 5. The United States system of checks and balances limits the Supreme Court in other ways as well:

> Under Article III of the United States Constitution, Congress can control the appellate jurisdiction of the Supreme Court (*see* the Reconstruction Laws), as well as the size of the Court. Under Article V, Congress can, in conjunction with the States, overthrow Court decisions by amending the Constitution. See U.S. CONST. amend. XVI which authorized the federal income tax. Congress can overturn specific Court rulings by explicit legislation. *See* the Civil Rights Restoration Act of 1988. Under Article II, the President can nominate, and the Senate can approve, strict constructionists for life-time terms, for example, William Rhenquist, 1970-

In Colombia, the danger of a long-term activist judiciary is lessened because Constitutional Court judges are appointed for eight year terms, not life, and cannot be re-elected.[247] As such, a truly activist judiciary would be relatively short-lasting, at least in comparision to the United States. Indeed, those in the United States who oppose judicial activism of either the conservative or liberal stripe might prefer a system like Colombia's with fixed term limits where time, not the electoral process, will "boot the bums out."[248]

Given this difference between the United States' legal system and that of Colombia's, the specific danger to the Colombian democratic process lies less in the accountability of the judges, whose terms are relatively short. Rather, the danger is the judicial hubris that judges, not elected officials, are especially enabled to discern the reigning principles that govern - or should govern - Colombian political life. It no doubt has come as a surprise to the thiry-five million Colombians that their principle values, at least according to the five person majority of the Court, resound in libertarianism, the radical autonomy of the self, and an almost paranoiac suspicion of state power. Part of the answer to the harsh reaction to the case lies in the way the Court seems to speak a separate and exclusive cultural language from the people its decisions will affect. As others have noted, it is of vital importance that the judiciary "take care to speak and act in ways that allow people to accept its decisions on the terms (the judiciary) claims for them."[249]

This cultural gap between the people and the judiciary cannot be bridged as long as the Court insists that it, and not the Colombian people, should have the final say on what values should govern society. The problem of the judiciary's search for "fundamental values" has perhaps been best expressed by Dean John Hart Ely:

> present. The Court neither gives advisory opinions, nor does it seek out cases. Instead, it must wait for "cases and controversies" brought by plaintiffs who have "standing." Finally, the Court has to rely on the executive branch to enforce its rulings. See Brown v. Board of Education, 349 U.S. 294 (1955), for the "proceed with all deliberate speed" opinion.

Letter from Thomas L. Pahl, Ph.D., Instructor, Lakewood Community College, to Michael R. Pahl, Visiting Professor of Comparative Constitutional Law, Pontificia Universidad Javeriana, (Mar. 30, 1995) (on file with the *Indiana International and Comparative Law Review*).

247. Constitutional Article 239 establishes that justices of the Constitutional Court are nominated by the President, the Supreme Court of Justice, and the Council of the State, approved by the Senate and serve a single term of eight years. Constitutional Article 245 prohibits judges serving in other official capacities while on the bench and for one year after completion of service.

248. Political commentator and former Republican presidential candidate, Patrick Buchanan, for example, has advocated limiting the terms of service of the federal judiciary, parallel to current political movements seeking to limit congressional terms. *Look for Federal Term Limits to be Stronger*, THE SAN DIEGO UNION-TRIB., June 1, 1995, at B11.

249. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2814 (1992) (O'Connor, Kennedy & Souter, J.J.).

> [The problem with the] idea that society's "widely shared values" should give content to the (United States Constitution) is that the consensus is not reliably discoverable, at least not by the courts. [In] any event the comparative judgment is devastating: as between courts and legislatures, it is clear that the latter are better suited to reflect consensus. [We] may grant, until we are blue in the face, that legislatures aren't wholly democratic, but it isn't going to make courts more democratic than legislatures.[250]

The crucial problem is that if Colombia has turned over a new libertarian leaf, this is not readily discernible from constitutional text. If libertarianism is to be the new Colombian political reality, this is fundamentally a matter for the peoples' representatives, not the judiciary, to decide.

The danger posed to the democratic process by judges donning policy-making garbs rather than judicial robes is especially acute regarding drug policy, given that the Colombian Senate had recently reviewed Ley 30 de 1986 and discussed the progressive decriminalization of personal drug use. While decriminalization had little grass-roots support, the fact that the topic was undertaken by the Senate indicates that the political branches were functioning as they should in considering this difficult policy issue.

In June of 1993, a special congressional commission began studying some of the problems of narcotics trafficking.[251] The commission's conclusions regarding drug consumption are of particular interest. Many praised Ley 30 de 1986, considering it rich in possibilities and alternatives to confront drug dependence through treatment.[252] Moreover, many members of the commission expressed their support for a drug consumption law containing a caveat which provides for gradual depenalization when effective prevention programs have been put in place.[253] The balanced, incremental approach, favored by the congressional commission, evinces a laudable concern with a compelling practical problem: Is a developing country like Colombia able to provide adequate treatment and prevention programs to handle the probable increase in drug use and addiction inherent with drug decriminalization? This cautious approach is a far cry from the Court's immediate depenalization of all drugs. Indeed, the Court does not appear to express any acknowledgement of the possible societal effects of its decision, or the ability of problem-burdened Colombia to add increased drug addiction to its list of social headaches.

In a related matter, the members of the congressional commission specifically rejected the unilateral decriminalization of consumption. Rather, they

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250. ELY, *supra* note 93, at 63.

251. *See Informe y Conclusiones de la Comision Accidental para el Estudio del Problema del Narcotrafico, in* LA LEGALIZACION DE DROGA, *supra* note 60, at 313.

252. *Id.*

253. *Id.*

advocated that this difficult and tendentious topic be studied further, planting the seed for the policy debate both within and outside Latin America. The commission ended with the sanguinary comment that "in a short time the Congress will be an excellent and natural forum for debating this idea."[254]

The Court's decision proved them wrong, taking the decriminalization debate off the legislative agenda. Temporarily muzzled politically by the Court's decision, the Colombian people have been forced to seek two options outside normal legislative channels: constitutional reform and various time, place and manner restrictions on drug use alluded to by the Court majority. The first, a constitutional reform of Article 49 concerning the duty of the state to provide for the health of the citizenry, was introduced by the Minister of Justice and the Minister of Health in May of 1995. This legislative act would change Constitutional Article 49 so that the state can:

> [r]estrict or prohibit the carrying or conserving of drugs for use or consumption, and establish sanctions, including criminal penalties, to preserve the public interest and protect the health, harmonic and integral development, and the full exercise of citizens' rights.[255]

The Ministers, perhaps acknowledging some of the concerns raised in the Court's decision, were careful to note that criminal sanctions should be used only in certain circumstances and ultimately as a last resort.[256] Moreover, any criminal sanctions passed pursuant to the Act should be flexible and reasonable, with due consideration given to other, non-penal methods.[257] Examples of the latter include fines, suspensions of drivers licenses, and rehabilitative methods.[258] This mini-decriminalization, however, must be matched by increased penalties for hard drugs, as opposed to soft drugs. Exceptions should also be established for therapeutic or cultural uses.[259] Echoing the concerns of the *salvamento*, the Ministers referred to drug policies in the United States and other Latin American countries to support the reasonableness of their proposal.

In part because the Ministers were advocating the reform of an amendment specifically concerning health, they emphasized that the problem of drug use is best confronted through prevention and education, not criminal law which dissuades, but does not ensure, the rehabilitation of the addict.[260] This balancing of criminal sanctions with treatment and rehabilation is the precise type of policy

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254. *Id.* at 331.

255. Proyecto de Acto Legislativo *Por el cual se adiciona el artículo 49 de la Constitución Política de Colombia 1.* [hereinafter Legislative Act].

256. *Id.* at 1.

257. *Id.* at 2.

258. *Id.*

259. *Id.*

260. *Id.* at 4.

question best left to the political branches. They concluded by asking Congress to approve their proposed Act, which would reimpose criminal sanctions for drug consumption whose only end is to feed the coffers of the growing drug market. They hoped that doing so would preserve Colombia's image in the international arena.[261]

The second approach taken by the government concerns the Court's constitutional window regarding time, place and manner restrictions. On March 31, 1994, less than a month after the opinion was issued, former President Gaviria issued an Executive Decree concerning various dispositions in the legal codes concerning minors, the National Police and penitentaries, for example, to establish limitations on the carrying and consumption of drugs.[262] Examples of reasonable time, place and manner restrictions enacted under this Executive Decree include forcing teachers to inform parents when students are suspected of using or dealing drugs[263] and prohibiting drug use in public places,[264] as well as in the nation's jails.[265]

The proposals and reactions undertaken by legislative and executive branches, however, do not stop here. A third approach goes directly to the heart of the Constitutional Court itself. A group of senators, supported by the government, recently introduced a bill in Congress to do away with simple majority decisions, requiring a two-thirds super-majority of six judges.[266] Personal drug use, of course, would not have been decriminalized under this heightened standard.

The stated purpose of this reform goes directly to the issue of judicial activism: to prevent the Court from "legislat(ing) and assum(ing) congressional functions."[267] To this end, the bill also would limit the Court to deciding the constitutionality of issues, "without establishing conditions or judicial rules of obligatory observance."[268]

This second, interpretive limitation derives, in part, from another controversial Court decision, holding that military officials in active service, subject to command influence, lack the necessary impartiality to administer military justice.[269] The Court suggested that retired military officials could serve in their place as judges in Court Martials. The Retired Military Officers

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261. *Id.* at 5.

262. Decreto Número 1108 de 1994 [hereinafter Executive Decree 1108].

263. *Id.* art. 11.

264. *Id.* art. 16.

265. *Id.* art. 27.

266. John Gutierrez, *Lista Reforma a la Corte Constitucional*, EL TIEMPO, April 28, 1995, at 14A; *see also Minjusticia Defiende Corte Constitucional*, EL TIEMPO, Apr. 29, 1995, at 10A (expressing support of the Minister of Justice, Néstor Humberto Martínez, for a supermajority vote to give more security and legitimacy to Constitutional Court opinions).

267. Gutierrez, *supra* note 266, at 14A.

268. *Id.*

269. *Los Magistrados Dejaron Afuera El Fuero Militar*, EL TIEMPO, Apr. 9, 1995, at 3B.

Association, however, rejected the Court's decision, stating that none of its members would serve as judges.[270] As a consequence, military justice was temporarily put on hold.

As with the decision to decriminalize drugs, Congress moved quickly to overturn the Court's decision regarding military courts through calls for constitutional reform.[271] Political fallout from the Court's activism includes bitterly divided Court decisions, followed by saber-rattling between the judicial and the political branches and proposed constitutional amendments. Others have gone even further, suggesting that the Constitutional Court be shut down entirely - hardly a propitious start for a four-year-old Court.

VIII. CONCLUSION

> "When you look at the opinion you realize, Jesus Christ! They really could become dictators . . . . [T]hat is what really worries me about this Court."[272]

The tough questions of drug policy cannot be easily reduced to mere slogans, such as the quasi-militaristic "War on Drugs", the simplistic "Just Say No", or the philosophically tempting, but societally irresponsible, "free development of the personality." Due to the complexity of the policy questions surrounding personal drug use, their resolution lies quintessentially in legislative action rather than judicial action.

Recent experience shows that those countries which have decriminalized personal drug use have generally done so through the elective process, not judicial fiat. Even those few countries or states which have legalized drug use through judicial decision have never done away with all restrictions on all drugs as the Court has done here.

A comparison with the decision of the German Constitutional Court is instructive. That opinion came down at roughly the same time as that of Colombia's and considered a constitutional article similar to the free development of the personality. However, the German court decriminalized only small quantities of marijuana and hashish, leaving all other criminal sanctions intact. That there was little outcry over the German court's decision, which reflects, in part, the generally accepted distinction between soft and hard drugs. The German court's legalization of a widely used and arguably harmless substance simply

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270. *Id.*

271. *Bloque de Apoya a Fuero Militar*, EL TIEMPO, May 4, 1995, at 6A (104 congressmen signed a proposal to amend the Constitution to permit officials in active military service to continue judging crimes in the system of Court Martial).

272. *See* Santos, *supra* note 28.

pales in comparision with the sweeping decriminalization undertaken by the Colombian Court.

Suffice it to say that the Court, in an act of extreme judicial overreaching, has enshrined a constitutional right to personal drug use premised on libertarian notions of radical individualism, a concept foreign to the Colombian civil society and the 1991 Constitution. The Colombian people have overwhelmingly rejected the Court's efforts to partake in the expanding rights revolution. The Court's refusal to exercise self-restraint in its constitutional role has even lead to calls for its abolition.

The Court's decision is insufficient as a jurisprudential matter and as sound drug policy. A more sensible drug policy, like one suggested by a commission of the Colombian Senate and most recently in the government's proposed reform of Constitutional Article 49, might have found ample room between the two policy extremes of what Professor Mark Kleiman has called "do what you like" and "go to jail." This search for legislative compromise through the democratic process, a middle ground acceptable to the Colombian people, has been muzzled by the Court's embrace of the non-compromising, exaggerated absoluteness and hyperindividualism of "rights talk." The Court's libertarian jurisprudence severely curtails the state's use of the criminal to protect its citizens' health and well being through laws penalizing pernicious drug use. This is all the more so because the Colombian Constitutional Court, unlike the United States Supreme Court, is empowered to consider the constitutionality of any law passed by Congress before the law takes effect.[273] Any restrictions regarding time, place and manner of drug use consequently fall within the Court's ambit. It is highly unlikely that the Court will approve any statute remotely resembling the statute declared unconstitutional. As such, the Court, at least in regards to personal drug use, will continue to sit less as a judicial body and more as a super-legislator.

This judicial power, and the inherent trumping of the democratic process through the placing of individual rights on the constitutional pedestal, is especially troubling in a country which sought in its 1991 Constitution to create democracy anew. Let this analysis serve as a clarion call to Colombia's Constitutional Court, which is designed to protect a broad array of constitutional rights and which may turn out to be - unexpectedly and unfortunately - Colombia's most dangerous branch of government.

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273. The U.S. Supreme Court does not issue so-called advisory opinions, due to the "case or controversy" requirement of U.S. Const. art. III.

EVOLUTION OF THE COLOMBIAN JUDICIARY AND THE CONSTITUTIONAL COURT

Luz Estella Nagle[*]

Colombians, guns have given you independence, laws will give you freedom.
—Francisco de Paula Santander[1]

I. INTRODUCTION

In 1991, Colombia enacted a new constitution, the thirteenth since Colombia gained independence from Spain. Among many significant changes found in the Constitution is an article establishing a new composition of the country's high courts. Not only has the Supreme Court assumed new responsibilities as the highest court of ordinary law, but a new Constitutional Court was established to decide all constitutional law issues brought before it.

Since its creation, the Constitutional Court has been at the center of controversy, due mainly to decisions it has handed down involving issues of personal rights and freedom of expression. Last spring, the Court declared that any prohibition on one's personal use of cocaine, marijuana, and other drugs went

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1. Known as the "Law Giver," Santander (1792-1840) "fought beside Simón Bolívar in the war for independence and was president of the newly formed Gran Colombia in 1833-37." VIII ENCYCLOPAEDIA BRITANNICA 881 (1976). This proclamation was first published in JOSÉ FÉLIX BLANCO AND RAMÓN AZPURÚA, DOCUMENTOS PARA LA HISTORIA DE LA VIDA PÚBLICA DEL LIBERTADOR (Caracas: La Opinión Nacional, 1876), t. 8, pp. 223-224, and *reprinted in* LUIS HORACIO LOPEZ D., ED., A LOS COLOMBIANOS: PROCLAMAS Y DISCURSOS 1812-1840 (Bogotá, Biblioteca de la Presidencia de la Republica, 1988), p. 152. The full proclamation reads:

> Colombianos: Apenas hemos echado la semilla del bien en una tierra fértil, que empapada de la sangre de muchos héroes, ofrece abundante fruto. Mas no es esto obra de un sólo día; sólo el tiempo y vuestras virtudes os lo pueden proporcionar. Las armas os han dado independencia, las leyes os darán libertad. Palacio de gobierno en Bogotá, a 2 de deciembre de 1821 11°.
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> [Colombians: Scarcely we have planted a righteous seed in a fertile land that, soaked in the blood of many heroes, offers abundant fruit. However, it is not the work of a single day; but what time and your virtues would furnish. Arms have given you independence, laws will give you freedom.]

The quote is inscribed over the entrance to Colombia's Supreme Court. In 1985 the building was destroyed by fire resulting from the Colombian army's inept assault to "rescue" the justices who had been taken hostage by guerrillas of the leftist M-19 movement. Most of the justices, court officials and visiting lawyers were killed in the conflagration.

against constitutionally guaranteed freedoms of self-expression. The decision touched off a storm of debate throughout the government and around the world, especially in the United States where news of the decision under-scored the U.S. government's position that Colombia has become a *narco-democracy.*

I believe the Court's decision, while poorly arrived at, raises a more significant issue—the new role the judiciary is assuming as a lawmaking body. This power contradicts the high court's traditional role in Latin America of being little more than a rubber stamp for the executive and legislative branches. The lack of a legal tradition of stare decisis in this civil law country also raises the issue of where the court, in its new capacity of judicial review and judicial activism, should draw its models and legal fundamentals for making its decisions.

The intent of this article is to present and discuss an extraordinary event in the history of Colombia's civil law tradition. Those interested in constitutional law will appreciate the controversy and confusion the inception of the Constitutional Court has generated in Colombia's conservative legal system, especially when the high court, prior to the new constitution, played only a subordinate role to the other branches.

This article begins with an in-depth discussion of the historical foundations of the Colombian judiciary. It explains the composition of the court before and after the 1991 constitution. This is followed by a description of the Supreme Court, and the other high courts of appeal. The article then concentrates on the Constitutional Court and the impact this Court has had as a lawmaking body and how its influence can permanently alter the balance of political power in the Colombian government. The drug legalization case, while extremely controversial and poorly thought out, illustrates how the Constitutional Court views its singular authority to interpret the Constitution and set new precedent in contradiction to the traditional structure of checks and balances.

The article is presented in a comparative point of view relative to the U.S. high court tradition of judicial review and activism because the U.S. system, and to a lesser extent the French system, has been the chief model upon which the Constitutional Court's authority and composition is based. The manner in which the U.S. model is adapted is very interesting, and at times, almost unbelievable. This article will shed light on how the judiciary in a civil law system is taking on a role of judicial activism not previously tolerated by the other branches of government.

II. HISTORICAL FOUNDATIONS OF THE JUDICIARY

Inspired by the successful popular revolutions in France and the United States, Colombia, then called Nueva Granada, gained independence from Spain in 1810. Combined Granadine regulars and mercenaries from the United States, under the leadership of Simón Bolívar, defeated Spanish forces at the Battle of Boyaca in the highlands north of Santafe de Bogotá.

Seduced by the promise of these newly established nations so full of liberal and democratic ideas, the founding fathers embarked upon the challenge of building a new nation with little prior experience in self-government. Because of the exigencies of unifying a population displaced by large distances and isolating geography, Bolívar and his compatriots looked to the recently developed models of government in France and the United States. They struggled over whether to choose a centralized unitary government as was established in France, or to adopt a federal union of territories as implemented in the United States. Differences of opinion between factions led by Bolívar and Francisco de Paula Santander, respectively, compelled compromise and adaption from both models of democratic government.

From France, the founding fathers borrowed the notion of individual guarantees of a bill of rights as appeared in the *French Declaration of the Rights of Man and of the Citizens*, the concept of separation of powers and the role of the judiciary.[2] From the United States, the Colombian drafters took the concept of a written constitution, the bare text of the Presidential system and the structure of the judiciary; what was not expressly written in the text of the U.S. Constitution was not taken, however.[3]

While the new government grappled with the intricacies of the other political systems, the Spanish law, as Eder noted, remained in force, and the practices of the courts and the modes of Spanish legal thinking continued with little change until the adoption of its own codes later in the 19th century that were modeled after the Code of Napoleon.[4]

The battles for attaining an ideal model and identity has not proven easy, for Colombia has produced thirteen constitutions to date.[5] Taken together, the constitutions are of great importance, for they furnish the historical basis for the

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2. Antonio Narino published a translation in Bogotá in 1793. *See generally* Phanor J. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570 (1960).

3. Indeed, the U.S. Constitution does not expressly provide for judicial review or how checks and balances should operate. Though the function and meaning has evolved over time, these elements of government were unknown to Colombia's founding fathers.

4. Eder, *supra* note 2, at 571.

5. Colombia is known as the "Country of Laws," where a new law is enacted for every new idea. Lawmaking might even be analogous to a sport and reflects the degree of instability in Colombia. For comments and explanations, see *generally* DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF (1993). Colombia's constitutions have been as follows: The Act of Federation of United Provinces of New Granada, known as the Constitution of Tunja of 1811; the Constitution of 1821; the Organic Decree of 1828; the Constitution of 1830; the Fundamental Law for New Granada of 1831; the Constitution of 1832; the Constitution of 1843; the Constitution of New Granada of 1853; the Granadan Confederation Constitution of 1858; the Pact of Union of the United States of Colombia of 1861; the Constitution of the United States of Colombia of 1863; the Constitution of 1886; and the Constitution of 1991.

endless difficulties of today's nation in which the judiciary plays such a complex role.

A. *Establishment of Self-Governance*

Understanding the differences between the U.S. and Colombian judiciaries requires an examination of the historical environment in which each developed.[6] Little in Colombia's colonial background could have prepared the budding nation for a judiciary vested with the power ingrained in that of the United States.[7]

One may divide the development of the Colombian judiciary into two elements as compared to the evolution of the judiciary in the United States. First and foremost is the relationship between the former colonies and the motherland and the extent to which each colony nurtured any form of self-governance.

Unlike the English colonies, the Spanish colonies had precious little exposure to self-government. The English colonies were managed as permanent public and private investments and commercial enterprises regulated as mercantile enterprises to ensure exports of raw materials to England and imports of British goods to the colonies. The colonies afforded the opportunity to alleviate over-population in England, while establishing a rigid northern barrier to further Spanish expansion.

The English Crown governed the colonies through charters by which the Crown, more or less, entrusted the colonists to conduct their daily affairs. The colonists, led by ambitious and capable individuals, enacted many of their own laws to administer colonial commerce and social conduct.[8] Within the first century of occupation, the colonists established their own bicameral legislative bodies, including a lower house of representatives elected by popular vote. The English colonies even had a court of appeals.[9] By the mid 18th century, the American colonies had developed a character distinct from that of England.[10] By the time the English colonists aspired toward independence, they understood the fundamentals of self-government and were prepared to challenge the Crown's authority.[11]

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6. The comparisons drawn are to the U.S. federal judiciary and not to those of any states.

7. The law of Castille was the law for the colonies. Under Castillian law the King was subject to no law, and his powers were absolute. *See* Eder, *supra* note 2, at 570.

8. The laws could not be contrary to the laws of England and had to be reasonable. *See* E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT IS TODAY 8 (1950).

9. The Governor's Council, composed of colonists serving in the upper house, performed the judicial functions. Their duties were legislative, advisorial to the Governor and judicial. *See generally* 1 SAMUEL E. MORRISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC (7th ed. 1980).

10. DAN BRAVEMAN, & WILLIAM C. BANKS, CONSTITUTIONAL LAW: STRUCTURE & RIGHTS IN OUR FEDERAL SYSTEM 6 (2d ed. 1991).

11. *Id.*

In sharp contrast, the Spanish colonies had little experience at home rule, because the Spanish Crown, through an elaborate and aristocratic system, exerted absolute totalitarian rule from across the ocean. The Council of Indies, appointed by the Spanish monarchy and resident in Spain, was the most important group of advisers. The members served as an administrative board, fount of legislation and appeals court all at the same time.[12] The will of the Council was carried out abroad by royally appointed viceroys and provincial governors whose loyalty and interests were to the Crown, not toward the good of the colonial subjects who were treated as an appanage, the personal property of the Crown.[13] Unlike their English counterparts, the Spanish colonists enjoyed no franchises, immunities or liberties afforded Spanish subjects at home.[14]

If the viceroys were the principal agents of the Crown, the *audiencias*, as the advisors to the viceroys but with direct authority from the Crown, performed the duties of the high court in the colonies. In times of crisis, they assumed supreme executive as well as judicial authority.[15] By reviewing the acts of the royal officers in the colonies, the *audiencias* assumed a type of appellant power to protect royal prerogatives.

Contrary to the English colonies in the New World that could occupy government positions and enjoy social privileges, Spain did not trust the *criollos*[16] in government. While the English colonists were astutely aware of the constraints imposed upon them by the power of Mother England, whenever convenient they relied liberally upon their privileges and rights as Englishmen in their disputes with the Crown. In contrast, the subjects of New Granada were often naively uncertain of their limits and were blindly submissive to the Spanish Crown.[17] Only at the lowest local level of government, called the *cabildos*, did Creoles participate in any form of self-representation.[18] However, not only did the *cabildos* lack autonomy and power, but the institution was "marked by corruption, inefficiency, and abuse."[19]

Following independence from Spain, the former colonists were uncertain as to how to rule themselves. They had no historical, home-grown precedent to do so and no exposure to autonomous or democratic rule except for the *cabildos*

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12. BUSHNELL, *supra* note 5, at 10. *See also* JOHN H. MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 150 (1978).

13. Eder, *supra* note 2, at 570.

14. For information on the rights enjoyed in the U.S. colonies, see generally DUMBAULD, *supra* note 8.

15. BUSHNELL, *supra* note 5, at 29.

16. *Criollos*, or in English, Creoles, were pure-blood Spanish born in the New World and usually educated in Spain or elsewhere in Europe.

17. Consequently, the Spanish colonists never confronted the royal authority until shortly before the Creole revolt of 1781, known as the Revolt of the Comuneros of New Granada. *See* BUSHNELL, *supra* note 5, at 27.

18. *Id.* at 12.

19. *Id.*

model of local government, which was dominated by rampant corruption and intrigue.

While the United States developed a distinct system from that of England following independence, the Colombian founding fathers could only shop around for a model upon which to bring forth their new democracy. Consequently, Spanish influence on Colombian law and political institutions persisted until late in the 19th century. From Bolívar's address to the new Congress at Angostura in 1819, it appears that the lack of experience with self-governance and the differences between North American and South American cultures were significant in the Congress' decision to establish a system similar to that which they had been under prior to achieving independence. Changing faces, while leaving things the way they were, seemed the easiest route to take.

> The more I admire the excellence of the federal Constitution of [the United States], the more I am convinced of the impossibility of its application to our state. And, to my way of thinking, it is a marvel that its prototype in North America endures so successfully and has not been overthrown at the first sign of adversity or danger. Although the people of North America are a singular model of political virtue and moral rectitude; although that nation was cradled in liberty, reared on freedom, and maintained by liberty alone; and—I must reveal everything—although those people, so lacking in many respects, are unique in the history of mankind, it is a marvel, I repeat, that so weak and complicated a government as the federal system has managed to govern them in the difficult and trying circumstances of their past. But, regardless of the effectiveness of this form of government with respect to North America, I must say that it has never for a moment entered my mind to compare the position and character of two states as dissimilar as the English-American and the Spanish-American. Would it not be most difficult to apply to Spain the English system of political, civil, and religious liberty? Hence, it would be even more difficult to adapt to Venezuela the laws of North America.[20]

B. *Changes Brought by Independence*

The second element in the development of the Colombian judiciary concerns whether each country's wars of independence brought real changes in

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20. From the address delivered by Simón Bolívar at the inauguration of the Second National Congress of Venezuela, *reprinted in* 1 S. BOLIVAR, SELECTED WRITINGS OF BOLIVAR 173, 179 (H. Bierck, ed., 1951).

the form of a restructuring of colonial wealth, adjustments in social systems, and shifts in political power.

The English colonists had clear reasons for pursuing independence, namely, freedom from interference by the Crown in their own government and freedom of self-determination in all matters of society and commerce. Those reasons were clearly and concisely stated in the seditious slogan, "[n]o taxation without representation."[21]

Even though the framers of the U.S. Constitution were influenced by European thinkers and mindful of English traditions, they created a singularly unique document to fit their own society—a living testament to liberty that has stood the test of time for more than 200 years. The framers tried to balance governmental power with the protection of individual rights, knowing that accumulation of power did not serve the country well. The framers believed that fragmentation of power was the best way to prevent such an accumulation. The drafters of the Constitution founded their fledgling government on three principles: 1) Federalism to divide power between the states and the nation (vertical distribution of power); 2) Separation of powers to divide national government between the branches of government (horizontal distribution); and 3) Checks and balances to prevent any branch of government from becoming too powerful (horizontal).[22]

An important change central to the theme of this article resulted from the former colonists dissatisfaction over judges' dependence on the will of the English State and the Crown. The framers expressly emphasized the importance of an independent judiciary by trying to guarantee independence through lifetime tenure and the protection of judicial compensation.[23]

If the struggle for independence in the thirteen English colonies was triggered by a massive desire for self-government, in Colombia it was provoked by a crisis in the Spanish monarchy and increased antagonism between Creoles and European-born Spaniards.[24] Even though the Spanish colonies had been unhappy with discriminatory and absolutist treatment from the Crown, the real linchpin in the move toward independence was Napoleon's move to replace King Ferdinand VII with Napoleon's brother, Joseph. The subsequent resistance movement in Spain resulted in the creation of *juntas* to rule in the name of Ferdinand until he could regain the throne. In the New World, the subjects of New Granada were constrained to choose between the authority of Ferdinand VII or the usurpation of Joseph. Repulsed by the thought of a Corsican commoner ruling over the Spanish aristocracy, the Creoles decided, likewise, to organize

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21. A. E. HOWARD DICK, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 135-50 (1968).

22. Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 12 (1990).

23. *Id.* at 15-16.

24. BUSHNELL, *supra* note 5, at 35.

juntas to rule in the name of Ferdinand VII. It was then, for the first time, that Creoles were able to taste the intoxicating sweetness of self rule. Not so surprisingly, factions within the New World aristocracy soon realized that anyone could form a *junta* to rule in the name of the deposed King, and that anyone who wanted separation from Spain could use this opportunity to achieve his agenda.

The Creoles, who by default became the new ruling elite following independence, continued to embrace the colonial system while struggling through numerous attempts (over more decades than they would care to admit) to agree upon the form of government they really wanted. Between 1810 and 1816, they quarreled over whether to create a unitary regime or a federal alliance. The number of constitutions enacted throughout the 19th century reflect this continuing inability to reach a lasting consensus toward the ideal form of government.

Paramount to Creole concerns was the caveat that they must preserve, for themselves, the absolute power over their new country that the Spanish King had formerly exercised over them.[25] I am certain that this fact, alone, doomed Colombia from ever achieving the democratic ideals inherent in the French and U.S. models they sought to emulate.[26]

C. *Early Manifestations of the Judiciary*

Between 1811 and 1858, Colombian efforts to create a senates of censure gave way to a system of legislative supremacy.[27] The senates of censure were intended to screen the provincial constitutions and annul those laws and administrative acts contrary to the Act of 1811. However, the ultimate power rested in the general council which was reminiscent of the *curia* of medieval England.[28]

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25. This is my point of view, and, although debatable, is supported by Professor Merryman who writes that "while [the Creoles] aspired to oust their political superiors, they were also concerned to keep in their place the mass of the people below themselves . . . ." *See* MERRYMAN & CLARK, *supra* note 12, at 205.

26. Colombia has long prided itself on being one of the oldest democracies in Latin America. I cannot agree with so noble a description of my birth country. While a democratic government clothed in pinstripes and populism exists on the surface, there lurks an ominous and omnipotent side to the Country of Laws. The attitude of the original Creole oligarchy manifested itself over time in the form of a conservative military elite which to this day runs Colombia with an iron fist gloved in a cloth of shadows. One may discuss every facet of government and law in Colombia; for indeed there is much of interest to discuss and debate. But one must be ever mindful and respectful that the military, as the watchdog of the oligarchy, keeps the civilian government on a short leash and allows it to do only that which benefits the oligarchy's status and self-preservation.

27. J.A.C. Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 S. CAL. L. REV. 484, 489 (1949-50).

28. *Id.* at 491.

At the end of 1811, the United Providences of New Granada was formed in an attempt at achieving unity. The Act of Federation which created the United Provinces was little more than an expression of hope while Creole factions haggled over, among other things, the type of regime they wanted. The constitutions of most of the provinces, called *departamentos*, expressly provided for legislative supremacy.[29] Such a declaration was carried over in the future constitutions of the fledgling nation.

In 1819, the founding fathers proclaimed the formation of Grand Colombia, and a constituent Congress adopted a rigidly centralist constitution providing for a new convention to consider federation after a ten-year period.[30] The institutions put in place were intended to shield the new Colombians from absolutism while guaranteeing certain individual rights, at least on paper.

While a young United States in North America underwent real social revolution, Colombia remained essentially the same. Colonial institutions survived throughout the centuries either because of the power of vested interests or because the continuing strength of traditional beliefs and *procupaciones* (attitudes) persisted among the elite.[31]

Following the secession of Venezuela and Ecuador from Grand Colombia in 1830,[32] the present state of Colombia began to emerge. Between 1830 and 1853 Colombia produced three constitutions, all of which preserved a centralist form of government. The nation was divided into *departamentos* which, in turn, were subdivided for administrative purposes.[33] In 1886, the country adopted the constitution that provided the institutional framework that would last until 1991 when the present constitution was drafted.

The 1886 constitution is an exceptional document in terms of how the judiciary would evolve throughout the 20th century. Most significant is the absence of any power of judicial review of enacted statutes. This absence of judicial authority reflects the drafters opinion, echoing Rousseau, that there will

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29. The legislature shall resolve by law or decree the doubts and rivalries that arise as to the limits of legislative, executive and judicial powers conforming faithfully to this Constitution. *Constitution of Tunja of 1811 art. 22, reprinted in id.* at 491.

30. The constitution was modeled closely after the French, via the 1812 Spanish Constitution of Cadiz, because Colombians identified more with the French revolution and its attempts to protect itself against tyranny. Also, the Congress was elected by suffrage that excluded most inhabitants from voting. Venezuela and Ecuador did not vote because they were still under royalist control. *See* BUSHNELL, *supra* note 5, at 51.

31. This was a term used by frustrated reformists among the general population. *See* BUSHNELL, *supra* note 5, at 54.

32. *Id.* at 71-73.

33. The *departamentos* are broken down into *provincias*, the *provincias* into *cantones*, and *cantones* into local municipalities. All are units of local government that remain subordinate to the central government in Bogotá.

be no probability, no moral possibility, that unconstitutional laws will be passed.[34]

The political model for the 1886 constitution provided for a balance between national and local governments. This arrangement, considered a great achievement at the time, featured general administrative decentralization and political centralization. The charter is known as the "ultra-centralist constitution" because it strengthened the powers of the president while diminishing the authority of the other branches of government.[35] However, a subsequent amendment in 1910 established a form of judicial review, after nearly three decades of virtual dictatorship and inspired by Tocqueville's *Democracy in America*.[36] The amendment provided that, after hearing the opinion of the Attorney General, the Supreme Court would be entrusted with guardianship of the Constitution and empowered to decide definitely as to the *exequibilidad* (enforceability) of the Legislative Acts vetoed by the government, or laws and decrees challenged by any citizen as unconstitutional.[37]

The constitutional questions could be raised in three ways: 1) *Inter Partes*—in the course of ordinary litigation as is done in the United States; 2) *Acción Popular In Rem*—permitting any person, regardless of standing, to bring an action challenging a statute directly to the Supreme Court (which is not used in the United States); and 3) *Veto Presidencial*—in which the Supreme Court must rule definitively as to the enforceability of bills that have been vetoed by the president as unconstitutional.[38]

Under its power of judicial review, the Court invalidated several statutes on the grounds that they disturbed rights vested under contracts or under prior law, interfered with freedom of contract or with freedom of speech, took private property for public use without adequate compensation, appropriated money for other than a proper government purpose or granted special privileges in defiance of the principle of equality before the law.[39]

The present constitution, drafted in 1991, established a more balanced distribution of power among the three branches. This near equilibrium was reached by trimming certain powers from the dominant executive branch and investing the legislative and judicial branches with more authority.[40] The influence of both the U.S. and the French constitutions can be seen within the Articles of the new constitution, the most significant being the introduction of the

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34. Grant, *supra* note 27, at 499.

35. JENNY PEARCE, COLUMBIA: INSIDE THE LABYRINTH 24 (1990).

36. Tocqueville was widely translated and published throughout Latin America. *See* Eder, *supra* note 2, at 571.

37. 1886 COLOM. CONST. art. 214.

38. *Id.* art. 151(4).

39. Eder, *supra* note 2, at 591, *citing* Grant, *supra* note 27.

40. Donald T. Fox & Ann Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INTL L. 139 (1992).

Constitutional Court and other courts of specific jurisdiction. Probably the most significant provision effecting the judiciary is the shifting from a system in which judges brought charges against defendants, the so-called inquisitorial system, to a prosecutorial system modeled on the common law adversarial system in the United States where charges are brought by a government prosecutor. Henceforth, the *Fiscalia General De La Republica* (Prosecutors General's Office) must investigate crimes and bring charges before the courts against alleged offenders.[41]

D. *The Judicial Branch and the Present Constitution*

Clearly, the U.S. Constitution has influenced the organization of the Colombian government, and the U.S. court system has been regarded as an inspirational model for organizing the courts, especially that of the Supreme Court. The irony, however, lies in the fact that while the institution was literally copied, it was accomplished with neither genuine understanding nor practical insight of the Supreme Court's function in U.S. government. Rather, the manner in which the model was adapted to fit the Colombian socio-political values resulted in implementation of a very different interpretation of the function of the Supreme Court and the lower courts.

The problem, in my view, is analogous to fitting a square peg in a round hole, for while the U.S. judicial organization was a model, its function could not easily mesh with the legal philosophy and tradition of Colombia's judicial system which is based on two sources radically different from those of the United States. First, Colombia's legal system is based on Roman Law as it was initially adopted in Spain, France and Germany.[42] Second, Colombia imported the French doctrine of separation of powers, as well as France's theory of sources of law. These philosophies differ substantially from the U.S. system of reciprocal checks and balances.

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41. This system elicits great concern because the army and police forces still have considerable judicial police functions. Their authority not only endangers human rights and due process guarantees, but it leaves these agencies free from accountability because the Prosecutor General does not have disciplinary power over them. *See generally*, Human Rights in the World: Colombia, Impact of the New Constitution, THE REVIEW: International Commission of Jurists No. 47 (1991).

42. This pollination of the Roman law is known as the Romano-Germanic family of legal systems and is referred to as the civil law system by legal scholars in the United States and other common law countries. Such a system evolved from the final compilation of the private law of the Roman Empire known as *Corpus Juris Civiles* by Justinian. The *Corpus Juris Civiles* was treated as imperial legislation manifest in the authority of the Pope and the Emperor. *See* JOHN MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 7-14 (1969).

The separation and distribution of governmental power in Colombia amongst distinct institutions, in an effort to preclude intrusion upon one another, established a judiciary subservient to the role of the legislative and executive branches, which in turn were considered more important than the judicial branch. No control whatsoever by the judiciary was allowed over the actions of the other governmental entities, while both legislators/public administrators and the executive branch *did* have their own internal controls. As such, there was a rigid anti-judicial review attitude. Colombia's interpretation of separation of powers established the supremacy of the law as proclaimed by the legislative bodies and the job of judges in a supporting role was only to articulate and assiduously apply such law.[43]

Even if the French notion of separation of powers grew out of conditions peculiar to France's own struggle, they were per se readily adaptable to Colombia's experiences because both legal systems evolved from Roman law rather than from the common law milieu. If the central purpose of the French Revolution was to dissolve and destroy the deeply rooted feudal regime in which the judges—*parlaments*—had exerted great control,[44] it is understandable then, that the French doctrine of separation of powers should provide for a judiciary subservient to the other branches.

Even assuming that Colombia had not faced the multifarious problems with judges that France has, one could argue that, in light of the conflicts with their own judiciary, the manifest distrust of the Colombian people toward their courtroom guardians is fitting based upon this grevious history. Surely the ravages of the Inquisition in the New World set a historical precedent for popular revulsion of the *carte blanche* given judges which they asserted to allow abuses against innocent individuals in the name of combating heresy.[45] Consequently, the implementation of the French notion of the separation of powers within government placed totalitarian authority in the hands of the executive branch. Considering the historical precedent, doing likewise in Colombia seemed the logical course to pursue.

The theory of the sources of law imported from France was based on the idea that law emanates only from the Congress through legislation or from the President through the exercise of decree powers, and that the judge can only apply such law. Under this notion a case decided by the courts does not become a binding precedent for later cases. Later cases do not consider prior cases, but rather the laws duly enacted by the political branches. Whereas in the United

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43. For an expansion of the French historical background on separation of powers, see MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 190 (1989).

44. Mike Bothwell, *Nicolo and the Push to 1992—The Evolution of Judicial Review in France*, 1990 B.Y.U. L. REV. 1649, 1651 (1990).

45. The Constitution of 1821 officially abolished the Inquisition. *See* BUSHNELL, *supra* note 5, at 53.

States the decisions of the court must be followed, the doctrine of stare decisis was and remains inapplicable in Colombia.

E. *Structure of the Highest Courts*

With the ratification of the 1991 Constitution, the structure of the judiciary changed dramatically.[46] The Articles pertaining to the courts only pretend to strengthen one of the weakest institutions in the entire Colombian political system. No single phenomenon can explain the reasons for the judicial branch's ineffectiveness in preserving the rule of law and, most importantly, in safeguarding basic human rights.

Unlike the United States, Colombia is a unitary political community whose existence and power are derived from the general government.[47] Title VII of the Constitution addresses the judicial branch. Under this section the judicial branch is composed of *la Corte Suprema* (the Supreme Court), *el Consejo del Estado* (Council of State), *la Corte Constitucional* (Constitutional Court), *el Consejo Superior de la Judicatura* (Higher Council of the Judiciary), *el Fiscalia General de la Nación* (Prosecutor General) and *los Tribunales* (Tribunals).

Also, unlike the United States which has a dual state and federal court structure, Colombia is composed of a single national government with a single set of uniform laws. Even though the Colombian system appears to be simple, the high court, as illustrated in the following table, is divided between the Administrative Court, the Supreme Court which serves as the high court of ordinary jurisdiction (encompassing labor, civil, criminal, commerce, and family), the Constitutional Court and the Ethics and Jurisdiction Conflicts Courts.

One of the most significant changes in the judicial branch is the creation of the Constitutional Court. Because of the introduction of this entity into the judicial fabric of the high court, all pre-1991 Supreme Court decisions and judicial branch functions should be judged under parameters different from those of the post-1991 Constitutional Court.

In addition, there are differences between how the United States and Colombia qualify judges to sit on the high courts. For instance, a judge of the Colombian Supreme Court, Constitutional Court or the Council of State must be a lawyer *and* a Colombian citizen by birth.[48] The 1991 Constitution also requires the individual to have a minimum of ten years experience in either the judicial

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46. After several years of escalating violence resulting from guerrilla warfare, drug trafficking, political turmoil, right-wing paramilitary groups and other widespread violence that allowed the executive branch and the military to veil themselves in totalitarian powers, Colombia resolutely promulgated a new social contract.

47. COLOM. CONST. art. 1.

48. *Id.* art. 232(1)(2).

branch, the public ministry, in practice as an attorney or as a law professor at an officially recognized institution.[49]

F. *The Supreme Court*

Prior to the 1991 Constitution, the Supreme Court was the highest court for all legal, civil, criminal and constitutional issues. After 1991, the Supreme Court was limited to ordinary jurisdiction.[50] One of the reasons given for relieving the Supreme Court of hearing and deciding constitutional issues is that this institution had always been a victim of intervention and manipulation by the other two branches.[51]

The Constitution of 1886 had established an independent judicial branch. However, at no time during the existence of the Supreme Court did it enjoy independence and autonomy from the other branches of the government as perceived and conducted in the United States. The Court's authority was curtailed by the immense command that the executive branch acquired through the special powers given to it during a state of siege.[52] As Grant noted in 1948:

> The Constitution of 1886 and its implementing statutes produced a new combination of features drawn from the many previous systems, with a few additions. Colombia had had sufficient experience in this field to demonstrate the need to concentrate authority, yet those in control feared to give too much power to the Supreme Court.[53]

It is important to avoid equating the Supreme Court's inaction with a lack of judicial independence whenever a question of a political nature arises. Such

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49. *Id.* art. 232(4).

50. Prior to 1991, the Supreme Court had constitutional *salas* (chambers). After 1991, that authority was assumed by the Constitutional Court itself. Ordinary jurisdiction includes criminal and civil appeals, but excludes all constitutional issues.

51. The following presidential decrees represent a few of the many invasions on judicial autonomy by the executive branch: 1) Decree 3519 of November 9, 1949, established that the decisions given by the court with regards to extraordinary decrees given by the President and which were challenged for constitutionality had to be decided by three-quarters of the votes of the full court; 2) Decree 1762 of 1956 created the chamber of constitutional business in charge of resolving constitutional challenges and gave the government the authority to appoint its members; and 3) Decree 3050 of 1981 attempted to establish a qualifying majority in decisions that the court would make on constitutional issues, thereby obstructing any declaration of unconstitutionality.

52. Except for brief periods, Colombians have lived under a state of siege for almost forty years. Pursuant to the executive declaration of a state of siege, the President has special powers, including many that, under normal circumstances, are of the exclusive providence of Congress. Consequently, the President cannot only issue legislative decrees, but he can limit civil liberties and create special tribunals.

53. Grant, *supra* note 27, at 501.

passivity is due to Colombia's scrupulous tradition of respecting separation of powers as the drafters of the first constitution adopted the concept from France, and as it is still preserved in today's Constitution. Judges are submissive to the law; they do not make the law. This fact should not be judged by American observers as a shortcoming, especially when in the United States the Supreme Court is viewed as "the nation's balance wheel, continually tilting the flow of power away from one sufficiently powerful branch of the national government to another and to or from the individual and the states."[54] The point to stress in order to assess the merits of the Colombian approach is not whether a judge's decision must become law, but whether such passivity has curtailed the balance of powers.

The role of the military courts relative to the Supreme Court is germane to this discussion and should not be overlooked. Through a possibly coerced presidential decree, civilian courts relinquished considerable power to the military tribunals and to the National Police authority.[55] The 1978 executive action extended the power of the military court to include jailing people for national security offenses. The decree also authorized the military court to decide conflicts of competence between ordinary and military courts. In 1986, military jurisdiction was further extended to give the military criminal jurisdiction over civilians for illegal arms possession[56] and crimes involving drug trafficking.[57] Civilian investigative judges were not barred from investigating crimes in which the military was implicated, but only the military could prosecute, and it was extremely difficult to obtain probative evidence from a predictably uncooperative military.[58] Furthermore, the Disciplinary Tribunal always upheld the army's jurisdiction.[59] Only in 1987, after several people were tortured and disappeared, and after international organizations denounced such situations,[60] did the Supreme Court challenge the constitutionality of the military courts,[61] holding

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54. CONGRESSIONAL QUARTERLY, THE SUPREME COURT: JUSTICE AND THE LAW 2 (Michael D. Wormser ed., 1983).

55. *Id.* at 6, *citing* the National Security Statute decreed by President Turbay in 1988. This appeared in the form of two decrees, Legislative Decree 1923 and Legislative Decree 2347 arts. 8 and 9, respectively.

56. Decrees 1056 and 1058, respectively.

57. Decree 3671.

58. *Human Rights In Colombia As President Barco Begins*, AMERICAS WATCH REPORT (The America's Watch Committee, New York, N.Y.), Sept. 1986, at 50.

59. *Id.* at 38.

60. The procedures authorizing the army to try civilians for arms possession was a way to sweep up so-called insurgents. Yet, such procedures sacrificed a defendant's procedural protections in favor of expediency. Military jurisdiction, by its very nature, threatens the internationally guaranteed right of every Colombian to be tried by competent, independent and impartial tribunals. *Id.* at 39.

61. This Supreme Court had authority to declare laws unconstitutional. *See* BUSHNELL, *supra* note 5, at 257.

that "the abnormality of times cannot be combated by creating abnormalities in the judicial structures of the Republic."[62]

In the same year, the Supreme Court also declared itself competent to settle disputes of jurisdiction between military and ordinary courts. Furthermore, the Court established that ordinary courts should have jurisdiction over cases involving crimes committed beyond the scope of military service.[63] Nevertheless, during 1988 and 1989, Colombia's continuous state of violence, due to the drug war and guerrilla insurgencies, led the government to again issue several emergency decrees. The Supreme Court struck down sections authorizing the military to conduct searches and seizures and to make arrests without a judicial warrant. However, the Court left standing the authorization of the military to act as an auxiliary to the judicial police. To confront a general strike brought on by civil unrest, the executive branch suspended legal recognition of trade unions by a summary proceeding, allowed the arrest of demonstration leaders and imposed censorship on news about the strike. The Supreme Court invalidated parts of the decrees, allowing the arrest of demonstration leaders. Yet it upheld the constitutionality of the decree that allowed the government to suspend the legal recognition of trade unions and to impose censorship over the media.[64]

As is the practice in the United States, most Supreme Court appointments result from political pressure. Justices are chosen by sitting members of the same Supreme Court from a list of names submitted by the *Consejo Superior de la Judicatura* (Superior Council of Judicature).[65] Justices sit for eight years and cannot be re-appointed.[66] Causes for removal include bad behavior, unsatisfactory performance and attainment of the age of mandatory retirement.[67]

In Colombia, even if observers from the United States think otherwise, the new Constitution establishes several provisions to restore judicial independence. It includes:

> [A] guarantee of noninterference with judicial proceedings and the affirmation that judges shall be subject only to the rule of law. More specifically, the danger of encroachments upon the jurisdiction of the ordinary courts by the military tribunals is countered by the clearly

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62. Fox & Stetson, *supra* note 40, at 151 (*quoting* Decision de 5 Mar. 20 1987 (Colom.), Sala Plena, 16 Jurisprudencia y Doctrina 492 (May 1987)).

63. *Id.*

64. Decrees 180, 182, 2201 and 2204, respectively. For further information, see generally *The Killings In Colombia*, AMERICAS WATCH REPORT (The America's Watch Committee, New York, N.Y.), Apr., 1989.

65. COLOM. CONST. art. 231.

66. *Id.* art. 233. In the Constitution, the language used for appointment is elected. This is a good example of how words, when translated literally, can be misleading. In this case, the election of justices is done by members of the Court selecting and appointing justices to sit on the court from a list of aspirants.

67. *Id.*

> stated and more narrowly defined jurisdiction of the military courts to adjudicate crimes committed by members of the armed forces in active service and in relation to military service. In addition, the President's formerly unchecked power to declare a state of siege is curtailed by the provision establishing a role for the Constitutional Court in reviewing the constitutionality of the President's decrees for governing during the state of siege.[68]

Colombia's ordinary courts do not use their powers as do their counterparts in the United States. In fact, a Colombian judge would likely conclude that the U.S. courts overstep their judicial role and, at times, supersede the intent of the Congress and the President. To a U.S. observer, Colombian courts, especially the Supreme Court, are not truly independent because they hesitate in dealing with political power. Under the 1886 Constitution, for instance, whenever a question of a political nature arose, the Supreme Court usually disqualified itself by taking the position that the Court did not judge the constitutionality of the legislative activity and that the courts were compelled to respect separation of powers.

Also prior to 1991, Colombian courts hesitated to declare presidential actions unconstitutional. The Supreme Court often found the President's actions to be within presidential discretionary power. The Court not only allowed broad delegation of power by the legislature to the President but condoned the broad interpretation of the President's ordinance power.

Colombia tried to adopt a common law institution that is, per se, the least adaptable to its positivist ideology.[69] In the United States judicial system, judges are trusted individuals who exercise an active role in government. They not only check the other two branches to balance and distribute power among government, but they also expound the Constitution through dynamic, yet valid, interpretations.[70] In such a system, judicial decisions are the great source of law. The judiciary functions as an institution from which law emerges. It is a body

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68. *Id.*

69. One could argue that one of the most influential positivists in Colombia was the Viennese jurist Hans Kelsen. Among the principles that affected Colombia's legal development are that all law derives from the will of the State, and the State exists only and so far as it expresses itself in the Law. Therefore, the State is the subject and object of its norms. The Law constitutes the State as a normative entity and the State is the Law as normative activity. Positive Law is the one imposed by the Organs of the State. Organs of the State are those established as such by the Law. Only those laws can be enforced by the courts. Law is of coercive and autarchic character. Law is the means of how a society attains its ends. Under Kelsen's propositions, the Law is a norm with a hypothetical character (that which is the will of the State). A norm has a condition and a sanction. *See* HANS KELSEN, PURE THEORY OF LAW (Peter Smith, Trans., undated).

70. The judicial role was articulated by Chief Justice John Marshall in Marbury v. Madison, 5 U.S. 137 (1803). "It is emphatically the providence and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

whose decisions can limit, invalidate and create rights. Its decisions can even modify actions of both political branches.

In contrast to such an active position by the U.S. judiciary, Colombia's judicial branch is extremely passive and formalistic. Ordinary judges are not trusted. Therefore, their function is limited to declaring whether or not a given law is legal, provided that a law has violated the procedures by which the law should be established. In this sense, the Supreme Court is not competing with the parliament, but it is its logical complement.[71] This difference makes it difficult to envision a U.S. type of Supreme Court in a country where the power of the judges is excessively limited by their duty to only apply the positive law. The meaning of the law becomes the key to further understanding the difference between the judicial function of the Supreme Court in both countries.

"Law" in Colombia is only legislation, or executive decrees with a legislative character. Once it has been interpreted by the legislature, law has general binding effect. Judges are then compelled to apply that interpretation to particular cases.[72] Consequently, a judicial decision has effect only in the particular case brought before the Court. Therefore, a court's decisions do not become a general rule applicable to other cases.[73]

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71. JUAN MANUEL CHARRY URENA, JUSTICIA CONSTITUCIONAL: DERECHO COMPARADO Y COLOMBIANO 103 (1993).

72. COLOM. CONST. art. 230.

73. Contrary to the dogma that a judicial process in civil law systems is nothing more than automatic application of laws, with no interpretation or scholarly expression, civil law judges do engage in scholarly interpretation of law. A statute needs a judicial interpretation to supply a meaning for laws that are unclear to the lawyers, the parties or even to the judges. Codes are not self-evident in application. Courts usually have to fill *lagunas* (gaps) of law, clarify obscure expressions and reconcile conflicting statutes. In any event, a judge is charged with applying the law and cannot dismiss decisions for a lack of legal clarity. If the meaning of the law is unclear, the judge still must find the meaning to apply the law. To facilitate the judicial process, the system provides directives to the judges. A judge follows the rules of interpretation given to him or her in the Civil Code, arts. 25-32. In sequence, a judge can look at the intention or spirit of the law which is manifested in the law per se or in its history. If still unclear, the judge can use analogy with other laws that deal with the same obscure point. Scientific or artistic words have the meaning of their respective fields, unless it is clearly expressed that they have different meaning. If the law is still unclear, the judge looks at the general spirit of the legislation and principles of equity. After these steps have been followed, the judge finds the meaning and applies it to the case. Not to apply a law with the "excuse of silence, obscurity or insufficiency of the law a judge would be held responsible for the negation of justice." Law 153 of 1887, art. 48. Then it would be fair for a U.S. observer to say that what these judges do is find judicial justification of the law given by the political branches. But they cannot deny that these judges engage in a difficult and complex process of interpretation on a level similar, if not identical to, that of a U.S. judge.

Under the 1991 Constitution, law can only emanate from the political branches—never from the judiciary.[74] Judges can only apply those rules formulated by both the legislative and executive branches, and judges' decisions on prior cases are discarded as sources of law or as aids in interpreting the law. Consequently, in order for Colombia to tailor the U.S. institution of the Supreme Court to its own civil law tradition, Colombia found it necessary to make adjustments so profound that today's Court bears no semblance to its model—except in name.

In contrast to the U.S. Supreme Court, Colombia's Supreme Court reviews neither administrative nor constitutional controversies. Such matters become the jurisdiction of the administrative high court (the Council of State) and the Constitutional Court, respectively. In addition, Colombia divides the Supreme Court into chambers.

When the Supreme Court acts as the Court of Cassation,[75] it considers only questions of law and never of fact. As such, its role is to ensure consistency of the judicial decisions by nullifying laws promulgated in violation of legal procedure. The judge must value the validity of the law in the face of a superior law—the Constitution. Cassation supposes the omnipotence of the positive law as a manifestation of the supreme will of popular assemblies.[76]

The Supreme Court only considers that part of the lawsuit dealing with the specific question of law. It is considered an extraordinary recourse to decisions rendered in violation of law. A petition is rejected when the Court decides that the point of law has been correctly decided. If the Court decides that the lower court made an error of law, it will quash its decision and send the dispute back to a Court of Rehearing. This is a new court of the same level as the one from which the quashed decision came. The Court of Rehearing has jurisdiction over the entire dispute, hears the entire case and has the right to follow or disregard the position of the Court of Cassation. If the Court of Rehearing decides to adopt the Court of Cassation's point of view, then the litigation ends, and the Court of Rehearing's decision is final. On the other hand, if the Court of Rehearing refuses to follow the Court of Cassation, a new petition to the Court of Cassation can be taken. In this case, the full Court of Cassation has jurisdiction. If the full court quashes the second petition, it sends the case back to a Court of Rehearing. Only then must the Court of Rehearing yield to the Court of Cassation, and the opinion of the full court must be followed by the Court of Rehearing. Contrary

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74. Congress has the responsibility not only of enacting laws but of interpreting, amending and repealing them. COLOM. CONST. arts. 114, 150. The President has the power to issue decrees, resolutions and orders. *Id.* art. 189(11). These functions, in both political branches, affirm adherence to the principle of judicial submission to the other political branches. The creation of the Constitutional Court, if intended to make this court a law making body, contradicts the language of the present Constitution and goes against the established legal tradition.

75. COLOM. CONST. art. 235 (1). Cassation means to tear or break.

76. URENA, *supra* note 71, at 105.

to what a U.S. observer may conclude, who by now is so thoroughly confused by this procedure, the decision of the Court of Cassation does not have *erga omnes* effect. Such a decision only binds the case in which it is rendered. If, however, after the decision is rendered the same issue is raised in any other court, the Court's decision is only *doctrinal probable* (probable doctrine) persuasive—never obligatory.[77] Any decision of another court can be brought before the Court of Cassation.[78]

The Supreme Court also has the power to judge high public officials such as President, Ministers, Prosecutor General, and others.[79] Additionally, the court may investigate and try members of Congress.[80]

G. *The Council of State*[81]

Bolívar created an administrative body based on the French model called the *Consejo del Estado* as part of his liberation campaign.[82] As in France, the Council's role was primarily advisory, although over time it became

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77. Law 169 of 1896 art. 4 states "[T]hree uniform decisions given by the Supreme Court in Cassation on the same point of law constitute probable doctrine, and the judges should apply them in analogous cases. However, the Supreme Court may change doctrine if it judges the previous decisions to have been erroneous."

78. Many lawyers are never made aware of court decisions because court reports are selective and incomplete. Colombia lacks the resources that the United States enjoys with the various official and unofficial annotated publications of Supreme Court decisions. Colombia produces only the official LA GACETA JUDICIAL (THE JUDICIAL GAZETTE), in which only those decisions appear that the Court permits to be published. Therefore, the decisions are subject to irregular publication, unbound, and with neither topical digesting nor case headnotes, as is the norm in the United States. The published decisions can have annotations to texts by legal writers and references to applicable codes. However, as is done in the United States, there is special citation format for the Court's decisions as follows: The source court followed by the date of the decision, followed by the volume and page number of the Judicial Gazette in which the decision is published. Lawyers tend to rely more on the treatises and annotated versions of the codes, current laws and decrees in guiding them in their practice.

79. COLOM. CONST. art. 235(2).

80. *Id.* art. 235(3).

81. Even though this Institution remains the same as it was under the 1886 Constitution, my discussion is constrained by limitations on having access to the research materials necessary for more authoritative citation.

82. EDUARDO ROZO ACUA, SISTEMA CONSTITUCIONAL COLOMBIANO 178-80 (1982). Establishing a separate tribunal to decide *erga omnes* the legality of administrative actions (court decisions not just limited to the parties but with general effects over the nation) was an acceptable solution to the traditional approach taken by civil law countries. The intention may have been to preserve the strict notion of separation of powers by preventing ordinary courts from reviewing the actions of the political branches, yet at the same time, permitting *erga omnes* effect without *stare decisis*. *See* MERRYMAN, *supra* note 42.

adjudicatory.[83] Today the Council is the court of final review of administrative complaints. The Council is also the supreme consulatory body of government in matters of administration, and its opinion must be heard in all cases determined by the Constitution and the laws.[84] The functions of the Council are: 1) To be the highest Court in administrative actions; 2) To be the government's advisory body on administrative matters; 3) To declare null or unconstitutional government decrees when the Constitutional Court does not have jurisdiction; 4) To prepare and present projects of constitutional reform and of legislative bills; and 5) To know of the process of jurisdictional conflict among administrative courts.[85]

As with the Supreme Court justices, judges of the Council are chosen (appointed) by members of the Council from a list of names submitted by the Council of the Judicature. The Council hears all challenges to administrative acts and decrees.[86] The challenges can be either on constitutional grounds or based on any principle of civil administrative law.[87] In comparison, these actions resemble cases arising out of federal or state tort claims acts in the United States.[88] The Council is divided into various *salas* (chambers): 1) Sala de lo Contencioso;[89] 2) Sala de Consulta;[90] and 3) Sala de Gobierno. The Sala de lo Contencioso and Sala de Consulta form the Council en Pleno.[91] The Council meets en banc (as a full court) whenever requested to do so by the President, the Vice-president when the President is absent or by three or more *Consejeros* (members of the Council). The fact that no one has supervisory jurisdiction on the decisions of the Council involving issues of constitutional law creates a type of double jurisdiction on constitutional matters.

The Council voids or annuls government actions when they are challenged for their legality. This may occur when an *official publico* (government official) acted outside his or her jurisdiction, did not follow the legal procedures or committed a legal error. These attacks describe what is known in the United

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83. Over time the Council's role developed into an adjudicatory function. Such development was recognized by the 1886 Constitution, in which Article 141(3) provided for the Council to sit as the nation's highest administrative court. This has been preserved by the 1991 Constitution.

84. COLOM. CONST. art. 237(3).

85. COLOM. CONST. art. 237, and Administrative Law Code art. 128.

86. COLOM. CONST. art. 237(3).

87. According to the code of administrative law, anyone injured by an act of the executive can determine the procedure to follow. Usually these cases deal with issues of taxes, expropriations, admiralty matters, controversies between the nation and its *departmentos* or municipalities, cases involving public or waste lands, torts caused by governmental institutions or officials and other cases specified by law.

88. *See* Federal Tort Claims Act of 1946, 28 U.S.C. § 1346(b)(c) (1992).

89. The Chamber deals with actions under administrative law.

90. The Chamber of Advisorial character.

91. The full Court.

States as abuse of power and the ultra vires doctrine. A decision of the Council as to an administrative decree, where adverse to the government, causes the law or decree to have force that becomes binding precedent for later cases (that is, the matter is conclusive).[92]

Beneath the Council of State are administrative tribunals in each territorial *departamento* (department). The *tribunales administrativos* (administrative tribunals) are the courts of original jurisdiction, and the *tribunales administrativos de apelación* are the appellate courts. The function of these tribunals is to hear complaints by citizens against officials of the executive branch and other public officers.

H. *The Constitutional Court*

One might inquire as to why Colombia wanted to create a special Constitutional Court by taking powers away from the existing highest court of appeal, the Supreme Court, which already had jurisdiction in constitutional matters. Constitutional jurisdiction might have been granted to the Supreme Court alone, thereby making all decisions of constitutionality binding *erga omnes* on all inferior courts.

Likewise, the new Constitution could have made the Supreme Court a more manageable and less divided structure.[93] More importantly, the Court could have been given discretionary power, such as a certiorari mechanism, to refuse jurisdiction. Doing so would have allowed the Supreme Court to put more thought into the issues brought before it.

What the framers did instead was to create a Constitutional Court to handle all matters of constitutional jurisdiction. While the idea is probably sound, the controversy and intrigue emanating from the decision to establish the Constitutional Court have exceeded all foreseeable expectations as to the level of judicial activism displayed by the justices. In retrospect, the power given to the Court appears to have been ill-conceived and poorly orchestrated. The justices of the Constitutional Court assumed the task of fulfilling their duty to the new Constitution by elevating themselves to a higher sense of discretion. In so doing, they tried to copy a type of judicial review both foreign and unfamiliar to them and the Colombian legal tradition.

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92. The Councils' decisions and some decisions of administrative tribunals, are published periodically in the ANUALES DEL CONSEJO DEL ESTADO.

93. The Court was divided in four separate panels, each comprised of six justices. The panels were: 1) penal; 2) civil; 3) laboral; and 4) constitutional. The Court sat as a full bench only when a case or controversy involved a constitutional challenge. *See* Luz E. Nagle, *The Rule of Law or the Rule Fear: Some Thoughts on Colombian Extradition*, 13 LOY. L.A. INTL. & COMP. L.J. 851, 855 (1991).

I. *Genesis and Intent*

The *Corte Constitucional* (Constitutional Court) is modeled after the French *Conseil Constitutionnel*, via Spanish adaptation, and is Colombia's highest court entrusted with guarding the integrity and supremacy of the Constitution.[94] Unlike the United States Supreme Court, the Constitutional Court has no jurisdiction at all in ordinary cases; its jurisdiction is exclusively on constitutional matters. What should surely be viewed as an overburdening drawback, the Court is constrained to hear every case presented to it, while the U.S. Supreme Court, through the use of certiorari, only hears those cases it chooses to accept.

In order to offer the nation a court with more representation and legitimacy, the three branches of government collaborate in the Court's composition. Each branch elects one-third of the members of the Court. The Senate appoints the justices from a list of three members chosen by the President, Supreme Court, and Council of State. Each appointment lasts for eight years.

The creation of the Constitutional Court is quite revolutionary for it manifests significant changes to the legal system, including a textual recognition of the Constitution, at least on paper, as the fundamental and supreme law of the land that must be protected.[95] While in the United States the supremacy of the Constitution was established by judicial interpretation,[96] in Colombia it was a result of express language. In this sense, Colombia's Constitution matures into special law that cannot be treated like ordinary law. Accordingly, as is the case in the United States, the Constitution is interpreted as a matter of principle, with expansive interpretive flexibility depending on the philosophical views of the sitting justices. What results is that the justices of the Court may use their power in a manner analogous to Chief Justice Marshall's observation, to expound a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.[97]

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94. Under the 1886 Constitution, the Supreme Court was entrusted only with guarding the integrity of the Constitution, while the 1991 Constitution entrusts the Constitutional Court with guarding both the integrity and supremacy. COLOM. CONST. art. 241.

95. It is fundamental to understand that prior to 1991 the constitutions of Colombia were treated like other statutes. This ordinary law was viewed as a series of rules that served as a checkpoint for the decisions of judges. For this reason, unlike the U.S. Constitution, the Colombian constitutions were not interpreted as a matter of principle or with great flexibility. The constitutions were never what the judges said they were, but rather what Congress said they should be.

96. Marbury v. Madison, 5 U.S. 137 (1803).

97. McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819).

J. *Judicial Activism*

Recent decisions of the Constitutional Court illustrate how it actively began to enforce and extend uniform standards of the Fundamental Rights against not only the government, but also against private individuals.[98] This development could be compared to how the U.S. Supreme Court has expanded and enforced the Bill of Rights against the federal and state governments.

The Court also represents a radical departure from the traditional notion of the separation of powers because it assumes a more active and aggressive role of checks on the political branches. For the first time, the system places confidence in the judges and entrusts them to elucidate and declare the validity of the acts or omissions of the political branches with regard to a superior norm. As Urena notes, the Constitutional Court reveals itself as the one which controls the acts that rule the life of the Nation because the law is imposed upon the administration and justice.[99]

The justices are empowered to monitor the political branches and declare whether a given law is constitutional as a matter of principle. Under this view, where there is no express demonstrable authorization to the court, the justices assume jurisdiction by using principles of law, even if doing so gives the appearance of judge-made law.[100] The decisions of the justices are no longer based on the positive and pre-established law. Rather, the interpretations emanate from the Constitution per se. This notion allows the justices to utilize the aid of the judicial order as a whole to determine what is best for the common well-being.[101]

K. *A Watchdog of Abuse, or a Referee?*

The Constitutional Court has the ability to reign in the authority of the executive branch of government. The executive branch's formerly unchecked power to declare a state of siege, for instance, is curtailed by the provision establishing a role for the Constitutional Court in reviewing the constitutionality

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98. Among the decisions rendered by the Court are: 1) Preventing a private high school from banning a student who wore make-up on the grounds that it violated her right to an education; 2) Giving police protection to a member of a left wing group on the grounds that his right to personal liberty was violated by the army's death threats; and 3) Ordering medical care for a patient inflicted with AIDS who was denied care at a state hospital on the grounds that he was discriminated against because of a disease. *See State of War: Political Violence and Counterinsurgenty in Colombia*, AMERICAS HUMAN RIGHTS WATCH (The America's Watch Committee, New York, N.Y.), 1989.

99. URENA, *supra* note 71, at 112.

100. In this respect it is unlike the Supreme Court in the United States.

101. For a broad explanation of the Constitutional Court *see* URENA, *supra* note 71.

of presidential decrees.[102] The Court has the power to rule on ordinary laws and all executive decrees issued by the President pursuant to emergency powers and judge the constitutionality of the laws and treaties issued by the political branches.[103]

The interpretation of the scope of the Constitution, when dealing with the power of the executive, has created intense conflicts. The following excerpt from a letter by the President of the Court suggesting the dangers of a presidential dictatorship illustrates such tensions.

> The constitution recognizes the separation of state branches—Common citizens are permitted to do anything that is not specifically prohibited by law, but public servants must limit their actions to the duties outlined by laws and regulations—The President of the Republic is not a common citizen and there are limits on his ability to exercise power—The duty of the Constitutional Court is to decide whether the rules and regulations are in accord with the Constitution. In terms of reviewing laws, for example, this responsibility cannot be fulfilled by Congress, which issues them. The chief executive cannot do this either, because this would imply dictatorship—If we fail to fulfill our duty, the Senate of the Republic is there. The Constitution states that the Senate should act as our judge.[104]

In my opinion, it is too soon to determine the Constitutional Court's position when deciding separation cases between the two political branches, or how well the justices really understand the separation of powers doctrine. Whether the justices would construe the separation of powers as reflecting a shared, but reciprocally limiting, power distributed among branches or as a principle that precludes one branch from performing tasks that the other does remains to be seen. Thus far, the Court has not undertaken cases deciding issues of separation between the political branches.[105]

The Court also performs a consultorial role of broader scope than its Spanish and French models because consultancy in Colombia is available not

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102. COLOM. CONST. art. 44.

103. In July of 1994, the Constitutional Court abolished an executive decree declaring a state of internal disturbance to prevent the release of at least 840 inmates from Colombian jails. Pursuant to a 6-3 vote the Court declared that it could examine all state of emergency decrees issued by the President. *Constitutional Court Abolishes State of Internal Disturbance Decree* (Broadcast by BBC Monitoring Service, Latin America, July 4, 1994).

104. *Gaviria Respects Constitutional Court Decisions But Will Advocate Alternatives* (Broadcast by BBC Monitoring Service, Latin America, May 26, 1994).

105. As addressed earlier in this paper, Congress relinquished its power to the executive branch which, in turn, created a greater imbalance in government.

only to government officials but to all citizens who submit constitutional questions to the Court. The questions regard legal concerns such as treaties proposed for ratification, laws passed by the government and other matters of state.[106]

L. *Into the International Arena*

The Constitutional Court is competent to decide on the constitutionality of international treaties and the approving laws.[107] The government has to submit to the Court the treaty and its approbatory law six days after its sanction. Once the law is in the Court, any citizen can intervene to defend or attack the constitutionality of the law. The government can only ratify the treaty if the Court decides the approving law to be Constitutional.

M. *Protector of Constitutional Rights*

The 1991 Constitution provides several devices through which individuals can assert their constitutional rights:

* *Acción de Tutela* (Action of *Tutela*) establishes that any person can bring an action before an ordinary judge seeking the immediate protection of his or her fundamental constitutional rights whenever they are threatened or endangered by acts or omissions of a public authority.[108] Such a proceeding is preferential and summary. The judge, through an order to be immediately implemented, may enjoin others to act or refrain from acting. The order may be challenged and, if so, the judge then sends the order for review to the Constitutional Court for the final decision. This action could perhaps be comparable to a judicial injunction being leveled against actions or omissions of a public authority effecting individual fundamental constitutional rights in the United States.
* *Acción Popular* (Popular Action) permits any person, regardless of standing or stake in the controversy, to bring an action directly challenging a law or decree. This action was established for the protection of rights and collective interest related to homeland, space, public safety and health, administrative morality, the environment, free economic competition, and so forth.[109]

In the Court's first year, nearly seven thousand actions were submitted to the Court and between fifty and one hundred appeals were received each day.

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106. COLOM. CONST. art. 241.
107. *Id.* art. 214(10).
108. *Id.* art. 86.
109. *Id.* art. 40(6).

Because there is no certiorari, the Court is obligated to hear every case brought before it.[110]

Has the Constitutional Court become the new lawmaking authority of the country? Has this branch of the judiciary embarked on a cruise into the uncharted waters of judicial activism? An analysis of the Constitutional Court's controversial decision to legalize drug use supports this probability and serves well to illustrate the profound change in the Colombian legal tradition brought about by the 1991 Constitution. Whereas the Supreme Court prior to 1991 only declared null those laws it considered unconstitutional without expounding the Constitution, it did not declare what the law was supposed to be. Clearly, the Constitutional Court is now doing just that.

N. *Just Say Yes*

On May 5, 1994 the Constitutional Court legalized the personal use of small quantities of cocaine and other drugs.[111] In its 5-4 ruling, the Court overturned prohibition and held that Articles 51 and 87 of Law 30 of 1986 were unconstitutional because they constituted an intrusion on privacy, autonomy and free development of the personality guaranteed by the 1991 Constitution.[112]

Some of the arguments given by the majority include:

* Each individual should elect his or her way of responsible life. In order to reach such a goal it is indispensable to definitively remove the biggest obstacle—ignorance. The road to confront drug addiction is education and not repression.
* It does not harmonize with Colombia's basic organization of the typification, as a crime, of the conduct that, per se, only regards those who observe it. Consequently, such conduct is subtracted from being regulated by law and from a judicial system which respects freedom and dignity.
* Each person is free to decide if he or she wants to recuperate his or her health. Not even under the 1886 Constitution was the nation considered the owner of one's life. If each individual is the owner of his or her own life, then that person is also free to

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110. Some public officials have criticized the overuse of the Action, seeing it as a usurpation of the duties of the political branches. Some appellants have attempted to use the Action in order to appeal sentences handed down after trial. *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

111. Legal measures include up to: 1) twenty grams of marijuana; 2) one gram of cocaine; 3) five grams of hashish; 4) two grams of barbiturates. GACETA DE LA CORTE CONSTITUCIONAL, EDICION EXTRAORDINARIA, CORTE CONSTITUTIONAL, SENTENCIA No. C-221/94.

112. *Id.* at 21. The Court stated that the legislator can prescribe the way in which one should behave with regards to others. However, it cannot do so in the way one should behave toward one's self if such conduct does not interfere with anyone else. *Id.* at 15.

care or not care for his or her health. If one wishes to do so, he or she may deteriorate to death.

* The free development of personality is the recognition of the person as an autonomous individual. The first consequence that derives from autonomy consists in that it is the person (and not a self-appointed surrogate) who should give a sense to his or her existence and harmony with his or her course. If autonomy of the person is recognized, then autonomy can only be limited when it enters into conflict with somebody else's autonomy.
* Affairs that concern individuals can only be decided by that same person. To decide in another's name is to brutally snatch away that person's ethical condition, to reduce him or her to the condition of an object, *cosificarla*,[113] and to convert that individual into the means for the ends that others choose for him or her.
* To recognize and guarantee the free development of the personality, while fixing upon it as limits the capriciousness of the legislator, is something that negates what is being affirmed. This means you are free to choose what is good but the State tells you what is good. Furthermore, it is only in the function of another's freedom that one's own freedom can be restricted.

The *salvamento*, or dissenting opinion, vehemently rejected the majority's arguments offering the following rejoinder:

* The fundamental rights consecrated in the Constitution are not absolute. Every guarantee has its limits as do personal prerogatives and the *ordenamiento juridico* (legal order). One cannot reach the extreme to consecrate the right of the individual to self-destruct.
* This is a decision without Constitutional support. It contradicts the purpose to secure life and peaceful co-existence, both of which are within the legal framework structured in the Preamble of the Constitution. It also goes against the prevailing general interest and solidarity of the people, that of the promotion of general prosperity, secure peaceful coexistence and just order.
* The decision contradicts the constitutional precept according to which the State protects the family as the basic institution of the society, and the protection that should be offered to those

113. Loosely translated to mean the act of making someone a thing.

persons who because of their physical, economic or mental condition are manifestly weak.[114]

* The decision by the majority goes against Article 42 of the 1991 Constitution which states that the family is the fundamental nucleus of the society, and any form of violence against it is considered destructive to the family's harmony and unity and punishable according to the law.[115]

The initial reaction of President Gaviria was vitriolic. He attacked the Court's decision, maintaining that there was a need to secure a national referendum or constitutional reform and demand the Court clarify the decision. He proposed that the Court make clear several aspects of the decision so that at least they could be regulated by Congress in a regulatory law and not make this an absolute right because that would be an absurd decision.[116]

What is particularly significant, and I believe largely under-appreciated by Colombian observers of the legal system, is the fact that not only did President Gaviria recognize that the Court, not being the traditional lawmaking body, was making law, but that the Court should further regulate the recognized right when he stated that Congress or the Court should avoid, or limit, the consumption in educational centers, schools and universities.[117] Clearly, the President unwittingly found himself in a difficult position, having sworn to uphold a new Constitution for which he was largely responsible, while being blindsided by the irresponsible activism of a court he indirectly helped to empower.

Understandably the immediate, and certainly not unexpected, reaction to the Court's decision was overwhelming rejection by the other branches of government, not to mention swift condemnation by the world community. The President, wriggling between a rock and a hard spot, meekly stated that he accepted but did not share the Constitutional Court's decision, which was based on the libertarian interpretation of individual rights and responsibilities.[118] Subsequently, in an attempt to salvage what little credibility the government had enjoyed, a real battle ensued:

* On May 7, a campaign to hold a referendum was displaced.
* On May 23, an exchange of correspondence occurred between the President of the Constitutional Court and President Gaviria. The president of the Court reaffirmed the independence of the

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114. In other words, someone who is a drug addict should be considered to be in a state of diminished capacity and, therefore, is unable to make informed and responsible decisions regarding his or her personal autonomy.

115. *Propician La Autodestruccion*, EL TIEMPO, May 7, 1994 at 6A.

116. *Rechazo General A La Despenalizacion*, EL TIEMPO, May 7, 1994 at 1A.

117. *Id.*

118. *Court Legalizes Drug Consumption*, LATIN AMERICA REGIONAL REPORTS: AMERICA GROUP, May 26 (1994).

branches and asked for respect in deference to the Court's autonomy.

* On May 24, because his office lacked the power to overturn the Court's decision, President Gaviria used his power of decree to impose tight restrictions on drug use in public places.
* On May 26, the judicial branch publicly requested the government to respect the decisions of the Court.
* On July 26, the government announced that for the first time Colombia would use the constitutional mechanism of public participation to decide whether to penalize the consumption of drugs.

Taking desperate measures, the government invoked every option available to curtail the Court's decision, including considering a referendum, legislative action and even constitutional reform. The administration introduced a bill to Congress to approve the addition of Article 49 to the Constitution. This Article stated that the government could restrict and prohibit the carrying, transporting and consumption of drugs, and that sanctions, including criminal, could be imposed in order to preserve public interest, the health of the individual and the harmonic and integral development and full exercise of individual rights.[119]

The Constitutional Court perceived the steps taken by the government as contemptuous and a direct challenge to the Court's authority. The Court especially objected to the referendum. The President of the Constitutional Court declared it was not acceptable that a mechanism of popular participation could become an instrument in the hands of the government to ignore a judicial decision.[120] However, for the government, the referendum would not have been a challenge to the Court; on the contrary, it would have been an appropriate democratic mechanism to obey the Court's decision: "[The Court's perception] could not continue because we [the government] are fully respectful of the majesty of the law and the independence of the other branches."[121] After several public confrontations between the political branches of the government and the judiciary, the Constitutional Court won its fight. On November 2, 1994, the government declared that it did not seek confrontations with other branches of government, particularly with the Constitutional Court. Therefore, the government would henceforth observe and respect the Court's decisions.

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119. *Aprobada Reforma Para Penalizar La Dosis Minima*, EL TIEMPO, Dec. 8, 1994 at 1A.

120. *Gobierno Dijo No Al Referendo*, EL TIEMPO, Nov. 1, 1994 at 1A.

121. *Con Ley Atajarán La Dosis Personal*, EL TIEMPO, Nov. 2, 1994 at 1A. Could this submission by the government to the Court's decision, as if the Court's interpretation were the law of the land, constitute a Marbury v. Madison scenario?

O. *Competence of the Justices as Activists*

I believe there are legitimate concerns regarding the high degree of judicial activism and lawmaking awareness in the Constitutional Court. The traditional perspective of the lawmaking role of Colombia's judiciary has changed, and one could argue that the timing for such newly discovered power is a questionable,[122] yet profound, factor in the evolution of Colombian law.

The introduction of judicial activism has been influenced by numerous U.S. legal writers and Colombian lawyers who have had the opportunity to study the U.S. system of judicial review.[123] For the first time a high court has declared itself in actions, if not so much in words, independent from the other branches of government. The Court has exercised a higher degree of discretion when interpreting the Constitution than at any time in history.

But the competence of the justices to assume a lawmaking capacity through judicial activism must be examined critically, if not for any other reason than that it seems too extraordinary that the justices could successfully retool their training and legal conditioning in less than four years, thereby casting aside nearly two hundred years of judicial deference to the other two branches. Where would they acquire the background to pull it off? From what indigenous historical precedent could they proceed? How are their skills acquired, and from where? In moving too quickly are they courageous reformers of a troubled legal system, or meddlesome loose cannons on a listing ship of state?

The Constitutional Court justices are assuming roles and methods similar to those of U.S. appellate justices. However, the civil law tradition dictates that Colombian justices be trained to apply the law, not to create it. The functions and dexterity of the justices in the United States when exercising judicial review cannot be learned readily, and surely not without historical precedent.

The fact that the decision to legalize drugs was based largely on a leap of faith and on the ethereal writings of foreign legal philosophers indicates the lack of anything approaching stare decisis so necessary, I believe, for establishing precedent in matters of Constitutional intent. Furthermore, it is no easy task to overcome the tradition of the Colombian Supreme Court, which unlike its

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122. I do not address whether or not legalization of personal doses of cocaine constitutes a legitimate interest of the individual to find judicial protection. Nor do I analyze if such interest, considering Colombia's long history of violation of human rights, is a veil to protect illegitimate groups. The purpose of this section is intended to explore the change in Colombia's attitude toward the judicial branch.

123. Many Colombian lawyers come to the United States for a year of study to get LL.M.'s and go back with numerous books, ideas to share and attitudes of having learned all there is to learn about U.S. common law. No one in so short a time can read in textbooks about the Marbury v. Madison decision, judicial review, the Bill of Rights and other important doctrines of the Anglo-American system without embarking on a more in depth course of legal study such as that acquired in pursuit of a J.D.

counterpart in the United States, was created originally to lack the structure, procedures and reasoning required for effective constitutional adjudication.

Truly, the boldness of the Constitutional Court to break from tradition and chart new territory in Colombian law is admirable and necessary for a legal system that for so long existed to support the status quo in favor of the country's oligarchy. It is acceptable that mistakes in judgment will be made in the course of the evolution of the Court. However, decisions such as legalizing drug use, arrived at through uninformed libertarian activism, do nothing to promote efforts by all branches of government to build a more representative and fair democratic system where checks and balances replace the status quo of the oligarchy as the integral component of the rule of law.

III. CONCLUSION

The position taken by the legislative and executive branches to acknowledge the autonomy of the Constitutional Court did bring a measure of tranquillity to a new judiciary in need of support from the other political branches and strengthened respect for the legal order, especially as to the independence of the judicial branch.[124]

The executive branch has elected to save face by taking the moral high ground of noble enlightenment. With republican and democratic sense that exalts him, the President of the Republic, President Samper, has accepted a principle that is the irreplaceable foundation of the legal order: The rulers are those who must obey the Constitution and not for the Constitution to obey the wishes of the rulers.[125]

Now, even though the country is left to deal with a harsh decision, one can only wonder if, indeed, a better judiciary has emerged.

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124. EL TIEMPO, *supra* note 119.

125. *Id.*

CORPORATE GOVERNANCE IN ITALY: STRONG OWNERS, FAITHFUL MANAGERS. AN ASSESSMENT AND A PROPOSAL FOR REFORM

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I. INTRODUCTION

The goal of this paper is to provide some insight into the Italian corporate governance system. It has been said that "[i]n an overall economic perspective two main models of control have emerged: systems which utilize the market as a monitor (for example, the market for corporate control as particularly in the United States and Great Britain), and systems of control in which banks and fellow corporations function as monitors (as in Germany and Japan)."[1] This is doubtful. I think Italy represents a third model in which entrepreneurs as shareholders have remained in control and influence the corporate policy rather than simply monitor more or less independent managers.

Even though important changes in the Italian corporate landscape are now taking place, and more are to be expected in the future, the present governance pattern will remain the same for several years to come. Is Italy an anomaly, thus not worthy to be studied? I do not think so. Italy could be a useful subject of study for corporate governance specialists, to be added to the much studied countries of the former Communist Bloc. The lesson is that, when certain conditions are met, the owners of the enterprises may retain a part—indeed, an important one—even in a mature economy. Therefore, separation of ownership and control must be explained in a historical perspective, and cannot simply be taken for granted once the economy develops.

In order to familiarize the reader with corporate governance in Italy, Part II gives the reader a general background of Italian corporate law and structure, providing information on what is strictly necessary for the correct understanding of the paper's main theme. It is not intended to be a substitute for direct knowledge of the matter, which can be acquired only through a reading of the various manuals and treatises on the subject.[2]

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1. Klaus J. Hopt, *Preface* to INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE 1, 2 (Theodor Baums et al. eds., 1994).

2. A selective bibliography includes the following texts (listed in alphabetical order):

(a) *Manuals*

(1) GIUSEPPE AULETTA & NICCOLO' SALANITRO, DIRITTO COMMERCIALE (9th ed. 1994).

(2) GIAN FRANCO CAMPOBASSO, DIRITTO COMMERCIALE, in three volumes: 1 DIRITTO DELL'IMPRESA (2d ed. 1993); 2 DIRITTO DELLE SOCIETÀ (2d ed. 1992); 3 CONTRATTI - TITOLI DI CREDITO - PROCEDURE CONCORSUALI (1992).

(3) GASTONE COTTINO, CORSO DI DIRITTO COMMERCIALE, in two volumes: 1 (3d ed. 1993); and 2 (3d ed. 1994).

(4) FRANCO DI SABATO, MANUALE DELLE SOCIETÀ (4th ed. 1992).

Details, often important ones, sometimes have been passed over or simply have been referred to in the footnotes, with an indication of sources where they are appropriately discussed. Those familiar with the subject may simply skip Part II, and those who are interested in its conclusions can find them in Section II.F.

Part III explores the legal framework of directors' liability under the particular prism of the balance of power between majority and minority. Particular focus is on the Civil Code rule requiring a majority vote for an action against directors to be brought by the company and its significance as a governance tool. Conclusions can be found in Section III.D.

Part IV analyzes the structure of the Italian industrial system and the ownership pattern of Italian companies. The result of this analysis is that the dominant institution of Italian corporate governance is direct involvement of large shareholders, either alone or associated in a structured control group. Synthetic conclusions are drawn in Section IV.N.

Part V, starting from the analysis of the existing "case law" concerning directors' liability, suggests a change in the legal rules of corporate governance concerning minority suits against directors. Such change is necessary to pave the way for new organizational forms, in which the role of particular kinds of minority shareholders—namely, institutional investors—will be of critical importance. Findings and proposals are summarized in Section V.G.

II. THE ITALIAN SYSTEM OF CORPORATE GOVERNANCE: THE LEGAL FRAMEWORK

A. *The Legal Sources of Italian Private Law: the Civil Code.*

The Italian *Codice Civile* [hereinafter Civil Code] was enacted on March 16, 1942. At that time, Italy had been ruled by the Fascist government for almost twenty years and was at war. Badly equipped Italian armies had recently joined the armies of Germany in the invasion of Soviet Union, which later proved to be one of the turning points of World War II.

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(5) FRANCESCO FERRARA & FRANCESCO CORSI, GLI IMPRENDITORI E LE SOCIETÀ (9th ed. 1994).

(6) GIUSEPPE FERRI, MANUALE DI DIRITTO COMMERCIALE (9th ed. 1993).

(7) FRANCESCO GALGANO, DIRITTO COMMERCIALE, in two volumes: 1 DIRITTO DELL'IMPRESA (4th ed. 1991); 2 DIRITTO DELLE SOCIETÀ (4th ed. 1991).

(8) PIER GIUSTO JAEGER & FRANCESCO DENOZZA, APPUNTI DI DIRITTO COMMERCIALE (3d ed. 1994).

(b) *Treatises*

TRATTATO DELLE SOCIETÀ PER AZIONI, (Giovanni E. Colombo & Giuseppe B. Portale eds.) (Eight volumes of a scheduled ten have been published).

Notwithstanding the tragic circumstances in which it was passed, the Civil Code is a fairly sophisticated product. Excellent scholars with an extensive knowledge of comparative law and of the French and the German legal systems in particular contributed to the debate over the reform, a debate which lasted several years.

Enacted together with a new Code of Civil Procedure, the Civil Code was the result of a merger of the Civil Code project with the Commercial Code project, and replaced both the first Italian Civil Code of 1865 and the second Commercial Code of 1882.[3] In the merger of civil and commercial principles, the latter generally prevailed.[4] According to the emphatic Official Report of the Ministry of Justice on the Civil Code, the reform marked the triumph of the new principles of economic activity over the old Roman structure based on property rights.

The structure of the Civil Code, after the pruning of a few tributes to the Fascist regime,[5] has since withstood radical changes in both the political and

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3. In 1865, five years after the reunification of Italy, a Civil Code, a Commercial Code, and a Code of Civil Procedure were enacted. While both the Civil Code and the Code of Civil Procedure lasted until 1942, the Commercial Code was replaced in 1882.

4. This process has been called "commercialization of private law." FERRARA & CORSI, *supra* note 2, at 15. 2 TULLIO ASCARELLI, *Il dialogo dell'impresa e della società nella dottrina italiana dopo la nuova codificazione*, *in* PROBLEMI GIURIDICI 781, 783 (1959), observing the seamlessness of the process of unification of civil and commercial law in legal practice, affirmed that "the unification of civil and commercial law was welcomed . . . as a ripe and foreseen fruit."

5. The Civil Code rested in part on the authority of the so-called "*corporazioni*," non-democratically elected political bodies, entitled to enact and enforce rules of economic policy subordinated to the law. *See* Widar Cesarini Sforza, *Corporativismo*, *in* 10 ENCICLOPEDIA DEL DIRITTO 664, 667-68 (1962) (the Italian was only a nominal corporatism, as it came authoritatively from the State; moreover, "[t]he myth of the nation and of the national interest [have] proven . . . to be unable to curb the interests of the strongest classes, composed by capitalists and leaders of enterprises."); *see also* Luisa Riva-Sanseverino, *Corporazione (Diritto corporativo)*, *in* 10 ENCICLOPEDIA DEL DIRITTO 679 (1962). The *corporazioni* were abolished and the *norme corporative* [corporative rules] were generally repealed by the Royal Decree of Aug. 9, 1943, No. 721, a few days after the breakdown of the Fascist regime and a month before the signing of the armistice with the Allies and by Decree of the Lieutenant of the Kingdom of Nov. 23, 1944, No. 369. Other minor amendements (although important from the civil rights standpoint) related to the change of the political regime were implemented between 1943 and 1945.

For the influence of Fascist ideology on the Civil Code, *see generally* RAFFAELE TETI, CODICE CIVILE E REGIME FASCISTA, SULL'UNIFICAZIONE DEL DIRITTO PRIVATO (1990); on the Fascist notion of enterprise as a quasi-public community of interests, where the entrepreneur (or the directors) and the workers overcome class war for the superior benefit of the *Unternehmen an sich* (and of the Nation in general), *see* the illuminating pages of 2 ASCARELLI, *supra* note 4, at 786-89. While in the participative model, the composition of the various interests is internalized in the board of directors, in the corporative model, as interpreted by the Fascist regime, such composition was to be achieved by the action of the entrepreneur (or of the board of directors, formed by his representatives alone), who supposedly acted in the general interest (*see generally* DISIANO PREITE, L'"ABUSO" DELLA REGOLA DI MAGGIORANZA NELLE DELIBERAZIONI ASSEMBLEARI DELLE SOCIETÀ PER AZIONI 195 & n. 62 (1992)).

economic situations. The enactment of the new Constitution in 1948, resting on radically different principles, has led to some partial reforms[6] and to a few interventions by the Constitutional Court, but has not created the need for a complete revision of the Civil Code. Some of its provisions, moreover, have given the courts an exceptionally wide latitude in adapting apparently unchangeable rules to changing times.[7]

The Civil Code of 1942 is the principal source of Italian private law, and it is likely that this will continue for many years to come. Some laws dealing with special aspects of private law (e.g., adoption, consumer protection, and labor law) have been enacted, but, unlike what has happened concerning other major pieces of Fascist legislation, the need for a general reform of the Civil Code is not perceived.[8]

B. *The Legal Sources of Italian Corporate Law. The Different Role of the Civil Code and the Relevance of Special Laws.*

The story regarding the part of the Civil Code that deals with business organization has been less static and is somewhat peculiar. Business organization law is contained in articles 2060 to 2642 of the Civil Code.[9] Articles 2325 to 2497-*bis* of the Civil Code deal specifically with the three possible forms of corporations: the *società per azioni* [stock company], the *società in accomandita per azioni* [stock company with personally liable directors], and the *società a responsabilità limitata* [limited liability company]. The legislative model is the *società per azioni*: the rules of the *società in*

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6. The family law section of the Civil Code arts. 79 to 455, for example, was extensively amended by the Law of May 19, 1975, No. 151.

7. Two significant examples of adaptation of the law by means of case law are Civil Code arts. 1375 and 2043. The former, which prescribes a bona fide execution of the contract by the parties, was long considered nothing more than a formula without any binding significance and is now being reevaluated by the courts. The latter, which is a general provision on torts, was first interpreted as including only damages to the body and to property and now is used to grant recovery for any kind of tort. For an excellent assessment of the role of so-called "general clauses," *see* LINA BIGLIAZZI GERI ET AL., 1 DIRITTO CIVILE 19 (1987); on the evolution of art. 2043, *see* LINA BIGLIAZZI GERI ET AL., 3 DIRITTO CIVILE 671-93 (1992).

8. It seems fair to say that of the four major pieces of Italian legislation originating in the Fascist era (Civil Code, Code of Civil Procedure, Criminal Code, and Code of Criminal Procedure), the Civil Code is considered the most satisfactory. The Code of Civil Procedure is currently in legislative trouble, and a reform, extensive as well as controversial, has come into force in May 1995. The debate over the reform of the Criminal Code has led to a complete project prepared by a Ministerial Committee; an entirely new Code of Criminal Procedure was enacted in 1988 and has been in force since 1989.

9. There are some provisions included by attraction in other parts of the Civil Code. For example, art. 320, in which the fifth paragraph deals with the business activity of underage children, is in the family law section.

accomandita per azioni and the *società a responsabilità limitata* are largely construed by cross-references to the rules of the *società per azioni.*

Each type of corporate legal structure was conceived to fit different factual patterns. The *società per azioni* was designed as an organizational form for medium-large businesses. The *società in accomandita per azioni*, which has proven mainly a doctrinal creation, was intended as a device to raise capital by a personally liable entrepreneur, well known to and trusted by the public.[10] The *società a responsabilità limitata* was devised as a small-business limited liability corporation, a role which it has widely played since its introduction.

The corporate law part of the Civil Code, unlike other parts of it, has been amended several times. The main thrust of change has been provided by the directives of the European Community (now European Union), nine of which deal directly or indirectly with corporate law and were implemented between 1969 and 1993.[11] However, other powerful forces, principally the rapid development of non-banking financial intermediation since the early '70s, have been at work in shaping the landscape.

The result is a Civil Code flanked by a number of laws dealing with particular areas.[12] Even so, when financial markets are not directly involved (in

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10. The *società in accomandita per azioni* seems suitable for what Professor Robert C. Clark defines as the first stage of capitalism: "the age of the entrepreneur, the fabled promoter-investor-manager who launched large-scale business organizations in corporate form for the first time in history .... He was primarily a nineteenth century phenomenon." Robert C. Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561, 562 (1981). The Italian economy, even if it had developed later than the American economy, had already passed the "first stage" in 1942, in effect, causing the *società in accomandita per azioni* to be born old-fashioned; or possibly personal liability for large-scale enterprises has never been an acceptable compromise for entrepreneurs, given the alternative of the fully limited liability easily achievable by means of the *società per azioni*. The *società in accomandita per azioni* is nonetheless living its first life in a totally different context from that the writers of the Civil Code had in mind. This strange corporate form is, in fact, being used as a top holding company for large business groups. The high stability of the personally liable directors, who cannot be removed by a simple shareholders' vote, and the relative unlikeliness of a financial breakdown of a company not involved in direct economic activity (either operating or financial), can render the form of the *societa in accomandita per azioni* attractive for this use. For example, at the top of the Fiat group pyramid (a group with $20 billion turnover in 1994) is the "Giovanni Agnelli & C. società in accomandita per azioni," whose (interesting) charter was published in 1987 GIURISPRUDENZA COMMERCIALE I, 1027.

11. Four more directives are in project stage, but their adoption seems doubtful at the present moment.

12. The most important of which are:

(a) Law of June 7, 1974, No. 216, on the financial market in general and on public offerings of securities; it created the *Commissione nazionale per le società e la borsa* [*National Commission for Companies and Stock Market*, hereinafter *CONSOB*, an independent agency modeled after the American SEC]. It is the main piece of legislation on the matter. This law has been amended innumerable times to respond to changes in the financial markets and to implement European directives;

which case directors must follow substantive rules of disclosure and independent auditors play some role) the corporate structure rules are to be found in the Civil Code.

C. *Corporate Governance Rules: the Absence of Significant Changes Since the Enactment of the Civil Code.*

This intense legislative activity with respect to corporate law, apart from a few exceptions, has not touched the corporate governance field. The basic structure of the relationship between the shareholders, the board of directors, and the board of auditors,[13] which are the three organs of the corporation, has remained basically unchanged since 1942.

The immediate reasons for this peculiarity can easily be found. First, the European Union's directives, which have been the main legislative driving force, have touched corporate governance only marginally. The proposal for a Fifth European Directive concerning "the structure of public limited companies, and the powers and obligations of their organs," which would be the central text on European corporate governance, has proven very difficult for the member states to reach agreement on, and it is very likely that it will not be adopted in the near future, if ever.[14] Should such a directive be adopted, some corporate governance rules would change, but, except for the very unlikely case that the German model

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(b) Law of Mar. 23, 1983, No. 77, on open-end mutual funds, extensively amended in 1992 to implement two European directives on the matter;

(c) Law of Jan. 2, 1991, No. 1, on the financial market and on *società di intermediazione mobiliare*, general name for companies engaged in the business of broker-dealer, financial advisor, etc. (apart from two categories partially "grandfathered" by the law, only *società di intermediazione mobiliare* and banks can publicly perform such activities);

(d) Legislative Decree of Apr. 9, No. 127, on consolidated financial reports [a Legislative Decree is enacted by the Government on delegation of powers by the Parliament and is equal in authority to a Law];

(e) Law of May 17, 1991, No. 157, on insider trading;

(f) Legislative Decree of Jan. 27, 1992, No. 88, on *revisori contabili* [*auditors*];

(g) Law of Feb. 18, 1992, No. 149, on tender offers;

(h) Legislative Decree of Apr. 21, 1993, No. 124, on private pension funds;

(I) Law of Aug. 14, 1993, No. 344, on closed-end mutual funds.

13. We will deal with each of these organs later.

14. This is the forecast of COOPERS & LYBRAND, EC COMMENTARIES, Mar. 2, 1995, *available in* LEXIS, World Library, ALLWLD File. The last official steps on the subject were a vote of the European Parliament on the second draft proposal of second amendment, on July 10, 1991, and a third amendment to the proposal made by the Commission in the fall of 1991. The proposal, however, has not been included in the list of those to be scrapped or amended under the European Community "subsidiarity drive" that followed the resistance encountered by the Maastricht Treaty in 1992 (source: REUTER TEXTLINE, Dec. 9, 1992, *available in* LEXIS, World Library, ALLWLD File). The most difficult subject has proven to be the role of workers in corporate governance.

of workers' codetermination is mandated by the directive, a complete revolution would probably not occur.

Second, the development of financial markets has been substantial, but it has turned out to be compatible with, or has adapted to, the old rules of governance. As we will see later, the system of corporate governance was conceived with a strong monitoring role of the shareholders in mind (even in listed companies), and this continues to be true. In every Italian company, publicly or privately held, there is a controlling shareholder or a group of influential shareholders tied by strong economic and contractual relationships. The public company, as studied by Adolf Berle and Gardiner Means,[15] and recently by Mark Roe,[16] does not exist in Italy. The vigorous development of Italy, which has led it to become the fifth industrial power in the world,[17] has put the Italian corporate structure on a path different from the American one.

Let us start with a look at the substantive rules; first in general, and then with particular focus on the directors' liability rules. Then, we will move to the characteristic patterns of Italian corporate governance using some economic and statistical data. Next, we will examine Italian corporate governance law in action, looking closely at case law. Finally, we will assess the suitability of the present rules of directors' liability for the Italian system.

D. *The* Società per Azioni *as the Model of Italian Corporate Law: the Reasons for a Choice.*

As we have seen before, the legislative model for Italian corporate law is the *società per azioni*. The disciplines of the *società in accomandita per azioni* and the *società a responsabilità limitata* borrow from that of the *società per azioni*, the only one of the three that is complete and self-standing.

Moreover, even if the *società a responsabilità limitata* is the dominant form,[18] it is less and less common as the firm's size increases. Its capital structure is limited to one class of voting shares,[19] which cannot be transferred

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15. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

16. MARK J. ROE, STRONG MANAGERS, WEAK OWNERS (1994).

17. According to the 1995 WORLD BANK ATLAS, in 1993 Italy's gross output, as measured by goods and services, was (in U.S. dollars) $1.135 trillion ranking fifth in the world, behind the United States ($6.388 trillion), Japan ($3.927 trillion), Germany ($1.903 trillion), and France ($1.289 trillion), and ahead of the United Kingdom ($1.042 trillion).

18. As of September 30, 1993, about 36,750 *società per azioni* and 336,000 *società a responsabilità limitata* were active in Italy (source: data CERVED, analyzed in *L'azienda cambia vestito*, IL SOLE - 24 ORE, Nov. 15, 1993, at 1).

19. GIAN CARLO M. RIVOLTA, LA SOCIETÀ A RESPONSABILITÀ LIMITATA 170-74 (1982); 2 CAMPOBASSO, *supra* note 2, at 499 & n. 1.

through share certificates.[20] Its debt financing is limited to trade credit and direct borrowing,[21] and it cannot be listed on stock exchanges.[22] Higher cost of financing, however, cannot account entirely for the prevalence of *società per azioni* among medium-large firms. There are no significant disadvantages for the *società a responsabilità limitata* when the company stays private and borrows only from banks. Moreover, creditors and suppliers could "contract" with the company for a satisfactory amount of guarantees regardless of its legal structure.[23] The taxation of profits, at both the corporate and the individual level, is identical,[24] and the *società per azioni* has slightly higher operation costs.[25] It

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20. C.c. art. 2472(2) (Italy).

21. C.c. art. 2486(3) (Italy) (no issuance of bonds); art. 18(1), Law of June 7, 1974, No. 216; art. 11 (2-4), Legislative Decree of Sept. 1, 1993, No. 385; and Law of Jan. 13, 1994, No. 43 (no issuance of commercial papers, loan notes, evidences of indebtedness, and no public offerings of debt and equity securities in general).

22. All CONSOB regulations about admission of companies to listing or public trading require the form of the *società per azioni* or the *società cooperativa*. This is true for the Italian Stock Exchange (*infra* note 143), for the *"Mercato ristretto"* [*Restricted stock exchange*], and for minor stock exchanges, which will take the form of interdealer quotation systems and are expected to start operations soon. *See*, respectively, the regulation adopted on May 24, 1989, No. 4088 (1989 RIVISTA DELLE SOCIETÀ 538), the regulation adopted on June 30, 1977, No. 233 (1977 RIVISTA DELLE SOCIETÀ 229), and the regulation adopted on Sept. 30, 1994, No. 8469 (IL SOLE - 24 ORE, Oct. 7, 1994, at 9).

23. The minimum contributed capital of the *società per azioni* is 200 million liras (roughly 120,000 U.S. dollars at the prevailing 1995 exchange rate), while that of the *società a responsabilità limitata* is ten times smaller. *See*, respectively, C.c. art. 2327 and 2474(1) (Italy). There are no limits, however, to the maximum capital of either kind of company. Nothing, then, prevents creditors from conditioning the financing of a *società a responsabilità limitata* to the existence of a certain amount of capital.

24. Arts. 87, 91, 116, 118(1), 121, Legislative Decree of Dec. 22, 1986, No. 917. The normal corporate tax rate is currently 53.2% (resulting from a 37% general corporate income tax and a 16.2% local income tax on capital). Dividends are taxed at the individual level according to the applicable tax bracket (varying approximately from 10% to 51%, plus another tax between 4.6 and 6.6%, applied as a contribution to the national health care service). Individual shareholders, however, are entitled to offset part of the tax paid at the corporate level against their personal income tax liability. Originally, the whole amount of general corporate income tax (then 36%) paid on the amount distributed as dividend could be offset. Today, after an increase of one percentage point in the corporate income tax rate adopted in March 1995 as part of an extraordinary, but not temporary, national budget containment measure, the tax credit does not restore completely the shareholder of the corporate income tax anymore. Of course, shareholders do not receive credit for the income tax the company pays on earnings that are retained. Under art. 4, Law of Aug. 8, 1994, No. 489, individual shareholders of listed companies are entitled to give up the tax credit and to opt instead for a flat tax of 12.5%, which is attractive only for high-bracket taxpayers.

The set-off is made according to a rather complicated formula: a 1,000-lira dividend gives rise to a taxable income of 1,562.5 liras, but the shareholder is entitled to a tax credit of 562.5 liras (amounting approximately to the general corporate income tax paid by the corporation); thus, considering the health care service contribution:

- a shareholder whose tax bracket is 10% actually receives a "dividend" of about 1,300 liras;

is very likely, then, that intangible but extremely important considerations of "corporate image" come into play in determining the corporate landscape. Companies, as they grow, need to hold themselves out as serious enterprises, and therefore, they need to wear the clothes typical of serious enterprises, *i.e.*, the form of the *società per azioni*. Everyone with any practical experience knows how serious concerns of this kind are.

Legal and non-legal constraints, thus, render more "costly," in a broad sense, the adoption of the legal structure of the *società a responsabilità limitata* for medium-large firms. Such firms, then, normally choose the form of the *società per azioni*.[26] In the following pages, therefore, we will examine the

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- a shareholder whose tax bracket is 27% actually receives a "dividend" of about 1,050 liras;
- a shareholder whose tax bracket is 41% actually receives a "dividend" of about 850 liras;
- a shareholder whose tax bracket is 51% (at this level of income the health care contribution has reached a ceiling, so that one can assume dividends as subject only to the personal income tax) actually receives a "dividend" of about 750 liras. (Hypotheticals found in IL SOLE - 24 ORE, June 9, 1994, at 3, and adapted to the increase of one percentage point in both the corporate tax rate and the national health care service contribution resulting from the mentioned budget measure adopted in March 1995. This measure has obviously reduced the amount of corporate income that goes into, and stays, in the shareholders' pockets.)

25. The call for a shareholders' meeting and a few other operations are more complex and costly in the *società per azioni* than in the *società a responsabilità limitata*; otherwise, most of the costs are identical, or only slightly lower in the *società a responsabilità limitata*. (A substantial difference in annual corporate franchise tax has been recently eliminated. This difference could account for a part of the past success of the *società a responsabilità limitata*.) The difference is significant, however, for small *società a responsabilità limitata*, for which the board of auditors is optional ("small," here, means capital less than 200 million liras *and* limited business size, as defined in C.c. art. 2435-*bis* (Italy), to be read in connection with C.c. art. 2488 (Italy)).

26. As of 1993, among the 1,000 largest Italian companies, excluding banks and insurance companies, classified by annual turnover, there were 810 *società per azioni*, 116 *s.r.l.*, 37 cooperatives and consortia, two foreign companies, one public entity. Thirty-four companies were reported without indication of the legal form in the name. (Some of which were subsidiaries of large groups). Of the first 100 companies, all but six *s.r.l.* and seven cooperatives were *società per azioni*. More specifically, as of 1992, among the 5,000 largest Italian companies—excluding banks and insurance companies—4,003 were *s.p.a.*, although *only a very small part of them* (less than five percent) were listed on a stock exchange. Other kinds of companies were distributed as follows, in decreasing size order:

- companies from No. 1 to No. 10 (from 30,008 to 5,311 billion lire turnover): no companies other than *s.p.a.*;
- companies from No. 11 to No. 100 (from 5,259 to 877 billion lire turnover): four *s.r.l.* (two of them are operating subsidiaries of an Italian group, one is an operating subsidiary of a foreign group, and one is a holding company of an Italian group);
- companies from No. 101 to No. 500 (876 to 247 billion lire turnover): 47 *s.r.l.*, seven cooperatives (many of the *società a responsabilità limitata* were operating subsidiaries or holdings of large groups);
- companies from No. 501 to No. 1000 (246 to 140 billion lire turnover): 71 *s.r.l.*, 16 cooperatives;

structure of the *società per azioni*, giving brief accounts of the peculiarities of the *società in accomandita per azioni* and the *società a responsabilità limitata.*

E. *The Protagonists of the Governance of the* Società per Azioni.

Power in the *società per azioni* is allocated among three organs: the shareholders; the board of directors; and the board of auditors. Broadly speaking, shareholders have the power to decide who will manage the company, who will supervise the managers, and they have a voice in certain fundamental decisions. Directors manage the company, and auditors, who are part of the corporate structure, supervise directors in the interests of shareholders and creditors.

- companies from No. 1001 to No. 1500 (140 to 98 billion lire turnover): 77 *s.r.l.*, nine cooperatives;
- companies from No. 1501 to No. 2000 (98 to 76 billion lire turnover): 85 *s.r.l.*, four cooperatives;
- companies from No. 2001 to No. 2500 (76 to 63 billion lire turnover): 109 *s.r.l.*, nine cooperatives;
- companies from No. 2501 to No. 3000 (63 to 54 billion lire turnover): 97 *s.r.l.*, seven cooperatives;
- companies from No. 3001 to No. 3500 (54 to 47 billion lire turnover): 111 *s.r.l.*, one cooperative;
- companies from No. 3501 to No. 4000 (47 to 42 billion lire turnover): 116 *s.r.l.*, four cooperatives;
- companies from No. 4001 to No. 4500 (42 to 37 billion lire turnover): 111 *s.r.l.*, two cooperatives;
- companies from No. 4501 to No. 5000 (37 to 34 billion lire turnover): 104 *s.r.l.*, six cooperatives, one limited partnership.

For banks and insurance companies, moreover, the only legal form presently allowed is the *società per azioni* and the *società cooperativa* (some non-stock public entities, "grandfathered" by the financial market laws, survive). Again for the fiscal year 1992, out of the 50 largest commercial banks, classified by total assets, 39 were *società per azioni*, ten were cooperatives and one ("Monte dei Paschi di Siena," founded in 1472 and the most ancient bank in the world still operating) was a public entity (it became a *società per azioni* only in 1995). All the largest 100 insurance companies (with the exception of very few mutual insurances), classified for total amount of premiums, were *società per azioni*.

The preceding survey is based on the corporations' names as published in *Le prime 5000 società italiane e i 200 gruppi consolidati*, Supp. to MONDO ECONOMICO, Dec. 25, 1993, and *Le prime 1000 società italiane e i 200 gruppi consolidati*, Supp. to MONDO ECONOMICO, Dec. 31, 1994. There is a slight margin of error, due to possible errors in reporting. Also, as above noted, a few companies' names were reported without any indication of their legal form, so that it has been impossible to assign such companies to any specific group. The numbers, however, can be considered significant evidence for the predominance of the *società per azioni* among companies whose total added output was a very substantial part of the Italian GNP in 1992.

1. *The Shareholders.*

Shareholders in the *società per azioni* do not have direct power to manage the company. Their fundamental powers consist in electing and removing directors and auditors,[27] in determining their compensation, in voting on amendments to the charter and by-laws (which include matters such as the issuance of new stock and convertible bonds, mergers, dissolution of the company), in voting on the issuance of bonds,[28] C.c. art. 2364, 2365 (Italy),[29] and on other subjects.[30] A key feature of the system is a special power of shareholders over directors' and auditors' liability. This feature will be specially examined throughout this paper: directors and auditors may be held liable only if a *majority* of the voting shareholders decide to institute action against them. C.c. art. 2393(1) (Italy).

Shareholders act generally as a group, following a call for a meeting. Each shareholder, however, or in certain cases shareholders representing a certain fraction of the capital, have some special rights. These rights include authority

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27. *See infra* note 61 and accompanying text, for a difference between removal of directors and auditors.

28. The issuance of bonds by banks has been permanently assigned to the board of directors by the new banking law, except for bonds convertible in stock of the same bank (art. 12(3), Legislative Decree of Sept. 1, 1993, No. 385).

29. The law requires higher majorities for charter amendments and issuance of bonds. C.c. arts. 2368, 2369, 2369-*bis* (Italy).

30. One of the most emphasized powers of shareholders is the power to approve the financial statements of the company. The shareholders' role with respect to this matter, however, is ambiguous at best. Financial statements are obviously prepared by the board of directors (C.c. art. 2423(1) (Italy)), which has the relevant information and can make the necessary evaluations. Whether shareholders can only approve or reject financial statements or they can also modify them is a matter of debate. (*Compare* BERARDINO LIBONATI, FORMAZIONE DEL BILANCIO E DESTINAZIONE DEGLI UTILI 33 (1978); FRANCESCO GALGANO, LA SOCIETÀ PER AZIONI 337-38 (2d ed. 1988); FERRARA & CORSI, *supra* note 2, at 661-62 (shareholders cannot modify financial statements), *with* 2 CAMPOBASSO, *supra* note 2, at 419; DI SABATO, *supra* note 2, at 592-93; JAEGER & DENOZZA, *supra* note 2, at 502-03 (shareholders can modify financial statements)). Moreover, the law makes clear that shareholder approval of financial statements does not constitute a waiver for possible directors' liability (C.c. art. 2434 (Italy)), but it is unclear what happens if shareholders expressly *refuse* to approve them. *See* DI SABATO, *supra* note 2 at 592-93. (My view is that due to the normal coincidence of interests between controlling shareholders and directors, this problem is largely moot, as the scarcity of cases confirms). The meaning of shareholders' approval, then, seems to be limited to the fact that any shareholder, by contesting the validity of the approval, has the right to react against the illegality or the falsity of financial statements, by challenging the approval in court. (Shareholders of companies whose financial reports are mandatorily subject to audit—listed companies and financial intermediaries, principally—can sue only if they possess shares amounting to five percent of the capital or to a total par value of 100 million liras. Art. 6, Legislative Decree of Mar. 31, 1975, No. 136.)

For a complete and detailed list of the subjects on which shareholders can, or must, vote, *see* 2 CAMPOBASSO, *supra* note 2, at 288-89, and DI SABATO, *supra* note 2, at 419-20.

to provoke inspections by the auditors and by the court[31] and to request and obtain a call of a shareholders' meeting.[32] Each shareholder, moreover, has the right to question in court the validity of any shareholders' resolution and to obtain its voidance if it is proven to be against the law or the charter.[33]

Shareholders are not allowed to intrude in the management of the company unless expressly requested to do so by the directors or, *ex ante*, by the charter.[34] In no event may they give orders to the directors.[35] Even so, the amount of power shareholders of Italian companies have, when compared with their American counterparts, can be considered very high. The law prevents a dilution of their voting rights by means of multiple voting shares[36] and sharply limits departures from the "one share one vote" principle.[37]

Shareholders have the final say on fundamental matters like dividend policy and capital structure. They decide what part of the earnings must be paid out to

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31. C.c. art. 2408 and art. 2409 (Italy). C.c. art. 2409 (Italy), which is one of the key provisions of the balance of power between majority and minority shareholders (*infra* note 277 and accompanying text), will be discussed later.

32. C.c. art. 2367 (Italy).

33. C.c. arts. 2373, 2377-79 (Italy). C.c. art. 2373 (Italy) deals specifically with the conflict of interest of one or more voting shareholder (the resolution is voidable if it passed with the decisive vote of interested shareholders and it can harm the corporation), while the other three provisions deal with void or voidable resolutions and with procedural problems.

34. C.c. art. 2364(1), No. 4, (Italy).

35. Judgment of Feb. 7, 1972, No. 296, Cass. civ., 1972 GIUSTIZIA CIVILE I, 688. *See also* FRANCESCO CORSI, IL CONCETTO DI AMMINISTRAZIONE NEL DIRITTO PRIVATO 267-84 (1974); FRANCO BONELLI, GLI AMMINISTRATORI DI SOCIETÀ PER AZIONI 5-12 (1985); 2 CAMPOBASSO, *supra* note 2, at 327. According to a different opinion, shareholders' resolutions can be binding for the directors under particular circumstances: VINCENZO CALANDRA BONAURA, GESTIONE DELL'IMPRESA E COMPETENZE DELL'ASSEMBLEA NELLA SOCIETÀ PER AZIONI 159-88 (1985).

36. C.c. art. 2351(3) (Italy).

37. C.c. art. 2351(2) (Italy). As to voting rights, only three classes of shares can be created: common stock, which votes on every matter, limited-voting preferred stock, which votes only in "extraordinary meetings" (i.e., essentially, on charter amendments and issuance of bonds), and non-voting cumulative preferred stock, which the law defines, a little populistically, as "*azioni di risparmio*," i.e., savings shares. Three clarifications are necessary:

(1) the total numbers of shares of stock with limited voting rights (i.e., preferred stock and non-voting cumulative preferred stock) can never exceed one-half of the total number of shares outstanding. C.c. art. 2351(2) (Italy);

(2) every charter amendment resulting in the impairment of the rights of one class of stock comparatively to the others must be approved by a majority of shares of the impaired class. C.c. art. 2376 (Italy); on class voting see the unsurpassed study of ARIBERTO MIGNOLI, LE ASSEMBLEE SPECIALI (1960);

(3) only listed companies can issue non-voting cumulative preferred stock. C.c. art. 14-16 (Italy), Law of June 7, 1974, No. 216; See generally MAURIZIO DE ACUTIS, LE AZIONI DI RISPARMIO (1981). The non-voting cumulative preferred stock gives the stockholder an *absolute right* to the dividend, provided that there are earnings (unlike the limited-voting preferred stock, whose right to dividends is subject to the vote of shareholders: *see* infra note 38 and accompanying text); this right, if unsatisfied, is carried over the following years.

them and what part may be reinvested.[38] They must approve the issuance of stock, bonds, warrants and convertible bonds, which technically take the form of charter amendments[39] and may be delegated to the board of directors only for a limited period of time.[40] Preemptive rights may not be waived by the charter and may be only limited for single issuances, in special circumstances and following an absolute majority vote.[41]

In light of the predominant ownership structure of Italian companies, which we will examine in Part IV, the rather important role of shareholders is hardly surprising. The whole system of corporate governance, and sometimes the very ability of the company to survive, is based on the assumption that a large part of the shareholders will participate actively.[42] This assumption is basically correct

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38. C.c. art. 2433 (Italy). The directors of companies whose financial reports are mandatorily subject to audit (*see supra* note 30) have the power to declare semi-annual advances on dividends. *See* C.c. art. 2433-*bis* (Italy).

39. The issuance of bonds is not an amendment of the charter, despite its being subject to identical formalities.

40. Maximum five years. C.c. art. 2420-*ter*, 2443 (Italy), amended by the Legislative Decree of Feb. 10, 1986, No. 30. Previously the maximum period was one year. Shareholders must also authorize repurchase and resale of the company's shares. C.c. art. 2357 (Italy) (authorization must be detailed and can be given for a maximum period of 18 months). In listed companies, however, this authorization is given routinely and can lawfully be open-ended as to the total number of transactions. Tribunal of Trieste, Judgment of July 3, 1987, 1988 GIUSTIZIA CIVILE I, 2994; 1988 GIURISPRUDENZA COMMERCIALE II, 124.

41. C.c. art. 2441(5) (Italy). The majority requirement is reinforced in that, even at a second and third call of the shareholders' meeting, where the number constituting a quorum is lowered (*see infra* note 42), the approval of more than a half of the total capital is always necessary.

42. Charter amendments are implemented following a resolution approved during a so-called "extraordinary shareholders' meeting." "Extraordinary" means little more than a meeting with stricter voting quorums. Such quorums are set as follows:

At the first call, the approval of *more than one-half* of the voting shares is necessary. C.c. art 2368 (Italy). At the second call, which may take place after the first call has failed to gather more than a half of the voting shares, the approval of *more than one-third* of the voting shares is necessary, and of more than one-half for particularly sensitive matters, including the limitation of shareholders' preemptive rights. C.c. arts. 2369, 2441(5) (Italy). At a third call, which may take place *only in listed companies* and after the second call has failed to gather more than one-third of the voting shares, the approval of *more than one-fifth* of the voting shares is necessary; this quorum is raised to more than one-third for particularly sensitive matters, and to more than a half for the limitation of shareholders' preemptive rights. C.c. arts. 2369-*bis*, 2441(5) (Italy).

As illustrated, matters like capital structure are embodied in the charter, and changes in the capital structure are charter amendments, requiring the affirmative vote of a high number of shares. Thus, vote by proxy is very limited (C.c.art. 2372), and vote by mail (apart from an exception, strange and indeed very limited in practice, for the newly privatized companies, introduced by art. 5(5), Law of July 30, 1994, No. 474 and implemented with Regulation issued jointly by Bank of Italy, CONSOB and ISVAP on Dec. 30, 1994) is not allowed. It seems reasonable to assume that such high majority requirements have stayed until today because companies are actively followed by large shareholders. *See infra* Part IV).

because directors are closely watched by the majority shareholders when they are not the majority shareholders themselves.

As noted earlier, however, Civil Code art. 2393 grants to the shareholders, *as a body,* absolute authority also over directors' liability: a suit against directors may indeed be maintained only if authorized by a shareholders' vote. This means that the majority of shareholders has the authority to decide whether directors are acting in the interests of the company. Due to the normal coincidence between majority shareholders and directors, this grant of powers seems less obvious and less justifiable. We will come back to this point later.

2. *The Board of Directors.*

All members of the board of directors are elected by the shareholders; any contrary provision is void.[43] A partial exception to this principle is midstream vacancies owing to resignation or other causes, which can be temporarily filled by the board itself.[44] While a different rule is permitted,[45] the default rule is that *all* the members of the board are elected by the majority.[46] No representation on the board is thus granted to the minorities only by operation of the law, and charters rarely provide otherwise.

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43. Judgment of Jan. 25, 1965, No. 136, Cass. Civ., 1965 FORO ITALIANO I, 427; Judgment of Apr. 17, 1990, No. 3181, Cass. Civ., 1991 FORO ITALIANO I, 1533; Judgment of Aug. 27, 1969, Appellate Court of Milan, 1970 GIURISPRUDENZA ITALIANA I-2, 546; 2 CAMPOBASSO, *supra* note 2, at 329 n. 2; BONELLI, *supra* note 35, at 57 & n. 13. Compare the different solution in § 8.03 (b) and (c) of Revised Model Business Corporation Act [hereinafter RMBCA].

A different solution was proposed in the Commercial Code project of 1940, eventually merged with the Civil Code (*supra* text accompanying note 3). Under art. 240 of this project shareholders could elect only half of the board, delegating to the directors the election of the other half. The solution was turned down in the final draft.

The law allows a narrow exception, permitting charter provisions which grant to State or public entities the right to elect some directors, and auditors, of companies in which they have an interest, whether they own stock or not. C.c. arts. 2458-61 (Italy). These provisions have limited practical application for business corporations, while they are often applied for mixed public-private consortia set up in the form of *società per azioni.*

44. C.c. art. 2386(1) (Italy). When vacancies involve the majority of members of the board, the board cannot fill them and must promptly call a shareholders' meeting to elect new directors. C.c. art. 2386(2) (Italy). *See* C.c art. 2386(4) (Italy) for other specific cases.

45. C.c. art. 2368(1) (Italy). The last sentence reads: "The charter may establish special rules for the elections of corporate officers." *Id.* The recent law on privatizations of state-owned companies has mandated list-vote for the election of directors of privatizated companies when the charter imposes a ceiling on the ownership of each shareholder. Art. 4, Law of July 30, 1994, No. 474.

46. As we will see later, the majority is sometimes formed by various shareholders tied by an agreement on the governance of the company. Even when the company lacks an absolute majority shareholder, however, the line between majority and minority remains usually well clear.

The board is elected for a maximum period of three years.[47] Although a recent decision has taken a different view,[48] the default system appears to be the non-staggered board; however, the charter may lawfully provide differently. Directors can be removed by a shareholders' vote at any time, and they are only entitled to damages if the removal is proven to be without cause.[49]

The corporation is governed by a one-level board. The board of directors has all the powers necessary to manage the company, while the supervision of the management is committed to a special body that is independent from the board of directors and lacks any managerial power. The Italian system is, therefore, "monistic,"[50] as opposed to "dualistic" systems like Germany's, in which day-to-day operations, on the one hand, and major corporate policy decisions and supervisory activity, on the other, are mandatorily apportioned at two different levels of the same administrative structure.

However, the Italian "monistic" system is very flexible. The directors act collectively as a board,[51] but the shareholders or the charter may authorize the board to delegate most of its powers to one or more of its members. Powers can be delegated to one or more "delegated directors" who can act alone on specific matters, or to an executive committee of delegated directors who act collectively according to Civil Code Art. 2381. No high-level decisional authority can be granted by the board to non-members.[52]

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47. C.c. art. 2383(2) (Italy).

48. Judgment of Mar. 4, 1994, No. 2144, Cass. Civ., 1994 GIURISPRUDENZA COMMERCIALE II, 639. The Court of Cassation has gone against a long-standing (*see, e.g.*, GUSTAVO MINERVINI, GLI AMMINISTRATORI DI SOCIETÀ PER AZIONI 33 (1956)) and almost uncontested theory, and seems to be contrary to the plain interpretation of C.c. art. 2386 (Italy). See a penetrating critique of the cited decision in Francesco Corsi, *Amministratori: avanti in disordine sparso?* [Directors: Ahead in Open Disorder?], 1994 GIURISPRUDENZA COMMERCIALE II, 641.

49. C.c. art. 2383(3) (Italy). *Cf. infra* for the difference between removal of directors and auditors.

50. The Fifth European Directive Proposal on company law, although favoring the first alternative (see the introductory "*Whereas*"), leaves to State members of the European Union the choice between a menu of two alternatives: the dual board structure, with a management board responsible for the day-to-day operation of the company and a supervisory council responsible for overseeing the management board, and a single board or internal subdivisions of responsibilities.

51. It is also possible to commit the management to a sole director. *See*, implicitly, C.c. art. 2380(2) (Italy). This kind of managerial structure is clearly suitable only for very small businesses.

52. The decisional level immediately below the board is normally occupied by the "*direttori generali*," [*general managers*] full-time, high-level employees in charge of particular sectors of activity such as finance, administration, export, and operations with foreign countries, etc. They are not members of the board, and are, at least as a matter of law, subordinated to it. Their relationship is mostly subject, regarding internal aspects, to the labor law and regarding external aspects (i.e., the existence and limits of the general managers authority to bind the corporation), to the law of general and commercial agency.

Thus, a double level of management can be, and in medium-large companies usually *is*, created by the shareholders.[53] Typically, members of

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The relevance of *direttori generali* for black letter corporate law is limited to Civil Code art. 2396 (Italy), which, in synthesis, states: (a) that the *direttori generali* can be elected directly by the shareholders (which rarely happens); (b) that their role can be provided for by the charter; (c) that in the preceding two cases, they are subject to the same liability provisions of the directors, as far as their own tasks are concerned. Provided that every employee of the company, under general provisions of the law, can be held liable in connection with possible wrongdoing or fraud, C.c. art. 2396 (Italy), subjecting the liability of *direttori generali* to the same provisions of directors' liability, in some respects expands that liability (by rendering them directly responsible to creditors, in limited cases) and in some other respects restricts it (by requiring a shareholders' vote to maintain a suit against them). *See generally* ALESSANDRO BORGIOLI, I DIRETTORI GENERALI DI SOCIETÀ PER AZIONI (1975).

It is disputed whether Civil Code art. 2396 has the effect of strengthening the general principle that directors are entitled to reasonable reliance on subordinates (normally weaker in the Italian corporate law than the model one set forth in § 8.30(b) of the RMBCA) (*compare* BORGIOLI, *supra*, at 187, 190 (directors' liability reduced for matters delegated to *direttori generali* elected under Civil Code art. 2396 (Italy)) with Franco Di Sabato, *Sui rapporti fra la responsabilità degli amministratori di s.p.a. e quella dei direttori generali*, 1985 RASSEGNA DI DIRITTO CIVILE 450 (no differences in liability due to the method of selection)).

53. The delegation of power on the basis of Civil Code art. 2381 addresses only the allocation of *internal decisional authority*, and has nothing to do with the *authority to bind* the corporation. The law treats these issues differently. While the charter, the shareholders and the board have a certain leeway in allocating internal decisional authority, the law conclusively resolves most of the questions arising from the existence or absence of authority to bind the corporation.

The law requires that the charter establish clearly and in a general way who has the authority to bind the corporation (*e.g.*, the president of the board of directors, each delegated director, two delegated directors jointly) C.c. art. 2328, No. 9 (Italy)). The directors who actually have that authority must deposit their signatures in the *"Ufficio del registro delle imprese"* [*Office of Register of Enterprises*]. C.c. art. 2383(4) (Italy). The Register of Enterprises contains an updated version of the charter, the financial statements and other relevant data on listed and unlisted companies. It is accessible to everyone in person or by on-line service.

Once the corporation has been properly represented by the director(s)/officer(s) authorized by the charter, every question of existence of authority is irrelevant for the third party under C.c. art. 2384(2) (Italy) (except in those rare cases in which the third party acted fraudulently). Moreover, C.c. art. 2384-*bis* (Italy) establishes that the ultra vires defense cannot be used against a third party in good faith, with the company having the burden of proving bad faith. Every violation of the charter or other internal rules will give rise to the liability of the agent, but absent exceptional circumstances, will not affect the third party.

For instance, if the charter gives the president of the company authority to bind the corporation, the party contracting with him can, under C.c. art. 2384(2) (Italy), enforce the contract even if a board's resolution, or the charter itself, requires that kind of contract be authorized by the board. The result is the same, under C.c. art. 2384-*bis* (Italy), if the company claims that the contract does not serve its business purpose as stated in the charter. As a matter of fact, notwithstanding that Italian law does not allow a general purpose clause like the one allowed by § 3.01 (a) of the RMBCA, Italian courts are reluctant to allow any kind of ultra vires claims, except in egregious cases in which the bad faith is apparent. (*Compare, e.g.*, Judgment of June 15, 1989, No. 2876, Cass. civ., 1989 MASSIMARIO DEL FORO ITALIANO 424 (remittal of debt

the executive committee and/or delegated directors are full-time employees of the company, while other directors serve only part-time. We can term the former "inside directors/officers," and the latter "outside directors."[54]

The principal duty of directors is to manage the company in the interests of the shareholders. Specific obligations to the creditors, imposed by the general civil law and by some specific provisions, do not create a general duty to act in the creditors' interest.[55] Moreover, even if a certain amount of charitable contribution is commonly admitted,[56] a general duty to act in the interest of

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without immediate consideration held valid), *with* Appellate Court of Turin, Judgment of Oct. 18, 1982, 1983 DIRITTO FALLIMENTARE II, 367 (purchase of a racing car by the president of a small cooperative voided).

Both C.c. art. 2384(2) and 2384-*bis* (Italy) are the result of the implementation, in 1969, of art. 9.1 and 9.2., respectively, of the First European Directive on company law. The goal of the Directive, in this respect, was to protect third parties, then reducing the transaction costs arising from uncertainties concerning the corporate officers' authority to bind the corporation. This approach seems quite straightforward, and seems much more effective than that based on the so-called "cheapest cost avoider," suggested, for instance, by ROBERT C. CLARK, CORPORATE LAW 121 (1986) (otherwise generally oriented toward a broad protection of the third party), and by WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 133 (5th ed. 1993) (stressing economic efficiency). True, the third party can sometimes easily ascertain the authority of the corporate officer; however, substantial costs arise from the need to repeat the operation for every non-trivial transaction, as well as from the litigation that even the least uncertainty about corporate authority usually sparks when appropriately big interests are at stake.

The choice seems somewhat a policy one. Who should bear the cost of the directors' violation? The European answer is the shareholders, while the American answer varies, depending on the circumstances. Perhaps these different solutions can be seen as a result of the different positions of European and American shareholders: as a matter of fact, European shareholders are typically strong and influential, while their American counterparts are typically "weak" (*see* ROE, *supra* note 16, for a thorough analysis of the phenomenon and of its possible economic and political causes). The approach of the American courts may thus be seen as a (weak and probably costly) way of protecting "weak owners" against strong and potentially unaccountable managers.

54. We can also consider "officers" the *"direttori generali,"* described *supra* note 52, making it clear, however, that they are always subordinated to the board.

55. *See infra* note 89 for a discussion of the board's duty to creditors.

56. For an important case involving a listed company, *see* Tribunal of Perugia, Judgment of Apr. 26, 1993, 1994 FORO ITALIANO I, 261 (upholding a charter provision mandating some yearly charitable contributions); *see generally* DISIANO PREITE, LA DESTINAZIONE DEI RISULTATI NEI CONTRATTI ASSOCIATIVI 209-10 (1988) (enhancement of the interests of the shareholders through a reasonable amount of charitable contributions). A corporate charter that states the goal of enhancing interests other than making and distributing money to shareholders is commonly considered void: *see* GIORGIO MARASÀ, LE SOCIETÀ. SOCIETÀ IN GENERALE, 220-26 (1991). The main argument, which I will not discuss here, justifying this draconian conclusion is the following: limited liability is a privilege that the legal system grants only for limited purposes; different legal structures and different incorporating procedures grant limited liability for non-dividend purposes (cooperatives, consortia), or for non-profit purposes (associations, foundations). Therefore, an indirect use of the corporate form is unlawful.

constituencies other than the shareholders or of the community at large does not exist.[57]

As directors' liability is the main subject of this paper, we will examine it extensively later.

3. *The Board of Auditors.*

The board of auditors, probably the most peculiar aspect of the Italian corporate governance system, is composed of independent professionals entrusted by the shareholders with the supervision of the directors. The manner in which auditors are elected is identical to that of directors: the shareholders elect all the members of the board, and, unless the charter so provides, no representation is granted to the minority.

The board is composed of either three or five members, plus two substitutes for possible vacancies. A recent reform enacted in compliance with the Eighth European directive on company law has tightened requirements for serving on the board,[58] providing that all members be chosen from the roll of the

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57. The problem of the goal of public enterprise is a very difficult one, especially when the public sector has vast proportions, as in Italy. It has long been debated whether the state should use the tool of the *società per azioni* to achieve its non-economic (or non-purely economic) objectives (*see* 2 TULLIO ASCARELLI, *Tipologia delle società per azioni e disciplina giuridica, in* PROBLEMI GIURIDICI 1001, 1019-23 (1959)) (no joint state and private ownership of *società per azioni* because they have different goals; the public entity form better suitable for state enterprise). The trend towards the general use of the *società per azioni*, however, seems irreversible at the present moment, as hundreds of banks and other enterprises have recently been changed from public entities into *società per azioni* (*see infra* note 192 and accompanying text). For a brilliant assessment of the history of the large public holdings, see Natalino Irti, *Dall'ente pubblico economico alla società per azioni (profilo storico-giuridico)*, 1993 RIVISTA DELLE SOCIETÀ 465. BONELLI, *supra* note 35, at 19-21, discusses in detail two cases that occurred some years ago, which well illustrate the conflicts that can arise between economic structure and non-economic goals.

Ente Nazionale Idrocaurburi, or ENI (public entity-holding, now *società per azioni*), wanted to force a subsidiary (SNAM s.p.a.) to enter into a transaction with the Algerian Government for the supply of natural gas. The transaction was economically unfavorable for the subsidiary, but politically important for the Italian-Algerian relationship. The directors of the subsidiary, claiming that it was not the subsidiary's duty to benefit the country as a whole, asked for, and obtained, relief from the Italian Government from losses arising from the contract.

The second case had a different conclusion. The president of Alfa Romeo s.p.a., a large car maker then controlled by Istituto per la Ricostruzione Industriale, or IRI (also a public entity-holding that has become *società per azioni*), refused to implement a "directive" from the parent entity. The directive, which had clear social, rather than economic, purposes, required Alfa Romeo s.p.a. to build a new plant in the Naples area instead of one close to the existing plants. IRI, availing itself of its powers as majority shareholder (even if in an indirect way), replaced the president of Alfa Romeo.

58. The reform was implemented between 1992 and 1994 (Legislative Decree of Jan. 27, 1992, No. 88, and following regulations of the Minister of Justice).

"revisori contabili" [*auditors*].[59] The roll is kept under public supervision and lists persons with a significant curriculum of studies in law, business organization and/or accounting, who have proven experience in practice, and who have passed a special examination. Typically, auditors are practicing professionals who serve on the board of more than one company.

The central idea behind the legal structure of the board of auditors is independence. Relatives of the directors and persons who are employees or who are otherwise compensated on a regular basis by the company or by its subsidiaries cannot be elected as auditors.[60] Auditors serve for a period of three years, and unlike directors, they can be removed exclusively for cause; the shareholders' removal, moreover, takes effect only if approved by the court.[61] Auditors have fixed compensation and variable risks; their compensation is fixed for the entire period of service and does not depend on the company's performance.

The auditors' duties are basically monitoring directors and acting in the place of the latter if they refuse to follow the rules of corporate governance, or to accomplish specific and legally mandated acts.[62] It is not the auditors' responsibility to assess the appropriateness of business decisions made by the board of directors. In other words, the auditors' task is to assure compliance with the rules set forth in the law and the charter, not to review the conduct of the board on its merits.[63]

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59. C.c. art. 2397 (Italy). Professional qualification was previously required only for part of the members of the board. Unfortunately, the reform has "grandfathered" everyone having served as a member of the board of auditors for a certain amount of time, even if completely unqualified, allowing him or her to continue to serve.

60. *Id.* art. 2399 (Italy).

61. *Id.* art. 2400(1-2) (Italy).

62. *E.g.*, a mandatory call for shareholders' meeting: *see* C.c. art. 2406 (Italy). See also the corresponding sanction for its violation set forth by C.c. art. 2632 (Italy).

63. A recent case sent shockwaves through the corporate community. Judgment of May 7, 1993, No. 5263, Cass. Civ., 1994 FORO ITALIANO I, 130, found auditors liable for lack of intervention against a series of negligent decisions causing the company to spend a substantial amount of money in partly unauthorized real estate purchases, saying explicitly that it is the auditors' duty to review managerial decisions. The case, however, concerned an easily detectable case of gross negligence, and it is arguable that the duty to review managerial decisions constitutes only *dictum*.

The dispute about whether auditors must review directors' decisions on their merit is long-standing (*see, e.g.*, DI SABATO, *supra* note 2, at 504-05, where there are ample citations). However, it is my opinion that the differences are mainly verbal. As noted *infra* notes 77-78 and accompanying text, courts hold auditors liable *at least* for gross negligence in disregarding several "red flags" and do not charge them for not reviewing normal, even if unfortunate, business decisions. Whether this is "merit" or not is an open, but in my view, a non-decisive, question.

In particular, auditors must (a) meet as a board at least each quarter, and attend the meetings of the shareholders and board of directors;[64] (b) check regularly the company's books and internal accounting system;[65] and (c) prepare a report accompanying the annual financial statements, which goes to the shareholders and then, together with the financial statements, is made publicly available.[66] (The auditors' report must take a position on the fairness of the financial statements with respect to the accounting system and to the financial situation of the company.) Moreover, auditors have a general power to make investigations[67] and a duty to report to the shareholders irregularities discovered in the management of the business.[68] They are not, however, mere agents for the shareholders, as they may challenge in court the validity of shareholders' resolutions.[69]

Auditors are liable for their own violations (*e.g.*, revelation of confidential information and insider trading).[70] More importantly, though, auditors are jointly and severally liable with the directors for the directors' acts or omissions that cause losses to the company or its creditors,[71] if they could have avoided the losses through diligent behavior and monitoring.[72] While the first kind of responsibility does not create any particular difficulty, the second can be problematic because it involves a judgment on when an omission has taken place. Therefore, deciding when auditors can be held responsible for directors' conduct may not be simple.

The problem arises because auditors do not have a direct power of intervention. In other words, auditors cannot stand in for unfaithful directors in

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64. C.c. arts. 2403-05 (Italy). Failure to attend a shareholders' meeting or two meetings of the board of directors, without justification, causes loss of office. Attendance at the executive committee's meetings is, on the other hand, optional.

65. Auditors can delegate routine accounting controls to assistants, whose work they are responsible for: C.c. art. 2403-*bis* (Italy), introduced by the reform implemented by Legislative Decree of Jan. 27, 1992, No. 88.

66. The financial statements, with the directors' report [comparable to the Management Discussion & Analysis: *see* C.c. art. 2428 (Italy)], is deposited in the Register of Enterprises (C.c. art. 2435 (Italy)), which is accessible to the public. (*See supra* note 53 for a brief explanation of the function of the Office.)

67. Auditors have *the duty* to make investigations when requested by shareholders holding at least five percent of the capital. *See* C.c. art. 2408(2) (Italy).

68. For an exhaustive list and discussion of auditors' duties *see* DISABATO, *supra* note 2, at 501-06.

69. C.c. art. 2377(2) (Italy).

70. Respectively, C.c art. 2407(1) (Italy) (implicitly), and art. 2, 4, Law of May 17, 1991, No. 157, on insider trading.

71. See *infra* Part III for details on the differences between these two kinds of liability. It is also important to note that the procedure for affirming the liability of the directors and auditors to the company and its creditors is the same.

72. C.c. art. 2407(2) (Italy).

managing the company.[73] They can, however, ask the court to void the board's resolutions approved with the vote of interested directors.[74] The auditors can report acts of mismanagement to the shareholders, and they can report criminal activities (embezzlement, frauds perpetrated on creditors, etc.) to criminal prosecutors, who have the means to stop directors.[75] If the directors do not, auditors must report the company's losses to the shareholders and, in certain cases, can ask the court to appoint a liquidator.[76] In most cases, the auditors' normal monitoring activity and the threat of their intervention will suffice to instill diligence in the directors.

In deciding on auditors' liability, the courts tend to follow a rule of reason. They normally charge collusive or simply idle auditors with responsibility for

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73. They can only accomplish legally mandated acts. *See supra* note 62 and corresponding text.

74. C.c. art. 2391(3) (Italy). This provision is clearly defective, as it does not give to one or more shareholders the standing to challenge the resolution, and it does not provide for any remedy against non-collegial decisions (such as transactions implemented by the delegated director or by the sole director of the company).

Courts have found a remedy for the second problem, resorting to the general private law remedy for transactions by an interested agent (C.c. art. 1394 (Italy): a contract by an agent in a conflict of interest with the principal may be avoided when the counterpart actually knew or could have known of the conflict. As for the sole director, *see* Judgment of June 22, 1990, No. 6278, Cass. Civ., 1990 GIUSTIZIA CIVILE I, 2265. As for the delegated director, for the first time before the Court of Cassation, *see* Judgment of Feb 1, 1992, No. 1089, Cass. Civ., 1992 FORO ITALIANO I, 2139). The first problem, however, is still open, and it is particularly serious given that shareholders as individuals cannot sue directors derivatively. *See infra* Part III.

It is my opinion that when requested by a shareholder, a court can issue an injunction under art. 700 Code of Civil Procedure (Italy) to prevent the board from implementing a transaction approved by interested directors. (I argue this because of the criminal sanction imposed on directors acting in conflict of interest, C.c. art. 2631 (Italy)). However, such a remedy would apply only *ex ante*, and could do nothing once the transaction has been implemented. Additionally, equally serious arguments go *against* granting an injunction under art. 700 Code of Civil Procedure (Italy) in this situation because the standing requirements for filing an injunction tend to overlap with the standing requirements for initiating an ordinary trial, which shareholders, as individuals, lack. Another way to stop the board of directors, more certain but probably less immediate, would be a petition under C.c. art. 2409 (Italy), which we will examine *infra* note 278 and accompanying text.

75. Criminal laws give prosecutors, duly authorized by an impartial judge, ample powers to prevent criminals from committing further crimes and from carrying already committed crimes to further consequences. It is argued that C.c. art. 2409 (Italy), which gives the prosecutors a civil remedy in case of mismanagement by directors and collusive behavior by auditors, can be triggered also by the auditors themselves, who, in this hypothesis, are not colluding at all. It is clear that a positive solution is preferable. *See*, implicitly, Gino Cavalli, *I sindaci*, *in* 5 TRATTATO DELLE SOCIETÀ' PER AZIONI 1, 175 n. 61 (Giovanni E. Colombo & Giuseppe B. Portale eds., 1988); *contra* FERRARA & CORSI, *supra* note 2, at 601.

76. C.c. arts. 2446-48, 2450 (Italy).

directors' egregious violations that easily could have been detected[77] or for a delay in reporting to shareholders a financial crisis that required their prompt intervention.[78] In other words, courts charge auditors with having ignored serious, and often multiple, "red flags." The fact that the majority of, or all of, the shareholders were aware of the "red flags" is not deemed a valid defense.[79]

There is a risk, however, that the auditors can become scapegoats for the losses of insolvent companies. Most liability suits against directors and auditors are instituted by bankruptcy trustees who want to enrich the estate by trying to involve auditors, often professionals with deep pockets or insurance.[80] It is up to the courts to discourage this type of action. Courts seem to strike an appropriate balance when they dismiss charges against auditors that diligently fulfilled their

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77. Judgment of May 7, 1993, No. 5263, Cass. Civ., 1994 FORO ITALIANO I, 130 (involving no intervention against a series of grossly negligent and unlawful acts causing the company heavy losses; the significance of the case is discussed *supra* note 63); Judgment of Oct. 9, 1986, No. 5928, Cass. Civ., 1986 LE SOCIETÀ, 1314 (causation found in the failure to control the accounting system and detect clear embezzlements); Judgment of Oct. 13, 1988, Tribunal of Milan, 1989 DIRITTO FALLIMENTARE II, at 442 (omission of controls facilitated embezzlements by the directors).

78. Judgment of Apr. 4, 1977, No. 1281, Cass. Civ., 1977 GIURISPRUDENZA COMMERCIALE II, 449 (failure to control the financial situation and the accounting system of the company allowed directors to keep on running it, thus aggravating the crisis); Judgment of Mar. 28, 1980, Appellate Court of Milan, 1982 GIURISPRUDENZA ITALIANA I-2, 219; Judgment of Jan. 24, 1983, Tribunal of Milan, 1983 IL FALLIMENTO 811.

79. Cavalli, *supra* note 75, at 175 & n. 59; less clear GUIDO UBERTO TEDESCHI, IL COLLEGIO SINDACALE 382 (1992). Same result when directors and shareholders physically coincide: Cavalli, *supra*, at 175 n. 60; Judgment of Oct. 16, 1959, No. 2886, Cass. civ., 1959 DIRITTO FALLIMENTARE II, 913 (the statement is *dictum*, however); Judgment of July 9, 1975, Appellate Court of Turin, 1976 GIURISPRUDENZA COMMERCIALE II, 871.

There may be two reasons for this seeming severity, one dictated by pure law and the other by policy considerations. On the one hand, the violations and/or the delay in reporting a crisis may cause harm to both shareholders and creditors, who might not have dealt with the company had they known its situation. Most of the actions against auditors are brought in bankruptcy, where both the rights of the shareholders and of the creditors are asserted. On the other hand, courts probably perceive the danger of a defense resting on the shareholders participation in the fraud.

80. GALGANO, *supra* note 30, at 314 n. 14 (noting the widespread diffusion of insurance policies covering the liability incurred by professionals serving as auditors, and suggests the possibility of voiding that part of the coverage because of its ability to reduce professionals' incentive to monitor effectively). The conclusion is certainly too broad and must be balanced against the risk of discouraging the best professionals to serve as auditors. *See*, in the United States, the debate and the legislative changes following *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). Moreover, it is clear that the possibility of reputational harm deriving from an adverse judgment contributes to keeping auditors alert.

duties[81] or were unable to detect skillfully concealed directors' acts of mismanagement or misappropriation.[82]

It is difficult to assess whether the board of auditors is an effective institution. The answer probably varies with the size of the company. It is clear that a handful of part-time professionals alone cannot assure airtight monitoring in very large companies.[83] It is far less clear that they are completely ineffective.[84] Moreover, in small-medium companies, where they may have a less serious informational disadvantage vis-à-vis directors than in large ones, their goals seem reasonably achievable.

An assessment of past cases alone is not sufficient. First, the qualifications for serving on the board of auditors is now more stringent than before the reform of 1992. Therefore, the only cases giving an insight into the future are those involving auditors with a professional training comparable to that required today. Second, the cases tell what has happened *notwithstanding* auditors but do not tell what could have happened *without* them.

On the one hand, auditors are perceived as risk-averse monitors. They have nothing to gain, at least immediately, from loosening the standards of control, nor do they have something to lose from exerting control properly.[85] Besides, the auditors' risk-aversion does not seem to discourage a healthy dose of risk-taking by the directors, as the former have no power of intervention in "normal" (i.e., not tainted with conflict of interest) business decisions taken by the latter. Finally, when the lines between "normal" and "abnormal" business decisions are blurred, (*e.g.*, because directors are effectively concealing self-interest or fraud), courts seem willing to forgive auditors in good faith.

On the other hand, the institution of the board of auditors suffers from a fundamental ambiguity: the same constituency with the same majority elects the

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81. Judgment of July 15, 1982, Tribunal of Milan, 1983 LE SOCIETÀ 1016; TEDESCHI, *supra* note 79, at 382.

82. Judgment of Nov. 15, 1960, No. 3056, Cass. civ., 1961 FORO ITALIANO I, 253; Judgment of Dec. 9, 1981, Appellate Court of Palermo, 1982 FALLIMENTO 248; Judgment of Jan. 19, 1974, Tribunal of Milan, 1974 GIURISPRUDENZA COMMERCIALE II, 174.

83. Remember that the 1992 reform found a partial remedy, allowing auditors to delegate most of the accounting controls to assistants. C.c. art. 2403-*bis* (Italy). Moreover, in listed companies some of the tasks and responsibilities of the board of auditors are taken over by an accounting firm (typically, one of the Italian affiliates of the big American accounting firms), appointed by the company for a period of three years (Legislative Decree of Mar. 31, 1975, No. 136).

84. The board of auditors is said to be "scarcely effective" by GALGANO, *supra* note 30, at 312.

85. Auditors' compensation is fixed and their tenure is assured, at least until the end of their term. Of course, there is a risk that they will take into consideration the possibility of not being re-elected.

directors and their guardians. The system seems to protect *all* the shareholders against managers' shirking or lack of due care, but not *minority* shareholders' against abuses committed by the directors in the interests of the majority.[86]

In light of the particular, highly-concentrated ownership structure of Italian firms, the issue of remedies against the majority's conflict of interest with the minority, or the lack thereof, stands out as the single most important problem of Italian corporate law. After a synthesis of the conclusions reached so far, we will examine the directors' liability system in detail.

F. *Summary of Part II.*

Based on the legal system, the following conclusions concerning the respective roles of shareholders, board of directors and board of auditors can be inferred.

A. Shareholders.

A.1. Shareholders possess powerful tools of corporate governance. Essentially they possess the right to vote on capital structure, on dividend policy and on fundamental changes such as mergers. Normally, however, shareholders' powers consist of the right to veto the board's actions rather than the right to impose such actions.

A.2. Shareholders' powers are primarily in the hands of the majority. In other words, majority rule normally governs the way in which shareholders express their voice, while single shareholders have very limited powers. The directors' liability rules, which we will examine next, confirm this conclusion.

B. Board of directors.

B.1. The board of directors has all the powers not expressly reserved to the shareholders. No formal separation between managerial and supervisory activity exists at the board level.

B.2. The board of directors, however, has a flexible structure that allows a delegation of day-to-day operations and substantial decisional authority to a part of its members. Non-delegated members still retain authority to intervene in every decision. A separation between directors in charge of day-to-day operations and directors in charge of supervision exists in every medium-large company.

C. Board of auditors.

C.1. The board of auditors is formally charged with supervision over the administration of the company. Aside from the case of directors' conflict of interest, the board of auditors has no direct intervention or veto power over directors' decisions. However, it has an effective, even if indirect, means of

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86. As for the procedural requirements, auditors are liable on the same grounds as directors only if the shareholders, following a majority vote, authorize the suit. *See infra* note 110 and accompanying text.

preventing directors from committing unlawful acts. The board of auditors is not charged with the duty to review directors' business decisions on their merits.

C.2. The board of auditors is normally elected by the majority of shareholders, *i.e.*, by the same group that elects directors. Yet auditors, once elected, are relatively independent of shareholders and can challenge their resolutions, if invalid, in court. Moreover, auditors are normally interested in preserving their reputation and are risk-averse monitors as evidenced by the fact that their compensation does not depend on the performance of the company. Whether the board of auditors is an effective institution is an open question.[87]

III. THE SYSTEM OF CORPORATE DIRECTORS' LIABILITY: THE LAW

A. *The "Tortious Interference" Liability of Directors to Creditors.*

The system of corporate directors' liability is entirely consistent with the assumption that the key to Italian corporate governance structure lies in the tight relationship between directors and majority shareholders.

Directors can be liable (a) to the company (Civil Code art. 2392, 2393 (Italy)), (b) to its creditors (Civil Code art. 2394 (Italy)), and (c) to shareholders and third parties in general (Civil Code art. 2043, 2395 (Italy)). These different kinds of liability rest on different grounds. While the first is a consequence of directors' obligation to serve the company, the second and third derive from

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87. As promised *supra*, it is now time to keep pace with the differences between *società per azioni* and *società a responsabilità limitata*. As for the corporate governance structure, the most significant differences are the following:

(1) the institution of the board of auditors is mandatory only when the company has at least 200 million liras of stated capital or its activity is not minimal in size (i.e., when the company has for two consecutive years been meeting two of the following requirements: (a) total assets more than 3,090 million liras; (b) turnover more than 6,180 million liras; or (c) an average of more than 50 employees each year. C.c. arts. 2435, 2488 (Italy));

(2) when the board of auditors has not been instituted, each shareholder has inquiry and control powers, and shareholders representing one-third of the capital may perform an annual accounting control. C.c. art. 2489 (Italy);

(3) the default (but widely opted-out) rule is that only shareholders can be elected directors. Directors can serve indefinitely (i.e., an expiration date is not mandated as it is in the *s.p.a.*), but a shareholders' vote can always remove them; and

(4) the *società a responsabilità limitata* is the only kind of corporation that can be incorporated by a sole shareholder and is the sole kind of corporation that allows a sole shareholder to enjoy limited liability (C.c. arts. 2475(3), 2475-*bis*, 2497(2) (Italy)), provided that the shareholder is not an entity having legal personality and that certain other conditions are met. (The *società per azioni* can have a sole shareholder only once it has been incorporated, and in this case the sole shareholder is liable for the obligations of the company when some further conditions, set forth by C.c. art. 2362 (Italy), are met.) No significant changes occur when the *società a responsabilità limitata* has a sole shareholder, except that the transactions between the shareholder and the company must always be done in writing (C.c. art. 2490-*bis* (Italy)).

general principles of tort law. Putting aside directors' liability to the company for later examination, let us now deal with the other two kinds of liability briefly.

Directors, under the Civil Code art. 2394 (Italy), are liable to creditors when the assets of the company are insufficient to satisfy its obligations *and* directors have violated the "rules of preservation of the company's assets" (*e.g.*, they have distributed or wasted assets, or they have paid out more dividends than they were allowed).[88] This provision does not create a duty of the board owed to creditors of the company, but only imposes upon it a duty to abstain from prejudicing the relationship between the company and its creditors.[89] The most convincing theory, then, seems to be that which describes this provision as codifying a tort-of-interference liability.[90-91]

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88. C.c. art. 2394 (Italy) does not only concern illegal payment of dividends but also illegal repurchase of shares, stock watering, and in general every operation that has the effect of reducing the company's assets in violation of a specific provision of law. A strict causation between the operation and the insufficiency of the assets is usually not required. For example, an illegal payment of dividends can be attacked even if the company became insolvent at a later date.

89. It is interesting to discuss the possible outcome of the famous case Credit Lyonnais Bank, Nederland v. Pathe Communication Corporation, No. 12150, 1991 W.L. 277613 (Del. Ch. Dec. 30, 1991) under the Italian law. The case has stirred debate on whether the board of directors owes duties to the creditors of the company, and Chancellor Allen answered that, "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent for the residual risk bearers, but owes a duty to the corporate enterprise." *Id.* at 28. The board, then, cannot engage in overly speculative undertakings when the company is nearly insolvent. (A possible, more narrow reading of the case is that the board is not liable to the shareholders if it does not engage in speculative undertakings which may have a positive net present value for them but not for creditors: John C. Coffee, Jr., Corporations course, Columbia University School of Law, New York (Jan. 19, 1995).)

One of the criminal provisions accompanying the Italian bankruptcy law punishes directors who wasted a substantial part of the company's assets in "operations of mere chance or [ones which were] clearly imprudent" (art. 217, 224, Royal Decree of Mar. 16, No. 267). No one has ever read such provision as imposing an *affirmative* duty towards creditors. Actually, much of the debate following the *Credit Lyonnais Bank, Nederland v. Pathe Communication Corporation* opinion, which pigeon-holed the case as one about the "social responsibility" of the corporation, greatly exaggerated its importance. Are we really to think that the duty of a board of a nearly insolvent company to abstain from operations of pure chance is the consequence of its responsibility towards to the society at large? Or, instead, should we distinguish a non-existing duty to "benefit" creditors, which would prevent the board from taking any risk, from a simple duty not to impose avoidable and clearly unforseeable losses on the creditors?

Probably art. 2394 of the Italian Civil Code represents a reasonable compromise. Taken alone, it is more a "manifesto" provision than a provision frequently enforced and belongs clearly to the field of tort law, rather than to the field of the board's fiduciary duties. Moreover, it saves transaction costs, as creditors are granted a basic protection by default and do not need to resort to negotiation (which they are obviously free to do if, as can often be the case, the importance of the transaction commands higher and more specified standards of board conduct).

90. To be precise, the nature of the directors' liability to creditors has been discussed. A well-articulated theory asserts its contract-like nature, FRANCO BONELLI, LA RESPONSABILITÀ DEGLI AMMINISTRATORI DI SOCIETÀ PER AZIONI 187-89 (1992) (C.c. art. 2394 (Italy) sanctions a violation of specific duties to protect the interests of creditors). This construction, however

Creditors can sue directors under the Civil Code art. 2394 (Italy) directly, except when the company is in bankruptcy. In this case the trustee has standing to sue directors in the place of the individual creditors, and the recovery flows into the estate.[92]

B. *The General Tort Law Liability of Directors to Shareholders and Third Parties.*

Directors, according to general tort law principles, are also liable to shareholders or third parties they *directly* prejudiced while exercising their office (Civil Code art. 2043 (Italy), implicitly recalled by Civil Code art. 2395 (Italy)). Typical examples of such liability are the violation of preemptive rights, or misstatements on the financial condition of the company in connection with the purchase or sale of shares[93] or with the extension of credit to the company.[94]

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appealing, is not fully convincing; directors do not *personally* owe a duty to creditors, which would be required had this obligation been contractual in nature. The clearest reading of C.c. art. 2394 (Italy) as curbing "tortious interference" is in GALGANO, *supra* note 30, at 298.

The practical consequences of the dispute, however, are not really relevant. Courts do not require evidence of intent or negligence to be offered by creditors. More precisely, once it is established that directors violated their specific obligations toward the company, courts consider intent or negligence with respect to creditors irrelevant. Moreover, for this kind of obligation the statute of limitations is established directly by law. C.c. art. 2949(2) (Italy). Normally, the statute of limitation for obligations arising from a specific duty—improperly called "contractual obligation"—is 10 years, while that for tort obligations is five years).

91. For a particular hypothesis concerning directors' liability for continuing operations while the company is in a (qualified) economic crisis, *see infra* note 101.

92. It remains unsettled whether creditors lose standing to sue directors in case of *concordato preventivo* [judicial procedure for insolvent enterprises that the debtor, with the consent of a quorum of creditors, may elect as an alternative to bankruptcy: art. 160 to 184, Royal Decree of Mar. 16, No. 267]: *see* Judgment of Jan. 14, 1992, Appellate Court of Milan, 1993 GIURISPRUDENZA COMMERCIALE II, 63, and the following note by Simone Borella (creditors' action can be maintained after the judicial approval of the *concordato preventivo*).

93. In Italy, most of the securities frauds covered by Rule 10b-5 and 14a-9 under the Securities Exchange Act of 1934 would fall under general criminal and tort law (or contract law, if the parties are in privity of contract). Others would fall under the law on insider trading (Law of May 17, 1991, No. 157). Two interesting cases recognized standing to sue to shareholders of two large private banks that collapsed amid probes of fraud perpetrated by their presidents and other managers, on the basis that shareholders would have sold the shares had the financial statement not been falsified, i.e., a non-sale of securities (Order of Jan. 24, 1983, Tribunal of Milan, 1984 GIURISPRUDENZA COMMERCIALE II, 42; Order of Sept. 29, 1983, Tribunal of Milan, 1984 FORO ITALIANO I, 202, 1984 GIURISPRUDENZA COMMERCIALE II, 42). A complete comparison of the two systems, although interesting, exceeds the scope of this research and will not be attempted.

94. For an exhaustive analysis of most of the cases arising under C.c. art. 2395 (Italy) *see* BONELLI, *supra* note 90, at 198-205 & nn.98-103. A special provision, enacted as part of the reform of 1991 implementing the Third and Sixth European Directives on mergers and divisions

The requirement that the prejudice be "directly" caused by the directors, expressly stated by Civil Code art. 2395 (Italy), is commonly intended to preclude a direct suit for damages against directors, brought by shareholders alleging the loss of value of the stock due to directors' mismanagement or fraudulent practice; such injury is indeed the consequence of the injury to the company, and therefore does not "directly" affect shareholders. Besides, shareholders cannot sue directors derivatively, *i.e.*, on behalf of the corporation,[95] because no such provision exists.

The system of corporate governance, apparently neutral so far, begins to appear biased in favor of directors. It can be argued that general tort law (Civil Code art. 2043 (Italy))[96] would allow a shareholder to recover damages resulting from the loss of value of the stock; if that is so, art. 2395, far from allowing recovery for "direct" damages, precludes it for "indirect" ones. Moreover, the absence of a shareholders' derivative remedy in the Italian legal system, which progressively admits derivative suits as a general remedy for creditors, seems the product of a clear political choice.[97]

The barrier created by the law against shareholders' suits for directors' mismanagement or fraud is in fact not a result arrived at by chance; to the

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(splitting) of companies, expressly provides for the liability (also) of directors arising from the merger or division (C.c art. 2504(2) (Italy), recalled by C.c. art. 2504-*novies*(4) (Italy) for divisions). This liability, even if somewhat peculiar (it indeed can be used as a form of "appraisal remedy"), appears to be tort-like in nature and similar to that provided for by C.c. art. 2395 (Italy) (Alberto Picciau, *Osservazioni alle istruzioni del Tribunale di Milano per le omologazioni in materia di fusione*, 1991 GIURISPRUDENZA ITALIANA IV, 496, 510; Carlo Angelici, *La nullità della fusione*, 1992 RIVISTA DEL DIRITTO COMMERCIALE I, 267, 272; Lorenzo Stanghellini, *Osservazioni in materia di sindacabilità del rapporto di cambio nella fusione dopo la riforma del 1991*, 1995 GIURISPRUDENZA COMMERCIALE II, 127.

95. For the distinction between "direct" and "derivative" suits *see* CLARK, *supra* note 53, at 662-64 (suit is derivative "when the wrong complained of primarily constituted an injury to the corporation"; it is direct "when the injury was primarily to the shareholder(s) as such"); JESSE H. CHOPER, JOHN C. COFFEE, JR., & C. ROBERT MORRIS, JR., CASES AND MATERIALS ON CORPORATIONS 867-68 (1989) (direct suit when the plaintiff has been injured and has a cause of action, and the corporation is a real defendant; derivative suit when the corporation has been injured and has a cause of action and therefore it is only a nominal defendant).

96. "Any act, intentionally or negligently committed, causing damages to a third party, binds its author to indemnify the injured person for such damages." For a fascinating history of the evolution of the case law under C.c. art. 2043 (Italy) from 1942 to date *see* 3 BIGLIAZZI GERI ET AL., *supra* note 7, at 671-93.

97. C.c. art. 2900 (Italy) generally allows creditors to bring a derivative action to enforce debtor's rights that he neglects enforcing. The debtor is called upon as a nominal defendant. Moreover, by imposing on directors liability to the creditors of the corporation, C.c. art. 2394 (Italy) itself, examined *supra*, is derivative in nature (Judgment of Dec. 14, 1991, No. 13498, Cass. civ., 1992 FORO ITALIANO I, 1803).

This does not mean that shareholders should be considered like creditors; it only means that the absence of a derivative remedy seems particularly striking, and not fortuitous, in a system so attentive to protecting rights when enforcement depends on some action by the debtor.

contrary, legislative history demonstrates that this was precisely what legislators wanted to achieve.[98] This introduces the central topic of this paper: the liability of directors to the company.

C. *The Liability of Directors to the Company.*

1. *The Grounds.*

Directors must manage a company with the diligence of a prudent person.[99] The law does not explicitly impose a duty of diligence *and* a duty of good faith, but both are obviously considered by the courts. Cases concerning directors' liability can be classified as follows:[100]

(a) Cases finding that directors violated specific duties, set by the law or the charter. Here the courts often impose liability for the damages actually derived from the violations, under a quasi-*per se* rule.[101]

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98. This can be read between the lines of the Official Report of the Minister of Justice on the Civil Code, §§ 172-74 (see *infra* paragraph V.C.).

The preclusion of shareholders' direct suits against directors goes back to the Second Code of Commerce of 1882. An influential author of the time, approving such preclusion, described deplorable maneuvers and settlements of "strike suits" in the years before the reform, having both the effect of discouraging good directors and of allowing the recovery to flow directly into the pocket of shareholders (it is the same problem examined by Keenan v. Eshleman, 194 A. 40 (Del. Ch. 1937), *aff'd* 2 A.2d 904 (Del. 1938)): 2 CESARE VIVANTE, TRATTATO DI DIRITTO COMMERCIALE 471-72 (4th ed. 1912).

99. C.c. art. 2392(1) (Italy), remanding to C.c. art. 1710 (Italy). The Civil Code pays tribute to the Roman tradition in adopting the standard of the "good father of a family" (*"bonus paterfamilias"*). Apart from sexist concerns, totally absent when the Civil Code was enacted, courts have sometimes tried expressly to correct the standard, resorting to that of a normally skilled entrepreneur, mindful of the complexity of business management (Judgment of June 26, 1989, Tribunal of Milan, 1990 GIURISPRUDENZA COMMERCIALE II, 122). Implicitly, however, they have always adopted it, by refusing to consider ignorance of business and corporate law a valid excuse from liability (even criminal liability, in the case of bankruptcy). On the problem of judicial evolution, or lack thereof, of the Civil Code standard *see* Alessandro Arrigoni, *La responsabilità sociale degli amministratori tra regole e princìpi*, 1990 GIURISPRUDENZA COMMERCIALE II, 122 (note to Tribunal of Milan, Judgment of June 26, 1989).

100. BONELLI, *supra* note 90, at 10-109 (valuable and careful review of virtually all cases concerning directors' liability from 1942 to date).

101. Typical examples are falsification of book entries or the preparation of financial statements in violation of the law or the accounting principles, first steps of a pattern usually ending in bankruptcy. If the amount of assets falls below the amount of liabilities (or if the difference is positive, but less than two-thirds of the capital stated in the charter *and* less than 200 million liras), directors cannot start new operations and are required to call a shareholders' meeting (Civil Code art. 2447 (Italy)). If they instead keep on assuming new risks, they become jointly and severally liable for them (both toward the company and the contracting parties) (C.c. art. 2449 (Italy)). Often directors, for reasons of negligence or worse, omit disclosing the financial crisis or take steps to positively conceal it.

(b) Cases finding that directors acted negligently. Such cases are not very common: courts usually affirm their willingness not to interfere in business decisions, even though they have not developed a complete and consciously applied "business judgment rule."[102] When the courts do find directors liable, it is often possible to read some kind of interested directors' conduct between the lines, which the plaintiff has been unable to establish with absolute certainty.[103]

(c) Cases finding that directors acted in conflict of interest with the company. In these cases, the courts and, in some circumstances, the law itself impose strict liability for the resulting damages, if any.[104] Such cases are an overwhelming majority of the total: some of them deal with borderline questions (*e.g.*, parent-subsidiary relationship, corporate group policy),[105] most of them

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102. I dissent in part from BONELLI, *supra* note 90, at 63-66 & n.117. Italian courts, whether right or wrong, usually stress only their refusal to substitute their judgment for the directors' *as to the result*; they do not insist, as a precondition to granting immunity, on the procedural aspects through which the business decision has been reached (procedural aspects found relevant in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).

103. According to the study by FRANCO BONELLI, *La responsabilità degli amministratori*, *in* 4 TRATTATO DELLE SOCIETÀ PER AZIONI 321, 357-58 (Giovanni E. Colombo & Giuseppe B. Portale eds., 1991), from the enactment of the Civil Code to the end of the 1980s, only in a handful of published cases have directors been held liable on pure negligence counts; interestingly enough, CLARK, *supra* note 53, at 126, notes that "[n]ot infrequently, the facts suggest that the directors were actually being sued and held liable because of wrongful self-interested conduct—for a violation of their fiduciary duty of *loyalty*—and the courts' talk about duty of care is simply a way of letting the plaintiffs win without having to prove all the elements of a wrongful conflict of interests transaction."

104. The relationship between the directors and the company (that, mindful of the many differences between the Italian and the American legal systems, we will call a principal-agent relationship for the sake of simplicity), is governed partly by the general contract law and partly by specific corporate law provisions. More particularly, the former applies when the agent is a single individual (sole or delegated director), the latter when there is a collective decision and a resulting problem of quorum. (This does not mean that the resulting system is absolutely consistent or completely effective. For a critique of C.c. art. 2391 (Italy) *see supra* note 74.)

Under C.c. art. 1394 and art. 1218 (Italy), general contract law provisions, the principal has the right to avoid agent's self-dealing transactions and the right to be indemnified by him for the suffered losses. Under C.c. art. 2391 (Italy), especially concerned with the *società per azioni*, disinterested directors and auditors have the right to avoid a board's resolution adopted with the decisive vote of interested directors. Independently from the avoidance of the resolution, the interested directors are automatically liable for the losses derived from such resolution (C.c. art. 2391(2) (Italy)).

105. *See generally* Agostino Gambino, *Responsabilità amministrativa nei gruppi societari*, 1993 GIURISPRUDENZA COMMERCIALE I, 841; Francesco Galgano, *Il punto sulla giurisprudenza in materia di gruppi di società*, 1991 CONTRATTO E IMPRESA 897; BONELLI, *supra* note 90, at 95-106; Judgment of Sept. 14, 1976, No. 3150, Cass. civ., 1977 FORO ITALIANO I, 1998. The problem of corporate groups, not only under the profile of directors' liability, has been dealt with in a number of recent cases. Among the most interesting, *see* Judgment of Feb. 26, 1990, No. 1439, Cass. civ., 1990 FORO ITALIANO I, 1174; Judgment of Feb. 13, 1992, No. 1759, Cass. civ., 1992 LE SOCIETÀ' 794 (the best interests of a subsidiary must be judged with respect to the whole group policy and not with respect to the single act); Judgment of May 8, 1991, No. 5123, Cass.

with outright fraud. As we are more interested in a corporate governance perspective, we will not examine those cases in detail.

2. *The Procedure.*

A suit against directors on behalf of the company can be instituted in three cases:

(a) when shareholders, with a majority vote, have authorized it (Civil Code art. 2393(1) (Italy)); in this case the action is brought by the new directors or by an especially appointed agent for the company;

(b) when the court, requested by a quorum of shareholders or by the public prosecutor,[106] has ordered an investigation and, serious irregularities having been found, has appointed a temporary administrator (Civil Code art. 2409 (Italy)); the administrator has the power to bring a suit against directors;

(c) when the company is bankrupt; in such case the action is brought by the trustee,[107] authorized by the bankruptcy judge (art. 146, Royal Decree of Mar. 16, 1942, No. 267).[108]

From a corporate governance standpoint, the difference among these three hypotheses is apparent: while the second and third do not require the consensus of the majority of shareholders, the first does.

This may have important consequences. As paragraph V.A. will show, an overwhelming majority of the actions against directors is brought by bankruptcy trustees. Actions brought by companies in an ordinary situation following a vote by the majority of shareholders are very rare and so are actions brought under Civil Code art. 2409 (Italy) by administrators appointed by the court. Leaving for further consideration this last hypothesis (*infra* note 278 and accompanying text), several explanations for the asymmetric distribution of liability actions brought by the majority of shareholders and by bankruptcy trustees can be offered.

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civ., 1991 LE SOCIETÀ 1349 (narrowing the broad statements of the preceding cases, in a fact pattern where it was probably not strictly necessary).

106. The procedure has wider legal grounds for listed companies and standing requirements for large groups with insolvent companies (*see* FERRARA & CORSI, *supra* note 2, at 605), and is inapplicable to banks, where its place is taken by a procedure aiming at an intervention by the Bank of Italy (art. 70(7) Legislative Decree of Sept. 1, 1993, No. 385).

107. The trustee acts also on behalf of creditors, who lose individual standing (see *supra* note 92 and accompanying text).

108. Special insolvency procedures for particular kinds of companies provide for an action identical in structure: *e.g.*, the action is brought by the appointed commissioner during the forced administrative liquidation procedure, authorized by the supervising administrative agency (art. 206, Royal Decree of Mar. 16, No. 267; for banks, art. 84(5), Legislative Decree of Sept. 1, 1993, No. 385, authorization by the Bank of Italy), and by the administrator during the special reorganization procedure for large enterprises (art. 3(6), Law of Apr. 3, 1979, No. 95) (for some other cases and more details, *see* BONELLI, *supra* note 90, at 174-76).

First, it is a common experience that bankruptcy trustees often look for expedients to increase the value of the estate, and courts tend to be sympathetic to trustees.[109] The higher number of suits against directors of bankrupt companies can therefore be explained as the product of abnormal judicial pressure against directors in such a setting.

Second, it is much more likely that previous mistakes or wrongdoings are found in the pre-bankruptcy management of bankrupt companies because such actions tend to result in the company's insolvency more than normal managerial action does. The higher number of suits against directors of bankrupt companies can therefore be seen simply as a judicial reaction to illegal actions that lead a company into bankruptcy.

The first explanation assumes an abnormal distribution of judicial reactions, the second an abnormal distribution of starting points with which courts deal in a neutral way. Both explanations are probably true, but not exhaustive; in my opinion, a third possibility exists.

As previously discussed, to bring an action against directors, a majority vote by shareholders is necessary. No conclusion can therefore be drawn from a simple analysis of the actions actually instituted without *at least taking into consideration* the possible number of actions that the majority has stopped. In other words, a correct statistic should include both liability suits which were actually brought and those which were not. Unfortunately, published court reporters give accounts of the former, but not of the latter.

An indirect method can be used to second-guess the system of directors' liability without a majority vote requirement, however. We should look for cases that show an attempt to reach the same goal: to put pressure on the majority and on directors for some kind of alleged wrongdoing. Among these cases, we should try to spot those which, absent the majority vote requirement, would most likely have concerned a minority suit against directors.

At that point, the corporate governance picture could be considered almost complete. If cases showing a tension between the majority's and minority's dealing with management's choices are found, it will be clear that the law shields not the directors as such, but the directors as agents for the majority: given that

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109. I could cite scores of cases where courts appeared to be biased in favor of the trustees in bankruptcy (*see, e.g.*, the unmotivated reasoning of Judgment of July 25, 1987, No. 6467, Cass. civ., 1987 IL FALLIMENTO, 1246) (a particular kind of bank operation can be avoided when made within two years before the declaration of bankruptcy, instead of one year, because it is "essentially" an anoumalous form of payment and falls under the discipline of anomalous payments), or the fuzzy logic of Judgment of Dec. 10, 1992, No. 13095, Cass. civ., 1993 FORO ITALIANO I, 3100 (the shareholder of a company which later went bankrupt is not entitled to offset a debt for purchase of shares with a preexisting debt owed by the company to him "because the stated capital is the exterior image of the company")). The critique of such a form of bias has long been made (*see, e.g.*, FRANCESCO FERRARA, IL FALLIMENTO, v (1st ed. 1959)), and this is not the right place to continue it.

the majority *is* allowed to bring a suit, directors are protected only against the minority. As suits against auditors are subject to the same procedural requirements,[110] they too will fit into the picture as part of the game between the majority and minority.

After a second series of provisional conclusions (the paragraph that follows), in the next part we will examine the structure of Italian corporate ownership. Then we will come back to the question we have just left suspended.

D. *Summary of Part III.*

On a purely legal basis, the following conclusions on the liability of directors of *società per azioni* can be inferred.

A. Liability to creditors.

A.1. The law does not impose on the board the duty to act in the interests of creditors; however, it imposes a duty not to prejudice their interests by means of illegal acts.

A.2. This duty is sanctioned by allowing creditors to sue directors personally, through an action based on a "tort of interference" in their relationship with the company. When the company is in bankruptcy, creditors lose standing to sue directors in favor of the trustee.

B. Liability to shareholders and third parties.

B.1. General tort law principles would arguably allow shareholders and third parties to sue directors who have injured them. Civil Code art. 2395 (Italy) recalls such principles, but limits standing to persons whom directors injured "directly." Such a limitation prevents individual shareholders from suing directors simply for the loss of value of shares, which is considered an indirect, "second-grade" injury.

B.2. The Italian private law system, unlike most others, admits derivative suits as a general remedy for creditors; yet, Italian corporate law does not provide for derivative suits of shareholders, who, like creditors, have a right whose satisfaction depends on someone else's assets.

B.3. A provisional conclusion is that the system appears to be designed to shield directors from shareholders' suits. *But see* summary *infra* C.5.

C. Liability to the company.

C.1. Cases finding directors liable to the company can be classified under three headings: liability for violation of directors' specific duties, liability for negligence, and liability for conflict of interest. Courts tend to be rather strict in cases belonging to the first and third categories, and more or less consciously apply a sort of "business judgment rule" in cases belonging to the second category (negligence claims).

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110. C.c. art. 2407 (Italy) refers to art. 2393 and art. 2394 concerning the procedural requirements for suits brought against auditors by the company and its creditors.

C.2. Apart from an exception (provided for by Civil Code art. 2409 (Italy)), liability suits against directors can be instituted by the company itself, *following a majority vote of shareholders*, or when the company is in bankruptcy, by the bankruptcy trustee.

C.3. As a starting point to be supported by empirical evidence, we assumed that most actions for liability against directors are instituted by bankruptcy trustees, and that only a minority of such actions is instituted by non-bankrupt companies following a majority vote of shareholders.

C.4. We offered some possible non-corporate governance explanations of such abnormal distribution of plaintiffs in liability actions against directors. However, we advanced the hypothesis that the majority vote requirement may constitute an effective barring, preventing tensions between majority and minority shareholders over directors' mistakes or conflicts of interest from being resolved by a judicial decision.

C.5. Should this hypothesis be proven true, the majority vote requirement for liability suits against directors would assume a different significance: not a protection for directors, but a tool in the hands of the majority shareholders. The legal corporate governance system would reinforce the majority by protecting directors it elects against minority shareholders, and only against them. This conclusion, however, does not necessarily entail a negative valuation if it is not accompanied by the consideration of other factors concerning the balance of power between the majority and minority.

IV. LAW AND SOCIETY: THE ITALIAN INDUSTRIAL SYSTEM AND THE OWNERSHIP STRUCTURE OF ITALIAN COMPANIES

A. *An Industrial System Based on Small Firms.*

In recent years, the Italian gross national product ranked fifth in the world. Italy possesses, in all senses, a developed economy, fully integrated with the other major economies of the world. As is the case with any others, however, the Italian economy has its own peculiarities, the most striking of which is a particularly small average industrial size.

The Italian industrial system is based on small-medium firms. In the early '90s about 99.2% of Italian firms had less than 100 employees, and 95% of them had less than twenty employees.[111] Looking at the picture from a different point of view, in 1991 about 78% of the work force was employed by firms with no more than 500 employees, about 59% by firms with no more than 100 employees,

111. Statistics by Confindustria, IL SOLE - 24 ORE, May 19, 1994, at 1.

and about 32% by firms with less than ten employees.[112] All these percentages are significantly higher than those of other large European countries.[113]

Far from declining, this feature is becoming more marked. Thus, at the end of 1991, only 602 Italian manufacturing firms had more than 500 employees, and this number shrunk to 498 at the end of 1994.[114] More precisely, the trend shows a general decline of large firms *and* a tendency of small firms to grow both in number and in size.[115]

B. *A Follow-up: the Insufficiency of Data on Industrial Size in Assessing the Efficiency of the Italian Industrial System as a Whole.*

The smallness of average Italian industrial size is not the whole story. The number of employees a firm has tells only about the part of the economic activity that takes place inside the firm, under hierarchical coordination. It does not tell anything about the size and the structure of the economic activity that takes place

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112. Source: database Istituto Nazionale per la Previdenza Sociale—INPS (public agency on employment benefits), summarized in *Alle imprese piace il formato mignon*, IL SOLE - 24 ORE, Jan. 4, 1994, at 10 (data of 1991).

113. In Italy, 37% of firms have between 10 and 499 employees, compared with 27% in Germany, 20% in France and 15% in the United Kingdom (source: EUROSTAT 1992, quoted by MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, INDAGINE SULLE IMPRESE MANIFATTURIERE. QUINTO RAPPORTO SULL'INDUSTRIA ITALIANA E SULLA POLITICA INDUSTRIALE 66 (1994)). A recent survey of Swedish labor structure showed that in 1993, 70% of the Swedish manufacturing work force was employed by firms with 200 or more workers, and only 12% by firms with less than 10 workers. *Small isn't beautiful in Sweden*, THE ECONOMIST, Feb. 18, 1995, at 64.

114. Telephone interview with Giovanni Scanagatta, General Manager of Research Service of Mediocredito Centrale (Feb. 23, 1995) (citing from CERVED, electronic database of Italian Consortium of Chambers of Commerce. Mr. Scanagatta is the coordinator of the survey cited in the preceding note). Moreover, the national census of 1991 showed that the average for firms with more than 10 employees was 41.9 employees, down from 50.3 in the 1981 census. The same trend is shown by a comparison between data for the years 1984 and 1991 of INPS. *See supra* note 112).

115. This conclusion is drawn from multiple sources: SERVIZIO STUDI, MEDIOCREDITO CENTRALE, INDAGINE CONGIUNTURALE SULLE PICCOLE E MEDIE IMPRESE. SECONDA RILEVAZIONE GENNAIO 1995 ii, iv (draft Jan. 1995) (showing both a process of hiring new workers by small-medium firms and of creating new firms); Istituto Superiore di Statistica (summarized by Massimo Bongiovanni, *Piccole imprese, grandi numeri*, IL SOLE - 24 ORE, May 19, 1994, at 18) survey of years 1981-89 (showing an increase of 15.8% in firms with less than 20 employees, a decline of 6.2% in firms with 20 to 49 employees, a decline of 16.9% in firms with 50 to 99 employees, a decline of 21.2% in firms with 100 to 499 employees, and a decline of 25.2% in firms with more than 500 employees).

outside the firm, in the market, by means of instantaneous exchanges or in long-term, complex contractual arrangement.[116]

All this data tells is that the "efficient boundary"[117] of Italian firms are normally small. Possible determining factors and subjects of further research are: the role of labor laws imposing higher burdens on firms with more than a certain number of employees,[118] the role of "industrial districts" in which small homogeneous firms clustered in the same area achieve economies of various nature,[119] the existence of stable interfirm relationships mirroring the productive structure of large firms[120] or at any rate reducing transaction costs,[121] the existence of quasi-public agencies with the same goals,[122] and an unsuspected

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116. This is, of course, the kind of analysis suggested first by Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *reprinted in* RONALD H. COASE, THE FIRM, THE MARKET AND THE LAW 33 (1988); *id.*, *Industrial Organization: A Proposal for Research*, *in* POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59 (Victor R. Fuchs ed., 1972), *reprinted in* COASE, *supra*, at 57, 65, 74 (1988).

117. Ronald J. Gilson, *The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment*, 61 FORDHAM L. REV. 161, 162-63 (1992).

118. The most relevant burdens are triggered when the firm reaches or passes 16 employees (there are a few exceptions, and different ways of calculating the number of employees): art. 18, Law of May 20, 1970, No. 300, as amended by Law of May 11, 1990, No. 108 (duty to rehire non-high level employees dismissed without cause, and higher liability of the employer to them); art. 35 of the same law No. 300/1970 (unions' rights, some of them imposing direct costs on the employer). Additional burdens arise for the employer if the firm passes 35 employees, as the employer must hire a fixed percentage of people having a reduced ability to work.

A clear reaction of such burdens is the phenomenon of micro-groups of companies, often targeted by unions and workers and sanctioned by the courts as "fraud on the law." For a thorough analysis, and a critique, of such doctrine and of cases arising out of it, *see* Alberto Niccolai, *'Gruppi' di imprese, personalità giuridica e rapporto di lavoro*, 1990 NUOVA GIURISPRUDENZA CIVILE COMMENTATA II, 464.

119. For particular focus on the Italian experience of industrial districts, *see* MERCATO E FORZE LOCALI: IL DISTRETTO INDUSTRIALE (Giacomo Becattini ed., 1987).

120. According to the survey of MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113, at 47-48, about a quarter of the 4,811 firms in the sample (representative of the 64,463 Italian manufacturing firms with more than 10 employees in the years 1989-1991) work under subproduction agreements. The percentage is more than 33% in specialized industries (production of software, industrial machinery, etc.): *see* table No. 97.

121. MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113, at 15 (39% of the firms in the sample had at least one project of interfirm cooperation; *see also* tables No. 95-99).

122. Typical examples of such public or quasi-public agencies are export interfirm consortia, consortia aiming at lowering the cost of credit by means of a sort of mutual (limited) collateral, companies that insure export trade credits, etc. For a partly critical assessment of the Italian experience with such agencies, as compared to the French, British and German ones, *see generally* MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113, at 71-77.

tendency of Italian small firms to invest in R & D.[123] Other factors are less tangible, and their role is even less determinable here.[124]

Advantages and disadvantages of small size have long been described in Italy and abroad, and it is not possible to discuss them in detail. Among the advantages, reduced (or absent) agency costs and high flexibility stand out.[125] Among the disadvantages are the reduced ability to make strategic investments and a higher sensitivity to financial problems. Although the profitability of Italian small-medium firms is generally in line with that of large firms[126] and is comparable with the profitability of foreign corporations, we cannot reach a conclusion as to which structure is best, for the Italian economic system or others. If ever such a conclusion is reached, more evidence will be needed.

One thing, however, we can say: the Italian system constitutes a point in favor of the assumption that performance and size are not *necessarily* interrelated. This does not imply that, with the present technology and with the present legal and social system, *every* activity can be organized efficiently through small firms. The only conclusion that can be inferred from the Italian experience is that the economic data do not warrant the absolute desirability of a legal system *positively encouraging* intrafirm growth.

C. *The Important Role of the Public Enterprise System.*

Another characteristic of the Italian economic system is the strong presence of public enterprise. Wholly or majority State-owned companies have a legal

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123. *Id.* at 21, 24-25. *See* tables No. 51-65; DANIELE ARCHIBUGI & MARCO CECCAGNOLI, MEDIOCREDITO CENTRALE, INNOVAZIONE E INTERNAZIONALIZZAZIONE NELLE IMPRESE MANIFATTURIERE ITALIANE 7, 9, 19-29 (1994). Neverthless, surveys show that investments in R & D are not enough, and that they are higher in Northern Italy than in the rest of the country. Elio Pagnotta, *Poca innovazione in azienda*, IL SOLE - 24 ORE, Aug. 9, 1995, at 13.

124. I could cite a natural individualistic tendency of Italians, but some evidence is needed to introduce elements such as human behavior into an economic analysis. Progress in this direction has been made (Arthur T. Denzau & Douglass C. North, *Shared Mental Models: Ideologies and Institutions*, 47 KYKLOS 3 (1994) (emphasizing the importance of cultural heritage as a factor influencing economic choices)); a complete theory, however, seems well in the future.

125. MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113, at 36 and table No. 81 (showing that the highest percentage of firms exporting to Eastern Europe in 1989-91 were found among firms with less than 21 employees, which reveals a superior ability of small firms in exploiting newly opened markets).

126. There are situations in which performances of small-medium firms and of large firms differ, but such discrepancies seem due to economic trends rather than to permanent factors. For instance, the economic recession of 1992 hurt small firms more, but they were the first to react in 1993-94 (*compare* Paolo Gnes & Franco Varetto, *Piccole aziende col fiato grosso*, IL SOLE - 24 ORE, Sept. 24, 1993, at 31 (computerized analysis of financial statements of 9,100 Italian firms); *with* SERVIZIO STUDI, MEDIOCREDITO CENTRALE, INDAGINE CONGIUNTURALE SULLE PICCOLE E MEDIE IMPRESE. PRIMA RILEVAZIONE SETTEMBRE 1994 7, 8, 25, and SERVIZIO STUDI, MEDIOCREDITO CENTRALE, *supra* note 115, at iii-iv).

monopoly over production and distribution of electric power supply[127] and over cable telecommunications. The State directly or indirectly owns and operates an overwhelmingly large portion of the railway system and a large part of other transportation facilities, and owns large chunks of the steel and chemical industries and the financial sector.[128]

The role of the State in the industrial system is, at least in part, the product of forced choices. In the world economic crisis following the end of World War I, the State intervened in the collapse of the banking system, crippled by participation in industries which had become worthless. Such intervention carried two by-products whose consequences still endure: (a) the State was left with vast holdings in the largest banks and industrial complexes of the country, and (b) "firewalls" were erected between the banking and the industrial system to prevent the crisis from happening again.[129]

That system survived the fall of the Fascist regime in 1943, the establishment of the Republican democratic system in 1946, and the first post-war political elections in April 1948. In the following years, the public enterprise system was used as a tool of intervention, notably, but not only, in some depressed areas of Southern Italy, and as a means of assuaging social conflicts.[130] Thus, the public enterprise system assumed roles clearly beyond the simple production of goods and services in a free market.[131] The Italian economic boom during the '50s and '60s sustained both the profitability of a part of the system and the ability of the State to cover, by various means, the losses of the other part.

Both a changing and less favorable economic environment and the enactment and increasingly effective enforcement of art. 92 of the Treaty of Rome[132] by the European Community authorities produced a crisis in the public enterprise system, one that still lasts. The reduced economic and legal ability of

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127. Law of Dec. 6, 1962, No. 1643. Only recently has self-production for enterprises and groups of companies been allowed (art. 9, Law of Oct. 10, 1990, No. 287).

128. Financial institutions (mainly banks and insurance companies) were relatively easy to privatize, and, with the exception of Banca Nazionale del Lavoro (BNL), were privatized between the end of 1993 and the summer of 1994. *See infra* note 134.

129. For the analysis of the legal structure and consequences of the separation between banking and industrial system before the reform of 1992-1993 (on which see *infra* note 183 and accompanying text), see RENZO COSTI, L'ORDINAMENTO BANCARIO 330 (1st ed. 1986).

130. *See supra* note 57 for some examples of the problems created by the range and variety of activity committed to the public enterprise sector.

131. In Italy the State has assumed the conflicting roles of both "referee and player," according to a colorful metaphor of ROMANO PRODI, IL TEMPO DELLE SCELTE. LEZIONI DI ECONOMIA 84 (1992).

132. Art. 92, Par. 1, Treaty of Rome: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." Par. 2 of art. 92 sets forth some exceptions for aid having social purpose or development goals.

the State to inject money into the public sector resulted in systematic undercapitalization and, in some cases, in outright failures.[133]

The system, now for the first time under pressure by all political parties, will almost certainly undergo a drastic change in the next few years. Any forecast about its future size and role is thus impossible at the moment. It is enough to observe that, after more than sixty years, the effects of the post-World War I choices are still there. As we will soon see, the "firewalls" erected between banks and industry were dismantled only two years ago, when the industrial system was irreversibly shaped, and the long needed process of privatizing public enterprises is still taking its first steps.[134]

D. *The Ownership Structure of Unlisted Companies.*

Very large Italian businesses are run by companies that never went through a public offering. Public capital markets play a rather marginal role in Italy: a large part of the productive system is made up of companies not listed on any stock exchange or interdealer system, and whose capital is not otherwise widely traded.[135] This is hardly surprising given the small average industrial size, but

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133. Ente Finanziamento Industria Manifatturiera, or EFIM, one of the four largest public holdings, was liquidated by an emergency law. Government Decree-Law of July 18, 1992, No. 340, converted, after several reenactments, by Law of Feb. 17, 1993, No. 33. The crisis has not yet been completely solved after almost three years. Most of EFIM's assets, consisting of large mechanical and defense firms, have been transferred to the first public holding (IRI), and the debts, amounting to several trillion liras (1.7 trillion liras equals approximately one billion U.S. dollars), have been paid by the State, which was authorized to do so by the European Union.

134. The process of privatization of State-owned enterprises, heralded by several laws, accelerated dramatically in 1992 under the Amato Government. The collapse of EFIM (*see supra* note 133), a deep and still lasting public deficit, and a changed general consciousness of public-private relationship induced the Government, supported by the Parliament, to start a privatization program involving most state enterprises (art. 15, 16, Law of Aug. 8, 1992, No. 359). As of August 1995, only three banks (Credito Italiano, Banca Commerciale Italiana and Istituto Mobiliare Italiano), an insurance company (Istituto Nazionale delle Assicurazioni) and a few industrial companies (among them Nuovo Pignone, acquired by General Electric) have been privatized, principally through public offerings (for some of them the State has retained a minority share), but other important companies seem on the way (notably, the oil and natural gas holding, ENI, the telephone holding, Stet, and the electrical power company, ENEL).

135. Examples are extremely rare of companies that, although unlisted, are widely held and traded. (One of the few widely held unlisted companies, Banco S. Geminiano e S. Prospero s.p.a., a large local bank with a very unusual control group, was the target of a finally successful hostile takeover in October 1993.) The total volume of Italian over-the-counter trading amounts to a total of about one trillion liras [about $600 million] a year (Enzo Berlanda, Chairman CONSOB, quoted in Giuliano Boggiali, *Consob dice sì al Nasdaq*, IL SOLE - 24 ORE, May 28, 1994, at 21), and it is therefore negligible from our perspective. We can then fairly say that *only three* ownership patterns of *società per azioni* exist in practice:

(a) the closely held *società per azioni*, where "closely held" means held by very few shareholders, usually less than 10 and strictly related among themselves; again, I stress that in

several other factors, which will be examined in Paragraph IV.I., concurred.

Unlisted companies are usually controlled by an individual shareholder or by a close group of shareholders (often members of a family). Typically each shareholder owns a significant share of the capital, and a web of shareholders' agreements on corporate governance and of restrictions on transfers of shares keeps ownership firmly in the hands of the founding group.[136] Of course, no

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Italy, a closely held company *does not necessarily mean a small business*;

(b) the joint-venture, or consortium, with the form of *società per azioni*, whose shareholders are entrepreneurs incorporating the company to accomplish a specific task; the capital of this kind of company is not traded, the receipt of dividends not being the primary goal of shareholders. In many respects this is not a real, for-profit *società per azioni* and presents peculiar problems;

(c) the widely held, listed, *società per azioni*, with a clear subdivision between controlling shareholders and passive investors (even if the relative quantities may vary: *see infra* paragraphs IV.E. to IV.H.). (A similar, but not identical, three-fold division was made by 2 ASCARELLI, *supra* note 57, at 1003-07.)

136. Restrictions on transfer of shares are set forth in clauses of the charter or, less frequently in unlisted companies, they are a part of a broader shareholders' agreement. (Transfer restrictions on shares of listed companies can only be set forth in shareholders' agreements, free transferability of shares according to the charter being a precondition for a listing on the Italian Stock Exchange: see *infra* paragraph IV.G. The issue is, however, more complex than this, as there are some exceptions, and ownership caps have been deemed compatible with listing.) Restrictions on transfer of shares present several forms, and they are often extremely complex. On the basis of their structure, it is possible to single out five basic kinds of clauses limiting the free transfer of shares:

(a) *Clauses requiring the transfer be approved before it can take effect for the company*. The distinctive feature of this first kind of restriction is that the transfer may not take effect for the company unless discretionary approval is given. Approval is usually the prerogative of the board of directors or of the majority of the shareholders (including the shareholder who sells: it is not *as such* an antitakeover device similar in effect to the "control share acquisition statute" analyzed by RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 601-02 (Supp. 1993), for it has an antitakeover effect only in the rare cases in which the controlling group has less than the absolute majority). The Court of Cassation, reversing a well-established trend, ruled in 1978 that consent or denial cannot be absolutely discretionary (Judgment of May 15, 1978, No. 2365, Cass. civ., 1978 GIURISPRUDENZA COMMERCIALE II, 639), and the standard established by the Court of Cassation seems to have been written into law by art. 22, Law of June 4, 1985, No. 281. The amount of discretion deemed acceptable, however, is still far from clear.

(b) *Clauses giving a "power of first refusal" to shareholders*. This clause gives to a group of insiders, typically the remaining shareholders, the right to acquire pro-rata the shares of the selling shareholder, with preference over the prospective buyer chosen by the selling shareholder. The purchase price is usually equal to the amount agreed upon by the selling shareholder and the buyer; sometimes the price is directly or indirectly determined by the charter, in which case, in my opinion, the clause becomes closer to a repurchase clause (see *infra*). The right of first refusal clause is extremely common and heavily litigated for the following main reasons: (1) it is (questionably) immune from judicial criticism, unlike the clause requiring that the transfer be approved (whose role it has partly taken over in limiting the free transfer of shares), and (2) by its very structure and not in consequence of the dispersion of shareholders, it is the only clause that gives the minority the power to react when controlling shares are sold.

market for shares of such companies exists.

Small-medium companies are usually the product of the effort of an individual, or of a joint effort of closely related people. Their ownership structure tends to be absolutely homogeneous. Shareholders are directly interested in the firm[137] and sometimes are shareholders of a company exercising a related activity.

(c) *Clauses requiring that shareholders have personal qualities.* Such clauses give effect to transfers only if the purchaser possesses specific qualities, e.g., possesses a certain professional diploma or is engaged in a particular industry. They are common in professional companies (e.g., engineering companies) and in consortium-like companies (i.e., joint-ventures among a wide group of firms achieving economies or setting up a common service). These clauses may also appear elsewhere as an integrative, rarely exclusive device meant to control ownership. They are generally considered unproblematic.

(d) *Clauses imposing a ceiling on shareholders' ownership.* Largely unstudied, this kind of clause has recently been inserted in the charter of newly privatized companies, thus assuming a high political value. (No single shareholder, or group of shareholders associated, is supposed to acquire complete control of such companies; it is at least doubtful that the device of the ownership cap, as in fact it has been geared, can achieve such a goal). The effect of such clauses is to maintain the relative ownerships in an equilibrium envisioned by the first shareholders in the charter. (Problems arise for midstream amendments). The structure remains the same, but the substance changes according to the percentage of ownership allowed: a ceiling fixed at *three to ten per cent* can be found in joint-ventures among many firms or in real for-profit companies with a composite controlling group (not necessarily a public company, as the first Italian experience of privatization demonstrates); a ceiling fixed at *over ten percent* (very often at fifty per cent) can be found only in closely held corporations or in bilateral joint ventures in which the participating groups want to protect themselves against reversals of alliances. (For a clear example of such a factual pattern, *see* Judgment of Feb. 8, 1992, Tribunal of Milan, 1992 GIURISPRUDENZA ITALIANA I-2, 489, involving the descendants of the two founders of the company.)

(e) *Repurchase clauses.* Repurchase clauses give to some shareholders the right to acquire the shares of one or more shareholders when a certain event, provided for by the charter, occurs (typically, the discontinuation of an agreement for personal services or the death of a shareholder). The purposes of repurchase clauses can be various: to solve deadlock problems, to give incentives to the shareholders to offer valuable services (for a case involving shareholders of an insurance brokerage service corporation, *see* Judgment of July 14, 1982, Appellate Court of Milan, 1983 GIURISPRUDENZA COMMERCIALE II, 397) or, more often, to simply control ownership (for a clear example, *see* art. 6 of the charter of "Giovanni Agnelli & C. s.a.p.a.," *supra* note 10).

For statistics on restrictions on transfer of shares *see*, recently, Goffredo Zuddas et al., *Ancora sui limiti al trasferimento delle azioni nella pratica statutaria*, 1988 GIURISPRUDENZA COMMERCIALE I, 897; Giorgio M. Zamperetti, *Le clausole di gradimento nella recente prassi statutaria*, 1988 GIURISPRUDENZA COMMERCIALE I, 915. Both works, based on slightly different samples, show a very high frequency of restrictions (about 63% of companies recently incorporated had at least one kind of restriction, according to Zuddas et al., *supra*, at 901), and, in particular, right of first refusal clauses (more than 80% in the sample examined by Zamperetti, *supra*, at 916, concerning the Milan region).

137. This does not exclude the fact that shareholders are sometimes passive components of the controlling family. We can assume homogeneity of interests between active shareholders and members of their family, at least until a conflict arises.

Institutional investors are rarely found, and until now,[138] have been limited to merchant banks[139] and venture capitalists.[140] Shareholders (or managers of companies that are shareholders) and directors usually coincide, and typically the company hires full-time professional managers, who work closely under the supervision of directors.[141]

Given the homogeneity of shareholders, generally unlisted companies do not have institutional majorities and minorities. Of course, conflicts among shareholders do arise here also. However, the conflicts arise in most cases because, for some reason, the harmony that once reigned among shareholders has broken down, and not because there is real dissent over the management of the company. In other words, dissent over the management of unlisted companies is more likely to be *the product* of conflicts among shareholders than to be *their cause*.[142]

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138. Changes, even very important ones, might take place in the near future following the beginning of operations of closed-end investment funds, pursuant to the recent enactment of their discipline (Law of Aug. 14, 1993, No. 344) and the lifting of separation between banks and commercial firms (*see infra* note 182 and accompanying text).

139. The Italian merchant banking market is growing (37% of the newly listed Italian companies in the years 1987-91 came from operations of merchant banking) but is still not fully developed due to the absence of a strong secondary market and to an unfavorable tax regime. *See* Symposium, *Capitale di rischio in cerca di mercato*, IL SOLE - 24 ORE, May 11, 1993, at 28; Gianfranco Imperatori, *Merchant, sì al Nasdaq all'italiana*, IL SOLE - 24 ORE, Apr. 19, 1994, at 31.

140. As of 1993, Italy, with 3,802 billion ECU of total funds raised, had the fourth-ranking venture capital market in Europe, following the United Kingdom (17,038 billion ECU), France (8,570 billion ECU), and Germany (4,267 billion ECU), and preceding Holland (1,702 billion ECU), Spain (1,232 billion ECU) and Sweden (1,010 billion ECU). Still, the importance of the market is relatively limited in amount.

The peculiarities of the Italian venture capital market, as of 1993, were the following: (a) more than 71% of the funds came from banks, through subsidiaries, compared to about one-third of the European average; (b) few resources were directed toward start-up companies (11.4% of operations and 1.1% of amount invested), while most of them financed expansion projects (47.7% of operations and 63.7% of amount invested); and (c) the Italian market has a higher presence of foreign capital (20%) than the average (EUROPEAN VENTURE CAPITAL ASSOCIATION, 1993 REPORT, discussed in IL SOLE - 24 ORE, June 20, 1994, at 36).

141. This point will be stressed *infra* note 189 and accompanying text.

142. This is not to say that challenges to the management in this setting are usually without merit. The factual patterns underlying most judicial decisions show that very often conflicts among shareholders have turned directors from fiduciaries of all the shareholders into fiduciaries of the majority alone—or at least this is the claim of the minority. When this in fact has happened, and it is the task of the court to ascertain if it has, challenges do have merit. No *general* conclusion as to the merit of challenges to directors in a highly concentrated ownership structure context can be drawn, nor does it have to be. All we can say is that in such a setting, the legal system of directors' liability, rather than being a physiological monitoring tool *over directors*, determines the balance of power *between majority and minority shareholders*, thus influencing the outcome of conflicts between them.

E. *The Ownership Structure of Listed Companies.*

Italy has a rather small public stock market. In June 1995, only about 240 Italian companies were listed and regularly traded on the Italian automated stock exchange[143] and on the minor stock exchange.[144] In 1993, the total capitalization of the Italian Stock Exchange was about fifteen percent of the GNP, a percentage substantially lower than in other industrialized nations.[145]

Although a handful of Italian companies listed on foreign exchanges must be added to these numbers,[146] it is clear that few Italian companies, out of many more eligible,[147] resort to the public market for their financing needs. True, the number of Italian listed companies, and thus the Italian stock market as a whole, is growing.[148] Nevertheless, for some years to come, the public stock market will

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143. The "Borsa Valori" of Milan, which was the main Italian stock exchange, technically does not exist anymore. It was completely taken over in 1994 by an automated exchange system, whose administrative and operating headquarters are still in Milan. The reform has been implemented by CONSOB regulations, empowered to carry on a general reform of the Italian public financial market by art. 20, Law of Jan. 2, 1991, No. 1.

144. The *"Mercato ristretto" [Restricted stock exchange]*, has a limited importance and small daily volumes (an average of less than 10 million dollars in 1995). Minor stock exchanges can be established by joint public-private corporations, under CONSOB regulation of Sept. 30, 1994, No. 8469, *supra* note 22. Several projects have been started, but as of March 1995, none has begun operations.

145. In the same year, the percentage of capitalization was 21.2% in Germany, 37.6% in France, 61% in Holland, 66% in the United States, 68.2% in Japan, and 129% in the United Kingdom (Federico Rendina, *Borsa vietata ai piccoli e dominata da pochi 'big,'* IL SOLE - 24 ORE, Dec. 17, 1994, at 31). In early 1994, the total capitalization of the Italian Stock Exchange amounted to 290,607 trillion liras (Ettore Livini, *Piazza Affari, diluvio d'aumenti*, IL SOLE - 24 ORE, Oct. 27, 1994, at 31).

146. This is the case, for example, of Luxottica Group s.p.a. and Natuzzi s.p.a., listed on the New York Stock Exchange and not listed on the Italian Stock Exchange (for a survey of these two companies *see Italy's Luxottica and Natuzzi are showing that remote locations need not hinder growth*, FINANCIAL TIMES, Mar. 10, 1995, at 15). Companies listed both in Italy and abroad (*e.g.*, Fiat s.p.a.) are obviously not included in the count.

147. Experts estimate the number of Italian companies eligible for a public offering and following listing on the primary stock exchange to be between 1,000 (Attilio Ventura, Chairman of the Exchange Council, IL SOLE - 24 ORE, Mar. 26, 1994, at 29), 1,500 (Enzo Berlanda, chairman of the CONSOB, IL SOLE - 24 ORE, Apr. 9, 1994, at 25), and 1,700 (Antonio Fazio, Governor of the Bank of Italy, LA STAMPA, June 23, 1994, at 19). Extremely significant is the fact that the average capitalization of companies listed on the Italian Stock Exchange is roughly twice that of the companies listed on the NYSE (Source: CONSOB, quoted in Rendina, *supra* note 145).

148. The number of companies listed in Italy (primary stock exchange) grew from 147 in 1985 to 206 in 1993, while at the same time the number of companies listed on primary stock exchanges shrunk (slightly) from 489 to 472 in France, from 472 to 426 in Germany and from 2,188 to 1,927 in the United Kingdom (source: RAPPORTO IRS SUL MERCATO AZIONARIO 1993 (1994), discussed in Alberto Ronchetti, *Matricole cercansi*, MONDO ECONOMICO, Jan. 30, 1995,

probably remain a comparatively less important institution in Italy than it is abroad.

Even more important, however, is the ownership structure of these companies. Data regularly collected by the CONSOB, the supervisory agency for public capital markets, and regularly published pursuant to the Italian law on tender offers,[149] reveal that all but around fifty listed companies have a shareholder or a group of shareholders stably associated holding more than fifty percent of the voting capital.[150] Estimates keeping account also of "informal" associations among shareholders (family relationships, principally) put the number of companies without an absolute majority controlling group at around thirty.[151] All other companies, *i.e.*, more than 200, are not only closely watched by powerful shareholders but also takeover-proof.[152]

There is more. Even in companies with a float higher than fifty percent, shareholders have a strong voice; the same data shows that most of these companies have shareholders, or stable associations of shareholders, holding between fifteen and forty-nine percent.[153] Very few companies, also having large shareholders, are possible targets of hostile takeovers, and, interestingly enough, one of them *was* taken over in early 1995.

There are a few real public companies in Italy: the *banche popolari* [*popular banks*], many of which are listed and very healthy. They are public companies, however, not because of the spontaneous play of market forces,[154] but

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at 65). (The number of companies listed on the Italian Automated stock exchange was 222 in June 1995: *Fib 30 promosso nel semestre*, IL SOLE - 24 ORE, Aug. 9, 1995, at 23.) A decisive thrust to the increase in the number of listed companies has come from a very favorable, if temporary, tax regime introduced in 1994 for companies that choose to go public.

149. Art. 10(3), Law of Feb. 18, 1992, No. 149. Data are collected from notifications by shareholders having more than two per cent, mandated by art. 5 to 5-*sexies*, Law of June 7, 1974, No. 216. The first list of companies and percentages was embodied in *Comunicazione* CONSOB No. 92005380, published in GAZZETTA UFFICIALE, Aug. 3, 1992, No. 181, and is regularly updated.

150. "Voting capital" means capital giving the right to vote in ordinary meetings where directors are elected (*supra* note 37).

151. Walter Riolfi, *AAA public company cercasi*, IL SOLE - 24 ORE, July 19, 1994, at 29.

152. This is probably a slight overstatement because of the uncertain validity of shareholders' agreements. See *infra* paragraph IV.G. A scenario in which the agreement breaks down under pressure from a hostile bidder, and some of its members tender their shares is therefore theoretically possible. This did not happen, however, in a hostile takeover attempt of Banco Ambroveneto s.p.a. that took place in fll 1994. For more details, *see infra* note 175 and accompanying text.

153. *See infra* paragraph IV.H. for detailed data on ownership structure.

154. For "spontaneous play," I mean the play of market forces *once the regulatory framework is given*, as pointed out by ROE, *supra* note 16.

because of their peculiar legal structure, based on a very low ownership cap for each shareholder (0.5%) and on the one-shareholder-one-vote principle.[155]

Apart from this exception, for a number of reasons negligible from our perspective,[156] the governance structure of Italian companies rests on the influence of "strong owners" over not weak, but simply faithful managers.[157] Let

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155. Art. 30, Legislative Decree of Sept. 1, 1993, No. 385, has reformulated, and slightly amended, if not in this respect, a long-standing principle. Apart from some classical phenomenon of separation between ownership and control (fragmentation, absenteeism, self-perpetuating board, contexts for control in form other than a tender offer, etc.), which can easily fit into the traditional literature on the topic, the governance of the *banche popolari* is largely an unstudied subject.

156. *Banche popolari* have a fair, if far from dominant, share of the Italian retail banking market, and as noted in the text, they are performing well. The trend, however, appears to be towards their "demutualization," favored by the new banking law (art. 31, Legislative Decree of Sept. 1, 1993, No. 385). Moreover, it is clear that not every enterprise can be organized on the one-shareholder-one-vote principle and on such a low ownership cap. The success of such a scheme, indeed, is closely tied to the structure of the firm's activity and to the economic and social environment in which it operates. HENRY HANSMANN, THE OWNERSHIP OF THE ENTERPRISE (forthcoming, 1995) (success of mutual companies is higher in banking and insurance industries, due to asymmetric information between banks and insurance companies, on the one hand, and depositors and insureds, on the other hand. This success tends to decrease as the economy develops).

157. I am obviously borrowing the terminology, reversing it, from ROE, *supra* note 16. The phenomenon of shareholders' influence is so resistant that it has survived recent attempts to counter it by force of law. After intense political debate, and pursuant to a temporary Government Decree-Law enacted five times from September 1993 to May 1994 and finally converted by the Law of July 30, 1994, No. 474, an ownership cap varying from three to ten percent was introduced into the charter of newly privatized companies. At the first shareholders' meetings of the two banks with an ownership cap set at three percent, the directors were elected by a number of shareholders with significant holdings (from about 0.5 to almost 3%, totalling together between 15 and 20%), with a ratio between large shareholders and directors close to one-to-one. *See, e.g.*, as for Credito Italiano s.p.a., LA STAMPA, Apr. 18, 1994, at 12, and for Banca Commerciale Italiana s.p.a., IL SOLE - 24 ORE, Apr. 24, 1994).

For deep insights into the debate surrounding Italian privatizations see, in English, *On sale in Italy*, THE ECONOMIST, Oct. 16, 1993, at 15, and the response of the then Italian Minister for Industry, Paolo Savona, THE ECONOMIST, Dec. 18, 1993, at 6. In the former, the benefits of a popular-capitalism approach to Italian privatizations, and in the latter, the risks of a blind sale to not necessarily interested shareholders are outlined. As often happens when dealing with Italy, THE ECONOMIST, however well informed, had a quite factious and snobbish tone, and the polite remarks of Mr. Savona were fully justified regardless of which approach one favors.

For documents in Italian, see, on the so-called public company-approach (with ownership cap) side, Romano Prodi and the majority of the Ciampi government, under which the first flotations were implemented. See detailed accounts on this position in Umberto Mosetti & Vincenzo Visco, *I nemici della public company*, IL SOLE - 24 ORE, Oct. 14, 1993, at 6 (outlining the peculiarities of the Italian financial market); Giangiacomo Nardozzi, *La Borsa aspira ad un ruolo nelle nuove public company*, IL SOLE - 24 ORE, Feb. 13, 1994, at 19. (The Berlusconi Government followed the same road, but slightly changed the rule on the ownership cap, as a response to the partial failure of the experiment. See art. 3(3), Law of July 30, 1994, No. 474.)

us look at the causes of this phenomenon.

F. *Expanding the View: the Structure of the Control Group in Listed Companies.*

The control group in Italian listed companies currently presents only two possible forms: (a) a shareholder having alone a controlling share; (b) a group of shareholders acting together and controlling the company. No manager-controlled firm has emerged so far.

A. Control by a single shareholder. Even in large companies, a single shareholder often holds a controlling share. This concentration, however apparently impossible in large companies, has a simple explanation. Typically, such a shareholder is not an individual, but a holding company, which in turn is controlled by one or more large shareholders. Thus, the problem of the structure of the control group is not solved, but arises again at the next level (and possibly, further), which we will examine immediately below.

The device of "pyramided" holding companies as a means to retain control, well known since the time Berle and Means wrote,[158] has been widely used in Italy. Its effects have been amplified in the past by the possibility of listing on an exchange more than one of the members of the chain.[159] This possibility now remains only for holding companies performing a real economic activity, and has been suppressed for mere "Chinese boxes."[160] For our purposes, we simply "look

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On the opposite side, favoring a guided sale, or at least disfavoring any ownership cap, see Attilio Ventura, IL SOLE - 24 ORE, Dec. 9, 1993, at 29; Bruno Visentini, *La sconfitta di Prodi*, LA REPUBBLICA, Apr. 28, 1994, at 1 (vibrant critique of the experience of the first privatizations); Pier Giusto Jaeger, quoted in Giuliano Boggiali & Raffaella Zagordi, *La public? Solo uno slogan*, IL SOLE - 24 ORE, May 11, 1994, at 28 (diffused ownership cannot be created simply by force of law).

158. BERLE & MEANS, *supra* note 15, at 72-75.

159. A clear example of this phenomenon is the structure of the so-called "Orlando group," the largest European group for semi-finished copper products, as of January 1995 (a merger and some changes took place a few months later). Eleven shareholders form part of an agreement that controls the 63.1% of Gim s.p.a., listed on the Italian Stock Exchange, which controls the 47.6% of Smi s.p.a., listed on the Italian Stock Exchange as well, which in turn controls the 44.5% of Europa Metalli s.p.a., third company of the chain listed on the Italian Stock Exchange. (To go on with the game, Europa Metalli s.p.a. controls Kabelmetal Ag, listed on the Frankfurt Stock Exchange, and the group has subsidiaries all over Europe.) Both Smi s.p.a. and Europa Metalli s.p.a. have some large, very influential, "external" shareholders (graphics in IL SOLE - 24 ORE, Jan. 19, 1995, at 27).

160. Art. 6(2), Regulation CONSOB of May 24, 1989 No. 4088. The CONSOB reserves the right to deny approval of listing to companies "whose economic performance depends essentially on the economic performance of only one block of shares issued by a listed company," even if they possess all other requirements for listing. The Official Report of CONSOB on Regulation No. 4088/1989 stresses that such a company "lacks functional autonomy," and while a "holding company performs an activity of risk diversification and transformation, the 'Chinese

through" the holding company to discover the real controlling group. Behind it there might be a single shareholder, but very often there is a group, which takes us to the second class of hypotheses.

B. Control by a group of shareholders acting together. In almost every company the control is shared among a group of large shareholders. Such groups, however, assume in practice three different forms.

The first form is the family group, in which families exercise control. Normally family control is a remnant of the firm's founding process: it may resist time, remaining in perfect shape, but once it is lost it rarely comes back.[161] The nature of the relationship among shareholders may be sufficient to keep them aligned as a group; shareholders of a family may then waive the necessity to put the agreement in writing. When this happens—and it inevitably does when the family widens and ties loosen—the case falls in the second category.

The second form is control through a shareholders' agreement. This is probably the most common form for two reasons: not only do shareholders with a significant share of the capital normally agree on corporate governance, but in addition, shareholders having alone a potentially controlling share tend to stipulate agreements with other large shareholders.[162] Agreements vary in object and structure; their validity, and hence their enforceability, is highly doubtful. Due to their importance, we will further deal with shareholders' agreements below.

The third form of control is new, and rather mysterious. In a few newly privatized companies, apparently without any previous consultation, the largest shareholders have agreed to elect themselves to the board reciprocally (more precisely, to elect their representatives), thus giving rise to a strange kind of

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box,' set up by the majority shareholder to raise risk capital without imperiling his control, is only a means to minimizing contributed capital and risk."

A typical example of listed "Chinese box" is Bonifiche Siele s.p.a., whose sole relevant asset is an almost absolute majority holding in Banca Nazionale dell'Agricoltura s.p.a., also listed. This created serious problems in early 1995, in connection with the transfer of control of Bonifiche Siele s.p.a. because of the uncertainty about the obligation of the buyer to launch a follow-up tender offer on the stock of Banca Nazionale dell'Agricoltura s.p.a. This is required, in connection with transfer of control of *unlisted* parents of listed subsidiaries, by a (very reasonable) CONSOB interpretation of the Law of Feb. 18, 1992, No. 149, on tender offers.

161. An example of a successful family empire that escaped from the family's hands is the Ferruzzi group, which fell into a deep financial crisis in 1993 and was taken over by the creditor-banks. At the time of the change of ownership it was the second Italian private group after the Fiat group.

162. For example, this is the case of the shareholders' agreement involving Fiat s.p.a. The largest shareholder, sub-holding for the controlling family (which as a whole, directly or indirectly, holds a share around one-third of the capital of Fiat), has stipulated an agreement with four shareholders with shares ranging from two to around three percent. *See* IL SOLE - 24 ORE, May 14, 1994, at 31.

spontaneous-concerted action.[163] Many voices claimed the existence of undisclosed agreements between shareholders, but a CONSOB probe found no evidence of agreements whatsoever. It is instead very likely that each large shareholder, in a perfectly rational and independent way, decided to converge with the others in governing the company under a non-adversarial, cooperative model. Social studies might show how much the usual patterns of corporate governance—the "shared mental models" of the Italian business community[164]—have been at work.

The most interesting and problematic governance institution is shareholders' agreements. Let us look at them in further detail.

G. *Shareholders' Agreements as Non-legal, or At Least Only Partly Legal, Institutions of Governance of Italian Companies.*

Shareholders' agreements on corporate governance are one of the most controversial topics in Italian corporate law. Authors have different opinions as to their validity, while courts tend to look at them with suspicion.

Shareholders' agreements may involve the right to vote, the right to transfer shares, or both. Shareholders' agreements involving the right to transfer shares (so-called *"sindacati di blocco,"* or block syndicates) are not considered very problematic from the standpoint of validity,[165] and instead create serious problems of enforcement.[166] By virtue of these agreements, the parties usually agree not to dispose of their shares for a certain period of time, or grant each other a right of first refusal.

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163. *See supra* note 157, for the case of Credito Italiano s.p.a. and Banca Commerciale Italiana s.p.a.

164. Denzau & North, *supra* note 124.

165. *But see* Guido Rossi, *Le diverse prospettive dei sindacati azionari nelle società quotate e in quelle non quotate*, 1991 RIVISTA DELLE SOCIETÀ 1353, 1364-65, arguing against a different treatment of agreements involving the right to transfer the shares as opposed to agreements involving the right to vote (which will be examined subsequently in the text). It is true that the two sets of provisions are often intermingled, and tend to the same result; nevertheless, courts focus on provisions of the second kind, possibly to strike down the *entire* agreement (as happened in the Mondadori s.p.a. case, for which *see infra* note 167). The same distinction is made in France, where while courts seem favorable to the validity of "accords [qui] visent la transmission des titres," the validity of "[accords] sur la répartition des postes d'administrateur" is more uncertain. Yves Guyon, *Les Investisseurs Institutionelles en Droit Français*, *in* INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE, *supra* note 1, at 385, 395.

166. *See generally* Alessandro Pedersoli, *Sindacati di blocco: validità, tipi ed effetti*, *in* SINDACATI DI VOTO E SINDACATI DI BLOCCO 231 (Pier Giusto Jaeger & Franco Bonelli eds., 1993) (examining problems of judicial enforcement); Franco Bonelli, *Clausole di prelazione: modelli per evitarne l'aggiramento*, *in* SINDACATI DI VOTO E SINDACATI DI BLOCCO, *supra*, at 255 (examining problems of drafting effective block agreements).

The structure of shareholders' agreements involving the right to vote (so called "*sindacati di voto*," or vote syndicates) is usually much more complex. Such agreements present many shades of binding force for the contracting shareholders, ranging from mere commitments to meet before any scheduled meeting of the board or of shareholders, to commitments to vote as all the parties or a majority of them agree, to transfers of the syndicated shares to a fiduciary that will vote as the majority indicates, and to flat arrangements on how the board must be composed.

Courts consider shareholders' agreements which restrict the right to vote to be void. This means that most of the arrangements above described—indeed, the most effective arrangements from a corporate governance standpoint—are unenforceable. The argument in support of this conclusion rests on the illegality of every attempt to tamper with the free interplay of the company's organs, as structured by legislators. In other words, according to the courts, the default system of corporate governance can be modified—within precise limits—by the charter, but it cannot be deprived of significance by devices external to the corporate structure.[167]

Even if the most recent court decisions have smoothed its corners a little, this doctrine appears to be more emotionally based than sound.[168] Other theories against the validity of shareholders' agreements rest on different principles, which can be disposed of much less easily. The most convincing of them claims that shareholders' agreements in listed companies infringe the "equality of treatment" principle, which is mandated by market rules and by the legal system as a whole.[169] On the opposite side, other theories favor shareholders' agreements because of their legality and the opportunity, as devices to achieve

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167. For a careful step-by-step account of the (few) cases, *see* Mauro Bernardini, *Rivisitando la giurisprudenza sui sindacati di voto*, 1988 CONTRATTO E IMPRESA 716; the following affair, involving two large groups (Fininvest, controlled by Silvio Berlusconi, then still far from the political arena, and CIR, controlled by Carlo De Benedetti) fighting over the control of the Arnoldo Mondadori Editore s.p.a., started with cross-requests for injunctions in December 1989 and ended in an arbitration ruling affirming the validity of a complex shareholders' agreement, which was subsequently voided by Judgment of Jan. 14, 1991, Appellate court of Rome, 1991 GIURISPRUDENZA COMMERCIALE II, 448. (The dispute was eventually settled.)

168. For an excellent review and critique of the dominant courts' position, *see* FERRARA & CORSI, *supra* note 2, at 447-53.

169. Rossi, *supra* note 165, at 1367-74. The "equality of treatment" principle is now mandated, for listed companies, by art. 4-*ter*, Law of June 7, 1974, No. 216, introduced by Legislative Decree of Jan. 27, 1992, No. 89. This provision, however, does not automatically invalidate shareholders' agreements, as it refers only to how *the company* must treat its shareholders. (This provision may prevent some of the most aggressive takeover defense measures, which are known in America, such as poison pills; the great majority of them, however, would nevertheless incur in the general prohibition set forth by art. 16, Law of Feb. 18, 1992, No. 149, on tender offers, discussed briefly *infra* note 237.)

stability of management, to pursue long-term policies, and to make "business" prevail over "finance."[170]

It is evident that the matter is far from settled.[171] Both sides present very serious arguments; thus, formal reasoning aside, the question of the validity of shareholders' agreements is largely one of policy. Disfavoring secret governance arrangements cannot be used as a general argument against the validity of shareholders' agreements because, at least for listed companies, the CONSOB must be notified of the existence of arrangements involving the transfer of shares or the right to vote, and the content of these arrangements must be published.[172]

The phenomenon of shareholders' agreements, however, has a life of its own, far from the rumors and the publicity of courtrooms.[173] Shareholders' agreements are incredibly widespread, in small as well as in large companies. Moreover, in listed companies they appear to be the rule rather than the exception. Given the courts' criticism, of which everyone is obviously well aware, shareholders' agreements must rest on other institutions: honor, reputation, or fear of informal but nevertheless effective sanctions.[174]

It is beyond question that shareholders' agreements perform a primary role in the governance of Italian companies, especially listed companies. What remains to be seen is what kind of stability they give to the control group, *i.e.*, how they react under the pressure coming from a bidder. If they do not break up and tend to resist, then they can be considered an almost perfect substitute for a single shareholding when considering the stability of governance structure.

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170. Berardino Libonati, *Sindacato di voto e gestione d'impresa*, 1991 RIVISTA DEL DIRITTO COMMERCIALE I, 97, 103. Among those who deem shareholders' agreements generally valid, *see also* Pier Giusto Jaeger, *Il problema delle convenzioni di voto*, 1989 GIURISPRUDENZA COMMERCIALE I, 201; Renzo Costi, *Il problema della validità dei sindacati di voto nella legislazione più recente*, *in* SINDACATI DI VOTO E SINDACATI DI BLOCCO, *supra* note 166, at 25.

171. It is quite interesting to note that on both sides there are many authors with an extensive comparative knowledge (mostly French, German and American). For the most recent discussion of the topic, *see* SINDACATI DI VOTO E SINDACATI DI BLOCCO, *supra* note 166. *See also* Didier Martin, *Les conventions de vote en France*, *in* SINDACATI DI VOTO E SINDACATI DI BLOCCO, *supra*, at 377.

172. Art. 10(4), Law of Feb. 18, 1992, No. 149, recently amended by Law of July 30, 1994, No. 474. The publication of the content must be made in three national newspapers. Less extensive disclosure was previously mandated pursuant to CONSOB regulations.

173. "[T]here are in nature animals and plants we are able to see only in particular circumstances. This is the destiny of shareholders' agreements . . . .": Gaetano Castellano, *Il patto parasociale di Mediobanca; sindacato di voto e sindacato di blocco*, 1985 GIURISPRUDENZA COMMERCIALE I, 342. Now, at least regarding their visibility, things have changed, as their existence and content must be published (*see supra* note 172). One of the circumstances in the past in which it was possible to see shareholders' agreements at work was the battle for the control of Mondadori s.p.a., which was fought in the open and involved the use of every possible judicial weapon.

174. Some shareholders' agreements, however, are clearly drafted to avoid the possibility of being struck down by the courts. This is the case of the shareholders' agreement involving Fiat s.p.a., *supra* note 162.

In resolving this last issue, the judicial trend toward the invalidity of shareholders' agreements may play some role. Often such agreements provide for liquidated damages, and even more often they provide for self-enforcing techniques that effectively prevent adhering shareholders from withdrawing their shares before the expiration date. Thus, the anticipated outcome of a controversy with other shareholders may influence a shareholders' decision whether to tender in violation of a shareholders' agreement or not.

The Italian experience with hostile takeovers is still too little to advance a seriously based prediction on the behavior of shareholders' agreements in such a setting. An attack from a hostile bidder on a shareholders' agreement at the end of 1994 was unsuccessful;[175] this may be a sign that, when other rules are broken or other relationships are endangered, economic rewards may not be enough, or must be higher than normal, for the kind of actors that control Italian companies.[176] Such a situation may change in the near future, however, if, as is almost certain, new actors will enter the arena. We will explore this point below.

H. *The Nature and the Structure of the Control Group of Italian Companies.*

We now know how strong shareholders *as a group* are in listed and unlisted Italian companies, and how they arrange corporate governance; what we do not know is who they are and why they own shares. This is possibly the most interesting point. We have seen *supra* that control groups are normally very strong. In probing more deeply, let us look *into* the control group, searching for the dominant shareholder, if there is one.

According to the CONSOB, as of August 1992, only ten companies listed on the major stock exchange did not have a well-defined control group; apart from one exception,[177] however, the largest shareholder of these companies owned between 12.99 and 40.48% of the capital. All other companies had a stable control situation: twenty-two others had a dominant shareholder, owning between 34.93 and 49.47%; seven others had a shareholder that, although

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175. In the fall of 1994, a hostile bid was launched by Banca Commerciale Italiana s.p.a. for Banco Ambroveneto s.p.a., at the time governed by a shareholders' agreement gathering more than 50 percent. The bid, after being rejected by the members of the agreement (although with some coordination difficulties due to a shareholder willing to sell) was withdrawn. After the buyout of the dissenting shareholder, the agreement was first extended and then redrawn with less participants (*see* Antonio Quaglio, *Patto a tre per Bazoli*, IL SOLE - 24 ORE, July 25, 1995, at 25).

176. Of course, it may also be that the bid was considered too low by each of the parts of the shareholders' agreement, in which case the agreement played no role at all.

177. Assicurazioni Generali, one of the largest insurance groups in Europe, was shown as having its largest shareholders at 5.96%, but this number was later corrected to more than 12% due to a calculation which included shares temporarily issued to Mediobanca s.p.a. and not yet claimed by the holders of long-term warrants.

syndicated with others, dominated the company with a holding ranging between 31.01 and 66.40%; fifteen had a stable controlling syndicate ranging between 50.00 and 63.99%. The remaining listed companies, *i.e., around 150*, had a shareholder having more than the absolute majority.[178] Things have changed slightly since then, in some case significantly, but the overall ownership pattern still shows a very high concentration.

More importantly, both data and day-to-day experience show that most dominant or controlling shareholders of listed companies have traditionally been directly involved in the management of the company for a long time. Families of the founders or strong individuals control each company, either by themselves or jointly with other large shareholders. This is all the more true for unlisted companies, due to the factors noted above (IV.D).

The remaining members of the controlling group, in turn, are normally large or controlling shareholders of other companies and are sometimes involved in related industries. Shared control and minority holdings, when significant and part of a broader agreement, tend to form webs of stable interfirm relationships. Such relationships, however, remain mostly one-directional:[179] the law confines cross-ownership to small percentages of the capital, and circular ownership, although not expressly prohibited, faces some obstacles.[180]

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178. *Comunicazione* CONSOB No. 92005380, *in* GAZZETTA UFFICIALE, Aug. 3, 1992, No. 181. I have neglected data on the *"Mercato ristretto,"* regarding them as without great significance. Apart from the *banche popolari* (*supra* notes 155-156), such data showed an even higher ownership concentration.

179. Also for this reason, interfirm ownership seems to have little to do with the type found in the Japanese *keiretsu*, as described by Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871 (1993). The effect of shareholders' associations, however, may be similar.

180. This conclusion results from a simultaneous reading of a fairly intricate set of provisions. As the general provisions, C.c. art. 2360 (Italy) prohibits cross-issuance of shares, and C.c. art. 2359-*bis* (Italy), as amended by Legislative Decree of May 2, 1994, No. 315, limits to 10 percent the capital of the parent company that all the subsidiaries together can own and requires that the purchases be made only with earned surplus. This provision is complemented for listed companies by art. 5(8) Law of June 7, 1974, No. 216, which limits direct or indirect cross-ownership (other than between parent and subsidiaries) to two percent of the voting capital (ten percent between a listed company and an unlisted one). Other important prohibitions are also included in art. 5, Law 216/1974 (*e.g.*, the equivalence between ownership and discretionary power to vote in computing cross-ownership percentages: for example, a bank that has the power to vote its clients' shares cannot use such power to force another company to purchase its own shares).

Institutional investors have so far been the great absentee in the Italian stock market. The global size of their investment is relatively small,[181] and the portion of such investment represented by stock is even smaller.[182] Some financial institutions (banks and insurance companies) are very large, but their ability to invest in stock issued by non-financial firms is limited, and it was even more so until two years ago.[183] Other financial institutions are able to invest in

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181. The percentages of financial activities committed to institutional investors by households in some industrialized countries were in recent years the following:

	1985	1993
United States	44.3	54.7
Britain	25.7	36.8
Japan	25.3	34.5
France	12.3	27.0
Germany	21.6	26.1
Italy	4.5	9.6

Source: RAPPORTO IRS SUL MERCATO AZIONARIO, *supra* note 148. Almost identical percentages are shown, as for Italy, in *Survey of Italian Banking and Finance*, FIN. TIMES, Nov. 24, 1994, at 36 (high household savings on disposable income amount, but only 9.7% of the average household's financial assets entrusted to institutional investors).

182. As of December 31, 1993, institutional investors allowed to own stock (as for the banks, see recent developments *infra* note 183 and accompanying text) had stock amounting to only 33,778 billion liras, out of 387,964 billion liras of managed assets. The most important category of investor in stock was insurance companies (15,379 billion liras), followed by mutual funds (12,220 billion liras), account managers (4,573 billion liras), private pension funds (1,435 billion liras) and *"società d'intermediazione mobiliare"* [*supra* note 12] (171 billion liras). The largest type of investment was Italian Govermental bonds (229,126 billion liras), followed by foreign securities in general (68,312 billion liras) and private Italian bonds (44,400 billion liras). Stock was then a relatively unimportant investment, both in total and in relative size.

In detail, as of December 31, 1993 the composition of assets under professional management (in billion liras) was the following:

	Insurance Companies	Managed Accounts	Pension Funds (*)	Mutual Funds	SIM(**)
Italian Govt. Bonds	61,875	97,173	11,591	51,298	7,189
Bonds	25,654	14,849	1,134	2,174	589
Stock	15,379	4,573	1,435	12,220	171
Foreign Securities	17,727	13,576	858	35,243	908
Other	413	4,320	6,434	1,140	41
TOTAL (387,964)	121,048	134,491	21,452	102,075	8,898

(*) Estimated in part.

(**) S.I.M. stands for *"Società d'intermediazione mobiliare," supra* note 12. (Source: Sige s.p.a., in Ronchetti, *supra* note 148).

183. The implementation of the Second European Directive on banking (No. 89/646/CEE) caused a revision of the previous separation between the banking and industrial systems. Art. 22(1), Legislative Decree of Dec. 14, 1992, No. 481, followed by art. 53(1), Legislative Decree of Sept. 1, 1993, No. 385, mandated the Bank of Italy to determine the criteria for stock holding by banks. Following the mandate, the Bank of Italy on June 23, 1993, issued a regulation allowing minority ownership in non-banking firms (up to 15 % of the total capital of the firm, which can mean up to 30% of the voting capital: *see supra* note 37), provided that other

stock, but their total ownership is not very significant.[184] With few exceptions, in the portfolio of banks and insurance companies, then, there are only minority holdings and some controlling shares of other financial firms.[185] Moreover, proxy voting rules restrict greatly the ability of financial institutions to exert influence by voting clients' shares.[186]

The Italian system of corporate governance does not seem to have gray tones. Very few entities exist between large shareholders directly involved in the management of the company and passive investors; only one of them is outstanding for importance and know-how, and the benefits of its actions are not generally acknowledged.[187] All other institutions having a stake in listed

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conditions are met (adequate monitoring structure internal to the bank, sufficient diversification, etc.).

On the opposite side—i.e., ownership *of* banks—the law itself limits the ownership of a bank by non-financial firms: art. 19(6), Legislative Decree of Sept. 1, 1993, No. 385 (no ownership of more than 15% of the voting capital and in no event control of the bank by an entity predominantly engaged in non-financial activity).

184. As of December 31, 1993, the total stock ownership of mutual funds was around 5% of the total capitalization of companies listed on the Italian Stock Exchange, compared with around 10 % in 1986-87. The total ownership of the first 20 mutual funds in some of the largest Italian companies ranged between as high as 7.24% (Parmalat), 5.12% (SAI), 4.87% (Italcable), 4.19% (Ras), 3.88% (Stet), to as low as 2.53% (Benetton), 1.94% (Fiat), 0.83% (Olivetti) (source: Databank, *in* LA REPUBBLICA, Apr. 1, 1994, AFFARI E FINANZA, at 19). A mutual funds association (Assogestioni) recently set up a permanent commission to monitor the stock market and react to violation of formal regulations and ethical rules (*see* Giuliano Boggiali, *Assogestioni battezza l'Authority per vigilare sulle società del listino*, IL SOLE - 24 ORE, Mar. 26, 1994, at 29).

185. According to a leading expert of the field, Italian banks are not ready to accept the challenge of monitoring on non-financial firms (Mario Sarcinelli, quoted in Mario Calderoni, *"Non va la banca alla tedesca,"* IL SOLE - 24 ORE, Aug. 3, 1995, at 21). One of the few relevant cases of bank ownership in non-financial firms was the situation of the Ferruzzi group (which includes Montedison s.p.a.) in 1993-95. The group fell under the control of banks that, thanks to the above mentioned dismantling of the firewalls between banks and non-banking firms, in 1993 rescued it from a deep financial crisis through an exchange of stock for debt (*see supra* note 161). The controlling banks, however, far from seeing their control as a final state, are actively seeking a way to cash-out their investment, or to reduce its size in September 1995.)

186. C.c. art. 2372 (Italy) limits the number of proxies each person can be given and prohibits banks (and other people and entities, such as directors, auditors, subsidiaries, etc.) from receiving proxies. The rule was introduced in 1974 as part of a wider attempt to moralize the market and reduce separation between ownership and control, but it seems under many respects ill-conceived (*see* a critique by Pier Giusto Jaeger, *La nuova disciplina della rappresentanza azionaria*, 1974 GIURISPRUDENZA COMMERCIALE I, 554). This rule is considered burdensome and unfavorable for minority shareholders by American institutional investors (*see* interview of Howard Sherman of Institutional Investors Service, Washington D.C., in Giuliano Boggiali & Stefania Pensabene, *Italia nel mirino dei gestori Usa*, IL SOLE - 24 ORE, Mar. 5, 1994, at 21).

187. This institution is Mediobanca s.p.a., which buys and holds minority stock in financial and industrial companies. The role Mediobanca has played in shaping Italian capitalism is criticized by FABRIZIO BARCA, IMPRESE IN CERCA DI PADRONE. PROPRIETÀ E CONTROLLO NEL CAPITALISMO ITALIANO [FIRMS LOOKING FOR OWNERS. OWNERSHIP AND CONTROL IN ITALIAN CAPITALISM] 182, 204-06 (1994) (the institution survived the banking crisis of the early '30s as

companies (most of them holding companies) are vehicles for outright control, whether exerted by absolute majority or by a minority but controlling block.[188]

The practice of hiring professional managers for the highest level posts (namely, delegated director) is widespread,[189] and it seems to be entirely wise. Even so, the presence of large shareholders is strong, on the board as well as outside it, and their supervision of managers is extremely effective. We can fairly say, in sum, that large shareholders of Italian companies are nothing less than *entrepreneurs with limited liability.*[190]

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virtually the sole consulting service provider, and later assumed a role of capital provider; the effects of its actions, however, have been more to reinforce group and family relationships than to ease the optimal allocation of control). A critical assessment of Mediobanca's role is found also in *Mediobanca, Italy's Insider Bank, Wants To Write Guest List for Key Privatization*, THE WALL ST. J., Mar. 22, 1995, at A12 (relating to the possible role of Mediobanca in the future privatization of Stet s.p.a.).

188. Ronald J. Gilson & Reinier Kraakman, *Investment Companies as Guardian Shareholders: The Place of MSIC in the Corporate Governance Debate*, 45 STAN. L. REV. 985 (1993), describes the structure of institutions defined as Managerial Strategic Investment Companies (MSICs) and the legal constraint they would face in America. MSICs are institutions that make "large and active equity investments in a small portfolio of public companies" (*id.* at 992) and create value by constantly monitoring the management of portfolio companies, participating on their boards without assuming outright control over them. The authors (*id.* at 992 n.29) include among examples of European MSICs the Italian Ferruzzi Finanziaria, Compagnie Italiane Riunite (CIR), and Istituto Finanziario Industriale (IFI).

This inclusion is incorrect. Ferruzzi Finanziaria, CIR, and IFI do not appear to be simple monitors; rather, they appear *to fully control* their portfolio companies, and particularly the most important among them (which is, respectively, Montedison s.p.a., Olivetti s.p.a., and Fiat s.p.a., controlled through a less than absolute majority stake). True, they also have minority stakes, but such stakes are more "commitments" to reinforce strategic alliances than financial investments. In other words, Ferruzzi Finanziaria, CIR, and IFI are not monitoring institutions, but active enterprises in every sense.

189. The delegated directors of all the largest Italian groups (Fiat, Olivetti, Fininvest, Credito Italiano, Banca Commerciale Italiana, Benetton, etc.), are professional full-time managers, some of whom have served in more than one firm during their careers. A complete study of the background of managers, their incentives, their relationship with majority shareholders, and their ability to shift from one firm to another would give powerful insights into the Italian corporate governance system. Unfortunately, such a study still has to be done.

190. This is the underlying assumption of FRANCESCO CORSI, LEZIONI DI DIRITTO DELL'IMPRESA 166-68 (1992), who proposes a "research of the lost entrepreneur" for economic policy purposes. A *de facto* distinction between shareholders-entrepreneurs and shareholders-capital providers, long noticed, is particularly stressed by ROBERTO WEIGMANN, CONCORRENZA E MERCATO AZIONARIO 13 (1978); Pier Giusto Jaeger, *Gli azionisti: spunti per una discussione*, 1993 GIURISPRUDENZA COMMERCIALE 23, 38; Disiano Preite, *Investitori istituzionali e riforma del diritto delle società per azioni*, 1993 RIVISTA DELLE SOCIETÀ 476, 480.

I. *Factors Determining the Concentrated Ownership Structure of Italian Companies.*

Many factors can be traced as determining the peculiar, highly concentrated ownership structure of Italian companies. A complete assessment of the factors contributing to the present shape of Italian capitalism exceeds the scope of this paper. I will list only the most relevant among them. Factors that favored the concentration can be divided into two main categories: factors that have traditionally restrained the *offer* of equity capital by enterprises and factors that have restrained the *demand* of equity capital by investors.

In Italy, many firms, even very large ones, and entire industrial sectors have developed independently of the public market. There are many reasons for this peculiar phenomenon. First, in Italy the State has traditionally offered services that in America were offered by the first giant corporations. The development of railways, cited by many as a determining factor in early American development, was carried out by large public corporations, several of which were mentioned by Berle and Means,[191] whereas in Italy railway development was furthered by the State. The same can be said for public utilities. These undertakings by the State deprived the Italian public capital market of the pathbreaking examples of giant corporations, which could have been successfully imitated by other firms. And many large firms that actually *were* public ended under control of the State as a result of the crisis of the early '30s.

Moreover, a large part of the banking sector, whose ownership amounts to a very high total value, has never gone through a public offering of equity. Most Italian banks have indeed developed as not-for-profit institutions, with their roots going back centuries, and their growth has so far been financed internally.[192] (It was only in 1990 that a massive process of transformation of not-for-profit banks into *società per azioni* started,[193] with competitive and financing goals that in large part still have to be achieved.) The public market, then, has been deprived of potential equity not only directly by the State, but also by history.

Although important, these phenomena represent only the tip of the iceberg. The reality is that the bulk of Italian private industry has grown without the

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191. BERLE & MEANS, *supra* note 15, at 23. As for the case of the Pennsylvania Railroad, for example, *see* charts at 54-55.

192. For example, the *casse di risparmio* [*savings banks*], which together amount to a very large share of local retail banking, were foundations-public entities, as were other important banks. Most of them, pursuant to the law cited in the following note, have now undergone a process of transformation in *società per azioni*.

193. The process has been rendered possible by the Law of July 30, 1990, No. 218 (so-called "Amato Act," after the then Minister of the Treasury), and the following Legislative Decree of Nov. 20, 1990, No. 356. This law has allowed the unilateral incorporation of an ordinary *società per azioni* by the not-for-profit entity, accompanied by the transfer of the business and of most assets to it. The not-for-profit entities have so far remained the controlling shareholders of the newly-created for-profit banks, but spin-offs are likely to occur in the coming years.

contribution of the public stock market, and notwithstanding recent regulatory attempts to induce firms to go public,[194] has very strong incentives to continue to do so.

Italians have traditionally had very high savings quotas.[195] In the past, their savings were channelled into a banking system shielded from both intra-industry competition and external substitutes. Banks, then, had an abundant source of capital supply, readily available for enterprises. Banks, however, could offer only debt financing because of the restrictions laid down as a consequence of the crisis of the 30s, and most of that financing took a short-term form.[196] Probably as a consequence, the tax system has always been very favorable to debt financing, allowing a complete deduction of interest expense while taxing heavily corporate income and dividends.

When substitutes for bank deposits finally appeared and European integration exposed the Italian banking system to internal and external competition[197] the landscape was already shaped. Although only as lenders, banks had become the dominant form of financial intermediary in the Italian market, and enterprises continued to find it easier to resort to debt financing, which was also cheaper from a tax standpoint. The result has been that Italian

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194. Among which a three-year reduction of 16 percentage points in corporate income tax for firms that are newly listed on a stock exchange, adopted in summer 1994, stands out (art. 5, Law of Aug. 8, 1994, No. 489).

195. This is notorious: *see, e.g., Survey of Italian Banking and Finance, supra* note 181, at 36 (pointing out that household savings on disposable income amount to a higher proportion in Italy than in the United States, Japan, Germany, France and the United Kingdom). Having recently lost its long-standing leadership, in 1993 Italy was third among industrialized countries with 18.9% savings on disposable income, after Belgium (22.9%) and Portugal (21.3%), and before Greece and Denmark (15.8%), Ireland (14.8%), Japan (14.6%), and France (14.1%). Germany was tenth, with 12.1%, and the United States had only 4.6%. Last was Holland with 1.6% (source: data OECD, in *Terza nella graduatoria Ocse. L'Italia non è più il Paese leader per il risparmio*, IL SOLE - 24 ORE, July 13, 1994, at 4; *see also Financial Indicators*, THE ECONOMIST, Aug. 26, 1995, at 93, reporting an OECD forecast for 1995 in which Italy slides to the fourth position, after Belgium, Denmark, and Japan).

196. The banking law of 1936, besides limiting the ability of banks to invest in equity, fragmented their activities, dividing them between short-term lenders, on the one hand, and medium-long-term lenders, on the other, the rationale being that banks receiving demand deposit could not engage in other than short-term financing. As demand deposits were the predominant form of savings, the consequence was that most of the offer of financing for enterprises came as short-term debt. Thus, the capital structure of Italian firms is unbalanced toward short-term debt, with all the problems that this causes. (*See infra* note 198 for further data.)

197. *See* ALBERTO PREDIERI, IL NUOVO ASSETTO DEI MERCATI FINANZIARI E CREDITIZI NEL QUADRO DELLA CONCORRENZA COMUNITARIA (1992), and RENZO COSTI, L'ORDINAMENTO BANCARIO (2nd ed., 1994) for ample accounts on the gradual evolution of the banking system from a virtually protected market, under the original design of the Fascist legislation of 1936-38, to a market exposed to internal and external competition pursuant to the First and Second European Directives on banking.

firms tend to have highly leveraged and bank-dependent capital structures.[198] (This does not necessarily mean that Italian firms are subject to bank-monitoring: it is widely recognized that Italian banks are poor monitors,[199] at least when their credit exposure is not significant.)

The consequences of the availability and of the comparative economic advantage of debt financing can be intuited. Publicly owned firms have issued less equity than they otherwise would have, thus reducing the dilution of dominant ownership stakes, and extremely large and profitable firms have remained privately owned. Significantly, Italian firms that go public often adduce reasons of corporate *image* rather than of corporate *finance*,[200] and in general

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198. The phenomenon is particularly marked for unlisted companies, but even listed companies tend to be quite leveraged. The result is that Italian *società per azioni*, between 1988 and 1992, paid out 46 trillion liras as dividends and 450 trillion liras as interest expense on bank loans (Ronchetti, *supra* note 148). The average debt/equity ratio of 152 largest private Italian groups was in 1992 close to three to one, and even higher was such ratio in small-medium firms. The overwhelming majority of the debt capital comes from banks via direct financing (source: data Centrale dei Bilanci, summarized in Supp. to MONDO ECONOMICO, Dec. 25, 1993, at 251; Ronchetti, *supra* note 148; IL SOLE - 24 ORE, July 15, 1994, at 30). Moreover, such financing is generally short-term. On the heavier taxation of equity as compared to debt and the significance and scope of going public for small-medium firms *see* MERCATI FINANZIARI PER LE PICCOLE E MEDIE IMPRESE. ANALISI E PROGETTO PER IL CASO ITALIANO (Giancarlo Forestieri ed., 1993).

199. BARCA, *supra* note 187, at 207; GIANGIACOMO NARDOZZI, TRE SISTEMI CREDITIZI (1983); *id.*, *Le banche ago della transizione*, IL SOLE - 24 ORE, Oct. 4, 1993, at 6; Tommaso Padoa Schioppa, quoted in *La ripresa va, ma è senza credito*, LA STAMPA, Nov. 15, 1994, at 27 (Mr. Padoa Schioppa is the General Manager of the Bank of Italy). The reasons for this, stressed particularly by Professor Nardozzi, are that while the banking system is strong toward enterprises, individual banks are not, having chosen the easiest, if not necessarily the most efficient, way of limiting risk: diversification. Each bank lends a relatively small amount of money to each enterprise, which in turn resorts to multiple banks for its needs. Each bank is sure of losing a given percentage of loans to bad debtors, but it is unlikely to suffer losses heavier than the class of banks of the same kind (which is satisfactory for bank managers, according to the notorious phenomenon that managers risk more when the firm underperforms the market than when all the market performs badly; therefore, having asymmetric risks and asymmetric incentives, managers may consciously pursue suboptimal strategies: MICHAEL E. PORTER, COMPETITIVE STRATEGY (1980)).

Moreover, Italian banks perform virtually no consulting function since the banking crisis of the '30s (BARCA, *supra* note 187, at 204-05), possibly as a consequence of width of the portfolio of debtors.

Using a very effective metaphor (John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991)), we could then say that Italian banks have chosen "liquidity" rather than "control"; the economic system, however, is a net loser, as good entrepreneurs receive the same conditions as bad ones. We could then explore the reasons for this behavior, which in my view, not unlike the diagnosis of Professor Coffee for institutional money managers, lie in the lack of incentives for credit managers of banks to invest resources in selecting good borrowers.

200. This strange motivation is noticed by Attilio Ventura, quoted in Ronchetti, *supra* note 148. Mr. Ventura is a leading observer of the Italian stock market and is presently the Chairman of the Stock Exchange Council, supervisory authority on the Italian Stock Exchange set up by

entrepreneurs are wary both of going public and of letting in new shareholders.[201] Besides tax and economic factors, cultural factors also play a significant role.[202]

So far we have examined why firms have not resorted to the public stock market. Other elements, not less important, explain why investors have not found stock particularly attractive, or in any event why there has been relatively little demand for stock. First, up to now Italy has had, and even after the 1995 reform will continue to have, a pension system mostly based on the intervention of public or quasi-public agencies that tend to use the cash paid by present employees to pay benefits to retired workers. Nothing like American pension funds, one of the driving forces of American capital markets,[203] exists in Italy; Italian pension funds are made up only of voluntary, *additional* and therefore necessarily limited, retirement savings.

Furthermore, a huge public deficit has forced the State to continually drain capital from the public, thus diverting a large part of household savings from private capital markets into the Government's ailing coffers. In recent years, average Government bond yields, pushed up by the State's increasing financing needs, have been higher than most stocks.[204] Although this phenomenon cannot account entirely for the underdevelopment of the Italian stock market,[205] it is

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art. 24, Law of Jan. 2, 1991, No. 1. Many voices claim that going public would nevertheless be beneficial for many small-medium firms (*see also supra* note 147 for some impressive data on how many Italian firms would be eligible for listing), but many of them point at the costs of listing as a deterring obstacle (*see* Alberto Ronchetti, *E le aziende tornano a respirare*, MONDO ECONOMICO, Oct. 15, 1994, at 84).

201. MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113, at 248-52 and tables Nos. 68 to 72, shows a not very high 22.2% of the firms of the sample ready to accept participative financing, 21.3% ready to accept equity financing, and a mere 9.0% of firms deeming external equity financing particularly useful as a development tool. Table No. 69 shows what firms expect from equity financing: enhanced financial soundness, easier access to bank financing and consulting services by the entering shareholder. A previous unpublished draft of MINISTERO DELL'INDUSTRIA & MEDIOCREDITO CENTRALE, *supra* note 113 (draft Nov. 1993), contained a Table No. 68, which does not appear in the final version, eloquently showing what firms *fear* from equity financing coming from new shareholders (mainly, loss of autonomy and managing problems). For another survey on the motives that actually induced firms to ask for listing between 1985 and 1990, and motives that may deter firms from doing it, *see* Evelina Marchesini, *Un esercito di candidati con tutte le carte in regola*, in *Borsa. Guida alla Quotazione*, Supp. to IL SOLE - 24 ORE, July 27, 1994, at 5, and Marco Liera, *Troppi controlli e soci curiosi spaventano gli imprenditori*, in *Borsa. Guida alla Quotazione*, *supra*, at 7.

202. Jody Vender, quoted in Giuliano Boggiali & Ettore Livini, *La Borsa dei piccoli parla europeo*, IL SOLE - 24 ORE, Nov. 15, 1994, at 28.

203. *See* Gilson & Roe, *supra* note 179, at 898.

204. Emanuele Scarci, *Dividendo limitato/Azionisti di minoranza. Mai più parco buoi*, MONDO ECONOMICO, Aug. 6, 1994, at 68.

205. Giangiacomo Nardozzi, *Nel capitalismo made in Italy i limiti del listino*, IL SOLE - 24 ORE, Sept. 17, 1991, at 21 (stressing that the competition coming from public bonds is a relatively recent phenomenon, while the Italian stock market has always had a limited size).

likely to have played some role.[206]

J. *Completing the View. Factors Determining the Ownership Structure as a Whole: Long-term Entrepreneurs and Short-term Companions.*

In the preceding paragraphs we have seen that Italian unlisted companies, apart from very few exceptions and from change in alliances, are closely held and do not have well-defined majorities and minorities. We have next seen that listed companies, although widely held, are usually controlled by a stable control group formed by interested owners, and we have examined the structure of such control groups. We have then explored the causes of the peculiar, concentrated ownership of Italian companies. It is now time to complete the picture, examining who the remaining, non-interested, owners are, and why they invest their money in the firm.

Large shareholders involved in the management of the company have an incentive to retain earnings. On the one hand, profit retention is instrumental to the long-term view controlling shareholders are naturally inclined to follow. On the other hand, controlling shareholders are less likely to be affected by a systematically low stock yield, as they are able to be compensated through salaries, strategic alliances, acquired social prestige or other means.[207] Not only does the Italian legal system not *discourage* this practice, but it actually *encourages* it, at least to some extent. The exceptionally heavy taxation of corporate income constitutes a strong incentive to conceal earnings, and the financial reporting system, although less than before, renders some underestimate of income possible.[208]

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206. The daily trading volume on the *Mercato Telematico Secondario dei Titoli di Stato* [*Governmental Bond Automated Exchange*] reached 30 trillion liras in February 1995, while at the same time the daily trading volume on the Italian Stock Exchange did not pass one trillion liras, and its all-time record is around two trillion.

207. As preemptive rights can be waived only in specific cases and following a reinforced majority vote of shareholders (*See supra* note 40), stock options as an incentive for directors are quite difficult to implement once the company has gone public. The closest substitutes are long-term warrants that directors receive in their quality as shareholders (i.e., in proportion to their ownership).

When the company is privately owned, shareholders are able to profit not only from salaries that zero-out reported income, but also by shifting a part of personal expenses on to the firm: *see* Claudio Dematté, *Il Fisco spiazza l'erede in azienda*, IL SOLE - 24 ORE, Feb. 9, 1995, at 13 (pointing at the perverse effects of taxation on both the capital structure and the ease of the succession process in family-owned firms).

208. The transparency of reported earnings was significantly improved by the reform carried out by Legislative Decree of Apr. 9, 1991, No. 127, which implemented the Fourth and Seventh European Directives on the subject. The reform has on the one hand solved some issues over which there has been tension among shareholders (*see, e.g.*, Judgment of Feb. 27, 1985, No. 1699, Cass. civ., 1985 LE SOCIETA', 870: LIFO does not constitute an underestimate of income;

Profit retention produces an immediate selection among investors. The ability of shareholders other than those interested in the management to cash in retained earnings is limited to capital gains.[209] Not *every* investor, however, can focus its strategy on capital gains. On the one hand, the need for liquidity resulting from a capital gain strategy obviously discourages investors who follow it from buying large stakes and becoming actively involved,[210] while, on the other hand, the taxation of capital gains is more favorable for investors who sell small stakes.[211] The tax regime of equity investment, coupled with the presence of large shareholders, not only influences the relative proportion of debt and equity, but also influences how equity is subdivided. In other words, it shapes *the total ownership structure* of the firm.

Multiple factors combine to make shareholders of Italian companies cluster at two extremes: either controlling, interested entrepreneurs or small, disinterested investors. Shareholders' agreements fit the picture as compromises between the difficulty of dominant shareholders in retaining control and their reluctance to lose it. (It is my opinion, however, that shareholders' agreements

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the law now expressly allows it when adopted on a consistent basis). On the other hand the reform explicitly prohibits outright underestimates of income (*see* for instance C.c. art. 2423(4), 2324-*bis* (3), (Italy)). No law, however, can completely prevent financial reporting from being an extremely powerful governance tool (Berardino Libonati, Final remarks at the Meeting of the University of Florence, School of Economics, on the new law on financial reporting (Apr. 22, 1994)).

The law of Aug. 8, 1994, No. 503, in my opinion, marked significant regress on the road of fairness in financial reporting. This law allows depreciation and other income-reducing items for tax purposes to be used for financial reporting, thus assimilating two kinds of financial statements that serve totally different purposes. The change took place without any previous discussion by experts of corporate governance, probably as the result of a lobbying effort by strong owners-managers to which the government was sensitive.

209. The focus on capital gains may help explain why the Italian stock market, as far as price/earnings ratio is concerned, is very expensive as compared to others, and why new, high-priced issuances of stock are usually fully subscribed (*see* Francesco Micheli, *Questa Borsa così depressa e arretrata continua a essere la più cara d'Europa*, IL SOLE - 24 ORE, Oct. 30, 1991, at 23; Nardozzi, *supra* note 205; Scarci, *supra* note 204; a few signs of a slowdown of new issuances are observed in 1995: *Fib 30 promosso nel semestre*, *supra* note 148). Average industry yields range between a low of 1% of the price in the insurance industry and a "high" of 2.5% in the banking and trade industries. Companies' cash flow is indeed very high as compared to reported income, thanks to the reasons stated in the preceding note. This capital gain-orientation is seen in the Italian stock market's lack of sensitivity to change in dividends. (For some interesting examples, *see* Scarci, *supra* note 204).

210. A capital gain focused investor needs liquidity, which by its very nature discourages not only an involvement in control, but also the purchase of substantial stakes (Coffee, *supra* note 199).

211. Until a few years ago, Italy did not tax capital gains. Now, after the Government Decree-Law of Jan. 28, 1991, No. 27, converted by the law of Mar. 25, 1991 No. 102, and subsequently amended, the taxation of capital gains is waived for sale of stakes of less than two percent of listed companies. The past system strongly encouraged liquidity, and the present system still does.

are probably also a response to industrial organization problems.[212]) Large investors buy substantial stakes only if they can participate in the control group. Where this is not possible, they abstain from buying.

The picture is now complete. Italian companies have some strong, real owners, as well as many passive beneficiaries of their achievements, or lack thereof. Italian shareholders either manage the company long term, or tend to invest in it short term.

The nature of the Italian stock market is fully consistent with this assumption. It has frequently been said that the Italian stock market privileges short-term gains,[213] and it could not be otherwise. Transfers of control do not usually take place in the market, so that when the controlling stake is transferred short-hand, the law compels a sort of "shotgun wedding" between the buyer and the market: the buyer must launch a tender offer for the same quantity of shares at the same price.[214] Moreover, the law, by forcing the controlling shareholder to launch a tender offer for the remaining shares when the float falls below a certain level, recognizes the fact that the Italian stock market is a market for the exchange of minority blocks.[215]

Paralleling further Professor Roe's definition of the American corporate landscape,[216] we can say that Italian corporate governance is based on a triangle formed by strong owners, faithful managers, and short-term companions.

K. *Italian Corporate Governance: Some Final Remarks. The Majority Stake as the Most Important Institution of Italian Capitalism.*

As we have seen throughout the paper, the main feature of the Italian corporate governance system is the role of entrepreneurs. It is here that qualities and limits of this system reside. Scholars debate over whether it is best that powerful financial institutions monitor managers or that the market monitor them, and interest groups fight over which model to "suggest" to developing

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212. *See infra* note 231 and related text.

213. NOMISMA, RAPPORTO 1991 SULL'INDUSTRIA ITALIANA 113-56 (1992); Preite, *supra* note 190, at 477.

214. Art. 10(8), Law of Feb. 18, 1992, No. 149, on tender offers. This follow-up, mandatory tender offer increases the cost of acquisitions, thus creating an obvious obstacle to transfers of control that should be carefully weighed against the benefits of the resulting deepening of the market (*see* a very questionable interpretation of the law, given by CONSOB in connection with the privatization of Sme s.p.a., in *In arrivo il sì della Consob sull'Opa Sme*, IL SOLE - 24 ORE, Feb. 7, 1995, at 24, explicitly justified by the need to reduce the cost of transfer of control over the company). Any assessment of the effects of this provision is still premature, as significant changes are being observed from 1992-93 to 1994-95.

215. Art. 10(9), Law of Feb. 18, 1992, No. 149. The level of float below which the mandatory residual tender offer is triggered is generally set at 10 percent, but can be reduced by the CONSOB on a case-by-case basis.

216. ROE, *supra* note 16.

economies.[217] They may be missing an alternative: reducing agency costs by leaving management of firms to directly involved shareholders who are not monitored, but simply *restrained* in their otherwise absolute freedom by external institutions such as antitrust law, specific antifraud provisions, etc.

This possibility may be too simplistically stated, but at least it is worth considering. I do not see, for instance, an *a priori* advantage in fostering the creation of a public stock market in economies that lack a market culture,[218] or in committing to newly born financial institutions a monitoring function that proves to be extremely difficult even for mature financial institutions in mature economies.[219] As a safer alternative, I see fostering entrepreneurial culture and product market institutions at the expense of a growth in average firm size in the short run, if necessary. In other words, as entrepreneurs have a spontaneous incentive to perform well, an approach that privileges "buy" over "make" may be much more self-enforcing than one based on delicate checks and balances that require decades to be built.[220]

Italy is a living demonstration that such an approach can work and be extremely beneficial. Until very recently, banks have not been allowed to own stock, and even now they cannot control the voting process through proxies.[221] Other institutional investors are small, or are not otherwise very influential. Therefore, the largest part of the productive system has been financed almost exclusively through debt coming from banks abundantly supplied by large household savings. The availability of alternative sources of financing, coupled with other causes previously examined, has rendered development of a large stock market less critical. This is not necessarily good, but it shows that alternatives to both stock market and financial institution monitoring exists, compelling

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217. See a description of attempts to influence Eastern European countries to adopt either the German or the American model in Mark M. Nelson, *Two Styles of Business Vie in East Europe*, THE WALL ST. J., Apr. 3, 1995, at A10.

218. Which is the underlying motive of many studies on the subject favoring the adoption of rules that encourage monitoring by outside shareholders. Experience shows that very rarely, even in mature economies, investors buy large stakes *with external monitoring as the sole means of protecting their interests*; it is very unlikely that this could happen in a developing economy, in which the management faces less external constraints.

219. In Germany, the case of Schneider, supposedly monitored by powerful banks, and in France the repeated bailouts of Credit Lyonnais, crippled by an overly active investment policy, while not allowing radical conclusions to be drawn as to the alleged ineffectiveness of financial institution monitoring (which are instead drawn in *After Schneider. Germany should stop pretending that its corporate governance is working well*, THE ECONOMIST, Apr. 16, 1994, at 20), at least suggest that such activity is particularly difficult and, therefore, should not be left to less than very experienced financial institutions.

220. The debate over business law in Russia and other Eastern European countries seems in certain cases to overlook the intrinsic difficulty of public market and institutional monitoring and the far from absolute reliability of financial institutions in emerging countries.

221. *See supra* note 186.

scholars to consider not two (as they do now: *supra* note 1 and related text), but three alternative models of corporate governance.

The Italian industrial system has developed on the basis of an almost absolute coincidence between ownership and control. Equity is typically in the hands of directly involved shareholders, and the remaining part of the capital comes, as debt, from institutional *lenders*. When the growth of the firm requires more equity and endangers the exercise of control, strategic alliances among large shareholders tend to emerge. Therefore, the system and its formal and informal institutions, rather than allowing management to remain in control, have allowed owners-entrepreneurs to remain managers.[222]

This seems to be the Italian path. The many advantages are obvious, as are the many disadvantages. Although its governance model cannot be suggested as suitable for every social and economic environment, Italy demonstrates that, absent institutional investors and/or stock market pressure, other "institutions" come into play and keep the industrial system going. What instead remains to be seen is *what model prevails absent regulatory constraints*. It has been well argued that the Berle-Means corporation is the product of adaptation to regulatory constraints.[223] Instead, we do not know if the Italian corporation is *solely* the product of adaptation to other constraints, and particularly to the constraints on equity ownership by banks. In other words, we do not know if in the United States a large availability of bank capital,[224] coupled with Glass-Steagall limitations[225] but without any restraint on non-bank shareholders, would

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222. A significant example of tilted perspective is the otherwise remarkable paper by Randall Morck et al., *Management Ownership and Market Valuation, An Empirical Analysis*, 20 JOURNAL OF FINANCIAL ECONOMICS 293, 297 (1988). The authors, analyzing data on most Fortune 500 firms and finding only 14 of them totally management-controlled, write: "These results also corroborate the hypothesis . . . that firms in which management owns over 50% of the equity (and thus has complete control) should have a hard time surviving as organizations."

This statement seems affected by a logical flaw. The fact that few Fortune 500 firms are totally management-controlled supports only the proposition that it is problematic to reach a very large size while at the same time retaining complete control, and does not support the proposition that totally management-controlled firms do not grow or do not survive. The quoted statement could be logically translated in the following hypothetical report of an extra terrestrial for his or her home planet: "Humans can be short or tall. As few humans shorter than four feet are older than twenty, it follows that short humans usually die before reaching the age of twenty." (*See infra* note 239, for an analysis of this paper.)

223. ROE, *supra* note 16.

224. *Id.* at 54-59, points out that the deliberately fragmented banking system was "incapable of easily financing the new large scale industry": "[t]hose financing the new large enterprises ninety or a hundred years ago could not go to a big bank for one-stop shopping. No single bank was capable of providing the necessary financing."

225. On the prohibition against bank equity ownership, embedded in the Glass-Steagall Act and in other previously enacted sections of the National Bank Act, and in general on the deliberate regulatory efforts to weaken American banks and financial institutions, *see* ROE, *supra* note 16, at 26-49 and 94-101. The trend is now reversing, as a wave of bank mergers in 1995 testifies, and the recent case *NationsBank of North Carolina N.A. v. Variable Annuity Life*

have produced an Italian-style governance model instead of creating a mass stock market. Nor do we know if in Italy, absent the Glass-Steagall-like barriers erected after the collapse of the '30s, banks would have directed capital also to German-style large equity stakes instead of advancing capital only as loans.[226]

If there is uncertainty as to what the optimal model is, there is none as to the useful role of bank credit. The availability of bank financing widens the number of available alternatives, giving mid-range firms the option whether to go public or not. Moreover, banks are in a good position to fend for themselves with the debtor and to assess the debtor's risk. Thanks to bank financing, many large, if not exceptionally large, Italian firms (as well as German) go public when they choose to do so, and are not forced to do so as soon as they grow. Despite some very well-argued differing opinions, I do not see anything intrinsically wrong in this. Going public has its costs,[227] and the availability of more options normally means more efficient choices.[228]

Insurance Co., 115 S. Ct. 810 (1995), seems to be a signal of the political consensus for the attempt to disenfranchise banks from regulatory constraints. (In an important footnote 2, the Court stated: "We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh [of the National Bank Act] and that the Comptroller [of Currency] therefore has discretion to authorize activities beyond those specifically enumerated.")

226. *See also* Ronald J. Gilson, *Corporate Governance and Economic Efficiency*, in ASPECTS OF CORPORATE GOVERNANCE. THE STOCKHOLM SYMPOSIUM 131, 137-38 & n.17 (Mark Isaksson & Rolf Skog eds., 1994), for possible path-dependent explanations of the present role of Japanese financial intermediaries in corporate governance.

227. "Going public is a relatively time consuming and expensive means of raising capital, although the commensurate benefits may more than outweigh these disadvantages in the appropriate situation." (Carl W. Schneider et al., *Going Public: Practice, Procedure and Consequences*, 27 VILL. L. REV. 1, 50 (1980), *reprinted*, with later revisions, *in* RICHARD W. JENNINGS ET AL., Securities Regulation 164, 185 (7th ed. 1991)). Costs of being publicly owned for Italian firms are variously assessed (Giancarlo Pagliarini, *Federalismo, ma non in borsa*, IL SOLE - 24 ORE, Apr. 9, 1994, at 25; Franco Gallo, quoted in Marco Liera, *Consob e Bankitalia frenano le nozze fra banca e impresa*, IL SOLE - 24 ORE, Mar. 23, 1994, at 32), ranging between 300 million and one billion liras a year.

228. Two recent Italian works stand out for their completeness and the depth of their arguments in favor of a radical transformation of the Italian economic system and corporate governance. Preite, *supra* note 190, proposed a governance model based on separation between ownership, more than fifty percent of which should be on the market, and control, coupled by active monitoring by institutional investors and, if necessary, hostile takeovers. (Professor Preite, who died prematurely in 1994, was a young and extremely brilliant graduate from Milan and Yale.) He strongly favored shareholders-entrepreneurs to be replaced by professional managers, constantly submitted to the scrutiny of the market. I do not fully share this idea. First, the risks of managerialism may be less important than the risks of entrenchment, but they are very serious, as very serious are the problems encountered by proposals aimed at selecting effective monitors (*see*, for example, the problems of outside directors monitoring in Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991)). Monitoring by institutional investors, suggested as a solution (Preite, *supra*, at 519), is not an easy road at all. Moreover, as I noted above, the practice of selecting professional managers is widespread among Italian companies, and I think that "strong owners"

An assessment of the efficiency of Italian corporate governance follows the

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give at least *some* assurance that managers are effectively monitored (at most the problem being that the latter are too "faithful", *i.e.*, they lack autonomy). Second, I have problems with any argument that starts from the risk of inefficient use of private property to mandate solutions. Therefore, I concede that a shareholder with more than the absolute majority *can* be an inefficient manager or monitor of managers (as Professor Preite stated, for instance, at 504-05) and cannot be replaced. However, I do not see on the basis of which theory he or she should be expropriated of the right to manage the firm (of course, once minority shareholders are given some basic protection against abuses, on which the Italian system is weak: *see infra*, part IV).

Similar, in many respects, is BARCA, *supra* note 187, a comprehensive work on the structure of Italian capitalism. (Mr. Barca is manager of research with the Bank of Italy, and has been a visiting scholar at MIT). Mr. Barca's thesis is that the Italian system creates obstacles to the optimal allocation of control, thus preventing the natural selection of the most efficient users of the asset-firm. The diagnosis seems to be correct overall, and the thorough critique of some institutions of Italian capitalism and of the role of the State in the economy is convincing (*id.* at 187, 204). I cannot follow the argument, however, when it blames Italian capitalism for being a "capitalism without anonymous property," *i.e.*, where ownership and control coincide (*id.* at 185). Again, it is possible that non-anonymous (indeed, extremely active) owners will not be the most efficient ones, but I do not see any justification that compels the expropriation of their stability, so long as the means by which they retain control are fair. (What is fair, in turn, may be debatable.) Moreover, it is possible that shareholders' entrenchment limits growth, but this is not the end, since the market is a possible substitute, and often a very efficient one, for hierarchy. In other words, I agree that transfers of control should be eased, but I do not carry the argument to the conclusion that it should always be possible even against the will of the owner (*i.e.*, in practice, by means of a hostile takeover).

Objections to this kind of approach can go even further. What is "efficient" depends on a variety of factors, only part of which is strictly economically driven. In the same way that firms cannot be considered simply factors of production (as Coase, *The Nature of the Firm*, *supra* note 116, taught us). Also ownership rights over firms cannot be considered simply "factors of ownership," the efficiency of whose allocation can be measured regardless of the entire context. The context determines not only which class of "patrons" will own the firm (and on this aspect see the pathbreaking work by HANSMANN, *supra* note 156), but also how ownership will be structured among a class of patrons. For instance, the ownership structure of a closely held firm may be "inefficient," or "suboptimal" (this statement is rather common in Italy), but, given the people that run it, or given many other factors, a widely held firm might never have been born or might not have survived. (*See* the consideration of intangible factors that possibly contribute to shaping industrial organization in Ronald J. Gilson & Mark J. Roe, *supra* note 179, at 899. Japanese traditional reluctance to use the courts may have imposed a higher degree of vertical integration, which is a non-adversarial governance technique of long-term relationships.)

Therefore, which ownership structure is best, if there is one, is only partly assessable using solely economic tools, and it is an extremely difficult target of regulatory interventions. The preferable approach is not that of mandating solutions, but of creating alternatives (ROE, *supra* note 16, at xi). Once broad economic policy goals are set and regulatory-supervisory agencies are established, the availability of alternatives would presumably yield the ownership structure. Very strong arguments seem necessary to second-guess the optimality of spontaneous arrangements ("[I]t is a reasonable research strategy to assume that the agreements reflect the purposive behavior of the parties." (Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AMERICAN BEHAVIORAL SCIENTIST 337 (1980), *reprinted in* VICTOR P. GOLDBERG, READINGS IN THE ECONOMICS OF CONTRACT LAW 16, 17)).

finding that it is based on the action of strong owners. Among the advantages, reduced (or absent) agency costs[229] and convergence of interests among shareholders stand out. An active shareholder prevents managerial slack without incurring the possible conflict of interests inherent in a multi-dimensional monitoring.[230] Shareholders' agreements can be viewed as an institution that performs a useful role in industrial organization by creating long-term relationships among firms.[231]

Among the disadvantages, one finds risk of appropriation of corporate wealth and entrenchment (not by managers, but) by controlling shareholders.[232] While many institutions impose constraints on the ability of controlling shareholders to appropriate corporate resources, at least when the company is exposed to the attention of the public, the risk that controlling shareholders, fearing loss of control, may inadequately capitalize the firm is serious.[233]

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229. The well-known, black letter proposition that agency costs are inversely correlated with the managers' share in the firm's residual earnings is stated by Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 JOURNAL OF FINANCIAL ECONOMICS 305 (1976).

230. Gilson & Kraakman, *supra* note 188, at 1004-06 & n.82.

231. A key to the study of shareholders' agreements could lie in their comparison with the long-term relationships that make up for the Japanese *keiretsu*. The agreements could be considered "credible commitments" to stabilize long-term business relationships, whose governance would be costlier otherwise (OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1986)).

Of course, much of the debate is made of policy arguments. Mr. Barca, for instance, focuses on the fact that shareholders' agreements, by tying ownership with non-transferable relationships, reduce transferability of control, BARCA, *supra* note 187, at 185; Professor Preite disfavored them as obstacles to an effective institutional and market monitoring (Preite, *supra* note 190, at 546 & n.175, 551 n.191). As previously discussed (*supra* note 228), my opinion is that clear evidence of undesirable effects, particularly on third parties, is needed to deny the efficiency of relational arrangements chosen by fully informed parties. A consideration of the alleged negative effect of shareholders' agreements on the public stock market is not sufficient if it is not supported by evidence that the costs entailed are higher than any other possible efficiency gain (*i.e.*, particularly, transaction costs savings in the peculiar Italian setting).

232. A broad analysis of the possibilities of appropriation of corporate wealth by managers can be found in Eugene H. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 JOURNAL OF LAW AND ECO. 301 (1983).

233. Preite, *supra* note 190, at 505. *See* the case of a recapitalization that caused the controlling family ownership to fall below 50 percent, which clearly was forced only by a serious financial crisis (that later worsened), in *Ora Fochi teme la scalata*, IL SOLE - 24 ORE, Feb. 2, 1995, at 27.

The risk of inadequate capitalization is an inevitable by-product of the power of shareholders to decide on the issuance of shares. In fact, no rule can force a controlling or simply influential shareholder to vote a recapitalization that dilutes his or her influence. Only two alternatives are possible: (1) either managers are empowered to issue all the shares they deem necessary, as it is *de iure* or *de facto* the case in the American system (apart from some exceptions and stock exchanges rules requiring shareholder approval of certain large issuances) or (2) shareholders have tight control on the capital structure, as is the case in most European systems. Both have benefits

Particularly worrisome, finally, is the risk that powerful and strongly interested owners may collude with regulators and public agencies to obtain unlawful advantages.[234-235]

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and costs, and as incentives of controlling and non-controlling shareholders may differ, the choice of which of the two is better may depend on the predominant ownership structure. A system based on the influence of large shareholders may then suggest the adoption of the "European" approach, as absolute managerial discretion would change nothing in the substance, while subtracting the decision on capital structure to the disclosure, the checks and the balances imposed by the law on shareholders' voting. Therefore, the recurrent definition of the risk of insufficient capitalization of the firm as one of the possible "conflicts between the reasons of property and the reasons of business" is descriptive, but does not carry any prescriptive meaning as long as managers are not totally freed by shareholders' influence, which in turn carries other negative consequences.

234. In Italy, the issue of business ethics is very serious, as the recent wave of investigations has shown. It is a matter of notoriety that since February 1992, Italy has undergone what can be termed a "bloodless revolution." The bulk of investigations concerned illegal payments made by entrepreneurs to politicians and bureaucrats to influence public construction or supply contracts. The blame fell more on the bribed than on the bribing, who—no matter here how justly—claimed a sort of "state of necessity."

235. It is at least debatable, however, that a concentrated ownership structure is socially more dangerous than a dispersed one. Large and stable ownership, besides increasing the incentive to corrupt by increasing the share of benefits that such action yields to the corrupter, also increases public exposure, which has powerful restraining effects. One or more visible owners face more constraints by engaging in socially questionable conduct than managers that may claim that they act in the interests of anonymous shareholders and that have the alibi of maximizing their wealth (even when such wealth comes as a transfer from someone else's). The unscrupulous and aggressive, even if largely lawful, business behavior of the tobacco companies in western countries in the past and in developing countries today, is a clear example of lack of managerial moral constraints. (I want to stress that my point does not concern the question whether managers should enhance interests other than those of shareholders; it only concerns *the extent* to which managers are allowed to pursue the interests of shareholders. I am not advancing any theory about the issue of the social responsibility of the corporation.)

The position expressed in 1 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (b)(2) (1994) is interesting but somewhat affected by ambiguity: "Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: - (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law; - (2) *May* take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business . . . . " (emphasis added). Although the accompanying *Comment* (*id.* at *h*) states that making corporate decisions also on the basis of non-profit-maximizing ethical consideration is "not only appropriate, but desirable," the literal formulation of § 2.01 (b)(2) does not *recommend* such conduct: it only *insulates* managers that follow it from liablility.

By contrasting mandatory compliance with the law and voluntary observance of "ethical considerations," ALI places an enormous reliance on the promptness of the legal system in identifying and prohibiting every kind of unjustified wealth transfer, an ability which seems to me at least doubtful. (The problems encountered by even the most meritorious suits against the tobacco companies for their past conduct are evidence that complete reliance would be misplaced.) Possibly, ALI is giving up any attempt to curb the powerful force of the public stock market, pragmatically settling for objective criteria.

What is the role of the Italian public stock market as a governance institution? Its role is limited, but not negligible. Besides being a source of equity capital for large firms,[236] the public stock market is a (semi-strong) monitoring device on management. Indeed, although shareholders' concentration (and not the existing law)[237] usually prevents the controlling group from being replaced through a hostile tender offer, the stock market can put an inefficient management under strong pressure. Actual cases show that managerial entrenchment does not depend only on the size of ownership as some studies seem to assume,[238] and it is not complete even with the possession of the absolute majority of voting rights. Formal and informal mechanisms, other than hostile takeovers, may come into play.

It is clear that Italian corporate governance must be perfected, but its advantages and disadvantages cannot be separated. The incentive to a good performance that comes from large shareholdings may cause the entrenchment effect as a by-product. The stability that allows the managers' a long-term view may also reduce their incentive to maximize shareholders' wealth in the short as

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In sum, I strongly doubt that capitalism with anonymous property is socially more responsible than a capitalism with well-identified owners. (A dissimilar view seems to emerge in Giangiacomo Nardozzi, *Il capitalismo tutto in famiglia*, IL SOLE - 24 ORE, Apr. 24, 1994, at 22, where Italian industrial families are blamed for having turned to the Government to seek protection against competition. This is certainly true, but it remains to be seen if such behavior is to be traced to family concentrated ownership.) A different issue from desirable ownership structure is that of desirable business size, which underpins large parts of the American legal system: *see* ROE, *supra* note 16, at 21-49, although with particular focus on the fragmentation of financial institutions. Antitrust law, of course, is the most powerful tool of economic policy dealing with the issue of desirable business size.

236. *See supra* note 209, for the relative ease with which Italian firms can raise capital from the public.

237. The Italian law on tender offers has a double-face effect. It renders costlier the transfer of control by means of direct purchase of a controlling share, but restricts the target's management ability to implement defensive tactics once the hostile bid has been launched (respectively, art. 10(8) and art. 16, Law of Feb. 18, 1992, No. 149, on which see mixed thoughts *supra* note 214). This solution was modeled after the Thirteenth European Directive Proposal on company law (*see* Gilson, *supra* note 117).

238. The outcome of the recent crisis of the Ferruzzi group (*supra* note 185) is a clear example of the role played by the public stock market in such a setting. The group, due also to mismanagement by the members of the controlling group, fell in the spring of 1993 in a very serious financial crisis. The creditor banks not only managed to rescue it by giving up part of the credits and exchanging part of them for stock, but also obtained a liability suit against directors to be instituted through a shareholders' majority vote, both by the parent and by the largest subsidiary. While the first part of the agreement is a normal, value-creating step towards the solution of a financial crisis afflicting a productive business, the second is much less usual in Italy, as a suit against directors can be brought only if a majority of shareholders authorize it (C.c. art. 2393 (Italy): *supra* III.C.2). It is strongly arguable that, absent the pressure coming from the stock market, the deal between the majority shareholders and the banks would not have included any liability suit.

well as in the long term.[239] Therefore, an analysis of Italian corporate governance

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239. Recent studies have examined particularly the effects of ownership structure and shareholders' concentration on performance. None of them yields results warranting the conclusion that one kind of ownership structure is absolutely better than others. Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 JOURNAL OF POLITICAL ECONOMY 1155 (1985) find no absolute correlation between ownership concentration and performance of the company, but find some positive relationship when the firm has unstable profits, as the wealth gain a large shareholder can achieve increases when managerial performance is actively monitored.

The findings of Morck et al., *supra* note 222, who studied a large sample of Fortune 500 firms are very enticing. The authors verify the relative influence of the proposition by Jensen & Meckling, *supra* note 229, that agency costs increase with separation between ownership and control and the various theories according to which managers' control is likely to reduce other, countervailing incentives. The authors find that Tobin's *Q* (ratio of the firm's market value to the replacement cost of tangible assets, chosen as a proxy of the firms' performance), increases markedly between 0% and 5% of board ownership, then decreases between 5% and 25%, and finally increases slightly above 25%. The authors' hypothesis is that while agency costs decrease constantly as percentages of board ownership increase, managerial entrenchment increases significantly, more than offsetting the decrease in agency costs, between 5% and 25%, a percentage beyond which it is extremely difficult for hostile takeovers to succeed. This data seems to warrant the conclusion that some board ownership is good, but that too much is bad.

The authors offer some alternative explanations for the results of the experiment (*id.* at 312, increase in managerial ownership, rather than being the cause of the increase in Tobin's *Q* between 0% and 5%, is its effect, induced by the exercise of stock options by managers of successful firms) and offer different criteria to evaluate what *good performance* is (*id.* at 312-13, non value-maximizing behavior can be efficient for managers who have control). Nevertheless, this study appears a sophisticated statistical application on an ill-chosen sample. It does not seem wise to choose Fortune 500 firms to study board ownership, *i.e.*, to choose huge, manufacturing firms to assess ownership by *relatively few* individuals or entities: increasing the cost of control, large firm size is not a neutral factor in analyzing concentrated ownership. Therefore, giant corporations do not seem to me the right starting point to study the effect of board ownership on performance. (It is true that there are a few majority-owned firms even among Fortune 500 firms, but it is likely that they are exceptions, and it is at least arguable that their control has been retained *because* of some underperformance.) The problem of perspective casting doubts on the full acceptability of the study emerges from the statement quoted *supra* note 229.

A possible alternative explanation of the results reached in Morck et al., *supra*, is offered in Clifford G. Holderness & Dennis P. Sheehan, *The Role of Majority Shareholders in Publicly Held Corporations. An Exploratory Analysis*, 20 JOURNAL OF FINANCIAL ECONOMICS 317 (1988). This study is particularly interesting, as its sample consists of a large number of majority-owned firms, whose performance and other characteristics are measured against those of a random sample of comparable firms. The authors suggest that Tobin's *Q* may not be the right proxy to assess the performance of majority-owned firms as it does not fully incorporate any premium associated with transfer of control, which for majority-owned firms, although higher than zero, tend to be lower than for diffusely held firms (*id.* at 327-33, 342). In other words, stock price in majority owned firms does not reflect, or reflects in a lower measure, the premium shareholders usually get when control is transferred in a friendly or hostile takeover. (This may suggest that the "shotgun wedding" forced by the Italian law on tender offers examined *supra* note 214 and accompanying text, and even more the British mandatory 100% tender offer in connection with transfers of control, spreading over all outstanding stock the control premium, could induce a better sample

based only on shareholders' entrenchment and on the virtually non-existent possibility of hostile takeovers would be one-sided and a little naïve,[240] as would be a mere apology for the strength of small-medium Italian firms.[241]

Possibilities for opportunistic behavior by the majority, however, remain. Moreover, important changes are to be expected, changes that may render the now existent legal framework dramatically inadequate. The thrust provided by the majority stake, on which Italian capitalism has relied so far, could not be sufficient anymore to fully support the further development of the economic system. Part V, by proposing the introduction of minority shareholders' suits against directors for acts in conflict of interest, will try to offer a partial solution to this problem.

L. *The Way Ahead: The Foreseeable Developments.*

The previously described image of Italian corporate governance may undergo some significant changes in the years ahead. Many factors may contribute to inducing alternative corporate governance patterns, and in particular a pattern of bank monitoring, which will flank that based on the direct involvement of large shareholders. Possible causes include:

(a) In the next few years thousands of Italian firms will experience a generational transition, determined by demography.[242] Many among the most prestigious and active Italian firms were indeed founded between the '50s and the '60s, and they will soon face such a problem. According to estimates of experts, the transitional process will be massive, and its outcome will be of critical importance.[243] The solution of transition problems usually requires high liquidity,

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to measure the performance of majority-owned firms, as it spreads the control over all the outstanding stock.) The authors conclude that there is no significant difference between the performance majority and diffusely-held firms, and there is no evidence that majority shareholders use their influence to expropriate or consume corporate resources.

240. A bit paradoxically, a takeover-related reading of corporate law comes sometimes from Italian scholars. Much of the debate about the validity and the effects of the clause requiring transfer of shares to be approved to take effect for the company ("*clausola di gradimento*," *see supra* note 136) is based on its alleged antitakeover effects (*see*, for instance, Floriano d'Alessandro, *Le azioni*, *in* DIRITTO COMMERCIALE 250, 278-79 (Vincenzo Allegri et al. eds., 1993)), when virtually none of the many thousands that have this clause in their charter is a possible takeover target.

241. A balanced assessment is made in *Italian small business. Change in the heartland*, THE ECONOMIST, Apr. 2, 1994, at 73.

242. *See* Marcello Zacchè, *Dinastie industriali: generazioni al bivio*, MONDO ECONOMICO, Nov. 20, 1993, at 89.

243. Paolo Jovenitti, quoted in Zacchè, *supra* note 242.

and it is foreseeable that often liquidity will come from the public market or from bank equity financing.[244]

(b) The stock market is going to witness an extensive offer of equity that the actors now on the scene cannot satisfy. Privatizations of very large state-owned firms and massive recapitalizations by non-profit banks now turned into *società per azioni*[245] require capital widely in excess of that available to listed firms and to their present owners. A dominant role of the largest bank groups is not only predictable, but it is already on the horizon.[246] Although a change in the tendency to retain profits—with all that means for corporate governance—will probably follow by bank-owned companies,[247] what the overall governance pattern of these companies will be is far from clear.

(c) New institutional investors are appearing, whose potential, depending also on important political choices to be made, can turn out to be very high. While closed-end investment funds will not dominate, they seem likely to thrive in the Italian universe of healthy medium firms, provided that they are granted a less unfavorable tax regime than they are now.[248] Many medium firms could be financed and could eventually go public as an effect of closed-end fund financing. As for private pension funds, their future depends on the choices regarding the

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244. It is very likely that succession problems, more than midstream, ordinary financing, will constitute one of the primary settings in which Italian banks will intervene as equity capital providers.

245. *See supra* note 193.

246. *See I vertici Imi e Ina stringono i tempi per i nuclei stabili*, IL SOLE - 24 ORE, Mar. 4, 1995, at 28 (role of Cassa di Risparmio delle Provincie Lombarde, Istituto Bancario San Paolo di Torino, Monte dei Paschi di Siena, as "stable core" of shareholders in the privatized Istituto Mobiliare Italiano); Gianni Dragoni & Antonella Olivieri, *Sale la febbre per la Stet*, IL SOLE - 24 ORE, Mar. 9, 1995, at 25 (discussion of the future "stable core" in Stet) ("*nucleo stabile*," or "*stable core*," is an Italian translation of the French "*noyau dur*," i.e. the group of large shareholders charged with assuring stability to the management of newly privatized companies).

247. This is the (sensible) forecast of some fund managers, cited in Scarci, *supra* note 204. Using the analytic tools of transaction cost economics, we could say that financial institutions are more interested in immediate profits than in long-term industrial relationships, as their performance is easily comparable within the industry and their activity requires a lesser degree of integration with the activity of the firms they finance. (For a complete theory on the payoffs from vertical integration *see generally* WILLIAMSON, *supra* note 231; on transactional advantages and disadvantages as cause of the natural selection of the class of "patrons" that most efficiently can own the firm *see* HANSMANN, *supra* note 156; on firm's performance comparability as a cause of benefits from its concentrated ownership structure *see* Demsetz & Lehn, *supra* note 239, at 1158-60, whose suggestions on firm's performance instability as a cause of higher degree of ownership concentration can be logically extended to the payoffs from vertical integration in general.) True, the Japanese experience with bank-centered keiretsu may also suggest an interest of banks in long-term industrial relationships, but I am nevertheless convinced that bank ownership will at least reduce, even if not eliminate completely, the present very high profit-retention ratio of Italian companies.

248. They have been recently regulated by Law of Aug. 14, 1993, No. 344. Their major feature is their ability to invest in equity of unlisted companies.

public Social Security system, but the huge current public deficit renders the development of these funds almost inevitable.[249]

(d) Recently enacted regulations aim at boosting the importance of the stock market by granting exceptionally favorable tax advantages to companies that choose to go public[250] and by allowing minor stock exchanges to be established.[251] The effects of both of these interventions cannot presently be assessed, but they are likely to cause an increase in the resort to public capital markets by firms of medium size.

M. *The Need to Reform the System to Provide Strong Minority Monitoring.*

The expected increase in the importance of banks and of the public stock market urges us to rethink the continuing adequacy of the present legal framework of corporate governance. Bank ownership and new companies that go public mean more minority shareholders. An efficient system requires them to be protected and encouraged to invest in the firm.[252] The "new" generation of minority shareholders will probably demand more than paternalistic benevolence from majority owners. Their ability to monitor and, if necessary, to intervene will be critical.

Although Italian antitrust law is very recent,[253] and antitrust culture, particularly among regulators, is totally absent, the small average size and the economic environment provide the large majority of firms with sufficient incentives to perform well.[254-255] Even where it is competitive and efficient,

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249. Private pension funds have been regulated by the Legislative Decree of Apr. 21, 1993, No. 124. Their importance seems to have been boosted by the general reform implemented with Law of Aug. 8, 1995, No. 335. Accurate forecasts about their future role, however, are not possible yet.

250. *See supra* notes 24 and 194, for tax breaks and advantages allowed by art. 4, 5, Law of Aug. 8, 1994, No. 489. For a comment about the opportunities offered by these incentives see Attilio Ventura, *La Borsa si è modernizzata ma l'impresa resta lontana*, in *Borsa. Guida alla Quotazione*, *supra* note 201, at 2.

251. CONSOB Regulation adopted on Sept. 30, 1994, No. 8469 (*supra* note 22).

252. It is foreseeable that a higher level of investment in equity, especially by powerful business groups like banks, will create political pressure to reduce or eliminate the present tax disparity between debt and equity.

253. Law of Oct. 10, 1990, No. 287, almost literally modeled after the antitrust law of the European Union (art. 85, 86 Treaty of Rome, Regulation No. 4064 of Dec. 21, 1989).

254. Due to the small average firm size, most Italian product markets are extremely fragmented. Italian firms are exposed to foreign competition, which mainly comes from the European market, and they compete abroad. In recent years — also thanks to the devaluation of its currency — Italy has been consistently running a large commercial surplus.

255. The opinion expressed in *Competition in Italy. Call it authority?*, THE ECONOMIST, Apr. 8, 1995, at 60, is not justified. Acknowledging the work done so far by the *Autorità Garante della concorrenza e del mercato* [Italian antitrust commission], the article goes on to say: "The

however, product market monitoring is not enough, as its mechanisms sometimes work too late and are too costly.

"Society wins if [corporate] governance works."[256] In this respect, Italy stands only on one leg: the incentives and the self-discipline of large shareholders. Other forms of control over the performance of the company and its management are not completely effective[257] or are totally absent.[258] The restriction on shareholders' suits comes from a Civil Code that openly favored entrepreneurs, although as instruments of public policy.[259] They are not anymore, and they are now completely free to make their own choices, for which they must accept full responsibility.

The rule that prohibits shareholders' suits (Civil Code art. 2393 (Italy)) has probably limited minority investments until today. Part V offers a valuation of the *present* impact of such rule on corporate governance, and the conclusion is that it effectively compresses the powers of minority shareholders. This may have been costly, but it may be much more so in the future: deterring investments by banks or by other institutional investors, and deterring minority investments

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Autorità is less than four years old and operates in a country where competition is often frowned upon. More than anywhere else outside Asia, Italian business is built around dynastic alliances. Family empires, such as Fiat or Olivetti, do not necessarily share consumers' enthusiasm for letting more foreign cars or computers into Italy." *Id.* Here, rhetoric prevails over logic. First, there is a reasoning gap between the article's assessment of the *internal* governance structure of large Italian companies ("dynastic alliances") and the alleged anticompetitive effect of that structure, which manifestly would be an effect *external* to the firm. Second, the competitiveness of markets, fortunately, is not to be measured by the intent of those who compete, who very often would prefer to eliminate competitors, but by the concrete situation of the markets themselves, which can be very competitive despite any participants' effort to the contrary. In other words, what is relevant here is not what Fiat and Olivetti (or Wolkswagen, or Renault) *would* do, but what they *can* do, and the answer is to be looked for in the European and national antitrust laws as well as in their enforcement.

256. *See* ROE, *supra* note 16, at ix (referring to the lack of reaction to economic and technological changes by some large American firms, a lack of reaction possibly due to poor corporate governance).

257. As is the case, for instance, of the monitoring by creditors: apart from the structural weakness of Italian banks' monitoring, alluded to *supra* note 199, it is a notorious fact that creditors are not necessarily value-maximizers for shareholders. Monitoring by other institutional investors is weak because they have very small equity ownership (*supra* note 182).

258. The Italian law prohibits proxy fights *de facto* (*supra* note 186), and the stock market, although an important source of pressure in the event of a crisis, does not assure a performance valuation on an ongoing basis (the market being rather thin and capital gain-oriented: *supra* note 209). Moreover, very rarely management can be replaced through a hostile takeover (*supra* Part IV.E).

259. *See supra* note 5, for the role of managers as instruments of the superior economic interest of the enterprise and the Nation, envisioned by the Fascist legislation.

in general, may have dramatic effects.[260] A reform is necessary now, before it is too late.

N. *Summary of Part IV.*

The prevailing Italian corporate governance pattern and an assessment of it can be summarized as follows.

A. The Italian industrial system.

A.1. The relevance of small-medium firms in the industrial system is higher in Italy than in other industrialized countries. The overall productivity of Italian and foreign firms, however, is comparable.

A.2. A substantial part of the Italian GNP comes from the public enterprise system, whose large size has path-dependent and political causes. The trend is towards a massive privatization process, but a sure forecast on what the size of the Italian public system will be in the future is not possible.

B. The ownership structure of Italian companies.

B.1. Most Italian firms, even very large ones, are unlisted and privately held. Their ownership structure is extremely closed. Private companies do not usually have clearly defined majorities and minorities and are controlled by an individual or by a group of closely related individuals.

B.2. Consequently, the public stock market is comparatively less important in Italy than in other industrialized countries, as only few very large companies (about 240 in June 1995) are listed on a stock exchange.

B.3. The ownership structure of listed companies is based on the influence of large shareholders who often have the absolute majority of voting rights. In many Italian listed companies large shareholders set up stable associations that, due to judicial disfavor, rest more on participants' reputation and economic incentives than on their own binding force. Such associations may be playing a relevant role as industrial organization institutions that allow the governance of long-term relationships, but any assessment of them, independent of policy implications, is particularly difficult.

B.4. The remainder of the ownership structure of listed companies is made up of small capital gain-oriented shareholders, who invest short-term and have no voice in the management of the companies. Financial institutions, due to an only recently removed ban on equity holding by banks, play a limited role in the stock market.

B.5. Shareholders of Italian companies cluster at two extremes: either controlling, interested entrepreneurs or small, disinterested investors.

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260. It is not by chance that very often the scholars most sensitive to economic problems have favored derivative suits: *see, e.g.*, 2 ASCARELLI, *Schemi di progetti di legge sulle intese industriali e commerciali e in tema di società*, *in* PROBLEMI GIURIDICI, *supra* note 4, at 933, 941 (1959); Preite, *supra* note 190, at 562.

C. Managers and monitors in Italian corporate governance.

C.1. Although large firms often resort to professional managers, ownership and control in Italian companies are not separated. Closely held, unlisted companies are managed by 100% owners, or under their active supervision. Widely held, listed companies are managed by majority shareholders, acting alone or in stable associations, or under their active supervision. Italian capitalism is thus based on direct control of strong owners.

C.2. External monitoring on the activity of large shareholders is weak. Financial institutions are marginally involved as equity holders. Minority shareholders have little or no voice either in management or in monitoring. The public stock market can monitor managers and can put pressure on large shareholders, but normally cannot replace them in the control of the company.

C.3. Owners-managers of Italian companies, then, have strong incentives to perform well, but lack external monitors. The problem of lack of monitoring is particularly serious for acts in conflicts of interest, to avoid which spontaneous incentives are not sufficient.

C.4. Very important changes in the now prevailing ownership structure are to be expected in the near future, and minority shareholders will play a more important role in corporate governance than they have so far. Banks have recently been allowed to own equity in non-financial firms and they are starting to become actively involved as large, minority owners. Multiple factors will give the public stock market a more central role in Italian corporate governance.

C.5. A reform that empowers minority shareholders to bring suits against directors appears necessary to encourage substantial equity investments by minority shareholders.

V. CORPORATE GOVERNANCE IN ITALY AND the SYSTEM OF DIRECTORS' LIABILITY: A PROPOSAL FOR REFORM

A. *Directors' Accountability: Who are the Plaintiffs in Liability Suits against Directors?*

We have seen in Part III that directors can be liable either to the company or to individual shareholders,[261] but that only the company, and *not* individual shareholders, can sue directors for damages they caused to the firm. We have also seen that the suit brought by the company can be instituted only following authorization by a majority of the shareholders. Civil Code art. 2393 (Italy). In synthesis, then, shareholders cannot sue directors derivatively on behalf of the

261. We set aside liability to creditors and third parties (*supra* Parts III.A, III.B) as negligible from a corporate governance standpoint. It must be remembered that individual shareholders are entitled only to "direct" damages, *i.e.*, to damages *other* than those deriving from the loss of value of their shares (*supra* Part III.B).

company, and the decision to sue is taken by the company according to the majority principle.

It is now time to examine directors' liability "in action," to understand how directors' liability is actually enforced. The starting point of the analysis is to understand who plaintiffs really are, *i.e.*, who resorts to the courts asking for directors to be held accountable. As a statistical sample, I have chosen cases in which courts were asked *either by companies or by individual shareholders*, on any ground, to award a monetary recovery against directors of companies as a consequence of their action. Among all cases published between 1981 and 1992, seventy-two present this characteristic.[262]

We first examine actions brought by the company. Actions against directors on behalf of the company may be brought (*supra* III.C.2): (a) by new directors or by a specially appointed agent for the company, following authorization by a majority of the shareholders (art. 2393(1) Civil Code); (b) by a bankruptcy trustee (art. 146, Royal Decree of Mar. 16, No. 267); (c) by a temporary administrator appointed by the court following an investigation (art. 2409 Civil Code).

The overwhelming majority of suits against directors for liability to the company is brought by bankruptcy trustees. A very small number of suits are brought by non-bankrupt companies following a majority vote of shareholders. Only a tiny fraction of liability suits are brought by court-appointed administrators.[263] The first finding, then, is that *very rarely* does a majority of the shareholders decide to institute an action for liability against directors.[264]

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262. The statistical sample consists of a selection based on cases classified under the appropriate headings in FORO ITALIANO. REPERTORIO, annual editions between 1981 and 1992 (these years included). In selecting the relevant cases, I applied the following criteria: (a) cases where the court dealt with directors' liability only in dictum have been excluded; (b) cases classified under multiple headings have been counted only once; and (c) cases concerning the same parts, but decided at different levels (e.g., Appellate Court *and* Court of Cassation), have been also counted only once.

The sample includes cases decided both by the Court of Cassation and by lower courts (Appellate Courts, Tribunals). While virtually all decisions issued by the Court of Cassation are published in full text or abridged, only a relatively small part of decisions issued by Appellate Courts and Tribunals are published. The selection is made on a case-by-case basis by law review editors, and, quite obviously, decisions that are selected for publication normally involve new or unsettled legal questions.

263. *See infra* note 278 for an explanation of why liability actions under C.c. art. 2409 (Italy) are relatively rare.

Out of a total of 56 cases dealing with directors' liability to the company, 40 were brought by bankruptcy trustees, 14 were brought by non-bankrupt companies following a shareholders' vote, and only two were brought by administrators appointed by courts under C.c. art. 2409 (Italy).

264. Published cases do not fully reflect the predominance of bankruptcy trustees among plaintiffs in actions against directors. Two factors may contribute to such under-representation: (a) most cases brought by bankruptcy trustees do not reach the Court of Cassation level and are not otherwise published, as they rarely involve uncertain questions of law, and (b) cases brought

It is not less interesting, however, to understand the factual patterns underlying the very few cases in which shareholders authorized an action against directors. In so doing, shareholders seem to have gone after the very people they chose, and with whom, given the Italian concentrated ownership structure (Part IV), they had such a tight relationship.

The clue is that this is not normally the case. Directors were sued following a shareholders' vote mostly: (a) when control had been transferred and the sellers could not or did not vote to relieve the directors they elected of any liability, so that the new majority, often opportunistically, sued the previous directors;[265] (b) when directors had been elected by distant, but not weak shareholders who, again opportunistically, did not hesitate to sacrifice directors to protect their own

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by non-bankrupt companies, discussed *infra*, do normally involve particular factual situations (reversals of alliances, changes in control, etc.), and, thus, are more likely to receive attention by law review editors.

Even so, however, the results are sufficiently eloquent in showing that directors, absent exceptional circumstances or bankruptcy, are rarely held accountable.

265. In the case Judgment of May 8, 1991, No. 5123, Cass. civ., 1992 FORO ITALIANO I, 817, for instance, the parent company went bankrupt and the trustee sold the shares. The buyers voted for a liability suit against the former directors to be instituted by the company. In Judgment of June 22, 1990, Cass. civ., 1992 FORO ITALIANO I, No. 6278, at 1892, the control was voluntarily transferred, apparently without any covenant or other contractual device restricting the buyers from causing the company to sue the former directors; the same factual pattern occurred in Judgment of May 30, 1985, Tribunal of Catonia, 1986 GIURISPRUDENZA COMMERCIALE II, 923. In all cases directors were finally held liable.

When the company sues following a transfer in its control there is a clear potential for abuse. The new controlling shareholders may have bought the shares at a discount because of directors' mismanagement or fraud, and the recovery coming from a suit against directors may therefore come to them as a windfall. Nevertheless, there is little that a court can do to prevent such abuse, as the directors, if they are liable, must compensate the injured company (which may have minority shareholders). The windfall, if any, derives from an imperfect allocation of the value of the possible recovery between sellers and buyers, *sub specie* of a too low price of the shares. In Judgment of May 8, 1991, No. 5123, *supra*, the Italian Court of Cassation liquidated this defense with a formalistic but inevitable argument, stressing that the plaintiff was the company *and not a shareholder*.

The issue of potential windfalls coming from liability suits instituted after the purchase of shares has been developed in depth in American law, where plaintiffs are shareholders, although acting derivatively. See a discussion and a partial critique of the judicially created "contemporaneous ownership rule" in CLARK, *supra* note 53, at 650-52 (contemporaneous ownership rule may bar suits by investors better situated or less risk-averse than the present shareholders, whereas such investors might otherwise be willing to buy the shares and act as prosecutors on behalf of all the shareholders); *see also* the solution, partly different from the "contemporaneous ownership rule," advocated in 2 AMERICAN LAW INSTITUTE, *supra* note 235, § 7.02 ("A holder of an equity security has standing to commence and maintain a derivative action if the holder: - (1) acquired the equity security either (A) before the material facts relating to the alleged wrong were publicly disclosed or were known by, or specifically communicated to, the holder, or (B) by devolution of law . . . from a holder [who would have had standing to sue under (A)] . . .").

interests;[266] and (c) when the company had undergone a reversal in alliances, for which directors were the first to pay the expenses.[267-268] "Real" suits, brought by companies in normal settings, were extremely rare.[269]

B. *Minority Shareholders and Directors' Liability: How Many Explicit Attempts? How Many "Undercover" Liability Suits against Directors?*

So far, our findings are consistent with the findings on the predominant ownership structure of Italian companies. If there is no real separation between ownership and control, shareholders will not normally vote to institute an action against the very people they have chosen (especially when such people are the shareholders themelves).

There is nothing inherently wrong in this. If majority shareholders manage the company, they will also bear the cost of every possible mismanagement. Therefore, it is understandable that liability suits principally arise when the electing shareholders, by an act of their will or following the insolvency of the company, have transferred control or have lost it. Is this the happy end of the story? Yes, provided that there are no minority shareholders.

But quite often *there are* minority shareholders, and there could probably be even more if minority investments were more attractive. Therefore, the problem of the treatment of minority shareholders cannot be judged irrelevant only because the ownership structure tends to be concentrated. We have to look

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266. This is clearly the factual pattern on which Judgment of Nov. 5, 1991, Appellate Court of Milan, 1992 GIURISPRUDENZA ITALIANA I-2, 384, was decided. A company 100% owned by an *Anstalt* from Liechtenstein was sued by a third party for collection of a debt originated by an act stipulated by a previous director; the company, now under new management (but, apparently, with the same owner), sued the former director alleging, *inter alia*, that the obligation derived from an act "ultra vires." The Court rejected both the defense and the liability suit. *Id.*

267. A reversal in alliances originated the liability suit decided in Judgment of Nov. 11, 1987, Tribunal of Milan, 1988 GIURISPRUDENZA COMMERCIALE II, 967.

268. In other cases the accounts of the facts do not tell whether there had been a change in control or a reversal of alliances (*see* Judgment of Nov. 12, 1987, No. 8337, Cass. civ., 1988 FORO ITALIANO I, 3378). Finally, in some cases the factual patterns, as reported in the published opinions, are completely obscure, so that none of the alternatives (change in control, reversal of alliances, "real" liability suit) can be safely excluded (Judgment of July 9, 1987, No. 5989, Cass. civ., 1989 GIURISPRUDENZA COMMERCIALE II, 208; Judgment of Jan. 28, 1982, Tribunal of Milan, 1983 GIURISPRUDENZA COMMERCIALE II, 438).

269. *See* Judgment of Nov. 5, 1992, Tribunal of Milan, 1992 GIURISPRUDENZA ITALIANA I-2, 641 (company brought on the brink of insolvency suing directors and auditors); Judgment of June 26, 1989, Tribunal of Milan, 1990 GIURISPRUDENZA COMMERCIALE II, 122 (company suing directors that committed a securities fraud). In a listed company, a "real" suit was brought in 1993 for a very high amount by Ferruzzi Finanziaria. The factors that influenced the decision to sue are accounted for *supra*, note 238.

also at the other side of the coin, *i.e.*, we have to look at how many liability suits, notwithstanding the requirement of a majority vote, have been explicitly or implicitly attempted by minority shareholders.

The research is fruitful: in our sample, almost one-fourth of the cases show attempts of minority shareholders to get around the requirement of a majority approval for suits against directors, relying on very peculiar fact patterns or on general tort law principles.[270] The courts, however, sensing what the real substance of the claims were, rejected most such attempts.[271-272] Thus, the empirical evidence confirms our hypothesis: often minority shareholders do put pressure on directors through liability suits, but the legal requirement of a majority approval for such suits comes into play and bars those suits.

Yet, a sensible research strategy impels us not to stop here. Given the existence of an explicit prohibition against liability suits brought by individual shareholders, cases concerning directors' liability do not seem the *only* place to look to discover tensions between majority and minority shareholders. Given that the rejection of minority suits is entirely predictable, minority shareholders may give up any will to fight, or may well try to turn elsewhere. The statistical sample, based on *explicit* attempts of minority shareholders to have directors condemned, may therefore underestimate the role of art. 2393 as a powerful governance tool in the hands of the majority.

In my view, actions brought under Civil Code art. 2409 (Italy) are a reliable proxy of what the corporate law landscape would be should Civil Code art. 2393

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270. In 16 cases minority shareholders asked the court to hold directors liable for their acts. In virtually all such cases directors' conflict of interest with the company was alleged.

271. The very few successful actions brought by minority shareholders were due to the peculiarity of settings or to a loophole in the otherwise tight majority principle, a loophole that takes a toll of directors only in small, unsophisticated companies. (C.c art. 2373(3) (Italy) bars shareholders who are also directors from voting on their own liability, so that minority shareholders can authorize the action.) No authentic departures from the principle that directors can be held liable only if the majority authorizes it are found.

272. In an action brought under C.c. art. 2395 (Italy) the Court of Cassation argued that individual shareholders, absent direct prejudice (*supra* Part III.B), do not have an enforceable right against directors, as such right belongs to the corporation (Judgment of Sept. 7, 1993, No. 9385, Cass. civ., 1994 GIURISPRUDENZA COMMERCIALE II, 365, not included in the statistical sample, as decided later).

It is my strong opinion that this position is without basis. It is arguable that, if interpreted consistently with the recent rulings by the Constitutional Court and the Court of Cassation, general tort law (C.c. art. 2043 (Italy)) would allow recovery against directors. Therefore, the role that courts carve out for C.c. arts. 2393 and 2395 (Italy) (which taken together seem to bar both derivative suits and direct suits by individual shareholders) is suspect at best. Either the interpretation courts give is wrong, or the norms themselves are contrary to art. 24(1) of the Constitution of Italy, which states that "[e]veryone is entitled to take action to enforce his rights or legitimate interests." In other words, only two possibilities exist: (a) C.c. arts. 2393 and 2395 (Italy) do not preclude recovery under C.c. art. 2043 (Italy) (general tort law), or (b) they do preclude such recovery, and this clashes with art. 24(1) of the Italian Constitution. The Italian Constitutional Court has not examined such a question until now.

(Italy) be repealed. As we have mentioned before, Civila Code art. 2409 (Italy) provides minority shareholders with the possibility of obtaining a court-ordered investigation and injunctions against directors, and an administrator appointed by the court may theoretically bring a liability suit against directors and auditors. Although the last kind of outcome is extremely rare (*supra*, V.A), Civil Code art. 2409 (Italy) provides minority shareholders with a crucial remedy, widely used in situations of hard conflicts among shareholders. More particularly, the use of such remedy indicates tensions concerning the way the company is managed.[273]

Evidence shows that minority requests for inspections under Civil Code art. 2409 (Italy) are *fifteen times* more frequent than liability actions against directors attempted by minority shareholders.[274] In all of these cases minority shareholders challenged directors' conduct on various grounds -- most frequently conflict of interest and fraud. In most cases, shareholders sought to have the court stop directors from managing the company.

Affirming that, absent the majority vote requisite, at least a substantial part of the cases arising under Civil Code art. 2409 (Italy) would have been minority liability suits against directors appears to be just common sense. We can well say, then, that a non-superficial scrutiny of Italian cases sheds light on a very important phenomenon: the existence of an enormous quantity of "undercover" liability suits against directors.

C. *Directors' Liability Legal Framework in Action: Who is Protected against Whom?*

The Official Report of the Ministry of Justice on the Civil Code, § 173, stated that one of the principles inspiring the reform was that "the fear to

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273. Obviously, actions under C.c. art. 2409 (Italy) do not exhaust all the remedies minority shareholders have. Actions that challenge the validity of shareholders' resolutions under C.c. arts. 2377 and 2379 (Italy), for instance, arise from the attempt of absent or dissenting shareholders to have the court avoid a resolution approved by a majority of shareholders. Therefore, such actions also reveal the existence of tension between shareholders.

Nevertheless, legal grounds for such a course of action may vary, and a link between challenges of shareholders' resolutions and challenges to directors cannot be strictly established. Aiming at a favorable cash-out by the majority, for example, unsatisfied minority shareholders may well challenge the election of directors, alleging the illegality of the voting procedure that was followed, even though they are not able to allege any kind of mismanagement. Cases under C.c. art. 2409 (Italy) alone, therefore, are a more limited, but much more significant proxy for potential liability suits against directors.

274. The research is again based on a selection of the cases classified under the appropriate headings in FORO ITALIANO. REPERTORIO, annual editions between 1988 and 1992 (these years included). In selecting the relevant cases, I have applied the same criteria explained *supra* note 262. Published cases arising from a tension between majority and majority amounted to 156, while in the same period published decisions on liability actions instituted by minority shareholders numbered only ten.

shoulder overwhelming responsibilities must not deter the best and most conscious people from assuming an office for which their skill and rectitude are exceptionally valuable." If this was the goal, achievements fell well short of it. Besides, what has been achieved could have been achieved through less restrictive alternatives.

Actual cases concerning directors' liability show that even very dishonest people may escape from being held accountable, and very conscientious people may fall prey to authentic ambushes. In fact, the majority vote requirement protects directors regardless of what they have done (managerial errors, conflict of interest, fraud), and it leaves them without any protection as soon as the majority changes its mind, alliances reverse, control is transferred, or the company goes bankrupt. Art. 2393 Civil Code does not protect directors against meritless actions, but against minority actions. In other words, it filters *plaintiffs*, not *actions*.

If we desire that directors take even risky business decisions and manage the company effectively, actions against them must be screened. The problem is that the Italian system screens actions along the wrong line. On the one hand, a mistake, or an act in conflict of interest, is such regardless of who alleges it, and whether it has actually been committed or not, it is for the courts and not for the majority to ascertain. On the other hand, if directors must be protected against frivolous suits, they must be protected objectively and consistently, against minority shareholders as well as against majority shareholders and bankruptcy trustees.

Our empirical examination yields both meritless suits by the majority[275] and intense pressure coming from the minority, which hardly can be presumed to be *always* meritless. The majority requirement for suits against directors, set forth by art. 2393 Civil Code, does not safeguard directors, who are at the majority's mercy, but increases the weight of the majority, which is empowered with an unquestionable right over directors' liability.

D. *Concentrated Ownership Structure and Majority Vote: Spontaneous Incentives versus Optimal Deterrence. The Different Situations of the ———Duty of Care and of the Duty of Loyalty.*

What are the combined effects of the majority vote requirement for liability suits against directors and the concentrated ownership structure of Italian companies?

If the costs of making collective decisions were zero and perfect information were available, shareholders would be the ideal constituency to decide whether or not the company should sue its own directors. After all,

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275. *See, e.g.*, Judgment of Nov. 5, 1991, Appellate Court of Milan, *supra* note 266.

directors are supposed to pursue the interests of shareholders, and the latter seem well entitled to evaluate how the former discharge their duty. Neither of the preceding assumptions, however, is true: collective decision processes can be very costly, and perfect information is not cheaply available to shareholders.[276] Moreover, in a concentrated ownership structure like the Italian one, we have no assurance at all that the shareholders' vote on directors' liability is objectively motivated. If the shareholders' meeting is increasingly considered an inadequate forum to decide on directors' liability in American corporate governance, it is even less adequate in the Italian case.[277] Dominant shareholders, actively involved in the management of the company, are not exactly independent when the moment comes to assess the conduct of directors.

Minority shareholders, as we have seen, have a reduced ability to monitor directors effectively. They have the right to challenge certain corporate decisions and to ask a court investigation under Civil Code art. 2409 (Italy), but they do not have the right to hold directors accountable for their actions.[278] Given the *de*

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276. To the contrary, directors have typically more information than shareholders, or at least more information than a part of them.

277. *See generally* CLARK, *supra* note 53, at 649-50 (stressing the costs of a demand on shareholders requirement, the lack of information among shareholders in public companies, and the possibility that wrongdoers influence the shareholder vote). The position of 2 AMERICAN LAW INSTITUTE, *supra* note 235, is less draconian: on the one hand, § 7.03 sets forth that demand on shareholders to commence a derivative action should not be required, since, as the accompanying *Comment* points out (*id.* at *h*), "informed collective shareholder consideration of proposed litigation is not feasible [because, as a body] the shareholders cannot realistically discuss and evaluate the often complex factual and legal issues raised by derivative actions." On the other hand, under § 7.11 "[t]he court should dismiss a derivative action . . . upon approval by the shareholders of a resolution requesting dismissal of the action as in the best interests of the corporation," provided that certain conditions are met (full disclosure, approval by disinterested shareholders, and dismissal not a waste of corporate assets). Dismissal upon request of a majority of shareholders is considered a bad solution by CLARK, *supra*, at 650, which stresses that "this majority vote would always be solicited by the alleged wrongdoers, who would do so at corporate expense, using their control of the proxy machinery."

Under both standards, concentrated ownership structure and strong ties between directors and majority shareholders, two features that are typical of Italian companies, are considered factors that reduce or nullify the meaning of a shareholder vote.

278. C.c. art. 2409 (Italy) provides minority shareholders with a powerful remedy, but not with a perfect substitute for derivative suits. This provision, as we have seen *supra* Parts III.C.2(b) and V.A, bestows upon the temporary administrator appointed by the court the power to bring a liability action against directors. While requests for inspections under C.c. art. 2409 (Italy) are extremely frequent, liability actions brought by temporary administrators are not (*supra* note 263). Several explanations for this phenomenon are possible: (a) C.c. art. 2409 (Italy) provides for a summary evidentiary procedure and not for a full-scale one, and therefore is more suitable for use in cases of multiple violations by directors and systematic oppression of the minority, which are only a part of the possible violations of their duties by the directors; (b) C.c. art. 2409 (Italy) provides for powerful injunctive intervention, but it is ill-suited to grant relief against isolated acts by directors, acts whose effects have already been consummated. (*See, e.g.*, Decree of Oct. 10, 1985, Tribunal of Milan, 1986 GIURISPRUDENZA COMMERCIALE II, 459:

facto "emasculation" of minority shareholders as corporate monitors, we must inquire if the incentives for directors of Italian companies to perform well are adequate. The answer is: their incentives are strong, yet not sufficiently balanced.

Let us subdivide the directors' duties in the two classical categories of duty of care and duty of loyalty. In a concentrated ownership setting we are likely to observe strong spontaneous observance of the duty of care by directors, the costs of whose mistakes are borne by shareholders in proportion to their holdings. In such a setting, however, we are not necessarily likely to observe spontaneous compliance with the duty of loyalty, as, while the costs of its violation are borne by all shareholders, the resulting benefits are entirely appropriated by the violators.[279]

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minority shareholders claimed the existence of a typical squeeze-out pattern by the parent company and of various formal irregularities. The parent company allegedly overcharged the subsidiary's products it sold on foreign markets, pocketing the spread. The court rejected the request for inspection, *inter alia*, because: (a) there was no evidence of the denounced facts, and (b) the formal irregularities had been later rectified. A full-scale evidentiary proceeding probably would have shown whether the alleged squeeze-out was actually going on or not).

279. In many respects this is the analytical framework developed in the seminal paper by Jensen & Meckling, *supra* note 229. However, Professors Jensen and Meckling do not sufficiently stress the basic difference existing between violations of duty of care and violations of duty of loyalty. Their paper focuses on agency costs "as deriving from the manager's tendency to appropriate perquisites out of the firm's resources for his own consumption," which are clearly conceptually similar to violations of duty of loyalty; it construes what resemble violations of duty of care as the product of conscious or semi-conscious manager's decisions to avoid "too much trouble or effort on his part to manage or to learn about new technologies. Avoidance of these personal costs and the anxieties that go with them also represent a source of on the job utility to him . . . ." (*Id.* at 313).

This definition seems absolutely correct, but it risks blurring the fundamental difference between the effect of managerial ownership on the incentive to perform well and its effect on the incentive not to cheat. (By "managerial ownership" I mean every kind of direct link between equity holders and managers, *i.e.*, something that goes beyond the usual understanding of the term, which in my opinion is unable to embrace fully the role of large shareholders involved, although indirectly, in the management of the company.) While incentives to perform well (duty of care), all other factors equal, are a linear function of managerial ownership, the incentives not to cheat (duty of loyalty) are more skewed. Again all other factors equal, incentives to behave in compliance with the duty of loyalty depend not only on the managerial ownership in the firm, but also on the value of what the managers subtract from the firm (time, information, opportunities, physical assets, etc.) when employed elsewhere. Assuming a firm where (a) the manager is bound by a normal managerial contract, (b) he is the sole residual claimant, and (c) there are no creditors (*i.e.*, a firm where agency costs for shareholders are zero by definition, and transfers of wealth from creditors to shareholders are not possible), the manager has an incentive to perform with absolute care, but he may be perfectly rational in deciding to violate his contractual "duty of loyalty" towards his own firm, provided that what he takes from it will be more valuable somewhere else.

In other words, as a distinction between "loss" and "transfer" of the firm's wealth makes sense, and as the size of managerial equity (as defined above) affects incentives to avoid losses and transfers differently, it follows that it is reasonable to treat them differently while examining a corporate governance system like the Italian, which is characterized by a strongly concentrated

As for directors' incentives to act with due care, the absence of derivative actions does not seem to cause serious negative consequences. Not only do directors of Italian companies, as large equity holders or representatives of large equity holders, have strong incentives to perform well, but also shareholders' suits themselves are generally considered not to be a good remedy for enforcing directors' duty of care. American law has gradually created a complex system of protection for directors and managers and courts are wary about intervening in the merit of business decisions. Therefore, American courts rarely interfere with business judgments, although *ex post* ill-advised, and they have created a series of procedural hurdles that make it extremely difficult for a derivative suit based on alleged violations of the duty of care to reach the stage of the final decision.[280] In conclusion, since spontaneous incentives are strong, judicial review of business decisions is inherently difficult and the cost of letting the courts intervene in business decisions may easily exceed the benefits, the prohibition against derivative actions does not seem to considerably affect the incentives of directors of Italian companies to act with due care. Perhaps the majority rule on directors' liability for violations of duty of care is not the best alternative, but at least, as the costs of such violations are spread evenly among all shareholders, it has some systematic justification.

This is not the case for directors' incentives to act loyally toward all shareholders. Here, the possession of large blocks alone is not sufficient to eliminate gains from transfers of wealth from all the shareholders to a part of them — typically, to the part of the shareholders who elect the directors.[281] Directors' incentives and deterrents come from other sources, such as their need to preserve reputation,[282] the fear of criminal sanctions for acts in conflict of

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ownership structure. Evidence that inside ownership serves as a successful monitoring institution for negligence, but not for conflicts of interests is in fact found by Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 JOURNAL OF LAW, ECON. & ORG. 55 (1991).

280. Moreover, many jurisdictions, such as Delaware, recognize the validity of charter provisions that limit liability for duty of care violations. As an example of the disfavor of American scholars towards derivative actions alleging only due care violations *see* 2 AMERICAN LAW INSTITUTE, *supra* note 235, § 7.10. The *Introductory Note* [to the chapter on derivative actions], states explicitly that "a basic distinction is drawn between the duty of care and the duty of fair dealing. Given both the evidence that due care cases rarely yield more than modest financial recoveries to the corporation . . . and the availability of other mechanisms of accountability, § 7.10(a)(1) provides that a derivative action alleging only due care violations . . . can be terminated by the board or committee subject only to judicial review for compliance with certain minimal procedures and the business judgment rule." (*Id.* at 6-7).

281. For an example of wealth transfer allegedly resulting from a merger between parent and subsidiary with an unfair stock-for-stock ratio, *see* Judgment of Apr. 26, 1993, Tribunal of Perugia, 1994 FORO ITALIANO I, 261 (upholding the chosen stock-for-stock ratio as fair).

282. Reputation as a constraint against opportunistic behavior is stressed, for instance, by Benjamin Klein, *Transaction Costs Determinants of "Unfair" Contractual Arrangements*, 70 AMERICAN ECONOMIC REVIEW: PAPERS AND PROCEEDINGS 356 (1980), *reprinted in* GOLDBERG, *supra* note 228, at 139, 145-46 (1989).

interest, and the prospect of bankruptcy if the transfer of wealth threatens the solvency of the company.[283] None of these incentives or deterrents, however, completely protects minority shareholders from being expropriated.

First, reputation may not work effectively in a bilateral monopoly relationship, as the relationship often is between owners-managers and minority shareholders. Moreover, criminal sanctions imposed for acts in conflict of interest do not cover all possible situations of conflict,[284] and criminal courts are simply not an adequate forum to solve the largest part of the disputes among shareholders. Finally, the prospect of insolvency, by definition, does not discourage wealth transfers rationally calculated as non-solvency threatening.[285]

It is clear that derivative suits for violations of loyalty duties could effectively integrate the set of incentives and deterrents that directors of Italian companies presently have.[286]

E. *The Consequences of the Problematic Enforcement of the Duty of Loyalty.*

We have to keep in mind that in talking about rights of minority shareholders, we are nonetheless dealing with purely economic matters. Having found that enforcing the directors' duty of loyalty is problematic for minority shareholders, a judgment of inefficiency does not follow *per se*. It may well be that allowing majority shareholders a certain degree of freedom to expropriate corporate wealth is efficient, or that minority shareholders are able to discount fully the loss in value of the shares they buy that results from such freedom,

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283. Not only is bankruptcy an event that directors and managers are normally likely to try to avoid as it imperils their posts, but also Italian bankruptcy law, although scarcely efficient, is particularly severe with entrepreneurs and with directors of bankrupt companies. As we have seen, directors may quite easily face liability suits brought by trustees, against which they have no more procedural protection.

284. C.c. art. 2631 (Italy) does impose sanctions on directors acting in conflict of interest, but its reach — for a series of reasons not discussed here — is not complete.

285. *See* 2 AMERICAN LAW INSTITUTE, *supra* note 235, § 7.10. After describing the relative disfavor against derivative action alleging only due care violations, the *Introductory Note* goes on to say: "Conversely, in the case of an action alleging a breach of the duty of fair dealing, the court is permitted to review the reasonableness of the board's determinations, as well as the procedures followed and the objectivity of the decisionmaker. While limited, the authorization of substantive review reflects the greater need for judicial oversight in an area in which other mechanisms of accountability may be less able to prevent unfair self-dealing and other potential fiduciary abuse." (*Id.* at 7).

286. "[T]he derivative action may offer the only effective remedy in those circumstances in which a control group has the ability to engage in self-dealing transactions with the corporation." 2 AMERICAN LAW INSTITUTE, *supra* note 235, 7.10 *Introductory Note* at 5.

thereby avoiding personal losses.[287]

In my view, this is not the case. First, capital markets are not perfectly efficient in anticipating every possible loss resulting from opportunistic behavior and markets for equity ownership of closely held companies, so important in the Italian industrial landscape, are not efficient at all. Moreover, high transaction costs prevent shareholders from specifying every possible contingency and effectively coping with it. Therefore, a shareholder may be effectively expropriated by acts in conflict of interest he did not anticipate or he anticipated in a lower measure. The resulting "unpleasant" surprise may well warrant the case for *ex ante* intervention by the law.

Second, even if shareholders were able to anticipate losses from possible appropriations by owner-managers, a "market for lemons" would follow.[288] In a market dominated by uncertainty on the possible extent of future expropriations by the majority all outside, minority equity would be traded at a value that discounts future losses, even when imposing such losses, in fact, was not the intention of the owner-managers. An inefficient allocation of capital would result.

Third, the most likely consequence of the scarcity of effective monitoring powers of the minority is not only the discount of minority shares, but also the dead loss of synergies between entrepreneurs, or between entrepreneurs and capital providers. In my view, this is the worst, and probably the most realistic, scenario. Facing the difficulty of governing future conflicts among them and of solving such conflicts "fairly," different providers of factors of production may well give up on the possibility of cooperating. Thus, entrepreneurs may resort to setting up smaller, wholly owned firms, and capital providers may resort to advancing capital as loans or as equity fragmented across a highly diversified portfolio of firms. The difficulty in governance of future relationships based on equity, therefore, may yield an explanation for some of the features of the Italian industrial system.

The size of equity investments adapts to the quantity of governance power investors are granted. In a system that gives little or no power to the shareholders, like the American system,[289] we are likely to observe a fragmented ownership structure. In a system that gives strong powers to majority shareholders and little or no power to minority shareholders, like the Italian system, we are likely to observe a very unbalanced ownership structure, with a

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287. This is one of the most important points of Jensen & Meckling, *supra* note 229, at 345, who stated that "as long as capital markets are efficient . . . the prices of assets such as debt and outside equity will reflect unbiased estimates of the [agency costs]," and therefore "the selling owner-manager will bear those agency costs."

288. This is the well-known thesis of the paper by George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 QUARTERLY JOURNAL OF ECONOMICS 488 (1970), *reprinted in* GOLDBERG, *supra* note 228, at 24.

289. ROE, *supra* note 16.

strong control group, possibly composed of several large shareholders acting together, and small, uninfluential minority shareholders, if any minority shareholders at all.[290] In different ways, both systems introduce rigidity in the organizational structure of the corporation, which may put their ability to adapt, and therefore their success, at risk.[291] More particularly, the Italian legal framework discourages investors unable to enter in the control group from entering the company at all.

F. *What Role for Derivative Actions based on Violations of the Duty of Loyalty in Italian Corporate Governance? A Possible Contribution to the Implementation of the "Mutability Principle?"*

Derivative actions against directors for acts in conflict of interests would integrate the Italian system of corporate governance. They would fill a clearly visible gap left by a legal system biased in favor of owner-managers and, coupled with other remedies, would create an "overlapping system of protections," which best serves the interests of shareholders.[292] The deterrent effect of a possible derivative action for directors facing situations of potential conflict of interest could be substantial.

It would certainly be naïve to think that derivative actions could act like a magic wand, instantly able to solve all the problems and contradictions of the Italian capitalism. Shareholders that bring suit would encounter problems of information vis-à-vis directors and they would have to advance the costs of litigation. Moreover, courts would probably be burdened with actions requiring a screening and an evaluation of the fairness of transfer prices, a task which they are not necessarily well equipped to perform. Finally, some leeway for strike suits certainly would exist.[293] Therefore, the small, capital gain-oriented investor

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290. Constraints on the exercise of power by residual claimants require some justification. The majority principle *is* such a justification, but only to the extent of what has previously been agreed upon. Leaving directors the ability to act in conflict of interest, however, is something that we cannot lightheartedly presume shareholders have agreed upon.

291. The thesis that the success of organizational structures lies (also) in their ability to adapt to a continually changing environment is advanced by Gilson, *supra* note 117 (discussing the harmonization of European Union members' laws on takeover bids).

292. 2 AMERICAN LAW INSTITUTE, *supra* note 235, *Introductory Note* at 5.

293. The criticism that surrounds the abuses of shareholder suits in the United States, however, is strictly tied to the unique system of attorneys' compensation, and cannot be considered universally applicable to shareholder suits in general. Such compensation system introduces a personal interest of the attorney to bring the suit and later to settle it. (This phenomenon is described in John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS 5 Summer (1985); CLARK, *supra* note 53, at 657-59; KLEIN & COFFEE, *supra* note 53, at 196; 2 AMERICAN LAW INSTITUTE, *supra* note 235, *Reporter's Note*, at 9-12; an extremely accurate study of actual litigation involving large corporations, which aims at casting serious doubts on the overall utility of shareholders' suits as

would probably continue to follow the "Wall Street Rule" even when there is a suspicion of conflict of interest. Informed minorities however, would have one more arrow in their bows. But, are there informed minorities in Italy? Although there are only in particular situations now, there could be many more in the future.[294]

As we have seen in IV.L-IV.M, important changes are taking place in the Italian industrial system. A new, dramatically important role for banks as equity holders is emerging, and a host of new types of institutional investors is going to create demand for large equity investments. It is self-evident that this kind of equity investors can possibly act as a bridge towards later initial public offerings, and, in any event, can bring valuable expertise and qualified financial support. By providing relief against potential oppression by controlling groups, derivative actions would probably improve the now rather bleak set of incentives to invest capital in a minority equity position.

These "new species" of minority shareholders will ask for a voice in the management of the company and for remedies against possible opportunism by majority shareholders. Given the doctrine embraced by Italian courts, that the corporation is a separate legal person and that shareholders cannot contractually influence its organs,[295] both voice and remedies cannot be fully obtained simply by means of detailed contracts and shareholders' agreements. It is the Italian system of corporate governance in its entirety, therefore, that must prove adequate to this new challenge.[296]

Although a large part of the thrust of the Italian capitalism presently comes from firms owned by a handful of investors, its continuing success depends on its ability to provide new viable organizational forms and efficiently accommodate new demands. The present success of one institutional structure of production

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an instrument of corporate governance, is that by Romano, *supra* note 279.)

The Italian system of lawyer compensation, like the systems of other European nations (e.g., Germany), differs in at least three fundamental ways from the American system, namely: (1) contingency fees are prohibited (C.c. art. 2233(Italy)a), or are anyway considered illegal by the courts (under C.c. Sec. 138(1) (Germany)); (2) "loser pays," except when the litigation was objectively uncertain or there are other special reasons; (3) average lawyers' fees are significantly lower than in the United States. Although abuses of shareholder litigation are certainly possible with this system also, the probability of their occurrence is substantially smaller than in the United States. (Of course, the drawback is that, together with the possible abuses, the benefits from the monitoring activity of interested lawyers are lost.)

294. As noted before, in closely held companies minorities are frequently the product of changes of alliances, and in publicly held companies minorities are usually uninfluential and uninformed (*supra*, IV.D and note 142, IV.J).

295. *See supra* note 167, and accompanying text.

296. BARCA, *supra* note 187, at 200-01, argues that interventions of financial institutions may be more likely if protection of minority shareholders is effective. The same point underlies the excellent paper by Preite, *supra* note 190.

is no excuse for refusing to pave the way for alternatives to it.[297] "In an environment characterized by constant and unpredictable change, the quality necessary for evolutionary success is mutability — an organism's ability to alter its structure to adapt to new conditions."[298] Derivative actions, by serving the needs of a new category of owners in Italian companies, could give some contribution to adaptation.

G. *Summary of Part V.*

The following conclusions can be drawn from the examination of actual cases concerning directors' liability and the prognosis about the probable evolution of Italian capitalism.

A. The empirical evidence.

A.1. An overwhelming number of liability actions against directors is brought by bankruptcy trustees. Suits against directors brought by non-bankrupt companies are exceptional, and are normally the consequence of a reversal in alliances or of a change in control.

A.2. Published cases, however, show a number of actions brought by minority shareholders aiming at challenging directors' business policy or acts in conflict of interest. Very rarely such actions take the form of liability suits, and when they do, courts generally reject them on the basis of Civil Code art. 2393 (Italy), which requires a majority vote to institute liability actions against directors.

B. Policy considerations.

B.1. A system of corporate governance largely built on strong spontaneous incentives for the majority, like the Italian system, can remove from the courts the enforcement of the duty of care, but cannot abstain from the close enforcement, with all possible means, of the duty of loyalty. As the shareholders' vote requirement for suits against directors lends itself to abuses and may prevent relief against violations of the duty of loyalty, the Italian legal framework proves to be dangerously weak on this particular point.

B.2. The concentrated ownership structure of Italian companies may be the product of the governance problems of long-term relationships based in equity. The lack of sufficient remedies against opportunistic behavior by majority shareholders may discourage potential suppliers of factors of production from realizing synergies by means of common ventures.

B.3. It is a fair assumption that the difficulty of challenging the majority shareholders' policy discourages investors from buying minority stakes. The costs of such discouragement are not easily quantifiable.

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297. ROE, *supra* note 16, at 14 (stressing that productivity successes or failures alone do not tell whether corporate governance systems in which they take place are optimal or not).

298. Gilson, *supra* note 117, at 175.

B.4. Derivative suits against directors for conflict of interest seem to be the appropriate balance.

VI. CONCLUSION: WHAT PART FOR THE OWNERS OF THE FIRM IN A MATURE ECONOMY?

Comparative corporate governance is, in many respects, the study of how different systems react to the same problem of separation between ownership and control. The causes of the separation of ownership and control and the different responses of various economic systems to the problem of agency cost it poses have been explained in historical perspective.[299] The phenomenon of separation between ownership and control itself, however, has not.

With an industrial system characterized by reduced or absent separation between ownership and control, Italy could easily be classified as a "laggard" from a corporate governance standpoint, a remnant of a slower or of an interrupted evolutionary path.[300] As some of the features of the Italian system are shared by the French system, Italy and France introduce a number of unusual questions in the corporate governance debate. It is not by chance that studies of corporate governance rarely deal with France in depth, and largely ignore Italy,[301] notwithstanding that both countries rank very high among industrialized countries as to total and per capita GNP.[302]

The corporate governance debate has become a debate over monitors. Professors Roe and Coffee, taking different sides, have given an answer to the question why American institutional investors have so diversified portfolios, and therefore are such poor monitors.[303] This emphasis on monitoring has caused a strange phenomenon: as the owners' inability to fend for themselves has been taken for granted, in proposals for improving they have been skipped and forgotten.

Corporate governance literature should not only closely examine which institutions are better situated to monitor managers when ownership and control become separated, but also understand precisely at which point separation

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299. The most complete attempt to provide a historical explanation for the emergence of different corporate governance patterns is that by ROE, *supra* note 16, who demonstrated the path-dependent, non *a priori* inevitable origin of the Berle-Means corporation in America.

300. The risk of considering laggards system different from those we are familiar with is stressed by Gilson & Roe, *supra* note 179, at 873.

301. A clear example of the difficulties encountered by the traditional corporate governance studies in dealing with the Italian system is offered by the (otherwise remarkable) paper by Eddy Wymeersch, *Elements of Corporate Governance in Western Europe*, in ASPECTS OF CORPORATE GOVERNANCE. THE STOCKHOLM SYMPOSIUM, *supra* note 226, at 83. The Italian system, after little data, gradually disappears from the horizon.

302. *Supra* note 17.

303. ROE, *supra* note 16; Coffee, *supra* note 199.

between ownership and control is inevitable to occur. In other words, besides studying the response by different environments, or lack thereof, to the demand for monitoring, corporate governance literature should present a historic background of the *demand for monitoring itself*, explaining why such demand arises at so disparate levels in different environments.

A crucial question remains largely unanswered: why have *owners* started diversifying, instead of finding solutions for coping with the evolution of the firm? Risk-aversion, in my view, is not the whole story,[304] and I suspect that intuition has tended to play a nontrivial part in previous discussions.[305] A three-dimensional research would follow, a research that could give interesting contributions to the debate.

In the traditional view, control by founders, or by stable, "entrenched" owners is considered a synonym of inefficiency. The lesson coming from Italian capitalism is that this is not necessarily true.[306] Stable owners may create institutions that allow an efficient, or at any rate not necessarily inefficient,

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304. For a sharp critique of the ability of the risk-aversion notion to explain real life phenomena *see* Victor P. Goldberg, *Aversion to Risk Aversion in the New Institutional Economics*, 146 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 216 (1990): "the assumption regarding risk preferences should . . . be judged for [its] usefulness, not for [its] realism." *Id.* at 217.

305. ROE, *supra* note 16, at 4, describing how America's large enterprises typically were created in the twentieth century, states: "Entrepreneurs would found a business, succeed, and make the business grow. . . . Eventually the successful firm would go public, issuing new stock (or selling the founders' stock) to the public. For some firms, the stock market's role was to raise new capital; for many others its role was to provide the founders and their heirs an exit when they wanted to diversify and cash out. . . . Although descendants sometimes took over running the firm from the founders, more frequently hired managers did, and stock dissipated into fragmented holdings as the heirs sold off the inheritance. . . ." *Id.*

This description would not be accurate if it were extended to France or to Italy. A theory of the separation of ownership and control should give us the answer to the question of *why* it would not be accurate. It is not a sufficient explanation to say that "[a]lthough the defects of separation are today in the spotlight . . . separation of ownership and control was historically often functional (and still is), because it allows skilled managers without capital to run the firm and separates unskilled descendants from control of a firm they could not run well. Sometimes successful founders became poor managers, because their accumulated wealth allowed them to slack off but still live well, as historically was a problem in Britain." ROE, *supra* note 16, at 4. Why did this phenomenon happen in a much lower measure in continental Europe than in Britain? Which social and economic "institutions" reduced the risk of successful founders becoming poor managers? Why have not American owners developed a system of professional managers and direct monitoring, which has developed in Italy? Why in the United States could not skilled managers be hired by owners, and why did the advent of professional managers mark the disappearance of owners? Why does separation of ownership and control occur at a certain level in one economic environment and at a much higher level in another?

306. See, for instance, *Che non ci sera. Chrysler and Fiat*, THE ECONOMIST, Apr. 29, 1995, at 75 (discussing the different role of the largest shareholders in Chrysler and Fiat, respectively Mr. Kerkorian and Mr. Agnelli, and praising the successful action of the second in overcoming a crisis in 1993).

exercise of control. Among such institutions, the widespread resort to closely monitored, professional managers[307] and the emergence of stable associations among large shareholders stand out.[308]

Italian corporate governance exceeds on the opposite. The historical favor for owner-managers has produced a legal framework that protects the directors they elect not only against interference in the management, but also against legitimate claims of conflict of interest. In Part V, therefore, I have proposed a legislative reform, aiming at introducing derivative actions against directors based on the violation of the duty of loyalty.

Many different models of corporate governance may exist at the same time and, possibly, in the same place. Corporate governance should try to understand them all, and suggest an array of different alternatives, each with the best possible mix of factors and each of them suitable for different settings. Reaching a standard, balanced model that includes owners, managers and monitors, however, is not easy at all. Italy is a living demonstration of how difficult such a task is.

307. See *supra* note 189, for the widespread practice of hiring professional managers by Italian large firms. After all, large owners seem well-suited to monitor them effectively.

308. On agreements among large shareholders see *supra*, Part IV.G.

THE INHERENT PROBLEMS OF LEGAL TRANSLATION: THEORETICAL ASPECTS

Edgardo Rotman[*]

I. INTRODUCTION

A theory of legal translation can be overwhelmingly vast. Leading translation theoreticians have asserted that all communication is translation.[1] This view expands translation theory into a comprehensive theory of language.[2] On the other hand, the consideration of the close relation between language and the law carries the risk of transforming legal translation theory into a general theory of law.

The relation between language and the law is so intimate that it is not far-fetched to say that law is essentially language. Law may be expressed in nonverbal forms, such as traffic lights, sirens or tolling bells. Also, customary law, as a "language of interaction,"[3] is not a negligible part of the legal

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1. For Octavio Paz, language itself is essentially a translation: "[f]irst from the nonverbal world and then because each sign and each phrase is a translation of another sign, another phrase." Octavio Paz, *Translation: Literature and Letters*, *in* THEORIES OF TRANSLATION: AN ANTHOLOGY OF ESSAYS FROM DRYDEN TO DERRIDA 154 (R. Schulte and J. Biguenet eds., The University of Chicago Press 1992). "As language itself is a translation, . . . 'translation is translation for a second time . . . the process of translating comprises the whole secret of human understanding of the world and of social communication . . . .'" *Id.* at introduction, *quoting* the German philosopher Hans Georg Gadamer.

2. León Robel, *Théorie Générale de la Traduction et Métamorphismes Rythmiques*, in THEORY AND PRACTICE OF TRANSLATION 93, 95 (Grähs, Korlén and Malmberg eds., Peter Lang 1978). Mr. Robel identifies the theory of translation with the theory of meaning. Bertil Malmberg underscores the linguistic nature of translation theory in the introduction to this same book. *Id.* at 11.

3. Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 2-3 (1969).

phenomenon. Yet, law is substantially formulated through written language. Law and language are structurally similar. They are generated through social practices, resulting in organized and more or less formalized communication systems, in the sense that they are both governed by their own rules of creation and reproduction.

The relation between law and language can significantly broaden the scope of legal translation theory. For instance, a group of legal theoreticians took translation as a model for legal interpretation and for justice itself.[4] Translation is seen by James Boyd White as "a set of practices that can serve as an ethical and political model for the law and, beyond it, as a standard of justice."[5] Lawrence Lessig draws on the practice of translation to formulate a general interpretive legal model and Clark Cunningham speaks of the law as a language and of the lawyer as a translator.[6]

Given the breadth of this theoretical field, this article addresses but one of the components of translation theory—the "description and analysis of operations."[7] In this regard, this article will draw conclusions from the author's experiences in legal translation, while attempting to underscore the significance of the field for professional translators.

II. DETERMINING THE SCOPE OF LEGAL TRANSLATION

Roman Jakobson, a leading linguist and noted expert in the subject of translation, defined translation as "the interpretation of verbal signs by means of some other language."[8] Through this process of translation, texts in one language are transformed into texts in another language with the same meaning.

The nature and scope of translation depends on the nature and scope of the translated materials. These materials range from the isolated words in a language dictionary to the complex network of sentences of philosophical texts. Furthermore, translations can convey the supposedly plain, unequivocal, and

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4. *See generally* JAMES B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (The University of Chicago Press 1990). *See also* Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) and Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

5. WHITE, *supra* note 4, at 258.

6. Lessig, *supra* note 4, at 2483.

7. LOUIS G. KELLY, THE TRUE INTERPRETER: A HISTORY OF TRANSLATION THEORY AND PRACTICE IN THE WEST 1 (St. Martin's Press 1979). Mr. Kelly points out that a complete theory of translation "has three components: specification of function and goal; description and analysis of operations; and critical comment on relationships between goals and operations." *Id.*

8. *Id. (quoting* Roman Jakobson).

verifiable laws of the natural sciences, as well as the subtle emotions, mind sets, and personal insights of poetry.[9]

In legal translation the demands of precision are greater than in literary translation. The translator must comply, not only with the rules of the foreign language, but also, with the rules of the foreign legal system. Legal translation has its own rules and procedures, which have to be added to those already existing in the translation of nonlegal texts. Everyday language already implies a formalized way of communication, while legal language introduces a supplementary system of formalization.

Although legal translation demands precision and certainty, it is bound to use abstractions, whose meanings derive from particular changing cultural and social contexts. These contexts generate a certain degree of ambiguity, which increases when the legal cultures and systems are vastly different from each other. To translate a text from the language of a civil law country to the language of another civil law country is generally less complicated than to translate the same text to the language of a common law country. Difficulties increase when the translation is from non-Western legal systems, such as the Hindu or Islamic, which differ substantially from the system of the target language.[10]

Translators must be familiar with the legal culture of the target language in order to reformulate an equivalent meaning through what they judge to be the most appropriate linguistic and legal expressions. Persons speaking the same language, but belonging to different legal systems, can have greater "translational" problems than persons speaking different languages under the same legal system. For example, a Scotch lawyer who has to translate terms from a text of American corporate law might encounter greater difficulty than a German Swiss translating a French text on Swiss law.[11]

Greater difficulties arise when a legal institution is foreign to the legal system of the target language. That was the case of the word "trust" in French law before 1990.[12] The legal translator is more rigidly bound to specialized knowledge than the translator of everyday language or humanities.[13]

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9. Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47, 49 (1986 Supplement). Mr. Schroth indicates that computer-programmed translations are "most nearly satisfactory when the subject matter is most nearly independent of culture, as in chemistry or mathematics." *Id.*

10. HENRY P. DEVRIES, FOREIGN LAW AND THE AMERICAN LAWYER: AN INTRODUCTION TO THE CIVIL LAW METHOD AND LANGUAGE xvii (Columbia University 1969).

11. Tomasz Gizbert-Studnicki, *Das Problem des Übersetzens und das juristische Weltbild, in* ÜBERSETZEN, VERSTEHEN, BRÜCKEN BAUEN 309 (Erich Schmidt Verlag 1993).

12. Draft legislation was presented, in the form of an *avant-projet*, introducing a trust equivalent, *la fiducie*, into French law in 1990. In February 1992, the Ministry of Justice proposed a bill modifying the civil code for that purpose. *See* Madeleine C. Cumyn, *L'avant-projet de loi relatif a la fiducie, un point de vue civiliste d'outre-atlantique, in* RECUEIL DALLOZ SIREY 117-120 (14ème cahier-chronique 1992).

13. Gizbert-Studnicki, *supra* note 11, at 313.

It is important to distinguish between the normative language of the law (statute, custom, or judicial doctrine) and the language of the jurist, who thinks or writes about the law.[14] In the first instance, the translator is more constrained by the words of the positive, obligatory law. In the second situation, the language of the jurist (law review articles, treatises, or monographs) is given more latitude to translate the spirit of the message, thus, diminishing the bondage to literal expression.

Within the language of lawyers one should further distinguish between an internal and an external view of the law. The constraints are greater when lawyers interpret a particular rule of positive law than when they examine legal issues as part of global social issues.

A major point of contention in translation is the notion of "translatability" (or "untranslatability").[15] Poetry, in which the words are so blended with the message, can be very difficult to translate without losing its original flavor. Such an example can possibly justify some assertions of "untranslatability." Within the sphere of the law, where vital social problems are at play, transfrontier communication is essential and the mere idea of "untranslatability" becomes extremely harmful.

Human problems are universal and common. The internationalization of basic human issues (economy, crime, health, and environment) has increased cooperation among countries. The cutting edge of legal progress is in the harmonization of laws and eventual unification. Translation can help to build a universal legal language aimed towards resolving universal legal problems.

III. SIGNIFICANCE OF LEGAL TRANSLATION

The significance of translation is multifold. Translation allows different cultures to connect, interact, and enrich one another. So far as translation takes an element from one particular cultural system and introduces it into another, it serves as a cultural "pollenizer." As Ralph Linton points out: "The comparatively rapid growth of human culture as a whole has been due to the ability of all societies to borrow elements from other cultures and to incorporate them into their own."[16] Translation also contributes to the resolution of medical, political, and other professional, social, and individual problems.

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14. The distinction between language of the law and language of the jurists was first employed by Kelsen and later developed by the Swedish philosopher I. Hedenius, and by Wroblewski. *See* JUAN-RAMON CAPELLA, EL DERECHO COMO LENGUAJE: UN ANÁLISIS LÓGICO 33 (Ediciones Ariel 1968).

15. FREDERIC WILL, TRANSLATION THEORY AND PRACTICE: REASSEMBLING THE TOWER 187 (The Edwin Mellen Press 1993). For Mr. Will, "untranslatability" is a "nonconcept" that can never be proven, because "our only legitimate way of querying whether untranslating exists, by its nature precludes the discovery of what it seeks." *Id.*

16. RALPH LINTON, THE STUDY OF MAN: AN INTRODUCTION 324 (New York 1936).

The general importance of legal language is shared by legal translation. The significance of legal language is made apparent if one considers its connection to human action. Words are not only instruments of expression, but also instruments of action. The language of the law is not merely the denotation of objects, but it is the language of future actions. It is, in the terms of Richard M. Hare, prescriptive.[17] Legal language constitutes a projection into the future that permits one to anticipate and predict human behavior with the degree of certainty necessary for social life.[18]

In the field of international law, the significance of legal translation is evident in many respects. Since the right of states to communicate in their own language has replaced the use of diplomatic languages such as French or Latin, translation has become more important than ever in international law. Yet, very little attention has been devoted to language in international law and there are virtually no rules regarding the use of interpreters and language specialists in international relations.

The danger of the existing communication gap among nations is discussed by Christopher B. Kuner in an article reviewing various misunderstandings in the recent Persian Gulf crisis.[19] A hilarious example of a communication gap is President Jimmy Carter's visit to Poland, during which his wish to "learn opinions and understand your desires for the future" was erroneously translated as "I desire the Poles carnally."[20]

Translation also matters greatly for international law in the area of international organizations. For example, the plurality of languages in the European Community creates a serious challenge to communication.[21] Unlike conventional international law, much of European Community law is directly and immediately applicable to individual citizens of its member states who, in turn, must have access to this law in a language they understand.[22] It is a situation similar to that of multilingual nations, such as Belgium, Switzerland, and Canada. The European Community has the world's largest translation service. Significantly, in 1987 the Commission of the European Community spent about one-third of its two billion dollar annual budget on translation operations.[23]

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17. RICHARD MERVYN HARE, THE LANGUAGE OF MORALS 1-14 (Clarendon Press 1952).

18. SEBASTIAN SOLER, LAS PALABRAS DE LA LEY 15 (Fondo de Cultura Económica 1969).

19. Christopher B. Kuner, *Linguistic Equality in International Law: Miscommunication in the Gulf Crisis*, 2 IND. INT'L & COMP. L. REV. 175 (1991).

20. PAUL SIMON, THE TONGUE-TIED AMERICAN: CONFRONTING THE FOREIGN LANGUAGE CRISIS 8-9 (Continuum 1980).

21. Hélène Bauer-Bernet, *Le Multilinguisme du Droit de la Communauté Européenne*, *in* LANGUAGE DU DROIT ET TRADUCTION: ESSAIS DE JURILINGUISTIQUE 189 (Jean-Claude Gémar, ed., Linguatech-Conseil de la Langue Française 1982).

22. Robert Huntington, *European Unity and the Tower of Babel*, 9 B.U. INT'L L.J. 321, 327 (1992).

23. *Id.* at 325-26.

Comparative law is largely dependent upon translation.[24] The availability of foreign legal materials through legal translation enriches the range of possible solutions by connecting readers to foreign legal cultures. In addition, "borrowing from abroad has become a recognized legislative practice for most contemporary states."[25]

As the United States evolves into a multilingual society, legal translation has become vital to American law firms. A growing number of American clients, who do not know English, require legal services. Meanwhile, the expansion of transborder law firms demands communication with an increasingly international clientele. Moreover, foreign investment in the United States intensifies the need for translation of a larger variety of documents.[26]

IV. EVALUATING LEGAL TRANSLATIONS

An important aspect of legal translation theory is how to determine the quality of a translated text. Fidelity in translation includes not only fidelity to text, but also preservation of the meaning of the context. An efficient translator must track any change of context between the writing of the text and its interpretation. As Lawrence Lessig states, "meaning is made from something in the foreground (text) and something in the background (context). To preserve meaning both grounds must be tracked."[27]

The translator must understand both the legal culture from which the source text derives and the legal culture to which the target text will apply. In legal translation this often includes understanding complex legal theoretical contexts.

If the target text belongs to a very different legal system, it will be necessary to reach an equivalent meaning by using a high degree of explanation, flexibility, and creativity. Translators must find equivalent legal terms in the target language or terms that have an equivalent legal function. Translators may even encounter terms for which there is no equivalent legal meaning.[28] In such

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24. Schroth, *supra* note 9, at 53. Mr. Schroth points out that comparative law always involves translation even when the comparison is between two legal systems that share the same language.

25. Peter H. Sand, *The Harmonization of African Law*, in CURRENT TRENDS IN AFRICAN LEGAL GEOGRAPHY: THE INTERFUSION OF LEGAL SYSTEMS 126 (Guiffre 1974). *See also* JOSÉ HURTADO POZO, LA LEY "IMPORTADA": RECEPCIÓN DEL DERECHO PENAL EN EL PERU 14 (Centro de Estudios de Derecho y Sociedad 1979). Prof. Hurtado explains how law, as part of culture, is transferred from one social group to another.

26. George P. Rimalower, *Translating and Interpreting: A Growing Law Firm Need*, 18 LAW PRAC. MGMT. 34, 34 (1992).

27. Lessig, *supra* note 4, at 1177-78.

28. DENNIS R. KLINCK, THE WORD OF THE LAW 25 (Carleton University Press 1992). Mr. Klinck illustrates this point with a hypothesis based on Whorf's conclusion that the Hopi language lacks a future tense. The Hopi law would therefore lack a doctrine of "future interests," which would make a translation of such concepts into Hopi language extremely difficult. He also uses

situations they may have to resort to neologisms or to the repetition of the word in its original language with an appropriate explanation or definition incorporated into the text or listed in a glossary.

The notion of equivalence does not mean simple replication of words from the original text, but rather to construct the text in the target language so as to "carry the same force or significance as the text in the source context."[29] Fidelity demands accounting for context, whether the contextual distance is temporal or geographical. In translating a term from the law of a country belonging to a certain legal system into the language of a country belonging to a different system, one has to find a way to neutralize, or at least minimize, the change of context.

V. TRANSLATION IN ACTION

As Maurice Gravier indicates, the practice of translation has unquestionably preceded the speculation of theoreticians. Gravier recognizes, however, that a lucid work of translation demands reflection on the task, a continuing refinement of method, and avoidance of routine approaches.[30]

The problems of translation methodology cannot be resolved in the abstract. Working with specific instances of translations, Lawrence Lessig maintains "we see that the differences in method track differences in the purpose or function of translation, more than they track any useful philosophical commitment to one method or the other."[31]

Translating legal and social science texts requires two basic skills. First, of course, solid linguistic knowledge of both language systems is necessary. But this alone is not sufficient. One also needs a thorough knowledge of the subject in the legal or social systems concerned. These two conditions make possible the translation of a scientific text even when the contents are extremely complex. The difficulty lies in the fact that concepts of law and legal policy are closely related to the respective language systems. Through the translation from one language system to another, it is very easy to alter the information provided in the text. A good translation maintains both the integrity of the information and the nuances inherent in each language.

These theoretical arguments are extracted from the author's personal experiences as a translator. The specific problems to be addressed arose from the author's translation of two articles from German to Spanish: THE AIM OF CRIMINAL PUNISHMENT AND THE REFORM OF CRIMINAL LAW by Klaus Roxin and

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other examples of cases in which legal translation demands that a "new word should be coined, or the word from the first language simply imported into the second."

29. Lessig, *supra* note 4, at 1201.

30. Maurice Gravier, *Pedagogie de la Traduction, in* THEORY AND PRACTICE OF TRANSLATION 203 (Grähs, Korlén and Malmberg eds., Peter Lang 1978).

31. Lessig, *supra* note 4, at 1165.

ECONOMIC CRIME AND ECONOMIC CRIMINAL LAW IN THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY by Klaus Tiedemann. The ideas here discussed are also drawn from the author's experience in translating a text on habeas corpus from English to Spanish for Hispanic prisoners in Massachusetts.

One preparatory task of a translation into English is to dissect the long sentences that are common in the German language, and to a lesser extent, in Spanish and other Romance languages. This segmenting of the source-text sentence is a necessary but risky procedure that can easily alter its meaning.

The first requirement is to understand the structure of the language through a grammatical approach (including phonology, morphology, and syntax) and the semantical analysis of the combination and grouping of words into sentences and of sentences into paragraphs. As W. H. Snyder affirms, "if we can devise rules for the structure of a language, then we can also derive rules for the transposition of the structure of one language to that of another."[32]

The approach taken in translating the above mentioned articles was to first identify the main parts of the sentence, such as the subject, predicate, objects, attributes, adverbs and secondary sentences (*nebensaetze* in German) and their functions. Because the legal system deals mainly with human behavior, the central role of the verb in the sentence is intensified in legal translation.

After having analyzed the sentence, it was necessary to identify certain complex word contents. In social sciences, such concepts are a central mode of communication. For example, in the Roxin essay, it was necessary to explain the meaning of the word *Entmoralisierung* in the phrase "*Entmoralisierung des Strafrechts*," meaning that criminal law should dispense of private moral issues in its regulations. Without explanation, the word *Entmoralisierung* could easily have been interpreted in that context as a criminal law that was "against morality" or as advocating the "elimination of morality" in criminal law, which would have certainly not conveyed the true meaning of the text. Another case of a word whose legal significance requires careful explanation in translated text is "common law marriage." As Keith Rosenn points out, the full legal significance is not given by the words *concubinato* or *union de hecho*, terms that refer to informal unions.[33]

There were also difficulties in translating legal terms connected to particular legal theories. In German criminal law, there are words such as *Tipizitaet* (typicality), *Tatbestandsmaessigkeit* (adequacy of conduct to a legal definition), and *Tatschuld* (responsibility for the fact), which can be understood only through a thorough knowledge of the theoretical system in which they were

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32. William H. Snyder, *Linguistics and Translation*, in TRANSLATION SPECTRUM: ESSAYS IN THEORY AND PRACTICE 128 (M.G. Rose ed., State University of New York Press 1981).

33. Keith S. Rosenn, *Review of Dahl's Law Dictionary. Diccionario Jurídico*, 24 U. MIAMI INTER-AM. L. REV. 607, 615 (1993).

developed. Likewise, to grasp the full significance of the word "injunction," it is necessary to have fully understood the doctrine of equitable remedies.[34]

Often words lose their ordinary significance and have to be translated in their more specific legal meaning. The literal translation into Spanish of "to challenge" would be *desafiar*, if the narrower legal technical meaning were mistakenly ignored. As a result, in the translation of the habeas corpus text, the word "challenge" was not translated as *desafío*, but rather as *impugnación* or *ataque*. The Spanish word *culpable* does not necessarily mean "guilty" in the technical sense of an admission of guilt in American criminal procedure, but can also mean being "culpable" or "blameworthy" in a more general sense.[35]

When ordinary events, objects, and concepts enter the realm of the legal world, they often undergo significant transformations. For example, the word "death" has a special technical meaning when it becomes an element of a legal norm, as opposed to the theological or common meaning of the word.[36] Another example is the word "person," which has a specific legal meaning different from the common one.[37]

The need to deal with this specialized terminology shows that only a translator acquainted with both legal systems can undertake the task. Non-specialized translators, even with the highest degree of linguistic knowledge, are simply unable to translate legal texts such as the examples previously mentioned. Furthermore, this type of translation requires not only knowledge of the law in general, but also solid acquaintance with the specialized field, its doctrines, and particular theoretical models.

One should also take into account that words are not mere expressions to distinguish objects, but that these words and terms have a systemic meaning. A good translation should, as far as possible, maintain the measure and the style of the foreign author while respecting the rules of the target language. Legal essays

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34. *Id.* at 614.

35. Cunningham, *supra* note 4, at 2464. The author believes that to understand what "non-guilty" means, "the client would need at a minimum to know about the presumption of innocence, the procedural role of arraignment, the elements of the two different criminal charges against him, the possibility of suppressing key evidence, and the effect of such suppression on the state's ability to carry its burden of proof." *Id.* at 2483. Mr. Cunningham points out that the need of translating would have been the same if the client spoke English, which would support his thesis of lawyering as translation. *Id.*

36. For a full discussion of the various concepts of death, see REVEREND ALBERT S. MORACZEWSKI AND J. STUART SHOWALTER, DETERMINATION OF DEATH: THEOLOGICAL, MEDICAL, ETHICAL, AND LEGAL ISSUES (The Catholic Health Association of the United States 1982). On the legal concept of death, *see* DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH (President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research 1981).

37. FRANCISCO FERRARA, TEORIA DE LAS PERSONAS JURIDICAS 318 (1929), classifies the various meanings of the word "person" as anthropological (i.e., human being), theological-philosophical (i.e., rational being), and legal (i.e., a being possessing the capacity to act legally).

contain a great amount of argumentative thought and a very specific message that a translation must seek to preserve.

Translation functions as a "pollenizer" of cultures, enriching one culture with the insights of another. Moreover, legal translation serves as a bridge for understanding between nations, facilitating the resolution of vital human issues. Such a significant tool deserves broader recognition from both linguists and jurists alike.

RESPECTING HUMAN RIGHTS IN POPULATION POLICIES: AN INTERNATIONAL CUSTOMARY RIGHT TO REPRODUCTIVE CHOICE

All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.[1]

At the 1994 International Conference on Population and Development[2] in Cairo, Egypt, 179 nations joined in consensus[3] to support the right to reproductive choice.[4] Within the context of the interdependence of over-population, social and economic development, degradation of the environment, and women's rights, the countries attending the 1994 Population Conference issued a report that broadly expanded the meaning of the right to reproductive choice.

This paper posits that a human right to reproductive choice exists under international customary law. This right derives from various international treatises and non-binding resolutions and from the various laws of the nations.

After establishing that a basic international human right to reproductive choice exists, this paper posits that the right necessarily encompasses two primary rights. First, it includes the right to "the information, education and means" to determine the number and spacing of children. Subsumed within this right is the right to information about and access to contraceptives, the right to education, the right to be free from discrimination and violence and the right to reproductive health services. This right does not include the right to abortion.

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1. *Report of the International Conference on Population and Development*, U.N. International Conference on Population and Development, at 15, U.N. Doc. A/CONF.171/13 (1994) [hereinafter *1994 Population Report*].

2. Hereinafter 1994 Population Conference.

3. *1994 Population Report, supra* note 1, at 120-22.

4. The right to decide the number and spacing of children has been referred to differently by various authors. Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991) (referring to this right as the "right to reproductive freedom" and arguing that the right encompasses the international right to abortion); Ivonne Prieto, *International Child Health and Women's Reproductive Rights*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 143 (1993) (referring to the right as "individual right to family planning" and implying that the right only encompasses the right to contraceptives); Reed Boland, et al., *Honoring Human Rights in Population Policies: From Declaration to Action in* POPULATION POLICES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 89, 94 (Gita Sen, et al., eds., 1994) [hereinafter *Honoring Human Rights*] (using the term "reproductive choice" to include more than the right to contraceptives and information about and access to them, but also to include the right to abortion); and STEPHEN L. ISAACS, POPULATION LAW AND POLICY: SOURCE MATERIALS AND ISSUES 352 (1981) (using the term "fertility control"). This author will use the term "right to reproductive choice," because it seems more analogous to her definition of the right than the other terms. This author defines the "right to reproductive choice" to include the right to information about and access to contraceptives and the right to empowerment to effectively exercise this right to contraceptives. The definition of the term does not include the right to abortion.

Second, the right to reproductive choice includes the right to decide "freely" the number and spacing of children. Subsumed within this right is the right to be free from governmental coercion, including overt coercion as well as incentives and disincentives, when exercising the right to reproductive choice.

This note examines each of these arguments within the context of the over-population and environmental degradation debate. Part I surveys both the extent of the population problem and reasons for the attempt to limit population growth. Part II argues that a human right to reproductive choice exists under international customary law. Part III examines the meaning of this right.

I. THE DEBATE ON OVER-POPULATION AND ENVIRONMENTAL DEGRADATION

A. *The Scope of the Population Crisis*

In this century, world population has changed drastically. As recently as 1920, it was only two billion.[5] By 1960, it had grown to three billion.[6] In 1974, the figure hit four billion, and only thirteen years later, it hit five billion.[7] Today, the world population is 5.6 billion.[8] The United Nations estimates that the world population is growing by eighty-six million people per year.[9]

The United Nations' low, medium and high growth variant projections predict that the world population in twenty years could be 7.1 billion, 7.5 billion or 7.8 billion, respectively. The difference of 720 million people exceeds the current population of Africa.[10]

Every hour, the world's population grows by 11,000 people.[11] Every year, the world adds the equivalent of the population of Mexico, and every decade, the world adds 1 billion more people.[12]

To grasp the rate of population growth, consider these analogies:

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5. Elizabeth Rohrbough, *On Our Way to Ten Billion Human Beings: A Comment on Sustainability and Population*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 235 (1994).

6. *Id.*

7. *Id.*

8. *1994 Population Report, supra* note 1, at 9; Julia Preston, *U.N. Report: To Stem Population, Empower Women Controversial Document Declares Fertility Is the Key to Sustainable Development*, WASH. POST, Aug. 18, 1994, at A24.

9. *1994 Population Report, supra* note 1, at 9.

10. *Id.*

11. GEORGE D. MOFFETT, CRITICAL MASSES: THE GLOBAL POPULATION CHALLENGE 12 (1994).

12. Jessica Mathews, *The Abortion Distraction: The True Subject at Cairo Is Population — It's a Lot More Urgent Than Some Think*, WASH. POST, Sept. 12, 1994, at A23. The author of this editorial piece is a senior fellow at the Council on Foreign Relations.

(1) It took 10,000 generations for the world to reach its first two billion people, in 1930. It took only one generation to reach the next two billion, in 1980.[13]

(2) Every ninety-six hours, the world will have one million more residents. That is a new Pittsburgh or Boston every two days, a new Germany every eight months, a new Mexico or two new Canadas every year, and a new Africa and Latin America combined during the decade of 1990.[14]

(3) From the time of Christ, it took eighteen centuries for the Earth to reach its first one billion people, but only one century to reach its second billion, and only one decade to reach its latest billion.[15]

Predicting the level at which the world population will peak is difficult. Achieving population stabilization and sustainable development requires that the world population reach replacement level. This occurs when each couple replaces itself. Replacement level equals 2.1 children per family.[16] Currently, the world birth rate is 3.9 children per family, even though rates have fallen below replacement level in North America and Europe.[17] In Asia and Latin America, each family has 3.2 children; however, in Africa families have more than six children per couple.[18]

Compounding the problem of high birth rates is the fact that in developing countries thirty-six percent of the population is under the age of fifteen.[19] More than a third of the population is just beginning its reproductive years. This gives rise to the problem of "population momentum." Even if the world population reached replacement level today, it would skyrocket for decades to come.[20] For example, Japan reached replacement level in 1957, but it will not reach zero population growth until 2006.[21]

To reach replacement level fertility, each country progresses through a four-stage demographic transition. Stage one begins in pre-industrial societies,

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13. MOFFETT, *supra* note 11, at 7. This description of the phenomenal growth of the world population was first invoked by U.S. President Bill Clinton.

14. *Id.*

15. *Id.*

16. Rohrbough, *supra* note 5, at 235; MOFFETT, *supra* note 11, at 8.

17. Rohrbough, *supra* note 5, at 235.

18. *Id.* From 1985-1990, fertility ranged from an estimated 1.3 children per woman in Italy to 8.5 children per woman in Rwanda. *1994 Population Report, supra* note 1, at 35, para. 6.2.

19. *1994 Population Report, supra* note 1, para. 6.6., at 36.

20. MOFFETT, *supra* note 11, at 8; Rohrbough, *supra* note 5, at 235; and *1994 Population Report, supra* note 1, at 18, para. 3.2.

21. MOFFETT, *supra* note 11, at 8.

where both birth and death rates are high, keeping the population stable. After a country achieves improved living conditions, the country moves into the second stage where death rates begin to fall, but birth rates remain high because families still require a large number of children for farm labor and old-age security for parents. Most African nations are in stage two of their development.[22]

As living conditions continue to improve, urbanization occurs, the status of women improves and the cost-benefit analysis for child bearing shifts in favor of smaller families. Parents do not need large families for farm work and old-age security, but instead must educate their children, which increases the cost of raising a large family. A number of countries, particularly Latin American countries, are advancing through stage three.[23]

As a country moves from stage three into stage four, birth and death rates again reach parity, and population stabilizes. Most of the countries in Western Europe and North America have completed this transition. A few "developing countries," particularly South Korea and Thailand have also done so.[24]

The world must reach replacement level fertility to have sustainable development. As defined in the 1994 Population Report, "sustainable development implies, *inter alia*, long-term sustainability in production and consumption . . . to optimize ecologically sound resource use and minimize waste."[25]

B. *Is There a Limit to Growth or Does Population Growth Lead to Economic Growth?*

Two competing theories vie for dominance in the population debate. The first, and the one that has achieved the most wide-spread support in policy circles and the media, holds that population growth intensifies environmental degradation and exhausts natural resources. According to this view, the world population will exceed the earth's carrying capacity, and the world will undergo massive starvation to realign population with finite natural resources. The competing view, sometimes referred to as the "revisionist" view[26] or the "supply-side demographic" view,[27] finds that population growth has a neutral or even a positive influence on society.[28] It holds that population growth encourages

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22. *Id.* at 10.

23. *Id.*

24. *Id.*

25. *1994 Population Report*, *supra* note 1, at 18, para. 3.3.

26. Andrew D. Ringel, *The Population Policy Debate and the World Bank: Limits to Growth vs. Supply-Side Demographics*, 6 Geo. Int'l Envt'l. L. Rev. 213, 215 (1993); MOFFETT, *supra* note 11, at 106.

27. Ringel, *supra* note 26, at 214. Ringel refers to this view as both the "revisionist" view and the "supply-side demographic" view.

28. MOFFETT, *supra* note 11, at 107.

economic development through technological innovation and more efficient resource allocation. According to this view, the world population will never exceed its carrying capacity. The scarcity of natural resources will encourage the development of new technologies and will stimulate the development of substitutes to replace the need for scarce resources.[29] Evidence supports both views.

1. *Limits to Growth*

The first view, often referred to as the "limits to growth" theory, has as its forefather English political economist Thomas Malthus, who in 1798 wrote *Essay on the Principle of Population*.[30] Malthus predicted that population would expand geometrically, doubling every twenty-five years. However, because of limited natural resources, food production would not keep pace with increased demand. Ultimately, he concluded that the world population would reach the limits of sustainability and would be checked by famine, disease and war.[31]

Malthus' position was followed and popularized in the conventional wisdom[32] by Stanford University biologist Paul R. Ehrlich in his 1968 book *The Population Bomb*.[33] Ehrlich expanded Malthus' theory to include the effects of rapid population growth on the availability of other natural resources, such as water and energy, and on the earth's ability to absorb increasing waste, such as pollution.[34]

Although neither of these predictions have developed, ample evidence supports the theory that the Earth has a certain "carrying capacity" which may be reached in the future. "Carrying capacity is the largest number of any given species that a habitat can support indefinitely."[35] If the carrying capacity is

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29. *Id.*

30. THOMAS R. MALTHUS, AN ESSAY OF THE PRINCIPLE OF POPULATION OR A VIEW OF ITS PAST AND PRESENT EFFECTS ON HUMAN HAPPINESS (6th ed. Ward, Lock and Company, 1890).

31. *Id.* at 4-7. Malthus' Essay was a response to the optimistic writers of the sixteenth and seventeenth centuries who applauded the growth in population as a way to increase markets and wealth for the newly industrialized Europe. However, Malthus saw extensive poverty in England, which suffered from a series of economic crises and bad harvests. MOFFETT, *supra* note 11, at 102. *See also* Ringel, *supra* note 26, at 217 (succinctly discussing Malthus' hypothesis).

32. The book sold 3 million copies and brought Ehrlich and his doomsayer position into the media limelight with an appearance on the Johnny Carson Show in 1970. MOFFETT, *supra* note 11, at 109.

33. PAUL R. EHRLICH, THE POPULATION BOMB, (rev. ed. 1971).

34. Ringel, *supra* note 26, at 219.

35. Sandra Postel, *Carrying Capacity: Earth's Bottom Line in* STATE OF THE WORLD *1994:* A WORLDWATCH INSTITUTE REPORT ON THE PROGRESS TOWARD A SUSTAINABLE SOCIETY 3, 3 (1994).

surpassed, the resource base and population decline.[36] In the 1994 edition of the Worldwatch Institute's *State of the World*, author Sandra Postel illustrates a breach of carrying capacity with the following example: In 1944, twenty-nine reindeer were introduced to St. Mathew Island in the Bering Sea. By 1963, the number of reindeer had grown to over 6,000 deer. However, due to overgrazing the animals faced extensive competition for limited food supplies during a severe winter, and the population "crashed," leaving less than fifty reindeer.[37]

Although the world population will not "crash" as the reindeer population did,[38] evidence shows that the earth's carrying capacity may be reaching its limit. The earth's capacity to support the world's population is determined by a combination of food requirements, consumption levels, waste generated and available technologies.[39]

Evidence shows that the amount of available natural resources per person in the world is falling.[40] Assuming that the world's population increases by thirty-three percent by 2010 as is expected, the amount of cropland per person would decline by twenty-one percent,[41] and even though rangeland is expected to increase by four percent by the year 2010, the per capita gain would actually be

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36. *Id* at 3-4.

37. *Id.* at 4.

38. *Id.*

39. *Id.*

40. LESTER R. BROWN, WORLDWATCH INSTITUTE, STATE OF THE WORLD 1994: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY xv (1994). Between 1950 and 1984, as a result of the "Green Revolution", world grain production expanded 2.6-fold, outstripping population growth and increasing per capita grain harvest by 40%. The world fish catch also increased tremendously, 4.6-fold, doubling the seafood catch per person. However, since 1984, these trends have reversed. By 1993, the fish catch per person had fallen by 7%, and after 1984, grain production fell behind population growth. *Id.* at 177. See *id.* at 177-197 for an in-depth discussion of trends and projections of world food production from 1950 to 2030. Brown discusses the impact of the development of fertilizer and hybrid seeds which caused the "Green Revolution" and the lack of current technological innovations available to sustain the "Green Revolution" into the next 40 years.

41. Postel, *supra* note 35, at 9. Between 1980 and 1990, cropland area worldwide expanded by just 2%, thus any gains in food harvest resulted from an increase in yields from already producing land. *Id.* The problem with this is that cropland yields, through the use of fertilizer and hybrid varieties of seeds developed during the "Green Revolution," have climaxed. Farmers have found that increasing fertilizer is no longer increasing yields. Without new technologies to raise the yields of current land under cultivation, the amount of grain produced is not likely to increase. Brown, *supra* note 40, at 180-187. Further, cropland is being lost to industrial development. For example, between 1957 and 1990, China lost 35 million hectares of cropland, an area equal to all the cropland in France, Germany, Denmark and the Netherlands combined. Postel, *supra* note 35, at 9. Moreover, the cropland in production is losing its capacity to produce as a result of unsound management practices and overuse. The Global Assessment of Soil Degradation found that more than 550 million hectares are losing topsoil or undergoing other forms of degradation. *Id.*

a loss of twenty-two percent.[42] The world fish catch, which a number of nations rely on heavily for protein in their diet, is expected to drop by ten percent per person by 2010.[43] Moreover, the amount of forests and woodlands which provide lumber and fuelwood for consumption, and harbor the world's biodiversity of plants and animals, is expected to shrink by seven percent by the year 2010, which translates to a per capita drop of thirty percent.[44] Further, twenty-six countries, particularly countries in the Middle East and Africa, have insufficient renewable water supplies to meet the needs of a moderately developed society.[45]

Different consumption patterns and standards of living between the developing world and the developed world alter the impact of population increases on the earth's carrying capacity. Ehrlich developed an analytical equation to describe this relationship: Impact (I) = Population (P) x Affluence (A) x Technology (T).[46] Thus, if one American consumes resources fifty times faster than one Bangladeshi, every additional American child displaces fifty potential Bangladeshi children.[47] A good illustration of this is in the amount of energy used per person. The developed world uses much more energy per person than the developing world. Every person in the United States uses 10kw (200,000 kcal/day), while people in developing countries use only 1 kw (20,000

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42. Postel, *supra* note 35, at 10. Much of the world's rangeland is overgrazed. According to the Global Assessment of Soil Degradation, some 680 million hectares of land, 20% of the world's pasture and rangeland, has been overgrazed and is losing productivity. *Id.*

43. *Id.* at 11. Even though the world fish catch has climbed rapidly since 1950, it peaked in 1989, and the U.N. Food and Agriculture Organization estimates that all 17 of the world's major fishing areas have either reached or exceeded their natural limits. Nine are in serious decline. *Id.* at 10-11.

44. *Id.* at 12. Recent studies show that the world's forests shrunk by 130 million hectares between 1980 and 1990, an area larger than Peru. *Id.*

45. *Id.* at 11. Water constraints also hamper food production. Food grown with the use of irrigation accounts for only 16% of the total cropland, but one-third of the world's harvest. Irrigated land is expected to increase in total, but again considering an increase in population, per capita irrigated land would decrease by 12%. *Id.* at 11-12.

46. Paul R. Ehrlich & J.P. Holden, *Impact of Population Growth*, 171 SCIENCE 1212 (1974); J.P. Holden and Paul R. Ehrlich, *Human Population and the Global Environment*, 62 AM. SCIENTIST 282 (1974); Stephen Raucher, Book Note, 18 ECOLOGY L.Q. 259 (1991) *in* Ringel, *supra* note 26, at 219 n.16.

47. Russel Lawrence Barsh, *Indigenous Peoples' Perspectives on Population and Development*, 21 B.C. ENVTL. AFF. L. REV. 257, 258 (1994). Barsh argues that determining whether the resource space available is allocated to an American child or a Bangladeshi child is a matter of relative power. The wealthy can protect their standard of living by ownership of resources. But the poor can force the wealthy to share their resources by threatening to produce more children who will consume remaining resources making them unavailable to the wealthy. Thus, the poor can ultimately lower the standard of living of the wealthy by producing more children and consuming more resources unless the wealthy countries share their wealth with the poor.

kcal/day).[48] Thus, increasing the U.S. population by 125 million is the equivalent of increasing the population of a developing country by 1.25 billion people.[49]

As a result of consumption patterns and population growth, the earth's natural resources will be depleted and the environment will be destroyed. Further, according to the limits to growth view, the earth will reach its carrying capacity.

2. *The Revisionist View: Supply-side Demographics*

The revisionist view counters by relying on technology. It proposes that even if population increases and the earth has a limited carrying capacity, the fact that the world is faced with a burden on the carrying capacity will cause new technologies to be developed to avoid overburdening the earth's carrying capacity.

The revisionist view has as its historical underpinnings in writings by Frenchman Condorcet who predicted that new technology will reduce the need for labor and will enhance the productivity of limited natural resources, such as land.[50] Today, Julian Simon is Ehrlich's nemesis in the revisionist camp. He

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48. Rohrbough, *supra* note 5, at 237.

49. *Id.* This relationship can also be seen in food consumption patterns. Although most developing countries aspire to the diet of the western world, the world's population has foreclosed that possibility. The average American consumes 800 kilograms of grain per year, most of it indirectly through meat, while the average Italian consumes 400 kilograms of grain per year, most of it rice. Brown, *supra* note 40, at 190. At U.S. consumption levels, the world grain output could only sustain 2.75 billion people, half as many as are alive today. *Id.* At Italian consumption levels, it would support 5.5 billion people, the current population, and at the Indian level, world grain output could sustain 11 billion people. *Id.* Thus, to support the number of people in the world in 2030, the affluence of the world's diet must be reduced, given that the earth has a finite supply of natural resources.

The relationship between population and consumption is also apparent in the production of waste. The developed world produces two-thirds of all greenhouse gases, such as carbon dioxide, methane and nitrous oxide, from the burning of fossil fuels, while the developing nations produce one-third of greenhouse gas emissions from primarily agricultural practices, such as carbon dioxide from tropical deforestation and methane from rice cultivation and livestock. John H. Gibbons, *Energy and the Environment: Intersecting Global Issues, Decisionmaking in the Face of Uncertainty* 9 ARIZ. J. INT'L & COMP. L. 231, 233-34 (1992). Gibbons, a nuclear physicist, is Chairman of the Office of Technology Assessment, a nonpartisan analytical support agency of the U.S. Congress. As the developing world further industrializes, its use of fossil fuels will increase. Combining an increased use of fossil fuels with continuing population growth, the developing world's greenhouse emissions will escalate. *Id.* at 234. An increase in waste thus increases the burden on the earth's carrying capacity.

50. For example:

> New instruments, machines, and looms can add to man's strength and improve at once the quality and accuracy of his productions, and can diminish the time and labor that has to be expended on them. The obstacles still in the way of this progress will disappear. A very small amount of ground will be able to produce a great quantity of supplies.

argues that population growth positively affects society because it creates increased demand for goods, which expands markets and stimulates economic growth.[51] Further, he argues that by creating scarcity, population growth develops invention." Again and again, temporary scarcities induced by the growth of population and income have induced the search for solutions which, when found, left us better off than if the scarcities had never arisen."[52]

Evidence supports Simon's theory. In the 1960's and 1970's, technology started the "Green Revolution" and saved large portions of the developing world from famine.[53] Scientists developed chemicals and hybrid seeds, which were more resistant to weather changes, bugs and weeds. As a result, food harvests increased dramatically. Worldwide grain output increased nearly twice as fast as population growth.[54]

Nevertheless, trends show that the successes of the green revolution are coming to an end. The per capita production of food worldwide is falling.[55] And the technology that rescued large portions of the developing world from starvation during the 1960's and 1970's has reached a point of diminishing returns.[56] Further, the prospect of replacement technology is weak.[57] Leading scientists from the National Academy of Sciences and the Royal Society of the United Kingdom do not foresee the development of technological innovation that could dramatically increase production yields in the near future.[58]

Further, technology cannot solve the world's problems, but can merely buy time while the world stabilizes population and reduces excessive consumption.

MOFFETT, *supra* note 11, at 104 (quoting Marie Jean Antoine, et al., THE FUTURE PROGRESS OF THE HUMAN MIND (1795)).

51. *Id.* at 112 (citing Julian Simon, *Resources, Population, Environment: An Oversupply of False Bad News*, 208 SCIENCE 1431-37 (1980)).

> [M]ore people not only means the use of more resources but more units of creativity and productivity. More people compete creatively for ways to develop or find substitutes. Thus, the world's resources are not finite.

Id. at 113.

52. *Id.*

53. Years earlier, Europe was similarly saved from starvation with the advent of advanced farming techniques. In the 17th century, farmers learned that manuring and crop rotation eliminated the need to let land lie fallow. Farmers throughout Europe began rotating cereal crops, such as wheat and corn, with root crops, like turnips and cassava, and forage crops, such as clover to restore nitrogen to the soil. MOFFET, *supra* note 11, at 68-69.

54. *Id.* at 69-70.

55. *See supra* note 40.

56. Brown, *supra* note 40, at 178-87. Food yields are no longer increasing simultaneously with heavier applications of fertilizer.

57. *Id.* at 186-87.

58. *Id.* Technology that could lower the cost of desalting seawater or that could redesign the photosynthetic process to enable it to convert solar energy into biochemical energy more efficiently could dramatically increase world food production; however, scientists do not believe a break through in these technologies will occur in the foreseeable future.

Technology stretches the earth's carrying capacity, but cannot solve the carrying capacity problem.[59] Ehrlich summarizes the flaws in revisionist thinking as follows:

> It's like designing an airplane where you worry more about how many you can get on board than how many you can fly with. The attitude of let's just hope something comes along, that technology will save us, is fine if you want to play dice with the future of your children and grandchildren.[60]

3. *Influence on Population Policy*

Regardless of the view to which one adheres, both views have influenced U.S. and world population policies. The limits to growth view is institutionalized as the dominant view in the United Nations system, the World Bank, and the media.[61] For example, the 1994 Population Report framed the population issue in terms of environmental impact: "The everyday activities of all human beings, communities and countries are interrelated with population change, patterns and levels of use of natural resources, the state of the environment, and the pace and quality of economic and social development."[62] Further, World Bank President and former U.S. Secretary of Defense Robert S. McNamara demonstrated his support for the limits of growth view when he addressed the 1984 World Population Conference in Mexico City.[63] Clearly, the United Nations and other international government and nongovernmental organizations strongly support the view that population must be reduced to reach sustainable development.

However, the revisionist view has also influenced world population policies. In 1984 at the International Conference on Population in Mexico City, the United States, under the Reagan administration, officially adopted the revisionist view, declaring that population and growth did not impede economic development.[64] Nevertheless, with a change in the U.S. presidency, the United

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59. Postel, *supra* note 35, at 4-5, 12-16.

60. MOFFETT, *supra* note 11, at 111.

61. Ringel, *supra* note 26.

62. *1994 Population Report, supra* note 1, para. 3.1, at 18.

63. Ringel, *supra* note 26.

64. *Id.* U.S. Delegate James Buckley stated, "The relationship between population growth and economic development is not a negative one. Indeed, both in the American experience and in the economic history of most advanced nations, population growth has been an essential element in economic progress." *Policy Statement of the United States of America at the International Conference on Population* 2d Session, Mexico, D.F., at 6-13 (Aug. 1984) *quoted in* MOFFETT, *supra* note 11, at 283-84.

States reversed its position and re-adopted the limits to growth philosophy concerning population growth.[65]

The limits to growth philosophy, which advocates sustainable development, directly impacts world population policies. In fact, the mandate of the 1994 Population Conference was to address the interrelationships between sustainable development, sustained economic growth and population.[66] As sustainable development influences world policies, it necessarily affects the international customary right to reproductive choice.

II. CUSTOMARY LAW RECOGNIZES AN INTERNATIONAL HUMAN RIGHT TO REPRODUCTIVE CHOICE

The practice that "all couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so"[67] has ripened into a rule of customary international law.

A. *The Nature of Customary Law*

The body of international law derives from four sources: treaties, customary law, general principles of law recognized by civilized nations and "judicial decisions and teachings of the most highly qualified publicists of the various nations."[68] Generally, international law develops in two ways (1) by the practice of states, known as "customary law," and (2) by agreement among states, known as "conventional law."[69]

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65. John M. Goshko, *Planned Parenthood Gets Aid Grant*, WASH. POST, Nov. 23, 1993, at A12-13.

66. *1994 Population Report, supra* note 1, at 14.

67. *Id.* at 15.

68. Stat. I.C.J. art. 38(1). Article 38(1) provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. See also RESTATEMENT (THIRD) OF FOREIGN LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT (THIRD)]; RESTATEMENT (THIRD) § 102 reporters' note 1.

69. *Id.* (introductory note).

Customary law develops from a "general and consistent practice" followed by states from a "sense of legal obligation."[70] The International Court of Justice formulated the elements for customary law as follows:

> The Party which relies on custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party . . . that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State . . . .[71]

1. *Elements of Customary Law*

To become customary international law, the custom must be a "constant and uniform usage practiced by the states."[72] Generally, a practice must reflect "wide acceptance" by the states, but the practice need not be universally followed.[73] Further, contrary to earlier formulations of the rule, the practice need not continue for a long period of time. In the North Sea Continental Shelf Cases, the International Court of Justice acknowledged that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[74]

In addition to being a "general and consistent practice,"[75] the custom must be followed by states as a result of a legal duty or what is often called *opinio juris et necessitatis*.[76] The fact that states consistently act in a certain manner is not sufficient to form customary law, unless they act under a sense of legal obligation.[77] Often, states do not act with acknowledged compliance with the rules of international law,[78] thus, legal obligation is inferred from acts or omissions.[79]

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70. *Id.* § 102(1)(2).

71. Asylum Case (Colom. v. Peru), 1950 I.C.J. 276, 276.

72. *Id.*

73. RESTATEMENT (THIRD), *supra* note 68, § 102 cmt. b.

74. North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 44 [hereinafter North Sea Continental Shelf Cases]. Earlier definitions of customary law implied that states were required to practice a custom for a long period of time before it would develop into law. RESTATEMENT (THIRD), *supra* note 68, § 102 reporters' note 2.

75. *Id.* § 102(2).

76. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (4th ed., 1990).

77. North Sea Continental Shelf Cases, 1969 I.C.J. at 44. In this case, the Court stated: "The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough." *Id.*

78. BROWNLIE, *supra* note 76, at 7.

79. RESTATEMENT (THIRD), *supra* note 68, § 102 cmt. c.

2. *Evidence of Customary Law*

States act both internationally and domestically. In the international arena, a state may enter into international agreements that create law among the signatory states.[80] However, international agreements may also create customary law for those states that are not parties.[81] For example, where a multilateral agreement is designed for adherence by states generally, is widely accepted and is not rejected by a significant number of important states, it may become law for non-party states that do not actively dissent.[82]

Another state practice in the international arena that builds customary law is action in or through international organizations. The adoption of United Nations' resolutions, declarations and other statements of principles evidences and contributes to the development of customary international law.[83]

States also act through national domestic laws. Typically, a general principle of law recognized by civilized nations is an independent source of international law.[84] However, it also may be evidence of customary law. Trends in domestic laws can establish international laws.[85]

3. *The Effect of Customary Law*

Customary international law is enforceable. The International Court of Justice applies international conventions, international custom, general principles of law and judicial decisions and teachings of national scholars as sources of law.[86] Customary law and treaty law are equally binding on states within the

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80. *See* North Sea Continental Shelf, 1969 I.C.J. at 28-29, 37-43. International agreements by themselves also create international law that binds the party states. Stat. I.C.J. art. 38(1)(1).

81. *See* Article 38 of the Vienna Convention on the Law of Treaties, which provides that "[n]othing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such." Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27 (in force Jan. 27, 1980) U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

82. RESTATEMENT (THIRD), *supra* note 68, § 102 cmt. i.

83. *Id.* § 102 reporters' note 2. Recently at international conferences, states have been reaching agreement by consensus, rather than by vote. Such was the case at the 1994 Population Conference. *1994 Population Report, supra* note 1, at 4.

84. Stat. I.C.J. art. 38(1)(c).

85. RESTATEMENT (THIRD), *supra* note 68, § 102, reporters' note 7. For example, a rule against torture is a part of international law because it is a principle common to all major legal systems.

86. Stat. I.C.J., art. 38(1). Article 38(1) provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

international arena.[87] Once established as customary international law, a law is generally binding upon all states, even those states that enter the international arena after a practice has ripened into a rule of international law.[88]

Nations treat international law as law and consider themselves bound by it. They consider international law a legal obligation and are concerned about the consequences of its violation.[89] Often, international law is observed because states have a common interest in maintaining particular standards and in avoiding the consequences of its violation. This is particularly true where damage to their "credit" or reputation might result.[90]

In the case of the right to reproductive freedom, once it ripens into customary international law, it binds all the states of the world. This is significant because prior to becoming a rule of international law, this right was only enforceable upon those nations that were signatories to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.[91] As of 1993, only 122 states had signed the Women's Convention.[92] Although the United States is a signatory to the Women's Convention, the United States is not bound by it because it has not been ratified by the U.S. Senate.[93] A number of states are not parties to the Women's Convention, including the United States. Nevertheless, the ripening of the right to reproductive choice into a rule of customary law significantly expands the enforceable rights of women throughout the world. All states are now bound to uphold the right of all couples and individuals to freely and responsibly decide the number and spacing of their children, and to have the information, education and means to do so.

(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

87. RESTATEMENT (THIRD), *supra* note 68, § 102 cmt. j.

88. *Id.* § 102 cmt. d.

89. *Id.* pt. I, ch. 1, introductory note.

90. *Id.*

91. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) *reprinted in* 18 DUSAN J. DJONOVICH, UNITED NATIONS RESOLUTIONS, RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 381 (1975) [hereinafter *Women's Convention*].

92. Boland, *supra* note 4, at 94 n.2.

93. Hernandez, *supra* note 4, at n.148.

B. *International Documents Recognize an International Human Right to Reproductive Choice*

The right to reproductive choice is "a general practice accepted by law,"[94] and as such, is customary law. International practice sufficient to form custom is evidenced by international documents.[95] Since 1968, numerous international documents have recognized the right to reproductive choice.

The right to reproductive choice was first declared a human right by the international community in 1968 in the Proclamation of Teheran.[96] The right to reproductive choice was not formally guaranteed in the Universal Declaration on Human Rights, although article 16 did recognize the right of "men and women of full age" to "marry and found a family."[97] As formulated in the Proclamation of Teheran, the right recognized that "[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children [and a right to adequate education and information in this respect.]"[98] Just one year later in 1969, the international community reaffirmed its commitment to this right in the Declaration on Social Progress and Development.[99] This document provides that "[p]arents have the exclusive right to determine freely and responsibly the number and spacing of their children."[100]

The next international document to address the right to reproductive

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94. Stat. I.C.J. art. 38(1). *See also infra* part II.A. and accompanying notes.

95. *See infra* part II.A.2. and accompanying notes.

96. United Nations Conference on Human Rights, Teheran, Apr. 22 to May 13, 1968, Proclamation of Teheran, art. 16, *reprinted in Official Documents: United Nations Conference on Human Rights*, 63 AM. J. INT'L. L. 674 (1969) [hereinafter Proclamation of Teheran].

97. *The Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, art. 16, U.N. Doc. A/810, (1948).

98. Proclamation of Teheran, *supra* note 96, art. 16.

> *Believing* that it is timely to draw attention to the connection between population growth and human rights [the conference]:
>
> ....
>
> 3. *Considers* that couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect;
>
> 4. *Urges* Member States and United Nations bodies and specialized agencies concerned to give close attention to the implications for the exercise of human rights of the present rapid rate of increase in world population.

Id.

99. *Declaration on Social Progress and Development*, G.A. Res. 2542 (XXIV), U.N. GAOR (1968), *in* 12 DUSAN J. DJONOVICH, U.N. RESOLUTIONS: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 257 [hereinafter *Declaration on Social Progress*].

100. *Id.* at 258. Article 4 provides: "The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children."

freedom was the World Population Plan of Action adopted by consensus at the United Nations World Population Conference in Bucharest, Romania, in 1974.[101] This was the first international conference assembled to confront the perceived problem of over-population and environmental degradation.[102] Faced with an increasingly expanding population, the states of the world again adhered to the general premise that couples have a right to reproductive choice. Article 14(f) provides:

> All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community.[103]

The same year as the Bucharest Conference, the international community adopted the Resolution of the World Food Conference, which addressed the right to reproductive choice.[104] Specifically, Resolution IX provided:

> *The World Food Conference . . . . Now calls on* all Governments and on people everywhere . . . to support . . . rational population policies ensuring to couples the right to determine the number and spacing of births, freely and responsibly, in accordance with national needs within the context of an over-all development strategy.[105]

Shortly after these conferences, world leaders met in Mexico in 1975 for the World Conference on the International Women's Year.[106] Again, the international community addressed the right to reproductive choice. Here, the right was stated as:

> Every couple and every individual has the right to decide freely and responsibly whether or not to have children as well as to determine

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101. *Report of the World Population Conference*, art. 14(f) U.N. Doc. E/CN. 60/19 (1974) [hereinafter *1974 Plan of Action*].

102. Interestingly, the developed countries of the world thought population was an issue. The developing countries contended that the developed world's industry and heavy consumption of natural resources, not the developing countries' population, caused the degradation of the earth. Boyce Renseberg, *As Birthrates Fall, Population Rises: U.N. Cairo Conference to Address World Growth Stabilization Efforts*, WASH. POST, Sept. 4, 1994, at A1.

103. *1974 Plan of Action*, *supra* note 101, art. 14(f).

104. *Report of the World Food Conference*, Res. IX, U.N. Doc. E/CN.65/20 (1974).

105. *Id.*

106. *Report of the World Conference on the International Women's Year*, art. 12, U.N. Doc. E/CN. 66/34 (1975) [hereinafter *Women's Convention*].

> their number and spacing, and to have information, education and means to do so.[107]

These initial formulations of the right to reproductive choice are neither consistent nor all inclusive. The right as described in the Proclamation of Teheran grants the right to "couples," while the Declaration on Social Progress gives the right to "parents" and the 1974 Plan of Action allows the right to be exercised by "all couples and individuals." Further, the Declaration on Social Progress and the Report of the World Food Conference fail to include the phrase "and a right to adequate education and information in this respect" which was included in the Proclamation of Teheran, the 1974 Plan of Action and the Declaration on International Women's Year. These inconsistencies clearly demonstrate that the right to reproductive choice as a form of customary law was not solidified at this early stage of development.

Yet, the states of the world continued to adhere to the general premise that couples had a right to reproductive choice. By 1981, this right was embodied in the Women's Convention and for the first time became legally binding upon signatory states.[108] The Women's Convention mandates that:

> State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> > (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;[109]

Thus, signatory states to the Women's Convention are legally bound to support the basic human right of reproductive choice.

As the right of reproductive choice became a legally enforceable human right, the formulation of the right also solidified. The language of the Women's Convention reaffirms the language and meaning used in the Proclamation of Teheran and the 1974 Population Plan. This consensus on the fact that "couples and individuals" have the right to decide the number and spacing of children, and that they are entitled to "information, education and means" to exercise this right,

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107. *Id.*

108. *Id.* art. 16(e). *See also infra*, part II.A.3. and accompanying notes; *Honoring Human Rights, supra* note 4, at 94 n.2; and Hernandez, *supra* note 4, at 340 n.148.

109. *Id.*

establishes strong evidence that this international practice is developing into customary law.

In 1984, the international states further solidified their adherence to the basic human right of reproductive freedom when they convened in Mexico City for another conference on population and environmental degradation.[110] At this conference, the international community recognized the right to reproductive choice as a basic human right and elaborated on this right by proclaiming that "[t]he ability of women to control their own fertility forms an important basis for the enjoyment of other rights."[111] Emphasizing this, the states expanded the right to reproductive choice by reiterating that education and the means to exercise the right are necessary to effectively ensure the right of reproductive choice. Recommendation 24 admonishes governments because, although the right was "widely accepted," they were not providing couples and individuals with the necessary education and services required to exercise the right.[112]

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110. As the developing world underwent significant increases in population between 1974 and 1984, the dialogue between the developing world and the developed world significantly changed. In fact, the developing countries requested another world population conference, whereas in 1974, the developed nations requested such a conference. *Report of the International Conference on Population,* U.N. Department of Technical Co-operation for Development, 12th plen. mtg., at 51, U.N. Doc. E/CONF.76/19 (1984) [hereinafter *1984 Recommendations*]. However, the United States adopted the revisionist view espoused by Julian Simon which holds that population growth is a positive societal force because it creates an increase in the demand for goods, expands markets and stimulates economic growth. MOFFETT, *supra* note 11, at 112.

The twenty-second paragraph of the Mexico City Declaration on Population and Development succinctly summed up the message of Mexico City:

> At Bucharest, the world was made aware of the gravity and magnitude of the population problems and their close interrelationship with economic and social development. The message of Mexico City is to forge ahead with effective implementation of the World Population Plan of Action aimed at improving standards of living and quality of life for all peoples of this planet in promotion of their common destiny in peace and security.

1984 Recommendations, *supra* note 110 at 51.

111. *Id.* at 16.

112. *Id.* Specifically, Recommendation 24 states:

> The World Population Plan of Action recognizes, as one of its principles, the basic human right of all couples and individuals to decide freely and responsibly the number and spacing of their children. For this right to be realized, couples and individuals must have access to the necessary education, information and means to regulate their fertility, regardless of the overall demographic goals of the Government. While this right is widely accepted, many couples and individuals are unable to exercise it effectively, either because they lack access to information, education and/or services or because, although some services are available, yet an appropriate range of methods or follow-up services are not. Indeed, data from the World Fertility Survey for developing countries indicate that, on average, over one fourth of births in the year prior to the Survey had not been desired. In addition, the decline in the prevalence of certain traditional practices, such as prolonged breast-feeding and post-partum abstinence, has increased the relative importance

The international community next addressed the right to reproductive choice in 1985 in the Nairobi Strategies.[113] In this international document, states urged governments to make available "as a matter of urgency" information and education to assist individuals and couples to exercise their right to reproductive choice.[114]

By 1994, at the U.N. International Conference on Population and Development in Cairo, Egypt, the right to reproductive choice was well- defined. The 1994 Population Report adopted the previously accepted language to define the right. Specifically, Principle 8 provides "[a]ll couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so."[115]

Thus, "all couples and individuals," rather than "parents" or merely "couples," could exercise the right. Further, the international community affirmed that the right to reproductive choice necessarily includes the right to "education, information and means" to exercise the right. Moreover, the states emphasized that the enjoyment of other basic human rights depends upon the effective exercise of the right to reproductive choice.

At the 1994 Population Conference, 179 states, including the Holy See, by consensus reaffirmed their support for the right to reproductive choice.[116] Only six countries in the world refused to send delegates to the 1994 Population Conference.[117]

Nearly every state in the international community displayed its support for the right to reproductive choice by adopting by consensus the 1994 Population Report. Further, since 1968, numerous United Nations documents accepted by the international community have recognized the human right to reproductive choice. As international documents demonstrate international practice, the universal acceptance of these international instruments demonstrates that the right to reproductive choice is "a general practice accepted by law."[118] As such, the right to reproductive choice is a customary international right.

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of non-traditional family planning as a tool for the proper spacing of births. *Id.*

113. *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi* at 39, U.N. Doc. A/CONF. 116/28/Rev. 1 (1985) [hereinafter *Nairobi Strategies*].

114. *Id.* at 39, para. 157.

115. *1994 Population Report, supra* note 1, at 15.

116. *Id.* at 120-122. "[The International Conference on Population and Development] affirms the application of universally recognized human rights standards to all aspects of population programmes." *Id.* at 13.

117. John Lancaster, *Envoys to Population Meeting Try Compromise Wording on Abortion*, WASH. POST, Sept. 5, 1994, at A21. Only Saudia Arabia, Lebanon, Sudan, Monaco, Liechtenstein and Iraq failed to send delegates. *Id. See also 1994 Population Report, supra* note 1, at 120-22.

118. Stat. I.C.J. art. 38(1). *See also supra* part II.A. and accompanying notes.

C. *National Legislation Supports an International Human Right to Reproductive Choice*

A review of national legislation demonstrates that the right to reproductive choice is recognized as an international customary right. A general principle of law recognized by the major legal systems of the world evidences customary international law.[119] Nearly universal support in national legislation for the right to reproductive choice demonstrates that the right is an international right recognized by customary law.

As of 1988, of 170 countries in the world, only seven refused to support the right to reproductive choice by restricting access to contraceptives.[120] 163 states in the international arena have national legislation recognizing the right to reproductive choice as evidenced by legal access to contraceptives.[121] Of the 163 countries supporting access to contraceptives, 125 offered direct financial support, while twenty-one offered indirect support.[122] Seventeen countries, mainly developed countries, did not need to offer support for family planning programs because the private sector provided these services.[123]

Further, at least three countries have made the right to reproductive choice a fundamental right by constitutionalizing it. In 1974, Mexico amended Article 4 of its Constitution to provide "[e]very person has the right to decide in a free, responsible and informed manner on the number and spacing of their children."[124] Brazil's 1988 Constitution also supports the right to reproductive freedom. Specifically, it provides:

> Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide education and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.[125]

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119. RESTATEMENT (THIRD), *supra* note 68, § 102, reporters' note 7.

120. *Population Trends and Policies in the 1980s*, U.N. ESCOR, Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, Geneva, at 43, U.N. Doc. ST/ESA/SER.R/107 (1989) [hereinafter *Population Trends*].

121. *Id.*

122. *Id.*

123. *Id.* at 44.

124. MEXICAN CONSTITUTION, art. 4, *reprinted in* 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MEXICO 13 (Albert P. Blaustein & Gisbert H. Flanz eds., 1988).

125. CONSTITUICAO FEDERAL, ch. VII, Art. 226, p. 7 (Brazil) *reprinted in* Prieto, *supra note 4.*

In the United States, the due process clause of the 14th Amendment to the Constitution guarantees the right to reproductive choice under the rubric of the right to privacy. In 1965, the United States Supreme Court in *Griswold v. Connecticut*[126] struck down a state statute prohibiting the distribution of contraceptives because it violated the right to privacy guaranteed by the 14th Amendment to the United States Constitution.

Nearly every country in the world supports the right to reproductive choice. This general principle of law recognized by the major legal systems of the world demonstrates that the right to reproductive choice is recognized as customary international law.

Universal support in national legislation and widespread consensus in international documents, conventions and treaties, particularly in the 1994 Population Report, shows that the right to reproductive choice is a "constant and uniform usage practiced by the states."[127] Clearly, the right to reproductive choice exists within international customary law.

III. THE MEANING OF THE INTERNATIONAL HUMAN RIGHT TO REPRODUCTIVE CHOICE

A. *The Information, Education and Means to Decide the Number and Spacing of Children*

For the past thirty years, the world has interpreted the phrase "information, education and means" to exercise the right to reproductive freedom to mean that women have a right to information about and access to contraceptives.[128] Under the 1994 Population Report, the scope of this right was expanded to include the basic human right to education,[129] the right to be free from gender-based discrimination[130] and the right to sexual health.[131] Although these rights had been guaranteed as basic human rights in other international documents,[132] the 1994 Population Report included them as necessary rights to the fulfillment of the right to reproductive choice. However, the right to reproductive choice as described

126. Connecticut v. Griswold 381 U.S. 479 (1965).

127. Asylum Case, 1950 I.C.J. Rep. at 276.

128. *See infra* part III.A.1. and accompanying notes.

129. *1994 Population Report, supra* note 1 at 25-28. *See also infra* part III.A.2.a. and accompanying notes.

130. *Id.* at 25-31. *See also infra* part III.A.2.b. and accompanying notes.

131. *Id.* at 43-54. *See also infra* part III.A.2.c. and accompanying notes.

132. For example, the basic human right to education was first enunciated in 1948 in the Universal Declaration of Human Rights. The Universal Declaration of Human Rights, *supra* note 97, at art. 26.

in the 1994 Population Report and as developed in international law did not include the right to abortion.[133]

1. *Information About and Access to Contraceptives*

In the past, the right to reproductive freedom as practiced encompassed only the right to information about and access to contraceptives. After the adoption of the 1994 Population Report, this right has expanded, but it still includes the basic right to information about and access to contraceptives.

After the 1974 Plan of Action, governments throughout the developing world established family planning programs and clinics to distribute contraceptives. By 1988, 146 governments provided, either directly or indirectly, family planning services to their citizens.[134] In addition to access to contraceptives, most countries provided information about the use of family planning methods. For instance, in Thailand, government-supported messages that large families make families poor infiltrate every aspect of the Thai life. As most Thai homes now have radios and some have televisions, government announcements carry the message, and soap opera story lines subtly reinforce the message. Village loud speakers broadcast announcements about the government-run family planning clinic, and the clinics themselves provide literature about the virtues of smaller families.[135] Further, governments typically advocate the use of contraceptives. For example, in Zimbabwe, which has one of Africa's most successful family planning programs, the president appointed his sister-in-law to run the program for a brief period of time.[136] The goal has been to change the historical, social and cultural opposition to smaller families and to alleviate stigmatization associated with the use of modern family planning.[137]

These family planning services have brought a drastic decline in the fertility rate in developing countries since the 1960s. In Thailand, the use of contraceptives increased from 15% to 67% of the couples from 1970 to 1987, and the number of children dropped from 6.1 to just over two. Nearly 100% of Thai women know of at least one modern method of contraception.[138] In Kenya, where the birth rate was as high as eight children per couple in 1970, the fertility rate has dropped to 5.4 children, and contraceptive use has increased from 6% to 33% since 1989.[139] In Morocco, the fertility rate has dropped from 6.9 in 1980 to 4.5 children in 1991.[140] In Indonesia, the use of contraceptives increased from

133. *1994 Population Report, supra* note 1 at 61-62, para. 8.25. *See also infra* part III.A.3.
134. *Population Trends, supra* note 120, at 43.
135. MOFFETT, *supra*, note 11, at 138.
136. *Id.* at 152.
137. *Id.* at 153.
138. *Id.* at 146.
139. *Id.* at 141.
140. *Id.*

10% percent to fifty percent of couples and the average number of children fell to four.[141] The rate of contraceptive use by couples in Bangladesh has doubled to forty percent in the last ten years, and the fertility rate has dropped from 6.8 children to 4.2 children.[142] In Peru, the number of children per couple has dropped to 3.5 since 1978.[143] In what has become known as a model of family planning success for sub-Saharan Africa, the use of contraceptives in Zimbabwe has tripled since 1980. Currently, 43% of couples use family planning services.[144]

Worldwide, the increased use of contraceptives brought about through family planning programs has dropped the fertility rate from 6.1 to 3.9.[145] Yet, the birth rate has stalled at this level, still above the replacement level of 2.1 children per family.[146] Family planning programs from the 1960's to the 1980's have played a significant role in reducing the fertility rate, but this effort alone is not sufficient to reach replacement level fertility. Women's empowerment is necessary to reach sustainable development.[147]

2. *Women's Empowerment to Exercise the Right*

Governments have focused solely on providing information about and access to contraceptives. They have not interpreted the right to reproductive choice to encompass programs to increase women's education, to eliminate gender-discriminatory laws or to provide for women's sexual health.[148] However, the 1994 Population Report expands the right to reproductive choice to include the basic human right to education,[149] the right to be free from gender-based

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141. Boyce Rensberger, *As Birthrates Fall, Population Rises U.N. Cairo Conference to Address World Growth Stabilization Efforts*, WASH. POST, Sept. 4, 1994, at A1.

142. *Id.*

143. *Id.*

144. *Id.*

145. Rohrbough, *supra* note 5.

146. *Id.*

147. *1994 Population Report, supra* note 1, at 25, para. 4.1.

> The empowerment and autonomy of women and the improvement of their political, social, economic and health status is a highly important end in itself. In addition, it is essential for the achievement of sustainable development. . . . Experience shows that population and development programmes are most effective when steps have simultaneously been taken to improve the status of women.

Id.

148. *Honoring Human Rights, supra* note 4, at 99-103 (arguing that to reduce population growth governments should focus less on providing information about and access to contraceptives and focus more on empowering women, safe-guarding their basic human rights and providing for their sexual health, such as treatment for sexually transmitted diseases).

149. *1994 Population Report, supra* note 1, at 25-28.

> The empowerment and autonomy of women and the improvement of their political, social, economic and health status is a highly important end in itself. In

discrimination[150] and the right to sexual health.[151]

a. *The Right to Education*

"Education is one of the most important means of empowering women with the knowledge, skills and self-confidence necessary to participate fully in the development process."[152] The empowerment and autonomy of women and the improvement of their political, social, economic and health status enhances their decision-making capacity at all levels in all spheres of life.[153]

Yet, even basic primary education is not available to some women and girls around the world. The United Nations estimates that 170 million children are not

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addition, it is essential for the achievement of sustainable development. . . . In addition, improving the status of women also enhances their decision-making capacity at all levels in all spheres of life, especially in the area of sexuality and reproduction. This, in turn, is essential for the long-term success of population programmes. Experience shows that population and development programmes are most effective when steps have simultaneously been taken to improve the status of women.

Id. at 25 para. 4.1. "Education is one of the most important means of empowering women with the knowledge, skills and self-confidence necessary to participate fully in the development process." *Id.* para. 4.2.

150. *Id.* at 25-31. "All human beings are born free and equal in dignity and rights." *Id.* at 14.

Since in all societies discrimination on the basis of sex often starts at the earliest stages of life, greater equality for the girl child is a necessary first step in ensuring that women realize their full potential and become equal partners in development. In a number of countries, the practice of prenatal sex selection, higher rates of mortality among very young girls, and lower rates of school enrollment for girls as compared with boys, suggest that son preference' is curtailing the access of girl children to food, education and health care. This is often compounded by the increasing use of technologies to determine foetal [sic] sex, resulting in abortion of female foetuses [sic]. Investments made in the girl child's health, nutrition and education, from infancy through adolescence, are critical.

Id. at 28, para. 4.15.

151. *Id.* at 43-54.

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. . . . It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.

Id. at 43, para. 7.2.

152. *Id.* at 25, para. 4.1.

153. *Id.*

enrolled in primary school and seventy percent of these children are girls.[154] Further, 960 million people are illiterate, and two-thirds of these people are women.[155] Eman Ibrahim and Khadra Gomaa are two such women.[156] They live in Buram, a small farming village seventy miles southeast of Cairo, Egypt. Eman's father sent her brothers to school rather than her, and Khadra dropped out of school after third grade.[157] Often, families fail to send their daughters to school because education is expensive and families prefer to educate their sons.[158]

The 1994 Population Report set goals for the empowerment of women through education. The target set by the U.N. for universal primary education in all countries is the year 2015.[159] In addition, the 1994 Population Report urges governments to ensure "the widest and earliest possible" access by girls and women to secondary and higher levels of education.[160] Further, the Report encourages governments, schools, the media and other social institutions to eliminate stereotypes and gender biases.[161]

Access to education is necessary to fully allow women the opportunity to exercise their right to reproductive freedom. The scope of this right necessarily includes the right to general education in addition to information about contraceptives. Education is imperative to the full integration of women in the political, social, economic and development institutions of society and is critical to the achievement of sustainable development and replacement level fertility.

b. *The Right to be Free from Discrimination and Violence*

"All human beings are born free and equal in dignity and rights."[162] Yet, discrimination and violence against women and girls are rampant throughout the

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154. *Id.* at 25, para. 4.2.

155. *Id.*

156. John Lancaster, *Close to Cairo But Eons Away Population Conference Goals Meet Reality in Rural Village*, WASH. POST, Sept. 9, 1994, at A29.

157. *Id.*

158. MOFFETT, *supra* note 11, at 198. Pilot projects around the world work to circumvent families' reluctance to send girls to school. One such project by the Center for Women and Development in Dhaka, Bangladesh, provides girls with books and other school supplies and personal hygiene kits with soap, towels, lice-killing combs and five packages of vegetable seeds. The director of the program explains: "If a poor household has more access to vegetables and fruits there will be increased food in the household. If there is more food it means the girls will get their fair share to eat. If there is more food it also means her labor is less needed and the family won't mind letting her go off to school." *Id.*

159. *1994 Population Report, supra* note 1, at 29, para. 4.18.

160. *Id.*

161. *Id.* at 29, para. 4.19. "Countries must recognize that, in addition to expanding education for girls, teachers' attitudes and practices, school curricula and facilities must also change to reflect a commitment to eliminate all gender bias, while recognizing the specific needs of the girl child." *Id.*

162. *Id.* at 14.

world. The World Health Organization indicates that women ages fifteen to forty-four lose more "Discounted Healthy Years of Life" to rape and domestic violence than they do to breast cancer, cervical cancer, obstructed labor, heart disease, AIDS, respiratory infections, motor vehicle accidents or war.[163]

Discrimination against daughters and a preference for sons causes female infanticide and the abortion of female fetuses. Studies in India show that girls born to mothers who already have one or more surviving daughters have a fifty-three percent higher mortality rate than other children.[164] Also, in a study of 8,000 abortions performed following amniocentesis in an Indian clinic, 7,999 of the fetuses aborted were female.[165] In China, for every 100 girls born 118.5 boys are born. Nearly 1.7 million girls are missing each year.[166]

In addition to higher abortion rates of female fetuses, women endure discrimination, exploitation and violence. Take for example the plight of Dellnoor, a twenty-seven-year-old mother of six who lives in Dhaka, Bangladesh.[167] Bangladesh's family planning programs are some of the best in the world, but Dellnoor is unable to use them. Following conservative custom, religion and law in Bangladesh, Dellnoor was given over in an arranged marriage to Habib following her first menstruation. Under the custom of *purdah*, she is forbidden, except on rare occasions and then only with another adult, to leave her ten-by-ten home that she shares with her six children and husband. Although she wants to use modern contraceptives, she is forbidden by Habib. "It's not my decision," she says. "He doesn't want family planning."[168]

Like Dellnoor, numerous women throughout the world succumb to the dictates of men concerning reproductive choices. The elimination of all kinds of discrimination and violence against women is essential to the effective exercise of the right to reproductive choice. The 1994 Population Report and the international community recognize the necessity of the elimination of discrimination and violence against women as an imperative part of the right to reproductive choice.[169] Further, the right to reproductive choice encompasses the right to reproductive health.

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163. Adrienne Germain, Sia Nowrojee & Hnin Hnin Pyne, *Setting a New Agenda: Sexual and Reproductive Health and Rights, in* POPULATION POLICES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 26, 41 (Gita Sen, Adrienne Germain & Lincoln C. Chen eds., 1994).

164. *Population Trends, supra* note 120, at 37.

165. MOFFETT, *supra* note 11, at 217.

166. *Honoring Human Rights, supra* note 4, at 99.

167. *See* MOFFETT, *supra* note 11, at 194-96.

168. *Id.*

169. *1994 Population Report, supra* note 1 at 25-31. "Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development programmes." *Id.* at 15.

c. *The Right to Reproductive Health*

As recognized in the 1994 Population Report, the right to reproductive choice includes the right to sexual health.[170] The 1994 Report defines reproductive health as

> [A] state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. . . . It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.[171]

Reproductive health care includes information and counselling about and access to: family planning methods; prenatal care, safe delivery and post-natal care; education about the prevention of and treatment for sexually transmitted diseases and infertility and information and counselling on human sexuality.[172]

Throughout most of the world, adequate reproductive health care is unavailable. About 500,000 pregnancy-related deaths occur every year, and for every such death, another 100 women suffer significant pregnancy complications with long-term physical and social consequences.[173] Further, of the seven million perinatal deaths of children worldwide, about half are associated with low birth weight resulting from maternal malnutrition, anemia and sexual transmitted diseases.[174] Moreover, women are at higher risk for sexually transmitted diseases than men.[175] For example, Han'a, who lives in Egypt, is sixteen-years-old and has been married for two years.[176] She contracted syphilis and was treated but

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170. *Id.* at 43, para. 7.3.

> [R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so. . . .

Id.

171. *Id.* at 43, para. 7.2.

172. *Id.* at 44, para. 7.6.

173. Iain Aitken & Laura Reichenbach, *Reproductive and Sexual Health Services: Expanding Access and Enhancing Quality in* POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 177, 178 (Gita Sen, Adrienne Germain & Lincoln C. Chen eds., 1994) [hereinafter *Sexual Health Services*].

174. *Id.*

175. *Id.* at 179.

176. *Id.* at 188.

was reinfected by her husband. She knew nothing about sexually transmitted diseases and did not realize that her husband could infect her.[177]

Adequate reproductive health care is essential for women to effectively exercise their right to reproductive choice. The 1994 Population Report directs all countries to make adequate reproductive health available by the year 2015.[178] Sexual and maternal health is necessarily included within the right to reproductive choice.

3. *No Right to Abortion*

Although the right to reproductive choice includes the right to reproductive and sexual health, it does not include the right to an abortion. The issue of whether the right to reproductive choice as accepted in customary international law includes the right to abortion has been hotly debated. However, following the adoption of the 1994 Population Report, it is clear that the right to reproductive choice does not include the right to an abortion.

a. *Previous International Documents Relating to the Right to Abortion*

International documents relating to abortion neither prohibit nor endorse it. Twice the international community has refused to prohibit the right to an abortion by defining life as beginning at the point of conception. In the Universal Declaration on Human Rights, Article 3 guarantees that "[e]veryone has the right to life, liberty and security of person."[179] During the debates on this provision, two amendments were submitted to apply the article "from the moment of conception." However, the General Assembly refused to adopt these amendments and preferred a general formula not addressing this issue.[180] With the adoption of the Covenant on Civil and Political Rights, the states of the world again refused to define conception as the beginning of life.[181] An amendment to Article 6, which prohibits the execution of a pregnant woman sentenced to death, was introduced to protect the right to life "from the moment of conception."[182] The international community refused to recognize such a right and the

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177. *Id.*

178. *1994 Population Report, supra* note 1 at 44, para. 7.6.

179. *The Universal Declaration of Human Rights, supra* note 97, art. 3.

180. *Relationship Between Human Rights and Population Issues: Standard-Setting Activities of the United Nations Organization, U.N. ESCOR,* Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, at 54, U.N. Doc. ST/ESA/SER.R/107 (1989) [hereinafter *Standard-Setting Activities of the U.N.*].

181. *Id.*

182. See *id.* at 61 for a discussion of the arguments made by both sides.

amendment failed by a vote of thirty-one to twenty with seventeen abstentions.[183] The documents of the United Nations do not prohibit the right to an abortion.

However, United Nations instruments do not endorse the right to abortion either. The Declaration on the Rights of the Child proclaims that children "[need] special safeguards and care, including appropriate legal protection, before as well as after birth."[184] Further, the 1984 Recommendations to the World Population Plan of Action adopted at the 1984 International Conference on Population urges governments "to take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning."[185] Significantly, in one of the first enunciations of the right to reproductive choice, the right was presented as not including the right to abortion. In the Declaration on Social Progress and Development, the "exclusive right" of parents "to determine freely and responsibly the number and spacing of their children" was presented by some sponsors as not encompassing the right to abortion.[186]

Plainly, previous international documents neither endorse the right to an abortion nor prohibit it. "International human rights law is not yet crystallized in this field."[187] As such, a right to abortion included within the right to reproductive choice is not a "constant and uniform usage practiced by the states"[188] to form a basis for international customary law.

b. *National Legislation on Abortion*

National legislation regarding abortion cannot form a basis for a "constant and uniform usage practiced by the states"[189] to establish abortion as a part of the customary right to reproductive choice. Access to abortion is by no means universally recognized in the international community. Further, no trend in international abortion legislation has solidified.

Abortion upon the request of the mother, as legalized in the United States,[190] is available in only a minority of countries. Of eighty-two countries

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183. *Id.*

184. *Declaration on the Rights of the Child*, preamble (1959).

185. *1984 Recommendations*, *supra* note 110, at 21, recommendation 18(e).

186. *Standard-Setting Activities of the U.N.*, *supra* note 177, at 61 citing U.N. Doc. A/C.3/SR.1599, at 15, and U.N. Doc. A/C.3/SR.1682, at 3.

187. *Standard-Setting Activities of the U.N.*, *supra* note 180 at 62. *See also* Prieto, *supra* note 4, at 143 (1993). However, not all writers agree. *See* Hernandez, *supra* note 4 at 312 (arguing that international documents do support an inference that the right to reproductive choice includes the right to abortion).

188. Asylum Case, 1950 I.C.J. Rep. at 276.

189. *Id.*

190. Roe v. Wade, 410 U.S. 113 (1973) (the landmark case establishing a woman's right to abortion on demand. Holding that a woman's right to privacy under the 14th Amendment due process clause necessarily encompasses her decision whether to terminate a pregnancy before the end of the first trimester of pregnancy). Planned Parenthood of Southeastern Pennsylvania v.

responding to a survey conducted by the Population Policy Data Bank, which is maintained by the United Nations, only eighteen countries provide abortion on demand.[191] Of those countries that do not have legalized abortion upon request, most responding to the United Nations survey do authorize abortion in some circumstances. For example, nearly two-thirds of the nations responding allow abortion in cases of rape of the mother.[192] However, seventeen countries do not allow abortion to protect the physical health of the mother.[193] Finally, in six countries, abortion is not legal even to save the life of the mother.[194]

Moreover, the trend in abortion laws is not clear. While some countries are liberalizing strict abortion laws, other nations are enacting new constitutions or constitutional amendments to protect life from the point of conception. Canada, in 1988, found the criminalization of abortion unconstitutional,[195] while Cuba, Togo, Vietnam and the People's Republic of China decriminalized abortion through criminal code amendments.[196] Algeria, Burundi and Ghana now permit abortion when a mother's life or health is in danger, and Ghana also allows abortions in cases of rape, incest or severe physical deformities of the child.[197] Greece and Czechoslovakia, in 1986, legalized abortion upon request during the first twelve weeks of pregnancy,[198] while Cape Verde did the same in 1987.[199] Malaysia,[200] Saint Vincent and the Grenadines liberalized their abortion laws, adopting the English standard, which permits an abortion if a medical practitioner in good faith believes that continuation of the pregnancy would involve a greater risk to the mother's life or mental or physical health than if the pregnancy were terminated.[201]

Nevertheless, numerous countries have enacted stricter laws on abortion. In 1983, Ireland enacted a constitutional amendment explicitly acknowledging the

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Casey, 505 U.S. 833, 112 S.Ct. 2791(1992) (reaffirming a women's right to terminate her pregnancy established under Roe, but modifying the point at which that right could be overcome by compelling state interests. Under Casey, a woman may terminate her pregnancy without interference from the state prior to the point of viability).

191. *Population Trends, supra* note 120, at 46.

192. *Id.* Only 46 countries permit abortion where the mother has been raped, while twenty-eight do not.

193. *Id.*

194. *Id.*

195. Morgentaler v. The Queen, 44 D.L.R.4th 385 (1988).

196. Rebecca J. Cook, *Abortion Laws and Policies: Challenges and Opportunities*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 61 (Supp. 3, 1989), (Cuba prohibits abortion only if performed for profit, by an unqualified person, in an unofficial place or without the woman's consent. The national health care system provides abortion free of charge).

197. 12 ANNUAL REVIEW OF POPULATION LAW xxxiii (Reed Boland ed., 1985).

198. 13 ANNUAL REVIEW OF POPULATION LAW xlii (Reed Boland, ed., 1986).

199. 14 ANNUAL REVIEW OF POPULATION LAW xxxix (1987).

200. 16 ANNUAL REVIEW OF POPULATION LAW xxxviii (1989).

201. 15 ANNUAL REVIEW OF POPULATION LAW xxxviii (1988).

right to life of the unborn,[202] while Chile's Constitution, enacted in 1980, contains similar language.[203] Further, the 1986 Philippine Constitution,[204] the Constitution of Ecuador,[205] and Guatemala's Constitution[206] protect the life of the unborn from the moment of conception. Plainly, the various national laws on abortion are in conflict and do not represent a trend either toward the liberalization or the criminalization of abortion. Moreover, abortion upon the request of the mother is available in only a minority of states, and abortion is illegal, even to save the life of the mother, in at least six countries. The national laws on abortion do not demonstrate a "general practice"[207] of the states upon which to base an international customary right to abortion.

c. *The 1994 Population Report*

Just as the national laws of the various states of the world cannot evidence an international right to abortion, the 1994 Population Report adopted at the 1994 Population Conference cannot demonstrate a worldwide, consistent, uniform practice supporting an international right to abortion. Prior to the 1994 Population Conference, international consensus on abortion, as demonstrated by United Nations' documents, was not solidified.[208] However, with the adoption of the 1994 Population Report, an international consensus developed adopting the view that abortion is not included within the right to reproductive choice.[209]

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202. CONSTITUTION OF IRELAND, art. 40, sec. 3 *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: IRELAND 132 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994), ("The State acknowledges the right to life of the unborn . . . .").

203. CONSTITUTION OF CHILE, ch. III, art. 19, *reprinted in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CHILE 41 (Albert P. Blaustein & Gisbert H. Flanz, eds., 1991), ("The Constitution guarantees to all persons: 1. The right to life and to the physical and psychological integrity of the individual. The law protects the life of those about to be born").

204. CONSTITUTION OF THE PHILIPPINES, art. II, sec. 12, *reprinted in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PHILIPPINES, SUPP. 3 (Albert P. Blaustein & Gisbert H. Flanz eds., 1986), ("The State . . . shall equally protect the life of the mother and the life of the unborn from conception . . . .").

205. CONSTITUTION OF ECUADOR, art. 25, *reprinted in* 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: ECUADOR 16 (Albert P. Blaustein & Gisbert H. Flanz eds., 1987), ("The child will be protected from conception . . . .").

206. CONSTITUTION OF GUATEMALA, art. 3, *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GUATEMALA 27 (Albert P. Blaustein & Gisbert H. Flanz eds., 1986), ("The State guarantees and protects human life from the time of its conception as well as the integrity and security of the individual.").

207. STAT. I.C.J. art. 38(1)(b).

208. *See supra* part III.A.3.a. and accompanying notes.

209. However, those supporting unrestricted abortion will, nonetheless, continue to push for an international consensus supporting an international right to abortion. At some point in the future, an international customary right to abortion may develop; however, in 1994, this right does not yet exist.

First, the 1994 Population Report explicitly refuses to recognize any new human rights. One-hundred and seventy-nine nations joined in consensus to adopt the 1994 Population Report.[210] The Preamble to the Report provides that "the International Conference on Population and Development does not create any new international human rights, [but] affirms the application of universally recognized human rights standards to all aspects of population programmes."[211]

Second, while the issue of abortion, particularly unsafe abortion, is directly addressed, the 1994 Report explicitly states the matter of abortion is to be dealt with by legislation at the national level.[212] Moreover, the paragraph in the 1994 Report directly dealing with the issue of abortion, paragraph 8.25, advocates that abortion should never be promoted as a method of family planning, and the prevention of unwanted pregnancies should be given the highest priority to eliminate the need for abortion.[213]

Further, although all nations joined in consensus to support the 1994 Population Report, a number of countries issued reservations regarding the issue of abortion. El Salvador,[214] Ecuador,[215] Malta,[216] Paraguay,[217] Argentina,[218]

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210. *1994 Population Report, supra* note 1, at 120-22.

211. *Id.* at 13 (emphasis added).

212. *Id.* at 61-62, para. 8.25.

213. *Id.* Specifically, paragraph 8.25 provides:

> In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortions should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions.

Id.

214. *Id.* at 136. Specifically, El Salvador entered the following oral reservation:

> Recognizing that aspects of the Programme of Action are tremendously positive and are of supreme importance for the future development of mankind, the family and our children, we, as leaders of nations, cannot but express the reservations we feel are appropriate. If we did not, we could not possibly face the question from our people that are certain to be posed.
>
> . . . .
>
> We Latin American countries are signatories to the American Convention on Human Rights (Pact of San Jose). Article 4 thereof states quite clearly that life must be protected from the moment of conception. In addition, because our countries are mainly Christian, we consider life is given by the Creator and cannot

and the Holy See[219] objected to any reference to abortion because abortion

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be taken unless there is a reason which justifies it being extinguished. For this reason, as far as Principle 1 of the Programme of Action is concerned, we associate ourselves with the reservation expressed by the delegation of Argentina: we consider that life must be protected from the moment of conception.

Id.

215. *Id.* at 143-44. Specifically, Ecuador stated on the record:

With regard to the Programme of Action of the Cairo International Conference on Population and Development and in accordance with the provisions of the Constitution and laws of Ecuador and the norms of international law, the delegation of Ecuador reaffirms, *inter alia*, the following principles embodied in its Constitution: the inviolability of life, the protection of children from the moment of conception, freedom of conscience and religion, the protection of the family as the fundamental unit of society, responsible paternity, the right of parents to bring up their children and the formulation of population and development plans by the Government in accordance with the principles of respect for sovereignty.

Id.

216. *Id.* at 149. The country of Malta joined the consensus with the following written reservation: "The interpretation given by Malta is consistent with its national legislation, which considers the termination of pregnancy through induced abortion as illegal." *Id.*

217. *Id.* at 140. The delegation of Paraguay made the following oral reservation:

In accordance with the introduction to chapter II of the Programme of Action, the delegation of Paraguay would like to express the following reservations.

On chapter VII, paragraph 7.2, the right to life is the inherent right of every human being from conception to natural death. This is stipulated in article 4 of our national Constitution. Therefore, Paraguay accepts all forms of family planning with full respect for life, as provided for in our national Constitution, and as an expression of exercising responsible parenthood.

Id.

218. *Id.* at 142. Argentina introduced the following written reservation into the record of the Conference:

The Argentine Republic accepts Principle 1 on the understanding that life exists from the moment of conception and that from that moment every person, being unique and unreproducible, enjoys the right to life, which is the source of all other individual rights.

Id.

219. *Id.* at 146-49. After significant turmoil, the Holy See joined the consensus document and entered general reservations to chapters VII, VIII, XI, XII, XIII, XIV, XV and XVI and the following specific reservation regarding abortion:

But there are other aspects of the final document which the Holy See cannot support. Together with so many people around the world, the Holy See affirms that human life begins at the moment of conception. That life must be defended and protected. The Holy See can therefore never condone abortion or policies which favour [sic] abortion. The final document, as opposed to the earlier documents of the Bucharest and Mexico City Conferences, recognizes abortion as a dimension of population policy and, indeed of primary health care, even though it does stress that abortion should not be promoted as means of family planning and urges nations to find alternatives to abortion. The preamble implies that the

conflicts with their constitutions which protect life from the moment of conception. Honduras,[220] Nicaragua,[221] the Dominican Republic,[222]

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document does not contain the affirmation of a new internationally recognized right to abortion.

Id.

220. *Id.* at 137-38. Honduras introduced the following oral reservation:

The delegation of Honduras in supporting the Programme of Action of the International Conference on Population and Development bases itself on the Declaration of the Fifteenth Summit of Central American Presidents, adopted at Guacimo de Limon, Costa Rica, on 20 August 1994 and bases itself specifically on the following:

(a) Article 65 of the Constitution of the Republic of Honduras, which provides for the fact that the right to life is inviolable, and articles 111 and 112 of the same Constitution, which state that the State must protect the institution of the family and marriage and the right of men and women to contract marriages and common law marriages;

. . . .

As a consequence of this, one accepts the concepts of "family planning", 'sexual health', 'reproductive health', 'maternity without risk', 'regulation of fertility', 'reproductive rights' and 'sexual rights' so long as these terms do not include 'abortion' or 'termination of pregnancy,' because Honduras does not accept these as arbitrary actions; nor do we accept them as a way of controlling fertility or regulating the population.

Id.

221. *Id.* at 139. Nicaragua orally made this reservation:

The Government of Nicaragua, pursuant to its Constitution and its laws, and as a signatory of the American Convention on Human Rights, confirms that every person has a right to life, this being a fundamental and inalienable right, and that this right begins from the very moment of conception.

. . . .

Second, we accept the concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'reproductive rights' and sexual rights' expressing an explicit reservation on these terms and any others when they include 'abortion' or 'termination of pregnancy' as a component. Abortion and termination of pregnancy can under no circumstances be regarded as a method of regulating fertility or a means of population control.

. . . .

Fourth, Nicaragua accepts therapeutic abortion on the grounds of medical necessity under our Constitution. Thus, we express an explicit reservation on 'abortions' and 'termination of pregnancy' in any part of the Programme of Action of this Conference.

Id.

222. *Id.* at 143. The Dominican Republic set forth its written reservation as follows:

Pursuant to rule 33 of the rules of procedure of the Conference (A/CONF.171/2) the Dominican Republic joins in the general agreement on the Programme of Action. However, in accordance with its Constitution and laws and as a signatory of the American Convention on Human Rights, it fully confirms its belief that everyone has a fundamental and inalienable right to life an that this right to life begins at the moment of conception.

Accordingly, it accepts the content of the terms "reproductive health", 'sexual

Peru[223] and Guatemala[224] accepted the concepts of "family planning," "sexual health," "reproductive health," "maternity without risk," "regulation of fertility," "reproductive rights" and "sexual rights" only so long as those terms did not include "abortion" or "termination of pregnancy." Numerous Islamic nations, including Yemen,[225] the United Arab Emirates[226] and Libyan Arab

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health,' 'safe motherhood,' 'reproductive rights,' 'sexual rights' and 'regulation of fertility' but enters an express reservation on the content of these terms and of other terms when their meaning includes the concept of abortion or interruption of pregnancy.

Id.

223. *Id.* at 150-51. Peru issued a written reservation concerning abortion:

1. The main lines of the Programme of Action will be implemented in Peru under the Constitution and laws of the Republic and, *inter alia*, under the international human rights treaties and the Convention on the Rights of the Child, which have been duly approved and ratified by Peru.

2. We must mention in this context article 2 of the Constitution, which accords to everyone the right to life from the moment of conception; abortion is rightly classified as a crime in the Criminal Code of Peru, with the sole exception of therapeutic abortion.

. . . .

4. The Programme of Action contains concepts such as "reproductive health", "reproductive rights" and "fertility regulation", which in the opinion of the Peruvian Government require more precise definition, with the total exclusion of abortion on the ground that it is inconsistent with the right to life.

Id.

224. *Id.* at 144-45. Guatemala entered the following written, express reservation:

We also enter express reservation on:

(a) Chapter II (Principles): we accept this chapter but note that life exists from the moment of conception and that the right to life is the source of all other rights;

. . . .

(c) Chapter VII: we enter a reservation on the whole chapter, for the General Assembly's mandate to the Conference does not extend to the creation or formulation of rights; this reservation therefore applies to all references in the document to 'reproductive rights,' 'sexual rights,' 'reproductive health,' 'fertility regulation,' 'sexual health,' 'individuals,' 'sexual education and services for minors,' 'abortion in al its forms,' 'distribution of contraceptives' and 'safe motherhood.'

Id.

225. *Id.* at 141. The representative from Yemen included the following reservation on the record:

In chapter VIII, we have some observations to make, particularly relating to paragraph 8.24. Actually, we wanted to delete the words 'sexual activity.' And, if we cannot delete them, then we wish to express our reservations. In paragraph 8.25, concerning 'unsafe abortion,' we find that the definition is unclear and is not in accordance with our religious beliefs. In Islamic Sharia there are certain clear-cut provisions on abortion and when it should be undertaken. We object to the expression 'unsafe abortion.' We wish to express our reservations on paragraph 8.35, relating to 'responsible sexual behavior.'

Id.

226. *Id.* at 141. The United Arab Emirates orally introduced this reservation:

The delegation of the United Arab Emirates believes in protecting man and promoting his welfare and in enhancing his role in the family and in the State and

Jamahiriya,[227] objected to the provision on abortion included in the 1994 Population Report because it contravenes the laws concerning abortion in the Islamic Sharia.

Finally, the 1994 Population Conference opened with an address by the Prime Minister of Pakistan calling for "every child conceived" to be loved. Prime Minister Benazir Bhutto of Pakistan stated, "I dream of a Pakistan, of an Asia, of a world where every pregnancy is planned, and every child conceived is nurtured, loved, educated and supported."[228]

Plainly, the numerous reservations to the 1994 Population Report concerning abortion and the explicit language of the Report itself indicate that nations do not agree on the existence of an international right to abortion. Although the 179 states attending the 1994 Population Conference reached a consensus on the 1994 Population Report, this consensus did not extend to the existence of an international right to abortion. Because the prior international documents concerning abortion are unclear, the national legislation on abortion is inconsistent and the consensus reached at the 1994 Population Conference did not include agreement on the existence of a right to abortion, the right to abortion is not included within the international customary right to reproductive choice.

B. *The Right to Freely Decide the Number and Spacing of Children*

However, the international right to reproductive freedom does include the right to "freely" decide the number and spacing of children. Individuals and couples have a right to be free from government coercion and government incentives and disincentives designed to regulate their level of fertility. The 1994 Population Report emphasizes that the right to reproductive choice includes the "right to make decisions concerning reproduction free of discrimination, coercion and violence"[229] and stresses that "[a]ny form of coercion has no part to play" in family planning programs.[230] Nevertheless, as the 1994 Population Report

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> at the international level. We consider also that man is the central object and the means for attaining sustainable development. We do not consider abortion as a means of family planning, and we adhere to the principles of Islamic law also in matters of inheritance.

Id.

227. *Id.* at 139. The representative from Libyan Arab Jamahiriya made the following oral reservation: "I also want to express a reservation on the words 'unwanted pregnancies' in paragraph 8.25, because our written Constitution does not allow the State to undertake abortions unless the mother's health is in danger." *Id.*

228. *1994 Population Report, supra* note 1, annex II.

229. *1994 Population Report, supra* note 1, at 43, para. 7.3.

230. *1994 Population Report, supra* note 1, at 46, para. 7.12.

recognizes, governments have consistently violated the right to reproductive choice by using coercion and incentives and disincentives.[231]

1. *Government Coercion*

Government coercion occurs where the state denies "informed free choice" through legal and/or policy measures.[232] *Honoring Human Rights* defines coercion to include "forced abortion, sterilization, or contraceptive use; the denial of safe abortion; and more subtle activities, such as the imposition of psychological pressure and incentives that compromise voluntary choice."[233] The most well known example of the use of coercive government policies to regulate fertility is the People's Republic of China's (China's) "One-Child Policy."[234]

In 1980, China amended its marriage law and created a duty upon families to practice family planning.[235] This duty was constitutionalized in 1982: "Both husband and wife have the duty to practice family planning."[236] China introduced its "One-Child Policy" in 1980. The policy outlined the duty of the husband and wife to practice family planning and required that couples have only one child.[237]

At the national level, China officially denies using coercive measures to implement its "One-Child Policy."[238] Nevertheless, state and provincial laws and regulations are clearly coercive. In the province of Guangdong,

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231. *1994 Population Report, supra* note 1, at 46, para. 7.12. "In every society there are many social and economic incentives and disincentives that affect individual decisions about child-bearing and family size. Over the past century, many Governments have experimented with such schemes, including specific incentives and disincentives, in order to lower or raise fertility." *Id.*

232. *Id.* at 46, para. 7.12.

233. *Honoring Human Rights, supra* note 4, at 100.

234. For a general discussion of China's policies, see Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1084-91 (1988) [hereinafter *The Law of Abortion in the U.S.S.R. and China*]; *Honoring Human Rights*, supra note 4, at 98-99; and *Case Studies in Population Policy: China*, U.N. ESCOR, POPULATION POLICY PAPER NO. 20, at 40-45, U.N. Doc. ST/ESA/SER.R/88 (1989) [hereinafter *China Case Study*].

235. Marriage Law of the P.R.C., art. 12 (1980) (adopted on Sept. 10, 1980 by the Third Session of the Fifth National People's Congress), *translated in* BEIJING REV., at 24 (Mar. 16, 1981) (unofficial translation) *in The law of Abortion in the U.S.S.R. and China, supra* note 234, at 1084. "Husband and wife are duty bound to practice family planning." *Id.*

236. Constitution of the People's Republic of China, art. 49, *reprinted in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CHINA 46 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992). *See also* 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 15, 23-24 (official English translation).

237. *The Law of Abortion in the U.S.S.R. and China, supra* note 234, at 1084-85.

238. *Honoring Human Rights, supra* note 4, at 98. In 1990, China's Family Planning Minister Peng Peiyun was quoted as saying, "In no case is coercion allowed as a means of implementing [the] family planning policy." In 1992, he said, "It is the firm policy of the Chinese government to prohibit coercive action in implementing family planning." *Id.*

> a woman of child-bearing age who has given birth to one child must take the measure to use an intrauterine device, . . . a woman who has given birth to two children must take the sterilization measure, . . . [and] a woman who is pregnant beyond the plan must take remedial measures (i.e. abortion) . . . .[239]

In Hebei Province, if a woman who has already had one-child becomes pregnant, she must abort the child, and either she or her husband must undergo sterilization.[240] In only a five month period in 1983, the province of Hebei performed 300,000 abortions.[241] Further, a number of provinces use the "double contracting system," which requires couples to enter into contracts promising not to have any more children in exchange for certain financial bonuses and awards. The contract creates a legal obligation enforceable by the judicial system.[242] Clearly, these provincial policies adopted to implement the national "One-Child Policy" force families to limit their number of children. Ultimately, China's policies violate the right of every couple and individual to freely decide the number and spacing of their children.

India's policies also violate the right to reproductive choice. In the 1970's, India permitted state legislatures to enact laws for compulsory sterilization.[243] The state of Maharashtra enacted such a law, and police carried out the policy by rounding up millions of people who were sterilized against their will.[244] Currently, the most egregious abuses have been curtailed, but sterilization camps still exist in some areas.[245] In Indonesia, soldiers accompany family planning workers on "safaris" into villages, where workers espouse the virtues of family planning and implicitly threaten villagers with punishment if they do not accept the government's form of birth control. Often this results in mass acceptance of these family planning services.[246]

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239. *The Law of Abortion in the U.S.S.R. and China, supra* note 234, at 1089 (citing Guangzhow Guangdong Provincial Service radio broadcast, Apr. 22, 1983 (in Mandarin)), *transcribed and translated in Guangdong Holds Family Planning Work Conference*, U.S. JOINT PUBLICATIONS RES. SERV. CHINA REP.: POL. SOC. & MIL. AFF., May 26, 1983, at 84 (no. 83553).

240. *Id.* at 1089.

241. *Id.* (citing Shijiazhuang Hebei Provincial Service radio broadcast, June 15, 1983 (in Mandarin)), *transcribed and translated in Hebei Family Planning Issues Discussed: Success Noted*, U.S. FOREIGN BROADCAST INFO. SERV. DAILY REP.: CHINA, June 27, 1983, at R1 (no. 83-124).

242. *Id.* at 1088-89.

243. Rudolf Andorka, *The Use of Direct Incentives and Disincentives and of Indirect Social Economic Measures in Fertility Policy and Human Rights*, U.N. ESCOR, Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, at 132, 136, U.N. Doc. ST/ESA/SER.R/107 (1989).

244. *Honoring Human Rights, supra* note 4, at 97-98.

245. *Id.*

246. *Honoring Human Rights, supra* note 4, at 99. Of late, the Indonesian government has supported Norplant as the proper method of birth control. *Id.*

These overt coercive methods of regulating women's fertility clearly violate the international customary right to reproductive choice. The right includes the right to *freely* decide the number and spacing of children. The right is foreclosed when governments use the legal process to require contraceptive use. The right to reproductive choice is also violated when governments offer incentives and impose disincentives on the exercise of the right.

2. *Incentives and Disincentives*

Numerous governments throughout the world offer financial incentives and disincentives to individuals and couples to encourage them to have fewer children. In many countries, particularly developing countries, where families are poor, these financial incentives and disincentives remove the choice of whether to bear more children from the individual and couple. Whether to bear more children becomes an economic decision based heavily upon the offer of incentives or the imposition of disincentives.

Financial incentives and disincentives "encourage" families throughout the world to reduce fertility. In China, mothers who have received a "one-child certificate" receive a longer maternity leave with full pay, and children of one-child families receive priority in medical treatment and admission to nurseries and schools.[247] Furthermore, only those families with one child are eligible for health fee subsidies from the government.[248] In the Shanxi Province, a family loses twenty percent of its annual income for the birth of a second child and thirty percent of its annual income for a third child.[249] In 1985, Kenyan leader Daniel Arap Moi warned that families who had more than four children would lose certain social benefits.[250] South Korea offers housing loan preferences and free medical care for young children to two-child families who have been sterilized.[251]

These financial incentives and disincentives coupled with the economic reality of life in a developing country foreclose an individual and couple's decision of whether to have more children. "For people who are desperately poor, there is no such thing as free choice . . . [t]hus in practice incentives often have more to do with coercion than with choice."[252] Financial incentives and disincentives remove free choice from individuals and couples and violate their international right to reproductive choice.

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247. *China Case Study, supra* note 234, at 44.
248. *Id.*
249. *The Law of Abortion in the U.S.S.R. and China, supra* note 234 at 1086-87.
250. MOFFETT, *supra* note 11, at 191.
251. *Id.*
252. MOFFETT, *supra* note 11, at 191-92.

IV. CONCLUSION

Currently, the world's population is growing at a rapid rate. In the past twenty years, efforts have reduced the fertility rate throughout the world to just under four children per couple. Nevertheless, replacement level of 2.1 children per couple must be reached to achieve sustainable development.

The limits to growth view asserts that the earth has a certain carrying capacity that may be reached and exceeded if population growth is not curtailed. On the other hand, the revisionist view contends that the scarcity of natural resources will create new technological innovations that will prevent an increase in population from breaching the earth's carrying capacity. Past evidence supports both positions. Nevertheless, current trends indicate a decline in the per capita availability of natural resources.

Although both views have influenced world population policies, the limits to growth position is dominant. Currently, the limits to growth viewpoint advocating sustainable development affects world population policies. Thus, any review of international human rights in population policies necessarily must be completed within the context of the debate over environmental degradation and population.

International and national population policies have developed into an international customary right to reproductive choice. To develop into customary law, a principle must be a general and consistent practice followed by states from a sense of legal obligation. International documents and national legislation evidence customary law.

The right to reproductive choice derives from various international treaties and non-binding resolutions and from the various laws of nations. Over the past thirty years, numerous international documents have recognized the right to reproductive choice. Most recently, 179 nations joined in consensus at the 1994 Population Conference to recognize this right. Furthermore, every country in the world, save seven, through national legislation, supports the right to reproductive choice. With such universal support, the right to reproductive choice has developed into an international customary right.

The scope of the customary right to reproductive choice necessarily encompasses two primary rights: the right to the information, education and means to determine the number and spacing of children and the right to do so freely.

The right to information, education and means to exercise the right to reproductive choice includes the right to information about and access to contraceptives, the right to education, the right to be free from discrimination and violence and the right to reproductive health services. This right does not include the right to abortion. Abortion is not consistently accepted within international documents and is not universally guaranteed in national legislation.

The second right embodied in the right to reproductive choice is the right to decide "freely" the number and spacing of children. This includes the right to

be free from governmental coercion, including overt coercion, incentives and disincentives, when exercising the right to reproductive choice.

With the adoption of the 1994 Population Report at the 1994 U.N. International Population and Development Conference, the right to reproductive choice has developed into customary international law. As a principle of customary international law, every state in the international arena is bound to respect the human rights of all couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so.

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THE LITTLE NETWORK THAT COULD: FCC RESTRICTIONS ON FOREIGN OWNERSHIP

I. INTRODUCTION

When it was announced in 1994 that the United States would be deciding on the North American Free Trade Agreements, there was reaction. Likewise, when it was announced that the United States would join other nations in adopting the latest Uruguay Rounds of the General Agreement on Tariffs and Trade, the American public engaged in debate. But when it appeared as though their Thursday evening *Simpsons* viewing schedule might be interrupted due to an obscure FCC regulation, the American public went into uproar.

Of course, this is an exaggerated viewpoint of the recent battle between General Electric Company's National Broadcasting Corporation ("NBC") and Rupert Murdoch's Fox Television Stations, Inc. However, it may be the best way to begin a discussion of a relatively forgotten area of administrative law that stood to cripple an up-and-coming network and significantly impacts one of the

largest industries in our country: the entertainment broadcast industry.[1] This article represents a light-hearted chronicling of the events leading up to NBC's filing with the FCC which compelled the FCC to take action against NBC's newest competitor, Fox. Section Three will look at the underlying regulations of the FCC that led to this controversy. Section Four will examine the rationale behind these regulations. Finally, Section Five will discuss the FCC's reaction and congressional steps taken in response. Specifically, Section Five will discuss the future role of the FCC and its ability to impose limitations on foreign ownership.

II. THE BIRTH OF A NETWORK

A. *Foreign Beginnings*

Since its invention some 50 years ago, millions of Americans have grown up watching the television.[2] The majority of this time was spent watching one of the "Big Three," NBC, American Broadcasting Company ("ABC"), or Columbia Broadcasting System ("CBS"). In the 1970's cable television made its way into American homes, but only made a dent in the viewing market share of the "Big Three."

In 1985, an Australian publisher, Rupert Murdoch, made his way into the broadcasting arena.[3] At the time, Murdoch owned Fox Films with Marvin Davis, an oil man from Denver.[4] In May of that year, Metromedia, Inc., based in Secaucus, New Jersey, agreed to sell seven television stations to Twentieth Holdings, a company formed by Murdoch and Davis to buy broadcast stations.[5] Subject to FCC approval and to Murdoch becoming a United States citizen, Twentieth Holdings was to buy the seven stations from Metromedia for more

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1. All together, the entertainment industry is the second largest exporting industry behind aircraft. Lowell Forte, *Film Industry Left Out of Landmark Trade Pact*, CORP. LEGAL TIMES, June 1994, at 14. This industry accounted for nearly $8 billion in exports last year alone. John Follain, *Hollywood Warns Europe in Movie Row*, Reuter Newswire, September 5, 1994.

2. A determination of whether this is a positive or negative is far beyond the scope of this paper. I merely state fact.

3. Mr. Murdoch, though a newcomer to American broadcasting, had previous dealings with the entertainment (or information) industry through his ownership of several newspapers and publications around the country. For example, at the time, Murdoch owned various newspapers including the *New York Post*, the *Chicago Sun-Times*, and the *Boston Herald*. Stuart Taylor, Jr., *Witch-hunt or Whitewash?* AM. LAW., Apr. 1995 at 60. Ownership of these newspapers would come to present trouble for Murdoch.

4. Initially, it appeared as though the company owned by Murdoch and another businessman, Marvin Davis, would merge with New Jersey-based Metromedia. *See* Michael Cieply and Bill Abrams, *Fox Film, Metromedia Are Discussing Some Sort of Combination, Sources Say*, WALL ST. J., May 1, 1985, at B7.

5. *Metromedia Reaches Definitive Pact on Sale of Seven TV Stations*, WALL. ST. J., May 21, 1985, at A47.

than two billion dollars.[6] Murdoch did become a U.S. citizen, and the sale of the stations was cleared after an FCC hearing. And so, the Fox Broadcasting Network was born.

At first, the new network was hardly noticed.[7] Since then, it has risen to give the Big Three serious competition.[8] In addition to an increased share of the market, Fox was able to capture the right to televise National Football League games from CBS.[9] But it wasn't until the summer of 1994 that Fox was able to draw such widespread attention to itself.

B. *The Network Grows Up*

On the eve of its second decade, Fox's troubles began in May, 1994 when it unveiled plans to invest in twelve new stations in conjunction with another communications group, New World Communications Group, Inc.[10] These new stations[11] were former Big Three affiliates that would become Fox affiliates. As reported in the May 25, 1994, Wall Street Journal:

> In its seven years of existence, Fox Broadcasting Co. has been called a 'weblet' by the trade paper *Variety* while CBS, ABC, and NBC have been referred to as 'webs.'
> *Now the weblet seems about to grow up.*
> With new investments in a TV station group alliance and National

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6. *Id.*

7. "Fox was a non-entity in 1987-88, when it averaged a 3.7 rating while the Big Three had a 43 rating and a 71% share of the audience. Since that season, Fox . . . [has] chipped away to the point that midway through the 1994-95 season, ABC, CBS, and NBC have a 38.8 rating and 58% share." Steven Battaglio, *Big Three Brave Crowded New World*, HOLLYWOOD REP., Jan. 5, 1995, at 1, 46.

8. *Id.*.

9. Having bid $1.56 billion for the games in December of 1993, Murdoch himself attributes Fox's biggest successes to this. When asked if he thought Fox had finally come to be head-to-head with the Big Three, he responded, "Yes, I think that's true. They've all got their different philosophies and different ways, but we certainly see ourselves broadening to there being four real networks. And nothing has contributed to that more than the football." Alex Ben Block and Robert Dowling, *Murdoch: Fox Head-to-Head with Big Three*, HOLLYWOOD REP., Jan. 10, 1995, at 1, 13.

10. Elizabeth Jensen and Mary Lu Carnevale, *Fox Proves It's Ready to Play in the Big Leagues*, WALL ST. J., May 25, 1994, at B1.

11. The twelve stations, owned by New World, and being switched to a Fox affiliate included: WJBK (Detroit); WAGA (Atlanta); WJW (Cleveland); WTVT (Tampa); WITI (Milwaukee); KSAZ (Phoenix); WDAF (Kansas City); WGHP (High Point-Greensboro); WBRC (Birmingham); KDFW (Dallas); KTVI (St. Louis); and KTBC (Austin). For a report card look at how these new stations have done as Fox affiliates see Joe Flint, *Fox Pups Show Growth*, VARIETY, Dec. 18, 1994, at 92.

> Football League broadcast rights, Rupert Murdoch, chairman of Fox's parent, News Corp., is making a $2 billion bid to catapult Fox into the big-time ranks of its three network rivals. . . . [I]ts latest moves make it a formidable contender to fight the other networks on the most important turf: prime-time and sports programming.[12]

While the other networks had previously grumbled about certain benefits that Fox had received from the FCC in the past, Fox's latest action caused them to shout. As an upstart network, Fox does indeed enjoy certain advantages over the Big Three. Principally, as Fox is limited to fifteen hours of prime time as compared to NBC's, CBS's and ABC's 22 hours, Fox is permanently exempted from the major Prime Time Access Rule imposed upon the other networks.[13] Similarly, Fox is not restrained by the Fin-Syn regulations imposed on the Big Three.[14]

The first real challenge to Fox's ownership, however, came not from the Big Three, but rather from the National Association for the Advancement of Colored People (NAACP).[15] Citing several instances, David Honig, a Washington lawyer representing the Metropolitan Council of the NAACP, accused Fox of failing to report to the FCC Fox's ownership structure.[16] The NAACP's position in supporting the current FCC regulations restricting foreign ownership[17] stems from the desire to increase minority ownership of broadcast stations. "As it is, it is hard for minorities to bid against domestic capital, and it will be even harder for them to bid against foreign capital."[18]

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12. *Id.* News Corporation is a corporation based in Sydney, Australia. It owns a 99% equity interest in Twentieth Holdings. *See infra* text accompanying note 20.

13. Briefly, the Prime Time Access Rule (PTAR) prohibits the network affiliates in the 50 largest cities from airing network reruns during the 7:00 p.m. to 8:00 p.m. time slot. Earlier this year, the FCC met to discuss the elimination of the PTAR within the next year. Brooks Boliek, *FCC Primed To Phase Out Prime Time Access Rule,* HOLLYWOOD REP., July 28-30, 1995, at 1.

14. Fin-Syn, or financial (distribution) regulations and syndication regulations prohibit the Big Three from financing or distributing to local television stations directly and from competing in the domestic program syndication business, respectively. Two years ago, the FCC rewrote the fin-syn rules, allowing networks to own a financial interest in programming. All other prohibitions were to expire within two years (i.e., by November 1995). *See* Steve Brennan, *Sudden Sunset for Fin-Syn,* HOLLYWOOD REP., Sept. 7, 1995, at 1.

15. Jensen and Carnevale, *supra* note 10, at B1. The initial challenge from the NAACP came in the fall of 1993 as Fox attempted to buy WGBS-TV in Philadelphia. Christopher Stern and Steve McClellan, *Foreign Ownership Waiver Likely For Fox,* BROADCASTING AND CABLE, May 8, 1995, at 16.

16. *Id.* "This is the fourth or fifth time the commission has tried to get this information out of them, and it is unfortunate that it still is not fully disclosed."

17. *See infra* note 52 and accompanying text.

18. Jensen and Carnevale, *supra* note 10 at B1 (quoting attorney David Honig).

In June of 1994, New York branches of the NAACP, with the backing of Representatives Cardise Collins[19] and Edolphus Towns (D., N.Y.), filed papers with the FCC contesting Fox's ownership of nine TV station licenses.[20] The NAACP called for a "full-blown hearing" into the ownership and financing of Fox. In its letter, the NAACP argued that Fox was controlled by the Sydney-based News Corporation,[21] in violation of the FCC's restrictions on foreign ownership of broadcast stations. Furthermore, Fox had selectively made limited disclosures about its financing and ownership when originally applying for its license in 1985.[22]

In a response letter to the FCC amid these allegations, Fox denied that it had made limited disclosures and further claimed that Fox was in compliance with all FCC regulations:

> Fox lawyers said that News Corp. has an 'indirect approximately 99% economic/equity interest' in Twentieth Holdings, Fox Television Stations' parent. Rupert Murdoch, who became a U.S. citizen in order to buy the stations in 1985, owns stock that represents 76% of the voting rights of Fox Television; the remaining 24% is held by News Corp., which Fox lawyers say is controlled by Mr. Murdoch. Moreover, they say, Fox disclosed in 1985 that News Corp. would supply most of the funds to acquire the Metromedia Inc. stations that formed the core of the Fox network.[23]

C. *The Champion, NBC, Enters the Ring*

Fox's problems began to snowball in late fall of 1994. At the same time it was closing its deal with New World Communication, it was courting television stations in Philadelphia, Boston, and Green Bay. Through a joint venture with Savoy Pictures, Inc., Fox established SF Broadcasting, the objective being to buy NBC, CBS, and ABC affiliates and convert them to Fox affiliates.[24] Up to this

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19. At the time, Rep. Collins was a member of the Energy and Commerce Committee and Chairperson of the Consumer Protection Subcommittee. Rep. Collins' involvement in the controversy centered around a letter urging a congressional hearing while Rep. Towns' involvement comes in a protest against Fox for canceling the show "Roc," a show depicting a working-class African-American family in Baltimore.

20. Mary Lu Carnevale, *Control of Fox TV Sparks Controversy on Capitol Hill and Calls for Hearing*, WALL ST. J., June 13, 1994, at B8.

21. *See supra* note 11.

22. Carnevale, *supra* note 20.

23. *Id.*

24. Dennis Wharton and Joe Flint, *NBC Slams Fox's Bids*, VARIETY, Nov. 28, 1994 at 108. Ironically enough, the article appears directly above a quarter-page, full-color advertisement for Fox's programming.

point, NBC had been successful in attempting to block SF Broadcasting's purchase of WLUK in Green Bay, Wisconsin. But in November of 1994, the FCC announced that it would accept SF Broadcasting's application. Upon receipt of this announcement, NBC intensified its attacks on Fox's ownership. Joining the NAACP in the ring, NBC filed its petition on November 30, 1994,[25] arguing that Fox had "blatantly" violated the foreign ownership restriction rules of the FCC.[26] This time, Fox lashed back at the Big One. "NBC is simply using the FCC to thwart competition in the marketplace and that is wrong . . . [Fox] could take out a catalogue of fraud convictions against NBC parent General Electric, but then we'd be no better than they are."[27] Thus, the stage was set for a 90's version of the "Network Battle of the Stars," *Hard Copy* style.[28]

Shortly after the fireworks began, the FCC issued a gag order on the whole ordeal.[29] This drew criticism from within, without, and everywhere else. The gag order was initially imposed to prevent officials with the NAACP from discussing the issue with the public. Almost immediately, the American Society of Newspaper Editors blasted the FCC in a protest letter.[30] On December 15, the

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25. Brooks Boliek, *NBC Charge Foreign to Fox*, HOLLYWOOD REP., Dec. 1, 1994, at 1.

26. NBC additionally argued that Fox was attempting to skirt the FCC restriction which bars a single entity from owning more than 12 television stations nationally. 47 C.F.R. U.S.C. 73.3555 (1995). Under this rule, a company is considered the owner of a station if it has more than a five percent share of the voting stock. Fox already owned 10 stations, the stations in Philadelphia and Boston would make 12, and if the FCC was to find that Fox had an attributable interest (i.e. five percent voting interest) in the four SF Broadcasting stations, this would make sixteen, in violation of the ownership restrictions. Fox seems to argue that the televisions stations are under the domestic control of SF Broadcasting and New World Communications. Such domestic control would insulate it from having an attributable interest in the stations.

27. Wharton and Flint, *supra* note 24 at 108.

28. In one instance, Mr. Murdoch wrote to the FCC urging it to decide whether Fox was an American or foreign corporation, emphasizing his own "personal anguish" over the matter. In what has become typical corporate manner, NBC responded, writing, "It is certainly not clear why complying with the law should cause anyone 'anguish' -- unless they are not accustomed to complying with the law." Boliek, *supra* note 25.

29. Issued on December 7, 1994, the gag order was reported as follows:

> WASHINGTON -- In what may be an unprecedented action, the FCC slapped a gag order on officials and documents involved in a critical portion of the agency's investigation into Fox's ownership. . . . The gag order goes beyond what is usually termed a "restricted proceeding" in which FCC officials are forbidden to discuss a particular issue with the public. It not only applies to FCC officials, but also to parties in the case and puts new documents related to the issue under lock and key until after the commission decides the issue.

Brent Boliek, *FCC Imposes Gag Order on Fox Ownership Debate*, HOLLYWOOD REP., Dec. 8, 1994 at 1.

30. "The commission's decision to cloak in secrecy the inquiry and the proceedings concerning the dispute between NBC and Fox Television Stations Inc. is a gross violation of the public trust invested in the FCC." Lisa de Moraes, *Editors Oppose FCC Gag Order*, HOLLYWOOD REP., Dec. 14, 1994, at 4, 8 (quoting ASNE president Gregory Favre).

NAACP filed papers with the FCC accusing the commission of violating its First Amendment right of free speech by imposing the gag order.[31]

Criticism didn't stop there; it came from within the FCC as well as from the floor of Congress. The new chairperson of the Senate Commerce Committee lashed out against the FCC on its conduct concerning its probe of the issue. In a letter to the FCC chairperson Reed Hundt, Senator Larry Pressler (R., S.D.) criticized the FCC's gag order, saying that it represented "a serious lack of forethought and sensitivity to First Amendment rights."[32] Pressler's letter not only criticized the gag order, but indicated that political forces were behind the issue as well. "It appears on the surface that there was an orchestrated, partisan campaign that had nothing to do with the real issue facing U.S. businesses competing overseas who are facing barriers because of our outdated foreign ownership restrictions."[33] Similarly, FCC commissioner James Quello[34] criticized the commission's handling of the probe. In a letter to Sen. Pressler, Quello questioned a "series of unusual staff decisions" that gave the appearance of a "star chamber" investigation.[35] Eventually, the FCC had to relax its gag order in light of the overwhelming criticism.[36]

D. *The Book Deal Gone Bad*

Unfortunately, things only got worse for Fox. Newly-elected Speaker of the House, Newt Gingrich (R., Ga.) had a story to sell, and HarperCollins bought, giving Newt a $4.5 million advance.[37] The deal was scrutinized before the ink was even dry on the contract. HarperCollins is owned by News Corporation, the

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31. Brooks Boliek, *NAACP: Revoke Fox Gag Order, FCC Filing Seen as First Step Toward Getting the Issue Into Courts*, HOLLYWOOD REP., Dec. 16-18, 1994, at 3.

32. Brooks Boliek, *GOP's Pressler Lashes FCC on Probe of Fox*, HOLLYWOOD REP., Dec. 28, 1994, at 1, 2.

33. *Id.* Murdoch is not a stranger in Washington. In the late 1980's, he drew the attention of Sen. Ted Kennedy, whom Murdoch's papers regularly skewered. Kennedy waged a personal vendetta against Murdoch with the help of Sen. Ernest Hollings and was successful in forcing Murdoch to sell Alexander Hamilton's *New York Post*. Kennedy would later boast of having killed the *Post*, the nation's oldest newspaper. *See generally*, *Kennedy's Boast*, WALL ST. J., Jan. 6, 1988, at A14; *Ted Kennedy Killed the Post*, WALL ST. J., Mar. 17, 1993, at A14.

34. The FCC has five commissioners appointed for terms of five years and a chairperson appointed by the President. 47 U.S.C. §154(c); Pub. L. No. 99-334 (1986).

35. Dennis Wharton, *Fox Probe Stirs Talk*, VARIETY, Jan. 9-15, 1995, at 84.

36. Brooks Boliek, *FCC Relaxes Gag Order in Fox Ownership Debate*, HOLLYWOOD REP., Dec. 22, 1994, at 4.

37. Phil Kuntz and Jeffrey A. Trachtenberg, *Democrats Criticize Gingrich Book Deal with Murdoch From Amid FCC Dispute;* WALL ST. J., Dec. 23, 1994, at A12. Gingrich's book advance was second only to Ronald Reagan's seven million dollar advance in terms of book dealings with political leaders. In the end, Gringrich would refuse the hefty advance and settle for a $1 advance plus royalties to quiet the controversy. *Panel Queries Murdoch on Gingrich Book Deal*, HOLLYWOOD REP., Aug. 2, 1995, at 7.

same News Corporation that owns Twentieth Holdings, the parent of Fox Television Stations, Inc., all under the watchful eye of Rupert Murdoch. It was later revealed that Gingrich and Murdoch had met behind closed doors in late November.[38] However, both parties maintained that the book deal was not discussed as Murdoch was unaware of it.[39] While Gingrich was dealing with criticism from the Democrats,[40] Fox had to deal with new allegations brought by the NAACP. Based upon this most recent event, the NAACP filed papers with the FCC asking it to include the book deal in its ongoing investigation of the foreign ownership issue. Attorney David Honig wrote in his letter to the FCC, "As the book deal raises at least an appearance of impropriety, we believe it would be appropriate for the commission to inquire whether officials of Fox played any role in the HarperCollins negotiations."[41] This new charge brought Fox's "character" into question and added further potentially threatening material to the FCC's probe of Fox.

By January of 1995, industry analysts had begun offering opinions. Most experts agreed it was unlikely that Fox would have its licenses revoked.[42] More likely, if it was found that Fox was foreign-owned, an expensive restructuring process would have to be undertaken, a process that would surely set the up-and-coming network back some. And what of NBC?[43] NBC was clearly in

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38. Phil Kuntz, *Murdoch Lobbyist Explains Meeting with Gingrich*, WALL ST. J., Jan. 16, 1995, at A4.

39. *Id.*

40. Gingrich suffered from the incident as evidenced by the blow-up occurring on the floor of the House on January 18. In a Wall Street Journal/NBC poll, when asked who better represents the values of the Republican party, 60% of those Republicans polled named Senator Robert Dole as opposed to 24% for Rep. Gingrich. *Eyeing Newt*, WALL ST. J., Jan. 19, 1995, at A1.

41. Brooks Boliek, *NAACP Seeks FCC Probe of Fox Book Deal*, HOLLYWOOD REP., Jan. 4, 1995, at 1, 41.

42. Dennis Wharton and Joe Flint, *FCC Unlikely to Revoke Fox TV Licenses*, VARIETY, Dec. 12-18, 1994, at 31. Admittedly, the worst-case scenario would be for the FCC to find that Murdoch had not made full disclosure and that Fox had violated the 25% rule imposed by 47 U.S.C. §310(b). This is something the FCC has not done in over a decade (when it revoked RKO's licenses). Most every observer agrees that this will not happen: D.C. observers say such a finding is unlikely, in part because the FCC would be admitting it screwed up the original Fox investigation in 1985. "The FCC risks some embarrassment here for not having looked into this more closely the last time," says Craig Blakely, a D.C. communications attorney. *Id.*

43. Some (generally Fox supporters) have speculated that NBC originally joined the action because it was trying to eliminate competition from Fox. This would not be a novel use of the Commission's power. "[T]he biggest defenders of the F.C.C. may be in the industry, where companies routinely use Federal Regulation to seek advantage or to trounce rivals." Edmund L. Andrews, N. Y. TIMES, May 31, 1995, at D4. One recent Fox letter stated:

> Since NBC is widely reported to be for sale, and assuming a pricing multiple of 10 times cash flow, our aggressive competition may have cost NBC's parent (General Electric) $1 billion in the price of any contemplated sale . . . . It's no wonder that NBC has been all over the FCC and Capitol Hill seeking to make trouble for Fox.

a win-win situation. Obviously, if sanctions were taken against Fox, NBC would be successful in eliminating some of the recent competition that has affected it and the other networks. If the FCC ultimately adjudged Fox Television Stations, Inc. to be American owned, NBC would likely still win. At the time, it was widely rumored that General Electric was offering NBC up for sale.[44] Though NBC's domestic value might decrease if the FCC finds for Rupert Murdoch, its foreign value would increase. As David Londoner[45] wrote, "[I]t's even better for them (NBC) if they lose, because it opens the door wider to foreign companies. Everybody thinks its just the Japanese who would be interested -- the Sonys and the Matsushitas. But you can't count out European giants, like Bertelsmann."[46]

Meanwhile, the NAACP appeared as though it was already enjoying some limited success from its efforts against Fox. In October of 1994, Fox announced plans to join with yet another company in an effort to convert affiliates. This time, Fox joined with Silver King Communications, Inc. to form Blackstar Communications, L.L.C., its chairman to be John Oxendine, an African-American broadcaster.[47]

While all these involvements are fascinating and perhaps may someday be made into a made-for-TV "Movie of the Week," it is the underlying legal ramifications which are of more importance. The NBC-Fox battle is not the first time that the FCC's foreign ownership regulations have come into question. But when one begins to speak of NAFTA and GATT, the general public begins to lose interest and change the channel.

III. FCC RESTRICTIONS ON FOREIGN OWNERSHIP

A. *German Invaders and Section 310(b)*

The world today is truly becoming a global village. Perhaps no other area offers as much evidence of this as the field of telecommunications. As technological breakthroughs have led to instantaneous access to nearly any spot on the globe, one problem which has arisen is alien ownership and investment in

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Brooks Boliek, *Fox Looks to Stick It to NBC With Bumper Stickers*, HOLLYWOOD REP., Dec. 20, 1994, at 1, 70. The same article detailed Fox's attempt to persuade congressional attitudes by sending House members and Senators bumper stickers which read "Fox. Competition. Deal With It!" and "FOX – It's Competition Stupid!" (Whether this refers to NBC executives or Congressional members is uncertain).

44. *Id.*

45. Managing Director of the investment house Werthiem Schroder.

46. J. Max Robins and Joe Flint, *How Foreign is Fox?*, VARIETY, Dec. 5-11, 1994, at 1, 85.

47. Elizabeth Jensen, *Fox to Invest In Station Group Owned by Blacks*, WALL ST. J., Oct. 10, 1994, at A4.

domestic businesses.[48] Its seems as though one cannot turn around without encountering foreign-owned "American" icons. Foreign investment and ownership has sparked great debate over whether the merits outweigh the risks involved.[49]

One area which has been relatively free of foreign ownership is the broadcast industry. As evidenced by the NBC-Fox struggle, this long-standing immunity has come under fire.[50] Many have questioned the rationality of the FCC's current legislation that has remained virtually unchanged since its adoption in 1934.[51] 47 U.S.C. § 310(b) deals with alien investment and ownership as it appears in the context of broadcasting properties.[52]

Foreign ownership restrictions find their origination in the Radio Act of 1927,[53] and before that, the Radio Act of 1912.[54] The adoption of these regulations stemmed from the fear that a foreign-controlled radio station could seriously jeopardize national security interests through the interference with American broadcast.[55] Similarly, in 1927, the legislation was justified as German telegraph operators were able to give advance warning to German boats waiting off the East Coast of the United States concerning American activities.[56] To

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48. Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?* 8 AM. U. J. INT'L L. & POL'Y 417, 417 (1994).

49. *Id.*

50. For example, both the recent North American Free Trade Agreements (NAFTA) as well as the recently adopted General Agreement on Tariffs and Trade have contained exclusionary language concerning the entertainment industry, drawing criticism from not only those in the entertainment industry but the government as well.

51. The Communications Act of 1934, Title 47 of U.S.C. For instance, in a column found in the June 9, 1994 edition of the Wall Street Journal at A14, Bob Wright, president of NBC wrote the following:

> While the affiliate shuffle means Fox will compete more vigorously in the marketplace, we at NBC have no desire to rein in Fox through government regulation. Instead, the original broadcast networks, and broadcast stations across the country, should be set free from outdated government restrictions that apply only to our industry and thus discriminate against us as we increasingly compete with cable, telephone and other entities.

52. 47 U.S.C. § 310(b); Pub. L. No. 103-354 (1995).

53. Radio Act of 1927, Ch. 169, §39, 44 Stat. 1162 (1928).

54. An Act to Regulate Radio Communication, Pub.L.No. 62-264, 37 Stat. 302 (1912).

55. Stephan R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 316 (1994). The original 1912 Act only required the licensee to be an American citizen or corporation. However, the need for tighter restriction would soon be recognized as two German nationals applied for a radio station license in Long Island. The Germans were allowed the license as they had applied in the name of a U.S. corporation. Ian M. Rose, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole On the Global Information Highway*, 95 COLUM. L. REV. 1188, 1194 (1995).

56. Patricia Diaz Dennis, *Panel Discussion: Telecommunications in a Global Market*, 11 B.U. INT'L L.J. 153 (1993).

ensure that this would never happen again, Congress included the foreign ownership restrictions in 1927 and again in 1934.[57]

B. *Section 310(b) Today*

Section 310(b) provides the following:

> License ownership restrictions
> (b) Grant to or holding by alien or representative, foreign corporation, etc.
> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by --
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government.
>
> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives, or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
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> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.[58]

Sections 310(b)(1) and 310(b)(2) bar foreigners or foreign corporations from owning broadcasting licenses in the United States. Sections 310(b)(3) and 310(b)(4) restrict the amount of ownership that a foreigner may have in domestic corporations having licenses. Section 310(b)(3) applies to individuals or corporations that have a direct interest in a domestic corporation licensee. Of these types of corporations, a foreigner may only have up to twenty percent of capital or voting stock. Section 310(b)(4) applies to foreign holding corporations of domestic corporations. This paragraph was added to prevent foreign-controlled parent companies from circumventing the rules by creating

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57. For a more complete analysis of the legislative history of §310(b), see Watkins, *Alien Ownership and the Communications Act*, 33 FED.COMM. L.J. 1 (1981).

58. 47 U.S.C. § 310(b); Pub. L. No. 103-354 (1995).

domestically wholly-owned subsidiaries able to hold broadcast licenses.[59] Such a holding company is limited to a twenty-five percent share of the capital or voting stock, either directly or indirectly. Finally, Section 310(b)(4) provides an "out-clause": the Commission may refuse or revoke a license if it finds that the public interest will be best served by such refusal. Stating this conversely, the Commission may waive the foreign ownership restrictions if it finds the public interest to be served by such waiver. In the past, this "out-clause" has been exercised stringently.[60]

C. *Public Interest under Section 310(b)(4)*

Although Sections 310(b)(3) and 310(b)(4) seem nearly identical, they are different in several respects. A careful analysis of the differences indicates that by careful structuring, a foreigner can own a significant amount of broadcast properties without violating the FCC's regulations.[61] As pointed out above, Section 310(b)(3) deals with direct ownership interest in the broadcast license, limiting it to 20%, whereas Section 310(b)(4) limits to 25% the amount of ownership in companies directly or indirectly "controlling" the licensee.[62] More importantly, Section 310(b)(4) grants the FCC discretion in determining public interest while the other paragraphs of Section 310(b) lack such language.

Through a series of decisions, the FCC has developed various factors to be considered in making a public interest determination.[63] The following factors were enunciated by the FCC following a 1987 *Notice of Inquiry and Rulemaking*:[64] (1) whether the alien's country of citizenship enjoys close and friendly relations with the United States; (2) the extent of foreign ownership or control of the corporation (i.e., majority versus minority shares); (3) whether the

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59. Konigsberg, *supra* note 55, at 305 n.155.

60. Diaz, *supra* note 56, at 155. Ms. Dennis notes that a recommendation by the National Telecommunications and Information Administration (a division of the Department of Commerce), has been for the FCC to apply this clause less stringently so as to allow for more direct foreign investment. Prior to the Fox investigation, there has only been one instance where the FCC has waived the foreign ownership rules in the public interest, and then only when the foreign corporation was subject to several restrictions. *See Banque de Paris et des Pays Bas*, 6 F.C.C.2d 418 (1966). This public interest waiver would be crucial in determining the fate of Murdoch and News Corp.

61. *See generally* Ronald W. Gavillet, et al., *Structuring Foreign Investments in FCC Licensees under Section 310(b) of the Communications Act*, 27 CAL. W. L. REV. 7, 38 (1990). For instance, the authors suggest that through a direct 20% ownership position in a licensee along with a 25% interest in the domestic holding company that owns the remaining 80%, a foreigner could own up to a 40% interest in a licensee.

62. For the purposes on Section 310(b)(4), a controlling interest is a majority (50% or more) interest in a licensee. *Id.* at 10.

63. *See e.g.*, GRC Cablevision, 47 F.C.C.2d 487; PrimeMedia, 3 F.C.C.Rcd. 4293.

64. Gavillet et al., *supra* note 61, at 17.

licensed facility involved is passive in nature; and (4) the qualifications of the applicant.

D. *Case Law Interpreting Section 310(b)*

The FCC is granted broad discretion in applying Section 310(b) and only rarely does a case come before the Court of Appeals. One such instance involving foreign ownership where an appeal was granted was in *Telemundo, Inc. v. Federal Communications Commission*.[65] In that case, the plaintiffs were among three groups petitioning the FCC to block the sale of two defunct Puerto Rican television stations to the Television Broadcasting Corporation ("TBC"). Telemundo argued, *inter alia*, that the corporate structure of TBC would result in violations of Section 310(b)(4). Specifically, they argued that despite statutory compliance, de facto control of TBC would remain in the hands of aliens. The Mass Media Bureau ("the Bureau") of the FCC had initially determined that the structure would indeed violate Section 310(b)(4) as foreign ownership was above the 25% limit and that control of the station was in the hands of Venezuelan nationals.[66] However, the Bureau permitted TBC to amend its application, which it did, bringing the aggregate foreign ownership below 25% and giving 100% control to American citizens.[67] Quoting the Commission, the court stated:

> TBC has satisfactorily readjusted its alien ownership to comply with the statutory standard. Additionally, TBC has voided the questioned agreements and has, in fact, retained American citizens to provide the management services that were the subject matter of the voided contracts.[68]

In upholding the decision of the FCC, the court held, "[w]e see no reason to conclude that the Commission acted improperly or otherwise abused its broad discretion in finding that the problem of alien control had been satisfactorily resolved."[69]

While initial justification for Section 310(b) came in the form of national security interests, this could hardly be argued today. At best, it could be argued

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65. 802 F.2d 513 (D.C. Cir. 1986).

66. *Id.* at 515.

67. *Id.*

68. *Id.* at 515-16 (quoting *In re* Zaida Perez Vda. de Perez Perry, et al. and Television Broadcasting Corp., F.C.C. 85-381 (July 26, 1985), J.A. at 206).

69. *Id.* at 516. The court also cites two other cases in which the FCC determined that statutory compliance with Section 310(b)(4) was not the same as actual practice. *See* Channel 31, Debtor-in-Possession, 45 R.R.2d (P & F) 420 (1979) (Canadian de facto control of corporation was in question); Spanish International Communications Corp., 48 Fed. Reg. 28,549 (June 16, 1983).

that since some sixty percent of the viewing audience's attention is commanded by only three stations, foreign ownership should still be restricted.[70] More likely, there is some other reason for maintaining the sixty year-old regulations in a rapidly changing world. Indeed, an analysis of the United States' trading partners sheds some light on the existence of Section 310(b).

E. *Other Countries Attempts to Ward off Foreign Invaders*

The United States is not alone in its protection of ownership of broadcast properties. Canada[71] and France[72] have similar protective provisions. The list of examples does not stop there. In Australia, Rupert Murdoch and his News Corporation have difficulties obtaining television stations because the News Corporation is considered an American entity and, therefore, in violation of Australia's restrictive 15% limit. Likewise, in Asia Murdoch's efforts in a joint venture with Telstra Corp were frustrated by foreign ownership restrictions.[73] There are some countries however, that do not restrict their foreign ownership of broadcast properties, such as the United Kingdom.[74]

IV. NAFTA, GATT, CULTURAL PROTECTIONISM, AND HOW SECTION 310(B) HURT THE AMERICAN BROADCASTING INDUSTRY

A. *Canada's Cultural Industry Exclusion Clause*

The North American Free Trade Agreement (NAFTA) was passed on November 20, 1993. This agreement was designed to create a free North American trade zone, effecting six trillion dollars of trade among the populations of its member-countries, the United States, Canada, and Mexico.[75] NAFTA was not the first bilateral trade agreement. On January 1, 1989, the Free Trade Agreement (FTA) between the United States and Canada went into effect. Both NAFTA and FTA were the result of lengthy, precarious negotiations which seemed to be constantly on the brink of falling apart.

Few Americans realize the effect their culture has on those outside their borders. However, many Canadians, searching for a culture of their own, are

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70. *See* Battaglio, *supra* note 7, at 46.

71. Peggy Berkowitz, *Hushed Voices: Canada Tries To Foster Its Culture By Limiting U.S. Media Influences*, WALL ST. J., Aug. 12, 1986, at 1.

72. Thomas Kamm, *France Will Limit Foreign Ownership in Telecommunications Firm to 20%*, WALL ST. J., Dec. 2, 1988, at 1.

73. *News Corp. Planning Venture With Telstra in Asia-Pacific Region*, WALL ST. J., July 21, 1993.

74. Richard L. Hudson, *Britain Urges Telecommunications Field to Be Opened to Many Local, Foreign Firms*, WALL ST. J., Nov. 14, 1990, at A12.

75. Konigsberg, *supra* note 55, at 281.

painfully aware of the effect of the American culture. The fear of American cultural domination is very real for Canadians.[76] "Canada is carpet-bombed daily by American culture and entertainment. Occasionally, it bridles under the onslaught. This periodic expression of defiance known here as 'cultural nationalism' is stirring again."[77] It was this "cultural nationalism" that led to the Canadian insistence on the inclusion of the Cultural Industry Exemption Clause (Exemption Clause).[78] In addition to the Exemption Clause's inclusion, the Canadians refused to even discuss the possibility of its repeal.

The Exemption Clause represents an obvious barrier to free trade. Yet the clause again found its way into NAFTA when the Canadians refused to negotiate its omission.[79] Unfortunately, NAFTA goes one-step further than did FTA. Under NAFTA, the exclusionary clause has been expanded to include intellectual property rights. "This means that, although intellectual property is given substantial protection under the [sic] NAFTA, films, television programs, home videos, books, and sound recordings have no protection in Canada and are removed from those binding commitments of NAFTA's chapters on intellectual property."[80]

The clause immediately following this exemption appears to nullify the exemption at least partially. This clause allows a NAFTA party to "take 'measures of equivalent economic effect' in response to any actions that would

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76. A great example for anyone with a dry sense of humor is cited in Konigsberg's article:

> [A]s a relatively benign illustration of how American televison can undermine the constitutional style of another country, Canadians through the 1970s saw one American police drama after another in which officers read Miranda warnings to criminals as they were apprehended, including "you have the right to remain silent, you have the right to counsel." Despite their different constitutional and political system, which had no explicit bill of rights, a great number of Canadians apparently believed that they had the "right to keep silent, the right to counsel, and so forth."

Konigsberg, *supra* note 55 at 296 n.106 (citing George H. Quester, *The International Politics of Television* 109-110 (1990)).

77. Charles Trueheart, *Culture Clash: Canadian Nationalists Decry American Infiltration*, WASH. POST, Dec. 2, 1994, at A34.

78. Konigsberg, *supra* note 55, at 284 (citing U.S.-Canada Free Trade Implementation Act of 1988, Pub.L.No. 100-449, 102 Stat. 1851 (1988), art. 2005(1)). ("Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 (Retransmission Rights) and 2007 (Print-In-Canada Requirement) of this Chapter."). An example of the exemption clause in action is seen in the recent controversy between American-based Country Music Television (CMT) and Canada's new country-music channel. Ten years ago, CMT helped foster a boom in Canadian country music. Now the new Canadian-based country-music channel trumped its competitor, forcing it off the air. *See generally*, Truehart, *supra* note 77; and Etan Viessing, *CMT Invokes NAFTA In Protest*, HOLLYWOOD REP., Dec. 23-25, 1994, at 3. (citing Section 301 of NAFTA).

79. Konigsberg, *supra* note 55, at 284.

80. *Id.* at 299.

be considered inconsistent with the trade agreement were it not for the cultural exemption."[81]

The objectives of NAFTA appear relatively simple.[82] However, NAFTA falls short of these objectives when considering the broadcast industry. In addition to the United States' restrictions imposed by Section 310(b) for broadcast television systems, under NAFTA, the United States reserves the right to impose "equivalent treatment" on any person whose nation limits U.S. ownership of a cable television system as well as reservation concerning "investment in, or the provision of basic telecommunications networks and services."[83] Canada makes similar reservations.[84] Finally, Mexico restricts foreign ownership of television systems and reserves the right "to adopt or maintain any measure regarding virtually every aspect of its basic telecommunications network."[85]

B. *The EC's Green Paper*

"Cultural nationalism" is not to be found in Canada and Mexico alone. In June of 1984, the European Community (EC) Commission released its "Television Without Frontiers" Green Paper (Green Paper), which was to become the backbone of the infamous "Television Without Frontiers" Directive of 1989.[86] The Green Paper called for the relaxation of borders within the EC while recognizing the need to protect European culture from invasion.[87] Europeans

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81. *Panel Urges Canada to Push for Codes Covering Subsidies, Dumping in NAFTA*, BNA INTL. TRADE DAILY, Nov. 17, 1994.

82. North American Free Trade Agreement, December 17, 1993, U.S.-Can.-Mex., Pub.L.No. 103-182, 107 Stat. 2057, reprinted in 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The preamble of NAFTA states:

> The Government of Canada, the Government of the United Mexican States, and the Government of the United States of America Resolve to;
> STRENGTHEN the special bonds of friendship and cooperation among their nations;
> CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation . . . .
> FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.

83. *Exploding Goods and Services Under NAFTA*, MEXICO TRADE AND LAW REP., Oct. 1, 1994 *available in* Westlaw, World Library.

84. *Id.*

85. *Id.*

86. Konigsberg, *supra* note 55, at 300.

87. The objectives of the *Green Paper* were:

> to demonstrate the importance of broadcasting (radio and television) for European integration and, in particular, for the free democratic structure of the European Communities; to illustrate the significance of the European Economic Community (EEC Treaty) for those responsible for producing, broadcasting, and

drew justification for the move from a similar fear of American cultural domination.

The "Television Without Frontiers" Directive received immediate reaction from the American entertainment industry. The United States industry was being shut out of Europe while the internal borders were coming down. Jack Valenti, President of the Motion Picture Association of America, questioned whether "[t]he culture of any European [is] so flimsily anchored, so tenuously rooted, that European consumers and viewers must be caged and blinded else their links with the historic and distinguished past suddenly vanish?"[88]

The European Community was not without further justification for its protectionist attitude not only towards broadcast property ownership but also programming to be shown on European television sets.[89] To be sure, "[t]he Community further justifies its zealous position by identifying measures within the U.S. legal system."[90] It is Section 310(b) which is referred to here. However, the Community also stressed the exemption clause found in both the FTA and NAFTA, which explicitly recognizes culture as a separate and distinct animal from other goods and services.[91]

C. *GATT*

On November 30, 1994, in a 76-24 vote, the United States Senate approved a 124-nation trade pact known as the General Agreement on Tariffs and

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> re-transmitting radio and television programmes and for those receiving such programmes; and to submit for public discussion the Commission's thinking on the approximation of certain aspects of Member States' broadcasting . . . law before formal proposals are sent to the European Parliament and to the Council.

Television Without Frontiers: Green Paper on the establishment of the Common Market for Broadcasting, especially Satellite and Cable, COM (84) 300 Final (1984).

88. Konigsberg, *supra* note 55, at 306 (quoting Steven Greenhouse, *Europe Reaches TV Compromise — US Officials Fear Protectionism*, N.Y.TIMES, Oct. 4, 1989, at A1.).

89. By imposing quotas on what was to be shown on European televisions, the "Television Without Frontiers" Directive limited the amount of American programming which could be shown. While this drew flak from the U.S., the Directive also has few fans in Europe itself. As one insider labeled it, "it [the Directive] is an ill-conceived and ill-thought out document, a paper tiger." Furthermore, the Directive is not fully complied with anywhere in Europe. The quotas themselves are becoming useless "in the new universe of digital broadcasting." Michael Williamsadam Dawtrey, *GATT Spat Wake-Up on Yank Market Muscle*, VARIETY, Dec. 27, 1993, at 45.

90. *Id.*

91. *Id.* One French Ministry Official complained that the United States talked about goods while "[w]e talk about culture." This is the fundamental difference between Europeans, who view entertainment as culture and Hollywood, operating at a more commercial level. As the Hollywood saw goes: "If making movies were art, it would be called "show art" not "show business." Forte, *supra* note 1, at 14.

Trade (GATT).[92] This latest round of GATT talks began in 1986 in Uruguay. This Uruguay Round was to have ended back in 1990, but two key French holdouts delayed its completion. One of the French holdouts was the protection of their domestic market and legendary culture against the onslaught of American television. Finally, in December of 1993, the Uruguay Round came to a close.

Reaction from the broadcasting community was generally favorable.[93] Some of the new provisions GATT included called for the creation of the World Trade Organization, which will oversee the enforcement of member-states' compliance with GATT as well as the inclusion of provisions aimed at the Trade Related Intellectual Property Rights (TRIPS) section.[94] Under GATT, the copyright protection extended to member-states of the Berne Convention,[95] will now be enforced by the World Trade Organization.

However, as with NAFTA and FTA, the broadcasting industry and the entertainment industry, as a whole, were the big losers. The French, as "self-appointed defenders of European culture against Hollywood dominance,"[96] were successful with their attempts to remove sections dealing with the entertainment industry. Although GATT does not contain any exclusionary language, in the words of U.S. trade representative, Mickey Kantor, "we agreed to disagree. But our differences remain."[97] The Europeans were ultimately successful in keeping audiovisual matters out of GATT, though GATT does call for a periodic five year review.[98]

D. *The Prisoner's Dilemma*

And so it stands, protectionist measures on both sides of the Atlantic Ocean and to the north and south of the United States. Neither party wants to relinquish its restrictions on foreign ownership until the other does, leading to a sort of "prisoner's dilemma." If both sides work together, everyone wins big. If neither side works together, everyone loses big. However, unlike the classic dilemma game, in this instance, one side may act without the other and thereby afford itself great advantages. Simply by opening up its own market to foreign ownership, the

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92. Brooks Boliek, *Industry's Glad It Got GATT: Senate Approves Trade Pact 76-24; Vote 'A Positive Step,' Valenti Says*, HOLLYWOOD REP., Dec. 2-4, 1994, at 1. The United States House had approved the measure on November 29th, and President Clinton would later sign the pact on behalf of the nation.

93. *Id.*

94. *Id.* at 48.

95. The United States joined the Berne Convention in 1986.

96. Follain, *supra* note 1.

97. *Id.* This leaves unanswered the question of whether Section 310(b) violates provisions of GATT.

98. Boliek, *supra* note 92, at 1.

United States would likely receive a net benefit. In so doing, the U.S. would eliminate much of the justification for other countries protectionist measures.

It is becoming increasingly impossible to find traditional "American" icons that don't have foreign labels stamped on them. Of course, the immediate example that comes to mind is Sony's 1988 acquisition of CBS Records and its acquisition of Columbia Pictures the following year. Since then, Matsushita purchased MCA in 1990 for $6.13 billion.[99] With these acquisitions, the U.S. domestic work force has increased nearly 400% through employment at U.S. affiliates of foreign-based firms. During this period of foreign acquisitions, the total assets held by U.S. affiliates of foreign corporations in the film industry increased over 1800%.[100]

Likewise, opening up United States broadcasting properties to foreign investment would likely encourage other countries to open their broadcasting to American investors. As they stand today, the FCC's restrictions on foreign ownership provide anything but an incentive for foreign governments to relax their restrictions. Ultimately, one country must undoubtedly take the first step. As the most advanced, competitive broadcasting industry in the world, the responsibility of initiating this liberalization falls squarely on the United States. "[T]he Strength of the U.S. Industry and the opportunities derived therefrom would exceed any concomitant risks."[101]

Investment has not come without its drawbacks. Many blame the recession of the early '90's on this foreign investment. Others adopt the position of the French and complain of losing their sovereignty. However, any loss in sovereignty is made up for by gains in technological insight from foreign competitors, leading to "increased specialization and a more efficient use of the world's resources by encouraging international trade."[102] Furthermore, the need for cultural sovereignty is protected by Section 309(e) of the Communications Act of 1934. "The FCC requires each broadcaster to provide programming that meets the needs of its audience, to reach with its signals its entire community of license, and to locate its studio within the contours of its community of license."[103]

With recent expansive growth of cable companies and the deregulation of phone companies, one thing remains clear: In order to protect and preserve the

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99. Konigsberg, *supra* note 55, at 312. Employment figures within those U.S. affiliates of foreign corporations rose from 10,600 in 1986 to 42,700 in 1990. In April of 1995, Matsushita sold its interests in MCA. Eben Shapiro and Thomas R. King, *Seagram Buys 80% of MCA at $5.7 Billion*, WALL ST. J., Apr. 10, 1995, at A3.

100. Konigsberg, *supra* note 55, at 313. Assets rose from $1.194 billion in 1986 to $22.166 billion in 1990.

101. *Id.* at 315.

102. *Id.* at 316.

103. *Id.* at 317 (quoting NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPT. OF COMMERCE, GLOBALIZATION OF THE MASS MEDIA 1(1993)).

broadcast industry from competitive pressures it has not felt before, a solution must be reached concerning the foreign ownership restrictions.

V. POSSIBLE SOLUTIONS TO FOREIGN OWNERSHIP RESTRICTIONS

The number of voices calling for an end to the foreign ownership restrictions grows almost daily. While it seems most are in agreement that something must be done, no one is sure what to do.[104] The following suggestions, made by scholars, lawyers, and industry insiders, have made their way to the forefront.

A. *The "Do Nothing" and "Let the Courts Handle It" Solution*

One possible solution to the foreign ownership restrictions is to do nothing. Section 310(b)(4) provides the FCC with discretion that it seems to have misinterpreted. The FCC in the past has applied this provision so stringently that it seems to have interpreted it as an absolute bar against more than 25% ownership.[105] The FCC's most current decision is completely inconsistent with the prior hard-line stance.[106] To date, no court has addressed this misreading of Section 310(b)(4).

Foreign Ownership Restrictions can also be challenged on a Fourteenth Amendment constitutional basis. Prohibiting ownership by citizens of U.S. allies even during peacetime is vastly overinclusive, in violation of the 14th Amendment.[107] Similarly, the foreign ownership rules are underinclusive in some respects. By allowing up to 25% ownership in broadcast property and up to 100% in cable television property, it would not be a rational means of protecting

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104. In an editorial found in *Broadcasting & Cable*, the author writes:

> The least that should come from the shambles of FCC foreign ownership policy in the wake of the News Corp./Fox decision is a redefinition of the rules. . . . The fact is, the FCC's decision to waive News Corp.'s 99% ownership of the Fox Television Stations effectively repeals foreign ownership restrictions. When Bertelsmann applies to buy CBS, how will the FCC say no? Or should it? When the Bronfmans seek to joint-venture with NBC, what will be the standard? This is no longer a matter than can put off until tomorrow. Somewhere out there, the line has started forming.

Calling Congress; New Legislation For TV Station Ownership Rules Needed. BROADCASTING & CABLE, May 8, 1995, at 114.

105. J. Gregory Sidak, *Free Markets For Telecom: Don't Stifle Global Merger Mania*, WALL ST. J., July 6, 1994, at A18. Mr. Sidak is a former deputy general counsel of the FCC.

106. The decision referred to here is, of course, that of the News Corp./Fox decisions issued May 4, and July 31, 1995, and discussed *infra*.

107. Sidak, *supra* note 105 at A18.

national security to allow an enemy to obtain such ownership.[108] As Mr. Sidak, a former attorney for the FCC argues, "Since there is a random fit between the ostensible goal of section 310(b) — protecting our national security — and its means — discriminating against a broad class of aliens — a court should find it in violation of the Equal Protection Clause."[109] Finally, Mr. Sidak argues that Section 310(b) infringes upon the rights of foreigners to express their views, clashing with the First Amendment. "The Supreme Court, in a ruling last week, extended more First Amendment protection to the telecom industry. Assuming that the court applies tighter scrutiny to determine whether section 310(b) complies with the First Amendment, the government would have to show a 'compelling' or 'important' interest in limiting Americans' exposure to foreign opinions."[110]

The problem with Mr. Sidak's suggestions for leaving it up to the courts to decide is, as generally seen in administrative law cases, the court will usually defer to the judgment of the commission. This is supported by the *Telemundo* case, seen earlier.

Finally, one author has argued the restrictions against foreign ownership run afoul of the First Amendment right to free speech.[111] Quoting an article appearing in the June 1995 Columbia Law Review:

> Whatever its justifiability intially, Section 310(b)'s foreign ownership restriction today represents an anachronistic attempt to limit free speech in America based on xenophobic fears of foreign ideas and influence. The law is one of several examples of broadcast regulations that either have not, or arguably would not, pass constitutional muster under traditional First Amendment analysis. . . . Differential First Amendment treatment of broadcast regulation, critized by some from the very start, has come under increasing attack in recent years as technological and structural developments in the mass media industry steadily erode the constitutional basis for certain forms of broadcast regulation.[112]

Further, Rose points out that as Section 310(b)'s enactment was based on fear of foreign influence, it should be viewed as a "content-based and viewpoint discriminatory restriction on speech . . . [subject] to the strictest constitutional scrutiny."[113]

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108. *Id.*
109. *Id.*
110. *Id.*
111. *See* Rose, *supra* note 55.
112. *Id.* at 1190.
113. *Id.* Rose's article, in addition to his excellent attack on First Amendment grounds, also provides important policy reasons for doing away with Section 310(b).

B. *Inclusion in Section 310 of a New Subsection (f): The Reciprocity Clause.*

One suggestion has been to include a new subsection into Section 310. The suggested subsection would read as follows:

> (f) Preference Given to Alien Applicants by Reason of a Bilateral Treaty Between the United States and the Alien's Government
>
> In addition to broadcast licenses which the Commission may issue to aliens pursuant to this Act, the Commission shall issue preferential authorizations, under such conditions and terms as it may prescribe, to permit an alien or representative, whose government has in effect a bilateral agreement with the United States, to obtain a broadcast license, for operation on a reciprocal basis by United States entities, if the Commission finds that the public interest will be served by the granting of such a license.[114]

This proposed subsection limits the amount of foreign ownership while providing the Commission with the ability to prescribe "conditions and terms" by which it will grant the licenses to foreigners. The author of this proposed subsection has suggested that "the Commission initiate a rulemaking process to determine how best to establish these . . . ."[115] Such a rulemaking process would allow the Commission to liberalize foreign investment while simultaneously determining the basis of the status of reciprocal treatment by the foreign government.[116]

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114. Konigsberg, *supra* note 55, at 318.

115. *Id.* at 319.

116. The reciprocity element was added so as not to cause an "opening of the flood-gates" to foreign investment.

> A form of this reciprocity is already evident in cultural exchanges within the entertainment community. The Immigration Act of 1990 promotes reciprocal treatment by ensuring equal treatment for performers from the United States. For example, Equity, the British actors union, and Actor's Equity, its American Counterpart, have agreed on a reciprocal arrangement whereby roles in both countries are allocated to foreign performers on a one-for-one basis. At this time, the U.S.-based Screen Actors Guild ("SAG") and its Canadian counterpart, the Alliance for Canadian Cinema, Television and Radio Artists ("ACTRA"), are actively negotiating an equitable exchange agreement which will serve to facilitate and equalize the number of performers crossing the border to work. Under these arrangements the unions will have the ability to act on each others' behalf to promote foreign performers' rights.

Id.

Meanwhile, NAFTA, while immune from any type of amendment, could be redefined to accommodate the liberalization of foreign ownership through reciprocal legislation.

This "reciprocity" solution has support in Congress. Though he initially suggested completely eliminating the foreign ownership restrictions, which suggestion was later dropped, Representive Michael Oxley (R, Ohio), suceeded in attaching an amendment to the House's Communication's bill that would allow a foreigner to own 100% of a U.S. telephone company, provided U.S. investors are given reciprocal trade treatment.[117] Oxley was able to turn to fellow Republican Larry Pressler for support as well as Democrats Edward Markey and Rick Boucher.[118] However, the Clinton Administration has made it clear that it does not support any relaxation of the current restrictions.[119]

C. *Deregulation — Back to the NBC-Fox Battle*

The final solution to consider is that proposed by the Republicans — massive deregulation. Republicans are traditionally known to be deregulatory pro-business. Those in the broadcasting industry were apparently able to sense change even before the November 1994 elections as they scrambled to contribute PAC money and find new lobbyists.[120]

Despite the Republicans' favoritism of deregulation, support for and against legislation involving the broadcast and telecommunication industries has

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117. Dennis Wharton, *Pols Pounce on ReReg*, VARIETY, May 29-June 4, 1995, at 21-22.

118. *See infra* note 125 and accompanying text. Pressler (R, S.D.), who heads the Senate Commerce Committee, pushed for a loosening of the foreign ownership regulations so that they were reciprocal with those of trading partners. Brooks Boliek, *Still Tinkering with Telcom Bill*, HOLLYWOOD REP., Mar. 21, 1995, at 4. Meanwhile, Boucher (D-Va.), who co-sponsored the amendment with Oxley, supports similiar reciprocal action as does Markey (D, Mass.). Brooks Boliek, *Dems Hang Tough On Ownership*, HOLLYWOOD REP., March 6, 1995 at 4.

119. A spokesperson for the Administration told Pressler's committee that while the Administration supported unfettered foreign investment in the telephone industry, the White House drew the line when it comes to easing restrictions on ownership of the broadcasting industry. Citing national security concerns, the spokesperson said, "We should not be too hasty in lifting restrictions on the amount of foreign influence over, or control of, broadcast licenses due to the editorial discretion of broadcasters over the content of transmissions." *Clinton Backs FCC Ownership Regs*, VARIETY, Mar. 6-12, 1995, at 45.

120. J. Max Robins and Dennis Wharton, *Riled By Regs, TV Biz Begs to be Newtered*, VARIETY, Jan. 9-15, 1995, at 1, 82. For example, Time-Warner, which had traditionally contributed a majority of its PAC contributions to the Democrats, split an equal amount to both parties this year. Various other changes coming to Washington with the new Congress include replacing the term "Information Superhighway" with the term "Cyberspace" as "highway" is too reminiscent of the road-building images of the President Roosevelt's New Deal and connotes the possibility of speeding tickets. "Cyberspace" on the other hand connotes a "vast freemarket universe with no rules." *Id.*

generally been bipartisan.[121] For example, efforts within the House last year were led by current House Telecommunications Subcommittee Chairperson Jack Fields (R., Tex.) and then House Telecommunications Subcommittee Chairperson Edward Markey (D., Mass.). That legislation won overwhelming support in the House.[122] Meanwhile, in the Senate, opposition to a bill was led by Sen. John Breaux (D., La.,) and Sen. Bob Packwood (R., Ore.), as they had legislation in the workings that was more deregulatory than that offered by Sen. Hollings.[123]

Deregulation of the broadcast industry has not happened in over a decade.[124] It would appear as those on Capitol Hill do listen to the constituency. In a December 7, 1994 interview, incoming chairman of the Senate Commerce Committee, Larry Pressler (R., S.D.) stated that he would like to see the elimination of the foreign ownership restrictions.[125] "I would like to see us eliminate, if we could, the foreign ownership cap if other countries did the same. . . . It would have to be on a reciprocal basis."[126] Pressler, a Republican, said he generally supported deregulation, pointing to the example of radio, which in his opinion resulted in more information of a different kind.[127] In a letter to FCC Chairperson Hundt, Pressler wrote, "Let's face facts. . . . The recently approved GATT agreement will require us to repeal or reform the existing foreign ownership provisions of the Communications Act."[128] A few days after Pressler made his comments, the FCC announced that it would radically overhaul television ownership rules.[129]

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121. One notable exception would be the Kennedy-Hollings affair in 1988 taken against Rupert Murdoch.

122. Brooks Boliek, *GOP Gears Up To Retool Media,* HOLLYWOOD REP., Jan. 3, 1995, at 1.

123. *Id.*

124. Dennis Wharton, *FCC Revisits Ownership Rules: Overhaul Likely to Increase Number of TV Stations Allowed.* VARIETY, Dec. 19, 1994-Jan. 1, 1995, at 40.

125. Brooks Boliek, *Pressler Press for End of Foreign Ownership Cap: Comments Made as NBC-Fox Fight Intensifies*, HOLLYWOOD REP., Dec. 7, 1994, at 1.

126. *Id.*

127. Pressler also noted, while admitting he did not know the specifics of the Fox-NBC dispute, "The big boys, rather than wanting to compete, are running to Washington." *Id.*

128. Robins and Wharton, *supra* note 120, at 84.

129. *See supra* note 118. Though not specifically addressing foreign ownership limits, the FCC announced that it would likely be revamping the ownership limits on the number of stations. *See supra* note 25. Though not official, under the proposed regulations, networks could own as many stations as they wish, so long as they do not reach more than 50% of U.S. television households. Some discussion will also be made concerning the use of limited liability companies to attract minorities into the broadcast industry. Undoubtedly, some discussion of the foreign ownership rules is bound to come up at meetings.

Network television itself is one of the most regulated industries in the United States.[130] There are regulations governing nearly every aspect of the industry. With the huge growth of the cable television, direct broadcasting, and the telephone industries, none of which are subject to nearly the amount of regulation that the broadcasting industry is, many claim it is now time to ease up on some of those regulations, particularly the foreign ownership restrictions.[131]

Preston Paddden, President of Fox Network Acquisition, had this to say, "I think there will be an appropriate relaxation of the broadcast ownership rules. . . . We've got the cable industry and the telephone industry about to explode with the video product. If broadcast industry is to remain competitive, it can't be tied to a regulatory structure that dates to 1934."[132]

E. *And What of Fox and the Actors from Our Made-for-TV "Movie of the Week"?*

On May 4, 1995, two weeks after the Mass Media Committee issued a report implicating Fox for failure to reveal fully the nature of its ownership,[133] the FCC said that Murdoch had indeed exceeded the twenty-five percent rule, but the rule would be waived upon showing of public interest. Fox was given forty-five days to respond.[134] Most agreed that the decision was, in effect, a waiver, as the same rationale behind granting Fox its license initially still existed. Namely, the birth of the Fox network marked the beginning of a legitimate fourth network to compete with the "Big Three." This was clearly in the public's interest as it has

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130. Brooks Boliek, *New Congress May Be One to Loosen the Shackles*, HOLLYWOOD REP., Jan. 11, 1995, at 1.

131. Similarly, many argue that it is now time to do away with the Financial Interest Rule and the Syndication Rule, as well as limiting the Prime Time Access Rule. As one insider stated: "If we can get rid of two of the more incredible millstones around the neck of the network business, even if nothing else happens, that's not going to be a bad year." *Id.*

132. *Id.*

133. The Mass Media Bureau, a part of the FCC, issues recommendations to the Chairperson and the other four Commissioners. In its April 24, 1995 report, the FCC staffers recommended that Fox should be forced to bring its ownership into compliance with Section 310(b). Further, though Fox was not charged with "misrepresentation" or "lack of candor," the report did conclude that Fox had failed to reveal the true extent of its foreign ownership. Finally, the staff report did recommend that Fox be given the go-ahead with its SF Broadcasting acquistions. Christopher Stern, *FCC Staff Proposes Fox Restructuring*, BROADCASTING & CABLE, Apr. 24, 1995, at 9.

134. Edmund L. Andrews, *F.C.C. Vote Gives Murdoch Big Victory on Ownership*, N.Y. TIMES, May 5, 1995, at C5. Under the terms of the decision reached by the Commissioners, Fox was not required to restructure, as the earlier staff report had recommended. Instead, Fox was given 45 days to show that it was in the public's interest that it [Fox] be granted a waiver. *Id.*

not only created more viewing choices, but also created more jobs and opportunities for the American public.[135]

The agency's decision followed the May 2nd findings of the Federal Trade Commission and the United States Justice Department of Fox's acquisition of two additional stations.[136] Within the forty-five day period, the News Corporation restructured its ninety-nine percent equity ownership of Fox into debt so that it would be in compliance with Section 310(b).[137] In the end, the restructuring was not needed as the FCC determined the granting a waiver to Fox was in the public interest.[138]

Meanwhile, Murdoch went about acquiring more clout in the communication industry.[139] On May 10, 1995, it was announced that MCI would invest $2 billion in News Corporation.[140] The move would ultimately give MCI nearly a fourteen percent interest in the News Corporation and provide Murdoch with more capital with which to acquire more television stations.[141] Also, Murdoch hopes to launch a direct-to-home satellite service in Latin America.[142] Such a venture would give Murdoch near-complete global access. In addition to the

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135. *Id.* As one media analyst with Smith Barney stated, "[t]he News Corp. waiver was done for a particular reason— the company fostered competition. That doesn't necessarily apply to other companies, or open the floodgates to foreign ownership." Christopher Stern & Steve McClellan, *Foreign Ownership Waiver Likley For Fox.* BROADCASTING & CABLE, May 8, 1995, at 16.

136. Brooks Boliek, *Feds: In Murdoch They Trust*, HOLLYWOOD REP., May 3, 1995, at 3. Specifically, the FTC and the Justice Department found the proposed acquistions did not involve any antitrust concerns. The transaction still needed the FCC's approval. *Id.*

137. Dennis Wharton, *FCC Rules: Fox Can Break Them*, VARIETY, July 31-Aug. 6, 1995, at 21, 28. The FCC determined that the restructuring was merely an attempt to re-label equity as debt. *Id.* Meanwhile, the FCC has found that it has its own problems to worry about as it has come under attack. In its May report, the Progress and Freedom Foundation, a conservative research group closely linked to Newt Gingrich, called for the abolishment of the FCC, arguing "that the agency had consistently hurt consumers by blocking competition and innovation." Edmund L. Andrews, *A Conservative Group Proposes Abolishing the F.C.C.*, BROADCASTING & CABLE, May 31, 1995 at 4. Though it is unlikely that Congress would consider abolishing the FCC, it is quite likely, given the current deregulatory environment, that Congress will significantly curtail the power and influence of the FCC.

138. *Id.*

139. Murdoch also went "station shopping" in October, 1995. At the annual shareholders meeting, Murdoch announced that the News Corporation would agressively pursue the acquisition of new stations as soon as the pending FCC ownership rules lifted the 12 station cap. Jacqueline Lee Lewes, *Murdoch Going Station Shopping*, HOLLYWOOD REP., Oct. 11, 1995, at 1.

140. Chris McConnell, *News Corp., MCI Make $2 Billion Partnership*, BROADCASTING & CABLE, May 15, 1995, at 6.

141. *Id.*

142. *Id.*

influx of the $2 billion, each company would devote $200 million to a joint media venture between them. [143]

VI. CONCLUSION

The recent battle between Rupert Murdoch's Fox Television Station and General Electric's National Broadcasting Corporation has illuminated an area of Federal Communications Commission regulatory law that calls for a change. Though the outcome of the FCC proceedings taken against Fox by NBC and the NAACP should not affect the need for change, the case does serve as a reminder that our laws in this area have become antiquated.

With the advent of technological breakthroughs in the telecommuncations and broadcasting industries, it has become imperative that the FCC's long-standing tradition of restricting foreign ownership be abandoned. The passage of legislation concerning the North American Free Trade Agreement and the General Agreement on Tariffs and Trade only emphasizes this assertion. Without the burdensome restrictions imposed on the broadcasting industry, we have seen how successful businesses can become. In order to maintain its competitiveness, the restrictions on foreign ownership in the broadcasting industry must be repealed.

David H. Benz[*]

143. *Id.*

* J.D. Candidate, 1996, Indiana University School of Law—Indianapolis.

THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTE AND THEIR DISPOSAL: SHOULD THE UNITED STATES RATIFY THE ACCORD?

I. INTRODUCTION

The infamous vessel, the *Khian Sea*, sailed the seas for years searching for a nation that would accept its cargo.[1] Its voyage began on August 31, 1986, when the freighter departed from Philadelphia with 13,000 tons of incinerator ash and headed for the Bahamas.[2] After the Bahamian Government barred its entry, the *Khian Sea* searched for two years before finally unloading three thousand tons of noxious cargo on the Haitian shore.[3] After the Haitian government demanded that the ship leave port, the *Khian Sea* changed its name to the *Pelicano* and continued searching through the Middle and Far East for a disposal site.[4] Thereafter, reports surfaced that the freighter emptied the rest of its cargo on the ocean floor.[5] This is just one blatant example of the environmental exploitation of poor countries by rich industrialized nations during the 1970's and 1980's.[6] The *Pelicano's* illegal hazardous waste dumping demonstrates the most irresponsible and reckless way a country can rid itself of its unwanted toxic refuse.[7]

However, the tragic events of the 1970's and 1980's brought widespread attention to the enormous global dilemma of indiscriminate hazardous waste dumping. The public outcry sent a red flag waving over the world that focused attention on the nations which were illegally dumping their waste.[8] In response to the negative attention produced by the media and environmental groups, the

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1. John Langone, *Waste A Stinking Mess the Problem: Throwaway Societies Befoul their Land and Seas*, TIME, Jan. 2, 1989, at 44.

2. Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 TEMP. ENVTL. L. & TECH. J. 61, 62-63 (1992).

3. *Id.*

4. *Id.*

5. Langone, *supra* note 1, at 44.

6. *Id.* Another example occurred in the Nigerian port of Koko. In Nigeria, an Italian company dumped 8,000 leaking drums of toxic waste in an open air builder's yard. *Toxic Materials*, ECONOMIST, Feb. 18, 1989, *available in* LEXIS, World Library, ALLWLD File. Also, in Brussels, a West German company admitted illegally dumping more than 25,000 tons of hazardous waste in a quarry. Sean D. Murphy, *The Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste*, 88 AM. U. J. INT'L L. & POL'Y 24, 31 (1994).

7. *Id.*

8. *Where Danger Roams*, UNESCO COURIER, Nov. 1992, at 30. Concern for the environment reached a new peak in the 1980's. In 1988, devastating droughts, mega-forest fires, and record high temperatures convinced most that humanity was courting ecological disaster. Thomas A. Sanction, *The Fight to Save the Planet as Concern for the Environment Grows, and Some Promising International Initiatives Take Shape, the U.S. Must Do its Share*, TIME, Dec. 18, 1989, at 60.

industrialized nations acted by sending the waste to agreeing developing countries.[9] However, many problems surfaced due to the inability of the third world countries to safely dispose of the hazardous waste.[10] Thus, responding to the problems associated with crossboundary waste trade, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal was formed.

II. BACKGROUND LEADING UP TO THE BASEL CONVENTION

The world produces about 2.1 billion tons of industrial waste per year; 338 million tons of such waste is hazardous.[11] Industrial countries produce a disproportionate amount of waste compared to developing countries. For example, the United States produces about 275 million tons of hazardous waste per year while Thailand, a developing country, only produces 22,000 tons per year.[12] The Organization for Economic Co-Operation and Development (OECD) and the United Nations Environment Programme (UNEP)[13] estimate that ten percent to twenty percent of global industrial waste, which accounts for twenty to thirty million tons per year, is exported.[14] In 1990, the United States legally exported 139 tons of hazardous waste.[15] Although this represents only one percent of the hazardous waste generated in the United States, it is substantial.[16] Of this one percent, approximately eighty-five percent is exported to Canada,[17]

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9. *Id.*

10. *See infra* text accompanying note 33 (discussing the problems associated with hazardous waste trade).

11. *Where Danger Roams, supra* note 8. The exact amount of hazardous waste crossing international borders every year is unknown due to illegal traffic in hazardous waste and nations disagreement as to what defines hazardous waste. Maureen T. Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope with a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103, 108 (1992).

12. Joseph LaDou, *The Export of Environmental Responsibility*, 49 ARCHIVES OF ENVTL. HEALTH, Jan. 1994, at 6.

13. *See infra* note 113 and accompanying text. In 1972, delegates of the United Nations Conference on the Human Environment created the United Nations Environment Programme. Rosenthal, *supra* note 2, at 71.

14. LaDou, *supra* note 12, at 6.

15. Grant L. Kratz, *Implementing the Basel Convention into U.S. Law: Will it Help or Hinder Recycling Efforts?*, 6 B.Y.U. J. PUB. L. 323 (1992).

16. *Id.*

17. Robert E. Cattanach & Peter O'Connor, *Environmental Concerns Raised by the Canada-United States Free Trade Agreement*, 18 WM. MITCHELL L. REV. 461, 479-80 (1992). Most of the hazardous waste exported to Canada comes from the Northeastern United States and along the common border. *Id. See generally infra text accompanying* note 183 (trading under the North American Free Trade Agreement).

and twelve percent is sent to Mexico.[18]

The major problems associated with crossboundary waste trade derive from the exportation of hazardous waste from rich nations to developing countries. The industrialized nations face the dilemma of where to put the insurmountable volume of refuse because they produce about ninety percent of all hazardous waste.[19] Although it is estimated that more than 600,000 tons of toxic waste is exported annually from the industrialized countries, that number is actually double.[20]

Faced with soaring costs of hazardous waste disposal, the industrialized nations have turned to developing countries to rid themselves of this waste. The cost of hazardous waste disposal has increased 100% in the past twenty years due to developed countries' new and stringent environmental laws and enforcement.[21] Increased regulatory constraints have affected traditional low-cost disposal methods,[22] thereby causing a reduction in waste disposal capacity.[23] Due to increased operating costs over the past decade, many facilities capable of disposing of hazardous waste have been forced to close.[24] In the United States alone, nearly half of 4,600 facilities that treated or disposed of hazardous wastes during the 1980s closed because of increased regulation.[25] Due to the increasing cost of waste disposal, particularly hazardous waste, industry has gone beyond its own borders for disposal.[26] Developing nations, severely burdened by huge foreign debt, provide attractive disposal sites due to their lack of environmental controls and their need for capital.[27] This debt places enormous pressure on developing countries to exploit their resources to acquire substantial

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18. Maureen T. Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope With a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103, 136 (1992).

19. C. Russell H. Shearer, *Comparative Analysis Of The Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL. L. 141, 144 (1993). The UNEP estimates that every five minutes 23 tons of waste crosses the border of an OECD Member country. *Where Danger Roams, supra* note 8.

20. *Toxic Materials*, ECONOMIST, Feb. 18, 1989, *available in* LEXIS, World Library, ALLWLD File.

21. LaDou, *supra* note 12. The United States has enacted The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation & Recovery Act (RCRA) to regulate waste disposal. *See generally infra* note 145 and accompanying text (discussion of RCRA).

22. Sean D. Murphy, *The Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste*, 88 AM. U. J. INT'L L. & POL'Y 24, 30 (1994). Low cost disposal methods include landfill, storage in surface impoundments, and deep well injection. *Id.*

23. *Id.*

24. *Id.* at 31.

25. *Id.*

26. Rosenthal, *supra* note 2, at 61.

27. Shearer, *supra* note 19, at 144.

sources of income.[28] By accepting hazardous waste, developing nations have faced several problems in managing the waste. First, uncontrollable forces pose an insurmountable barrier to environmentally sound management.[29] Second, homes of the poorest people are usually located near or even in landfills.[30] Third, developing nations often do not have adequate resources to provide competent administrative agencies or administrators to regulate waste disposal.[31] Because they lack environmentally sound waste management, developing nations have become a low cost disposal site for industrialized nations.[32]

The hazardous waste trade creates deplorable conditions in many developing countries. The recipient country and bordering nations experience soil contamination, ground water pollution, air pollution, and threats to natural resources and biodiversity.[33] In addition, others may suffer the ramifications of hazardous waste trade. The importation of hazardous wastes in agricultural exporting countries affects human health in other countries through the exportation of contaminated food product.[34] The snowball effect of mismanaged waste can indirectly affect the entire world.

III. THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTE AND THEIR DISPOSAL

Responding to a lack of uniform crossboundary hazardous waste trade guidelines[35] and concern for developing countries' inability to adequately handle

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28. Rosenthal, *supra* note 2, at 62.

29. Shearer, *supra* note 19, at 146. In the tropics' heavy rains, wastes soak into the soil under the landfills, causing the contamination of water supplies. *Id.*

30. *Id.* The poorest neighborhoods may be located in waste disposal sites. As a result of the proximity of the disposal sites and the neighborhoods, groundwater is often contaminated, and residents frequently bathe, drink, grow food, and cook with the tainted water. In addition, children play with hazardous wastes, and adults view them as raw materials for projects or as objects of good luck. *Id.*

31. *Id.*

32. *Id.*

33. Murphy, *supra* note 22, at 32.

34. *Id.* During the 1950's and 1960's the residents of Minamata and Niigata, Japan suffered neurological diseases caused by the consumption of fish which had been contaminated by the discharge of mercury into the ocean. Shearer, *supra* note 19 at 147.

35. Murphy, *supra* note 22, at 34. In response to the concern for control of transboundary movements of hazardous wastes, many different national and international regulations were enacted. For example, the International Maritime Organization developed a technical annex to the Marpol Convention to govern the transport of hazardous waste by sea. The annex contains detailed requirements on packing, marking, documentation, stowage, quantity limitations, and other matters. Another example of rules promulgated to govern hazardous waste that are not internationally unified are the bilateral agreements between the United States, Canada, and Mexico. These agreements govern the import of hazardous waste with Canada and Mexico,the two largest importers of United States hazardous waste. *See supra* text accompanying notes17 and 18. In another attempt at addressing the hazardous waste problem, in 1984, the OECD

hazardous waste imports, the UNEP pursued a global solution.[36] In 1987, in an effort toward a global approach, the UNEP developed the Cairo Guidelines which set forth principles to assist developing countries in the implementation of environmentally sound management of hazardous wastes.[37] The organization of the Cairo Guidelines[38] set the foundation for the first unified global convention on the transboundary movement of hazardous waste.[39]

Thereafter, the UNEP wanted to surpass the scope of the Cairo Guidelines.[40] In 1989, a negotiating conference[41] in Basel, Switzerland drafted the first international convention on the control of transboundary movements of hazardous waste.[42] The resulting product of the Conference set forth guidelines and principles for control of the international movement of hazardous wastes.[43] The final document, known as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) signed by thirty-five[44] of the 116 countries that participated in the negotiations.[45] In response to growing concerns raised by the scandals of the 1970s and 1980s,[46] the Basel Convention went into force in 1992.[47] Currently,

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showed its concern through adoption of a Decision/Recommendation that requires countries to ensure that hazardous waste situated within their borders is managed responsibly in order to protect both human health and the environment. Although this was one of the first steps taken by an international organization toward managing the problem of toxic wastes, it was not a unified international solution. Murphy, *supra* note 22, at 33.

36. *Id.*

37. *Id.*

38. In sponsoring the Cairo Guidelines, the UNEP was attempting to assist developing countries in implementing safe hazardous waste management. Diana L. Godwin, Comment, *The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?*, 22 DENV. J. INT'L L. & POL'Y 193, 198 (1993).

39. Rosenthal, *supra* note 2, at 72.

40. Godwin, *supra* note 38, at 198.

41. The negotiating conference consisted of working technical and legal experts. *Id.*

42. Murphy, *supra* note 22, at 34.

43. Walsh, *supra* note 18, at 107.

44. Signatories to the Convention include Afghanistan, Bahrain, Belgium, Bolivia, Canada, Colombia, Cyprus, Denmark, Ecuador, Finland, France, Greece, Guatemala, Haiti, Hungary, Israel, Italy, Jordan, Kuwait, Lebanon, Liechtenstein, Luxembourg, Mexico, Netherlands, Norway, Panama, Philippines, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United States, United Arab Emirates, Uruguay, and Venezuela. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal [hereinafter Basel Convention], adopted and opened for signature Mar. 22, 1989, 28 I.L.M. 649, 653 (1989).

45. Godwin, *supra* note 38, at 199.

46. *See* Langone, *supra* note 1, at 44. *See also* Murphy, *supra* note 6 and accompanying text.

47. Narelle Hooper, *Industry Outfoxed on Waste Trade*, BUS. REV. WKLY., May 9, 1994, at 30. The Convention became effective only upon ratification by twenty countries. Godwin, *supra* note 38, at 199. The number of countries required to ratify the agreement was purposely kept low so that the Convention would quickly become law. Rosenthal, *supra* note 2, at 72.

sixty-four countries[48] have implemented domestic legislation, thereby making them full Parties to the Basel Convention.[49] Although some countries, such as the United States, are signatories to the Basel Convention, they will not be full treaty partners until they implement internal legislation to ratify the Basel Convention.[50] Thus, in order for the United States to ratify the Basel Convention, Congress must pass legislation to establish export and import controls set forth by the Basel Convention.[51]

The former Executive Director of the UNEP, Dr. Mostafa Tolba, stated that the aim of the Basel Convention is a "major reduction in the generation of hazardous wastes."[52] The Basel Convention itself provides that "the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum . . . ."[53] Although the overall aim of the Convention is to reduce the production of hazardous wastes, the primary objective is "to protect countries against the uncontrolled dumping of toxic wastes."[54] The guidelines of the Convention are the means to controlling the irresponsible dumping of hazardous waste, and the ends should be the reduction of the creation of those wastes at their source.

The main provision of the Convention, Article 4, requires that the State of export must guarantee environmentally sound management of the waste[55] and may export waste to a Party State only in situations where it does not have the technical capacity and facilities to dispose of the waste in an environmentally sound manner.[56] The Basel Convention defines "environmentally sound

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48. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, Daily Envtl. Rep. (BNA) No. 1167, at D-16 (May 19, 1994).

49. Godwin, *supra* note 38, at 201.

50. *'Wait-and-See' May Become U.S. Policy on Recent Export Ban under Basel Treaty*, Daily Envtl. Rep. (BNA) No. 1167, at D-8 (June 20, 1994).

51. *Id.* Many obstacles stand in the way of implementation of international environmental agreements. First, sovereign nations are often unwilling to cede their sovereign authority to an international agreement. The second hindrance to implementing an international environmental agreement involves convincing the nations that their country is in need of the agreement. Third, it is difficult to convince nations that the subject matter of the agreement is relevant and important to their state. Finally, another obstacle to implementing international environmental agreements is the developing countries' concern that the international agreement will place the industrialized nations' interests over those of the developing countries. Walsh, *supra* note 18, at 114-15.

52. Godwin, *supra* note 38, at 199.

53. Basel Convention, *supra* note 44, at 657.

54. Godwin, *supra* note 38, at 199.

55. Basel Convention, *supra* note 44, art. 4. The relevant language of the Basel convention provides that "[e]ach party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere." *Id.*

56. *Id.* The Convention provides:

> [p]arties shall take the appropriate measures to ensure . . . movement of hazardous wastes and other wastes only be allowed if . . . the State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites

management" as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."[57]

Article 6 of the Convention governs the guidelines of the exchange of waste among parties. The guidelines set forth that "[t]he state of export shall not allow a transboundary movement of hazardous wastes to commence until it has received the written consent, based on prior detailed information, of the State of import, as well as of any State of transit."[58] In addition, every State possesses the sovereign right to prohibit the import of hazardous wastes.[59] Therefore, the Basel Convention requires the exporting country to adhere to a developing country's legislation prohibiting the import of hazardous wastes.

Article 8 provides that when transboundary movement of hazardous waste which is carried out in accordance with the Basel Convention cannot be completed in accordance with the contracting Parties, the State of export must ensure that the wastes are re-imported.[60] The Basel Convention defines this as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."[61] Alternatively, it also creates an affirmative duty on the State of import to reject the hazardous waste if it has reason to believe the waste will not be managed in an environmentally sound manner.[62]

Article 9 of the Basel Convention provides that the transboundary movements of hazardous wastes which do not conform to the provisions of the Basel Convention or general principles of international law shall be deemed to be illegal traffic.[63] The Basel Convention provides that "illegal traffic in hazardous wastes is criminal."[64] In determining responsibility for illegal transboundary movement of hazardous waste, the State responsible for the movement of the waste is the criminal party.[65] Therefore, it is the criminal party that has the obligation to ensure the environmentally sound disposal of the hazardous waste

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> in order to dispose of the wastes in question in an environmentally sound and efficient manner . . . .

Id.

57. *Id.* art. 2.

58. Gonzalo Biggs, *Latin America and the Basel Convention on Hazardous Wastes*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 333, 338 (1994).

59. *Id.*

60. Basel Convention, *supra* note 44, art. 8.

61. 138 CONG. REC. S12291-01 (1992).

62. Basel Convention, *supra* note 44, art. 4. The Convention provides that "[e]ach party shall . . . [p]revent the import of hazardous wastes . . . if it has reason to believe that the wastes . . . will not be managed in an environmentally sound manner." *Id.*

63. Biggs, *supra* note 58, at 338.

64. Basel Convention, *supra* note 44, at art. 4.

65. Biggs, *supra* note 58, at 338.

by re-importing the wastes or otherwise.[66] However, Article 9 does not extend the obligations of re-importation to cleanup of the hazardous waste in the importing country.[67] The guidelines governing the criminal party's action shall be introduced by each party's national legislation to prevent and punish illegal traffic in hazardous wastes.[68]

A party shall not permit hazardous waste exports to a non-party nor permit imports from a non-party,[69] unless the parties enter into bilateral, multilateral, or regional agreements or arrangements.[70] Article 11 of the Convention provides that Parties may enter into bilateral, multilateral, or regional agreements or arrangements with non-parties, provided that such agreements do not derogate from environmentally sound management of hazardous wastes as required by the Basel Convention.[71] For example, preexisting agreements, such as the United States' bilateral agreements with Canada and Mexico, must be "compatible with the environmentally sound management of hazardous wastes and other wastes as required by the Convention."[72] To ensure that the agreements with non-parties are consistent with the Basel Convention, they must contain provisions guaranteeing that "agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention . . . ."[73]

On May 5, 1992, over three years after its creation, the Basel Convention finally went into effect.[74] During the negotiations of the Basel Convention, the parties delayed implementation of important decisions involving liability and compensation for damages until the parties had an opportunity to ratify the treaty,[75] thereby providing key countries such as the United States, Japan, and the European Community time to implement the Convention.[76] In October 1994, in Geneva, Switzerland, a meeting was held to discuss liability and compensation under the Basel Convention.[77] The member nations' legal and technical experts were unable to agree on a draft protocol on liability and compensation for

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66. *Id.*

67. 138 CONG. REC. S7352-03 (1992).

68. Basel Convention, *supra* note 44, art. 9.

69. *Id.* art. 4.

70. Biggs, *supra* note 58, at 338.

71. Godwin, *supra* note 38, at 200. *See infra* text accompanying note 83.

72. 138 CONG. REC. S12291-01 (daily ed. Aug. 11, 1992)(statement of Sen. Pell).

73. Basel Convention, *supra* note 44, art 11(1).

74. *Id.* As of December 28, 1992, the following countries had ratified the Basel Convention: Australia, Argentina, Bahamas, Bahrain, Brazil, Canada, Chile, China, Cyprus, Czechoslovakia, El Salvador, Estonia, Finland, France, Hungary, India, Jordan, Latvia, Liechtenstein, Maldives, Mexico, Monaco, Nigeria, Norway, Panama, Poland, Romania, and Saudi Arabia. *Id.*

75. Godwin, *supra* note 38, at 203.

76. *Id.*

77. *Experts from Basel Treaty Nations Wrangle on Liability in Draft Protocol*, 198 Daily Envtl. Rep. (BNA) at D-11 (Oct. 17, 1994).

attachment to the Convention.[78] The UNEP proposed several liability options where the transmission of hazardous wastes across boundaries results in legal actions.[79] The proposals included "putting responsibility for liability on the generator of the wastes, the exporter, any person who at the time of the incident in question has control over the wastes, brokers, any person with operational control of the wastes, or any permutation of these alternatives."[80] In addition, representatives of the insurance industry requested that the Parties define the scope of liability reserved for insurance companies and the government.[81] Therefore, the Parties will continue to work toward drafting a liability and compensation mechanism for implementation under the Basel Convention.[82]

IV. CONCERNS GIVING RISE TO THE DECISION TO BAN CROSSBOUNDARY WASTE TRADE BETWEEN OECD AND NON-OECD COUNTRIES

A. *Total Ban Desired*

The Basel Convention has been highly criticized for continuing to allow industrialized nations to export waste to countries that have inadequate resources to safely manage the waste. Under the Basel Convention, crossboundary waste is permitted between Member States, provided that trade is preceded by an exchange of detailed information on the intended export and written consent is acquired from the importing country.[83] However, crossboundary waste will even be authorized between Member and non-Member States so long as bilateral, multilateral, or regional agreements are environmentally sound.[84] Although the Convention provides positive steps toward the management of hazardous wastes, it is criticized by Greenpeace as not having a single clause prohibiting the transfer of waste, even if the country has inadequate environmental regulations.[85]

Because the Basel Convention did not adopt a total or partial ban of crossboundary waste trade, an environmental coalition urged for a total ban of hazardous waste trade from the rich to poor countries. In support of developing countries, environmental groups, including the Natural Resources Defense Council, International Organization of Consumers Unions, Greenpeace, and the African Network of Environmental NGO's, called for an outright worldwide ban

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Basel Convention, *supra* note 44, art. 11(1). *See also supra* text accompanying note 58.
84. Basel Convention, *supra* note 44, at art. 11(1). *See supra* text accompanying note 70.
85. *Where Danger Roams, supra* note 8, at 30.

on the transboundary toxic trade.[86] Environmental activist groups are convinced that the only way to protect the environment and human health and encourage reduction of waste production and recycling of waste is a complete ban on the export of hazardous waste from industrialized nations to developing countries.[87] These proponents insist that developing countries lack the internal structure to implement the guidelines prescribed by the Basel Convention.[88] Therefore, even though several developing countries generate their own waste, they have neither the experience nor the equipment for dealing with imported waste.[89] Thus, the ban on toxic trade between countries of differing industrialization is the single alternative which the environmental groups deem acceptable.[90]

B. *Recycling Exception*

Proponents of the plan to prohibit toxic trade exports to developing countries assert that the recycling exception is a dangerous loophole of the Convention.[91] The preamble to the Convention expresses the importance of recycling and states that the Parties to the Convention are "aware of the need to continue the development and implementation of environmentally sound low-waste . . . recycling options . . . ."[92] The Convention provides that hazardous waste trade will be permitted if "the wastes in question are required as a raw material for recycling or recovery industries in the State of import . . . ."[93] Even though the Convention's broad definition of hazardous waste includes recyclable waste, the import of recyclable materials is only permitted if the importing country is willing to claim that the materials are required for recycling or reclamation within that country.[94] Thus, under the recycling exception, waste that would normally be banned as hazardous under the Convention may be transported and disposed of in countries under the guise of recycling.[95] In addition, the Convention provides that the export of recyclable materials can go forth if the shipment meets "other criteria" to be decided at some other time by the Parties to the Convention, provided they do not conflict with those of the Convention.[96] This is one reason for favoring ratification by the United States,

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86. Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVTL. L. REP. 137, 151 (1993).
87. Kratz, *supra* note 15, at 325.
88. *Id.* *See supra* text accompanying note 29.
89. *Toxic Materials*, *supra* note 20.
90. Kratz, *supra* note 15, at 325.
91. Godwin, *supra* note 38, at 202.
92. Basel Convention, *supra* note 44, at 658.
93. *Id.* at art. 4(7)(b).
94. Kratz, *supra* note 15, at 338.
95. Godwin, *supra* note 38, at 202.
96. Kratz, *supra* note 15, at 339.

thereby permitting it to participate in implementation guidelines of the Convention.[97]

Most of the global trade in recyclable materials is between countries with advanced mechanisms prescribing the environmentally sound management of the wastes.[98] However, problems emerge when a significant portion of recycled trade is exported from countries with highly developed regulatory regimes to countries with nonexistent regulations or poorly developed ones.[99] Kevin Stairs, Greenpeace's adviser on treaties and conventions, claims that most hazardous waste trade is traded under the guise of the recycling exception.[100] In some cases the disguise is transparently thin, and it is questionable whether recycling activities are much more than dangerous waste disposal.[101]

Greenpeace asserts that wealthy countries often dump hazardous waste in the Third World under the guise of recycling.[102] Jim Vallette, co-coordinator for Greenpeace's campaign to ban waste trade, has claimed that the United States exports a large quantity of lead acid batteries to Asian countries.[103] In these Asian countries, Greenpeace inspected numerous facilities where the recycling of these batteries occurred and found that the workers suffered from lead poisoning.[104]

In response to the fervor against the recycling exception of the Convention, the United States Chamber of Commerce has proposed criteria to counteract the ambiguity in the Convention guidelines. They include the following:

> (1) Recyclers must be in the business of recycling and have the appropriate equipment, as well as the technical and environmental expertise, to process the materials they receive...
> (2) Recyclers must conduct transactions on the basis of contracts arranged in advance of shipment of material to them.

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97. *Id.*

98. Murphy, *supra* note 22, at 30.

99. *Id.*

100. Godwin, *supra* note 38, at 202 n.68. The German government was held responsible for recovery of more than 400 tons of toxic German pesticides. Greenpeace claims that Germany told Romanian farmers that the pesticides could be recycled. However, when Greenpeace investigated, they found the damaged and rusting barrels full of pesticides that were leaking into the environment. In 1992 Britain exported 280 tons of lead waste to Indonesia and 165 tons to the Philippines for recycling. When Greenpeace visited the lead recovery plants in Indonesia, they found workers stirring molten lead by hand with no protection from the highly toxic lead fumes. *Id.*

101. Hannah Pearce, *Dump and Run*, NEW STATESMAN & SOCIETY, Feb. 5, 1993, at v6.

102. *Industry Slams Parliaments Call for Waste Trade Ban*, Reuter Newswire, Feb. 14, 1992, *available in* LEXIS, World Library, ALLWLD File.

103. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48 at D-16.

104. *Id.*

> Nonconforming and incompatible shipments are, therefore, substantially less likely to occur.
> (3) There must be a governmental infrastructure with the authority and capability to regulate the recycling activity and to enforce the regulations.
> (4) Recyclers must register with their Competent Authorities and maintain a status of compliance with their national environmental laws.
> (5) Under the oversight of its Competent Authority, and in accordance with its laws, a recycler must comply, at a minimum consistent with environmentally sound management, with national requirements for storage, process wastewater releases, and process air emissions.
> (6) A recycler must properly manage process residues . . . .
> (7) A recycler must create and maintain accurate and timely records . . . .
> (8) At least one product of the process must be returned to commercial use, whether as an ultimate product or as a feed material for an industrial process, in a use that does not solely involve application to the land. At least one product must meet commercial specifications for use in commerce as a product or process feed material.[105]

Thus, in response to efforts of the environmental coalition urging for a ban of crossboundary waste trade, industry attempted to impose its own criteria to further define trade in recyclables.

C. *Limited Provisions*

The Basel Convention has been criticized as having "no teeth because it lacks executive authority; therefore it will not be able to coerce states into compliance with the Convention."[106] The Organization of African Unity was primarily concerned that any controls provided by the Convention could be circumvented because of the lack of competent administrators and administrative agencies.[107] Therefore, much of the force of the Basel Convention will depend upon who participates in the agreement and how they implement its values into their national legislation.[108] One suggestion is that the solution lies in an

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105. Kratz, *supra* note 15, at 339-40.

106. Godwin, *supra* note 38, at 201. The Secretariat to the Convention facilitates information rather than enforcing compliance with the Convention. *Id.*

107. *Id.* at 206.

108. *Id.*

international environmental agency within the United Nations that would be responsible for forcing compliance by Member nations.[109] A total ban of hazardous waste export to third world countries would abolish the need for implementation and execution of regulatory guidelines for developing countries that lack the infrastructure to implement the Convention.

V. BASEL RESOLUTION

On March 25, 1994, the Conference of the Parties to the Convention met in Geneva, Switzerland and agreed to ban shipments of hazardous waste between industrialized nations and developing countries.[110] The relevant language of the decision states:

> The Conference,
> Recognizing that transboundary movements of hazardous wastes from OECD to non-OECD States have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Basel Convention;
> 1. Decides to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States;
> 2. Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States . . . .[111]

The resolution calls for an immediate ban on waste trade between OECD and non-OECD countries and calls for a complete prohibition of the movement of hazardous wastes for recycling by December 31, 1997.[112] The OECD is composed of twenty-five of the world's largest industrialized powers.[113] When

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109. *Id.*

110. *'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, *supra* note 50.

111. Enclosure from LiAnn Parker, Assistant Director, Business Recycling Coalition (decision to ban crossboundary waste trade from OECD countries to non-OECD countries) (Mar. 25, 1994).

112. *Pressure on Waste Agreement*, Australian Financial Review, May 20, 1994, *available in* LEXIS, World Library, ALLWLD File. *See generally supra* note 20 (discusses the amount of hazardous waste exported from OECD countries).

113. *'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, *supra* note 50, at D-8. Mexico became the 25th member of the organization May 18, 1994. *Id.* Other members are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.*

it came down to the vote, only three countries voted against the decision, while sixty-three voted in favor of the ban.[114] However, in the two months prior to the Geneva meeting, Greenpeace used its strength in the media and vigorously lobbied ministers of Member countries.[115] Thus, through its efforts, it was evident that Greenpeace "was determined to close the recycling loophole."[116]

The decision to ban hazardous waste export to non-OECD countries immediately and to ban recycling by 1997 does not otherwise change the Convention from its original form.[117] Moreover, since the resolution is not a formal one, it is not legally binding on the treaty partners.[118] However, international political pressure is expected to induce compliance.[119]

The resolution does provide for the transboundary movements of hazardous wastes from OECD countries to non-OECD countries in exceptional circumstances.[120] However, hazardous wastes from OECD to non-OECD states for the purposes of recovery are generally prohibited.[121]

VI. CONCERNS RAISED IN RESPONSE TO THE BAN

A. *Industry and Recycling*

Industrialized nations have expressed concern over the plan to prohibit crossboundary hazardous waste trade. Industry claims that the ban on trading recycled wastes between OECD and developing countries could cost the United States industry $2.2 billion a year in commodities trade.[122] Although the resolution is not yet legally binding since it is not yet a formal amendment, industry groups are concerned that the resolution will inhibit legitimate trade in recyclable waste.[123]

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114. Hooper, *supra* note 47, at 30.

115. *Id.* Greenpeace ran a public campaign to maximize opposition and reinforce the need for a ban. Greenpeace gave graphic details of the contamination and pollution caused by plants in Asia that processed lead-acid batteries for recycling. In addition, Greenpeace sailed the Rainbow Warrior II from Singapore to Indonesia and the Philippines arranging with local environmental groups to publicize the pollution before and during its visits. *Id.*

116. *Id. See supra* text accompanying note 100.

117. *'Wait-and-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, *supra* note 50, at D-16.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal*, 25 Envtl. Rep. 165 (BNA) (May 27, 1994). *See infra* text accompanying note 132.

123. *Pressure on Waste Agreement*, *supra* note 112.

The United States Chamber of Commerce listed options the United States government and industry should consider in light of the ban:

> 1) The administration should inform Congress and the Basel Secretariat the United States will not implement the treaty because of the ban;
> 2) U.S. companies exporting Basel wastes to non-OECD countries that have ratified the treaty should inform their customers that the shipments may stop Dec. 31, 1997, unless a bilateral agreement is reached;
> 3) The United States should begin negotiating bilateral agreements with non-OECD Basel parties with whom it trades Basel wastes;
> 4) Non-OECD countries should develop a mechanism to decide what is a Basel waste;
> 5) The U.S. government should organize training programs in sound environmental management and hazardous waste identification for non-OECD countries with which it trades; and
> 6) Trade in recyclable commodities should be clarified to include issues not addressed in the convention such as the status of materials shipped as part of a stewardship program.[124]

A major opponent of the decision to ban waste trade is the scrap metal industry. A major representative of the scrap metal industry is the Business Recycling Coalition (BRC).[125] Prior to the ban, the BRC strongly supported implementation of the Convention, because it "believed it could be implemented in a way that would promote environmentally sound management of hazardous waste while allowing all Parties to realize the benefits of trade in recyclables."[126] However, since the March ban, the BRC claims that the United States should not ratify the Convention until the March decision has been reversed.[127]

Advances in technology allow the scrap metal industry to recover valuable materials, such as chromium, copper, mercury, and other metals.[128] Recovery of these materials has fueled an extensive recycling trade in hazardous waste among

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124. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban On Waste Trade*, *supra* note 48, at D-16.

125. The Business Recycling Coalition represents 50 companies and associations that are working toward legislative and regulatory frameworks that will encourage recyclable waste trade and the recovery of energy from industrial byproducts and secondary materials. Letter from Dr. Harvey Alter, manager of the Resource Pol'y Dept., U.S. Chamber of Commerce, to Ms. McGinty, Director, Office on Envtl. Pol'y (May 18, 1994).

126. *Id.*

127. *Id.*

128. Murphy, *supra* note 22, at 30.

industrialized nations.[129] For example, recycling in the United States has become quite successful.[130] The United States recycles almost ninety-two million tons of waste other than municipal solid waste each year and exports about nineteen million tons.[131] The exports of recyclable metals produce $5.1 billion annually and imports $1 billion, creating an annual surplus of $4 billion.[132]

Although recycling provides revenue to developing countries and is advantageous to the scrap metal industry, inadequate recycling processes are treacherous. Greenpeace discounts the industry's claim that $2.2 billion in commodities trade would be affected as "grossly inflated, and probably includes all scrap metal, not just that with toxic components."[133]

The recycling process in developing countries can be extremely dangerous. The shipments of scrap metal to third world countries for recycling include everything from asbestos to transformers containing PCB-contaminated oil.[134] When the scrap dealers burn the scrap to retrieve the copper inside, dangerous dioxins are released from burning the plastic wire coverings.[135] Often during the treatment process, the scrap industry employees are not provided with needed masks or equipment to protect them against asbestos, PCBs, and metal dust.[136] Thus, in many situations, although some commercially useful elements are recovered from the waste and used, the consequences often prove more problematic than the original waste.[137]

B. *Recyclable Waste under the Basel Convention and Current United States Legislation*

Dr. Harvey Alter, manager of the Resource Policy Department at the United States Chamber of Commerce, stated that the decision to ban Basel waste changes the Convention from its original form since Basel waste includes both hazardous and non-hazardous material.[138] Most of the controversy centers on the notion that much of the defined waste under the Basel Convention is not

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129. *Id.*

130. Kratz, *supra* note 15, at 335.

131. *Id.*

132. *Id.*

133. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

134. Rosenthal, *supra* note 2, at 64.

135. *Id.*

136. *Id.*

137. Pearce, *supra* note 101, at v6.

138. *Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal*, *supra* note 122, at 165.

hazardous.[139] Dr. Alter claims that Basel waste includes, "many secondary materials that are traded as ordinary commodities worldwide."[140]

In Article 1 of the Convention, waste is identified as hazardous if it is specifically listed in Annex 1 of the Convention.[141] In addition to specifically defined hazardous wastes, they "are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import, or transit."[142] Thus, the term "hazardous waste" pursuant to the Basel Convention includes characteristics defined by the Convention and set forth by each nation's implementing legislation.

Under terms of the Convention, the United States exported about 20 million tons of Basel waste in 1992.[143] Yet, industry claims that according to the Environmental Protection Agency (EPA), only about 150,000 tons of the 20 million tons of Basel waste exported is considered hazardous under the Resource Conservation and Recovery Act (RCRA).[144]

In 1976, Congress enacted RCRA[145] which, along with agency regulations, currently governs hazardous waste generated within the United States.[146] Waste is considered hazardous under RCRA if it is specifically listed as hazardous or

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139. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade, supra* note 48, at D-16.

140. Letter from Dr. Harvey Alter, *supra* note 125.

141. Basel Convention, *supra* note 44, art. 1.

142. *Id.*

143. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade, supra* note 48, at D-16.

144. *Id.* There is a discrepancy in hazardous waste figures formulated under the Convention and RCRA because no single accepted definition of hazardous waste exists. Prior to classifying waste as hazardous, the EPA first determines if the substance is a "solid waste." "Solid waste" is defined in RCRA as:

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows . . . .

42 U.S.C. § 6903(27). RCRA defines "hazardous waste" as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id. § 6903(5).

145. Walsh, *supra* note 18, at 124. The RCRA provided the EPA with the power to regulate domestic hazardous waste from generation through disposal. *Id.*

146. *Id.* at 123.

exhibits one of the characteristics defined by the EPA.[147] The characteristics include: ignitability, corrosivity, reactivity, toxicity, or the ability to cause a substantial endangerment to human health or the environment.[148] Industry fears that its trade in metal recyclables might disappear because of laws which fail to distinguish between waste and reusable materials.[149]

However, Greenpeace counters that industry's reliance on RCRA "is so full of loopholes that it renders meaningless the amount of waste the chamber cites as being hazardous."[150] This is because some hazardous waste is not regulated under RCRA.[151] Many recycled materials that contain hazardous substances or have the potential to cause hazardous releases during reprocessing are not considered hazardous waste under RCRA.[152] Thus, some recyclable waste that could be potentially hazardous is not subject to the regulations of RCRA.

C. *Effect on Developing Countries*

Industry asserts several reasons why the ban may actually cause harm to developing countries.[153] Third world industry that relies on Basel waste as a means of fueling its own manufacturing sector will suffer economically.[154] For example, when some developing countries built their steel industries, they chose to use electric arc furnaces.[155] The furnaces almost exclusively recycle scrap; however, the developing nations do not generate enough scrap metal to supply these furnaces.[156] The environmental benefits of these furnaces are substantial.[157] Therefore, if these nations are prohibited from importing scrap metal, the effects could seriously harm the developing countries' economies and the environment.[158]

In addition, trading with OECD countries provides the income necessary to develop sound management practices and provides a greater opportunity for

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147. Walsh, *supra* note 18, at 140.

148. 40 C.F.R. § 261.20-24 (1992).

149. *Scrap Metal Industry Warns Against New Waste Laws*, Reuter Newswire, Oct. 30, 1990, available in LEXIS, World Library, ALLWLD File.

150. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

151. Rosenthal, *supra* note 2, at 73-74.

152. *Id.*

153. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

154. *Id.*

155. Kratz, *supra* note 15, at 337-38.

156. *Id.*

157. They reduce energy consumption in the steelmaking process by 72%, cut down on toxic emissions and other airborne pollutants by 86%, reduce waste generation by 97%, and decrease water use by 40%. *Id.*

158. *Id.*

technology transfer and self-policing of environmental practices.[159] Industry claims that continued trade is the "only way for the U.S., with its relatively higher technological development, to influence the growth of environmentally sound management of hazardous materials in developing nations."[160]

D. *Migration of Industry to Developing Countries*

Another concern raised by stricter environmental regulations, is the migration of corporations in industrialized nations to developing countries. The environmental impact of crossboundary waste trade is small compared to the dangers associated with the migration of hazardous industries to developing countries.[161] One reason that developing countries provide attractive economic incentives for outside interests and investments is that environmental costs are significantly less than exporters would have to pay in their own country.[162] As a result, third world cities are overcome with migrating industry experience, severe air pollution, inadequate sewage treatment and water purification, and rampant dumping of toxic wastes.[163] Thus, wholesale migration of industry could be disastrous and have a detrimental effect that even exceeds that of crossboundary waste trade.

E. *Stricter Standards Giving Rise to Increased Illegal Waste Trade*

Economically, a total ban on the toxic trade may make the wastes more attractive in the international market and consequently result in hazardous waste smuggling.[164] Where the international community, the exporting country, or the importing country has imposed regulations or prohibited the crossboundary movement of hazardous wastes, the large profits to be made from their disposal encourage illegal trafficking.[165] Unfortunately because of the secretive nature of

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159. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

160. Letter from Dr. Harvey Alter, *supra* note 125.

161. LaDou, *supra* note 12, at 6.

162. *Id.*

163. *Id.* Due to migration of industry, most of the rivers in the Eastern European countries do not provide safe drinking water and some are so acidic that the water cannot even be used for industry. *Id.*

164. Okaru, *supra* note 86, at 152. After the Nigerian Government introduced a ban on the importation of rice and other goods in hopes of improving the agricultural sector, there was an increase in smuggling from neighboring countries like Ghana. *Id.*

165. Murphy, *supra* note 22, at 31. Even though treatment of polychlorinated benzenes can cost as much as $3000 per ton in the United States, it can cost as low as $2.50 per ton in developing countries which makes illegal shipment highly profitable even after paying for freight. *Id.*

illegal trafficking, detailed information about it is minimal.[166] Nevertheless, the United Nations Secretary-General asserted "that the foremost characteristic of illegal traffic in toxic and dangerous products and wastes is the dominant movement of these substances from the industrial to the developing world."[167]

VII. UNITED STATES LEGISLATION

Although the United States has signed the Basel Convention, it will not be a full treaty partner until Congress implements the appropriate legislation. In order for the United States to ratify the Basel Convention, Congress must pass legislation to "establish export and import controls on material covered by the treaty."[168]

In the 102nd Congress, the Senate voted to give its advice and consent for ratification of the Basel Convention.[169] However, the United States Congress failed in both the 102nd and 103rd sessions of Congress to accept legislation that would implement the Basel Convention.[170]

A. *The Waste Export and Import Control Act of 1994*

The latest attempt to establish legislation that would ratify the Basel Convention was the proposed bill entitled, The Waste Export and Import Control Act of 1994 (Waste Export Act).[171] On March 7, 1994, Representative Al Swift of Washington and Representative Mike Synar of Oklahoma introduced the Waste Export Act to implement the Basel Convention.[172] The Waste Export Act provided "the Environmental Protection Agency with the needed authority to implement the Basel Convention."[173]

Although current legislation requires the EPA to obtain the prior informed consent of the nation receiving the waste, the EPA does not have the authority to refuse waste shipments where the agency knew or suspected that the waste would not be handled properly.[174] In response to the lack of authority of the EPA in recalling such waste, the bill also authorized the EPA to halt shipments to or

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166. *Id.*

167. *Id.*

168. *'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, *supra* note 50, at D-8.

169. 140 CONG. REC. H1053-01 (daily ed. Mar. 3, 1994) (statement of Representative Swift).

170. Godwin, *supra* note 38, at 198.

171. H.R. 3965, 103rd Cong., 2d Sess. (1994).

172. *Id.*

173. 140 CONG. REC. H1053-01 (daily ed. Mar. 3, 1994) (statement of Representative Swift).

174. *Id.*

recall shipments from facilities that the EPA believed would handle the United States waste improperly.[175]

Because current legislation under the RCRA applies only to hazardous waste, other waste with hazardous characteristics is left entirely unregulated.[176] The Waste Act covered materials considered hazardous or that exhibited a hazardous characteristic under RCRA, as well as municipal solid waste and municipal incinerator ash.[177] The Waste Act would have been a positive step toward implementing more effective legislation governing crossboundary waste trade.

Prior to the March 25th meeting implementing the total ban, the United States Chamber of Commerce supported The Waste Export Act legislation to implement the Basel Convention.[178] However, on May 18, 1994, the United States Chamber of Commerce withdrew its support for the Waste Export Act, which reduced the chance that the United States would join the international accord in ratifying the Convention.[179] The Chamber of Commerce withdrew its support because of the resolution to the Basel Convention that bans crossboundary waste trade between OECD and non-OECD countries.[180]

B. *Trading with Mexico and Canada*

The text of the North American Free Trade Agreement (NAFTA) was released in September of 1992.[181] NAFTA itself does not prescribe hazardous waste regulations governing the relationship between the United States, Canada, and Mexico.[182] However, NAFTA will be subject to the terms of the Convention, and to the extent it is inconsistent with it, the latter will prevail.[183]

VIII. Conclusion

During the past ten years, environmental awareness has soared to new heights. The UNEP realized that protection of the environment could only be achieved through a joint effort. This notion derives from the ability of industrialized nations to seriously affect the lives of those in poorer countries.

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175. *Id.*

176. *Id.*

177. *Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal, supra* note 122. Failure to regulate hazardous municipal solid waste and incinerator ash has led to embarrassing international incidents where U.S. barges filled with municipal garbage incinerator ash traveled from port to port in search of a dumping ground.

178. *Id.*

179. *Id.*

180. *Id.*

181. Godwin, *supra* note 38, at 198.

182. *Id.*

183. *Id.*

The Basel Convention has been a positive step toward a relationship of responsible waste trade among nations.

The United States, as an international leader, should take responsibility and play a leading role in the management of international waste trade. This nation must recognize that the developing countries do not have the adequate resources necessary to properly handle hazardous waste disposal or treatment. The United States must take responsibility for the contamination of soil, water, and food due to the hazardous waste it exports to developing countries.

Congress should take a positive step and ratify the Basel Convention. Although the prescription of a total ban under the resolution to the Basel Convention may result in negative consequences and seem harsh to the recycling metal industry, it is necessary to combat current domestic legislation that does not provide the necessary protection for developing countries. Even though the waste itself may be adequate for recycling, the developing countries lack the infrastructure to adequately handle recyclable waste.

Congress should ratify the Convention so that it may participate in implementing the ban.[184] Further meetings of the Parties will specifically define the meaning and the scope of the ban. At that time, the United States could use its strength to influence the implementation of a recycling exception in situations where environmentally sound trade could be achieved. This solution would require strict legislation and a tight infrastructure in attempt to abolish mismanaged recyclable waste trade.

If the United States does not adopt legislation to implement the Basel Convention, changes must be made to current United States legislation if the United States wants to evolve as an environmental leader.

*Donna Valin**

184. Telephone Interview with LiAnn Parker, Director, *Business Recycling Coalition* (Jan. 13, 1995).

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A Brief Survey of the Smuggling of Fissile Material: An Embryonic Phenomena with a Terrifying Future in the European Community

I. INTRODUCTION

Following the bombings of Hiroshima and Nagasaki many feared that nuclear weapons technology would spread rapidly throughout the world.[1] However, this fear has not come to fruition. Since 1945, about one nation has "crossed the nuclear threshold every five years."[2] During the Cold War, the widescale development and use of nuclear weaponry was largely retarded by the United States and the former Soviet Union. These two Cold War adversaries utilized atomic weaponry[3] in order to arrest each other's aggression[4] and influence their feeble client States rather than to effectuate offensive objectives.[5]

Countries of strategic importance to either the Soviet Union or the United States were placed under the auspices of their mentor's nuclear umbrella.[6] Relying on this umbrella of Armageddon, non-nuclear states typically did not feel the need, nor were they permitted, to develop their own nuclear weapons programs.[7] This highly structured superpower stand off, coupled with the inescapable terror of nuclear war, stunted the use of nuclear weaponry.

With the collapse of the Soviet Union and the concomitant termination of the Cold War, the bipolar structure of the arms race has been translated into a much more complex equation.[8] As the former Soviet Union and the United States

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1. President John F. Kennedy's prediction, in the early 1960's, that over 20 nations would have nuclear weapons capacity by the 1970's. David Albright & Kevin O'Neill, *Jury-Rigged, But Working*, BULLETIN ATOMIC SCIENTISTS, Jan.-Feb. 1995, at 20.

2. *Id.*

3. *See* Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 759 (1994). An atomic bomb is composed of a core of fissile material—a minimum of either eight kilograms of plutonium or 25 kilograms of uranium—surrounded by explosives. When the explosives are detonated, the core is imploded, and the fissionable material instantly achieves critical mass, causing a sustained chain reaction that releases vast quantities of energy. *Id.*

4. *See* Samuel F. Wells Jr., *Nuclear Weapons and European Security During the Cold War*, 16 DIPLOMATIC HISTORY 278 , 280 (Spring 1992).

5. *See* George H. Quester & Victor A. Utgoff, *Deterrence and Proliferation*, THE WASHINGTON QUARTERLY (1993) *available in* LEXIS, Nexis Library, WASHQR File. People are generally "more impressed by what nuclear weapons can do to cities than by what such weapons might accomplish to reverse the military outcome on potential battlefields." *Id.*

6. William R. Youngblood, Book Note, 9 EMORY INT'L L. REV. 329, 329 (1995) (reviewing PETER VAN HAM, MANAGING NON-PROLIFERATION REGIMES IN THE 1990'S: POWER, POLITICS, AND POLICIES (1994)).

7. *Id*; *see also* William C. Potter, *U.S.—Soviet Cooperative Measures for Nonproliferation, in* THE NUCLEAR SUPPLIERS AND NONPROLIFERATION 1 (Rodney W. Jones et al. eds., 1985).

8. Youngblood, *supra* note 6, at 329-30.

reduce their weapons arsenals,[9] and become less involved in maintaining stability along the former Cold War front, other countries are increasing their efforts to develop nuclear weapons as a means of self defense.[10] As countries scrambled to fill the vacuum of military power, heretofore comatose antagonisms have resurfaced,[11] thus, placing a premium on the development of a modern military. Hence, the threat that nuclear weapons will be procured by nations previously bereft of such weapons has matured.[12]

Countries often acquire nuclear weapons in order to accrue prestige and to solve real or perceived security threats.[13] A nation languishing in a long-term affray could radically transform the scope of their confrontation by acquiring nuclear weapons. The procurement of nuclear weapons may also be attractive to a nation facing superior conventional forces or suffering from a perceived identity crisis.[14] A likely corollary to a nation acquiring nuclear weapons is for its adversary to do likewise.[15]

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9. Wolfgang K.H. Panofsky, *Safeguarding the Ingredients for Making Nuclear Weapons*, 10 ISSUES SCIENCE & TECHNOLOGY 67 (Spring 1994).

10. Youngblood, *supra* note 6, at 337. The desire for a non-nuclear state to obtain such weapons is directly proportional to the regional threat. One example of this regional tension is the case of India and Pakistan. India, seeking to increase its security and international prestige, began developing nuclear weapons and, in 1974, conducted its first nuclear test. Pakistan, feeling threatened by India's nuclear program, began its quest for nuclear weapons. Politicians publicly said that if India had nuclear weapons, the people of Pakistan "would eat grass" until they had nuclear weapons of their own. *Id.* at 337. This pattern of distrust and one-upsmanship is repeated in the Korean peninsula and the tensions between Israel and its Arab neighbors. Nature teaches us that for small creatures having a very deadly bite is an effective means of survival, consider Israel for example. *Id.* at 340.

11. In response to the Republic of Slovenia and the Republic of Croatia declaring independence from the Federation of the Republics of Yugoslavia in 1991, the Serbian led Yugoslavia People's Army invaded Slovenia. The ensuing battles, systematic rape of women, and "ethnic cleansing" demonstrates such hatreds. *See A Whirlwind of Hatreds: How the Balkans Broke Up*, N. Y. TIMES, Feb. 14, 1993 at E5, *available in* LEXIS, Nexis Library, NYT File.

12. *See* Brad Roberts, *1995 and the End of the Post-Cold War Era*, THE WASHINGTON QUARTERLY (1995) *available in* LEXIS, Nexis Library, WASHQR File. By the Year 2000, it is believed that forty countries will have the ability to produce nuclear weapons. *Id.*

13. FRANK BARNABY, THE ROLE AND CONTROL OF WEAPONS IN THE 1990's 116 (1992); *SEE ALSO* GEORGE H. QUESTER & VICTOR A. UTGOFF, *TOWARD AN INTERNATIONAL NUCLEAR SECURITY POLICY*, THE WASHINGTON QUARTERLY (1994) *available in* LEXIS, Nexis Library, WASHQR File.

14. For example, Israel, India, and Pakistan developed nuclear capabilities because each perceived a regional threat to its security as well as a need to enhance its overall military stature. *See* LAWRENCE SCHEINMAN, THE INTERNATIONAL ATOMIC ENERGY AGENCY AND WORLD NUCLEAR ORDER 4-6 (1987).

15. *Science and Technology: Plutonium, Uranium and Pandemonium*, ECONOMIST, June 5, 1993, at 98 [hereinafter *Plutonium*]; Quester & Utgoff, *supra* note 13. "Iraq's nuclear program was motivated by its desire to end Israel's nuclear monopoly in the Middle East. Had Iraq's nuclear program not been severely damaged as a result of allied bombing, Iran and Syria and

Since developing nuclear weapons is difficult, a country must either be extremely wealthy or fanatical in order to cultivate their own nuclear weapons.[16] Those nations inept at indigenously developing nuclear technology may resort to the smuggling of nuclear material and the importation of nuclear expertise in order to circumvent existing prohibitions in the marketing of nuclear weapons. With the existing uncertainty in Russia and the Commonwealth of Independent States (CIS), the concern over the smuggling of fissile weaponry is particularly acute.[17] In fact, R. James Woolsey, former Director of the United States Central Intelligence Agency (CIA), has stated that the potential for trafficking nuclear weapons is "fueled by a combination of declining morale among Russian security services and workers at nuclear research and production facilities, and customers such as Iran who are eager to shorten their timetable for development of nuclear weapons."[18]

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perhaps even Egypt would have had strong motivations to move ahead themselves. " BARNABY, *supra* note 13, at 117.

16. *Plutonium*, *supra* note 15, at 98.

17. As, a consequence of the collapse of the Soviet totalitarian command and control society, a vast potential supermarket of nuclear weapons and fissile material is becoming increasingly accessible. The collapse of the Soviet Union and the subsequent decay of the custodial system guarding the Soviet nuclear legacy has eliminated this proliferation chokepoint, since states and possibly even sub-state groups can now buy or steal what they previously had to produce on their own. This central fact has transformed the nature of the proliferation problem for . . . the rest of the world.

Avoiding Nuclear Anarchy: Containing the Threat of Loose Russian Nuclear Weapons and Weapons-Usable Nuclear Materials, , Testimony before the Senate Foreign Relations Committee: Subcommittee on Foreign Relations, Federal Document Clearing House Political Transcripts, Aug. 23, 1995, *available in* LEXIS, Nexis library, HILLPR File [hereinafter *Nuclear Anarchy*] (Graham T. Allison et al, Center for Science and International Affairs, Kennedy School of Government, Harvard University). David Osias, a strategic programs analyst for the Central Intelligence Agency stated: "Our concern about possible loss of weapons-usable nuclear material is increased by our recognition that the Russians may not know either who has all their material or where it is located. The fact that some material has made it out increases the likelihood that other material will also." *A Six-Pack of Nuclear Bombs, To Go*, CHI. TRIB., Aug. 28, 1995, at 14, *available in* WESTLAW 1995 WL 6240410; Arthur Allen, *Operation Hades: German Police Stings Create Market for Nuclear Smuggling*, OTTAWA CITIZEN, Sept. 2, 1995, at B3, *available in* WESTLAW 1995 WL 4324041; *Nuclear Smuggling Continues Los Alamos Scientist Cites Blackmail Threat*, DENV. POST, Aug. 25, 1995, at B03, *available in* WESTLAW 1995 WL 6582149; Bill Schackner, *More and More, Nuclear Fuels are Being Stolen*, PITTSBURGH POST-GAZETTE, July 16, 1995, *available in* WESTLAW, 1995 WL 3393553.

18. Prepared Statement of R. James Woolsey, Director of Central Intelligence before the Senate Select Committee on Intelligence World Threat Assessment Brief, Federal News Service, Jan. 10, 1995, *available in* WESTLAW, 1995 WL 6620595.

In addition to the five declared nuclear powers,[19] at least a half-dozen nations from the Middle East, the Indian subcontinent, and the Korean Peninsula, as well as some terrorist groups are actively pursuing nuclear weapons capacity, some of whom presumably already possess this technology.[20] Terrorist groups, previously proscribed from acquiring nuclear technology, could conceivably penetrate this arena.[21] If this occurs, they could threaten nuclear holocaust to extort extravagant demands.[22] Terrorists do not need the precision and polish of a high-yield weapon. Instead, a crude, low-yield bomb could serve their purpose, demolishing a large portion of a city.[23]

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19. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, art. IX, ¶ 3, 21 U.S.T. 483, 492-93, 729 U.N.T.S. 161, 174 [hereinafter *NPT*]. For the purposes of the Treaty, a nuclear-weapon State was one which had manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967. Five such states existed: China, France, Great Britain, the Soviet Union, and the United States. Presently, however, numerous other states either have nuclear weapons or the technology; they include: Israel, India, Pakistan, South Africa, North Korea, and Japan. *See Global View: Secret Nuclear Weapons Development Programs* (CNN television broadcast, Sept. 10, 1994) (transcript *available in* LEXIS, Nexis Library, CNN File) [hereinafter *Global View*] (interview with David Kay, chief inspector in Iraq for the International Atomic Energy Agency).

20. *Global View*, *supra* note 19.

21. Allison, *supra* note 17.

> Obviously, the random lone terrorist will not be able to fabricate a nuclear weapon. Clearly, many groups of terrorists (or criminals) will lack the technical wherewithal to make nuclear weapons. The point here is not that the entire universe of criminal weapons. The point is that some terrorist groups will likely be able to do so. After all, some groups that employ terror encompass large numbers of people, many of them educated; they are well organized and highly motivated; they can have access to substantial financial resources; and they may have the support of states or groups within states. Given time and fissile material, such a group could be capable of producing a nuclear weapon—especially if it had a little help.

Id.

> There have been no cases of a rogue state or terrorists using nuclear weapons. The sarin gas attack in Tokyo comes the closest to a terrorist attack using a weapon of mass destruction. This case may have relevance to nuclear terrorism to the extent that the cult had acquired a sophisticated laboratory and developed the capability to manufacture and stockpile a sizable quantity of and engineers.

Hearings on Nuclear Smuggling in Russia and Threat of Nuclear Terrorism, Senate Foreign Relations Committee, European Affairs Subcommittee, Federal Document Clearing House Political Transcripts, Aug. 23, 1995, *available in* LEXIS, Nexis Library, HILLPR File [hereinafter *Hearings*] (testimony of Dr. Thomas Cochran).

22. Plutonium, *supra* note 15, at 98; Jennifer Lin, *New Kind of N-peril emerging Rogue Nations, Terror Groups could Acquire Deadly Materials*, SAN DIEGO UNION TRIBUNE, April 17, 1995, at A1, *available in* WESTLAW, 1995 WL 5714041.

23. Plutonium, *supra* note 15, at 99.

> If terrorists who attacked the 110-story World Trade Center in 1993, or . . . the Federal Office Building in Oklahoma City [in April 1994] . . . had used the same mini-van that they drove . . . but carried not the chemical-based explosives that they used but rather a weapon that [was 30 pounds of HEU] . . . [t]hey could have

As nuclear capabilities spread, technological constraints on proliferation weaken. Preventing the proliferation of nuclear arms has become far more important than preventing or preparing for direct nuclear conflict. Controlling proliferation will necessitate dealing with technical, institutional, and political difficulties.[24] Moreover, increasing sources of supply undermine international control efforts and exasperate proliferators vulnerability to possible consequences. This note will examine what can be done to curtail the potentially devastating result of fissile material smuggling, holocaust. Part I will examine the perils of smuggling and how this is aggravated where nuclear weapons are concerned. Part II will investigate the applicable aspects of the Nuclear Non-Proliferation Treaty. Part III will examine the International Atomic Agency and demonstrate how it is currently incapable of dealing with smuggling. Part IV will examine the policing mechanisms in place in Europe, i.e., Interpol and Europol, and determine how they may be strengthened to deal with this embryonic disaster. Part V will offer recommendations to curtail the smuggling of fissile material.

II. THE PROBLEMS WITH SMUGGLING IN THE EUROPEAN COMMUNITY AND RUSSIA

A. *Fissile Material*

The smuggling of fissile material from the former Soviet Union is suspicioned by the West as possibly the most intolerable "wave" of organized crime sweeping not only Russia but all of the former Eastern Bloc countries.[25] The authoritarian mechanisms that formerly safeguarded Soviet nuclear material can no longer be assured;[26] hence, the potential for the smuggling of nuclear commodities exists. For example, attempts to smuggle fissile material into Germany has expanded in recent years. According to the Bundesnachrichtendienst (BND), a German police agency, attempts have grown from forty-one in 1991, 158 in 1992, 241 in 1993, to 267 in 1994.[27] Many of

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created an explosion of 10,000 to 20,000 tons of TNT, which would have demolished an area of about three square miles.

Hearings, *supra* note 21 (testimony of Dr. Graham Allison).

24. Panofsky, *supra* note 9.

25. Giovanni Facchini, *Smuggling of Nuclear Material from Eastern Europe Alarms Experts*, DEUTSCHE PRESSE-AGENTUR, July 5, 1994, *available in* LEXIS, Nexis Library, International File.

26. Burrus M. Carnahan, *Nuclear Smuggling as an International Crime*, 28 AKRON L. REV. 417, 418 (1995). The Soviet safeguarding system relied in large part upon psychology. The Soviets were confident in its control over its people hence any safeguards that were put into place focused on threats from outside of the Soviet Union. Plutonium, *supra* note 15, at 99.

27. Tyler Marshall, *European Nations Combine to Combat Crime*, LOS ANGELES TIMES, Sept. 9, 1994. *See also Ninety Radioactive Smugglings Found in Germany in First Half Year*, XINHAU NEWS AGENCY, Sept. 14, 1994, *available in* LEXIS, Nexis Library, International File.

these reported instances have been frauds or have involved material that in no way could be used to develop nuclear weapons. In fact, "since the fall of 1992, there have [only] been five serious cases of diversion of weapons-usable fissile material" the rest have either been hoaxes or have involved material that is not weapons-grade.[28] Nevertheless, "[t]he fact that a large fraction of the reports of nuclear smuggling have been scams involving material with no relevance to nuclear weapons, should not blind us to the seriousness of the smaller but still significant number of cases that have involved nuclear weapons materials."[29]

"The fall of the Iron Curtain and the loosening of internal borders within the (European) Union has resulted in a freer and more deregulated environment, which has created the perfect breeding ground for organized crime syndicates and their illicit activities."[30] Evidence exists that organized crime syndicates, or an "Atomic Mafia," have attempted to access Russia's 33,000 nuclear warheads[31] in order to peddle them for exorbitant sums abroad.[32] The fear of a "Russian

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28. *Hearings*, *supra* note 21 (testimony of Dr. Thomas Cochran). An example of a serious case of smuggling occured in November 1994. There, Czech authorities found six pounds of HEU in the back seat of an automobile parked on a side street. In addition, Russian documents were found with the fissile material. A Czech nuclear scientist, a Russian and a Belarussian were arrested in connection with the seizure. Allison, *supra* note 17.

29. *Id.* (testimony of Dr. John Holdren). Even though many of the alleged incidents of smuggling of fissile material turn out to be untrue or unproven or involve anything "remotely 'nuclear'—such as radioactive material used for medicinal purposes— . . . the available facts are grounds for grave concern, for at least five reasons." Allison, *supra* note 17.

> First, the large number of real or fraudulent efforts to sell things nuclear suggests a widespread appreciation within Russia that such material have market value. Second, these facts indicate that there is considerable effort within Russia to fill the supply side of an emerging, if not formed, nuclear black market. Third, the fact that there is a large number of failed or false attempts to move nuclear materials across international borders is less important than the reality that even a tiny number of successes in transferring nuclear weapons or weapons quantities of fissile material would have very damaging, if not disastrous, consequences. Fourth, it is unlikely that every attempt at nuclear smuggling is detected and reported; by definition, successful transactions on the black markets are covert and unnoticed. Finally, and perhaps most tellingly, buried in the large number of claimed cases are a small number of very serious, unchallenged, and unambiguously dangerous incidents.

Id.

30. Joel S. Solomon, *Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty*, 13 DICK. J. INT'L L. 623, 623 (1995).

31. Russia has so many weapons due to the fact that fresh plutonium slowly undergoes radioactive decay, making it unpredictable in warheads. The United States solves this problem by recycling old material, and chemically extracting impurities. As a rule, the Soviet Union did not refresh its plutonium. Aging weapons simply were placed in reserve, replaced by warheads full of fresh plutonium. Plutonium, *supra* note 15, at 99.

32. *See* David Morelli, *Russian Isotopes Recovered: Stolen Non-radioactive Elements Seized by Authorities*, WINDSOR STAR, Feb. 9, 1995, at A4, *available in* WESTLAW, 1995 WL

Mafia" extends to most countries.[33] The United States Federal Bureau Of Investigation (FBI) is "gravely concerned [that] Russian organized crime members may have already obtained, or will obtain, the capacity to steal nuclear weapons."[34] According to various estimates, organized crime controls about seventy to eighty percent of private business in Russia.[35] James Woolsey has claimed that about 5,700 organized crime syndicates operate in Russia, 200 of which have international affiliations.[36]

Conservative estimates place Russian stockpiles of weapons-grade plutonium at approximately 150 tons and weapons-grade uranium close to 900 tons.[37] Since neither plutonium nor the applicable uranium (U235 which is often referred to as Highly Enriched Uranium or HEU) exists naturally, the primary difficulty in producing nuclear weapons lies in obtaining sufficient quantities of the refined material.[38] The sheer volume of weapons grade material engenders the possibility that some material will escape the current control mechanisms.[39]

3612061; Eric Geiger, *Austria Feels Chill of Booming Russian Mafia*, S.F. CHRONICLE, Jan. 22, 1995, at G23, *available in* WESTLAW, 1995 WL 5266665.

33. Russian organized crime members include not only petty criminals, but also former security and intelligence agents from the now defunct KGB, former Communist Party officials and military officers. *Russian Crime a Global Threat*, SAN ANTONIO EXPRESS-NEWS, June 25, 1995, *available in* WESTLAW, 1995 WL 5566012; Ricardo Chavira, *U.S. Tackles Global Spread of Russian Mob: Underworld's Threat to National Security Foster Cooperation among Agencies, Series: International Crime*, DALLAS MORNING NEWS, June 4, 1995, at 1A, *available in* WESTLAW, 1995 WL 9040347.

34. *Global View*, *supra* note 19, statement by Louis Freeh, FBI Director.

35. "Approximately 40,000 Russian business and industrial enterprises are controlled by organized crime. Their combined turnover, over ten billion dollars, is higher than the gross domestic product of many members of the United Nations." Ariel Cohen, *The Mob and Russia*, SAN DIEGO UNION TRIB., Sept. 10, 1995, at G4. *See also*, Celestine Bohlen, *Graft and Gangsterism in Russia Blight the Entrepreneurial Spirit*, N.Y. TIMES, Jan. 28, 1994 at A1, *available in* LEXIS, Nexis Library, NYT File.

36. Woolsey, *supra* note 18.

37. *Europe: The Plutonium Racket*, ECONOMIST, Aug. 20, 1994, at 39 [hereinafter *Racket*].

38. Panofsky, *supra* note 9.

> Controlling proliferation will necessitate dealing with technical, institutional, and political difficulties. The dominant technical difficulty is limiting access to fissionable material—the plutonium or highly enriched uranium (HEU) that can be used to make a nuclear weapon. Well over 20 percent of HEU is in the form of the fissionable isotope uranium 235. Natural uranium contains only 0.7 percent uranium 235; the balance is uranium 238. Plutonium does not occur in nature; it is produced inside a nuclear reactor, through neutron capture by uranium 238, followed by beta decay.

Id.

39. *Id.*; David Perlman, *Piles of Plutonium Leftovers Grow as Bombs are Taken Apart*, S.F. CHRONICLE, Apr. 12, 1995, *available in* WESTLAW, 1995 WL 5277324.

Only a fraction of these huge stocks in the wrong hands would create havoc.[40] After efforts to cover up accidents and due to the lax security at its nuclear arsenals,[41] some Russian experts have reluctantly admitted that some superfluous nuclear warheads may not be adequately secured.[42]

Due to the disarmament treaties between the United States and the former Soviet Union, roughly six tons of plutonium and thirty tons of HEU are due to be released annually over the next thirteen years.[43] As weapons are gradually dismantled, the separated plutonium and uranium are either stockpiled or processed[44] by Minatom, the Russian Ministry of Atomic Energy and principle nuclear custodian.[45] The U.S. and Russia are engaged in a cooperative effort to control and account for fissile material in order to help ameliorate the logistical quandary of fissile material dismantlement.[46] Minatom and a private U.S. corporation, the U.S. Enrichment Corporation, have an agreement whereby Enrichment Corporation purchases nuclear material from Minatom which has been reprocessed into a commercially viable product. Enrichment Corporation

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40. A crude atom bomb requires a mere 15 kg of this uranium or five kg of the plutonium, about the size of a grapefruit. Panofsky, *supra* note 9. Thomas Cochran, the director of the Natural Resources Defense Council, sought to impress this point during a Capital Hill briefing. He had a six pack of Coca Cola cans filled with 15 pounds of uranium. The uranium was not weapons usable. If the fifteen pounds (or 6.8 kilograms) were plutonium it would have represented more plutonium than was used on Nagasaki during World War II.

> A country like the United States or Russia with very sophisticated capabilities could make small nuclear weapons with [close to] three to five kilograms of [HEU] or [approximately] one kilogram of plutonium. And if you start doubling that amount, you can do the same thing with greater ease, with less sophistication in the design.

Hearings, *supra* note 21 (testimony of Dr. Thomas Cochran). According to Dr. Cochran's estimates, a Middle Eastern country could take the material that has been smuggled to date and produce a low-yield nuclear weapon using technology used in the United States and Russia in the 1950's. *Id*; *see also Global View*, *supra* note 11.

41. Larry Thomson, *Yeltsin's Nuclear Report Reveals Problems*, BUFFALO NEWS, Aug. 7, 1995, at A3, *available in* WESTLAW, 1995 WL 5493568.

42. Plutonium, *supra* note 15, at 98. Alexei Lebedev of the Russian Atomic Energy Ministry openly states that there is no firm assurance that nuclear weapons have been stored in secured locations. Bettina Vestring, *German Police Smuggled Radioactive Material*, REUTERS, September 12, 1994, *available in* LEXIS, Nexis Library, International File.

In Russia, growing concern about the security at nuclear installations has prompted the formation of a special battalion of troops to combat possible nuclear terrorism and the smuggling of nuclear materials. Andrei Ivanov, *Russia: "Hooligan" Hunting Nuclear Weapons Face Special Army Unit*, INTER PRESS SERVICE, May 1, 1995, *available in* WESTLAW, 1995 WL 2260776.

43. Plutonium, *supra* note 15, at 98.

44. *Id.* at 99.

45. *Id.*

46. State Department Briefing, Mike McCurry, Aug. 17, 1994, *available in* LEXIS, Nexis Library, DSTATE File.

then peddles the material to civilian entities.[47] The U.S. has offered Russia up to $30 million to help account for the fissile material not yet dismantled and improve the security of the weapons.[48] The U.S. hopes to install temporary safeguards with the goal of establishing a more permanent and protective system patterned after the U.S. Nuclear Regulatory Commission.[49] Under that system fissile material is counted to within four-tenths of a gram, a stringent technical control regime costing the U.S. about $700 million a year to operate.[50]

The CIS and Russia have been consistent in their denial that any nuclear material has escaped their territories.[51] Russian officials charge that the reports of smuggling of fissile material is a Western ploy aimed at gaining control over Russian nuclear weapons.[52] They claim that such campaigns have been launched to prevent the presence of CIS enriched uranium, isotopes, and heat-releasing elements in the world market.[53] Alexander Mikhailov, an official of the Russian Federal Counter-Espionage Service (FSK), asserts that, "[a]ttempts to blame Russia for being unable to control the non-proliferation of its nuclear weapons, technologies and materials are politically-motivated"[54] and that the "accusations of Russian laxity [are] part of a campaign to prepare public opinion 'for the idea of implementing political control over Russian nuclear weapons.'"[55] Germany, for instance, is believed to have attempted to dramatize the situation with hopes of obtaining full disclosure of all nuclear inventories.[56] In fact, some believe that many of these incidents have been prompted by German officials[57] by their

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Global View*, *supra* note 19.

51. Christine Spolar, *Slovakian Holds 9 in Uranium Plot; Car From Ukraine Said to Bring in 100 pounds of Nuclear Material*, WASHINGTON POST, April 22, 1995, at A25, *available in* WESTLAW, 1995 WL 2089976.

52. *Russian Cites Western Plot in Nuke Smuggling Reports*, AGENCE FRANCE PRESSE, August 16, 1994, *available in* LEXIS, Nexis Library, AFP File.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See The Press on Nuclear Smuggling and the Intelligence Service*, WEEK IN GERMANY, April 21, 1995, *available in* WESTLAW, 1995 WL 2272717. Germany does not have any nuclear weapons.

57. *Trial Puts Spotlight on Smuggled Russian Plutonium*, CALGARY HERALD, May 16, 1995, at A5, *available in* WESTLAW, 1995 WL 7301384; *German Intelligence Accused of Cooking up Plutonium Plot*, ARIZONA REPUBLIC, May 12, 1995, at A8, *available in* WESTLAW, 1995 WL 2792532; *Plutonium Bust Faked*, MONTREAL GAZETTE, April 20, 1995, at B1, *available in* WESTLAW, 1995 WL 6957333.

On August 10, 1994, three men were arrested in Munich, Germany, when German police seized a suitcase with about 400 grams of highly enriched plutonium. These arrests came about after an undercover operation involving German intelligence agents. Georgi Saurov, a spokesman for Russia's Nuclear Energy Ministry supported a report that a German intelligence agency

offering of huge payments in sting operations.[58]

Regardless of Germany's motives or Russia's claims, concern that fissile material may eventually find its way into the wrong hands is legitimate. In fact, the Ukraine has previously suspended the transfer of nuclear weapons to Russia due to the "political instability and confusion" that has existed within the Russian Federation.[59] The Ukraine's concern was that the missiles being returned to Russia were not being destroyed, but actually falling into unfriendly hands.[60] This concern may be credible considering additional reports from Kazakhstan stating the possibility that the republic has had three or four weapons disappear.[61]

The absence of centralized control in Russia hinders the fight against smuggling. A paradigm of this acute problem exists in Central Asia. There, smuggling has been developed over the centuries into a highly skilled craft to the extent that even when the Soviet army and KGB controlled the border areas, local communities conducted trade with non-Soviet states.[62] In fact, smuggling via Armenia or Afghanistan has become a highly successful enterprise with little chance of detection.[63] This skill in smuggling coupled with the Muslim brotherhood of southern border republics and the nearby states that crave nuclear technology, i.e., Iran and Iraq, could conceivably lead to the border republics aligning themselves with their fellow Muslims rather than the rest of the CIS and Russia.[64] If such alliances do coalesce, the proliferation of former Soviet fissile materials stationed in the republics to punitive states is plausible.

B. *Nuclear Expertise*

In the former Soviet Union, as many as 100,000 scientists, engineers and technicians developed and cultivated the largest nuclear weapons arsenal in the world.[65] Two to three thousand scientists were involved in plutonium production and uranium enrichment activities—two of the most sensitive areas in nuclear

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shipped 12.8 ounces of weapons-grade plutonium to Moscow and back so it could be seized on its arrival. Spolar, *supra* note 51.

58. Arthur Allen, *Spy Scandal in Germany*, DAYTON DAILY NEWS, June 24, 1995, at 5A, *available in* WESTLAW, 1995 WL 8951370.

59. *Ukraine Halts Transfer to Russia of Nuclear Arms*, REUTERS, Mar. 12, 1992, *available in* LEXIS, Nexis Library, International File [hereinafter *Ukraine*]; *see generally* Victor Batiouk, *Ukraine's Non-Nuclear Option*, UNIDR, United Nations Institute for Disarmament Research (1992).

60. Ukraine, *supra* note 59.

61. Plutonium, *supra* note 15, at 98.

62. Igor Levin, *Where Have all the Weapons Gone? The Commonwealth of Independent States' Struggle to Stop the Proliferation of Nuclear Weapons and the New Role of the International Atomic Energy Agency*, 24 N. Y. U. J. INT'L L. & POL. 957, 966 (1992).

63. Racket, *supra* note 37, at 40.

64. Levin, *supra* note 62, at 966.

65. SCHEINMAN, *supra* note 14, at 148.

weapons production.[66] With the fall of the Soviet Union, programs for the development of nuclear weapons have been dramatically abated. Testing grounds have been shut down while production at several major nuclear facilities has terminated.[67]

Due to the acrimonious fiscal realities existing in the former Soviet Union, despondent scientists emigrating to punitive states as nuclear mercenaries is a grave concern.[68] This "brain drain"[69] extends beyond nuclear mercenaries,[70] inclusive in the problem are those scientists seeking legitimate employment outside the former Soviet Union.[71] Unsophisticated in the world arena, a scientist believing she is being employed on a civilian nuclear power project may inadvertently supply general information and expertise useful for weapons development. In fact, Iraq set up front companies in Western Europe in order to recruit unsuspecting Commonwealth scientists who would not otherwise consider laboring for rogue states like Iran, Iraq, or Libya.[72]

The concern over the smuggling of fissile material and expertise has merit regardless of whether Russian scientists are insulted by these accusations.[73]

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66. Potter, *supra* note 7, at 4; *See* Youngblood, *supra* note 6, at 339.

67. *Worries Express Over Export of Nuclear Expertise*, The British Broadcasting Corporation Summary of World Broadcasts, Jan. 15, 1992, *available in* LEXIS, Nexis Library, International File [hereinafter *Nuclear Expertise*].

68. Robert Lee Hotz, *Cold War Foes Forge Warm Ties What Once Was Called Treason is Now Encouraged by the U.S. and Russia*, L.A. TIMES, June 23, 1995, at 1, *available in* WESTLAW, 1995 WL 2059058; Lin, *supra* note 22.

69. The term "Brain Drain" was first used to describe the emigration of former Nazi weapons scientist to the United States after World War II. Another significant episode of "Brain Drain" occurred during the early 1950's when hundreds of high level British radar and communications scientists emigrated to the United States and Canada in response to the worsening economic conditions in the United Kingdom. *See Generally* Adam Treiger, Note, *Plugging the Russian Brain Drain: Criminalizing Nuclear Expertise*, 82 GEO. L.J. 237 (1993).

70. The scope of the brain drain is demonstrated on the Internet. There, scientists are able to interact with little chance of detection. The Internet does not recognize national borders and it is not subject to inspection by the International Atomic Energy Agency. In addition, with the encryption programs widely available, the United States National Security Agency or the former KGB are hard pressed to crack private E-mail. *See* Alan Cooperman & Kyrall Belianinov, *Moonlighting by Modem in Russia, Hard-Up Scientists Sell Their Skills Abroad*, U.S. NEWS & WORLD REPORT, April 17, 1995, at 45, *available in* WESTLAW, 1995 WL 3113667.

71. There is historical precedence for the exodus of skilled scientists, as evidenced by the large number of German rocket scientists who came to the United States after World War II. Youngblood, *supra* note 6, at 339.

72. Treiger, *supra* note 69, at 239 (*Arms Trade and Proliferation in the Middle East: Hearing Before the Subcommittee on Technology and National Security of the Joint Economic Comm.*, 102d Cong., 2nd Sess., pt. 2, at 25 (1992)(statement of William C. Potter, Director of the Center for Russian and Soviet Studies)).

73. Sergei Kapitza, a physics professor at the Academy of Sciences in Moscow explains:

> This fear is based on some strange and irrational assumption and stereotypes . . . . To single out nuclear scientists from Russia—however difficult their current

Russian nuclear scientists are no more amoral than their Western counterparts and are similarly horrified of nuclear proliferation. Nevertheless, many Russian scientists, formerly unfamiliar with fiscal anxieties, now must survive on meager gratuities.[74] Incentives offered by a few nations are sufficient to convince even the most idealistic scientist to stray from the path of nonproliferation when confronted with fiscal ruin.[75]

In an attempt to ameliorate the harsh economic situation for the once high level physicists and engineers, Russia has implemented a conversion program,[76] while the European Community, the United States, and Japan have pledged to fund two nuclear research centers in the CIS.[77] The Russian program is an attempt to convert many of the weapons producing industries into other enterprises such as automobiles or electronics. Unfortunately, the program has not been overly successful, as many of the former elite scientists are now relegated to designing "new kinds of iceboxes and . . . baby buggies . . . ."[78] With these menial vocations, most salaries have deteriorated.[79] That some of these scientists may become discouraged at the lack of use of their extensive expertise and training is self-evident.

The joint plan by the European Union, United States, Japan and the Russian Federation has also been developed in an effort to help Russian military experts channel their talents towards peaceful scientific and industrial activities.[80] The International Science and Technology Centre's (ISTC) objective is to "give Russian and other CIS weapons scientists and engineers opportunities to redirect

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> position—is an expression of distrust, if not a direct insult, to that community. Are we really to consider a nuclear bomb maker in the same category as a paid assassin?

Sergei Kapitza, *Debunking the Latest Red Scare*, HARPERS MAG., July 1992, at 15-16, (quoting *Soviet Scientists: Low Pay, No Pay, Now Insults*, BULLETIN ATOMIC SCIENTISTS, May 1992).

74. *See Iraq Said to Hire 50 Soviet Nuke Scientists*, THE REUTER LIBRARY REPORT, Mar. 3, 1992, *available in* LEXIS, Nexis Library, International File [hereinafter *Iraq*]. Some salaries have been reduced to the equivalent of fifty dollars per month and some to as low as twelve dollars per month. In order to better understand the situation fully, the compensation system in the former Soviet Union must be examined. There, nuclear scientists were among the highest paid personnel in the country. Access to goods and services was more important than money, and most were provided with top of the line cars, apartments, health care, etc. These perks coupled with relatively high salaries show the true compensation allotted to the scientists. The dwindling perks in addition to the meager salaries allotted to the scientists evidences their plight. *Id.*

75. Stephanie G. Neuman, *Controlling the Arms Trade: Idealistic Dream or Realpolitik?*, THE WASHINGTON QUARTERLY (1993), *available in* LEXIS, Nexis Library, WASHQR File.

76. *Nuclear Expertise*, *supra* note 67.

77. Youngblood, *supra* note 6, at 339.

78. *Nuclear Expertise*, *supra* note 67.

79. Iraq, *supra* note 74.

80. *Moscow Science and Technology Centre goes into Operation, Commission of the European Communities*, RAPID, Mar. 17, 1994, *available in* LEXIS, Nexis Library, CURNEWS File [hereinafter *Moscow*]; *see also* Youngblood, *supra* note 6, at 339.

their talents to peaceful activities, responsive to civil needs, and to promote their integration into the international scientific and industrial communities."[81] "To promote the objectives of the ISTC, the signatory Parties will finance, through the Centre, research and development projects by Russian scientists and institutions formerly engaged in military activities."[82] "The cummulat[ive] contributions of the parties will amount to approximately 65 million [dollars] for [the first] two years."[83]

The predicament does not necessarily concentrate within the Russian military establishment, where there is yet to be one confirmed incident from missing material, but with civilian controls.[84] Laboratory results taken of samples from previous recoveries confirm this, indicating that the fissile material originates from spent nuclear fuel from nuclear submarines and material for medical purposes produced by research reactors.[85] Consequently, the initial preventive measures should concentrate on the civilian sector. As the counting of bombs gives rise to the accounting for the material, i.e., dismantlement, the chances that material will disappear during this process are particularly acute.

III. THE NON-PROLIFERATION OF NUCLEAR WEAPONS TREATY

The Nuclear Non-Proliferation Treaty (NPT)[86] is one of the most far-reaching legal instruments currently in place to combat the spread of nuclear weapons materials and expertise.[87] For a quarter of a century, the NPT has been the "touchstone of all international efforts to limit the spread of nuclear weapons."[88] With over 170 parties, it is the most widely adhered to arms control agreement in history.[89]

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81. Moscow, *supra* note 80.

82. *Id.*

83. *Id.*

84. Neuman, *supra* note 75.

85. *Id.*

86. NPT, *supra* note 19, at Art. I. The initial NPT was in force in 1970 and was to last 25 years. The NPT was, however, indefinitely prolonged at a conference in New York City in May 1995. Igor Maximov, *Nuclear Nonproliferation Treaty Prolonged for Indefinite Time*, RUSSIAN PRESS DIGEST, May 12, 1995, *available in* WESTLAW, International Library, RPD File.

87. Other treaties or organizations dealing with proliferation of nuclear weapons include: Nuclear Suppliers Group (a cartel comprised of seven main nuclear supplier countries); Coordinating Committee for Multilateral Export Controls (an organization formed in conjunction with the U.S. Mutual Defense Assistance Control Act of 1951) *see* Cecil Hunt, *Cocom and other International Cooperation in Export Control*, 675 PRACTICING LAW INSTITUTE/COMM. 295 (1993); the Missile Technology Control Regime (mechanism organized by the G-7 to restrict the export of missile technology); the Chemical Weapons Convention (designed to ban the development , production, and stockpiling of chemical weapons); and the Biological Weapons Convention (set up to ban the development, production, and stockpiling of biological weapons).

88. Lin, *supra* note 22.

89. *See* Quester, *supra* note 5.

The NPT is concerned with stemming the demand for nuclear weapons. "[It] addresses horizontal proliferation by requiring non-nuclear states to comply with the International Atomic Energy Agency [IAEA] safeguards in order to receive the benefits of nuclear technology for peaceful purposes."[90] "It also addresses vertical proliferation, requiring the nuclear states to pursue in good faith complete nuclear disarmament."[91] Pursuit of these goals is premised on the fact that the vast majority of nations do not possess nuclear weapons technology and that indigenous development of such technology would be extremely difficult.[92]

Asymmetrical in nature, the NPT's participants have considerably divergent rights and obligations.[93] The five nuclear weapons states[94] agree not to export those items necessary for the development of nuclear weapons.[95] In return, those non-nuclear weapon countries are allowed to import items necessary for the production of peaceful nuclear power, subject to enforcement by the IAEA.[96]

Articles I and II of the NPT set forth the basic duties of the signatory states. Article I dictates:

> Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other explosive devices, or control over such weapons or explosive devices.[97]

Article II requires that:

> Each non-nuclear weapons State Party to the treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek to receive any assistance in the

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90. Youngblood, *supra* note 6, at 331.

91. *Id.*

92. *See generally* NPT, *supra* note 19, at Arts. I, II.

93. William Epstein & Paul C. Szasz, *Extension of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty*, 33 VA. J. INT'L L. 735, 736 (1993).

94. The treaty divides its signators into two groups: the five declared nuclear weapons states, each of which tested a nuclear device prior to 1967 and all others. NPT, *supra* note 19, at Art. IX.

95. Youngblood, *supra* note 6, at 331.

96. *Id.*

97. NPT, *supra* note 19, at Art. I.

manufacture of nuclear weapons or other nuclear explosive devices.[98]

"The benefits of the nuclear power technology coupled with the international respect of membership, make the NPT hard to resist for a country desiring nuclear power."[99]

The difficulty inherent in producing nuclear weapons is germane to proliferation control. Each signator to the NPT must "agree to be bound by [the treaty's] terms in order to receive the technology needed to support a successful nuclear power program."[100] Since an essential purpose of the NPT is to assist, or even encourage, the development of nuclear energy capabilities while severely restricting access to nuclear weapons technology,[101] the NPT encourages the dissemination of technology which could indirectly increase a state's capacity to produce nuclear bombs.[102]

In ratifying the NPT, the non-nuclear weapon states pledged not to secure, manufacture, or otherwise acquire a nuclear arsenal. They also committed themselves to accept safeguards as set forth in an agreement with the International Atomic Energy Agency (IAEA)[103] regarding all fissionable material used in peaceful nuclear activities within their territory or jurisdiction.[104] The non-proliferation commitment of the NPT and the acceptance of comprehensive safeguards on all peaceful nuclear activities attempted to address the political and security concerns of nuclear proliferation.[105]

In order to prevent diversion of fissile material to non-nuclear weapons states, fissile material must be accounted for.[106] Article III of the NPT requires each signatory nation to negotiate safeguard covenants[107] with the IAEA overseeing all of their peaceful nuclear activities.[108] The safeguards that the non-nuclear states must accept are not specifically addressed by the NPT itself, rather each country must individually work out the safeguard details with the IAEA.[109] Even though the NPT does not require that safeguards be applied to nuclear

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98. *Id.* at Art. II.

99. Youngblood, *supra* note 6, at 336.

100. Youngblood, *supra* note 6, at 335-336; *see* NPT, *supra* note 19, at Art. I

101. *See generally* Brian J. Leslie, Note, *Dual Use Goods and the European Community: Problems and Prospects in Eliminating Internal Border Controls on Sensitive Products*, 17 B.C. INT'L & COMP. L. REV. 193 (1994).

102. NPT, *supra* note 19, at Art. IV. "All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy." *Id.*

103. *See infra* text accompanying notes 123 to 160.

104. NPT, *supra* note 19, at Art. III, §1.

105. SCHEINMAN, *supra* note 14 , at 148.

106. John H. Nuckolls, *Post-Cold War Nuclear Dangers: Proliferation and Terrorism*, Science, Feb. 24, 1995, *available in* LEXIS, Nexis Library, ASAPII File.

107. NPT, *supra* note 19, at Art. III.

108. *Id.*

109. *Id.*

activities in the nuclear weapon states,[110] all five have volunteered to place their nuclear activities under IAEA safeguards.[111]

The safeguards are supposed to timely detect "diversion of significant quantities of nuclear material from peaceful activities to the manufacture of nuclear weapons."[112] Safeguards also engender confidence in the nature of each state's nuclear activity and expedite international cooperation in the development of nuclear energy.[113] For material existing within a country, the safeguarding procedure comprises three basic factors: (1) cataloging every transfer into or out of fissile material storage facilities such that the IAEA and the state are informed at all times of the quantity, locality, and movement of nuclear commodities;[114] (2) installation of containment and surveillance devices at the fissile storage facilities;[115] and (3) human observation of the facilities.[116] Unfortunately, these safeguards apply to declared nuclear material and not to the transfer or receipt of undeclared nuclear weapons or devices. Nor are the safeguards intended to verify that a state is not making preparations for developing a nuclear explosive device.[117]

The enforcement mechanisms available to stop the supply of nuclear expertise, ranging from the efforts of Russia to stop the unlawful emigration of its scientists to the role of the international community in deterring and prosecuting these scientists, differ from the mechanisms used to stop the demand for nuclear weapons. Article I of the NPT fails to address the problem of nuclear-expertise proliferation. The fact that Russian nationals are lending aid to another state's nuclear weapons program is probably not a technical violation of the NPT because there is no state action involved (i.e., Russia[118] is not assisting,

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110. *Id.*

111. *See* Michael J. Wilmshurst, *The Adequacy of IAEA Safeguards for the 1990's, in* NUCLEAR NON-PROLIFERATION AND THE NON-PROLIFERATION TREATY, at 13.

112. Jozef Goldblat, *The Non-Proliferation Treaty: How to Remove the Residual Threats*, UNIDR, United Nations Institute for Disarmament Research 6 (1992).

113. SCHEINMAN, *supra* note 14, at 168.

114. 1 NUCLEAR ENERGY AGENCY, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE REGULATION OF NUCLEAR TRADE 53 (1988).

115. *Id.* at 54.

116. *Id.*

117. SCHEINMAN, *supra* note 14, at 168.

118. *See generally* Edwin D. Williamson & John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 VA. J. INT'L L. 261 (1993).

> The former Soviet Union was the signor to the NPT in 1970. Since this time the Soviet Union has split up into various republics and states. This break up left a vacuum in regards to the treaties that the Soviet Union had entered into. Accordingly, with the Alma Ata Declaration, the republics of the former Soviet Union guaranteed the 'fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."

Id., quoting Text of Alma Alta Declaration: *Mutual Recognition and An Ernest Basis*, N.Y TIMES,

encouraging, or inducing any action because it is not sending its scientist abroad). Rather, these scientists are voluntarily leaving Russia against the interests and desires of the Russian government. Under the NPT, the Russian government is not compelled to prohibit its people from emigrating.

"Prior to the discovery of the Iraqi and Northern Korean nuclear programs no material breaches of the NPT had been recorded."[119] Subsequently, however, the insufficiencies of the treaty have become prominent. Parties to the treaty observe the provisions as they see fit, they could conceivably claim acquiescence to the NPT yet covertly seek to distribute fissile material. Iraq proclaimed obeisance to the NPT prior to the Gulf War, North Korea overtly refuses to comply with mandatory inspections. Meanwhile, states outside the NPT like Israel, a nuclear weapons nation,[120] and in the past South Africa,[121] refuse to enter the treaty while other non-nuclear states remain legally unobstructed in their pursuit of nuclear activities.[122] Even though Article II explicitly outlaws solicitation efforts by non-nuclear countries, [123] the treaty's safeguards are too weak to enforce its mandates, especially in the face of intense demand for nuclear expertise.

IV. THE INTERNATIONAL ATOMIC ENERGY AGENCY

After World War II, the initial United States response to the apocalyptic hazards of atomic weaponry was to enact the Atomic Energy Act.[124] This act

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Dec. 22, 1991, at A12. The problem is that under the NPT there were only five countries authorized to maintain nuclear weapons and the Soviet Union was one of these. Accordingly the U.S. argued that Russia should continue to not only occupy both the former Soviet Union's General Assembly and Security Council Seats but also the other republics must apply for membership into the United Nations as new states. One of the arguments for this was that Russia is clearly the dominant part of the former Soviet Union and this falls in line with eleven of the former Soviet republics that Russia be given the USSR Security Council seat. *Id.* at 264-265.

119. Kellman, *supra* note 3, at 801.

120. Israel is believed to have as many as 100 nuclear weapons. *Global View*, *supra* note 19.

121. Goldblat, *supra* note 112, at 2. South Africa formerly maintained nuclear weapons, however, it dismantled its arsenal in compliance with the NPT. *Id.*

122. *Id.*

123. NPT, *supra* note 19, at Art. II.

124. Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755 (1946). "The first attempts to control nuclear weapons were made immediately after the first bombs were used. The most important of the early steps was the so-called Baruch Plan, named after Bernard Baruch, who presented it on behalf of the United States to the United Nations in 1946." "[T]he plan was . . . 'too radical . . . .' In particular it called for intrusions on sovereignty that were totally unacceptable to the Soviets, then under the rule of Stalin, and (probably unacceptable to) the US Senate . . . if such an agreement had been put before it for ratification in those times." Herbert F. York, *The CTBT and Beyond*, UNIDIR, UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, 1 (1994).

attempted to contain the spread of nuclear technologies via secrecy and denial. The act prohibited "any person . . . to (A) possess or transfer any fissionable material . . . , or (B) export from or import into the United States any fissionable material, or (C) directly or indirectly engage in the production of any fissionable material outside of the United States."[125] The effectiveness of this act quickly dissipated as countries successfully tested their atomic weapons.[126]

On December 8, 1953, to ameliorate the ineffective Act President Dwight D. Eisenhower proffered, what was latter termed, the "Atoms for Peace" plan to the United Nations (U.N.) General Assembly.[127] He proposed setting up an Atomic Energy Agency under the aegis of the U.N. which would be responsible for the impounding, storage, and protection of contributed fissionable materials.[128] In addition, the "responsibility of this Atomic Energy Agency would be to devise methods whereby this fissionable material would be allocated to serve the peaceful pursuits of mankind."[129] Eisenhower believed that "[i]t is not enough to take this weapon out of the hands of the soldiers. It must be put into the hands of those who will know how to strip its military casing and adapt it to the arts of peace."[130] Finally, in order for this proposal to be effective, Eisenhower requested that involved governments contribute portions of their fissionable material stockpiles to the Agency.[131]

This Atoms for Peace proposal effectively rejected earlier and more encyclopedic strategies, acknowledging that comprehensive international control over nuclear weaponry would be formidable. By proposing such a plan, Eisenhower wished to strengthen and amplify American military and economic ties around the world, assure American primacy in international nuclear councils, advance American power reactor sales, yet concomitantly promote disarmament.[132]

As a result, on July 29, 1957, the U.N. established the International Atomic Energy Agency (IAEA) [133] to "accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world."[134] The IAEA was

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125. Atomic Energy Act, *supra* note 124, § 5(a)(3).

126. Two of the earliest successful tests were conducted by the Soviet Union in 1949 and Great Britain in 1952. *See* SCHEINMAN, *supra* note 14, at 17.

127. Dwight D. Eisenhower, Peaceful Uses of Atomic Energy, Address Before the General Assembly of the United Nations, (Dec. 8, 1953) *in* PUBLIC PAPERS OF THE PRESIDENTS, at 813-822.

128. *Id.* at 821.

129. *Id.* "A special purpose would be to provide abundant electrical energy in the power-starved areas of the world." *Id.*

130. *Id.* at 820.

131. *Id.*

132. SCHEINMAN, *supra* note 14, at 62.

133. *Id.* at 74.

134. Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. II, 8 U.S.T. 1093, 276 U.N.T.S. 3.

authorized to "establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities and information made available by the Agency or at its request or under its supervision or control [were] not used in such a way as to further any military purpose."[135] In addition, the IAEA was empowered:

> To send into the territory of the recipient State or States inspectors . . . hav[ing] access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded . . . and to determine whether there is compliance with the undertaking against use in furtherance of any military purpose . . . .[136]

Since 1970, IAEA responsibilities result primarily from non-nuclear weapon states joining the NPT and obligating themselves to accept IAEA safeguards on all their nuclear activities.[137] Unfortunately, the safeguards are neither intended to seek out clandestine operations nor undeclared activities, nor govern or regulate national action. Their function is to monitor, audit and report in order to verify that states are in compliance with their voluntary undertakings.[138] IAEA members do not have to submit to safeguards unless the member has sought and received assistance in some peaceful nuclear activity from the agency. In fact, nuclear safety is ultimately a national responsibility, and only the state has the authority to legislate and enforce.[139] Consequently, some fissile material activity will go undetected.

The IAEA abandoned the idea of monopolizing fissile material in favor of a system of international verification of nationally owned and controlled nuclear activities by member states.[140] In recognizing that the logistics of a fissile material monopoly were problematic, the U.N. has adopted a system of voluntary compliance. By volunteering to conform with the NPT, each state subjects itself to verification that its international nuclear commitments are not breached. Preventing the unauthorized accumulation of fissionable material is believed to be more successful if the material is discovered during the early stages of weapons fabrication rather than in the later stages (such as an actual bomb).[141]

The IAEA's effectiveness has been restrained due to its limited data-gathering operations. Often the Agency must solicit intelligence about a

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135. *Id.* at Art. III, A.5.
136. *Id.* at Art. XII, A.6.
137. SCHEINMAN, *supra* note 14, at 125.
138. *Id.*
139. *Id.* at 103.
140. *Id.*
141. *Id.* at 122-23

particular country's nuclear activities from outside intelligence agencies. [142] For example, Hans Friedrich Meyer, a spokesperson for the IAEA, claims that until the agency has independent confirmation from some reputable institution, it must remain aloof of reports that Saudi Arabia, Iran, Iraq, Turkey and Pakistan have visited Dushanbe, the capital of Kazakhstan, and shopped for nuclear technology.[143]

The IAEA acknowledges the inhering risks associated with its present restrictions; consequently, the agency has requested greater autonomy in monitoring potential trafficking in nuclear materials.[144] IAEA experts state that the risk of smuggling and leakage depends on the reliability of the CIS's system of accounting for its nuclear weapons. This system is weakest when weapons are being transported.[145] To effectively ameliorate the deficiencies in the current CIS monitoring systems, the IAEA should be given control over the entire nuclear cycle, from the mining of uranium and the production of deuterium and tritium to the handling of waste; however, the feasibility of this type of monitoring system may be fiscally unreasonable.[146]

In addition to expanding the powers of the IAEA, the fiscal quandary must be overcome. The present finite financial budget of the agency effectively renders meaningful inspection impossible.[147] As a result, the agency rarely exercises its full power of inspection; hence, much has slipped through the Agency's fingers. The Iraqi's clandestine buildup of nuclear technology amplifies this dilemma. Prior to the Gulf War, the agency's inspections dis-covered no illegitimate nuclear activities; the Iraqi nuclear technology was allegedly for peaceful use only.[148] In fact, Iraq had been a member of the NPT and the IAEA for the previous ten years during which they took an active role in fostering non-proliferation and peaceful nuclear cooperation.[149] Prior to its invasion of Kuwait, many experts believed that, Iraq was five to ten years away from developing a viable nuclear arsenal.[150] As subsequent events demonstrated, the time frame, and scale of Iraqi nuclear activity was grossly underestimated. This Iraqi nuclear deception emphasizes the inadequacies of both the NPT and the IAEA.

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142. Peter Beaumont, *Austria: West Gets Tough on Plutonium Trade*, OBSERVER, Sept. 18, 1994, *available in* WESTLAW, INT-NEWS File [hereinafter *Trade*].

143. *IAEA Seeks Tougher Nuclear Checks in Response to Collapse of Soviet Union*, AGENCE FRANCE PRESSE, Jan. 3, 1992, *available in LEXIS*, Nexis Library, AFT File.

144. *Id.*

145. Levin, *supra* note 62, at 975.

146. *North Korea and Iraq criticized at IAEA meeting*, DEUTSCHE PRESSE-AGENTUR, Sept. 22, 1995; *Secretary's Statement on International Day of Peace*, FEDERAL NEWS SERVICE, Sept. 20, 1995.

147. *Id.*

148. *Global View*, *supra* note 19. Their secret program was housed at the same facility as was safeguarded and inspected twice a year by the IAEA. *Id.*

149. *Id.*

150. *Id.*

In an attempt to mitigate fears of nuclear proliferation, the IAEA claims that would-be nuclear powers would have great difficulty servicing a plutonium-based weapon.[151] Plutonium-based warheads are relatively insatiable, thus requiring careful maintenance and having a short shelf-life compared to other conventional weapons. Maurizio Zifferero of the IAEA said that plutonium 241 isotope, which accompanies plutonium 239, decays and causes contamination that would require the warhead to be regularly cleaned by a large and steady flow of plutonium.[152] A single warhead with the minimum amount of plutonium, about five kilograms, has a shelf-life of between one and two years during which it must be carefully serviced. If the plutonium was not pure but only 80 percent enriched, then perhaps twice as much plutonium would be necessary for servicing. If the state wished to ensure a nuclear threat, a steady flow of the material would be necessary to help with the sophisticated reprocessing requirements.[153] Consequently, nuclear powers like the United States and Britain regularly rotate the warheads in order to ensure their serviceability.[154] Due to the inherent difficulties in developing a plutonium based weapon, "it does not make a great deal of sense to be buying plutonium unless you have had a previous program, and even then it would be easier to use a uranium-based weapon, which you can machine and weaponise in the open."[155] Countries like Iraq that have spent considerable money and expertise on a simpler uranium-based weapons system have had enormous trouble servicing this system.[156]

Presently, international supervision over the world's estimated supply of 1,000 tons of plutonium and 1,500 tons of Highly Enriched Uranium (HEU) is woefully limited.[157] Approximately 95% of the HEU inventories are controlled by the United States and Russian armed forces. Only 1% of the world's HEU is under the safeguards administered by the IAEA. Plutonium, meanwhile, is mostly under the auspices of civilian control, falling under international safeguards.[158]

Due to the recent concern over the smuggling of fissile material, there has been an outcry for the strengthening of the IAEA. Great Britain, the United States, France, and Germany have asked that the Agency's duties be expanded to become an intelligence clearing house in the fight against smugglers.[159] In an effort to facilitate this purpose, the above four countries have pledged to provide

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151. Peter Beaumont, *Germany: Only Big Boys Need Apply-Plutonium*, OBSERVER, Aug. 21, 1994, *available in* WESTLAW, INT-NEWS FILE.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Plutonium, *supra* note 15, at 99.

158. *Id.*

159. Trade, *supra* note 142.

up to 6.4 million dollars.[160] Additionally, IAEA directors have proposed setting up an international database to track plutonium smugglers, and the U. S. National Security Council has promised to pay for this database.[161] The IAEA also is considering how to "set up a series of international missions—similar to its established nuclear safety inspectorates—to inspect plutonium-handling facilities and to provide expertise and hardware." [162]

Nevertheless, the IAEA is the appropriate agency to monitor the disposition of CIS nuclear technology and its possible transferal to third world powers. As most of these countries are signatories of the NPT, it is within the jurisdiction of the IAEA to inspect all nuclear technology in the possession of these countries to determine whether it is being used for peaceful purposes. In theory, the IAEA has the right to review all documents and records, send inspectors into safeguarded states, have access at all times and places, as necessary, to account for the materials, and determine whether their country is in compliance with the NPT.[163] In practice, however, this is not always the case.

V. POLICING MECHANISMS IN PLACE

Policemen depend upon the powers conferred by the state to perform many of their criminal investigative functions, yet the internationalization of their investigations thrusts them beyond the jurisdiction of their sovereign, where they are effectively stripped of their police powers. The result is that most international law enforcement activities must depend upon the cooperation of foreign authorities.[164]

A. *Interpol*

The International Criminal Police Organization (Interpol)[165] was formed in 1923. Although World War II briefly interrupted its existence, Interpol has continued to prosper and now has over 140 member countries.[166] Headquartered in St. Cloud, France, Interpol promotes mutual assistance among criminal police

160. *Id.*

161. *Id.*

162. *Id.*

163. SCHEINMAN, *supra* note 14, at 125.

164. Detlev F. Vagts & Ethan A. Nadelmann, *Policing the World: Interpol and the Politics of International Police*, 85 AM J. INT'L L. 426, 426 (1991) (reviewing MALCOM ANDERSON, CO-OPERATION (1989)).

165. *See generally* PETER G. LEE, INTERPOL (1976). In 1938, Congress empowered the Attorney General to accept Interpol membership for the United States. *See* 22 U.S.C. § 263(a) (1995).

166. *See* Lee, *supra* note 165.

authorities in an attempt to better coordinate crime prevention.[167] Primarily a criminal information exchange service, Interpol serves as a central repository for the collection, transmission, and analysis of information on transnational criminals.[168]

A nation's reliance on Interpol tends to be in proportion to the extent the nation must cope with international crime and the quality of its law enforcement division's relationship with its foreign counterparts. In contrast, in many less developed states, police agencies rely on Interpol out of necessity.[169] In developed areas, such as Western Europe, bilateral relations among the national police agencies are well-developed.[170] Many of these law enforcement agencies are frustrated with Interpol due to its failure to adapt to changing circumstances and to quickly integrate new technological advances in crime control and communications.[171]

Despite the steady rise in international police cooperation, there is not a single international convention which governs or regulates interstate cooperation among police agencies.[172] Interpol has limited jurisdiction and authority in the areas of international law enforcement since it usually operates on a voluntary basis in agreements between domestic police agencies. The rise in drug trafficking, organized crime, and terrorism has resulted in a higher interaction between Interpol and national police agencies.[173] Unfortunately such cooperation has been relegated to bilateral and informal arrangements which do not have the status of treaties.

B. *Europol*

In Maastricht, Netherlands in December of 1991 the Treaty on the European Union[174] was signed by the twelve members of the European Community (EC).[175] The treaty's underlying purpose is to enable the EC "to play a more coherent political and economic role in the world, commensurate with its

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167. *See Id.*

168. *See* Ethan A. Nadelmann, *The Role of the U.S. in International Enforcement of Criminal Law*, 31 HARV. INT'L L. J. 37, 46 (1990).

169. *Id.*

170. *Id.*

171. Fijnaut, *The Internationalization of Criminal Investigation In Western Europe, in* POLICE COOPERATION IN EUROPE 32, 37-42 (C. Fijnault & R.H. Hermans Eds., 1987).

172. *See* M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, 4 PACE Y.B. INT'L L. 123, (1992).

173. Mary J. Grotenroth, *Interpol's Role in International Law Enforcement, in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 375-76 (M. Cherif Bassiouni ed., 1988).

174. Maastricht Treaty on the European Union, Feb. 7, 1992, 31 I.L.M. 247.

175. *Id.* The twelve states include: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom. *Id.*

international responsibilities."[176] This treaty, wider in scope than any previous EC treaty, consists of three pillars. The Third or Judicial and Internal Affairs Pillar covers a substantial range of issues including the creation of a unionwide police information exchange system, Europol.[177] The European Council[178] agreed to create Europol in order to organize the exchange of information between the EC police and customs agencies[179] in the fight against drugs within the EC's twelve member states.[180] Headquartered in the Hague, Europol's responsibilities have been expanded to include combating illegal immigration, car theft, and the smuggling of fissile material.[181]

With the termination of the Cold War and the fall of the Iron Curtain, criminal organizations have become increasingly sophisticated.[182] This, coupled with the European Unions' lack of cohesion,[183] has enabled criminals to traverse the continent without trepidation.[184]

Mired in technological, legal and political hang-ups,[185] Europol has yet to be accepted as a viable alternative to national police forces and Interpol.[186] EC members disagree on how much autonomy Europol should receive over traditional national matters. Indeed, most member states are against Europol becoming the primary crime fighting mechanism within the EC due to national

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176. *New European Treaty is Signed in Maastricht*, PRNEWSWIRE, Feb. 7, 1992, *available in* WESTLAW, PRNEWS File (press release by the European Commission) [hereinafter *Treaty*].

177. *Id.*

178. Four institutions comprise the European Community: the Council of Ministers, the Commission, the Parliament, and the Court of Justice. The Commission and the Council work together to create legislation. The Commission initiates legislative proposals and the Council effectuates enactments subject to review and recommendations of Parliament. The Court of Justice interprets and enforces application of EC law. *See generally* David O'Keefe, *Current Issues in European Integration*, 7 PACE INT'L L. REV. 1, 3 (1995).

179. Stephen Nisbet, *EU Seeks Tougher Action on Drugs, Nuclear Trade*, REUTERS, Sept. 5, 1994, *available in* LEXIS, Nexis Library, International File.

180. Treaty, *supra* note 176.

181. Alister Bull, *Europol Strains at Leash as Politicians Wrangle*, REUTERS EUROPEAN COMMUNITY REPORT, Jan. 9, 1995, *available in* LEXIS, Nexis Library, International File.

182. Tyler Marshall, *European Nations Combine to Combat Crime*, LOS ANGELES TIMES, Sept. 9, 1994, *available in* LEXIS, Nexis Library, PAPERSMJ File.

183. Major difficulties in the EC include legal, bureaucratic, and language differences.

184. Marcus Kabel, *German Business Fears Organized Crime Stranglehold*, REUTERS, Sept. 22, 1994, *available in* LEXIS, Nexis Library, International File.

185. *See French Officials Outline Four-Point Presidency Plan*, REUTERS, Jan. 9, 1995, *available in* LEXIS, Nexis, International File. In 1994, no central data base had been set up and the reluctance of France and Great Britain to pass on information to Europol on the grounds of national sovereignty have slowed the progress of Europol. *Id.*

186. Bull, *supra* note 181. The problem with Interpol is that it has world wide jurisdiction. It is not able to focus sufficient means in order to combat many of the criminal activities in Europe. *Id.*

sovereignty issues.[187] Germany, however, wants Europol strengthened to address the new wave of organized crime, especially since it is vulnerable to criminal activities along a weakened Polish border.[188] Europol is indispensable in filling the enforcement vacuum. Interactive information and communication systems could expeditiously coordinate the fight against international gangs which easily circumvent present national police agencies handcuffed by jurisdictional limitations.[189] Each member state must set up interactive communication systems in order to ensure rapid response to the criminal's activities.

VI. RECOMMENDATIONS

The proliferation of fissile material must be promptly addressed. With the increasingly frequent reports of nuclear smuggling, eventually enough nuclear material will wind up in the possession of terrorists or religious fanatics. "Although the cases of smuggling plutonium discovered to date in Germany and Eastern Europe have involved relatively small quantities of fissile materials, the capture of this material should provide only a modicum of reassurance—the smugglers who have been apprehended may be the clumsiest or most careless, or those most likely to fall for sting operations run by police and journalists."[190] Russia lacks sufficient funds and political stability to properly deal with its nuclear weapons, hence the EC along with the U.S. must lend financial assistance in order to set up proper control mechanisms. The present conversion program, an attempt to convert many of the weapons producing industries into other enterprises, must continue to receive EC and U.S. support.

A. *Comprehensive Test Ban Treaty*

A comprehensive ban[191] on testing nuclear weapons will not preclude the

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187. *Europe is Failing to Curb Drug Trade*, THE DAILY TELEGRAPH, Sept. 9, 1994, *available in* LEXIS, Nexis Library, International File.

188. Nisbet, *supra* note 179.

189. Bull, *supra* note 181.

190. Albright, *supra* note 1.

191. "In 1958 both President Eisenhower and Chairman Khrushcev undertook the first serious negotiations designed to achieve a comprehensive ban on nuclear weapons testing." President Eisenhower had two major goals in pursuing such a treaty. First, he wished to take a "decisive, though modest, first step down the long road leading to the eventual elimination of the nuclear threat." There had previously been many unsuccessful proposals seeking to control the nuclear threat.

The second purpose for the CTBT was to open the Soviet Union to outsiders. Eisenhower recognized that a CTBT would necessitate "some sort of international observation and inspection system." Since at that time the Soviet Union was relatively closed to all foreigners, any type of opening in the Iron Curtain would be useful for United States security interests.

smuggling of fissile material. That all the nuclear powers would agree, with the present state of the world, to such a ban is not reasonable.[192] A Comprehensive Test Ban Treaty (CTBT) cannot by itself prevent the acquisition of nuclear weapons by non-nuclear states. Even if such a ban were implemented, terrorists and rogue states could still procure nuclear weapons.[193] A CTBT may have been effective if implemented in the 1950s and 1960s when the technology was relatively new and each nation had a few highly skilled scientists developing (and testing) nuclear weapons. But, as nuclear weapons technology has became more mainstream, less testing of nuclear weapons is necessary. Powerful, concise nuclear weapons, weighing much less than the Hiroshima bomb, can easily be designed and built without testing.[194]

In addition, France and Great Britain are in a significantly different position than the United States and Russia in regards to nuclear weapons.[195] Both European countries have a more modest arsenal and much smaller quantities of fissile material than the United States and Russia.[196] "They must therefore see to the preservation of other basic interests."[197] Countries free from potential regional conflicts are less likely to be concerned with maintaining a nuclear arsenal.[198] However, countries with real or perceived threats to their security will insist on testing their nuclear arsenal. For example, French President Jacques

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"In the meantime, in the mid 1960's, after the first five states had already tested and deployed nuclear weapons, negotiations on" the NPT were well underway. With article six of the NPT, each of the parties is called upon "'to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament . . . under effective international control.'" "The preamble of the treaty and the negotiating record make it abundantly clear that a comprehensive test ban was widely considered to be an essential part of the" process of nuclear disarmament. A CTBT had in effect become a "part of the promise the states that had nuclear weapons made to the states that did not have them in order to persuade them to forever forego the acquisition of such weapons for themselves." Consequently, many feel that fulfillment of the promise by the five nuclear weapon powers to enter into a CTBT is overdue. Herbert F. York, *The CTBT and Beyond*, UNIDIR, UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, 2 (1994).

192. For example, France has tested nuclear weapons after the NPT was renewed in April 1995. *See* Robert K Musil & Daryl G. Kimbal, *France Is Testing Patience of World*, NEWSDAY, Oct. 24, 1995, at A35, *available in* LEXIS, Nexis Library, NEWSDY File.

193. York, *supra* note 191, at 4.

194. *Id.* THE reality of building nuclear weapons without extensive testing is demonstrated by Pakistan, Isreal, and South Africa. All of them have designed and built nuclear weapons without prior testing. *Id.* at 5.

195. Therese Delpech, *A Convention on the Prohibition of the Production of Fissile Material: Uncertain Benefits for Non-Proliferation, in* Halting the Production of Fissile Materials for Nuclear Weapons, UNDIR, United Nations for Disarmament Research (1994).

196. *Id.*

197. *Id.*

198. *See* David Fischer, *Drawing the Threshold States into a Regime of Restraint by Joining the NPT or Otherwise, in* NUCLEAR NON-PROLIFERATION AND THE NON-PROLIFERATION TREATY 36, 39 (Michael P. Fry et al. eds., 1989).

Chirac claims that maintenance of his country's nuclear arsenal is necessary for security interests.[199]

B. *Domestic Legislation*

Assisting another state or group to develop nuclear weapons must be criminalized through domestic legislation,[200] strong disincentives must be developed in order to prevent scientists from becoming nuclear mercenaries. The CIA believes the potential emigration of former Soviet scientists to aid rogue states in their development of nuclear weapons to be the most obdurate nuclear proliferation problem.[201] To curtail this problem, the U.S. Congress found it within the "national security interest of the United States . . . to facilitate, on a priority basis . . . the prevention or diversion of weapons-related scientific expertise of the former Soviet Union to terrorist groups or third countries."[202]

Russia and the CIS must enact and enforce similar legislation. Restraints must be sufficient so as to effectively offer adequate incentives to the scientist to remain at home; the economic hardship in Russia must be eased. The U.S. State Department recognizes the financial quagmire of nuclear physicists and has offered to provide funds to help those scientists work in peaceful applications of their knowledge and expertise.[203] This would deter many scientists from becoming involved in the development of other nations' nuclear capacities.

C. *NPT*

The NPT should be amended to discourage nuclear-expertise proliferation. The idea that Russian nationals technically may lend aid to another state's nuclear weapons program is a reprehensible oversight. The insertion of laws prohibiting "citizens of one country from participating in another state's nuclear weapon program"[204] or citizen participation laws into the NPT could help curtail the

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199. Musil, *supra* note 192. Frances nuclear weapons arsenal has not been effective in preventing terrorists attacks within its borders. *See Id.*

200. For example, the U.S. has enacted several statutes prohibiting the assistance to another country in the development of their nuclear arsenal. *See* 42 U.S.C. § 2277 (1995); 50 U.S.C. § 783 (b), (d) (Supp. 1995).

201. An example of the potential problem that could occur if nuclear experts are induced to join forces with terrorists organizations is demonstrated by the Japanese Cult that used nerve gas in Japanese subways in March 1995. It was reported after the cult was broken up that efforts were being made to recruit Russians who had expertise in nuclear activities. *Japanese Cult Recruited Nuclear Experts, Senator Says*, MIAMI HERALD, Oct. 16, 1995, at A4.

202. Former Soviet Union Demilitarization Act of 1992, 22 U.S.C.S. 5901 (1992).

203. McCurry, *supra* note 46.

204. Treiger, *supra* note 69, at 248.

emigration of nuclear mercenaries.[205] Amending such clauses into the NPT would not only be precedentially sound but unabashedly moral. Poignant to prosperity of this proposal is the inclusion of a proviso granting jurisdiction to all state-parties over any illegal expertise proliferation, regardless of where the actions occur. "For example, if a proliferating scientist is arrested while vacationing in Barbados, [it] could litigate and penalize the proliferator pursuant to the NPT's grant of jurisdictional authority."[206]

In addition, "[t]he pledge of the nuclear weapon states in Article VI of the [NPT] to pursue comprehensive disarmament negotiations in good faith can hardly be said to have been fulfilled."[207] France and China have tested nuclear weapons irrespective of their good faith requirements under Article VI of the NPT.[208] In April 1995, at the NPT extension conference, "France and the other nuclear states won the uneasy support of the non-nuclear states not to pursue their own nuclear arsenals."[209] In return, France promised to "eventually eliminate their own stockpiles."[210] France's decision to test nuclear weapons after their pledge demonstrates the weaknesses of the NPT and its enforcement mechanisms. The only realistic methods to influence France to abide by its pledge would be non-legal, political measures such as embargoes on French products.[211]

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205. *Id.* For a more indepth discussion of the effectiveness of "citizen participation laws" *see* Adam Treiger, Note, *Plugging the Russian Brain Drain: Criminalizing Nuclear Expertise Proliferation*, 82 GEO L. J. 237. There, the author discusses the effectiveness of "citizen participation laws" in respect to nuclear experts vending their skills abroad.

Such laws have been enacted in previous treaties effectively limiting the proliferation of weapons of mass destruction. For example, the Biological Weapons Convention Treaty contains such a clause in article IV which reads:

> Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery . . . within the territory of such State, under its jurisdiction or under its control . . . .

Id. (quoting Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons, Apr. 10, 1972, art IV, 26 U.S.T. 583,588, 1015 U.N.T.S. 163, 167).

206. *Id.* at 248.

207. Ove Bring, *The Non-Proliferation Regime—Stronger than the NPT*, *in* NUCLEAR NON-PROLIFERATION TREATY 31 (Michael P. Fry et al eds., 1989).

208. Musil, *supra* note 192.

209. *Id.*

210. *Id.*

211. *See Id.*

D. *IAEA*

For the IAEA to become more effective its budget must be increased.[212] Russia, the CIS, and EC member states should be encouraged to increase their voluntary contributions. Next, the Agency must take a proactive role in monitoring nuclear weapons at the source as well as in possible destination countries. Whether these weapons are being prepared for dismantlement, shipped from one former republic to another, stored or left in place, every weapon must be accounted for. In light of the fact that tactical weapons are extremely small in size, great in number, and spread throughout military bases in the former Soviet Union, accounting for them becomes extremely important.[213]

E. *Consolidation*

To help ameliorate the tremendous logistical difficulties presented to the IAEA by the sheer volume of fissile material located in the former Soviet Union, Russia should be strongly encouraged to consolidate its holdings into a few well secured facilities. Currently, more than a hundred such facilities exist in Russia. With the lack of sufficient control mechanisms in place in Russian and other CIS states, it has been estimated that a few hundred million dollars would be needed to bring the existing facilities housing fissile material to a "tolerable level of protection."[214] If there were not over a hundred such facilities but rather twenty-five facilities with protections greater than "tolerable" the IAEA would be better able to maintain inspections of the facilities and Russia would have to expend less.

E. *Europol*

The EC should proceed with its implementation of Europol. Interpol is limited in its effectiveness due to its world-wide jurisdiction, and is not equipped to handle the magnitude of criminal activity that permeates the EC. Europol, however, as an embryonic entity is capable of focusing on arresting the spread of fissile material smuggling before it develops into a profitable enterprise for criminal and terrorist organizations. The EC should have Europol work in conjunction with the IAEA in monitoring clandestine nuclear activities of its member states. Europol's assistance would indirectly benefit the EC and allow the IAEA to focus its efforts in the volatile former Soviet Union.

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212. The CIS has been derelict in its payments to the IAEA; in 1991 it reneged in its payment of $20 million.

213. *See generally* Allison, *supra* note 17; Carnahan, *supra* note 26; *Hearings*, *supra* note 21 (testimony of Dr. Cochran).

214. Hearings, *supra* note 21 (testimony of Dr. Holdren).

Timely detection and enforcement would effectively restrict the proliferation of fissile material and expertise. The IAEA, EC, and the former Soviet Union must coordinate efforts to arrest the development of this horrific potentiality. Nuclear weapons are presently sparse among rogue states. The involved parties should attempt to maintain this status since no nation is immune to the effects of a nuclear holocaust. The destructive powers of the original atom bomb should not be disparaged, they should be revered. Indeed, the smuggling of fissile material is an embryonic phenomena with a terrifying future.

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